The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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DEPUTY CLERK

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N O T I C E

In the Matter of David Arthur Braghirol

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on June 12, 2013 beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Thomas E. Hite, Jr., Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 14, 2013

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2013. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by June 21, 2013.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 22, 2013

LAWYERS NON-COMPLIANT
WITH THE MCLE REQUIREMENTS
FOR THE
2012-2013 REPORTING YEAR

Scott Christen Allmon
Allmon Law Firm, PC
133 Habersham Court
Easley, SC 29642
INTERIM SUSPENSION (1/16/13)

Michael E. Atwater
Atwater & Davis, LLC
1470 Ebenezer Road
Rock Hill, SC 29732
6-MONTH SUSPENSION (4/25/12)

Richard J. Breibart
The Law Firm of Richard Breibart, LLC
PO Box 310
Lexington, SC 29071
INTERIM SUSPENSION (6/1/12)

Mark Andrew Brunty
Brunty Law Firm
5001 North Kings Highway, Suite 205
Myrtle Beach, SC 29572
INTERIM SUSPENSION (11/21/12)

Kenneth Gary Cooper
314 West 5th North Street
Summerville, SC 29483
6-MONTH SUSPENSION (4/25/12)

William Joseph Cutchin
Cutchin Law Firm
1051-B Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464
INTERIM SUSPENSION (2/22/13)

Eric J. Davidson
Maryland Disability Law Center
1800 North Charles Street, Suite 400
Baltimore, MD 21201

Rosalee Hix Davis
White Rose Law
PO Box 197
York, SC 29745
DISABILITY INACTIVE (5-3-13)

William E. Davis, Jr.
Bill Davis Law Firm, LLC
171 Fairhaven Way
Chapin, SC 29063

Aarati Prasad Doddanna
Doddanna Law Group, LLC
1643-B Savannah Highway, #311
Charleston, SC 29407

Tracy Reed Evans
1124 Snyder Lane
Hartsville, SC 29550

Erica Michele Jackson
Sidley Austin
1501 K Street, NW
Washington, DC 20005

Kenneth S. Jannette
Weinstein & Riley, PC
14 Penn Plaza, Suite 1407
New York, NY 10122

J. Keith Jones
Shumaker Loop & Kendrick, LLP
128 South Tryon Street, Suite 1800
Charlotte, NC 28202

Shana Denice Jones-Burgess
Law Offices of Shana Jones-Burgess
1126 Lancelot Lane
Conway, SC 29526
INTERIM SUSPENSION (7/26/12)

Robert J. Klug, Sr.
Law Offices of Robert J. Klug, Sr.
1558 Chalk Avenue
Blue Bell, PA 19422

Laura Spears Knobeloch
The Law Office of Laura Spears Knobeloch
808 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

Steven Robert Lapham
PO Box 2111
Anderson, SC 29622
INTERIM SUSPENSION (1/15/13)

Adam West Lee
361 Foxport Drive
Chapin, SC 29036

James G. Longtin
109 Hiers Street
Walterboro, SC 29488
9-MONTH SUSPENSION (7/18/11)

Amelia Holt Lorenz
Lorenz Law Firm
468 Grand Oak Way
Moore, SC 29369
INTERIM SUSPENSION (11/1/12)

C. Kevin Miller
C. Kevin Miller, PA
PO Box 5346
Spartanburg, SC 29304
INTERIM SUSPENSION (3/7/12)

John Kevin Owens
J. Kevin Owens, LLC
PO Box 170128
Spartanburg, SC 29301

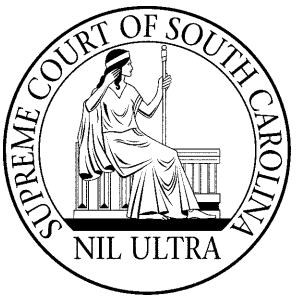
William Jones Rivers III
Schurlknight & Rivers, PA
123 Woodcreek Road
Darlington, SC 29532
INTERIM SUSPENSION (11/20/12)

Martin E. Rock
PO Box 13404
Research Triangle Park, NC 27709

John Tyler Roper
Burroughs, Collins & Newcomb, PLC
713 Market Street, Suite 120
Knoxville, TN 37902

George Thomas Samaha III
Samaha Law Firm, PLLC
288-A Highway 90 East
Little River, SC 29566
1-YEAR SUSPENSION (8/1/12)

Michael Scott Taylor
831 Barclay Drive
Florence, SC 29501
INTERIM SUSPENSION (2/8/13)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
May 22, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appellate Case No. 2010-160047

Appeal from Pickens County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 27124
Heard September 18, 2012 – Filed May 22, 2013

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, and Christopher D. Scalzo, of Greenville, for Appellant.

Tommy Evans, Jr. and John B. Aplin, both of Columbia, for Respondent.

E. Charles Grose, Jr. of the Grose Law Firm, of Greenwood, Chief Appellate Defender Robert M. Dudek, of Columbia, and Assistant Public Defender Shane E. Goranson, of Greenwood, for Amicus Curiae, Anthony Nation.

JUSTICE KITTREDGE: Jennifer Dykes appeals the circuit court's order requiring that she be subject to satellite monitoring for the rest of her life pursuant to sections 23-3-540(C) and (H) of the South Carolina Code of Laws (Supp. 2011). We affirm as modified.

Section 23-3-540 represents a codification of what is commonly referred to as Jessica's Law. Many states have some version of this law, which was enacted in memory of Jessica Lunsford, a nine-year-old girl who was raped and murdered by a convicted sex offender in Florida. Across the country, these laws heightened criminal sentences and post-release monitoring of child sex offenders. The specific issue presented in this case concerns the mandate for lifetime global positioning satellite monitoring with no judicial review. The complete absence of judicial review under South Carolina's legislative scheme is more stringent than the statutory scheme of other jurisdictions. A common approach among other states is either to require a predicate finding of probability to re-offend or to provide a judicial review process, which allows for, upon a proper showing, a court order releasing the offender from the satellite monitoring requirements. *See generally*, N.C. Gen. Stat. Ann. § 14-208.43 (West 2010) (providing a termination procedure one year after the imposition of the satellite based monitoring or a risk assessment for certain offenders). While we hold that the statute's initial mandatory imposition of satellite monitoring is constitutional, the lifetime requirement without judicial review is unconstitutional.

I.

Dykes, when twenty-six years old, was indicted for lewd act on a minor in violation of Section 16-15-140 of the South Carolina Code (2006) as a result of her sexual relationship with a fourteen-year-old female. Dykes pled guilty to lewd act on a minor and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation.[1]

Upon her release, Dykes was notified verbally and in writing that pursuant to section 23-3-540(C) she would be placed on satellite monitoring if she were to violate the terms of her probation. Shortly thereafter, Dykes violated her probation

[1] Because her offense predated the satellite monitoring statute, she was not subject to monitoring at the time of her plea.

in multiple respects.[2] Dykes did not contest any of these violations, though she did offer testimony in mitigation.

The State recommended a two-year partial revocation of Dykes' probation and mandatory lifetime satellite monitoring. S.C. Code Ann. section 23-3-540(A) mandates that when an individual has been convicted of engaging in or attempting criminal sexual conduct with a minor in the first degree (CSC-First) or lewd act on a minor, the court must order that person placed on satellite monitoring. Likewise, if a person has been convicted of such offenses before the effective date of the statute and violates a term of her probation, parole, or supervision program, she must also be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(C). The individual must remain on monitoring for as long as she is to remain on the sex offender registry, which is for life. S.C. Code Ann. § 23-3-540(H); *see also* S.C. Code Ann. § 23-3-460 (requiring biannual registration for life).[3] Significantly, the lifetime monitoring requirement for one convicted of CSC-First or lewd act on a minor is not subject to any judicial review process. *See* S.C. Code Ann. § 23-3-540(H) (prohibiting judicial review of the lifetime monitoring for CSC-First and lewd act on a minor).

In contrast, if a person is convicted of committing or attempting any offense which requires registration as a sex offender *other than* CSC-First or lewd act on a minor, the court has discretion with respect to whether the individual should be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(B), (D), (G)(1).[4] In addition,

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[2] Five citations and arrest warrants were issued to her for various probation violations: a citation pertaining to her relationship with a convicted felon whom Dykes met while incarcerated and with whom she was then residing; an arrest warrant for Dykes' continued relationship with that individual; a citation for drinking an alcoholic beverage; a citation for being terminated from sex offender counseling after she cancelled or rescheduled too many appointments; and an arrest warrant for failing to maintain an approved residence and changing her address without the knowledge or consent of her probation agent.

[3] Once activated, the monitor can pinpoint the individual's location to within fifteen meters.

[4] The offenses include: criminal sexual conduct with a minor in the second degree; engaging a child for sexual performance; producing, directing, or promoting sexual

after ten years, an individual who has committed the above-stated crimes may petition the court to have the monitoring removed upon a showing that she has complied with the monitoring requirements and there is no longer a need to continue monitoring her. If the court denies her petition, she may petition again every five years.[5] S.C. Code Ann. § 23-3-540(H).

II.

At her probation revocation hearing, Dykes objected to the constitutionality of mandatory lifetime monitoring. In support of her arguments, Dykes presented expert testimony that she poses a low risk of reoffending and that one's risk of reoffending cannot be determined solely by the offense committed. The State offered no evidence, relying instead on the mandatory, nondiscretionary requirement of the statute.

The circuit court found Dykes to be in willful violation of her probation and that she had notice of the potential for satellite monitoring. The court denied Dykes' constitutional challenges and found it was statutorily mandated to impose satellite monitoring without making any findings as to Dykes' likelihood of reoffending. The court also revoked Dykes' probation for two years, but it ordered that her probation be terminated upon release. This appeal followed.

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performance by a child; assaults with intent to commit criminal sexual conduct involving a minor; violation of the laws concerning obscenity, material harmful to minors, child exploitation, and child prostitution; kidnapping of a person under the age of eighteen unless the defendant is a parent; and trafficking in persons under the age of eighteen if the offense includes a completed or attempted criminal sexual offense. S.C. Code Ann. § 23-3-540(G)(1).

[5] As long as the individual is being monitored, she must comply with all the terms set by the State, report damage to the device, pay for the costs of the monitoring (unless she can show financial hardship), and not remove or tamper with the device; failure to follow these rules may result in criminal penalties. S.C. Code Ann. §§ 23-3-540(I) to (L).

III.

The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Dykes contends that the imposition of mandatory, lifetime satellite monitoring without consideration of her likelihood of re-offending violates her due process rights.

A.

Dykes asserts she has a fundamental right to be "let alone." We disagree. The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (noting the Supreme Court's reluctance to expand the concept of substantive due process). Indeed, courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." *Id.* at 720. The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (internal citations omitted). We reject the suggestion that a convicted child sex offender has a fundamental right to be "let alone" that is "deeply rooted in this Nation's history and tradition."

Our rejection of Dykes' fundamental right argument flows in part from the premise that satellite monitoring is predominantly civil. *See Smith v. Doe*, 538 U.S. 84 (2003) (noting that whether a statute is criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)) (internal quotations omitted).

Notwithstanding the absence of a fundamental right, we do find that lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference. We agree with other jurisdictions that have held the requirement of satellite monitoring places significant restraints on offenders that amount to a liberty interest. *See*

Commonwealth v. Cory, 911 N.E.2d 187, 196 (Mass. 2009) (finding satellite monitoring burdens an offender's liberty interest in two ways, by "its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities"); *United States v. Smedley*, 611 F.Supp.2d 971, 975 (E.D. Mo. 2009) (holding that imposing home detention with electronic monitoring as condition of release impinged on liberty interest); *United States v. Merritt*, 612 F.Supp.2d 1074, 1079 (D. Neb. 2009) (stating that "[a] curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty interest protected under the Due Process Clause"); *State v. Stines*, 683 S.E.2d 411 (N.C. Ct. App. 2009) (holding that requiring enrollment in satellite-based monitoring program deprives an offender of a significant liberty interest). Therefore, having served her sentence, Dykes' mandatory enrollment in the satellite monitoring program invokes minimal due process protection.

Thus, courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . ." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); *see also Nebbia v. N.Y.*, 291 U.S. 502, 525 (1934) ("[T]he guarant[ee] of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious . . . ."); *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (holding that, to comport with due process, the legislation must have a rational basis for the deprivation and may not be "so inadequate that the judiciary will characterize it as arbitrary").

B.

The General Assembly has expressly outlined the purpose of the state's sex offender registration and electronic monitoring provisions:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens [by] . . . provid[ing] law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007). This Court has examined this language and held "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Thus, a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme.

In light of the General Assembly's stated purpose of protecting the public from sex offenders and aiding law enforcement, we find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test. Accordingly, we find constitutional the baseline requirement of section 23-3-540(C) that individuals convicted of CSC-First or lewd act on a minor mandatorily submit to electronic monitoring upon their release from incarceration or violation of their probation or parole.

Although we find the initial mandatory imposition of satellite monitoring under section 23-3-540(C) constitutional, we believe the final sentence of section 23-3-540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC-First or lewd act on a minor.[6] The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. *See Luckabaugh*, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary"); *see also Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review "is not a toothless one") (quoting *Matthews v. De Castro*, 429 U.S. 181, 185 (1976))); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (noting that although Texas has legitimate interest to protect the community from those that are mentally ill, Texas "has no interest in confining individuals involuntarily if they

[6] "A person may not petition the court if the person is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140."

are not mentally ill or if they do not pose some danger to themselves or others").[7] Thus, we hold it is unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review, as is the case with CSC-First or lewd act pursuant to section 23-3-540(H).

The finding of unconstitutionality with respect to the non-reviewable lifetime monitoring requirement in section 23-3-540(H) does not require that we invalidate the remainder of the statute. This is so because of the legislature's inclusion of a severability clause. *See* 2006 Act No. 346 § 8 (stating that if a court were to find any portion of the statute unconstitutional, that holding does not affect the rest of the statute and the General Assembly would have passed it without that ineffective part). The only provision invalidated by today's decision is the portion of section 23-3-540(H) that prohibits only those convicted of CSC-First and lewd act on a minor from petitioning for judicial relief from the satellite monitoring.[8]

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[7] This finding of arbitrariness is additionally supported by the South Carolina Constitution, which, unlike the United States Constitution, has an express privacy provision. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."). Our constitution's privacy provision informs the analysis of whether a state law is arbitrary and lends additional support to the conclusion that section 23-3-540(H)'s preclusion of judicial review for those offenders mandated to satellite monitoring under section 23-3-540(C) is unconstitutional. *Cf. State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution).

[8] We respond to the dissent in two respects. First, the dissent misapprehends our position by its suggestion that "[f]ormulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake" and that "the Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens." Certainly, in the abstract, people generally have a right to be let alone. Respectfully, however, fundamental rights are not to be defined or examined in a vacuum, but rather must be viewed in the context of the situation presented. Even the dissent's analysis so acknowledges, as it refers to Dykes's status, stating "when viewed in light of the facts of this case" and quoting Justice Kennedy's opinion in *Lawrence v. Texas*,

Consequently, Dykes and others similarly situated must comply with the monitoring requirement mandated by section 23-3-540(C). However, persons convicted of CSC-First and lewd act on a minor are entitled to avail themselves of the section 23-3-540(H) judicial review process as outlined for the balance of the offenses enumerated in section 23-3-540(G). We affirm the circuit court as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., concurs. PLEICONES, J., concurring in result only. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

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539 U.S. 558, 562 (2003), in which he observed that "[l]iberty protects the person from *unwarranted* government intrusions . . . ." (emphasis added). The dissent's multiple invocations of the word "unwarranted" with regard to government intrusions necessarily implicate a context-specific analysis when examining the right asserted. *Compare District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding the Second Amendment confers to an individual the right to keep and bear arms) *with* 18 U.S.C. § 922(g)(1) (2012) (unlawful for a person with a prior felony conviction to possess a firearm). Indeed, the question before us is whether the state may constitutionally impose civil satellite monitoring for convicted child sex offenders. In the context of this case, as much as the dissent wishes otherwise, Dykes cannot avoid her unalterable status as a convicted child sex offender, and pursuant to *Glucksberg*, she holds no fundamental right to be let alone.

