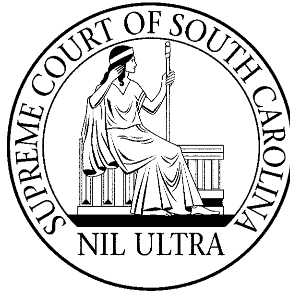

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
May 30, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

27725 - James Jefferson Jowers, Sr. v. SCDHEC 9

27806 - Sentry Select Insurance Company v. Maybank Law Firm, LLC. 31

27807 - Robert Gantt and Edward K. White v. Samuel J. Selph as Director 50

27808 - Randy Horton v. Jasper County School District 58

27809 - State v. Joshua William Porch 64

Order - In the Matter of John B. Kern 66

UNPUBLISHED OPINIONS

2018-MO-021 - Gene Gibbs v. Jill Roberts Gibbs
(Greenville County, Judge Gwendlyne Y. Jones)

2018-MO-022 - State v. James Kevin Bethel
(Richland County, Judge Deadra L. Jefferson)

2018-MO-023 - Amy Renee Lane v. State
(Orangeburg County, Judge Edgar W. Dickson,
Trial Judge, Judge Benjamin H. Culbertson, PCR Judge)

PETITIONS - UNITED STATES SUPREME COURT

27723 - City of Columbia v. Marie-Therese Assa'ad-Faltas Pending

27731 - The Protestant Episcopal Church v. The Episcopal Church Pending

PETITIONS FOR REHEARING

27693 - The State v. Michael V. Beaty, Jr. Denied 5/25/2018

27768 - The State v. Lamont A. Samuel — Denied 5/25/18

27785 - Yancey Thompson v. State — Pending

2019-MO-0009 - Onrae Williams v. State — Denied 5/25/2018

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5564-J. Scott Kunst v. David Loree 68

UNPUBLISHED OPINIONS

2018-UP-217-SCDSS v. Jacqueline Gladden
(Filed May 22, 2018)

2018-UP-218-State v. Royres Antwon Patterson

2018-UP-219-Corey Arness McCluney v, S. C. Dep't. of Motor Vehicles

2018-UP-220-State v. Trevin Millidge

2018-UP-221-Rebecca Delaney v. CasePro, Inc.

PETITIONS FOR REHEARING

5542-South Carolina Lawyers Weekly v. Scarlett Wilson	Denied	05/24/18
5543-State v. Hank Eric Hawes	Denied	05/24/18
5546-Paul Boehm v. Town of Sullivan's Island	Pending	
5548-James Dent v. East Richland County	Pending	
5549-Winrose Homeowners v. Devery A. Hale	Pending	
5552-State v. Walter Tucker	Pending	
5554-State v. Antwan J. Jett	Pending	
5556-BLH by parents v. SCDSS	Pending	
5557-Skywaves v. Branch Banking	Pending	

2018-UP-074-Edward Miller v. SCPEBA	Denied	05/24/18
2018-UP-078-David Wilson v. John Gandis	Denied	05/24/18
2018-UP-087-David Rose v. SCDPPPS	Pending	
2018-UP-096-MidFirst Bank v. Mahasin K. Bowen	Denied	05/24/18
2018-UP-099-Shaul Levy v. Carolinian, LLC	Denied	05/24/18
2018-UP-103-State v. Robert M. Watkins	Denied	05/24/18
2018-UP-107-State v. Terrance L. Calloway	Pending	
2018-UP-109-State v. Nakia Kerreim Johnson	Pending	
2018-UP-113-State v. Mark L. Blake, Jr. (2)	Pending	
2018-UP-121-State v. James W. Miller	Denied	05/24/18
2018-UP-126-State v. Richard P. Krochmal	Denied	05/24/18
2018-UP-129-Patricia E. King v. Margie B. King	Denied	05/24/18
2018-UP-130-State v. Frederick S. Pfeiffer	Denied	05/23/18
2018-UP-140-Peter Kucera v. Ashley Moss	Denied	05/24/18
2018-UP-141-Peter Kucera v. Ashley Moss (2)	Denied	05/24/18
2018-UP-147-State v. Courtney Ray Mitchell	Denied	05/24/18
2018-UP-150-Cedric E. Young v. Valerie Poole	Denied	05/24/18
2018-UP-152-SCDSS v. Lauren Chastain	Denied	05/24/18
2018-UP-155-Samuel Rose v. JJS Trucking	Denied	05/25/18
2018-UP-166-Thomas A. Williams v. State of South Carolina	Denied	05/24/18
2018-UP-167-ATCF REO HOLDINGS, LLC v. James Hazel	Pending	
2018-UP-169-State v. Marquez Glenn	Pending	

2018-UP-173-Ex parte Anthony Mathis	Pending
2018-UP-176-State v. Terry Williams	Pending
2018-UP-178-Callawassie Island Members Club v. Gregory Martin	Pending
2018-UP-179-Callawassie Island Members Club v. Michael Frey	Pending
2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-182-Bank of America v. Carolyn Deaner	Pending
2018-UP-183-South Carolina Community Bank v. Carolina Procurement	Pending
2018-UP-184-South State Bank v. Three Amigos Land Co.	Pending
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-193-Mark Ostendorff v. School District of Pickens Cty.	Pending
2018-UP-200-Bank of New York Mellon v. Charles Taylor	Pending
2018-UP-201-Knightsbridge v. Paul Nadeau	Pending
2018-UP-206-Patricia Craig v. E. Earl Jenkins	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5473-State v. Alexander Carmichael Huckabee, III	Denied	05/24/18
5500-William Huck v. Avtex Commercial	Pending	
5511-State v. Lance L. Miles	Pending	
5514-State v. Robert Jared Prather	Pending	
5516-Charleston County v. University Ventures	Pending	
5523-Edwin M. Smith, Jr. v. David Fedor	Pending	

5527-Harold Raynor v. Charles Byers	Pending
5528-Robert L. Harrison v. Owen Steel Company	Pending
5532-First Citizens Bank v. Blue Ox	Pending
5533-State v. Justin Jermaine Johnson	Pending
5539-Estate of Edward Mims. V. The SC Dep't. of Disabilities	Pending
2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee	Pending
2017-UP-054-Bernard McFadden v. SCDC	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2017-UP-359-Emily Carlson v. John Dockery	Pending
2017-UP-403-Preservation Society of Charleston v. SCDHEC	Pending
2017-UP-425-State v. Esaiveus F. Booker	Pending
2017-UP-427-State v. Michael A. Williams	Pending
2017-UP-443-Lettie Spencer v. NHC Parklane	Pending
2017-UP-451-Casey Lewis v. State	Pending
2018-UP-006-Jim Washington v. Trident Medical Center	Pending
2018-UP-010-Ard Trucking Co. v. Travelers Property Casualty Co.	Pending
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending
2018-UP-014-State v. Gerome Smith	Pending
2018-UP-025-State v. Favian Alphonozo Hayes	Denied 05/24/18
2018-UP-030-Church of God v. Mark Estes	Pending
2018-UP-031-State v. Arthur William Macon	Pending

2018-UP-038-Emily Nichols Felder v. Albert N. Thompson	Pending
2018-UP-039-City of Columbia v. Robert S. Bruce	Denied 05/24/18
2018-UP-046-Angela Cartmel v. Edward Taylor	Pending
2018-UP-050-Larry Brand v. Allstate Insurance	Pending
2018-UP-069-Catwalk, LLC v. Sea Pines	Pending
2018-UP-083-Cali Emory v. Thag, LLC	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-092-State v. Dalonte Green	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Jefferson Jowers Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman, and Anthony Ruhlman, Appellants,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2016-000428

Appeal from Barnwell County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 27725
Heard January 11, 2018 – Refiled May 30, 2018

AFFIRMED

Amy E. Armstrong, Amelia A. Thompson, and Jessie A. White, all of South Carolina Environmental Law Project, of Pawleys Island, for Appellants.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith Jr., Senior Assistant Attorney General T. Parkin C. Hunter, Assistant General Counsel Michael S. Traynham, all of Columbia and Lisa A. Reynolds, of Anderson, Reynolds & Stephens, LLC, of Charleston, for Respondent.

M. McMullen Taylor, of Mullen Taylor, LLC, of Columbia and John D. Echeverria, of Vermont School of Law, South Royalton, Vermont, for Amicus Curiae, Congaree Riverkeeper, Inc.

JUSTICE FEW: This is a challenge to the registration provisions in the Surface Water Withdrawal Act. The plaintiffs claim those provisions are an unconstitutional taking, a violation of due process, and a violation of the public trust doctrine. The circuit court granted summary judgment against the plaintiffs on the grounds the case does not present a justiciable controversy, both because the plaintiffs lack standing and the dispute is not ripe for judicial determination. We affirm.

We originally decided this case in an opinion filed July 19, 2017. *Jowers v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28). The plaintiffs filed a petition for rehearing as to our ruling that their claims for a violation of the public trust doctrine do not present a justiciable controversy. Neither side challenged our rulings that the plaintiffs' claims of an unconstitutional taking and a violation of due process are not justiciable, which were unanimous rulings. Therefore, we have not reconsidered those rulings, and we have repeated the explanation of them in section V of this opinion. We have reconsidered our ruling concerning the public trust claim, and we address that claim in section VI.

I. The Surface Water Withdrawal Act

The Surface Water Withdrawal, Permitting, Use, and Reporting Act regulates surface water withdrawals in South Carolina. S.C. Code Ann. §§ 49-4-10 to -180 (Supp. 2017). Surface water is defined as "all water that is wholly or partially within the State . . . or within its jurisdiction, which is open to the atmosphere and subject to surface runoff, including, but not limited to, lakes, streams, ponds, rivers, creeks, runs, springs, and reservoirs . . . ." § 49-4-20(27). The Department of Health and Environmental Control is charged with the implementation and enforcement of the Act. § 49-4-170. The Act establishes two mechanisms to regulate surface water withdrawals—a permitting system and a registration system.

A. Permitting System

The Act requires most "surface water withdrawers" to obtain a permit before withdrawing surface water. § 49-4-25. A "surface water withdrawer" is defined as "a person withdrawing surface water in excess of three million gallons during any one month . . . ." § 49-4-20(28). A permit applicant must provide detailed information to DHEC about the proposed surface water withdrawal. § 49-4-80(A). DHEC must provide the public with notice of a permit application within thirty days,

and if residents of the affected area request a hearing, DHEC must conduct one. § 49-4-80(K)(1). If DHEC determines the proposed use is reasonable, DHEC must issue a permit to the applicant. §§ 49-4-25, -80(J). In making its determination of reasonableness, DHEC is required to consider a number of criteria. § 49-4-80(B).[1] Permits are issued for a term of no less than twenty years and no more than fifty years. § 49-4-100(B). After a permit is issued, surface water withdrawals made pursuant to the terms and conditions of the permit are presumed to be reasonable. § 49-4-110(B).

B. Registration System

Agricultural users are treated differently under the Act. "[A] person who makes surface water withdrawals for agricultural uses[2] at an agricultural facility[3]" is classified as a "Registered surface water withdrawer," § 49-4-20(23), and is not required to obtain a permit, § 49-4-35(A).[4] Instead, agricultural users simply register their surface water use with DHEC and are permitted to withdraw surface water up to the registered amount. § 49-4-35(A). Because agricultural users are exempt from

[1] Subsection 49-4-80(B) sets forth the criteria for determining reasonableness: (1) minimum instream flow or minimum water level and the safe yield; (2) anticipated effect of the proposed use on existing users; (3) reasonably foreseeable future need for surface water; (4) reasonably foreseeable detrimental impact on navigation, fish and wildlife habitat, or recreation; (5) applicant's reasonably foreseeable future water needs; (6) beneficial impact on the State; (7) impact of applicable industry standards on the efficient use of water; (8) anticipated effect of the proposed use on: (a) interstate and intrastate water use; (b) public health and welfare; (c) economic development and the economy of the State; and (d) federal laws and interstate agreements and compacts; and (9) any other reasonable criteria DHEC promulgates by regulation. § 49-4-80.

[2] "Agricultural use" is defined broadly to include the preparation, production, and sale of crops, flowers, trees, turf, and animals. § 49-4-20(3).

[3] "Agricultural facility" is also defined broadly. § 49-4-20(2).

[4] As section 49-4-25 indicates, there are other exceptions to the permit requirement "provided in Sections 49-4-30, 49-4-35, 49-4-40, and 49-4-45." The exception for agricultural users is provided in section 49-4-35.

the permit requirement, their surface water use is not subject to the subsection 49-4-80(B) reasonableness factors.

The Act establishes two ways for agricultural users to register their water use with DHEC—one for users who were already reporting their use to DHEC when the Act was rewritten in 2010,[5] and one for users who were not yet reporting their use. For those already reporting, the Act allows the user to "maintain its withdrawals at its highest reported level or at the design capacity of the intake structure" and the user is deemed registered. § 49-4-35(B). For users who were not yet reporting their use, the Act requires the user to report its anticipated withdrawal amount to DHEC for DHEC to determine whether the use is within the "safe yield" of the water source. § 49-4-35(C). Safe yield is defined as,

> [T]he amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses.

§ 49-4-20(25). After DHEC determines whether the anticipated withdrawal amount is within the safe yield, it "must send a detailed description of its determination to the proposed registered surface water withdrawer." § 49-4-35(C).

The Act grants DHEC oversight over registered withdrawals. Subsection 49-4-35(E) provides,

> The department may modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water, if the registered surface water withdrawer withdraws substantially more surface water

[5] The Water Use Reporting and Coordination Act was originally enacted in 1982, Act No. 282, 1982 S.C. Acts 1980. It was completely rewritten in 2010 and renamed the Surface Water Withdrawal, Permitting, Use, and Reporting Act, Act No. 247, 2010 S.C. Acts 1824-49. The 1982 Act provided for a regulatory "reporting system for agricultural users." 1982 S.C. Acts at 1982.

> than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals result in detrimental effects to the environment or human health.

§ 49-4-35(E).

Registration has three effects important to the plaintiffs' claims in this case. First, unlike permits, which are issued for a term of years, registrations have no time limits. *Compare* § 49-4-35(C) (allowing registered users to continue making withdrawals "during subsequent years" with no reference to time limits), *with* § 49-4-100(B) (establishing time limits for permits). Second, the Act presumes all registered amounts are reasonable. § 49-4-110(B). Third, the Act changes the elements for a private cause of action for damages by requiring plaintiffs to show a registered user is violating its registration. *Id.*

II. Procedural History

The plaintiffs own property along rivers or streams in Bamberg, Darlington, and Greenville counties. In September 2014, they jointly filed this action against DHEC in Barnwell County, challenging the Act's registration system for agricultural users in three ways. First, they claim the registration system is an unconstitutional taking of private property for private use. *See* S.C. CONST. art. I, § 13(A) ("private property shall not be taken for private use"). Second, they claim the Act violates their due process rights by depriving them of their property without notice or an opportunity to be heard. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of . . . property, without due process of law . . . ."); S.C. CONST. art. I, § 3 ("nor shall any person be deprived of . . . property without due process of law"). Finally, they claim the Act violates the public trust doctrine by disposing of assets the State holds in trust. *See* S.C. CONST. art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State . . . ."); *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (stating "the state owns the property below . . . a navigable stream . . . [as] part of the Public Trust").

The plaintiffs and DHEC filed motions for summary judgment. The circuit court granted summary judgment in favor of DHEC after finding the plaintiffs did not have standing and the case was not ripe. The circuit court also addressed the merits of the plaintiffs' claims. The court ruled the Act's registration process was not an unconstitutional taking because the plaintiffs were not deprived of any rights. Likewise, the circuit court held that without a deprivation of rights, there could be

no violation of due process. The circuit court held the public trust doctrine was not violated because the plaintiffs had not lost their right to use the waterways or been injured by any withdrawals. The circuit court did not rule on DHEC's contention the claims were barred by the statute of limitations or that venue was improper.

The plaintiffs appealed to the court of appeals and moved to certify the case to this Court pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. We granted the motion to certify.

III. Justiciability

Our courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, we stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not . . . make an adjudication where there remains no actual controversy." *Id.*; *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). "Justiciability encompasses . . . ripeness . . . and standing." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). Standing is "a personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). A plaintiff has standing to challenge legislation when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the legislative action. 345 S.C. at 600-01, 550 S.E.2d at 291. To meet the "stringent" test for standing, "the plaintiff must have 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.'" 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992)).[6] We have explained ripeness by defining what is not ripe, stating "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Before we may determine whether the plaintiffs have presented a justiciable controversy, we must first understand their theory of how the Act has caused them

---

[6] A plaintiff must show two additional elements not at issue in this case: causation and likelihood the injury can be redressed by the court's decision. *Id.*

injury. Because their theory depends on their interpretation of the Act, we must then interpret the Act to determine whether they have properly alleged an "injury in fact" under it, *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291, such that this case presents an "actual controversy" as opposed to one that is "contingent, hypothetical, or abstract," *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864; *Colleton Cty.*, 371 S.C. at 242, 638 S.E.2d at 694.

We review de novo the circuit court's ruling that there is no justiciable controversy. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011) (affirming the circuit court's order granting summary judgment on the basis of justiciability where the ruling depended on statutory interpretation, and stating, "The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court.").

IV. The Plaintiffs' Theory of Injury

The plaintiffs' claims of unconstitutional taking and violation of due process are based on their allegation the Act has deprived them of "riparian" rights. The public trust claim, on the other hand, is based on the allegation the Act disposes of assets the State holds in trust for our citizens.

A. Riparian Rights

The property rights the plaintiffs allege have been taken from them under the registration provisions of the Act are known under the common law as riparian rights. The word riparian means "pertaining to or situated on the bank of a river, or a stream." 78 Am. Jur. 2d *Waters* § 33 (2013). *See also Riparian*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or located on the bank of a river or stream").[7] Under the common law, riparian property owners—those owning land

---

[7] The current editions of *American Jurisprudence* and *Black's Law Dictionary* recognize that some states include lakes and tidal waters within the definition of riparian. That is not true in South Carolina. In *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001), our court of appeals held "interests attached to property abutting an ocean, sea or lake are termed 'littoral.'" 347 S.C. at 108, 552 S.E.2d at 785 (citing *Littoral*, BLACK'S LAW DICTIONARY (6th ed. 1990)); *see also White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817-18 (Ct. App. 2005) (stating "there is a distinction in classification that our courts have indicated a desire to strictly observe: owners of land along rivers

adjacent to rivers or streams—hold special rights allowing them to make "reasonable use" of the water adjacent to their property. *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App. 2005) (citing *Lowe v. Ottaray Mills*, 93 S.C. 420, 423, 77 S.E. 135, 136 (1913)). We have described "reasonable use" as follows,

> All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water by the proprietor below on the stream . . . .

White v. Whitney Mfg. Co., 60 S.C. 254, 266, 38 S.E. 456, 460 (1901); *see also Mason v. Apalache Mills*, 81 S.C. 554, 559, 62 S.E. 399, 401 (1908) ("The different owners of land through which a stream flows are each entitled to the reasonable use of the water, and for an injury to one owner, incidental to the reasonable use of the stream by another, there is no right of redress.").

Thus, the right of reasonable use is "subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore." *White's Mill Colony, Inc.*, 363 S.C. at 129, 609 S.E.2d at 817 (citing *Mason*, 81 S.C. at 559, 62 S.E. at 401). Under the common law, if a riparian owner unreasonably interferes with another riparian owner's right of reasonable use, the injured owner's remedy is to bring an action for damages, or for an injunction, or both. *See McMahan v. Walhalla Light & Power Co.*, 102 S.C. 57, 59-61, 86 S.E. 194, 194-95 (1915) (approving a jury charge on the right of reasonable use in a case where a downstream riparian owner sued an upstream riparian owner for damages); *Mason*, 81 S.C. at 557, 62 S.E. at 400 (describing the downstream riparian owner's claim for an injunction against the upstream operator of a dam based on "the unreasonable use of the stream"); *see also* 78 Am. Jur. 2d *Waters* § 53 (2013) ("Interference with riparian rights is an actionable tort. Any interference with a vested right to the use of water . . . would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.").

B. Public Trust Assets

---

and streams are said to hold 'riparian' rights, while owners of land abutting oceans, seas, or lakes, are said to hold 'littoral' rights").

The Constitution of South Carolina provides, "All navigable waters shall forever remain public highways free to the citizens of the State and the United States." S.C. CONST. art. XIV, § 4. Consistent with this provision, the State owns all property below the high water mark of any navigable stream. *Sierra Club*, 318 S.C. at 128, 456 S.E.2d at 402; *see also McCullough v. Wall*, 38 S.C.L. (4 Rich.) 68, 87 (1850) (stating "in this State all rivers navigable for boats are *juris publici*[8]"). Courts have long recognized this ownership as a trust. In 1884, this Court held:

> The state had in the beds of these tidal channels not only title as property, . . . but something more, the *jus publicum*,[9] consisting of the rights, powers, and privileges . . . which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform.

State v. Pac. Guano Co., 22 S.C. 50, 83-84 (1884); *see also Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452-53, 13 S. Ct. 110, 118, 36 L. Ed. 1018, 1042 (1892) (recognizing this ownership as a "trust which requires the government of the state to preserve such waters for the use of the public").

We now call this the "public trust doctrine." *See Sierra Club*, 318 S.C. at 127-28, 456 S.E.2d at 402 (discussing "the Public Trust Doctrine"). Under the public trust doctrine, the State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003).[10] The plaintiffs argue

---

[8] *See Juris Publici*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of public right; relating to common or public use").

[9] *See Jus Publicum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The right, title, or dominion of public ownership; esp., the government's right to own real property in trust for the public benefit").

[10] In *Sierra Club*, to explain the general nature of the public trust doctrine, we quoted an expansive statement from an article in the Tulane Environmental Law Journal as to the scope of the doctrine. 318 S.C. at 127-28, 456 S.E.2d at 402. However, the permit applicant in *Sierra Club* never intended to consume the water itself, and we therefore confined our actual ruling to the permit's impact on the waterway: "marine life, water quality, or public access." 318 S.C. at 128, 456 S.E.2d at 402. While the

the Act violates the public trust doctrine by disposing of the State's water to agricultural users. According to the plaintiffs, "the State has lost complete control of registered amounts of water in perpetuity."

Having explained the plaintiffs' theory of injury, we turn now to the registration provisions of the Act to determine whether the terms of the Act support the plaintiffs' allegation of an injury in fact such that this case presents an actual controversy.

V. The Takings and Due Process Claims

The plaintiffs' takings and due process claims are based on their allegation that they have lost their riparian right to bring a challenge to another riparian owner's future unreasonable use. Significantly, the plaintiffs do not allege they have sustained any injury resulting from any withdrawal of surface water that has already been made by an agricultural user.[11] The allegation the plaintiffs do make is based on two provisions of the Act: (1) subsection 49-4-110(B), which states registered withdrawals are presumed to be reasonable and changes the elements for a private cause of action for damages, and (2) subsection 49-4-100(B), which requires permits must be issued for a specific term, but is silent as to time limits for registered uses. The plaintiffs argue these provisions allow registered users to withdraw a fixed amount of water that will forever be deemed reasonable, which in turn prevents them from ever successfully challenging a registered agricultural use, regardless of how conditions may change in the future. Based on this argument, the plaintiffs allege their "rights were fundamentally altered" the moment these provisions were signed into law,[12] and thus they have suffered an "injury in fact" sufficient to establish standing, and have presented an actual controversy that is ripe for judicial determination.

---

expansive statement we quoted was useful in conveying the general nature of the public trust doctrine, any portion of the statement that goes beyond the doctrine's applicability to "marine life, water quality, or public access" was not necessary to our decision, and is therefore dictum.

[11] In response to a discovery request, the plaintiffs admitted "[their] property and [their] use thereof have not been injured due to any withdrawal of water for agricultural purposes occurring on a river or stream flowing past property that [they] own."

[12] The rewritten Act became effective on January 1, 2011. 2010 S.C. Acts at 1848.

We find the Act does not support the plaintiffs' allegations of injury. First, we find nothing in the Act preventing the plaintiffs from seeking an injunction against a riparian owner for unreasonable use. Prior to the Act, a riparian owner could bring an action challenging another riparian owner's unreasonable use and seeking an injunction. *See Mason*, 81 S.C. at 563, 558, 62 S.E. at 402, 400 (affirming the circuit court's order granting an injunction, as modified, against the upstream operator of a dam based on "the unreasonable use of the stream"). After the Act, a riparian owner may still challenge another riparian owner's use as unreasonable—including a registered agricultural user. If such a plaintiff can prove a registered agricultural use is unreasonably interfering with his right of reasonable use, and otherwise establish the elements for an injunction, then the plaintiff may be entitled to injunctive relief.

Second, we find nothing in the Act preventing a riparian owner from filing a declaratory judgment action to protect his right of reasonable use. Under section 15-53-20 of the South Carolina Code (2005), courts have the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." A riparian owner may file a declaratory judgment action against registered agricultural users, and request the court declare their use unreasonable. While such a declaration may be of little value without an injunction, there is nothing in the Act preventing the plaintiff from including DHEC as a defendant. This, in turn, could trigger DHEC's right to modify the registration under subsection 49-4-35(E).

Third, we find nothing in the Act prohibiting private causes of action for damages against registered agricultural users. In fact, the Act specifically contemplates such actions. Subsection 49-4-110(B) states, "No private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained *unless* the plaintiff can show a violation of a valid permit or registration." § 49-4-110(B) (emphasis added). While this provision changes the elements a plaintiff must prove in an action for damages, the right of action clearly still exists. In other words, if a plaintiff proves "a violation of a valid permit or registration," then the plaintiff may maintain a private right of action for damages. We are aware of no authority—and the plaintiffs cite none—for a finding that a change to the elements a plaintiff must prove in an action for damages deprives a future plaintiff of property rights under the takings or due process clauses.

Finally, we find no support in the Act for the plaintiffs' argument that the presumption of reasonableness will prevent future plaintiffs from proving a registered use is unreasonable. Under the common law, the plaintiff has the burden of proving—by a preponderance of the evidence—a defendant's use is unreasonable.

The Act, however, provides, "Surface water withdrawals made by permitted or registered surface water withdrawers shall be presumed to be reasonable." § 49-4-110(B). The Act is unclear whether the presumption is rebuttable or conclusive.[13] Employing the rules of statutory construction, we find the presumption is rebuttable.[14] Therefore, under the Act, a plaintiff may still meet his burden by proving—by a preponderance of the evidence—the defendant's use is unreasonable.

In summary, the plaintiffs' allegations that the Act has deprived them of their common law riparian rights are not supported by the terms of the Act. The plaintiffs may still challenge an agricultural use as unreasonable, they are still entitled to injunctive relief when they prove the required elements, and they may still recover damages when they prove the required elements. Because the Act has not deprived the plaintiffs of their riparian rights, they have no standing, and their claim for future injury is not ripe for our determination.

---

[13] A rebuttable presumption is defined as an "inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." *Rebuttable Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014). A conclusive presumption is defined as a "presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." *Conclusive Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[14] The presumption of reasonableness is found in the first sentence of subsection 49-4-110(B). The next sentence specifically contemplates a right of action for damages, "No private cause of action for damages . . . from a surface water withdrawal . . . may be maintained *unless* the plaintiff can show a violation of a valid permit or registration." § 49-4-110(B) (emphasis added). If we interpreted the presumption in the first sentence as conclusive, it would prevent any right of action for damages, and thus the first sentence would be in conflict with the second sentence. "[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124-25, 754 S.E.2d 486, 492-93 (2014). "It is the duty of this Court to give all parts and provisions of a legislative enactment effect and reconcile conflicts if reasonably and logically possible." *Adams v. Clarendon Cty. Sch. Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978). Reading the presumption as rebuttable leaves no conflict.

The plaintiffs also argue they have standing under the public importance exception. "[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." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). However, we "must be cautious with this exception, lest it swallow the rule." *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). We find the public importance exception does not apply to the plaintiffs' takings and due process claims in this case because there is no need for "future guidance."

VI. The Public Trust Claim

As we did with the plaintiffs' takings and due process claims, we begin our discussion of the public trust claim with the fact the plaintiffs do not allege that any public trust asset has been lost as a result of any withdrawal of surface water that has already been made by any agricultural user. *See supra* note 11. This fact alone ends the justiciability analysis for the public trust claim. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (holding there must be an "injury in fact" for standing to exist); *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) (holding a claim involving "'a threat of *possible* injury'" or "'the mere threat of potential injury'" is not ripe for judicial determination because it is "'too contingent or remote to support present adjudication'" (quoting *Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F. Supp. 1083, 1086 (D.S.C. 1991))); *see also Thrifty Rent-A-Car*, 849 F. Supp. at 1085-86 (stating "a . . . court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all").

However, the plaintiffs advance a novel theory of justiciability based on their argument the Act "effectively dispose[s] of substantial, permanent rights in South Carolina's navigable waterways to agricultural users." They allege the State has "lost complete control of registered amounts of water in perpetuity" and the "registered owner has complete control over whether or not the State can ever alter the registered amount." According to the plaintiffs, the registration provisions create a "vested right" to use the registered amount in perpetuity, "without regard to reasonableness, future conditions, or future uses." Because the State "permanently transferred public trust property" to private registered users, the plaintiffs argue, they suffered an injury the moment the Act became law, despite the fact no public trust asset has yet been lost. In sum, the plaintiffs' theory of the justiciability of their public trust doctrine claim is based on the possibility that future surface water withdrawals might—depending on unknown future circumstances—endanger assets held in trust by the

State, and their argument that the Surface Water Withdrawal Act prohibits the State from protecting trust assets from that potential future loss.

Even under this theory, the plaintiffs have failed to present a justiciable controversy. First, as we have already explained, the theory depends on the possible occurrence of unknown future circumstances that might—or might not—cause the loss of trust assets. Claims that depend on contingent, future harm are not justiciable. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291; *Waters*, 321 S.C. at 228, 467 S.E.2d at 918.

Second, this theory depends on the argument that the State has no ability to act to protect trust assets if circumstances arise in the future that make action necessary. This argument is wrong, most importantly because the State contends it does have the ability to act to protect trust assets. Therefore, the State—whom even the plaintiffs contend is the party responsible for protecting these assets—has given clear indication it stands ready and able to act to protect trust assets if and when the need to do so ever arises.

The State presents three specific mechanisms through which it may act to protect trust assets if and when it becomes necessary. One, the State asserts, "State officials could bring a common law action to challenge the Act as applied." Return to Petition for Rehearing, filed Aug. 24, 2017, at 4 (citing *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976)).[15] Two, the State asserts it could bring "a common law challenge to the reasonableness of the withdrawal." Return to Petition for Rehearing, filed Aug. 24, 2017, at 4. As we explained in detail above, nothing in the Act abolishes a riparian owner's common law right to bring an action that challenges another riparian owner's use as unreasonable. Likewise, nothing in the Act prevents the State from bringing a similar action to protect the assets it holds in trust.

The third mechanism presented by the State is the Drought Response Act, which allows the State to protect its interest in navigable streams during periods of drought. S.C. Code Ann. §§ 49-23-10 to -100 (2008 & Supp. 2017). Under the Drought Response Act, the Department of Natural Resources (DNR) has the duty to

[15] In *Thompson*, we allowed public officials to bring a declaratory judgment action to challenge legislation that prohibited counties and municipalities from adopting or enforcing laws that criminalized drinking alcohol. 267 S.C. at 467-68, 229 S.E.2d at 719-20.