Secondly, the dissent attributes to the majority a position we have never taken. With our opinion today, we have not, as the dissent suggests, upheld mandatory *lifetime* monitoring with no judicial review for assessment of the risk of reoffending. In fact, although refusing to recognize a fundamental right, we have found the statutorily prescribed mandatory lifetime monitoring without a risk assessment is arbitrary and therefore unconstitutional. Going forward, pursuant to the savings clause and despite the dissent's suggestion to the contrary, Dykes and others similarly situated are entitled to periodic judicial reviews under section 23-3-540(H) to determine if satellite monitoring remains necessary.

JUSTICE HEARN: Respectfully, I dissent. Because I believe Dykes' status as a sex offender does not diminish her entitlement to certain fundamental rights, I would hold section 23-3-540(C) is unconstitutional because it is not narrowly tailored. I express no opinion on the constitutionality of section 23-3-540(H) because that subsection was never challenged and is thus not before us. [9] Dykes' argument is, and always has been, that subsection (C) of 23-3-540—the provision requiring lifetime satellite monitoring for persons who violate a term of probation and were convicted of committing criminal sexual conduct with a minor in the first degree or committing or attempting a lewd act upon a child under sixteen—violates her substantive due process rights by imposing monitoring without any showing of her likelihood to reoffend. By invalidating a statutory provision not challenged, the majority ignores those settled principles of error preservation and appellate jurisprudence, and awards Dykes a consolation prize she has never requested and arguably has no standing to accept.

Proceeding to the question presented, I agree with Dykes that subsection (C) of 23-3-540 unconstitutionally infringes on her right to substantive due process. The Fourteenth Amendment to the United States Constitution's command that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law," U.S. Const. amend. XIV, § 1, guarantees more than just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,'"

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[9] I question whether Dykes would even have standing to challenge subsection (H). The constitutional minimum of standing requires the showing of "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," a causal connection between the injury and the challenged action, and evidence that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted)). Here, Dykes would fail the initial inquiry because she cannot demonstrate any particularized, imminent injury. Subsection (H) allows a person to petition the court for release from electronic monitoring "[t]en years from the date the person begins to be electronically monitored." Dykes was ordered to begin GPS monitoring on April 22, 2010 and would therefore not be eligible to avail herself of this provision until 2018. Any claim that she suffered an injury under subsection (H) would be speculative at this point.

County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action. *Id.* at 845.

However, one does not have a right to be free from government action merely because a law is arbitrary or unreasonable. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting.). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). Substantive due process in particular protects against the arbitrary infringement of "fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Moore*, 410 F.3d 1337, 1342–43 (11th Cir. 2005) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)). If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not fundamental, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Accordingly, the initial inquiry is whether the alleged right impacted by the statute is fundamental.

As a threshold matter, I acknowledge the Court must tread carefully in this arena. Over the years, the United States Supreme Court has acknowledged the "liberty" protected by the Due Process Clause extends beyond the specific freedoms contained in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Supreme Court has found the right to marry, have children, direct the education of one's children, marital privacy, use contraception, retain bodily integrity, and receive an abortion are all protected). The Supreme Court, however, "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Furthermore, when a court recognizes a right as fundamental under the umbrella of substantive due process, it effectively removes the matter from the democratic process. *Glucksberg*, 521 U.S. at 720. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal citations and quotations

omitted). Hence, the Due Process Clause only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See id.* at 720–21 (internal citations and quotations omitted).

In articulating the precise right that section 23-3-540(C) infringes, Dykes frames it as the right "to be let alone." However, in determining whether the right at stake is fundamental, we must first make "a 'careful description' of the asserted liberty right or interest [to] avoid[] overgeneralization in the historical inquiry." *Hawkins*, 195 F.3d at 747. I profoundly disagree with the majority's characterization of the right at issue as the right of "a convicted sex offender" to be "let alone." Formulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake and instead focuses on the the State's asserted justification for infringing upon that right. The Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens. Furthermore, determining whether a law violates an individual's substantive due process rights is a two-pronged analysis that first requires a determination as to whether a fundamental right has been implicated, and if so, whether the State has a compelling interest to justify the infringement. Injecting the State's interest—here, Dykes' status as a convicted sex offender—into the articulation of the right at stake conflates the analysis and dooms from the outset any possibility of finding the alleged right fundamental. While a person's status as a sex offender may affect whether the State can infringe upon her fundamental rights in certain ways, that factor should be considered in the second part of the analysis. Therefore, when viewed in light of the facts of this case and the authorities relied upon by Dykes, I believe the narrow right on which she relies is the right to be free from the permanent, continuous tracking of her movements.

Although Dykes has overstated the exact right on which she relies, traditional notions of liberty and the right to be let alone are instructive for they provide the context within which the Court must analyze Dykes' specific right. Sir William Blackstone, in his landmark *Commentaries on the Laws of England*, noted the government's right to restrict an individual's free will is not immutable and any greater restriction than necessary threatens liberty in general:

> [W]e may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural,

> increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.

1 William Blackstone, *Commentaries* *121–22. Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good.

Furthermore, various members of the Supreme Court have voiced their views that the government has an acutely constrained power to infringe on one's liberty. Louis Brandeis, before he was appointed to the Supreme Court, wrote,

> [T]here came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges . . . .

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890). After joining the Supreme Court, Justice Brandeis noted the Founding Fathers

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). Additionally, in an oft-quoted dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep

> and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).[10] As the Supreme Court later noted, these words "eloquently" describe our role in the substantive due process inquiry. *Moore*, 431 U.S. at 501.

In *Glucksberg*, however, the Supreme Court admonished overreliance on these expansive concepts of freedom in the due process analysis. Although the Supreme Court has, in the past, relied on Justice Harlan's dissent in *Poe* in its fundamental rights analysis, at no point has the Court jettisoned its "established approach" of searching for concrete examples of the claimed right in the Court's jurisprudence. *Glucksberg*, 521 U.S. at 721–22 & n.17. While satellite monitoring itself may not have an analogous precursor in the Court's jurisprudence, in the absence of a history to rely on in similar circumstances, the Court has resorted to examining more traditional notions of liberty. *Cf. Griswold*, 381 U.S. at 482–86 (detailing general concepts of privacy under the Constitution and concluding that proscribing the use of contraception "is repulsive to the notions of privacy surrounding the marriage relationship"). In my opinion, the right at stake—preventing a government's ubiquitous eye from following an individual's every movement throughout her life—rests easily within our established conception of liberty. As Justice Kennedy has noted,

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.

Lawrence v. Texas, 539 U.S. 558, 562 (2003). A basic tenet of liberty is that there are places and aspects of our lives in which the State may not invade without clear justification.

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[10] The majority in *Poe* did not reach the substantive issue involved because it found the case to be nonjusticiable. *Poe*, 367 U.S. at 507–09.

Recognizing the growing threat of technological advances on individual liberty, Justice Douglas warned almost fifty years ago that "[t]he dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy." *Osborn v. United States*, 385 U.S. 323, 352 (1966) (Douglas, J., dissenting). Even then, the scope of the government's ability to enter an individual's private life was troubling, and it has only increased with the advent of GPS monitoring. I therefore believe an examination of the general impact of the satellite monitoring scheme is helpful in understanding how the articulated right is here infringed and the extent to which Dykes' liberty is impacted. Recently, the Supreme Court had the opportunity to consider a similar issue in *United States v. Jones*, 132 S. Ct. 945 (2012), albeit in a different context. At issue in *Jones* was whether the government's surreptitious placement of a GPS tracking device on Jones's car without a warrant was an unreasonable search in violation of the Fourth Amendment to the United States Constitution. *Id.* at 947. The majority held it was because the attachment of the monitor to the car was a physical trespass on personal property for the purpose of obtaining information. *Id.* at 949.

In his concurring opinion, Justice Alito tackled the thornier question of whether this satellite monitoring violated an individual's reasonable expectation of privacy. Justice Alito observed that recent technological advancements have placed vast swaths of information in the public realm, a development which "will continue to shape the average person's expectations about the privacy of his or her daily movements."[11] *Id.* at 963 (Alito, J., concurring). With that in mind, he concluded monitoring one's movements on a public street for a relatively short period of time would not violate an individual's reasonable expectations of privacy. *Id.* at 964 (citing *United States v. Knotts*, 460 U.S. 276, 281–82 (1983)). When that monitoring becomes long-term, however, the nature of the invasion changes:

> But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others

[11] In *Jones*, the monitor placed on the underside of Jones's car constantly tracked the car's movements over a four-week period without his knowledge. 132 S. Ct. at 947. The majority's contention to the contrary, Justice Alito noted there is no eighteenth century analogue to this type of investigation, because that "would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 958 (Alito, J., concurring).

> would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. Applying this principle to the four-week monitoring at issue in *Jones*, Justice Alito concluded, "We need not identify with precision the point at which the tracking of th[e] vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.*

Justice Sotomayor similarly noted we live in an age so inundated with technology that we may unwittingly "reveal a great deal of information about [our]selves to third parties in the course of carrying out mundane tasks." *Id.* at 957 (Sotomayor, J., concurring). In that vein, she agreed with Justice Alito's concerns about the intrusiveness of satellite monitoring: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[12] *Id.* at 955. Thus, satellite monitoring invites the State into the subject's world twenty-four hours per day, seven days per week, and it provides the State with a precise view of her intimate habits, whether she is in public or not. If we are not careful about and cognizant of this fact, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse" and "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 956 (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Although decided under the rubric of the Fourth Amendment, *Jones* is nevertheless instructive here. As Justice Alito and Justice Sotomayor incisively observed, the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives. More importantly, at issue in this case is not just the tracking of individuals for a period of time while they are being investigated for a specific crime—as with a Fourth Amendment search—but the statutorily mandated monitoring of certain

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[12] Justice Alito's concurrence was joined by three other members of the Court, Justice Ginsburg, Justice Breyer, and Justice Kagan. After noting she shared the same concerns as Justice Alito, Justice Sotomayor wrote that "[r]esolution of these difficult questions . . . is unnecessary" at this time because the majority's trespass theory was dispositive of the case. *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

individuals for as long as they live with no ability to have it removed. *See Osborne*, 385 U.S. at 343 (Douglas, J., dissenting) ("These examples . . . demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will."); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the government the power to track the movements of every one of us, every day of our lives.").

I therefore conclude that the right of an individual to be free from the government's permanent, continuous tracking of her movements is easily encompassed by the larger protection of liberty and personal privacy accorded by the Constitution. As our history of protestations on government intrusion from Blackstone to *Jones* illustrates, our Constitution was designed to guarantee a certain freedom from government interference in the day-to-day order of our lives which lies at the heart of a free society. Accordingly, I believe neither liberty nor justice would exist if the government could, without sufficient justification, constantly monitor the precise location of an individual twenty-four hours a day until she dies. In my opinion, safeguarding against this Orwellian nightmare[13] falls squarely within the ambit of fundamental precepts embraced by the drafters of the Constitution. I would therefore hold that Dykes has a fundamental right to be free from the permanent, continuous tracking of her movements which the State may only infringe upon where it demonstrates the statute at issue is narrowly tailored to serve a compelling interest.

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[13] George Orwell's novel *1984* increasingly appears less of a dystopian fantasy and more a cautionary tale:

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.

George Orwell, *1984* 6 (1949).

Before progressing to the second portion of the analysis, I question whether the majority's holding that the statute implicates "a protected liberty interest" is meaningfully different from my conclusion that it implicates a fundamental right or whether it is just an exercise in semantics. The issue is whether the interest/right is fundamental and in my opinion, a general liberty interest in being free from permanent, unwarranted government interference is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721. Unpalatable though it may be to recognize that persons guilty of sex crimes against children have fundamental rights, the Constitution was not designed to protect only the rights of people we like. *See Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 190 (1961) (Douglas, J., dissenting) ("Our Constitution protects all minorities, no matter how despised they are."). Constant, unjustified government intrusions in the lives of an individual are the types of tyrannical acts the Founding Fathers sought to protect against when establishing our nation. I therefore believe even under the majority's iteration of the interest at stake, that interest is fundamental and the statute must be evaluated under a strict scrutiny analysis.[14] *Flores*, 507 U.S. at 302 (1993) (holding that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347 (2002) (acknowledging that the constitutionality of a statute which implicated the defendant's "liberty interest from bodily restraint" should be analyzed under strict scrutiny).

Accordingly, I proceed to the consideration of whether section 23-3-540(C) is narrowly tailored to serve a compelling state interest—thus surviving strict scrutiny—and conclude it is not. One cannot "minimize the importance and fundamental nature of [an individual's liberty interest]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently

[14] I note as well my disagreement with the majority's assertion that merely because it is civil in nature, rather than criminal, the statute does not implicate a fundamental right. Whether a statute is characterized as civil or criminal is immaterial to this analysis and certainly not dispositive. *See Luckabaugh*, 351 S.C. at 135–140, 568 S.E.2d at 344–347 (recognizing that although the Sexually Violent Predator Act is civil and non-punitive in nature, it nevertheless infringes the "fundamental right to liberty, free from bodily restraint").

weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750–51 (1987). Dykes concedes that protecting the public from sex offenders who pose a high risk of reoffending is a compelling state interest; nevertheless, she steadfastly maintains, and I agree, that protecting the public from those who have a low risk of reoffending is not.

It is beyond question that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). In fact, "the victims of sexual assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 32–33. Thus, the General Assembly noted "[s]tatistics show that sex offenders often pose a high risk of re-offending," S.C. Code Ann. § 23-3-400 (2007), prompting it to enact provisions "to protect the public from those sex offenders who may re-offend," *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Accordingly, I recognize Dykes' status as a convicted sex offender is relevant to the analysis. However, any infringement which is substantially justified by the possibility that an individual may reoffend—without any actual consideration of her likelihood to reoffend—belies a conclusion that the statute is narrowly tailored. Monitoring sex offenders who pose a low risk of reoffending for the rest of their lives is not "sufficiently weighty" such that the subject's liberty interest in being free from government monitoring must be "subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51.

I therefore find that requiring Dykes to submit to satellite monitoring for the rest of her life without an assessment of her risk of reoffending violates her substantive due process rights. To paraphrase Blackstone, section 23-3-540(C)'s application to Dykes has the potential to decrease her natural liberty without any attendant increase in overall civil liberty. Accordingly, I would hold that subsection (C) of 23-3-540 is unconstitutional and must be stricken from the statute.

BEATTY, J., concurs.

The Supreme Court of South Carolina

Clifton Sparks, Petitioner,

v.

Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Respondents.

Appellate Case No. 2011-186526

ORDER

The petition for rehearing is denied. However, the attached opinion is substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 22, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clifton Sparks, Petitioner,

v.

Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Respondents.

Appellate Case No. 2011-186526

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27229
Heard December 4, 2012 – Refiled May 22, 2013

AFFIRMED

Edward L. Graham of Graham Law Firm, PA, of Florence for Petitioner.

Weston Adams III and M. McMullen Taylor of McAngus Goudelock & Courie, LLC, both of Columbia, and Helen

Faith Hiser of McAngus Goudelock & Courie, LLC, of Mt. Pleasant for Respondent.

JUSTICE PLEICONES: This Court granted certiorari to review the Court of Appeals' decision in *Clifton Sparks v. Palmetto Hardwood, Inc., and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates*, Op. No. 2010-UP-525 (S.C. Ct. App. filed Dec. 13, 2010), affirming the decision and order of the South Carolina Workers' Compensation Commission (the Commission)[1] awarding Clifton Sparks (Petitioner) five hundred weeks of compensation for total and permanent disability but denying him lifetime benefits because he did not suffer "physical brain damage" within the meaning of S.C. Code Ann. § 42-9-10(C) (Supp. 2011) as a result of a compensable injury. We affirm.

FACTS

Palmetto Hardwood, Inc., employed Petitioner as a saw operator. Petitioner suffered three work-related injuries during this employment, the first two of which injured Petitioner's lower back. In the third incident, Petitioner was required to remove a piece of metal from under a gang saw. In the process, the metal exploded and a three- to four-inch cubic piece struck him in the head.