"formulate, coordinate, and execute a drought mitigation plan," § 49-23-30, and has broad powers to protect the water in navigable streams against excessive consumption by surface water withdrawers, *e.g.*, § 49-23-50. These powers include the State's authority to prevent most registered agricultural users from withdrawing unreasonable amounts of water during periods of drought. § 49-23-70(C). Also, the Governor has the authority to declare a drought emergency and "issue emergency proclamations and emergency regulations to require curtailment of water withdrawals or to allocate water on an equitable basis." § 49-23-80. We agree with the State that it has the power to act to protect trust assets under each of these three mechanisms.

Not only does the State have the power to act, it also is under a duty to act. This action was brought against DHEC because it administers the Surface Water Withdrawal Act. However, DHEC's duties with regard to navigable streams are broader than administering this Act, and include the "obligations" that formerly belonged to the "Water Resources Commission regulatory division." S.C. Code Ann. § 1-30-45(D) (2005); *see also* S.C. Code Ann. § 49-3-30 (2008) ("The regulatory functions of the former Water Resources Commission are transferred to the Department of Health and Environmental Control."). Regulation 61-68—one of the regulations DHEC promulgated under that obligation—provides, "It is a goal of the Department to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water." 6 S.C. Code Ann. Regs. 61-68 (Supp. 2017).

In addition to DHEC, other State agencies are under a duty to protect navigable streams. DNR is under a duty to enforce the Drought Response Act. *See supra* discussion of the Drought Response Act. DNR is also under a duty to enforce the Water Resources Planning and Coordination Act. S.C. Code Ann. §§ 49-3-10 to -50 (2008 & Supp. 2017). The Water Resources Planning and Coordination Act does not specifically enable DNR to bring a lawsuit, but the Drought Response Act does. *See* § 49-23-100. The Water Resources Planning and Coordination Act does, however, require DNR to coordinate with other agencies who do have the power to bring legal action. *See generally* § 49-3-40 (2008) (providing DNR with broad powers and duties to "advise and assist the Governor and the General Assembly" to establish water resource policy in South Carolina).

These duties are important in understanding the power of the State to enforce—when an actual dispute arises—article XIV, section 4 of the South Carolina Constitution, which provides, "All navigable waters shall forever remain public highways free to

the citizens of the State . . . ." The State's duty to protect navigable streams is clear, and it may take the necessary action at the necessary time to fulfil that duty. If some future registered user defendant takes the position the State cannot act, the courts can address it then. Alternatively, if the State fails to take action sometime in the future if and when action is necessary, the plaintiffs could bring this same action and it would present a justiciable controversy.

The third reason the plaintiffs have failed to present a justiciable controversy even under their novel theory is that the theory depends on there being no changes to the law regarding surface water withdrawals between now and the occurrence of these unknown future circumstances. One of the State's duties—through DNR—under the Water Resources Planning and Coordination Act is to "recommend[] to the General Assembly any changes of law required to implement the policy declared in this chapter." § 49-3-40(a)(6). Though the plaintiffs have not presented a justiciable controversy in this lawsuit, they have brought to the State's attention—and into public discussion—the dangers associated with the possibility of excessive surface water withdrawals by agricultural users in the future. In the exercise of its duties in this regard, if the State determines it is advisable to amend the provisions of the Surface Water Withdrawal Act to protect against these dangers, it must make appropriate recommendations to the General Assembly to protect public trust assets. Because there is no way to determine whether the Act will be amended between now and that point, this issue is not justiciable. *Cf. Thompson v. State*, 415 S.C. 560, 566-67, 785 S.E.2d 189, 192 (2016) (declining to address the defendant's request for a declaratory judgment "because there is no way to determine whether the General Assembly will amend [the law in the future]," and therefore a declaration would be "purely advisory").

The final reason the plaintiff's novel theory of justiciability must fail is that the philosophical foundation of the plaintiff's public trust claim requires it. The public trust doctrine provides that the State has the inherent authority to act to protect public trust assets. *See Sierra Club*, 318 S.C. at 128, 456 S.E.2d at 402 (recognizing the State owns all property below the high water mark of any navigable stream). This inherent authority *requires* the State to act if and when the need arises. *See Pac. Guano Co.*, 22 S.C. at 83-84 (recognizing this ownership is "in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform"); *see also* § 1-30-45(D) (providing DHEC with "obligation" to perform "regulatory functions"); § 49-23-30 (providing DNR with duty to protect the State's water in drought conditions); § 49-3-40 (providing DNR with duty to recommend changes to the law when necessary). If a situation ever arises in which public trust assets are actually being lost due to excessive surface water withdrawals, the very

nature of the public trust doctrine requires the State to act, and provides that it must prevail.

The plaintiffs argue the public importance exception should apply to their public trust claim because this issue is of such public importance as to require its resolution for future guidance. In *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004), we explained that the decision of whether to apply the public importance exception to standing requires balancing two competing interests:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

357 S.C. at 434, 593 S.E.2d at 472.

The "alleged injustice" the plaintiffs seek to address in this case is that at some point in the future the State may fail to protect against currently nonexistent unreasonable uses of surface water, which in turn could become so severe that the State's inaction amounts to a violation of its responsibilities to protect the public trust. As we have explained, however, the State has a duty to attempt the necessary future action to protect against these hypothetical future unreasonable uses. Thus, the "Citizens must be afforded access to the judicial process" side of the *Sloan* balance carries very little weight. After weighing that factor against the other competing interests we described in *Sloan*, we find the public importance exception should not apply to the plaintiffs' public trust claim. As we stated earlier, courts "must be cautious with this exception, lest it swallow the rule." *S.C. Pub. Interest Found.*, 403 S.C. at 646, 744 S.E.2d at 524.[16]

---

[16] The dissent argues the plaintiffs' public trust claim should be remanded to the circuit court to allow the plaintiffs to fully develop the record "to determine the extent to which, if any, the Act has authorized activities that substantially impair the public interest in marine life, water quality, and public access." Not only does this position illustrate the plaintiffs' failure to prove any public trust asset has been lost as a result of water withdrawals, *see supra* note 11, it is also directly opposite of the position the plaintiffs have taken on the necessity of a remand. At oral argument

However, the plaintiffs' public importance exception argument must fail for an even more fundamental reason—the exception applies to standing, not ripeness. This point is illustrated by the plaintiffs' flawed reliance on a statement from our decision in *South Carolina Public Interest Foundation*. Relying on that decision, the plaintiffs argue the exception applies "to a party who has not suffered a particularized injury . . . ." *See* 403 S.C. at 645, 744 S.E.2d at 524. Our point in making the quoted statement, however, was that *somebody had* suffered an injury. In that case, the South Carolina Transportation Infrastructure Bank had expended nearly three billion dollars of taxpayer money on major transportation projects, 403 S.C. at 644, 744 S.E.2d at 523, with two legislators serving on the Board in violation of the Constitution's prohibition against dual office holding and the Constitution's provisions regarding the separation of powers, 403 S.C. at 646-48, 648-54, 744 S.E.2d at 524-25, 525-28. Thus, we stated, "The public importance exception *grants standing* to a party who has not suffered a particularized injury . . . ." 403 S.C. at 645, 744 S.E.2d at 524.

The "has not suffered a particularized injury" language does not remove the injury in fact requirement; instead, it simply allows someone who has not personally suffered an injury to step into the shoes of someone who has. *See ATC S., Inc.*, 380 S.C. at 198, 669 S.E.2d at 341 ("In cases which fall within the ambit of important public interest, standing will be conferred 'without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.'") (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007))). In other words, the exception allows a substitution in place. Here, the plaintiffs seek not only a substitution in place, but also a substitution in time. They attempt to fast-forward to a point in time when there might be a loss of trust assets, if and when the State fails to protect those assets. The public importance exception does not apply to a lack of ripeness.[17]

---

before this Court, counsel for the plaintiffs stated, "This is a facial challenge; it is to the validity of the Act itself, and we don't believe there is any further factual information that needs to be developed because you are looking at what the Act does. . . . The Court can do that just by looking at the language of the Act itself."

[17] In addition to *South Carolina Public Interest Foundation*, the dissent references two additional cases it claims represent the "wide range of cases" where we have applied the public importance exception to standing. However, like *South Carolina Public Interest Foundation*, these cases involved only standing, not ripeness. *See Davis*, 372 S.C. at 500, 642 S.E.2d at 741-42 (granting public importance standing

The dissent argues, however, "the public trust violation itself is the alleged injury," and thus the claim is actually ripe. The argument does not accurately represent the plaintiffs' theory. The "public trust violation"—under the plaintiffs' theory—would be the future loss of water, not the 2010 Act. The injury—under the plaintiffs' theory—is an existing inability to challenge a future loss of water, an inability created by the 2010 Act. Thus, the plaintiffs' own theory does not support the dissent's argument for ripeness, as the theory depends on the possibility of a future loss of water. The claim is not ripe.

VII. Conclusion

We find the plaintiffs do not have standing and have not made any claim that is ripe for judicial determination. Therefore, the circuit court correctly determined there is no justiciable controversy. Accordingly, the circuit court's decision to grant summary judgment in favor of DHEC is **AFFIRMED**.

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

---

to former members of the Richland County Recreation Commission to assert a claim belonging only to existing members to challenge the constitutionality of legislation that altered the way Commission members were appointed); *Baird v. Charleston Cty.*, 333 S.C. 519, 530-31, 511 S.E.2d 69, 75-76 (1999) (granting public importance standing to a group of doctors who had no personal stake in the matter to challenge tax-exempt bonds they claimed were issued illegally).

JUSTICE HEARN: I concur with the majority's analysis of Appellants' takings and due process claims, but I respectfully dissent on the issue of the public trust doctrine. Because of the Surface Water Withdrawal Act's inherent connection to the public waterways of South Carolina, I would find that Appellants' public trust claim comes squarely within the public importance exception to standing. Cognizant of the fact that the public importance exception is used sparingly by this Court, I believe if there is ever a time when the doctrine should be applied, this is it.

The public trust doctrine imposes on a government one of its most time-honored duties. The doctrine as we know it today traces its roots back to the time of Justinian and was a long-standing legal principle in medieval England before it was carried over to colonial America. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633–36 (1986). After the American Revolution, "the people of each state bec[a]me themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Shively v. Bowlby*, 152 U.S. 1, 16 (1894). While the English limited the public trust doctrine to waterways influenced by the tide, the sprawling geography of the United States and its major freshwater rivers led to the expansion of the public trust doctrine by making navigability the touchstone of a public waterway, even where there is no tidal influence. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478–79 (1988).

In its current form, the public trust doctrine protects the public's "inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995). As sovereigns, the "[s]tates possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842)). Concomitant with the public's right to enjoy the public trust assets, the public trust imposes on a state three types of duties or restrictions with regard to its management of public trust assets. To wit,

> [F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

Juliana v. United States, 217 F.Supp.3d 1224, 1254 (D. Ore. 2016) (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1970)). Inherent in its public trust duties, the State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 120 (2003).

With that in mind, I turn to the public importance exception to standing. The exception provides standing to a plaintiff where an issue is of such public importance that its resolution is required for future guidance. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005). Thus, the doctrine affords citizens access to the judicial process to address alleged injustices where standing otherwise would not be available. *See Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). We have applied the doctrine in a wide range of cases where we determined an underlying societal interest required resolution. *See, e.g.*, *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013) (issue of whether statute governing composition of board of directors of state infrastructure bank was unconstitutional fell within public interest exception); *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007) (finding public importance standing to bring action challenging constitutionality of act altering method for electing members of county commission); *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (doctors had standing to seek injunction against county issuing tax exempt bonds for purchase of medical facility).

Given the interests protected by the public trust, and the fact that public waterways extend to every corner and every county in South Carolina, I find it difficult to imagine a claim better suited to the public importance exception than an alleged public trust violation. The majority states the public importance exception is not appropriate in this case because Appellants' claim is not ripe.[18] Respectfully,

---

[18] Moreover, the circuit judge based his decision to deny public importance standing in part on the lack of previous challenges to the Act. This was error. A history of previous challenges to legislation is not a prerequisite to achieving standing under the public importance exception; if indeed it were, no party could ever raise a novel issue without meeting traditional standing requirements, and the public importance exception would be rendered meaningless. Rather, the hallmark of the doctrine is whether the matter is "inextricably connected to the public need for court resolution for future guidance." *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). In light of Appellants' allegations regarding violations of

I disagree. Appellants have alleged a current and ongoing injury—the State's abrogation of its duties as trustee to administer and manage the trust corpus. Under their theory, the public trust violation itself is the alleged injury, not a speculative future harm to waterways caused by the Act. Therefore, because of the complex and dynamic character of South Carolina's public waterways, I believe the merits of Appellants' public trust claim require full development at trial to determine the extent to which, if any, the Act has authorized activities that substantially impair the public interest in marine life, water quality, and public access. For example, given the ever-changing nature of rivers and streams, expert testimony would be most helpful to the Court in determining what types of harm have resulted from the Act, and more importantly, whether the State's remaining enforcement powers may be marshalled quickly enough to prevent further harm. The majority points to a number of tools the State retains to protect public waterways, and while I agree, I believe the analysis is incomplete until the record fully demonstrates how quickly those methods may be brought to bear to rectify any impairments to public waterways resulting from the Act.

Accordingly, I would reverse the circuit judge's grant of summary judgment as to the public trust claim. However, rather than rule on the merits of Appellants' claim at this stage without the benefit of a fully developed record, I would simply remand to the circuit court for further proceedings.

BEATTY, C.J., concurs.

---

the public trust, I believe the claim implicates significant societal interests deserving of a definitive disposition.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC, and Roy P. Maybank,
Defendants.

Appellate Case No. 2016-001351

CERTIFIED QUESTIONS

J. Michelle Childs, United States District Court Judge

Opinion No. 27806
Heard February 9, 2017 – Filed May 30, 2018

FIRST QUESTION ANSWERED

Daryl G. Hawkins, Law Office of Daryl G. Hawkins, LLC, of Columbia, for Plaintiff.

David W. Overstreet, Michael B. McCall, and Steven R. Kropski; all of Earhart Overstreet, LLC; of Charleston; for Defendants.

JUSTICE FEW: Sentry Select Insurance Company brought a legal malpractice lawsuit in federal district court against the lawyer it hired to defend its insured in an automobile accident case. The district court requested that we answer the following questions:

(1) Whether an insurer may maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?

(2) Whether a legal malpractice claim may be assigned to a third-party who is responsible for payment of legal fees and any judgment incurred as a result of the litigation in which the alleged malpractice arose?

The answer to question one is "yes," under the limitations we will describe below. We decline to answer question two.

I. Background

Sentry Select hired Roy P. Maybank of the Maybank Law Firm to defend a trucking company Sentry Select insured in a personal injury lawsuit in state court. Maybank failed to timely answer requests to admit served by the plaintiff pursuant to Rule 36(a) of the South Carolina Rules of Civil Procedure. Seven months later, Maybank filed a motion seeking additional time to answer the requests, which the circuit court held under advisement until the parties completed mediation. Sentry Select claims that because of Maybank's failure to timely answer the requests, and the likelihood the circuit court would deem them admitted,[1] it settled the case for $900,000, when Maybank had previously represented to Sentry Select it could settle in a range of $75,000 to $125,000.

Sentry Select then filed this lawsuit in federal district court against Roy Maybank and Maybank Law Firm alleging a variety of theories, including negligence. The district court certified these two questions to us pursuant to Rule 244 of the South Carolina Appellate Court Rules.

II. Analysis—Question One

[1] *See Scott v. Greenville Housing Authority*, 353 S.C. 639, 646, 579 S.E.2d 151, 154 (Ct. App. 2003) (stating "our courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial").