Petitioner subsequently sought workers' compensation for his injuries. At the hearing, Petitioner testified to substantial head pain, loss of cognitive ability, and other brain-function-related symptoms, including inability to read without severe headache, loss of his mathematical abilities, inability to balance while standing or to walk without a cane, hand tremors, anxiety, and more.

Six doctors opined regarding whether Petitioner had suffered a physical brain injury. Two opined that Petitioner might have suffered a mild brain injury as a result of the work accident but that any difficulties resulting from it were intermingled with other problems, including pain and psychiatric disturbances. Three opined simply that Petitioner had suffered a physical brain injury. One

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[1] We refer to both the Workers' Compensation Appellate Panel and the Workers' Compensation Full Commission as the Commission.

opined that Petitioner had suffered no physical brain injury. The Commission found that Petitioner had sustained a compensable injury to his head, including a mild concussion, but that his testimony relating to the extent of his brain injury was not credible and that the evidence failed to show that Petitioner had been dazed and confused after his head injury or suffered nausea, vomiting, cognitive impairments, or post-concussive headaches. The Commission found both that Petitioner had suffered a compensable injury to his head and that "the claim for physical brain injury borders on the frivolous." It also found him to be totally and permanently disabled. The Commission ruled that Petitioner should receive only five hundred weeks of compensation as a result of his total and permanent disability and medical expenses causally related to the three compensable injuries.

On appeal, the circuit court remanded to the Commission for it (1) to explain whether the "physical brain injury" it found "border[ed] on the frivolous" was intended to be the same as or different from "physical brain damage" as used in § 42-9-10(C) and (2) to reconcile the order's seemingly contradictory findings that Petitioner suffered a compensable injury to the head with its finding of no physical brain injury.

On remand, the Commission clarified that "Claimaint has failed to carry his burden of proof to establish physical brain damage as contemplated by S.C. Code Ann. § 42-9-10. Although Finding of Fact #7 above notes an injury-by-accident to the brain, this does not constitute damage to the brain."

On appeal, the circuit court affirmed the Commission's order. Petitioner subsequently appealed to the Court of Appeals, which affirmed in an unpublished opinion. This Court granted certiorari. We now affirm.

Petitioner argues that the Court of Appeals erred when it applied an improper definition of "physical brain damage" within the meaning of § 42-9-10(C). We disagree.

DISCUSSION

The interpretation of a statute is a question of law. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Further, "[t]he construction of a statute by the agency charged with its administration will be

accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id*. at 77, 716 S.E.2d at 882. However, if the agency's interpretation conflicts with the statute's plain language, it must be rejected. *Id*. The agency's interpretation of "physical brain damage" is clearly consonant with the intent of the General Assembly as more fully discussed below.

"The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget and Control Bd*., 310 S.C. 210, 213 (1992). "If the statute is ambiguous, . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Id*. (citation omitted).

S.C. Code Ann. § 42-9-10(C) reads as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

(Emphasis added.) At issue in this case is the term "physical brain damage." "[W]ords in a statute must be construed in context." *Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). Thus, "the Court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id*.

The immediate context of the term "physical brain damage" suggests that the General Assembly intended a more restrictive meaning than the most literal interpretation as urged by Petitioner. Section 42-9-10(C) awards lifetime benefits for totally disabled claimants suffering "physical brain damage" as an exception to

the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Both of these conditions are by definition severe, permanent physical impairments. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

Moreover, within a single statutory scheme, the same word should be given consistent meaning. *Doe v. South Carolina Dept. of Health and Human Services*, 398 S.C. 62, 73 n.11, 727 S.E.2d 605, 611 n.11 (2011). Here, the General Assembly used the term "brain damage" only one other time in the workers' compensation statutes, where it is included in a list of "permanent physical impairments." S.C. Code Ann. § 42-9-400(d) (Supp. 2011). Insofar as the term "brain damage" in § 42-9-400(d) is more clearly defined than it is in § 42-9-10(C), that definition should inform our interpretation of the term "brain damage" in §42-9-10(C). We conclude, therefore, the General Assembly intended "physical brain damage" in §42-9-10(C) to have a meaning consonant with § 42-9-400(d) of permanent physical damage to the brain.

Moreover, we note that this interpretation is consistent with that of the Commission and thus affords proper deference to the agency. *CFRE, LLC, supra*.

Finally, a definition of "physical brain damage" restricting it to severe permanent damage appears to be consonant with the purpose of the workers' compensation statutes to provide only minimal compensation. *See Town of Mt. Pleasant, supra*; *Wigfall v. Tideland Utilities, Inc*., 354 S.C. 100, 115-16, 580 S.E.2d 100, 107-08 (2003) (the purpose of the workers' compensation provisions is "to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation. In exchange for these benefits, the parties and society as a whole bear some costs"; "they are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." (citations omitted)).

Section 42-9-10(C) also requires that the damage be "physical." "Physical" means "[o]f or pertaining to the body, as distinguished from the mind or spirit; bodily" and "[o]f or pertaining to material things." *American Heritage Dictionary* 935 (2nd College Ed. 1991). Nothing in the context of the statute suggests that this word should be interpreted otherwise. We thus decline to impose a requirement

that the damage be proved through an "objective diagnostic medium," since some indisputably physical brain damage may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities.

Petitioner also argues that the General Assembly's use of the verb phrase "has suffered" indicates that the injury need not result in permanent damage, since this form of the verb requires no more than that the action—here "suffered"— occur at some (indeterminate) point in the past. We disagree. The present perfect tense may signify that the action occurred in the past but has continuing effects in the present, began in the past and continues into the present or is completed in the present, or is completed at the present time. *See Commonwealth v. U.S. E.P.A.*, No. 96-4274, slip op. at 3 (6th Cir. Sept. 2, 1998), *In re Gwynne P.*, 215 Ill.2d 340, 357-58 (Ill. 2005); *Schieffelin & Co. v. Dep't of Liquor Control*, 194 A.2d 1191, 1197 (Conn. 1984); *In re A.H.B., M.L.B., J.J.B.*, 791 N.W.2d 687, 689 (Iowa 2010); *American Heritage Dictionary* 980 (2d College Ed. 1991). The General Assembly's use of this tense is consistent with a finding that it intended "physical brain damage" to denote damage that is permanent and therefore necessarily continues to have effect into the present.

Thus, we conclude that "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.

As to Petitioner's remaining issues, we find substantial evidence in the record to support the Commission's decision. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981); *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the . . . Commission."); *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App. 1997) (§ 42-9-10 does not require that total and permanent disability result solely from physical brain damage but does require that the claimant suffer physical brain damage as a result of the compensable injury); *City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself.").

CONCLUSION

Because "physical brain damage" as contemplated in S.C. Code Ann. § 42-9-10 requires severe and permanent physical brain damage as a result of a compensable injury and the Workers' Compensation Commission's finding that Petitioner did not suffer such brain damage is supported by substantial evidence in the record, the judgment of the Court of Appeals is

AFFIRMED.

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

The Supreme Court of South Carolina

Michael D. Crisp, Jr., Employee, Petitioner,

v.

SouthCo, Inc., Employer, and Pennsylvania National Mutual Casualty Insurance Co., Carrier, Respondents.

Appellate Case No. 2010-180906

ORDER

The petition for rehearing is denied. However, the attached opinion is substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 22, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael D. Crisp, Jr., Employee, Petitioner,

v.

SouthCo., Inc., Employer, and Pennsylvania National Mutual Casualty Insurance Co., Carrier, Respondents.

Appellate Case No. 2010-180906

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27230
Heard October 2, 2012 – Refiled May 22, 2013

REVERSED

Kathryn Williams of Kathryn Williams, P.A., of Greenville, for Petitioner.

Vernon F. Dunbar, of Turner Padget Graham & Laney, P.A., of Greenville, and Carmelo Barone Sammataro of Turner Padget Graham and Laney, P.A., of Columbia, for Respondents.

CHIEF JUSTICE TOAL: Michael D. Crisp (Petitioner) petitioned this Court for a writ of certiorari to review the court of appeals' decision reversing the circuit court's finding that the Appellate Panel of the Workers' Compensation Commission (the Commission) erroneously determined that Petitioner suffered a compensable brain injury and physical brain damage as a result of an injury by accident while working for Respondent SouthCo., Incorporated (Employer). We reverse the decision of the court of appeals, and remand this action to the Commission for further consideration of whether Petitioner sustained physical brain damage, as contemplated under section 42-9-10(c) of the Workers' Compensation Act (the Act), which would entitle him to benefits for life.

FACTS/PROCEDURAL BACKGROUND

Petitioner[1] worked for Employer hydra-seeding grass and performing odd construction jobs. On March 10, 2004, Petitioner and other workers were installing silt fencing to combat ground erosion. This task involved installing fence poles into the ground using the bucket of a Bobcat earthmover. On this particular day, Petitioner was holding a pole while another worker operated the Bobcat. As Petitioner bent down to reach for a pole, the bucket of the Bobcat fell on Petitioner, covering him.[2] Petitioner stated he remembered running towards a truck at the jobsite, noticing that his right hand was broken and bleeding. Petitioner's co-workers also alerted him to a gash on the back of his head that was also bleeding. Petitioner was taken to the emergency room.

At the emergency room, Petitioner was treated for abrasions and bruises to the back of the head and neck and a complex fracture in his right hand. There is no mention of a brain injury in Petitioner's hospital records.

Petitioner required surgery to his right hand. Orthopedist James Essman performed the surgery and continued to treat Petitioner's hand injury. Dr. Essman's

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[1] Petitioner formally completed seventh grade and received his G.E.D. Since completing his schooling, Petitioner has performed general labor jobs.

[2] The bucket of the Bobcat was fabricated out of solid steel and weighed approximately 600 pounds.

notes do not reflect any post-operative complaints regarding any brain injury or symptoms.[3]

On March 23, 2004, Petitioner was treated for back pain, neck pain, and nausea by his family doctor, Dr. Hunter Leigh. Dr. Leigh noted that Petitioner complained of "headaches." On April 16, 2004, Dr. John Klekamp, an orthopedic surgeon, also evaluated Petitioner and diagnosed him with cervical strain, lumbar strain, and a fracture of the right hand. At his appointment on June 6, 2004, Dr. Klekamp noted that Petitioner was "neurologically intact," but, in his notes following a July 7, 2004, appointment, stated Petitioner still suffered from "intermittent headaches."

On August 12, September 2, and September 23, 2004, Dr. Kevin Kopera, a physician with the Center for Health and Occupational Evaluation, evaluated Petitioner and diagnosed him with chronic cervical strain, chronic lumbar strain, and a broken right hand. During the course of his evaluation, Dr. Kopera noted that Petitioner had "no cognitive deficits." However, after treating him on September 23, 2004, Dr. Kopera noted,

> One issue raised was [Petitioner] continues to have headaches . . . . [Petitioner's] wife questioned why he has not undergone MRI imaging of his head due to his persistent headaches. He did sustain a blow to the head in terms of his work injury and I guess this was not considered by prior evaluating physicians and we discussed this at some length today.

Therefore, Dr. Kopera diagnosed Petitioner with chronic cervical strain, chronic lumbar strain, and chronic headaches. In addition, Dr. Kopera stated "[Petitioner] appears neurologically intact but due to his persistent headaches it may be prudent to obtain an MRI scan of the brain to complete a thorough evaluation." The MRI

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[3] Dr. Essman ultimately declared that Petitioner reached Maximum Medical Improvement (MMI) with respect to his hand on September 16, 2004. *See O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) ("[MMI] is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment that will lessen the impairment.").

scan of Petitioner's brain showed no abnormalities. After completing a Functional Capacity Evaluation, Dr. Kopera released Petitioner to return to work with restrictions, and noted Petitioner "report[ed] feeling depressed related to his current condition and this will take some adjustment."[4]

On April 12–13, 2005, Dr. Moss, a clinical psychologist, performed a neuropsychological evaluation on Petitioner at the request of Petitioner's attorney. Dr. Moss noted:

> On the basis of the current examination, there are clear indications of deficits in verbal memory, attention, problem solving, and inhibition tied to his work injury. There are indications that he has likely experienced personality changes as a result of his injury . . . [Petitioner] is experiencing psychological distress from his injuries as well. The exacerbation of obsessive-compulsive tendencies can also be associated with brain injuries involving the orbito-frontal area. This is often affected in head injury cases due to the irregular shape of the skull and olfaction is often affected since the olfactory bulbs are there. The current findings would be consistent with a frontal lobe injury.

Based on his examination, Dr. Moss diagnosed Petitioner with Cognitive Disorder [not otherwise specified], probable personality change due to head injury, obsessive compulsive disorder, traumatic brain injury, and poly-substance abuse[5] in full sustained remission. Dr. Moss further opined that Petitioner could benefit from a brain injury program.

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[4] During this time period, Petitioner also attended regular physical therapy sessions to rehabilitate his injuries. On August 24, 2004, Petitioner's physical therapy intake sheet notes "severe headaches." On September 22, 2004, Petitioner's physical therapist noted that Petitioner reported headaches three times per week. On October 4, 2004, the physical therapist's notes indicate that Petitioner's headaches were "still bad."

[5] Petitioner has an extensive history of narcotic drug and alcohol abuse and was addicted to marijuana, cocaine, crystal meth, heroine, and LSD before achieving sobriety in 2003.

On May 24, 2006, Dr. Thomas Collings, a neurologist, conducted an independent medical evaluation on Petitioner. Dr. Collings diagnosed Petitioner with a traumatic brain injury/closed head injury, defining a closed head injury as "trauma to the brain in a global way as opposed to . . . a focal area of the brain . . . caus[ing] symptoms in . . . higher competent motions." Based on his in-office examination of Petitioner, Dr. Collings expressed some reservation with regard to his diagnosis, but he stated that the neuropsychological examination was the "best information to support that there's . . . significant change between this pre-and-post condition," as it was a better indicator of brain injury than his office examination. Dr. Collings also expressed some hesitation in his diagnosis with respect to Petitioner's headaches, testifying that he would have difficulty finding any evidence to support a finding of physical brain injury had he not relied on Dr. Moss's findings. However, Dr. Collings ultimately concluded that Petitioner sustained a brain injury.

On November 15 and 28, 2005, Dr. David Price, a clinical psychologist, conducted a neuropsychological evaluation on Petitioner at the request of defense counsel. Dr. Price opined that Petitioner did not sustain a traumatic brain injury nor was there any objective medical evidence of a brain abnormality, such as an abnormal CT scan, MRI, or EEG. Dr. Price diagnosed Petitioner with pain disorder associated with psychological factors and a general medical condition, adjustment disorder with depressed mood, obsessive compulsive disorder, antisocial personality disorder, partner relational problem, and phase of life problem.

On March 6, 2006, nearly two years after his injury, Dr. Moss opined that Petitioner "sustained physical brain damage as a result of his work injury of [sic] March 10, 2004."

At his deposition, Petitioner testified he began experiencing problems with his memory and difficulties mentally processing information, concentrating on more than one task, and keeping up with daily tasks in January 2005.[6] Petitioner testified he desired to receive further treatment to "learn to cope with the ability to multitask and to remember things and stay focused." Furthermore, Petitioner

[6] Up until this time, Petitioner testified his wife "had . . . been doing everything for [him]," so he did not notice these symptoms prior to January 2005 around the time they separated.

testified he suffered from depression since the accident, and he desired to receive treatment for this condition, as well. Petitioner testified he had not been able to obtain employment since the accident.

A hearing was convened before the Workers' Compensation Hearing Commissioner (the Single Commissioner) on March 22, 2006. At the hearing, Petitioner claimed he sustained injuries to his head, brain, neck, back, right upper extremity, and psyche as a result of the accident and sought continued temporary compensation benefits and continued medical treatment, including treatment in a traumatic brain injury program, and in the alternative, sought a finding that he was permanently and totally disabled and entitled to lifetime compensation benefits due to "physical brain damage." Respondents conceded Petitioner sustained compensable injuries to his neck, back, and right upper extremity, but denied he sustained a brain injury and physical brain damage as a consequence of the work-related incident. Respondents further argued that Petitioner reached MMI on November 1, 2004, and sought a determination of permanent disability and credit for alleged overpayment of temporary disability compensation benefits.