When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client. Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty. *See Spence v. Wingate*, 395 S.C. 148, 158-59, 716 S.E.2d 920, 926 (2011) (stating "an attorney-client relationship is, by its very nature, a fiduciary relationship"). Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibilities the attorney owes his client.

However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship. Pursuant to the insurance contract, the insurer has a duty to defend its insured, and must compensate the attorney for his time in defense of his client. If the insured settles or has judgment imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgment. Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of its insured. Finally, the insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits. *Tiger River Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931).

Because of the insurance company's unique position, we hold the answer to question one is yes, an insurer may bring a direct malpractice action against counsel hired to represent its insured. However, we will not place an attorney in a conflict between his client's interests and the interests of the insurer. Thus, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer. If the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for we will not permit the attorney's duty to the client to be affected by the interests of the insurance company. Whether there is any inconsistency between the client's and the insurer's interests in the circumstances of an individual case is a question of law to be answered by the trial court.

Our decision is consistent with established policy. In *Fabian v. Lindsay*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014), analyzing the individual circumstances of that case, we held an attorney can be liable for breach of duty resulting in damages to a third party. We relied in part on our conclusion that not recognizing such liability

"would . . . improperly immunize this particular subset of attorneys from liability for their professional negligence." 410 S.C. at 490, 765 S.E.2d at 140; *see also* 410 S.C. at 493, 765 S.E.2d at 142 (Pleicones, J., concurring in part and dissenting in part) (relying on "public policy considerations" to support his concurrence in the imposition of liability).

The deterrent purpose of tort law is also served by our decision.

> One reason for making a defendant liable in tort for injuries resulting from a breach of his duty is to prevent such injuries from occurring. Underlying this justification is the assumption that potential wrongdoers will avoid wrongful behavior if the benefits of that behavior are outweighed by the costs imposed by the payment of damages . . . .

F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 7 (4th ed. 2011); *see also* Rule 1.8 cmt. 14, RPC, Rule 407, SCACR, (stating the reason an attorney cannot prospectively limit his liability to a client is because doing so is "likely to undermine competent and diligent representation").

Our decision is also consistent with the rule adopted by the majority of states that have considered the issue. *See generally* Ronald E. Mallen, 4 *Legal Malpractice* § 30.39 (2018 ed.) (listing twenty-four states in which such an action is allowed under appropriate circumstances, and two states in which it is not allowed); William H. Black Jr. & Sean O. Mahoney, *Legal Bases for Claims by Liability Insurers Against Defense Counsel for Malpractice*, 35 The Brief 33, 33 (Winter 2006) ("Although the issue is relatively new to American jurisprudence, the majority of states permit a liability insurer to sue defense counsel for negligent representation in an underlying action."); *General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 955-56 (E.D. Va. 2005) (stating "courts of other jurisdictions generally recognize such a cause of action"); *see also* 7A C.J.S. *Attorney & Client* § 386 (2015) ("When, pursuant to insurance policy obligations, an insurer hires and compensates counsel to defend an insured, provided that the interests of the insurer and insured

are not in conflict, the retained attorney owes a duty of care to the insurer[2] which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured.").

Maybank argues our decision will destroy the sanctity and integrity of the attorney-client relationship by: (1) dividing the loyalty of the attorney between the client and the insurer; (2) threatening the attorney-client privilege; (3) allowing the insurer to direct the litigation even though the insured is the client; and (4) opening the door to other non-clients to sue attorneys for legal malpractice. We have the additional concern of ensuring there can be no double-recovery against an attorney.

In response to these concerns, we emphasize that the loyalties of the attorney may not be divided. *See Fabian*, 410 S.C. at 490, 765 S.E.2d at 140 ("It is the breach of the attorney's duty to the client that is the actionable conduct in these cases."). The duties an attorney owes his client are well-established according to law, and this opinion does nothing to change that. *See generally* Rule 407, SCACR (South Carolina Rules of Professional Conduct). The attorney owes no separate duty to the insurer. We do not recognize what the dissent calls the "dual attorney-client relationship."

As to Maybank's second concern, we emphasize the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client—the insured. We are confident the trial courts of this State are well-equipped to protect the attorney-client privilege according to law if any dispute over it arises.

As to Maybank's third concern, the attorney's control of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; . . . ."); Rule 5.4(c), RPC, Rule 407, SCACR ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Our opinion does nothing to change these principles.

---

[2] To be clear, the cause of action we recognize today is based on the attorney's duty to the client, not to the insurer.

As to Maybank's "opening the door" concern, we expressly limit the scope of this opinion so that it does nothing beyond what it expressly states. Next, there may be no double recovery. If a danger of double recovery arises, we are confident our trial courts can handle it. *See* Rule 17(a), SCRCP ("Every action shall be prosecuted in the name of the real party in interest.").

As a final limitation on an insurer's right to bring an action against the lawyer it hires to represent its insured, the insurer must prove its case by clear and convincing evidence. The clear and convincing standard is consistent with the result of *Fabian*. *See* 410 S.C. at 493, 765 S.E.2d at 142 (Kittredge, J., concurring) (stating "the burden of proof should be the clear and convincing standard"); 410 S.C. at 494, 765 S.E.2d at 142 (Pleicones, J., concurring in part and dissenting in part) (stating "I would require a beneficiary asserting such a legal malpractice claim to prove by clear and convincing evidence that the attorney breached the duty," joined by Toal, C.J.).

In this case, there appears to be no risk that our decision will place the attorney in a conflict position or create any divided loyalty. The attorney's duty to his client includes the obligation to timely respond to requests to admit. The fact that an insurance company may suffer financial loss from an attorney's negligence in failing to timely respond to the requests, and our recognition that the insurer may sue the attorney to recover this loss after settling the underlying case to protect the interests of the insured, do not in any way affect the attorney's duty to his client. We stress, however, the district court should independently make this determination based on all the facts and circumstances of the case. As to the other concerns, we see no basis on the limited record before us to find that any of the limitations we impose will be violated in this factual scenario. If some other fact or circumstance in the record before the district court raises such a concern, the district court is fully capable of addressing it.

The dissent offers several points of criticism we feel we should address. First, the fact that we do not specifically identify a theory of recovery—such as third party beneficiary theory or equitable subrogation—is fair criticism. This is a deliberate choice, however, designed to preserve the attorney's fiduciary allegiance to his client with no interference from the insurer. If permitting liability against the attorney on the basis of a duty to the client—not a duty to the plaintiff insurer—appears

awkward, we accept that awkwardness as adequately counterbalanced by the benefit of preserving the sanctity of the attorney-client relationship.

Second, the dissent argues we have ignored the *Fabian* "factors." However, we specifically rely on the fifth factor—the policy of preventing future harm—in our discussion of the deterrent purpose of tort law, and with our citation to the admonition in *Fabian* that we should not "improperly immunize [a] particular subset of attorneys from liability for their professional negligence." 410 S.C. at 490, 765 S.E.2d at 140. We also specifically discuss the sixth factor—the need to avoid an undue burden on the profession—by putting so much emphasis on not creating divided loyalties. The third factor warrants no discussion because its applicability here is obvious. When an attorney's breach of his duty to his client proximately causes a larger settlement or judgment in a case in which the insurer must pay, the harm to the plaintiff insurer is not merely "foreseeable"; it is inevitable.

The other *Fabian* factors are less applicable here, which brings up the reason we do not dwell on them as the dissent suggests we should. In *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), the decision we primarily relied on in *Fabian* for the use of the factors, the Supreme Court of California explained the purpose for their use. The court stated "the determination whether *in a specific case* the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors." 364 P.2d at 687 (emphasis added); *see also Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP*, 327 P.3d 850, 857 (Cal. 2014) (stating "the application of these factors necessarily depends on the circumstances of each case," relying on *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958), which we indicated in *Fabian* was the decision the California Supreme Court relied on in deciding *Lucas*, 410 S.C. at 484, 765 S.E.2d at 137). In *Fickett v. Superior Court of Pima County*, 558 P.2d 988 (Ariz. Ct. App. 1976), another case we relied on in *Fabian*, the court similarly recognized the factors are for use in a specific case-by-case analysis, 558 P.2d at 990, and in particular in cases in which a person's liability to the beneficiary of an estate is in question, 558 P.2d at 989-90. In fact, only one of the many cases cited by the dissent regarding the importance of the *Fabian*/*Lucas* factors involves the liability of an attorney to an insurer. *See supra* notes 6 and 7. That case, *Atlanta International Insurance Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991), does not even mention the *Fabian*/*Lucas* factors, but does impose liability against retained counsel—as we do—when the "case does not present a conflict

between the interests of the insurer and the public policy of ensuring undiluted loyalty by counsel to the insured." 475 N.W.2d at 297.

III. Question Two

As to question two—whether a legal malpractice claim may be assigned to a third party—we decline to answer the question. We are satisfied that our answer to question one renders the second question not "determinative of the cause then pending in the certifying court," Rule 244(a), SCACR, and thus it is not necessary for us to answer question two, *see* Rule 244(f), SCACR (providing we "may rescind [our] agreement to answer a certified question"); *see also Thomas v. Grayson*, 318 S.C. 82, 89, 456 S.E.2d 377, 381 (1995) (declining to answer a certified question because the Court's analysis of the other certified questions was dispositive).

KITTREDGE, J., and Acting Justice Thomas Anthony Russo, Sr., concur. BEATTY, C.J., dissenting in a separate opinion in which HEARN, J., concurs.

CHIEF JUSTICE BEATTY: I respectfully dissent. I would answer both questions in the negative and hold that an insurer may not maintain a direct legal malpractice claim against an insured's hired counsel and that a legal malpractice claim may not be assigned to a third party responsible for any judgment and legal fees. In deciding otherwise, the majority provides the insurer a windfall at the cost of preserving the attorney-client relationship, which is a decision I cannot support.

I. May an insurer maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?

Over a century ago, the United States Supreme Court held that, absent fraud, collusion, or similar circumstances, only those in privity with an attorney may pursue a legal malpractice claim. *Nat'l Sav. Bank v. Ward*, 100 U.S. 195, 205-07 (1879). South Carolina followed suit and required the plaintiff to prove the existence of an attorney-client relationship in order to establish privity. *Fabian v. Lindsay*, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014) ("Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship."); *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.").

The purpose of the attorney-client relationship requirement is "to ensure the inviolability of the attorney's duty of loyalty to the client." *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 296 (Mich. 1991); *see McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008) ("If an attorney were to owe a duty to a nonclient, it could result in potential ethical conflicts for the attorney and compromise the attorney-client relationship, with its attendant duties of confidentiality, loyalty, and care."); *Bovee v. Gravel*, 811 A.2d 137, 140 (Vt. 2002) ("The requirement of attorney-client privity to maintain a malpractice action 'ensure[s] that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.'" (quoting *Barcelo v. Elliot*, 923 S.W.2d 575, 578-79 (Tex. 1996))). Thus, by limiting the potential plaintiffs in a legal malpractice action to the attorney's clients, courts have, in effect, determined the concerns surrounding the preservation of the attorney-client relationship outweigh the collateral or peripheral interest of third parties.

In *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014), however, we created an exception to this longstanding requirement when we recognized causes of action in tort and contract for third-party beneficiaries of an existing estate planning document against an attorney whose drafting error defeats or diminishes the client's intent. In doing so, we explained:

> Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney.

Id. at 490, 765 S.E.2d at 140. The Court also acknowledged that "[i]n these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence." *Id*.

Today, the majority creates another exception to the attorney-client relationship requirement to allow an insurer to pursue a cause of action against counsel hired to represent the insured. In doing so, the majority asserts its decision is "consistent with the rule adopted by the majority of states that have considered the issue." This is somewhat misleading. While a majority of jurisdictions *may* permit an insurer to pursue a legal malpractice action against hired counsel, it is important to note that most of those jurisdictions appear to do so on the belief that a dual attorney-client relationship exists between the insurer, insured, and counsel, which is a belief the majority does not share.[3]

---

[3] Under the "dual attorney-client relationship," the attorney has two clients, in this context, the insured and the insurer. Consequently, in those jurisdictions that recognize this type of relationship, no exception to the privity requirement need be created for an insurer to bring a direct legal malpractice claim against hired counsel

Those jurisdictions that allow an insurer to pursue a claim against hired counsel under a premise other than the dual attorney-client relationship have done so using a number of approaches grounded in contract, equity, and tort law. *See, e.g.*, *Paradigm Ins. Co. v. Lagerman Law Offices, P.A.*, 24 P.3d 593, 601-02 (Ariz. 2001) (holding an insurer may pursue a legal malpractice claim against hired counsel because counsel "has a duty to the insurer arising from the understanding that [his] services are ordinarily intended to benefit both insurer and insured when their interests coincide"); *Hartford Ins. Co. v. Koeppel*, 629 F.Supp.2d 1293 (M.D. Fla. 2009) (granting insurer standing to sue under a third-party beneficiary theory); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991) (declining to recognize the insurer as a client, but nevertheless allowing the insurer to pursue an action against hired counsel under the doctrine of equitable subrogation).

The majority opinion is devoid of any reference to these approaches. It simply holds that, because of the insurer's "unique position," the insurer "may recover . . . for the attorney's breach of his *duty to* [*the insured*]." I take issue with the majority's holding. First, I do not agree with the majority that being contractually obligated to pay litigation costs places the insurer in a position sufficient to waive the privity requirement. Second, I am concerned about the manner in which an insurer can pursue a legal malpractice action against hired counsel after today's decision.

According to the majority, an insurer's cause of action against hired counsel is predicated on a breach of the duty owed *to the insured*, not on a breach of a duty owed *to the insurer*. At first blush, the cause of action available to the insurer sounds in tort. However, unlike other jurisdictions that have recognized a cause of action in tort for insurers against hired counsel, the majority declines to recognize a separate duty of care owed to the insurer. Thus, by limiting the insurer's recovery to the

---

under certain circumstances because the insurer, as a client, is already in privity with the attorney. However, that is not the rule in this state. Moreover, as at least one commentator has recognized, some states that have initially recognized such a rule have moved away from doing so in light of the conflicts it poses to the insured. *See* Amber Czarnecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law - Who Is the Real Client?,* 74 Def. Couns. J. 172, 176 (2007) (recognizing that "the judicial trend" is moving toward recognizing the insured as the sole client out of concern that recognizing the insurer as a client would weaken the attorney's loyalty to the insured).

extent hired counsel breached its duty to the insured and prohibiting double recovery, the action is more akin to equitable subrogation or an assignment of an insured's legal malpractice claim. As will be discussed, I would find such an action, under either theory, contrary to the public policy of this state.

I turn now to address Sentry's specific arguments in support of recognizing a direct action against hired counsel.

1. Third-Party Beneficiary of Contract Theory

First, Sentry argues this Court should allow insurers to bring claims against hired counsel under a third-party beneficiary of contract theory.[4] I disagree.

The contract at issue here is the contract of representation between the insured and hired counsel. Therefore, to pursue a third-party beneficiary claim, an insurer must show the insured and hired counsel intended, by virtue of the contract, "to create a direct, rather than an incidental or consequential, benefit to" the insurer. *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). That, however, is not the case.

There is no question that when an insured purchases an insurance policy that gives rise to the contract of representation, the insured is doing so with the understanding that his interests, not those of the insurer, will be represented should an issue arise requiring legal representation. Although the insurer pays for the legal representation and may share similar interests with the insured, any benefit to the insurer derived therefrom is incidental to the contract of representation. In sum, the insurer is merely performing its contractual duty to the insured. Consequently, I would find that an insurer cannot bring a breach of contract action as a third-party beneficiary because it is not the intended beneficiary of the contract of representation between the insured and hired counsel.

2. Negligence

[4] A third-party beneficiary is someone "who is not a party to a contract but who would benefit from its performance." Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1359 (1992).

Next, Sentry asserts an insurer should be able to proceed against hired counsel under a theory of negligence. I disagree.