By order dated August 1, 2006, the Single Commissioner found as fact, *inter alia*: (1) that approximately one year after the incident, Dr. Moss evaluated Petitioner and, using objective neuropsychological testing revealing cognitive deficits, diagnosed Petitioner with Cognitive Disorder [not otherwise specified], polysubstance abuse in full sustained remission, probable personality change due to head injury, exacerbated obsessive-compulsive disorder, traumatic brain injury, and "*physical brain damage*"; (2) that Dr. Collings's expert opinion was credible, including his testimony that he never saw an MRI or CT scan of Petitioner's brain, that cognitive problems usually start immediately after the injury, that the fact that Petitioner did not lose consciousness signified that his head trauma was likely less serious, that he would expect Petitioner to complain of headaches and seek medical intervention for those headaches soon after the accident if they had been severe, that no objective tests suggested Petitioner had a "*physical brain injury*," and that none of the attending physicians mentioned any brain injury symptoms, nor referred Petitioner for further testing; (3) that, based on the opinions of Dr. Moss and Dr. Collings, Petitioner sustained a head injury resulting in cognitive disorders to his brain, but did not sustain a "*physical brain injury*"; (4) that Petitioner sustained compensable head, psychological, and neuropsychological injuries; (5) that Dr. Collings and Dr. Moss opined that Petitioner needed additional psychological and neuropsychological evaluation and treatment, including, but not

limited to, evaluation and treatment in a brain injury center; (6) that Petitioner was unable to work and temporarily totally disabled because of his injuries, including his psychological and head injuries, and remained unable to work and temporarily totally disabled because of his psychological and head injuries; (7) that, based on the opinions of Dr. Moss and Dr. Collings, Petitioner had not reached MMI for his head and psychological injuries; and (8) that the determination of Petitioner's permanent disability because of his injury by accident was premature. (emphasis added).

Consequently, the Single Commissioner determined, as a matter of law, that Petitioner sustained an injury by accident causing compensable injuries to his neck, back, right upper extremity, and head, causing compensable psychological and neuropsychological injuries, and causing compensable cognitive disorders, and Petitioner reached MMI from his right upper extremity, neck, and back injuries, but not from his head and psychological injuries. Thus, the Single Commissioner found Respondents were responsible

> for all causally related medical treatment and expenses from March 10, 2004 to the present and continuing, including but not limited to causally related medical, psychological, and neuropsychological evaluation and treatment for [Petitioner's] physical, psychological, and neuropsychological injuries, evaluation and treatment for claimant's physical, psychological, and neuropsychological injuries, evaluation and treatment in a brain injury center, and necessary medications[,]

and ordered Respondents to pay Petitioner "temporary total disability compensation benefits from March 10, 2004 and continuing until further Order of the Commission or agreement of the parties."

Pursuant to its statutory authority, the Commission reviewed the Single Commissioner's order. *See* S.C. Code Ann. § 42-17-50 (Supp. 2011) (providing that "the Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[]"). The Commission unanimously affirmed the Single Commissioner's order with respect to all of the findings of fact and conclusions of law contained therein and incorporated the Single Commissioner's entire order by reference.

On appeal, the circuit court[7] reversed the Commission, finding that the Commission's order was "internally inconsistent" and "the only conclusion that can be reached on this record is that [Petitioner] has sustained *physical brain damage* as a result of his injury by accident." (emphasis added). More specifically, the circuit court stated:

> Despite finding Dr. Moss credible, adopting the findings of brain injury related symptoms and conditions that he used to diagnose frontal lobe brain injury and physical brain damage, and awarding treatment in a "brain injury program" he recommended[,] the Commission determined that [Petitioner] had not sustained physical brain injury. That conclusion contradicts the Commission's findings of brain injury related conditions, such as Cognitive Disorder [not otherwise specified], and is clearly erroneous. The Commission rejected the other expert's report, so there is no other credible evidence in the record on which the Commission can base its findings that claimant did not sustain *physical brain damage*.

(emphasis added). Based on the foregoing, the circuit court concluded that the Commission's finding in contravention of these facts was "erroneous" and was "not supported by the evidence" and found, as a matter of law, that Petitioner "sustained *physical brain damage* within in the meaning of the Act." (emphasis added).

Respondents appealed. *See Crisp v. SouthCo., Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010). In contrast to the circuit court, the court of appeals found that the Record was "replete with substantial evidence to support the Commission's finding that [Petitioner] did not sustain a *physical brain injury* based on Dr. Collings' testimony and the medical records of Crisp's physicians." *Id.* at 344–45, 701 S.E.2d at 765 (emphasis added). The court of appeals pointed to the following evidence in the Record to justify upholding the Commission's decision on substantial evidence grounds: (1) the medical records of the physicians who treated Petitioner in the hospital immediately following the accident did not mention any symptoms normally associated with a "*physical brain injury*"; (2) the physicians attending Petitioner following the surgery on his hand did not diagnose a "*physical brain injury*"; (3) the MRI scan conducted by Dr. Kopera did not

[7] Because Petitioner's injuries occurred prior to July 1, 2007, the Commission's decision was subject to review by the circuit court sitting in its appellate capacity.

identify any brain abnormalities indicative of a "*physical brain injury*," instead suggesting Petitioner's brain was neurologically intact; (4) and Dr. Collings's testimony at the hearing before the Single Commissioner that Petitioner's injury was not typical of a brain injury,[8] that Petitioner's headaches were not typical in character and severity to those suffered when a significant brain injury occurs and his conclusion that he would have "great difficulty" in diagnosing Petitioner with a "*physical brain injury*" entitling Petitioner to a lifetime of benefits absent Dr. Moss's report and a vocational evaluation stating Petitioner was not employable. *Id.* at 345–46, 701 S.E.2d at 765–66.

On appeal to this Court, Petitioner contends the court of appeals erred in finding the Commission's decision that Petitioner "has not sustained *physical brain damage*" was supported by substantial evidence in the Record, erred in finding that substantial evidence supported the Commission's findings where the findings were contradictory, and erred in upholding the Commission's decision because the only conclusion that could be reached on the evidence was that Petitioner sustained "*physical brain damage*" within the meaning of the Act. (emphasis added).

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[8] More specifically, the court of appeals relied on the following testimony from Dr. Collings concerning Petitioner's diagnosis:

> What's missing to me and what was missing when I examined him myself and tried to elicit this history is he doesn't seem to recall being hit in the head. He wasn't complaining of head trauma or pain at the time. He was not aware that he had a cut on the head. It was only when someone else was pointing out to him and he was not immediately but very briefly able to get up and run after the accident and was concerned about his hands. All of those things stand in contrast to someone who should've had a significant head injury, closed head injury, they're knocked out. They're unconscious for a period of time and then they're confused when they wake up from that and they're often unable to get up and would be ataxic or have [no] control of their balance and so forth. All of these things are lacking in that report. Did he have a head injury? Yes, he had some type of head injury but it appears from the records to be very minor.

Crisp, 390 S.C. at 345–46, 701 S.E.2d at 765.

We granted certiorari to review the court of appeals' decision pursuant to Rule 242, SCACR.

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) (citation omitted); *see* S.C. Code Ann. §§1-23-310, et seq. (Supp. 2011). Under the APA, this Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(5); *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (the Commission is tasked with finding facts, evaluating the credibility of the witnesses, and assigning weight to the evidence). However,

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

S.C. Code Ann. § 1-23-380(A)(5)(a)–(f).

ANALYSIS

We agree with Petitioner that the court of appeals erred in upholding the Commission's decision, albeit not for any of the reasons propounded by Petitioner.

Notably, the Commission did not resolve the permanent status of Petitioner's brain injuries. Rather, the Commission's order manifests a clear intention to delay a permanency finding with respect to Petitioner's brain injury because Petitioner had not yet reached MMI, and therefore, the Commission ordered further testing and treatment to be paid for by Respondents, including but not limited to treatment in a brain injury trauma center, and directed Respondents to continue to pay temporary total disability compensation "until further [o]rder of the Commission or agreement of the parties." In the substance of the order, however, the Commission found that Petitioner sustained a traumatic closed head injury as a result of an injury by accident and that the head injury caused compensable neuropsychological injuries and cognitive disorders, yet the Commission further found that Petitioner did not sustain a "physical brain injury."

From this inartful phrasing onward, the circuit court, the court of appeals, and the parties in their arguments to the various tribunals and in their briefs have alternatively referred to Petitioner's brain injuries in terms of "physical brain injury" and "physical brain damage," despite the marked difference in the length of time compensation may be awarded when the injury is "physical brain damage" contemplated under section 42-9-10(C) of the South Carolina Code.

Petitioner now contends that, because all of the probative expert evidence contained in the Record proves Petitioner sustained a brain injury and physical brain damage within the meaning of the Act and the Commission made a direct finding on that point, the only conclusion this Court may reach on this Record is that Petitioner suffered "physical brain damage." Thus, Respondents argue "[t]he critical issue in this case is whether the Commission correctly concluded that [Petitioner] is not entitled to lifetime benefits for a physical brain injury that no objective medical evidence supports," and the court of appeals did not err in reversing the circuit court because the Record is replete with evidence supporting the Commission's finding that Petitioner did not sustain "physical brain damage" as contemplated by section 42-9-10(C).

These arguments were prematurely before the circuit court, court of appeals, and now this Court, as the Commission explicitly left the determination of permanency to a later date. However, we clarify, *infra*, what is meant by "physical brain damage" under section 42-9-10(C) for guidance on remand.

Pursuant to section 42-1-160(A) of the South Carolina Code, for an injury to be compensable under the Act, it must be "an injury by accident" and "aris[e] out of and in the course of employment." *See* S.C. Code Ann. § 42-1-160(A) (Supp. 2011). To this end, "[a]n injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citation omitted). "Whether there is any causal connection between employment and an injury is a question of fact for the Commission." *Hill*, 373 S.C. at 431, 645 S.E.2d at 436 (citation omitted). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) (citation omitted).

In general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks. *See* S.C. Code Ann. § 42-9-10(A) (Supp. 2011); S.C. Code Ann. Reg. § 67-1101 (Supp. 2011). However,

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Id. § 42-9-10(C) (Supp. 2011) (emphasis added).

Petitioner argues that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of section 42-9-10(C). This argument is not persuasive, as it is contrary to legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain.

As we found in *Sparks v. Palmetto Hardwood, Incorporated*, Op. No. 27229 (S.C. Sup. Ct. refiled May 22, 2013) (Shearouse Adv. Sh. No. 23 at 40), we view the inclusion of "physical brain damage," along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage.

As noted in *Sparks*, permanency and physicality are requirements. However, the severity of the permanent brain damage is the lynchpin of the analysis. *Cf. James v. Anne's Inc.*, 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010) ("The 500 weeks limitation, however, represents the limit of the *monetary* amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. (emphasis in original)).

Inherent in the requirement that the damage to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment. *See Floyd v. C.B. Askins & Co.*, 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009) (addressing whether an award made pursuant to § 42-9-10(C) survives death from an unrelated cause and noting that "[c]laimants suffering catastrophic injuries like Claimant's may require specialized healthcare without the means to earn a wage . . .[, and] [t]he award of compensation for a claimant's life expectancy seems to recognize this reality."); *cf.* S.C. Code Ann. § 42-9-400(d) (Supp. 2011) ("As used in this section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.").

While other states have also adopted by legislative enactment an exception to the general compensation rule for permanent total disability, none of these states appear to utilize the "physical brain damage" terminology. Importantly, these exceptions to the general compensation rule hinge on the employee-claimant's ability to return to work. For example, the Virginia statute, permits lifetime benefits for "injury to the brain which is so severe as to render the employee-claimant permanently unemployable in gainful employment." Va. Code Ann. § 65.2-503(C). Likewise, the North Carolina statute on permanent total disability

allows an employee-claimant to receive extended benefits over the 500-week limit if he or she sustains a "[s]evere brain or closed head injury as evidenced by severe and permanent: [s]ensory or motor disturbances; [c]ommunication disturbances; [c]omplex integrated disturbances of cerebral function; or [n]eurological disorders" unless "the employer shows by a preponderance of the evidence *that the employee is capable of returning to suitable employment*." N.C. Gen. Stat. Ann. § 97-29(d)(3)(a.)–(d.) (emphasis added); s*ee also Dishmond v. Int'l Paper Co.*, 512 S.E.2d 771, 774 (N.C. Ct. App. 1999) (affirming the Commission's award of total permanent disability where there was competent evidence in the record that total disability was the consequence of the employee-claimant's brain injury and where the evidence indicated the employee-claimant "could no longer function in a work environment"); *Slizewski v. Int'l Seafood, Inc.*, 264 S.E.2d 810 (N.C. Ct. App. 1980) (finding the evidence supported a finding that claimant suffered permanent brain injury and was permanently unable to function in a work-related capacity).[9]

Bearing these states' treatment in mind, we interpret the inclusion of "physical brain damage" among the most serious impairments within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating brain damage so severe that the person could not subsequently return to suitable gainful employment. *See Adams v. Texfi Indus.*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("In construing a statute, the Court looks to its language as a whole in light of its manifest purpose." (citing *Simmons v. City of Columbia*, 280 S.C. 163, 311 S.E.2d 732 (1984))); *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 169, 14 S.E.2d 889, 894 (1941) ("While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished." (quoting *State ex rel. Walker v. Sawyer*, 104 S.C. 342, 346, 88 S.E. 894, 895 (1916))). This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other

[9] *See Adams v. Texfi Indus.*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("The decisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina's." (citation omitted)).

avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable. *See Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages."). Thus, only in cases of physical brain damage that is both permanent and severe would an employee-claimant be entitled to benefits for life.

The resolution of the question of whether an employee has sustained either a physical injury to the brain or physical brain damage gives rise to the coextensive question of what proof is required in these cases.[10] Respondents contend that the determination of whether Petitioner sustained "physical brain damage" in the instant case hinges on the fact that no objective measure, *i.e.* a CT or MRI scan, confirmed such damage.

To the contrary, Dr. Collings testified in his deposition that there are essentially three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing. Dr. Collings opined that the first two methods were inconclusive in this case. In addition, Dr. Collings concluded that there can be physical damage to the brain that does not appear on normal scans, and Dr. Moss was in a better position to assess Petitioner's brain damage based on the neuropsychological examination rather than his own in-office examination. In so concluding, Dr. Collings testified that neuropsychological testing was "the best information that would support that there's . . . significant change between this pre- and post-condition." Dr. Collings further testified that the neuropsychological report was an in-depth test that neurologists use to diagnose injuries to the brain, and neurologists "sort of view it just like we do the MRI scan." In light of this testimony, we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases.

Importantly, it is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits. *See Clade v. Champion Labs.*, 330 S.C. at 11, 496 S.E.2d at

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[10] Petitioner does not directly raise this question in his brief. However, Respondents argues vehemently that Petitioner has not proved his injuries "were so severe that he will require specialized healthcare over the remainder of his life expectancy."

857 (citation omitted). The fact that the injury allegedly resulted in physical brain damage under section 42-9-10(C) does not change the employee-claimant's ultimate burden of proving his or her injuries.[11]

CONCLUSION

Based on the foregoing, we reverse the court of appeals and remand this case to the Commission for a determination of MMI, permanency, and whether Petitioner's injury constitutes "physical brain damage" as contemplated by section 42-9-10(C) of the South Carolina Code, which would entitle him to workers' compensation benefits for life.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.

[11] We need not address the remaining issues on appeal, as our holding is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when determination of prior issue is dispositive).

JUSTICE PLEICONES: I concur in result. I agree with the majority that this case must be remanded to the Commission to clarify its holding regarding whether brain damage resulting from Petitioner's brain injury qualifies him for lifetime benefits under S.C. Code Ann. § 42-9-10(C) (Supp. 2011). However, I write separately because I would not reach the question what constitutes severe brain damage for purposes of § 42-9-10. Rather, I would wait until a case is before us for review of a Commission decision addressing it. I would then defer to the agency interpretation of the statute, if reasonable. *See CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

I also note that the language of other states' statutes cannot guide our interpretation of different language adopted by the General Assembly. Even to the extent we give great weight to North Carolina courts' interpretation of its workers' compensation act, this is true only when the courts deal with identical statutory language. *See Flemon v. Dickert-Keowee, Inc.*, 259 S.C. 99, 102, 190 S.E.2d 751, 752 (1972) ("At [the] time [the cited North Carolina case was decided] the pertinent provisions of the North Carolina Act were identical with the Code sections hereinabove quoted from our Act.").