In *Fabian*, this Court explained the determination of whether an attorney may be liable in tort to a plaintiff not in privity "is a matter of policy and involves the balancing of" the following factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether the recognition of liability would impose an undue burden on the profession.[5] *Id*. at 485, 765 S.E.2d at 137-38 (citing *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961) (*en banc*)). After careful consideration, I find none of these factors weigh in the insurer's favor.

Given the significance of the purpose of the representation, I believe the first factor, the extent to which the transaction was intended to affect, or benefit,[6] the

---

[5] Interestingly, although the majority recognizes a cause of action in tort, the majority makes no reference to these factors in doing so.

[6] I interpret this factor as requiring the representation do more than simply affect the plaintiff. Similar to other states that have adopted the *Lucas* test or something similar, I believe this factor weighs in favor of the plaintiff only if the client intended for the lawyer's services to benefit that plaintiff. *See Blair v. Ing*, 21 P.3d 452, 466 (Haw. 2001) (interpreting the first *Lucas* factor as requiring the principal purpose of the representation to be for the benefit of the plaintiff); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. 1995) (*en banc*) (determining the first factor "weighs in favor of a legal duty by an attorney where the client ***specifically intended*** to benefit the plaintiffs"). It has also been observed that, since deciding *Lucas*, California has imposed a duty on an attorney to a plaintiff only where, *inter alia*, the attorney and client intended the representation directly benefit the plaintiff. *Templeton v. Catlin Specialty Ins. Co.*, 612 F. App'x 940, 967-68 (10th Cir. 2015). Thus, with respect to the first factor, the question is not whether the plaintiff was affected by the representation, but whether the client intended for the representation to be for the plaintiff's benefit.

plaintiff, should be weighed more heavily than the others.[7] As discussed, the purpose of the representation between counsel and the insured is not intended to benefit the insurer.

Moreover, to be applicable, factors two, three, and four each necessitate the plaintiff suffer some type of harm or injury. However, I am unable to identify any harm suffered by an insurer when the case settles within the agreed-upon policy limits. In those cases, the insurer is merely fulfilling an agreed-upon promise between it and the insured. The insurer established a price to cover the risk and the insured paid it. Understandably, the insurer is unhappy when it pays more than it wanted to, but that is the risk that it took and it is the nature of the business.

As to the fifth factor, the policy concerns in preventing future harm are not as great as they are in the will-drafting context. In *Fabian*, we acknowledged that but for an exception to the privity requirement, an attorney would not be held accountable for the negligence in the preparation of a will or estate planning document. *Fabian*, 410 S.C. at 490, 765 S.E.2d at 140. However, here, the insured maintains the option of bringing a malpractice claim, which upholds the policy goals of preventing future harm by maintaining accountability and deterring further negligence.

---

[7] Indeed, some states have gone so far as to make this factor a threshold requirement for a plaintiff pursing a claim against counsel in tort. *See McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008) (finding "that in order for a third party to proceed in a legal malpractice action, that party must be a direct and intended beneficiary of the attorney's services"); *Trask v. Butler*, 872 P.2d 1080, 1084 (Wash. 1994) (*en banc*) (holding "under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained"). Additionally, at least one state, which has not adopted the *Lucas* test, has nevertheless made this a requirement for allowing a third party to pursue a legal malpractice claim in tort. *See Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) (concluding "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party").

Regarding the final factor, recognizing a cause of action in tort for an insurer against the insured's hired counsel may pose an undue burden to the profession by allowing multiple parties to pursue legal malpractice claims against hired counsel. More significantly, for reasons that will be discussed, such a cause of action could pose an undue burden to the attorney-client relationship by negatively affecting the duty of loyalty owed to the client, which is precisely what the privity requirement was intended to prevent. *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 296 ("The essential purpose of the general rule against malpractice liability from third-parties is . . . to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client.").

The principal concern in allowing third parties to pursue legal malpractice claims against an attorney is that, when a conflict arises between the client and third party, the attorney may carry out the representation in a manner inconsistent with the best interests of the client. *See id.* ("Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation."); Restatement (Third) of the Law Governing Lawyers § 51 cmt. b (2000) ("Making lawyers liable to nonclients . . . could tend to discourage lawyers from vigorous representation."). This is of special concern in the context here given the heightened risk of conflict due to the often diverging interests between the insured and insurer and the employment relationship between insurer and hired counsel.

Unlike the situation in *Fabian*, the purpose of the representation here is not for the benefit of the third party pursuing the legal malpractice claim. Here, the third party's purpose and interests routinely diverge from those of the client. As one court stated:

> [t]here can be no doubt that actual conflicts between insured and insurer are quite common and that the potential for conflict is present in every case. Conflicts may arise over the existence of coverage, the manner in which the case is to be defended, the information to be shared, the desirability of settling at a particular figure or the need to settle at all, and an array of other factors applicable to the circumstances of a particular case.

Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 597 (Ariz. 2001) (*en banc*).

In addition to the increased risk of conflict, the employment relationship between the insurer and insured's hired counsel heightens the concern that the attorney may make decisions in a manner more preferable to the third party than the client. *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298 (acknowledging "[t]he possibility of conflict unquestionably runs against the insured, considering that defense counsel and the insurer frequently have a longstanding, if not collegial, relationship"); 4 Ronald E. Mallen, *Legal Malpractice* § 30:53, at 333 (2017 ed.) ("A risk is that the attorney may not recognize [a] conflict or may favor the interests of the insurer. The lawyer may be tempted to help the [insurer], who pays the bills, who will send further business, and with whom long-standing personal relationships have developed."); Mallen, *supra*, § 30:57, at 346-47 ("During litigation, issues may arise that could influence the attorney to choose sides. When abuses have occurred, most reported decisions have involved an attorney, who has favored . . . the insurer."); Robert M. Wilcox & Nathan M. Crystal, *Annotated South Carolina Rules of Professional Conduct*, at 136 (2013 ed.) ("Whenever a person other than the client pays the lawyer, there exists a risk that the interests of the person paying the fees may interfere with the lawyer's duty to exercise independent professional judgment on behalf of the client.").

Sentry contends these concerns are not present in this case because it undoubtedly shared a mutual interest with the insured in counsel timely filing answers to the requests to admit. Although that may be true, certified questions are not based on the narrow facts of the case from which the questions arise. While there may be no conflict in allowing Sentry to bring a legal malpractice action *in this case*, the same may not be true in later cases involving challenges to other decisions made in an attorney-client relationship of which the insurer was not in privity. *See* 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 7:8, at 802-03 (2014 ed.) (noting "even if an implied duty does not interfere with fiduciary obligations in a given case, it may do so in other cases under different facts. For that reason, policy considerations are not developed on an *ad hoc* basis, but from a broader perspective concerning the potential adverse effects on future relationships").

Therefore, for the reasons stated, I would find the *Fabian* balancing test weighs against allowing an insurer to bring a cause of action in tort for legal malpractice against counsel hired to represent its insured.[8]

Based on the foregoing, I would answer the first certified question in the negative and hold an insurer may not maintain a direct claim against an insured's hired counsel. I acknowledge that, under this approach, the insurer would have to assume the risk concomitant with the attorney it hires to represent its insured. I also recognize that, in those cases in which a negligent attorney resolves a claim within the policy limits, it is unlikely the insured will bring a legal malpractice action. As a result, the attorney may avoid liability for his negligence. Although troubling, I believe my concerns in expanding the privity exception to permit an insurer to pursue an action against hired counsel outweigh a holding to the contrary.[9] Moreover, while an attorney may not be held liable for his negligence in some circumstances, the

---

[8] Sentry also asks this Court to find hired counsel owes a duty of care to the insurer. However, such a duty of care would necessarily sound in negligence. As discussed, I would hold Sentry and other similarly situated entities do not meet *Fabian*'s balancing test. Nevertheless, even if the recognition of such a duty of care could exist harmoniously with *Fabian*'s balancing test, I believe the previously discussed concerns in allowing an insurer to bring a direct legal malpractice claim would prohibit this Court from recognizing a duty.

[9] Other courts also favor the preservation of the sanctity of the attorney-client relationship over the economic interests of the insurer. *See, e.g.*, *State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1069 (Colo. App. 2008) (precluding an insurer from pursuing an equitable subrogation claim against counsel, recognizing that while "insurance companies and ultimately the public will pay the cost, or the bulk of the cost, of this burden, protecting every attorney-client relationship must take precedence over allowing lawsuits against attorneys whose clients do not want to sue but their subrogees do"); *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 724 (Ind. Ct. App. 2007) (declining to allow an insurer to bring a legal malpractice claim against hired counsel and dismissing those jurisdictions holding to the contrary; stating, "we do not agree with those jurisdictions that hold the possibility of the attorney garnering a windfall by not having to defend against his or her malpractice outweighs the sanctity of the attorney-client relationship").

attorney could still be held accountable for his conduct in a disciplinary proceeding before this Court.

II. May a legal malpractice claim be assigned to a third party who is responsible for payment of legal fees and any judgments incurred as a result of the litigation in which the alleged malpractice arose?

Sentry contends this Court should answer the second certified question "yes" and hold a legal malpractice claim may be assigned to a third party responsible for the payment of legal fees and any judgment incurred. I disagree.

In *Skipper v. ACE Property and Casualty Insurance Company*, 413 S.C. 33, 38, 775 S.E.2d 37, 39 (2015), this Court held a legal malpractice claim could not be assigned between adversaries in litigation in which the alleged legal malpractice arose. The Court based its holding, in part, on the potential threat to the attorney-client relationship. *Id*. at 37, 775 S.E.2d at 38-39. The relationship in *Skipper* is different than that here because the insurer and insured are presumably not adversaries. However, as discussed in the previous section, the threat to the attorney-client relationship still remains in allowing a third party responsible for the payment of legal fees to pursue a cause of action challenging the decisions made in an attorney-client relationship to which he was not in privity.

To be sure, in denying the assignment of legal malpractice claims outright, the majority of courts base their holding on the same policy considerations that form the basis of my position to deny an insurer the right to bring a direct legal malpractice claim. *See, e.g.*, *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976) ("It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment."); *Christison v. Jones*, 405 N.E.2d 8, 11 (Ill. App. Ct. 1980) (prohibiting the assignment of legal malpractice claims, holding "the decision as to whether a malpractice action should be instituted should be a decision peculiarly for the client to make" given, in part, "the personal nature of the duty owed by an attorney to his client"); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) (concluding legal malpractice claims cannot be assigned based on, *inter alia*, the need to preserve the sanctity of the attorney-client relationship, including the duty of loyalty and the duty of confidentiality, which would be weakened under the policy of assigning legal malpractice claims). *See generally* Tom W. Bell, *Limits*

on the Privity and Assignment of Legal Malpractice Claims, 59 U. Chi. L. Rev. 1533, 1544-45 (1992) (recognizing that "relaxing the privity requirement and allowing assignability stand or fall by the same arguments" because the policy concerns underlying the decision to prohibit a third party from asserting a direct malpractice claim also underlie the decision to prohibit the assignment of a legal malpractice claim to a third party).[10]

Consequently, I would also answer the second question in the negative and hold a legal malpractice claim may not be assigned to a third party responsible for any judgment and legal fees.

HEARN, J., concurs.

---

[10] Sentry further submits this Court should allow insurers to pursue a claim against hired counsel under the doctrine of equitable subrogation. I disagree. "In the context of the insured-insurer relationship, the doctrine of equitable subrogation provides that an insurer who pays a loss is thereby placed by operation of law in the position of its insured so that the insurer may recover from a third-party tortfeasor whose negligence or wrongful act caused the loss." Dale Joseph Gilsinger, Annotation, *Right of Insurer to Assert Equitable Subrogation Claim Against Attorney for Insured on Grounds of Professional Malpractice*, 50 A.L.R. 6th 53, 63 (2009). The concerns surrounding equitable subrogation in this context are similar to the concerns surrounding the assignment of legal malpractice claims. *See Nat'l Union Fire Ins. Co. v. Salter*, 717 So. 2d 141, 142 (Fla. Dist. Ct. App. 1998) (recognizing the same public policy reasons advanced for prohibiting the assignment of legal malpractice claims "apply and prohibit the subrogation of a legal malpractice claim"). Therefore, for the abovementioned reasons, I would also conclude that an insurer may not bring a claim against hired counsel under equitable subrogation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Gantt and Edward K. White, Respondents,

v.

Samuel J. Selph as Director, and Marjorie Johnson, Adell Adams, E. Peter Kennedy, Sylvia Holley and Jane Emerson as the Members of the Board of Voter Registration and Elections of Richland County, The Board of Voter Registration and Elections of Richland County, and Kim Murphy, Defendants,

Of whom Kim Murphy is the Appellant.

Appellate Case No. 2016-002134

Appeal from Richland County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 27807
Submitted January 16, 2018 – Filed May 30, 2018

AFFIRMED

Brian C. Gambrell, of The Law Offices of Jason E. Taylor, P.C., of Columbia, for Appellant.

Michael H. Montgomery, of Montgomery Willard, LLC, of Columbia, for Respondents.

JUSTICE JAMES: In this case, the circuit court ruled Appellant Kim Murphy was not qualified to be a candidate for election to a Richland County seat on the District 5 Richland-Lexington School Board of Trustees (School Board). The circuit court based this ruling on its conclusion that Murphy resides in Lexington County. We first hold the circuit court had subject matter jurisdiction over Respondents' declaratory judgment action challenging Murphy's qualifications. Second, we hold there is probative evidence in the record supporting the circuit court's conclusion that Murphy resides in Lexington County. Therefore, we affirm the circuit court's ruling that Murphy is not qualified to be a candidate for election to a Richland County seat on the School Board.

FACTS AND PROCEDURAL HISTORY

Kim Murphy has lived at the same residence in Chapin since the year 2000. Murphy was registered to vote and voted in the Spring Hill Precinct of Richland County from 2000 to 2013 without controversy. In 2004 and 2010, Murphy filed to run for a Richland County seat on the School Board, and the Richland County Board of Voter Registration and Elections (Richland Election Board) accepted her candidate's application as a resident of Richland County both times. Murphy was elected to a Richland County seat on the School Board in 2010.

The dispute as to Murphy's qualifications as a candidate centers upon Act No. 326 of 2002, § 9 (Act No. 326), which provides that the School Board must be comprised of three residents of Richland County and four residents of Lexington County. Act No. 326 first became an issue after Murphy was elected in 2010. In 2012, the Office of Research and Statistics (an arm of the South Carolina Budget and Control Board), the body then charged with keeping official records of voting precincts and the location of county lines, conducted a routine screening of voter precinct assignments in Richland County.[1] During that screening, Murphy's residence was flagged as being in Lexington County. In March 2013, relying upon this information, the School Board determined Murphy was not a resident of Richland County and was instead a resident of Lexington County. The School Board removed Murphy from her seat for cause pursuant to section 59-19-60 of the South

[1] The South Carolina Revenue and Fiscal Affairs Office is the successor to the Office of Research and Statistics.

Carolina Code (2004). The School Board based its decision on Murphy not meeting the residency requirements prescribed by Act No. 326.

In August 2016, Murphy filed to run against Respondent Robert Gantt in the November 2016 election for a seat representing Richland County on the School Board. Robert Gantt and Edward White (Respondents) petitioned the Richland Election Board, challenging Murphy's qualification as a Richland County *voter* pursuant to section 7-5-230 of the South Carolina Code (Supp. 2017). After a hearing, the Richland Election Board found Murphy was a qualified *voter* and allowed her to remain on the ballot. Respondents attempted to appeal to the circuit court; however, while section 7-5-230 would have allowed Murphy to appeal an adverse ruling, neither section 7-5-230 nor any other statute gave Respondents the right to appeal the Richland Election Board's conclusion that Murphy was a qualified *voter* in Richland County.