Thus, I concur in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brian P. Menezes, Petitioner,

v.

WL Ross & Company, LLC, Wilbur L. Ross, Jr., Michael J. Gibbons, David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P., WLR Recovery Associates II, LLC, and WLR Recovery Associates III, LLC, Respondents.

Appellate Case No. 2011-194626

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27254
Heard February 6, 2013 – Filed May 22, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William D. Herlong, of The Herlong Law Firm, LLC, of Greenville, Russell Thomas Burke, of Nexsen Pruet, LLC, of Columbia, and Thomas L. Stephenson and Andrew A. Mathias, both of Nexsen Pruet, LLC, of Greenville, all for Petitioner.

H. Sam Mabry, III, and Charles M. Sprinkle, both of Haynsworth Sinkler Boyd, PA, of Greenville, and Michael J. McConnell, N. Scott Fletcher, and Joseph E. Finley, all of Jones Day, of Atlanta, Georgia, for Respondents.

CHIEF JUSTICE TOAL: Brian P. Menezes (Petitioner) argues that the court of appeals erred in its analysis of when a claim for breach of fiduciary duty accrues under Delaware law. We disagree. The court of appeals performed a knowledgeable and perceptive analysis of the instant case. However, our review of Delaware law leads us to a different conclusion regarding the efficacy of Petitioner's claim. Thus, we affirm the court of appeals' decision in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL/PROCEDURAL HISTORY

Petitioner served as the chief financial officer (CFO) and interim chief executive officer (CEO) of Safety Components International, Incorporated (SCI), from 1999 until 2006. SCI was a publicly traded Delaware company with its headquarters and principal place of business located in Greenville, South Carolina. SCI designed and developed airbag fabric and airbag cushions. In 2005, SCI possessed a 66% share of the North American outsourced airbag cushion market, and an 11% share of the total North American airbag cushion market, along with a 38% share of the European outsourced airbag cushion market, and a 16% share of the total European airbag cushion market. In June 2006, SCI terminated Petitioner. Petitioner sued SCI, alleging, *inter alia*, breach of contract and violation of the South Carolina Payment of Wages Act. In addition, a short time after his termination, Petitioner exercised his stock options and became an SCI shareholder.

Meanwhile, the SCI board of directors (the SCI Board) entered into merger negotiations with the former International Textile Group (FITG). WL Ross & Company, LLC (Respondents), controlled both SCI and FITG. Respondents include a New York investment firm, specializing in leveraged restructurings, leveraged buyouts, and industry consolidations of financially distressed companies. Respondents owned approximately 75.6% of SCI and held four of the five seats on the SCI Board. Respondents formed FITG in 2004 as a privately held Delaware corporation with its headquarters and principal place of business in Greensboro, North Carolina. FITG consisted of four principle lines of business: apparel fabrics,

interior furnishings, government uniform fabrics, and specialty fabrics and services. Respondents owned 85.4% of FITG and held five of the six seats on the FITG board of directors (the FITG Board).

On August 29, 2006, the SCI Board approved the merger agreement between SCI and FITG. The SCI Board publicly announced the terms of the merger on August 30, 2006, with the filing of a Form 8-K with the Securities and Exchange Commission (SEC). On September 1, 2006, the SCI Board filed a Joint Proxy Statement/Prospectus, also known as a Form S-4, with the SEC. The Form S-4 provided shareholders with details of the merger between SCI and FITG. The Form S-4 explained that shares of FITG common stock would be converted into the right to receive shares of SCI common stock at an exchange ratio of one share of SCI common stock for every 1.4739 shares of FITG common stock. The Form S-4 also explained that as a precondition of the merger, SCI would have to adopt an amended certificate of incorporation reflecting the newly merged company. However, this precondition was a mere formality, as shareholders owning 75.6% of the company, i.e. Respondents, indicated they intended to adopt such a certificate and re-elect their directors to the SCI Board. According to the Form S-4, completion of the merger did not require any further action by SCI shareholders, but FITG shareholders would have to approve the merger. However, Respondents owned 86.4% of FITG's stock and consented in writing to the merger at the time of the Form S-4's issuance. The Form S-4 also provided shareholders with information regarding the 2006 Annual Meeting where the merger would be formally finalized. It is clear from the Form S-4, that due to Respondent's ownership role in SCI and FITG, the planned procedures at the 2006 Annual Meeting were a formality.

The more intricate details of the merger are not pertinent to our analysis. However, Petitioner argues that Respondents breached their fiduciary duty to SCI's shareholders by approving merger terms which were unfair to SCI shareholders, failing to conduct due diligence regarding the financial condition of FITG, and failing to protect SCI's minority shareholders.[1]

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[1] Petitioner alleged that Respondents violated their fiduciary duties by:

> (a) proposing the [m]erger and then allowing it to close notwithstanding the financial condition of FITG;

On September 28, 2006, Petitioner and SCI resolved the termination suit and executed a Settlement Agreement and Release (the Release). The Release extinguished all of Petitioner's claims against SCI:

> As a material inducement to Employer to enter into this Confidential Settlement Agreement, [Petitioner] does hereby release, acquit and forever discharge . . . from any and all manner of actions, causes of

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> (b) approving the [m]erger on terms which gave 65% ownership to the FITG stockholders and diluted the minority shareholders to 35%, or at all [sic];
>
> (c) not providing accurate and complete information regarding FITG . . . or ensuring that such information was provided;
>
> (d) failing to learn of the financial situation of FITG and failing to take it into account or see that it was taken into account with regard to the [m]erger;
>
> (e) failing to ensure that proper due diligence was conducted on behalf of SCI or FITG;
>
> (f) allowing the representation at the [m]erger closing that the [material adverse change] [c]lause condition was satisfied;
>
> (g) failing to call off or renegotiate the [m]erger (or caus[ing] it to be called off or renegotiated) because of the financial condition of FITG;
>
> (h) allowing the debt previously held by FITG to be transferred to Combined Company and/or by allowing that debt to be converted into preferred stock;
>
> (i) allowing or causing the renegotiation [of] the SCI's credit facility and/or obtaining $100 million of additional preferred stock in connection therewith; and/or
>
> (j) otherwise failing to protect the interests of the minority stockholders of SCI.

> action, suits, claims, setoffs, debts, compensation, salary, benefits, sums of money, accounts, covenants, trespasses, damages, judgments and demands whatsoever, in law or in equity, whether known or unknown, liquidated, contingent, absolute, or otherwise, which [Petitioner] either has had or now has against [Respondents] for or related to any matter or things whatsoever from the beginning of time up to and including the date of execution hereof. It is [Petitioner's] intention to release all rights and claims that he may lawfully release.

The Release specifically barred Petitioner from bringing any claim as an owner of any stock or interest arising prior to the Release's execution and from pursuing any claims made, or that could have been made, in his employment lawsuit.

On October 20, 2006, SCI and FITG completed their merger, creating the new International Textile Group (NITG). On April 9, 2008, Petitioner sued Respondents alleging breach of fiduciary duties. Respondents asserted the affirmative defense that the Release barred Petitioner's claim, moved for summary judgment, and asserted a counterclaim for breach of the Release. On July 31, 2008, the parties appeared before the trial court on this motion.

The parties agreed that this case presented a single issue of law: "[W]hen did the claims alleged in [Petitioner's] complaint accrue under Delaware law." Respondents asserted that, under Delaware law, a cause of action for breach of fiduciary duty accrues "when the wrong occurs," and in the merger context, this wrong occurs when a merger's terms are fixed. In this case, because Respondents controlled both SCI and FITG, the merger's terms were fixed when the SCI Board approved the merger. Under Respondents' view of Delaware law, the SCI Board fixed the merger terms prior to execution of the Release, thus barring Petitioner's claim.

Petitioner countered that the alleged wrong could not have occurred prior to when he could make a claim for damages. Accordingly, Petitioner argues that under Delaware law, a claim for breach of fiduciary duty cannot accrue until the merger is officially closed by vote of the company shareholders. Petitioner also focused on damages, and the general rule that a cause of action for the recovery of damages only accrues when the action can be prosecuted to a successful conclusion.

The trial court agreed that Petitioner's claims accrued no earlier than the closing of the merger. The trial court denied Respondents' motion for summary judgment, struck their affirmative defenses based on the Release, and dismissed Respondents' counterclaim for breach of the Release.

Respondents appealed and the court of appeals reversed. *Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011). The court of appeals noted the recent trend in Delaware law favoring the view that a claim for breach of fiduciary duty accrues as soon as the wrongful act occurs, and that whether or not a plaintiff can sue for damages is not dispositive because a plaintiff can seek injunctive relief. *Id.* at 593, 709 S.E.2d at 119 (citing with approval *Albert v. Alex Brown Mgmt. Servs. Inc.*, No. 762–N, 2005 WL 1594085, at *18 (Del. Ch. 2005)). Thus, the court of appeals held the trial court erred by relying on case law distinguishable from the latest Delaware decisions. *Id.* at 595, 709 S.E.2d at 120 ("After reviewing the facts *sub judice* and all the relevant case law, we conclude the circuit court's reliance . . . was misplaced.").

Petitioner sought review from this Court, and we granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in reversing the circuit court's holding that Petitioner's claims accrued at the close of the merger?

STANDARD OF REVIEW

The question of when a cause of action arises or accrues is a question of law. *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997); *Brown v. Finger*, 240 S.C. 102, 111–12, 124 S.E.2d 781, 785–86 (1962). This Court undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008).[2]

[2] Delaware law controls the question of the accrual date as claims concerning the fiduciary duties of corporate officers are governed by the state of incorporation. *Menezes*, 392 S.C. at 589–90, 709 S.E.2d at 117 (relying on Restatement (First) of Conflicts of Laws § 187 (1934)). "Generally, the rights and obligations of stockholders, including the relative rights of stockholders as respects the corporation itself, are determined and controlled by the law of the state of incorporation." *Id.* at 590, 709 S.E.2d at 117 (quoting 18 Am.Jur.2d *Corporations*

LAW/ANALYSIS

I. Fiduciary Duty Defined

Resolution of Petitioner's claim requires a brief description of Delaware law regarding the fiduciary duties of corporate directors and officers.

Under Delaware law, the duties of a fiduciary are composed of three elements: care, loyalty, and good faith. Hillary Sale, *Enron and the Future of U.S. Corporate Law and Policy*, 89 Cornell L. Rev. 456, 463 (2004). Directors and officers who comply with the duty of care are more likely to weigh decisions, consult with appropriate advisors, and disclose conflicts of interest. *Id.* at 465. Courts monitor the duty of care through the business judgment rule, which delegates the business affairs of Delaware corporations to the board of directors. *Id.* "The business judgment rule presumes that in making decisions and managing the corporation, fiduciaries have acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *Id.* (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). In *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985),[3] the Delaware Supreme Court held that corporate directors cannot create a "safe harbor" for their decisions by simply securing shareholder approval. *Id.*

The duty of loyalty requires corporate officers and directors act in the best interest of the corporation and prioritize the corporation's interest above their own. *Id.* at 483. The traditional formulation of the duty of loyalty states that if corporate directors and officers are independent of, and disinterested in, the complained of transaction, the court will not find them liable for a breach of that duty, unless the facts of the transaction are "such that no person could possibly authorize it if he or she were attempting in good faith to meet their duty." *Id.* at 484–85 (citing *Gagliardi v. Trifoods Int'l Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996)).

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§ 21). South Carolina courts generally follow the traditional choice of law rules as stated in the Restatement of Conflicts of Laws. *Id.* (citing *McDaniel v. McDaniel*, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963)).

[3]*Overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695, 713 n.54 (Del. 2009) (articulating the proper scope of the shareholder ratification doctrine); *see also Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (recognizing that part of *Van Gorkom*'s holding has been superseded by statute).

Finally, corporate directors and officers acting in good faith abide by the norms of corporate governance and comply with legal standards while performing their jobs. *Id.* at 485. Egregious or conspicuous failures to do so are subject to liability under the duty of good faith. *Id.* For example, directors must ensure that complaints about the company are sufficiently investigated. *Id.* Officers must create appropriate systems within the company to ensure proper governance, and material decisions must be supported by all reasonably available facts. *Id.*; *see also* Robert Summers, *The General Duty of Good Faith—It's Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 811 (1982) ("[A]lthough the general duty of good faith and fair dealing is no more than a minimal requirement (rather than a high ideal), its relevance . . . is peculiarly wide-ranging, and it rules out many varieties of bad faith in a diverse array of contexts.").

In our view, Delaware courts focus on the possible injury created by corporate directors' failure to adhere to their duties, apart and aside from any *after the fact* ratification or approval by corporate shareholders.

In his brief before this Court, Petitioner states unequivocally that "under Delaware law, a claim for breach of fiduciary duty against the directors or officers of a corporation sounds in tort." Petitioner is incorrect.

A recent commentary, upon which Petitioner relies, discussed this point:

> After a brief flirtation with the earlier theories that breaches of fiduciary duty arose in contract, a strong majority view emerged that characterized breaches of fiduciary duty as tort claims. For example, in the part of the country that was ground zero for the savings and loan crisis, courts consistently held that claims for breach of fiduciary duty against corporate fiduciaries were tort claims.

J. Travis Laster, Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71, 92–93 (2010). However, Petitioner failed to include in his brief the article's subsequent paragraph. That paragraph is critical to understanding the article's intended point:

> As a result of these authorities, there is now a large body of case law ***outside of Delaware that treats a claim for breach of fiduciary duty against corporate directors as a tort***. These decisions do not make fine distinctions between "legal" or "equitable" torts, nor do they

> delve into the nuances of the equitable underpinnings of the relationship. They simply hold that a breach of fiduciary duty is a tort. The natural consequence of such an approach is that contribution under the Uniform Act would exist, unless a state has adopted the provision from the 1955 revision excluding breaches of fiduciary duty from its coverage. ***Delaware's approach to fiduciary duties, however, is not so simple***.

Id. at 93 (emphasis added). The Delaware Supreme Court's decision in *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345 (Del. 1993), assists in understanding the reasoning behind the Delaware courts' position.

The *Technicolor* chronicle spans twenty years of litigation and six remands by the Delaware Supreme Court. Laster, 11 Del. L. Rev. at 94 n.130. The pertinent issue flows from an appraisal proceeding brought by Cinerama, Incorporated (Cinerama) following the acquisition of Technicolor, Incorporated (Technicolor). *See Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1184 (Del. 1988) (analyzing an interlocutory appeal regarding, *inter alia*, a shareholder's right to maintain an action for fraud in connection with the merger as well as appraisal action). Cinerama developed evidence that it believed supported a claim that the Technicolor directors breached their duties of loyalty and care, and filed an action asserting this claim. *Id.* The trial court first ruled on the terms of the appraisal,[4] and then issued a separate opinion addressing the fiduciary duty claim. The trial court held that even if the directors failed to exercise due care, the plaintiffs bore the burden to establish causation and damages. *Cinerama, Inc. v. Technicolor, Inc.*, Civ. A. No. 83581991, 1991 WL 111134, at *3–4 (Del. Ch. June 24, 1991) ("But I am of the view that the questions of due care . . . need not be addressed in this case, because even if a lapse of care is assumed, plaintiff is not entitled to a judgment on this record. That is because in this situation, where there is no self-dealing or other breach of loyalty, it is plaintiff's burden to establish by evidence that it was injured as a result of the board's action. This it has not done.").

Cinerama appealed, and the Delaware Supreme Court reversed. *Technicolor*, 634 A.2d at 370. The court held that tort principles did not control a claim for breach of fiduciary duty, and that these principles "have no place in a business judgment rule standard of review analysis." *Id.* at 370. The Delaware Supreme Court's decision in *Technicolor* represents the last *significant* discussion

[4] *See Cede Co. v. Technicolor Inc.*, Civ. A. No. 7129, 1990 WL 161084, at *1 (Del. Ch. Oct. 19, 1990).

among Delaware courts regarding the proper characterization of breach of fiduciary duty claims. Laster, 11 Del. L. Rev. at 96. However, later cases follow *Technicolor* in treating a breach of fiduciary duty claim as distinct from common law tort or contract claims. *Id.* (citing *North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 n.43 (Del. 2007); *IM2 Merch. and Mfg., Inc. v. Tirex Corp.*, No. CIV.A.18077, 2000 WL 1664168, at *6 (Del. Ch. Nov. 2, 2000) ("Plaintiffs' claim is really one based on contract or tort law, rather than the law of fiduciary duty.")).

The Delaware Supreme Court's decision in *Technicolor* surprised commentators previously under the assumption that a breach of fiduciary duty was a tort, especially in light of the majority of jurisdictions outside of Delaware that classify the breach in this way. *Id.* at 97–98. However, it is clear that while a breach of fiduciary duty may "look, swim, or quack like a tort," under Delaware law, it is not. *See id.* at 98 (citing *McMillan v. Intercargo Corp.*, 768 A.2d 492, 506 n.62 (Del. Ch. 2000) (using the "duck" analogy in determining which contractual merger provisions with defensive impacts would be reviewed as defensive measures)); *see also Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808, 820 (1944) (holding that where corporate officers and directors are required to answer for enriching themselves through injury to the corporation, the court would "not regard such acts as mere torts, but as serious breaches of trust").

The foregoing authority provides clarity on two points important to the resolution of the instant case. First, Delaware courts generally focus on the corporate directors' actual breach of fiduciary duty, as an injury, regardless of whether that breach causes separate damage. Second, Delaware courts do not consider a breach of fiduciary duty a mere tort, but instead as its own distinct cause of action. This perspective comports with the very existence of Delaware's deferential business judgment rule, and robust business court regime. Treating malfeasance by corporate directors and officers as torts would represent a significant incongruity with the rationale behind Delaware's Chancery Court system.[5]

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[5] The Delaware Chancery Court is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands of corporations and business entities conducting a vast amount of the world's commercial affairs. Delaware State Courts, http://courts.delaware.gov/chancery/ (last visited Jan. 27, 2013); *see also* Rick Geisenberger, *The Delaware Corporation Franchise Tax*, 30 Del. Law. 18, 19

II. The Claim Accrual Narrative

The parties have constructed a battle royale between what appears to be two competing lines of cases explaining when a claim for breach of fiduciary duty accrues under Delaware law. However, these competing cases are best viewed as two subsets representing different eras in a continuing narrative of the Delaware court's evolution on claim accrual in the fiduciary duty context. The Delaware Supreme Court's controversial decision in *Van Gorkom* stands as a dividing line between that subset of cases holding that a claim for breach of fiduciary duty accrues only after a party is injured in the form of actual damages, and the later subset that view the breach itself as sufficient injury to support a claim. Thus, we analyze the authority pertinent to the instant case in three sections: pre-*Van Gorkom* authority,[6] the *Van Gorkom* decision, and post-*Van Gorkom* authority.[7]

A. Pre-*Van Gorkom*

In *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), Turner & Newell Industries, Incorporated (Turner), proposed a tender offer for the shares of stock of Phillip A. Hunt Chemical Corporation (Hunt). Hunt's board of directors (the Hunt Board) voted unanimously to recommend to all Hunt stockholders that they accept the offer and tender their shares to Turner. *Id.* at 762. However, the Hunt Board subsequently considered the ramifications of the proposed offer on certain

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(2012) ("[O]ur Court of Chancery is a unique, centuries-old business court that, along with the Delaware Supreme Court, has authored most of the modern U.S. corporate case law."); John F. Coyle, *Business Courts and Interstate Competition*, 53 Wm. & Mary L. Rev. 1915, 1915 (2012) (arguing that business courts do not serve to attract companies from other states because, *inter alia*, those courts are unlikely to successfully compete with the Delaware Chancery Court).

[6] The line of cases cited in the trial court's order: *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3rd Cir. 1983); *Dofflemeyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983); *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982).

[7] The line of cases relied on by the court of appeals in reversing the trial court's order: *Int'l Brotherhood of Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008); *Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993); *Brown v. Automated Mktg. Sys., Inc.*, No. 6715, 1982 WL 8782, at *1 (Del. Ch. Mar. 22, 1982).

unexercised stock options held by Hunt employees, including officers. *Id.* The Hunt Board decided to avoid certain profit charges by accelerating the option date of all options held by non-officer employees. *Id.* The Hunt Board allowed corporate officers the opportunity to cancel their options and receive the difference between the option price and the tender officer price. *Id.* The Hunt Board adopted these decisions by resolution on August 22, 1977. *Id.* However, the resolutions were contingent upon Turner's actual commencement of the tender offer. *Id.* The tender offer began on September 12, 1977, and was consummated on October 3, 1977. *Id.* The plaintiffs contended that the directors wasted corporate assets by permitting corporate officers to surrender their options in connection with the tender offer. *Id.*

A primary issue in *Kaufman* was the date the cause of action arose. The defendants argued that the action arose on August 22, 1977, the date the Hunt Board took action. *Id.* at 763. The plaintiffs countered that the wrong did not occur until October 3, 1977, the date the tender offer ended, and that until the tender offer's actual completion, no injury could have occurred. *Id.*

The trial court agreed with the plaintiffs, relying on precedent stating that when exchanges of stock are contingent upon shareholder approval, the transaction is not complete until the shareholder vote takes place. *Id.* at 764 (citing *Lavine v. Gulf Coast Leaseholds*, 122 A.2d 550 (Del. Ch. 1956); Folk, *The Delaware General Corporation Law*, 487 (1967)). According to the trial court, the wrong "was a continuing wrong." *Id.*

In *Dofflemyer v. W.F. Hall Printing Company*, 558 F. Supp. 372 (D. Del. 1983), the United States District Court for the District of Delaware analyzed the defendant's motion to dismiss a derivative action brought by Robert and Josephine Dofflemyer (the plaintiffs) against W.F. Hall Printing Company's board of directors (the defendants) in connection with a merger of W.F. Hall Printing Company and a second tier subsidiary of Mobil Corporation. *Id.* at 375. The plaintiffs claimed that the defendants breached their fiduciary duty by engineering a merger that served no valid business purpose but benefited the majority shareholders' interests. *Id.* at 379. Allegedly, the defendants obtained an investment opinion from a banking firm they knew not to be independent, maneuvered to avoid provisions in the bylaws intended to protect minority shareholders, and issued a false and misleading proxy statement. *Id.*

The parties disputed when the statute of limitations began to run on the plaintiffs' claim. Relying on *Kaufman*, the district court held that the plaintiffs

could not have sued for damages until the merger was "actually accomplished." *Id.* According to the court, until that time, the plaintiffs had suffered no injury as a result of the defendants' acts. *Id.*

Later that same year, the United States Court of Appeals for the Third Circuit issued its decision in *Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105 (3rd Cir. 1983). In that case, John Baron, a stockholder in Allied Artists Pictures Corporation (Allied Pictures), appealed a summary judgment decision dismissing his complaint as time-barred. *Id.* at 106. Baron sought damages and declaratory relief concerning a merger between Allied Pictures and Allied Industries consummated on January 20, 1976. Baron alleged that the proxy solicitations, dated November 24, 1975, were false and misleading. *Id.* Baron filed his complaint on January 19, 1979. *Id.*

The Delaware district court had consistently recognized the principle that the statute of limitations begins to run from the date of the injury caused by the defendant. *Id.* (citing *Rose Hall, Ltd. v. Chase Manhattan Overseas Bank*, 494 F. Supp. 1139, 1157 (D. Del. 1980), *Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co.*, 484 F. Supp. 1375, 1388 (D. Del. 1980); *Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 922 (D. Del. 1975)). Thus, the district court held that Barron's complaint fell outside of Delaware's three year statute of limitations. *Id.* at 107.

The Third Circuit reversed, relying on precedent recognizing the general principle that a cause of action for the recovery of damages accrues only when it could be prosecuted to a successful conclusion. *Id.* at 108 (citing *United States v. Wurts*, 303 U.S. 414, 418 (1938); *Grayson v. Harris*, 279 U.S. 300, 304–05 (1929); *City of Philadelphia v. Lieberman*, 112 F.2d 424, 428 (3d Cir. 1940)). The Third Circuit did not view Baron's injury as having taken place at the time of the actual breach:

> Had Baron filed his complaint seeking money damages caused by anticipated use of the proxies in consummation of the merger, that complaint would properly have been dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which money damages could be awarded. Until the plaintiff can allege facts which would survive such a motion, his cause of action for damages, personal or derivative, has not accrued. Until it has accrued the statute of limitations does not come into operation.

Id. at 109; *but see Brown v. Automated Mktg. Sys.*, No. 6715, 1982 WL 8782, at *2 (Del. Ch. Mar. 22, 1982) ("Nor can there be an argument that no wrong occurs until the merger is voted upon and approved. The transaction of which she complains is the act of Automated's board in passing a resolution approving the merger on terms which she feels to be unfair to the public shareholders."); *FMC Corp. v. R.P. Scherer Corp.*, 1982 WL 17888, at *2 (Del. Ch. Aug. 6, 1982) ("In this case, FMC wants to contest what the Directors . . . approved and were submitting to the stockholders for approval. Why should FMC be heard to complain about what they bought? The Proxy Statement had been public for 16 days.").

In our view, prior to the Delaware Supreme Court's decision in *Van Gorkom*, there was a fractured view among Delaware courts regarding the point at which a claim for breach of fiduciary duty accrues.[8] Therefore, some of these decisions lend support to Petitioner's argument.

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[8] However, in *Brambles USA, Inc. v. Blocker*, 731 F. Supp. 643 (D. Del. 1990), the Delaware district court distinguished the tender offer of *Kaufman* from a fixed contract situation like that in the instant case:

> For similar reasons, Brambles' reliance on *Kaufman* is misplaced. In that case, until the requisite number of shareholders tendered pursuant to the tender offer there was no transaction. As the Court said, until that time the transaction complained of was subject to extinction. The resolutions of the board in *Kaufman* were simply not binding until it was consummated by the shareholders tendering the requisite number of shares into the tender offer. In the case *sub judice*, the merger in May, 1988, fixed the method of payment. That it may have provided an alternative method of payment does not mean that the Exchange/Put Agreement and the Merger Agreement were not binding on the parties. Thus it was not a resolution as in *Kaufman*; rather, it was a fixed contract.

Id. at 650 (internal citations omitted). Thus, the *Brambles* and *FMC Corp.* decisions support a plausible view that Delaware courts have consistently held that a breach of fiduciary duty claim accrues at the time a merger's terms are fixed, and that a tender offer, like that in *Kaufman*, is a distinct situation for accrual analysis purposes.

B. The *Van Gorkom* decision

As discussed, *supra*, the Delaware Supreme Court's decision in *Technicolor* explained that tort principles do not belong in the analysis of a breach of fiduciary duty under Delaware law. *See Technicolor*, 634 A.2d at 370. We view the *Technicolor* decision as a natural extension of the Delaware Supreme Court's sweeping opinion in *Van Gorkom*.

In *Van Gorkom*, the shareholders of Trans Union Corporation (Trans Union) brought a class action seeking rescission of a cash-out merger of Trans Union into New T Company (New T), a wholly owned subsidiary of Marmon Group, Incorporated. 488 A.2d 858, 863.

In August 1980, Trans Union CEO Jerome Van Gorkom began discussions with Trans Union senior management to discuss the possibility of selling Trans Union due to the company's inability to generate sufficient income. *Id.* at 865. Van Gorkom decided to meet with Jay Pritzker, a corporate takeover specialist. *Id.* at 866. However, prior to the meeting, and without consulting with Trans Union's board of directors (the Trans Union Board), Van Gorkom calculated, along with the CFO, an estimated price for Trans Union at $55 per share. *Id.* On September 13, 1980, Van Gorkom met with Pritzker and presented a plan for Pritzker to purchase Trans Union at $55 per share and "pay off most of the loan in the first five years." *Id.* Pritzker expressed interest in Van Gorkom's offer, and the two began a series of secret meetings on September 17 and 18. *Id.* at 867. Pritzker and Van Gorkom agreed that a merger would occur, and that the Trans Union Board needed to act on the merger proposal no later than September 21. *Id.* On September 19, Van Gorkom consulted with Trans Union's bank regarding financing and retained an outside attorney, instead of Trans Union's legal staff, to advise him on the merger. *Id.* On that same day, Van Gorkom called a special meeting of the Trans Union Board for September 20. *Id.* On September 20, Van Gorkom provided the Trans Union Board with a thirty-minute presentation on the merger. *Id.* at 868. The meeting lasted approximately two hours, and based solely on Van Gorkom's short oral presentation, the Trans Union Board approved the merger. *Id.* at 869. On September 22, Trans Union issued a press release announcing the definitive agreement. *Id.* On December 19, a shareholder commenced class action litigation. *Id.* at 870. On February 10, Trans Union stockholders approved the merger. *Id.*

The trial court found that the Trans Union Board's conduct was not reckless or improvident, but informed. *Id.* at 871. The trial court held that the Trans Union Board was free to turn down Pritzker's offer, and that the parties did not reach a legally binding offer until after the Trans Union Board had been informed of the merger terms. *Id.* However, the plaintiffs maintained on appeal that the initial decision to accept the $55 per share offer was not informed. *Id.* The Delaware Supreme Court agreed.

The Delaware Supreme Court found that the Trans Union Board's decision to sell the company to Pritzker was not an informed business judgment:

> The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.

Id. at 874. Thus, the court concluded that the Trans Union Board was grossly negligent in failing to act with informed reasonable deliberation in agreeing to the merger proposal on September 20. *Id.* at 882, 893 ("We hold, therefore, that the Trial Court committed reversible error in applying the business judgment rule in favor of the director defendants in this case."). Additionally, the court held that the Trans Union Board could be held liable for the fair value of the plaintiffs' shares on September 20. *Id.* at 893.

The *Van Gorkom* decision caused widespread angst about the personal culpability of corporate directors. *See* Sale, 89 Cornell L. Rev. at 466. The Delaware General Assembly swiftly amended the Delaware General Corporation Law to allow for an optional charter provision to exculpate directors for violating the duty of care. *Id.* This charter provision may only be proposed by directors and once approved by shareholders, may only be removed by directors. *Id.* In addition, several judicial decisions have chipped away at *Van Gorkom*'s breadth. *See, e.g.*, *Gantler*, 965 A.2d at 713 n.54 (holding that scope of the common law shareholder ratification doctrine encompasses only those director actions that do not legally require shareholder approval and overruling *Van Gorkom* to the extent it held otherwise); *Emerald Partners*, 787 A.2d at 90 ("The purpose of Section 102(b)(7) was to *permit shareholders* . . . to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of

monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct." (emphasis in original)).

Nevertheless, an essential point from *Van Gorkom* remains good law: A corporate board violates its fiduciary duty when it approves a merger or other corporate act inconsistent with the duty of care, loyalty, or good faith, and this act gives rise to a cause of action regardless of later shareholder approval. Delaware cases following *Van Gorkom* illustrate this principle.

C. Post-*Van Gorkom*

In *Dieter v. Prime Computer*, 681 A.2d 1068 (Del. Ch. 1996), Prime Computer, Incorporated (Prime) was a Delaware corporation with its offices in Massachusetts. D.R. Holdings, Incorporated (Holdings), a Delaware corporation, formed two wholly owned subsidiaries: Acquisition and DR Merger, Inc. (DR Merger), to acquire Prime. *Id.* at 1069. On June 23, 1989, the Prime board of directors (the Prime Board) approved a merger between Prime and Acquisition and DR Merger. *Id.* at 1070. The Prime Board announced the merger agreement on August 4, 1989. The plaintiffs, Prime shareholders, challenged the merger's terms and filed a motion for class certification against Prime, Acquisition, and DR Merger (collectively, the defendants). *Id.* at 1072. The defendants challenged the plaintiffs as appropriate representatives of the class and asserted that the plaintiffs failed the "typicality" requirement. *Id.* The defendants argued that the plaintiffs did not have a claim typical to other class members because "they purchased all of their shares of Prime stock between October 23, 1989 and December 12, 1989," well after the Prime Board announced the merger on August 4, 1989. *Id.*

The trial court agreed:

> The challenged transaction is [the Prime Board's] approval of the [m]erger. The alleged breach of fiduciary duty occurred at the time the [the Prime Board] approved the [m]erger [a]greement—June 23, 1989. It is not the [m]erger that constitutes the wrongful act of which [the plaintiffs] complain; it is the "fixing of the terms of the transaction." [The plaintiffs] will be subject to a defense that there is no continuing wrong. Arguably, [the defendants] refusal to cancel the [m]erger was not the wrongful act producing allegations of breach of fiduciary duty; it was the original decision to effectuate the [m]erger.