Respondents then commenced this declaratory judgment action in the circuit court. They seek a declaration that Murphy does not reside in Richland County and is therefore not qualified under Act No. 326 to be a candidate for a Richland County seat on the School Board. The circuit court ruled Murphy resides in Lexington County and is therefore not qualified to be a candidate for a Richland County seat on the School Board. This appeal followed.

DISCUSSION

A. Subject Matter Jurisdiction

Murphy claims the circuit court lacked subject matter jurisdiction to hear and decide Respondents' challenge to her qualifications as a candidate. We disagree.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010). "The question of subject matter jurisdiction is a question of law." *Id.* at 551, 703 S.E.2d at 503 (quoting *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007)). "An appellate court may decide questions of law with no particular deference to the trial court." *Id.*

As noted above, Respondents initially challenged Murphy's qualification to *vote* in Richland County by petitioning the Richland Election Board, claiming Murphy does not reside in Richland County. Article II, section 9 of the South Carolina Constitution provides that anyone denied registration to vote "shall have the right to appeal to the court of common pleas, or any judge thereof, and thence to the Supreme Court, to determine his right to vote." This section further provides that "the General Assembly shall provide for such appeal." S.C. CONST. art. II, § 9. To "provide for such appeal," the General Assembly enacted subsection 7-5-230(C) of the South Carolina Code (Supp. 2017), which allows for an appeal to the court of common pleas by any person who is denied registration to vote by the local election board. The Richland Election Board determined Murphy was a qualified Richland County voter; therefore, she did not have to exercise her right to appeal.

Murphy argues section 7-5-230 and South Carolina common law make the executive branch—the Richland Election Board—the sole arbiter of not only her qualification to vote in Richland County, but also of her qualification to be a candidate for election to the School Board. Therefore, Murphy contends, the circuit court and this Court do not have subject matter jurisdiction over this dispute. We disagree.

Murphy's reading of section 7-5-230 is overly broad, as subsection 7-5-230(A) simply does not address the Richland Election Board's authority to do anything other than be the judge "of the legal qualifications of all applicants for registration" to vote. It does not apply to a person who files as a candidate for office. Pursuant to subsection 7-5-230(C), if Murphy's application for voter registration had been denied by the Richland Election Board, she could have appealed that denial to the circuit court. In such an event, sections 7-5-240 and 7-5-250 would have governed appellate proceedings before the circuit court and this Court. However, the instant dispute does not center upon Murphy's application for voter registration; rather, the dispute centers upon her qualification to be a candidate for election to the School Board. Therefore, section 7-5-230 does not apply to the dispute before us.

Likewise, South Carolina common law has not established the executive branch as the final authority on Murphy's eligibility to run for and hold a seat on the School Board. Murphy's reliance on *South Carolina Public Interest Foundation v. Judicial Merit Selection Commission*, 369 S.C. 139, 632 S.E.2d 277 (2006), and *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), for this proposition is misplaced.

In *South Carolina Public Interest Foundation*, we held that a declaratory judgment action was an inappropriate vehicle for resolving the issue of residency of a judicial candidate. 369 S.C. at 142-44, 632 S.E.2d at 278-79. We explained we have no authority to rule on questions "exclusively or predominantly political in nature rather than judicial" and stated "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Id.* at 142-43, 632 S.E.2d at 278. The central premise of our conclusion that the dispute was a nonjusticiable political question was that article V, section 27 of the South Carolina Constitution specifically vested the General Assembly with the authority to investigate and determine the qualifications of judicial candidates. In turn, the General Assembly exercised this authority by enacting comprehensive legislation creating the Judicial Merit Selection Commission and giving it complete control over the investigation and determination of the qualifications of judicial candidates. *Id.* at 143, 632 S.E.2d at 279.

In the instant case, there is no such exclusive authority vested with the Richland Election Board by either the South Carolina Constitution or by statute to determine the qualifications of a candidate for election to the School Board. As noted above, article II, section 9 of the South Carolina Constitution addresses a person's right *to vote*; subsection 7-5-230(A) prescribes a procedure for challenges to a person's qualification to register *to vote*, and subsection 7-5-230(C) gives a person who applies to register *to vote* the right to appeal the Richland Election Board's refusal to approve such an application. There is no provision in the South Carolina Constitution, South Carolina Election Law,[2] Act No. 326, or any other statute granting authority to any executive or legislative entity to investigate and determine the qualifications of a candidate for election to the School Board.

Murphy's reliance on *Rainey* is likewise misplaced. In *Rainey*, the plaintiff sued Governor Haley in the circuit court, alleging that Governor Haley, while serving as a member of the House of Representatives, had violated certain provisions of the State Ethics Act.[3] 404 S.C. at 322, 745 S.E.2d at 82. We held the circuit court did not have subject matter jurisdiction in such a case for two basic reasons. First, article III, sections 11 and 12 of the South Carolina Constitution grant the General

---

[2] The South Carolina Election Law is set forth in Title 7 of the South Carolina Code (1976 & Supp. 2017).

[3] S.C. Code Ann. §§ 8-13-100 to -1520 (1986 & Supp. 2017).

Assembly authority over the conduct of its own members, and second, the General Assembly had adopted a comprehensive statutory scheme, the State Ethics Act, for regulating the behavior of elected officials, including those who serve in the General Assembly. *Id.* at 323-27, 745 S.E.2d at 83-85. To enforce the State Ethics Act, the General Assembly created both the Senate and House Legislative Ethics Committees. *Id.* at 324, 745 S.E.2d at 83. We concluded it was clear the General Assembly intended the respective Legislative Ethics Committees to have exclusive authority to hear allegations of ethics violations of its own members and staffs. *Id.*

We again note there is no specific constitutional provision or statutory provision giving the Richland Election Board the exclusive authority—or any authority for that matter—to determine the qualifications of a candidate for election to the School Board. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Rainey*, 404 S.C. at 323, 745 S.E.2d at 83 (quoting *Dema v. Tenet Physician Servs.—Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)). As we have repeatedly noted, careful examination of section 7-5-230 reveals the Richland Election Board's authority is limited to determining the qualifications of a person who applies to register to vote, not the qualifications of a person who applies to be a candidate for election to the School Board.

In the absence of exclusive authority vested in another branch of government, Respondents are entitled to pursue relief pursuant to the Uniform Declaratory Judgments Act,[4] which provides in pertinent part:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20 (2005).

---

[4] S.C. Code Ann. §§ 15-53-10 to -140 (2005).

Now that we have determined that the circuit court had subject matter jurisdiction over this declaratory judgment action, we must examine the factual and legal bases of the circuit court's ruling. This Court has adopted the "any evidence" standard of review of findings of fact in appeals from decisions of the State Board of Canvassers and in municipal election disputes. *See Knight v. State Bd. of Canvassers*, 297 S.C. 55, 57, 374 S.E.2d 685, 686 (1988) (holding that in an appeal from a decision by the State Board of Canvassers, this Court's review is limited to correcting errors of law, and the Board of Canvassers' findings of fact shall not be overturned unless wholly unsupported by the evidence); *see also Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005) (providing in municipal election cases, this Court reviews the judgment of the circuit court only to correct errors of law, and this Court must accept the circuit court's factual findings unless they are wholly unsupported by the evidence). Under this deferential standard, the findings of fact reached by the lower tribunal cannot be disturbed if there is any probative evidence in the record supporting the findings. While the instant case does not involve either a municipal election or a decision of the State Board of Canvassers, we conclude we must apply the "any evidence" standard of review.

The circuit court analyzed the evidence in great detail and noted, among other things, the following: (1) Lexington County tax maps show Murphy's residence to be in Lexington County, (2) Richland County tax maps show her residence to be in Richland County, (3) Lexington County and Richland County Geographic Information System (GIS) maps show her residence to be in Lexington County, (4) official State precinct maps show her residence to be in Lexington County, and (5) expert testimony established her residence is approximately 1000 feet inside Lexington County. Although Murphy was registered to vote in Richland County and paid real and personal property taxes in Richland County, and although there was a "gentlemen's agreement" between the Richland and Lexington County Assessors to treat the Murphy residence as being in Richland County, the circuit court rejected those factors when weighing the totality of the evidence. The circuit court's determination that Murphy resides in Lexington County is supported by probative evidence in the record.

B. Boundary Dispute

Murphy next contends the circuit court, in finding she is a resident of Lexington County, improperly resolved a non-existent border dispute between Richland and Lexington Counties. We disagree.

Subsection 27-2-105(A)(1) of the South Carolina Code (Supp. 2017) provides, "The South Carolina Geodetic Survey (SCGS) shall seek to clarify the county boundaries as defined in Chapter 3, Title 4." Subsection 27-2-105(A)(2) provides, "If there is a boundary dispute between two or more counties, the SCGS shall act as the mediator to resolve the dispute." Lexington and Richland Counties' borders are defined in sections 4-3-370 and -460 of the South Carolina Code (1986), respectively. Section 27-2-105 provides that an appeal of SCGS's determination of a county line is to be held in the Administrative Law Court; however, section 27-2-105 does not prohibit the circuit court from using data compiled by SCGS to assist the court in determining where a residence is located in connection to a county line. Nothing in section 27-2-105 limits the use of SCGS data as evidence of Murphy's county of residence in this case. Therefore, Murphy's argument fails.

CONCLUSION

Act No. 326 clearly requires Murphy to be a resident of Richland County for her to be qualified to run for a Richland County seat on the School Board. Section 7-5-230 applies only to a review of the Richland Election Board's determination of a person's qualification to vote. There is no constitutional provision or statute granting exclusive authority to any entity to determine the qualifications of a candidate seeking election to the School Board. The circuit court therefore had subject matter jurisdiction over Respondents' declaratory judgment action, and there is evidence in the record supporting the circuit court's finding that Murphy does not reside in Richland County. Therefore, the circuit court's declaration that Murphy is not qualified to be a candidate for a Richland County seat on the School Board is **AFFIRMED**.

KITTREDGE, Acting Chief Justice, HEARN and FEW, JJ., concur. BEATTY, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Randy Horton, Petitioner,

v.

Jasper County School District, Respondent.

Appellate Case No. 2016-001507

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27808
Heard March 28, 2018 – Filed May 30, 2018

REVERSED

James Ashley Twombley, of Twenge & Twombley, LLC, of Beaufort, for Petitioner.

David T. Duff and David Nelson Lyon, both of Duff & Childs, LLC, of Columbia, for Respondent.

JUSTICE FEW: After Randy Horton won this action seeking the production of documents under the South Carolina Freedom of Information Act (FOIA), the circuit court awarded him attorneys' fees at a rate of $100 per hour. On appeal, we address solely the question of whether the court abused its discretion in selecting that hourly rate. We reverse.

I. Facts and Procedural History

Horton is an elected member of the Board of Trustees for the Jasper County School District. In his capacity as a Board member, Horton requested the Board produce itemized credit card statements for District-issued credit cards, a list of bonus checks given by the District, and information regarding the funding sources for those expenses. For reasons the District did not explain—and which we cannot fathom—the District refused to turn over the information. Horton then made a number of written requests to the District to produce the information pursuant to the FOIA. Thirteen months later, having received no documents from the District and no explanation for the District's refusal to produce the documents, Horton filed this action requesting the circuit court order the District to produce the documents and award him reasonable attorneys' fees. The District answered and denied Horton was entitled to the records he requested.

Horton filed a motion for summary judgment. Between the filing of the motion and the initial hearing on the motion, the District produced to Horton some of the requested documents. At the initial hearing, the circuit court directed the parties to file additional briefs, and scheduled a full hearing. During the second hearing, the court instructed the District to produce the remaining documents and asked Horton's counsel to submit an affidavit of attorneys' fees and costs.

Horton's counsel—the late Jennifer I. Campbell—filed an affidavit in which she detailed the amount of time she and her co-counsel—J. Ashley Twombley—spent working on the case, as well as the hourly rates requested for each attorney. In particular, counsel stated, "As of the date of this Affidavit, I have spent 95.60 hours working on the case; J. Ashley Twombley has spent 39.7 hours . . . ." Campbell listed her hourly rate at $250 and Twombley's rate at $295. The affidavit contained evidence to support those hourly rates. The attorneys' fee request based on the hours and rates Campbell supplied was $35,611.50. In addition, Campbell stated the firm had incurred $1,096.56 in litigation costs. The District did not respond, and did not present any evidence to contradict Campbell's affidavit.

The circuit court issued an order granting Horton's motion for summary judgment, formalizing its previous instruction that the District produce "the entirety of requested documents." In the same order, the court found Horton was entitled to attorneys' fees and costs, stating,

> Jennifer I. Campbell's affidavit regarding legal fees and costs . . . portrays commensurate time, nature, extent and difficulty expended by both Jennifer I. Campbell and J. Ashley Twombley in procuring the FOIA requested documents and litigation related thereto. Legal fees claimed relate to counsel's preparation of pleadings, briefing the court regarding jurisdiction over this issue, standing and the merits of the case. Document review was conducted over the course of several months. Once production was complete, individual documents totaled over two thousand pages over the course of seven different submissions. Counsel has a combined twenty-five years of experience in litigation. Ultimately, my ruling produces beneficial results for their client.

The court then awarded attorneys' fees at a rate of $100 an hour for a total of 135.3 hours, which equals $13,530. The circuit court gave no explanation for why it chose $100 per hour as opposed to the hourly rates Campbell presented in her affidavit. As to costs, the court found Horton was entitled to $1,096.56. The circuit court's total award was $14,626.56.

On appeal, the court of appeals affirmed the circuit court's award of attorneys' fees in an unpublished decision. *Horton v. Jasper Cty. Sch. Dist.*, Op. No. 2016-UP-151 (S.C. Ct. App. filed March 30, 2016). Horton filed a petition for a writ of certiorari, which we granted.

II. Discussion

We begin our analysis with the fact that, despite its initial refusal to produce anything, the District does not now dispute Horton was entitled to the documents he requested. The District is a public body and the documents Horton requested are public records. *See* S.C. Code Ann. § 30-4-20(a) (2007) (defining "Public body" to include "any public or governmental body or political subdivision of the State, including . . . school districts"); S.C. Code Ann. § 30-4-20(c) (defining "Public record" broadly). Because Horton prevailed in his lawsuit, he is entitled to receive attorneys' fees. S.C. Code Ann. § 30-4-100 (Supp. 2017) ("If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's

fees and other costs of litigation specific to the request."); *see also Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 158, 711 S.E.2d 895, 898 (2011) (finding the plaintiff prevailed under the FOIA and therefore "is entitled to an award of attorney's fees"). Therefore, the sole issue before us is whether the circuit court abused its discretion in selecting the hourly rate of $100.

As to our standard of review, "[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); *see Sloan*, 393 S.C. at 156, 711 S.E.2d at 897 (applying the abuse of discretion standard to an award of attorneys' fees under the FOIA). There are six factors courts should consider in exercising that discretion: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004). We have previously held that a court should consider all six factors in making its decision, and we have explained "none of these six factors is controlling." *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). "[T]he trial court should make specific findings of fact on the record for each of these factors." *Burton*, 358 S.C. at 358, 594 S.E.2d at 898.

Here, the circuit court made general findings as to some—but not all—of the six factors. In particular, the court found counsel's affidavit portrayed "commensurate time, nature, extent and difficulty expended by both Jennifer I. Campbell and J. Ashely Twombley in procuring the FOIA requested documents and litigation related thereto." The court explained counsel's fees were for "preparation of pleadings, briefing the court regarding jurisdiction over this issue, standing and the merits of the case," as well as extensive document review of "two thousand pages over the course of seven different submissions." We interpret these general statements to indicate the circuit court agreed with counsel that the issues presented in this case warranted 135.3 hours of lawyer time.

The court also made general findings on two other *Burton* factors: counsel had "a combined twenty-five years of experience in litigation," and counsel achieved a beneficial result for their client. We interpret these general statements to support the

hourly rate Horton's attorneys requested. The circuit court made no findings, however, regarding the fourth factor—contingency of compensation[1]—and the sixth factor—customary legal fees for similar services. In sum, every finding the circuit court made appears to support the affidavit of Horton's counsel.

Nevertheless, the circuit court awarded attorneys' fees at a rate of $100 per hour, rather than the hourly rate presented by Horton—$295 for Twombley and $250 for Campbell. The court provided no explanation and cited no evidence in the record to support its conclusion that $100 per hour was reasonable. At oral argument, counsel for the District was asked to point to evidence that supported the $100 per hour rate. When counsel could not do so, he admitted the circuit court "should have explained her reasoning in a more comprehensive way." Although the circuit court has discretion in deciding the "specific amount of . . . reasonable attorneys' fees," *Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445, its decision must not be "based on unsupported factual conclusions," *Sloan*, 393 S.C. at 156, 711 S.E.2d at 897. In the absence of any evidence to support the rate, we find the circuit court abused its discretion.

If this were a situation in which the parties offered conflicting evidence as to the appropriate hourly rate, we would remand this case to the circuit court to allow the court to reconsider its decision and provide specific findings that support the award amount. *See Burton*, 358 S.C. at 358, 594 S.E.2d at 898 (reversing the circuit court for failing to make specific findings "as mandated" and "remand[ing] . . . for a full and proper consideration of the attorney's fees request"). Decisions as to the amount of attorneys' fees should ordinarily be made by trial courts. When a trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings—as the law requires—we defer to the trial court's discretion. Here, however, there is no evidence in the record that supports the circuit court's reduction of the hourly rate. Thus, we find a remand unnecessary. *See Sloan*, 393 S.C. at 158-59, 711 S.E.2d at 898 (reversing the circuit court's award of attorneys' fees under the FOIA and modifying the fee award "[r]ather than delay the matter further by remand").

III. Conclusion

[1] The only evidence in the record on this factor is that Twombley and Campbell's right to be paid was contingent on a fee award by the circuit court.

We find the circuit court abused its discretion by reducing the rate to $100 per hour without basing its decision on any evidence. We **REVERSE** the court's decision, and award Horton $35,611.50 in attorneys' fees and $1,096.56 in costs.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Joshua William Porch, Petitioner.

Appellate Case No. 2016-002146

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Trial Court Judge

Opinion No. 27809
Heard May 23, 2018 – Filed May 30, 2018

DISMISSED AS IMPROVIDENTLY GRANTED

Matthew A. Abee, William C. Wood Jr., Michael J. Anzelmo, and Caroline Delores Gimenez, all of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert Michael Dudek, all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General J. Anthony Mabry, Senior Assistant Attorney W. Edgar Salter III, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: We granted Joshua William Porch's petition for a writ of certiorari to review the court of appeals' decision to affirm his murder conviction. *See State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JAMES, JJ., and Acting Justice James E. Lockemy, concur.

The Supreme Court of South Carolina

In the Matter of John B. Kern, Respondent.

Appellate Case Nos. 2018-000873 and 2018-000874

ORDER

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

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

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

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

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

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

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

Within fifteen days of the date of this order, Respondent shall serve and file the affidavit required by Rule 30, RLDE, Rule 413, SCACR. Should Respondent fail to timely file the required affidavit, he may be held in civil and/or criminal contempt of this Court as provided by Rule 30.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Scott Kunst, Respondent,

v.

David Loree, Appellant.

Appellate Case No. 2015-001536

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5564
Heard January 17, 2018 – Filed May 30, 2018

AFFIRMED

Violet Elizabeth Wright, of V. Elizabeth Wright Law Firm LLC, of Greenville, and Gregory K. Smith, of King & Spaulding, LLP, of Atlanta, Georgia, for Appellant.

J. Scott Kunst, pro se, for Respondent.

WILLIAMS, J.: In this civil matter, David Loree appeals the award of actual damages to Scott Kunst on his defamation cause of action. Loree argues the circuit court erred in sustaining the jury's verdict because (1) Loree proved the substantial truth of the allegedly defamatory statements and proved a qualified privilege existed, (2) sufficient evidence did not support the verdict, and (3) the verdict was excessive. We affirm.

FACTS/PROCEDURAL HISTORY

This case arose out of David Loree's investigation into the construction of Richard and Barbara Gaby's (the Gabys') home on Lake Keowee, outside of Greenville, South Carolina. In 2004, the Gabys contracted with Kunstwerke Corporation (Kunstwerke) to design and build their residence at The Reserve on Lake Keowee (The Reserve).

Scott Kunst, a former certified public accountant, founded Kunstwerke after he started designing and building custom homes.[1] At trial, Kunst explained how his business differed from other firms and contractors, specifically detailing how his unique accounting methods and billing system allowed him to build the custom homes. Instead of utilizing the typical fiduciary construction-account system, Kunstwerke implemented a reimbursement system that allowed the company to advance credit to a client for building materials, which the client later reimbursed.[2] To ease the burden on its clients, Kunstwerke compiled daily invoices from vendors and subcontractors into a weekly summary, called a progress billing. It then forwarded the progress billing and copies of the invoices to each respective client every week for reimbursement. Because large amounts of money flowed through Kunstwerke each week, Kunst relied on his clients to trust his ability to manage financial matters involved in constructing their homes.

Because the company advanced credit to its clients, Kunstwerke required its clients to pay their weekly progress billing immediately upon receipt to continue the construction of their homes. Kunst explained any stoppage in payment required Kunstwerke to stop construction to reconcile the client's account. Kunst testified he relied upon Kunstwerke as his only source of income, which he derived from

---

[1] In the early 2000s, two periodicals wrote articles featuring Kunst and his uniquely designed homes.

[2] Conversely, Loree testified he believed Kunstwerke's billing operated as a pass-through account, wherein funds forwarded to Kunstwerke by the client for tallied invoices were passed directly to the subcontractor or vendor for the invoiced amount.

monthly fees[3] charged to clients for designing and building their homes. Kunst explained that the amount of collected fees remaining after he deducted corporate expenses were available to him as a personal draw from Kunstwerke's capital. Consequently, because he did not have a personal checking account, Kunst stated he made personal purchases using personal draws from the Kunstwerke corporate account.

In January 2006, Kunst experienced a "cash crisis." Kunstwerke had numerous projects nearing completion, and while the company was more profitable than it had ever been, Kunstwerke had also extended the most credit in its history. Compounding matters, Kunst claimed that some clients were not making timely payments, and that his bank implemented a new policy that placed ten-day holds on deposits, which prevented deposits from becoming immediately available to Kunstwerke. In February 2006, the Gabys—concerned that Kunst was over budget and not paying subcontractors or vendors—instructed Loree, their employee,[4] to investigate the matter. Loree sought to meet with Kunst at The Reserve, and requested that he bring copies of paid invoices and canceled checks—showing the disbursement of funds transferred by the Gabys—to explain what happened to their funds and to reconcile their account. As part of his investigation, Loree contacted numerous vendors, subcontractors, and other Kunstwerke clients to determine the balances of each account and to facilitate timely completion of the Gabys' home.

At trial, Tracy Hilton, Kunst's fiancée, testified she and Kunst received several inquiries from clients and subcontractors asking who Loree was, why he was contacting them, and what was happening with Kunstwerke. Kevin Goad, a vendor, and Glenn Alfonzo, a subcontractor, testified to meeting with Loree in 2006. Both men acknowledged discussing their respective accounting matters related to the Gaby project with Loree, who told them Kunst had taken money from the Gabys and other clients. Goad noted Loree mentioned that Kunst used

---

[3] Kunst claimed his fees helped his business stand out because his fees were typically less than the fees of other builders or designers that performed similar work. As an example, Kunst stated he only charged the Gabys $96,000, when the project should have cost $600,000.

[4] Loree's stated employment with the Gabys was as an "executive protection coordinator/property manager."

false invoices to take money from clients and spent client money on other projects. Similarly, Alfonzo recalled that Loree claimed Kunst took out an insurance policy on the Gaby project and later canceled the policy to keep the money. Although Loree admitted to contacting numerous vendors, subcontractors, and clients, he denied, or asserted he did not recall, making the statements to Goad or Alfonzo or discussing Kunst's financial matters with anyone.

Upon concluding his investigation, Loree found Kunst had not paid several vendors and subcontractors for some time, despite receiving wire transfers from the Gabys for invoiced amounts.[5] To resume construction of their home following Loree's investigation, the Gabys "double paid" and wrote checks directly to certain vendors and subcontractors, even though they allegedly paid Kunst for the same work. In March 2006, the Gabys terminated their contract with Kunst and Kunstwerke. Kunst stated the Gabys stopped paying him during Loree's investigation, and subsequently, other clients stopped making payments as well. As a result, Kunst dissolved Kunstwerke.

In May 2006, the Gabys brought an action (the Gaby Action) against Kunst and Kunstwerke, alleging breach of contract, breach of contract accompanied by fraudulent acts, conversion, and violation of the South Carolina Unfair Trade Practices Act. Kunst and Kunstwerke failed to timely answer the Gabys' complaint, and the circuit court entered default on June 20, 2006. Kunst and Kunstwerke moved for relief from default, but the circuit court denied the motion in December 2006. Following a March 2007 damages hearing, the circuit court issued an order awarding the Gabys actual and punitive damages, and attorney's fees and costs.

After the circuit court denied his motion for relief from default, Kunst brought the current action against the Gabys and Loree on December 19, 2006, alleging defamation, tortious interference with contractual relations, unjust enrichment, and

---

[5] In response to Loree's testimony regarding unpaid subcontractors, Kunst testified he withheld payments of certain subcontractors—despite collecting money for their payment—because the Gabys were behind in their reimbursements to Kunstwerke and Kunst needed to reconcile or settle the Gabys' account before proceeding further.

intentional infliction of emotional distress. On April 14, 2007, the circuit court issued an order dismissing Kunst's causes of action against the Gabys. The court found Kunst's causes of action were compulsory counterclaims under Rule 13(a), SCRCP, that should have been brought in the Gaby Action, and further, were barred under the doctrine of collateral estoppel. Accordingly, only the causes of action against Loree remained.

In March 2009, the circuit court granted summary judgment on Kunst's claims for tortious interference and intentional infliction of emotional distress, leaving only the defamation claim. On September 20, 2010, Loree moved for summary judgment based on collateral estoppel on Kunst's defamation cause of action. The circuit court granted Loree's motion and dismissed Kunst's defamation claim, finding the final adjudication of the Gaby action established Loree's affirmative defense of truth as a matter of law. Kunst appealed the circuit court's order, and on August 14, 2013, this court reversed and remanded the case to trial.[6]

On May 26-28, 2015, the circuit court held a jury trial on Kunst's defamation claim against Loree. In his pretrial brief,[7] Kunst claimed Loree made the following statements alleging criminal activity:

Slander 1: [Kunst] embezzled $400,000 from the Gabys.

Slander 2: [Kunst] embezzled money from all of his clients.

Slander 3: [Kunst] had taken money from named clients Parham, Covington, Coco, and Hickey.

---

[6] *See Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).

[7] Kunst's pretrial statements differ slightly from those alleged in his complaint. At the pretrial hearing, however, Kunst stated his pretrial brief statements were more specific than the statements in the complaint, and he consented to being limited to the pretrial brief statements.

Slander 4: [Kunst] created dummy invoices from dummy companies so that he could steal money from these clients.

Slander 5: [Kunst] took money from his clients to spend on an investment project, a car, trips, and family members.

Slander 6: [Kunst] did "criminal things" like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.

Slander 7: [Kunst] "is going to jail."

Slander 8: [Kunst] took money from his other projects and that money was missing from these projects.

Following trial, the jury returned a verdict in favor of Kunst and awarded him $1 million in actual damages. Loree moved for judgment notwithstanding the verdict (JNOV), a new trial absolute, or in the alternative, a new trial *nisi remittitur*. On June 17, 2015, the circuit court denied Loree's motions. This appeal followed.

ISSUES ON APPEAL

I. Did evidence support the jury's verdict that Kunst proved the elements of slander per se?

II. Did the circuit court err in failing to set aside the verdict despite the jury's findings that (A) Loree did not prove the truth of the alleged slanderous statements and (B) Loree was not protected by a qualified privilege?

III. Was the jury's verdict excessive, warranting a new trial?

STANDARD OF REVIEW

In an action at law, when a case tried by a jury is appealed, "the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

When making a motion for directed verdict, a party must state the specific grounds relied upon therefor, and the circuit court may grant the motion when the case presents only issues of law. Rule 50(a), SCRCP. If the court denies the motion, the party may then move for a JNOV to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion. Rule 50(b), SCRCP. A motion for a new trial may be joined with the JNOV motion or prayed for in the alternative. Rule 50(b), SCRCP. When a circuit court's ruling on a motion for a directed verdict or a JNOV is appealed, an appellate court must apply the same standard as the circuit court. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). In determining these motions, the circuit court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 558, 698 S.E.2d 845, 851 (Ct. App. 2010). If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the circuit court must deny the motion for directed verdict or JNOV. *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171. "When considering [such] motions, neither the [circuit] court nor the appellate court has [the] authority to decide credibility issues or to resolve conflicts in the testimony or [the] evidence." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). The appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999).

"On appeal, the appellate court reviews a denial of a new trial motion for an abuse of discretion." *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). In determining whether the circuit

court erred in denying a motion for a new trial, the appellate court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Id.*

LAW/ANALYSIS

I. Slander Per Se

Loree argues the circuit court erred in sustaining the jury's verdict because evidence does not support the jury's finding that Kunst proved the elements of slander per se. We disagree.

"Defamatory communications take two forms: libel and slander. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 133–34. "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Accordingly, the tort of defamation allows a plaintiff to recover when a defendant communicates a false message about the plaintiff to others, injuring the plaintiff's reputation. *McBride*, 389 S.C. at 559, 698 S.E.2d at 852. To state a claim for defamation, the plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged publication of the statement was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement regardless of special harm or the publication of the statement caused special harm. *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012).

Defamation may be either actionable per se or not actionable per se. *Id.* at 442, 730 S.E.2d at 309. "Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct. App. 2001). When a defamatory statement is actionable per se, the plaintiff need not prove general damages—as these damages are presumed—and the defendant is presumed to have acted with common law malice. *See Fountain*, 398 S.C. at 442,

730 S.E.2d at 309. "Whether the statement is actionable per se is a matter of law for the court to resolve." *Id.*

While Loree asserts no evidence exists in the record to show that his alleged slanderous statements met the elements of slander per se, we note that statements alleging the commission of a crime, such as theft, are actionable per se. *See McBride*, 389 S.C. at 561, 698 S.E.2d at 852 (determining a statement that accused a teacher of stealing property was actionable per se because it accused the teacher of committing a crime involving moral turpitude); *see also Turner v. Montgomery Ward & Co.*, 165 S.C. 253, 260–61, 163 S.E. 796, 798 (1932) (finding any words that clearly assume or imply that one committed a crime or that raise strong suspicion in the minds of the hearers that one committed a crime are actionable per se). Moreover, upon our review of the record, we find evidence supports Kunst's allegations that Loree made several slanderous statements accusing Kunst of, among other things, embezzling money from all his clients and taking money from clients to spend elsewhere. *See Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130 (finding the appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling).

At trial, Goad testified Loree told him that Kunst took money from clients and used clients' money for an investment project. Additionally, Alfonzo testified Loree mentioned that Kunst took out an insurance policy on the Gaby project, billed the Gabys, and intentionally canceled the policy to keep the money. Viewing the evidence in a light most favorable to Kunst, the nonmoving party, we find Loree's statements were actionable per se because the statements accused Kunst of committing a crime of moral turpitude—theft. *See McBride*, 389 S.C. at 561, 698 S.E.2d at 852. Accordingly, we affirm the circuit court's denial of Loree's motion for JNOV because evidence supports the jury's findings.