Id. (internal citations omitted).[9]

In *Seidel v. Lee*, 954 F. Supp. 810 (D. Del. 1996), the Delaware district court analyzed whether a plaintiff's state law claims in a securities based lawsuit were time-barred. In that case, the district court held that publicly filed documents give adequate notice of possible wrong-doing, sufficient to support a claim:

> However, beneficiaries should not put on blinders to such obvious signals as publicly filed documents, annual and quarterly reports, proxy statements, and SEC filings. Here, the Court concludes that the public documents, which form the basis of many of Plaintiff's claims, could have provided Plaintiff with adequate notice of any alleged misconduct by Defendants.

Id. at 817 (holding the doctrine of inherent unknowability inapplicable to the plaintiff's case and barring the plaintiff's state law claims).

In *Albert v. Alex. Brown Management Services*, No. Civ.A. 762-N, 2005 WL 1594085, at *1 (Del. Ch. June 29, 2005), the plaintiffs, investors in two exchange funds, sued the funds' managers for breach of fiduciary duty. *Id.* at *1. Each plaintiff contributed appreciated securities to the funds in the hopes of receiving a diversified basket of securities, capital appreciation, and tax deferral. *Id.* After the funds' value collapsed, the funds' managers suspended redemptions and communications with the investors. *Id.* The plaintiffs sued, and the managers sought to dismiss both complaints, arguing, *inter alia*, that the plaintiffs' claims were time-barred. *Id.*

The plaintiffs argued that their claims did not accrue until after the allegedly wrongful acts, specifically, when the funds' net asset value sank below the level the manager's initially reported. *Id.* at *18. The plaintiffs asserted that they could not

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[9] *See also Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) ("The wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. Any such wrong occurred at the time that enforceable legal rights against Seaboard were created. Suit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions.").

have suffered an injury or damages before suffering a loss relative to their initial investment. *Id.* The court rejected the plaintiffs' claim:

> This is incorrect. The law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred. Whether or not the plaintiffs could have sued for damages ***is not dispositive*** as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought ***injunctive relief***. They did not. Instead, they waited until the value of the [f]unds climbed to dizzying heights, and then came crashing down.

Id. (emphasis added). The court also described the strong policy considerations behind this view of claim accrual:

> The flaw in the plaintiffs' argument is best exemplified by their claims for hedging. The wrongful act the plaintiffs allege is the unhedging of the funds. However, after the defendants unhedged the funds, their value skyrocketed. This was due, of course, to the fact that the funds were exposed to much more risk. Assuming (without deciding) that unhedging the funds was a wrongful act, it was wrongful because it exposed the funds to this extra risk. However, under the plaintiffs' theory, they are given the equivalent of a call option. If the unhedging of the funds works out, and the value of the funds goes up, the plaintiffs will have no complaint. But if the hedging (or lack thereof) strategy does not work out, and the value of the funds falls, the plaintiffs can sue. This clearly is not, and should not be, the law. The plaintiffs made the decision to ride the bubble to the top. They cannot now complain that the bubble burst. The court reiterates that a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.

Id.

The *In re SunGard Data Systems, Inc. v. Shareholders Litigation*, No. Civ.A. 1221-N, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005), decision is an example of a suit actually *commenced* under the post-*Van Gorkom* accrual principle. In that case, shareholders of SunGard Data Systems, Incorporated (SunGard) filed a class action suit claiming breach of fiduciary duty in the proposed merger of the company with Solar Capital Corporation (Solar). *Id.* at *1.

Following approval of the merger, SunGard's shareholders were to receive $36 per share, a 44.4% premium over the share's prior market price. *Id.* The plaintiffs claimed that the defendants breached their fiduciary duties by agreeing to an unfair price and that the defendants failed to provide adequate disclosure of the proposed merger. *Id.* The plaintiffs sought an order expediting proceedings for the purpose of presenting a motion for a preliminary injunction. *Id.* The court denied the motion and ruled the plaintiffs failed to present a colorable claim. *Id.* at *1–2 ("The Proxy Statement devotes over 15 pages to a description of the investment bankers' analyses . . . [T]his information is public and readily available to the shareholders. Viewed in relation to the 'total mix' of available disclosure, this claim does not give rise to a colorable claim of breach of the duty of disclosure."). The *SunGard* decision is a practical application of the post-*Van Gorkom* rule indicating that Delaware courts expect claims for breach of fiduciary duty to be brought at the time the alleged breach occurs, and that the viability of those claims will be evaluated with reference to disclosures made when a merger is proposed and accepted.

Finally, the Delaware Supreme Court appears to have given a sign of approval of the post-*Van Gorkom* approach to claim accrual in its review of *In re Coca-Cola Enterprises, Inc. Shareholders Litigation*, C.A. No. 1927-CC, 2007 WL 3122370, at *1 (Del. Ch. Oct. 17, 2007). *See Int'l Brotherhood of Teamsters v. Coca-Cola Co.*, No. 601, 2008 WL 2484587, at *1 (Del. June 20, 2008) ("This 20th day of June 2008, upon consideration of the briefs of the parties, and their contentions in oral argument, it appears to the Court that the judgment of the Court of Chancery should be affirmed on the basis of and for the reasons set forth in its decision dated October 17, 2007.").[10]

In that case, the International Brotherhood of Teamsters (the Teamsters) filed a derivative action against Coca-Cola (Coke) alleging breaches of fiduciary duty. *Coca-Cola*, 2007 WL 3122370, at *1. Nominal defendant, Coca-Cola Enterprises (CCE), was the largest bottler and distributor of Coke beverage products in the world. *Id.* Initially formed as a wholly owned subsidiary of Coke, CCE was spun off in 1986 as an independent, public company. *Id.* Its relationship with former parent Coke continued pursuant to a series of contracts and licensing agreements. *Id.* The most important of those contracts was the 1986 Master Bottle Contract (the 1986 MBC). *Id.* The 1986 MBC defined the contours of the

[10] *Int'l Brotherhood of Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Table) (Del. 2008).

relationship between CCE and Coke, and the plaintiffs alleged that Coke and CCE's directors worked together to abuse the relationship between the two companies. *Id.* at *2. The Teamsters filed suit on February 7, 2006. *Id.* at *1–2. Coke argued that regardless of any actions taken in the years immediately preceding the lawsuit, all of the Teamsters' claims arose from the 1986 MBC. *Id.* at *2. Thus, Delaware's three year statute of limitations barred the Teamsters' complaint. *Id.* at *4 ("Where, as here, a plaintiff seeks money damages for breach of fiduciary duties, the claim will 'be subject to the three-year limitations period of 10 *Del. C.* § 8106' and this Court need not 'engage in traditional laches analysis.'" (citations omitted)). The trial court agreed, and held that under Delaware law, a plaintiff's cause of action accrues at the moment of the wrongful act—not when the harmful effects of the act are felt—even if the plaintiff is unaware of the wrong. *Id.* at *5, 7 ("CCE's relationship with Coke may not be optimal, but it is guided by a contract formed in 1986.").[11]

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[11] The trial court in the instant case cited *Coca-Cola* in support of its finding in favor of Petitioner:

> As recently re-affirmed by the Delaware Supreme Court, there can be no breach of fiduciary duty claim regarding an underlying contract until the contract is legally enforceable. Accordingly, since FITG had no right to enforce the merger until the closing date, plaintiff's claims for breach of fiduciary duty did not accrue until that date.

However, the court of appeals adequately addressed the trial court's misapprehension of *Coca-Cola*'s "legally enforceable" language:

> Finally, we do not believe the "legally enforceable rights" language in *Kahn* and *Coca–Cola* necessitate[s] a finding that [Petitioner's] claim accrued after the merger. Once the merger agreement was signed, SCI and FITG had legally enforceable rights against each other to proceed with all aspects of the merger agreement in good faith. If they did not, they would be in breach of the agreement and subject to suit. More importantly, once the merger agreement was signed, [Petitioner], as a shareholder, had a legally enforceable right to enjoin the merger.

Menezes, 392 S.C. at 596, 709 S.E.2d at 121 (alterations added).

In our view, post-*Van Gorkom* decisions stand for the proposition that, under Delaware law, a shareholder's claim for breach of fiduciary duty accrues at the time corporate directors or officers breach their fiduciary duty. In the merger context, this includes a board of directors fixing merger terms inconsistent with their fiduciary role. The leading treatise on Delaware corporation law reflects this view:

> Generally, the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt. Therefore, the circumstances of the case will determine whether the transaction is executed or continuing. For instance, an offer made by the corporation to certain of its stockholders to exchange one class of stock for another, which was specifically conditioned on approval by the corporation's other stockholders, was held to not be completed until stockholder approval was obtained. ***On the other hand, both a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and not to be continuing transaction up to the time of stockholder approval.***

2 Edward P. Welch, *Folk on the Delaware General Corporation Law: Fundamentals* § 327.3.2 (2010) (emphasis added);[12] *see also Wacht v. Cont'l Hosts, Ltd.*, Civ. A. No. 7954, 1993 WL 315461, at *2–3 (Del. Ch. Aug. 5, 1993) (finding that a shareholder could have challenged a proposed merger at the time of the merger's announcement).

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[12] *Kaufman v. Albin*, *supra*, relied on an older version of this treatise:

> Accordingly, the circumstances of the case will determine whether the transaction is executed or continuing. If the action complained of requires stockholder approval, the transaction is not considered complete until the stockholders have approved it.

Kaufman, 447 A.2d at 764 (citing Folk, *The Delaware General Corporation Law*, 487 (1967)). The revision to the Folk treatise demonstrates the Delaware court's evolution on the accrual of a claim for breach of fiduciary duty, and the inapplicability of the *Kaufman* decision to the instant case.

III. Petitioner's Claim

Petitioner argues that the court of appeals erred in holding that his claim for breach of fiduciary duty accrued when the SCI Board voted to approve the merger, and not when the merger was formally consummated by a shareholder vote. We disagree, and find that the trial court erred in relying on pre-*Van Gorkom* authority. The court of appeals properly reversed in light of the current state of Delaware law regarding accrual of a claim for breach of fiduciary duty.

Petitioner attempts to distinguish post-*Van Gorkom* case law, and argues, for example, that cases such as *Dieter v. Prime Computer*,[13] and *FMC Corporation v. R.P. Scherer Corporation*,[14] are inapplicable because those cases address a shareholder's standing to bring a claim for breach of fiduciary duty. This distinction is of no moment. In order to have standing one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a *real party in interest. Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996); *see, e.g., Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1293 (Del. 2007) ("In both actions, the defendants contend that the plaintiffs are not the real parties in interest. '[A] real party in interest objection closely resembles the defense of failure to state a claim for relief because it presupposes that the plaintiff does not have the substantive right [standing] to enforce the claim he is making.'" (alterations in original)) (citing 6A Wright, Miller & Kane, Federal Practice and Procedure § 1554 (3d 2004)).

A determination of when a claim accrues is essential in deciding whether a person has a viable stake in the subject matter of a lawsuit. Therefore, deciding the question of claim accrual through a standing analysis only increases the relevance of these opinions. Additionally, decisions addressing the standing issue are only a portion of the cases cutting against Petitioner's claim.

Petitioner also accuses the court of appeals of ignoring *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006), which allegedly makes "clear" that Petitioner's cause of action for breach of fiduciary duty could not have occurred prior to the closing of the merger. However, in our view, if the court of appeals "ignored" *Aidinoff*, it is because the case is inapposite.

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[13] 681 A.2d 1068 (Del. Ch. 1996).

[14] No. 6889, 1982 WL 17888, at *1 (Del. Ch. Aug. 6, 1982).

In *Aidinoff*, the plaintiff, Teacher's Retirement System of Louisiana (Teachers), sought relief on behalf of nominal defendant American International Group (AIG), against three AIG executives, Maurice Greenberg, Edward Matthews, and Howard Smith, and a separate corporation, Starr & Company, Incorporated (Starr) (collectively, the defendants). *Aidinoff*, 900 A.2d at 658. Starr operated four general insurance agencies and secured substantial payments from reinsurers dealing with AIG. *Id.* Greenberg, Matthews, and Smith were Starr's top three shareholders. *Id.* Greenberg served as Starr CEO, and Matthews and Smith served as directors. *Id.* Teachers claimed that Starr did not perform any duties that AIG could not perform in-house, and that the corporation existed merely as a vehicle to enrich Greenberg, Matthews, and Smith. *Id.*

Teachers alleged that this sham contractual relationship existed for at least twenty years before the period challenged in their complaint—1999 to 2004. *Id.* Teachers also complained that AIG annually decided to continue the practice. *Id.* at 658–59. The defendants argued, *inter alia*, that Teachers' claims were time-barred. *Id.* at 659. The court disagreed, and held that although the contractual relationship originated far outside the statute of limitations, AIG had no contractual duty to place business through Starr and had an annual opportunity to terminate Starr's contracts:

> Therefore, the complaint is not challenging the original decision of AIG to sign the [agreements] in the 1970s. It is attacking the allegedly disloyal and self-enriching decision of Greenberg, Matthews, and Smith to perpetuate an unfair relationship with Starr, with the supine complicity of the outside directors of AIG, who breached their duty of care by failing to understand, much less knowingly approve, the Starr—AIG relationship.

Id. at 659, 666. Curiously, Petitioner cites this very paragraph in support of his position. However, unlike the plaintiff in *Aidinoff*, Petitioner challenges an original decision, that of the SCI Board to adopt the terms of the merger with FITG. Petitioner does not challenge later, separate acts, such as the propriety of the shareholder vote approving the merger. Thus, *Aidinoff*'s holding does not support Petitioner's view of claim accrual, and its focus on the possible continuing wrong of contract renewal is immaterial to the instant case.

The most recent Delaware authority does not comport with the notion that a plaintiff must wait for actual damages prior to filing an action for breach of fiduciary duty, and there are important public policy justifications for this trend.

For one, the actions of corporate directors and officers are given deference through application of the business judgment rule, but this deference evaporates when the directors and officers fail to abide by the duties of care, loyalty, or good faith. Second, forcing a plaintiff to wait for actual damages translates into requiring a company and its shareholders to undergo possibly significant harm instead of taking action to prevent that harm. Efficiency and opportunity costs disfavor this approach. Finally, requiring a showing of actual damages for a breach of fiduciary duty allows individuals to purchase a lawsuit after a merger's terms have been fixed and publicly announced. This type of litigation has been expressly rejected by Delaware courts.

CONCLUSION

The foregoing analysis of Delaware law makes clear that a claim for breach of fiduciary duty accrues at the time of the breach, and that a plaintiff need not show damages in order to bring her claim. In the merger context, this breach takes place when the directors fix or adopt the terms of a merger contract. The facts of the instant case demonstrate that any alleged breach occurred when the SCI Board adopted and publicly announced the terms of the merger with FITG. Following the SCI Board's adoption and announcement of the merger terms, but prior to the merger's completion, Petitioner released all claims he held against SCI.[15]

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[15] The court of appeals' decision contains a separate concurrence addressing the trial court's combination of Petitioner's ten claims for breach of fiduciary duty. *Menezes*, 392 S.C. at 597–98, 709 S.E.2d at 121–22. The concurrence states that on remand, the trial court should divide Petitioner's claim because "one or more acts could be deemed a separate breach of fiduciary duty based on when each act occurred." *Id.* at 598, 709 S.E.2d at 122. We disagree.