II. Defenses to Defamation

A. Truth

Loree asserts the circuit court erred in sustaining the verdict because Loree proved the alleged slanderous statements were substantially true. We disagree.

"The truth of the matter is a complete defense to an action based on defamation." *WeSav Fin. Corp. v. Lingefelt*, 316 S.C. 442, 445, 450 S.E.2d 580, 582 (1994) (per curiam). "Under common law, a defamatory communication was presumed to be false, but truth could be asserted as an affirmative defense." *Parrish*, 376 S.C. at 326, 656 S.E.2d at 391. When the alleged defamatory statements are published by a private figure and involve a matter of private concern, the plaintiff is not required to prove falsity of the statements; instead, the defendant has the burden of pleading and proving the substantial truth of each of the alleged defamatory statements. *See Castine v. Castine*, 403 S.C. 259, 266, 743 S.E.2d 93, 96–97 (Ct. App. 2013) ("Substantial truth must be proven as to each individual statement [appellant] made, not as to the contents of the letters he sent as a whole."); *Parrish*, 376 S.C. at 326, 656 S.E.2d at 392 ("If the statements are a matter of private concern, the plaintiff is not required to prove falsity. Thus, truth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue." (citation omitted)). "When the truth of the defamatory communication is in dispute, the issue is a jury question." *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 515, 435 S.E.2d 864, 867 (1993).

We find the circuit court correctly denied Loree's motion for JNOV because the parties presented conflicting evidence regarding the truth of the statements, which created a question for the jury. For instance, Loree asserted his statements that Kunst took money from clients and spent it elsewhere were true because Loree introduced letters and invoices from suppliers showing Kunst did not pay subcontractors, despite receiving the funds to make the payments. Moreover, Loree argued that Kunst's own witness, Edward Covington, testified Kunst took money from his project and spent the money on an engagement ring. Conversely, Kunst explained how his personal draw schedule allowed him to make personal purchases—such as an engagement ring in 2005—using Kunstwerke capital collected from clients in the form of design fees. Further, Kunst detailed why production must stop if a client fell behind in his or her progress billing payments. Kunst later explained that, because the Gabys were behind in their payments, he withheld paying subcontractors—despite receiving money from the Gabys for specific invoices—so he could reconcile the Gabys' account.

Mindful of our standard of review and without elaborating on the credibility of any evidence, we find Kunst's testimony and explanations were sufficient to create a conflict in the veracity of Loree's alleged statements. *See Parrish*, 376 S.C. at 319,

656 S.E.2d at 388 (stating that, when deciding motions for directed verdict or JNOV, neither the circuit court nor the appellate court has authority to determine credibility issues or resolve conflicts in the evidence or testimony). Moreover, evidence in the record supports the jury's findings. *See Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130 (finding the appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling). Thus, we affirm and find the circuit court did not err in either refusing to overturn the verdict or denying Loree's motion for JNOV because determining the veracity of the statements was a question for the jury.

B. Qualified Privilege

Loree also argues the verdict was an error of law and the circuit court erred in not overturning it because Loree proved the statements were protected by a qualified privilege. We disagree.

A defendant may assert a conditional or qualified privilege as an affirmative defense in a defamation action when the defamation is made in good faith and with proper motives. *See id.* at 484, 514 S.E.2d at 134 ("In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege."); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) ("Whe[n] the defamation is made in good faith and with proper motives, a defendant may claim a qualified or conditional privilege."). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. However, the privilege does not protect against unnecessary defamation, and the person making the statement must be careful not to go beyond what his interests or duties require. *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001).

In *Bell v. Bank of Abbeville*, our supreme court held:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the

> person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

208 S.C. 490, 493–94, 38 S.E.2d 641, 643 (1946). Generally, whether an occasion gives rise to a qualified privilege is a question of law for the court. *Castine*, 403 S.C. at 267, 743 S.E.2d at 97. "A qualified privilege may exist whe[n] the parties have a common business interest. However, the qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only." *Abofreka*, 288 S.C. at 125–26, 341 S.E.2d at 624–25 (citation omitted).

When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice *or* that the scope of the privilege has been exceeded. *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: "(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless disregard of the victim's rights." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. "[T]he fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." *Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 (quoting *Fulton v. Atl. Coast Line R. Co.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951)). Ordinarily, the jury determines if a qualified privilege has been abused or exceeded. *See id.* ("Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.").

At trial, Loree moved for a directed verdict and JNOV on the basis that his statements were protected by a qualified privilege. Loree argues a qualified privilege protected his alleged defamatory statements because Kunst did not show

that Loree made the statements to anyone other than subcontractors and vendors. We find Loree's statement that Kunst took money from other clients was not a proper matter for Loree to discuss during the investigation of the Gaby project. *See Abofreka*, 288 S.C. at 125–26, 341 S.E.2d at 624–25 ("[T]he qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only."). Here, an occasion gave rise to the existence of a qualified privilege because Loree, the Gabys' employee, investigated whether Kunst paid the subcontractors and vendors on the Gaby project. Inherently, the scope of Loree's duties and interests extended to any discussion of financial matters involved with the Gaby project. However, Loree's qualified privilege only extended as far as Loree's duties and interests required, which meant that the privilege did not protect matters outside the Gaby project. *See Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 ("[T]he person making [the defamatory statement] must be careful to go no further than his interests or his duties require. . . . And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." (quoting *Fulton,* 220 S.C. at 297, 67 S.E.2d at 429)).

In the instant case, evidence demonstrates Loree's statements to subcontractors—that Kunst took money from other clients—went beyond the scope of the subcontractors' involvement in the Gaby project. At trial, Goad and Alfonzo testified Loree informed them that Kunst took money from other clients. Further, Goad testified Loree mentioned that Kunst spent client money on other projects. In our view, any discussion of Kunst's dealings outside of the Gaby project, even if with another person with a common interest in the matter, would amount to an abuse of privilege and would render the protection lost. We find that Loree could have investigated the Gaby project without implicating Kunst's financial affairs with other clients. Thus, the circuit court properly denied Loree's motions for directed verdict and JNOV because evidence existed that allowed the jury to find Loree's statements regarding Kunst and other clients exceeded the scope of the qualified privilege.

Additionally, Loree argues Kunst failed to meet his burden of showing an abuse of privilege because he failed to prove actual malice by Loree. However, we find that Loree misconstrues the law because a plaintiff may also show an abuse of a qualified privilege by demonstrating the speaker exceeded the scope of the qualified privilege. *See id.* at 484, 514 S.E.2d at 134 ("Whe[n] the occasion gives

rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice *or* that the scope of the privilege has been exceeded." (emphasis added)). Accordingly, the circuit court did not err in submitting the issue to the jury because evidence at trial allowed for factual inquiries as to whether the privilege was abused or exceeded. *See id.* at 485, 514 S.E.2d at 134 ("Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.").

Because evidence existed for the jury to determine that Loree abused or exceeded his privilege, we find the circuit court did not err in sustaining the verdict and properly denied Loree's motions for directed verdict and JNOV.

III. Damages

Last, Loree contends the circuit court erred in sustaining the verdict because the verdict was excessive. We disagree.

In a successful defamation claim, the plaintiff recovers for injuries to his or her reputation, which result from the defendant's communications to others of a false message concerning the plaintiff. *Murray*, 344 S.C. at 138, 542 S.E.2d at 748. Consequently, "[d]efamation does not focus on the hurt to the defamed parties' feelings, but on the injury to their reputations." *Castine*, 403 S.C. at 265, 743 S.E.2d at 96. If the alleged defamatory statement is actionable per se, the law presumes that the defendant acted with common law malice and the plaintiff suffered general damages;[8] however, if the alleged defamatory statement is not

---

[8] General damages include injuries such as: injury to one's reputation, mental suffering, hurt feelings, and any other similar injury that is incapable of being given a definitive monetary valuation. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510 n.4, 506 S.E.2d 497, 502 n.4 (1998). Conversely, "special damages are tangible losses or injury to the plaintiff's property, business, occupation[,] or profession, capable of being assessed monetarily, which result from injury to the plaintiff's reputation." *Id.*

actionable per se, the plaintiff must then plead and prove both common law malice and special damages. *See Fountain*, 398 S.C. at 442, 730 S.E.2d at 309.

The jury maintains discretion, as reviewed by the circuit court, in awarding actual and punitive damages. *See Miller v. City of West Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd,* 342 S.C. 47, 536 S.E.2d 663 (2000). While a circuit court may grant certain new trial motions on the ground that the verdict is inadequate or excessive, a jury's determination of damages is given substantial deference. *Id.* at 446–47, 520 S.E.2d at 629.

When considering whether the verdict is excessive, a court will not disturb the jury's verdict if substantial evidence exists to sustain the verdict. *Miller*, 322 S.C. at 231, 471 S.E.2d at 687. An appellate court will only intervene when the verdict is "so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence." *Id.*; *see also Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985) (stating that, while an appellate court will overturn a verdict actuated by passion, caprice, or prejudice, it "will not set aside a verdict for its possibly undue liberality"). "A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive." *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969).

The circuit court may grant a new trial *nisi* when it finds the amount to be merely inadequate or excessive. *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723. However, a party must provide compelling reasons to justify invading the province of the jury. *Id.* "The [circuit court that] heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Id.* at 405–06, 477 S.E.2d at 723 (citation omitted). The denial of a motion for a new trial *nisi* will not be reversed on appeal unless there was an abuse of discretion. *Id.* at 406, 477 S.E.2d at 723. An appellate court is obligated to review the record and

determine whether an abuse of discretion amounting to an error of law exists. *Id.* at 406, 477 S.E.2d at 723–24.

At the conclusion of the trial, Loree moved for JNOV, a new trial absolute, or in the alternative, a new trial *nisi remittitur*, all of which the circuit court summarily denied. On appeal, Loree appears to rely on the premise that Kunst failed to prove slander per se and did not provide evidence of special damages to support the jury's award. However, as previously discussed, we find Loree's alleged defamatory statements were actionable per se and not protected by a qualified privilege. Accordingly, South Carolina law presumes Loree acted with common law malice and Kunst suffered general damages. *See Fountain*, 398 S.C. at 442, 730 S.E.2d at 309; *contra Murray*, 344 S.C. at 142, 542 S.E.2d at 750 (finding that, although slander is actionable per se, the plaintiff must prove actual malice if the communication is privileged because a privileged communication is the exception to the rule that malice is presumed from statements that are actionable per se). Therefore, because Kunst's general damages were presumed and he was not required to prove actual malice or special damages, the circuit court did not err in denying Loree's motions.

Loree also argues the circuit court erred because the jury's award of $1 million was grossly excessive and not based on any evidence in the record,[9] and because Loree's statements did not cause Kunst's damages. Moreover, Loree contends that *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), warrants the grant of a new trial because the jury's award was "shockingly disproportionate to Kunst's injuries." Last, Loree asserts the circuit court erred in sustaining the verdict because the verdict was excessive given the lack of evidence at trial. We disagree.

In the instant case, Loree asserts the jury exceeded its authority when it sent a note to the circuit court asking whether it could stipulate how Kunst should distribute any award to his creditors, if it found against Loree. Loree contends the jury's note was the exact type of evidence our supreme court in *Sanders* found to indicate that a jury was motivated by passion, caprice, or prejudice. *See Sanders*, 604 S.C. at 238–39, 403 S.E.2d at 642. We find *Duncan v. Hampton County School District Number 2* is more akin to the instant case than *Sanders*. *See* 335 S.C. at 535, 517 S.E.2d at 449. Indeed, in *Duncan*, this court clarified the holding from *Sanders*,

---

[9] At oral argument, Loree conceded that Kunst testified to damages.

stating that while the jury's question in *Sanders* may have been evidence of the jury's improper motive, the lack of evidence supporting the size of the award played a major role in our supreme court's decision to grant a new trial in *Sanders*. *See Duncan*, 335 S.C. at 548, 517 S.E.2d at 455–56. Importantly, the court of appeals distinguished *Duncan* from *Sanders*, and found that the evidence in *Duncan* supported the large verdict and that the jury's recommendations to the circuit court were not evidence of an improper motive, when the recommendations were consistent with a reasonable view of the evidence. *Id.* at 548–49, 517 S.E.2d at 456.

Like *Duncan*, we find evidence in this case supports the jury's award of damages. Moreover, we find the jury's question was consistent with a rational view of the evidence because it directly related to the testimony introduced at trial. *See id.* ("Significantly, these recommendations are consistent with a reasonable view of the evidence and do not indicate that the jury's verdict was based on an improper motive."); *see also King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982) ("[The appellate court] will not usually interfere in the amounts of verdicts, the matter being ordinarily within the sound discretion of the [circuit court], unless the verdict is so grossly excessive as to be deemed the result of a disregard of the facts and of the court's instructions, and to be due to passion and prejudice rather than reason."). Here, Kunst testified he owed roughly $400,000 to subcontractors and vendors and estimated he would need approximately $1.6 million to design homes again. Kunst claimed he borrowed nearly $650,000 from others for his legal debts and "to survive." Kunst also estimated his total economic loss was nearly $2.6 million. Last, Kunst specifically mentioned he would not have incurred a loss in his greatest investment project "but for Loree coming to town."

Of note, the jury heard evidence of Kunst's success and reputation prior to the alleged defamation, including:

(1) Kunst's testimony discussing the great trust he developed with his clients, vendors, and subcontractors;
(2) Kunst's testimony discussing how he personally guaranteed his accounts with his suppliers;
(3) Kunst's testimony discussing how his designs were well-known and unique;

(4) Kunst's testimony discussing how articles from two periodicals featured him, his company, and his designs;
(5) Kunst's testimony discussing how he earned nearly $200,000 a year in fees;
(6) Kunst's testimony discussing how, prior to 2006, he had the most clients and projects in his company's history;
(7) Kunst's testimony that he had approximately eight simultaneous projects; and
(8) The introduction of Kunst's letter to clients, which detailed how his homes in The Reserve ranged in price from $200 per square foot to $350 per square foot, which he indicated was much less than the average cost of other builders.

The jury heard evidence of the damage to Kunst after Loree's investigation, including:

(1) Testimony that Kunstwerke's clients abruptly stopped paying their progress billings, when no client previously missed a payment;
(2) Testimony that Kunst lost his investments in other projects;
(3) Testimony that Kunst moved to Pittsburgh to try and start over;
(4) Testimony that Kunst worked as a security guard; and
(5) Testimony that Kunst's reputation around The Reserve diminished.

While Kunst admitted Goad and Alfonzo were willing to work with him again, Kunst implied his reputation with other suppliers and vendors was damaged because many would be unwilling to work with him as they believed he was "the reason they're owed money." Thus, evidence exists to support the jury's verdict.

We do not find the award to be unreasonable in relation to the character and extent of the injury. *See Young*, 252 S.C. at 187, 165 S.E.2d at 801 ("A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive."). Considering a person's reputation is invaluable, we find Loree failed to establish that the verdict was excessive. *See Miller*, 322 S.C. at 231, 471 S.E.2d at 687 (finding that, "[w]hen considering that a person's reputation is invaluable," the defendant failed to establish the verdict was grossly excessive because evidence of the plaintiff's status and time at the police department, history of

winning the highest awards, and inability to obtain employment demonstrated the defendant effectively destroyed the plaintiff's reputation). Given the evidence at trial, the amount of the award does not indicate that the jury's verdict resulted from prejudice, passion, partiality, bias, or caprice. Furthermore, we find a rational view of the evidence supports the award. Accordingly, the circuit court did not err in denying Loree's motion for a new trial.

CONCLUSION

Based on the foregoing analysis, the circuit court's denials of Loree's motions for a directed verdict, for JNOV, for a new trial, and, in the alternative, for a new trial *nisi remittitur* are:

AFFIRMED.

THOMAS and MCDONALD, JJ., concur.