Procedurally, any objection to the trial court's consolidation of Petitioner's allegation is not preserved for review. *Id.* at 598, 709 S.E.2d at 121. Additionally, it is not even clear that Petitioner contests the consolidation. *Id.* ("Appellants neither argued that the claims should be considered separately, nor asked the court to alter or amend its ruling on the issue.").

According to the concurrence, any claims arising between Petitioner's signing of the Release on September 28, 2006 and the finalizing of the merger on October 20, 2006, are valid. The concurrence is theoretically correct. If Petitioner released all claims on September 28, 2006, any *separate* breaches of fiduciary duty that occurred after that point would not be covered by the release. However, Petitioner's ten allegations are all consanguine with the SCI Board's adoption of the

Therefore, we acknowledge the court of appeals' well-reasoned analysis, but disagree that Petitioner's claim merely "could" have arisen prior to the closing of the merger. Instead, we find that Petitioner held a valid claim at the time he signed the Release, and therefore, his suit cannot be sustained and is dismissed with prejudice. The court of appeals correctly held that trial court erred in dismissing Respondents' defenses and counterclaim relating to the Release.

Thus, we remand for proceedings consistent with this opinion. The court of appeals' decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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merger terms. Each of the ten allegations stems from the SCI Board's fixing the merger terms, which occurred prior to the date Petitioner released all claims against SCI. Thus, the trial court properly consolidated Petitioner's allegations, and the parties to this action acquiesced in that decision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Myron Samuels, Appellant.

Appellate Case No. 2011-185186

Appeal from Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 27255
Heard March 5, 2013 – Filed May 22, 2013

AFFIRMED

James M. Griffin, of Lewis, Babcock & Griffin, LLP, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina J. Catoe, Assistant Attorney General Mark R. Farthing, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

JUSTICE HEARN: Duplicity is an ill-favored quality in both life and the law, and here we deal with duplicity in several forms. While commonly understood to be synonymous with deceitfulness and double-dealing, when used in

the law, duplicity means "[t]he charging of the same offense in more than one count of an indictment." Black's Law Dictionary 541 (8th ed. 2004). After a course of duplicitous conduct in which appellant Myron Samuels romanced two women at the same time, he was tried and convicted for assaulting those women. He now challenges his conviction and sentence on the grounds the indictment was duplicitous. Because of the distinct risks created by duplicitous indictments, we hold that an indictment is defective and entitles a defendant to relief if it is duplicitous, providing it results in prejudice to the defendant. Although we agree the indictment was duplicitous, we find Samuels was not prejudiced and accordingly affirm his conviction and sentence.

FACTUAL/PROCEDURAL BACKGROUND

Samuels was romantically involved with two women, Patricia Speaks and Carla Daniels, among others, but told each woman he was involved with her alone. Eventually, Speaks and Daniels learned of the other's relationship with Samuels. On the evening of April 14, 2009, Daniels traveled to Speaks' home in Columbia, suspecting Samuels was there and wanting to confront him. Samuels was there, and after Daniels entered the home, she and Speaks began to discuss their situation. Speaks informed Daniels that Samuels was romantically involved with two additional women and that she had copied their telephone numbers from his phone. They then decided to call the other women in Samuels' presence, ostensibly to alert them to the health dangers inherent in Samuels' duplicity.

While Daniels was speaking to one of the other women on the phone, she felt something touch her forehead. She looked up to see Samuels holding the barrel of Speaks' pistol against her forehead. Speaks began screaming, and Samuels then turned to her and threatened her with the gun. Samuels then fled from the home, and when Speaks ran after him to retrieve her pistol, Samuels hit her, knocking her to the ground. The women then called the police.

Samuels was indicted for one count of assault with intent to kill by a Richland County grand jury. The one count alleged: "That Myron Samuels did in Richland County on or about April 14, 2009, with malice aforethought commit an assault with intent to kill upon the victim, Patricia Speaks and/or Carla Daniels, in violation of Section 17-25-30 C/L, Code of Laws of South Carolina, (1976, as amended).

At the outset of Samuels' trial, he moved to quash the indictment on the ground that it charged two separate offenses by listing both Daniels and Speaks as victims. Samuels contended that by including two victims in the indictment, the jury could be divided on whether he committed the assaults on each woman, but could still convict him if each juror believed he assaulted one of the women. He also argued the indictment was deficient because the grand jury was presented with two victims and there was no way to determine that the grand jury voted for a true bill as to both victims. The State asserted that an indictment only must give a defendant notice of the alleged crime, and this indictment satisfied that standard. The circuit court ruled the indictment was valid because it provided notice and denied the motion, relying on *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

At the conclusion of the trial, a special verdict form with two parts was submitted to the jury without objection. First, the jury was asked to determine whether Samuels was guilty of assault with intent to kill, guilty of assault of a high and aggravated nature, guilty of simple assault, or not guilty as to Speaks. The form then asked the jury to make a separate finding for Daniels using the same options. The jury found Samuels guilty of simple assault of Speaks and assault of a high and aggravated nature of Daniels.

During the trial, the court had stated that even if the jury found him guilty as to both victims, he could only be sentenced on one count. At sentencing, Samuels argued that under the rule of lenity, he could only be sentenced to the lesser offense of simple assault. The court declined that request, and for the crime of assault of a high and aggravated nature, sentenced him to ten years' incarceration, suspended to time served and three years of probation, two hundred hours of community service, and anger management classes.

ISSUES PRESENTED

I. Did the circuit court err in refusing to quash the indictment?

II. Did the circuit court err in sentencing Samuels for assault of a high and aggravated nature rather than simple assault?

LAW/ANALYSIS

I. DUPLICITOUS INDICTMENT

Samuels asserts the circuit court erred in denying his motion to quash because the indictment was duplicitous in alleging he assaulted "Patricia Speaks and/or Carla Daniels." While we agree that the indictment was duplicitous, we hold defendant is not entitled to any relief due to the lack of prejudice.

In *Gentry*, we held the sufficiency of an indictment is determined by whether

> (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500. The indictment here provided sufficient notice to Samuels and the court by stating what crime he allegedly committed, on what date, where, and the name of the victims. In short, Samuels knew from the indictment what allegations he would be required to defend against at trial, and the indictment was therefore sufficient under *Gentry*.

However, *Gentry* addressed the sufficiency of indictments generally, and did not consider duplicitous indictments which allege two distinct and separate offenses in the same count. *See* 41 Am. Jur. 2d *Indictments and Informations* § 207 (2013). Duplicitous indictments "implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution." *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980). For example, such indictments present the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count. *United States v. Robinson*, 627 F.3d 941, 957 (4th Cir. 2010); *see also United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001) (discussing the "risk that the jurors may not have been unanimous as to any one of the crimes charged"). Duplicitous indictments also can create sentencing problems, such as where a jury's general verdict leaves the sentencing judge unsure as to whether the defendant is guilty of and subject to

punishment for multiple offenses. *See Sturdivant*, 244 F.3d at 78–79 (discussing the sentencing implications of a duplicitous indictment and general verdict). For those reasons, duplicitous indictments are generally considered defective and may be dismissed on that ground. *See* 41 Am. Jur. 2d *Indictments and Informations* § 209 (2013).

However, proceeding to trial on a duplicitous indictment does not alone create reversible error. For example, federal courts employ a prejudice analysis and will reverse a conviction for duplicity only where two or more distinct crimes are combined into one count and the defendant is prejudiced thereby. *See United States v. Mauskar*, 557 F.3d 219, 226–27 (5th Cir. 2009); *Sturdivant*, 244 F.3d at 75. In adopting that standard, the United States Court of Appeals for the Second Circuit reasoned that "[i]f the doctrine of duplicity is to be more than an exercise in mere formalism," it can only be applied where prejudice exists, i.e., where the policy considerations supporting the rule against duplicitous indictments are actually present. *Murray*, 618 F.2d at 897. In analyzing whether a defendant suffered prejudice, the Second Circuit has helpfully listed relevant policy considerations:

> avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in subsequent prosecutions.

Sturdivant, 244 F.3d at 75.

We recognize both the policy considerations supporting a prohibition against duplicitous indictments and that the *Gentry* standard does not protect against the potential harms. In recognition of those considerations, but also to avoid mere formalism, we adopt the federal standard. Accordingly, we supplement the *Gentry* standard by holding that a defendant will prevail on appeal when he establishes both that an indictment was duplicitous and that he was prejudiced by the duplicity.

Applying that two part standard to this case, we first agree with Samuels that his indictment was duplicitous. For offenses against the person, a separate offense exists for each person subjected to the criminal conduct. *See State v. Jones*, 344

S.C. 48, 54, 543 S.E.2d 541, 543 (2001). Samuels was charged with one count of assault with intent to kill, and assault requires that the defendant engage in conduct that threatens another person, and thus is clearly an offense against the person. *See State v. Sutton*, 340 S.C. 393, 397–98, 532 S.E.2d 283, 285–86 (2000). Therefore, each victim of his threatening conduct constituted a new assault offense. By including both victims in one count, the indictment charged two offenses in one count and was defective for duplicity.

Despite the indictment's duplicity, we find no prejudice to Samuels due to the actions of the circuit court. A duplicitous indictment's potential prejudice can be cured through jury instructions and the use of a special verdict. *See Robinson*, 627 F.3d at 958 ("It is black letter law that duplicitous indictments can be cured through appropriate jury instructions."); *Mauskar*, 557 F.3d at 226–27 (finding the defendant was not prejudiced due to the trial court's clear instructions that in order to return a guilty verdict, the jury had to unanimously agree he committed one of the offenses in a duplicitous indictment). At Samuels' trial, the circuit court instructed the jury a guilty verdict required unanimous agreement among the jurors that Samuels assaulted Daniels or unanimous agreement he assaulted Speaks. The court also employed a special verdict form requiring the jury to make separate findings of guilt or innocence as to Daniels and Speaks. Furthermore, Samuels was only sentenced for one offense despite the jury finding him guilty of two offenses. Accordingly, because Samuels cannot demonstrate how he was prejudiced by the duplicitous indictment, he is not entitled to the reversal of his conviction.

II. SENTENCING

Samuels also asserts that because the indictment was duplicitous the circuit court erred in sentencing him for assault of a high and aggravated nature. He contends the court was required to apply the rule of lenity and sentence him for simple assault, the lesser of the two offenses for which he was found guilty. We disagree.

Initially, we note the rule of lenity is a rule of statutory construction. *See Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) ("When a *genuine* ambiguity exists as a result of the proposed application of [a penal statute] to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor."); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("[W]hen a statute is penal in nature, it must be construed strictly against

the State and in favor of the defendant."). Because the circuit court was not construing a penal statute in sentencing Samuels, the rule of lenity is not applicable here.

Samuels also relies on *Sturdivant* for the proposition that when a defendant is charged through a duplicitous indictment, the sentencing court must give him the benefit of the doubt and sentence him to the lesser offense. We find that Samuels reads *Sturdivant*'s holding too broadly and it is distinguishable on the facts. There, unlike the present case, the jury returned a general verdict on the duplicitous indictment. *Sturdivant*, 244 F.3d at 75. At sentencing, the trial court assumed the jury found the defendant guilty of both offenses contained in the duplicitous indictment and sentenced him accordingly. *Id.* On appeal, the Second Circuit found the defendant had been improperly sentenced based on both offenses because it was unclear from the general verdict which of the two offenses the jury unanimously agreed upon. *Id.* at 78. Therefore, the court remanded for resentencing, concluding the defendant should be sentenced to the offense involving the lesser penalty in order to ensure he was not prejudiced by the unclear nature of the jury's verdict. *Id.* at 80.

The present case is materially different from *Sturdivant* in that here, the circuit court employed a special verdict form that unequivocally established the jury found Samuels guilty of both assault of a high and aggravated nature and simple assault. However, because Samuels was indicted and tried for only one count, the court only sentenced him for one of the offenses comprising that count. Because he was found guilty of assault of a high and aggravated nature, we find no error in the circuit court sentencing him for that offense.

CONCLUSION

For the foregoing reasons, we hold that although Samuels' indictment was duplicitous, it does not require reversal because he was not prejudiced. We also hold the circuit court did not err in sentencing Samuels for assault of a high and aggravated nature. Accordingly, we affirm Samuels' conviction and sentence.

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

The Supreme Court of South Carolina

RE: Rule 419 of the South Carolina Appellate Court Rules

Appellate Case No. 2013-000955

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 419 of the South Carolina Appellate Court Rules is amended to read as shown in the attachment to this order. This revised rule is effective immediately.

For persons whose memberships were administratively terminated under Rule 419 prior to this order, their membership records shall be changed to reflect that they are now administratively suspended. Those persons may seek reinstatement as provided by paragraph (e) of the revised rule.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 20, 2013

RULE 419
ADMINISTRATIVE SUSPENSIONS

(a) Applicability. This rule governs suspensions for failing to pay the license fees required by Rule 410, SCACR, or to comply with the continuing legal education requirements of Rule 408, SCACR, and the regulations implementing that rule. This rule is applicable to persons licensed to practice law under Rules 402, 405, 414, and 415, and to persons licensed as a foreign legal consultant under Rule 424, SCACR.

(b) Due Date of Fees and Reports.

(1) Annual license fees required by Rule 410, SCACR, shall be due not later than January 1.

(2) Reports of compliance with continuing legal education requirements required by Rule 408, SCACR, and the regulations of the Commission on Continuing Legal Education and Specialization (Commission), including the required fee, shall be due not later than March 1. The reporting period for lawyers, judges and foreign legal consultants shall run from March 1 through the last day in February, annually.

(c) Failure to Comply.

(1) Promptly after January 15, the Bar shall notify persons who have failed to pay the annual license fees and assessments, including payment of any penalty, that they will be suspended if they do not pay those fees by February 15.

(2) Promptly after March 15, the Commission shall notify persons who have failed to file a report of compliance and pay the annual filing fee, including payment of any penalty established by the Commission, that they will be suspended if they do not file the report of compliance and pay the filing fee and any penalty by April 15.

(d) Suspension by Supreme Court.

(1) Promptly after February 15, the Bar shall forward a list of the persons who have not paid their license fees and penalties to the Clerk of the South Carolina Supreme Court. Those persons shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of admission or license to the Clerk of the South Carolina Supreme Court.

(2) Promptly after April 15, the Commission shall forward a list of the lawyers who have not filed reports of compliance with continuing legal education requirements and any required fee and penalty to the Clerk of the South Carolina Supreme Court. Those lawyers shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of admission or license to the Clerk of the South Carolina Supreme Court.

(e) Reinstatement by Supreme Court. Any person seeking reinstatement following a suspension under this rule must petition the South Carolina Supreme Court. The petition for reinstatement must be accompanied by a written statement from the South Carolina Bar showing that the person has paid all license fees and penalties due to the South Carolina Bar and by a written statement from the Commission showing that the person is current on all continuing legal education requirements, including any fees and penalties. The petition shall be accompanied by a filing fee of $200 if the person has been suspended for two years or less, a filing fee of $400 if the person has been suspended more than two years, and a filing fee of $600 if the person has been suspended for more than four years. A proof of service showing that a copy of the petition has been served on the Office of Disciplinary Counsel shall be filed with the petition. The Court may take such action as it deems appropriate on the petition for reinstatement, including, but not limited to, requiring the person to appear before the Court for a hearing, referring the petition to the Committee on Character and Fitness or referring the petition to the Commission on Lawyer Conduct for investigation and a recommendation as to the propriety of reinstatement. The petition of any person who has been suspended for more than four years shall be referred to the Committee on Character and Fitness for a recommendation as to whether the person has the character and fitness to again engage in the practice of law in South Carolina.

For a person holding a limited certificate or licensed as a foreign legal consultant, any petition for reinstatement must be filed within ninety (90) days of the date of

the suspension. Otherwise, the expiration of the license based on the suspension under Rules 405, 414, 415 or 424 shall be final.

The Supreme Court of South Carolina

Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, Wendell Turner, Phyllis Turner, Jack Turner, Jack Bennett, Joan Bennett, on behalf of themselves and other similarly situated, Respondents,

v.

Georgia-Pacific Corporation and/or Georgia Pacific LLC, Grayco Home Center Inc., Del Webb Communities, Inc., an Arizona Corporation, Razor Component Systems, Inc., a South Carolina Corporation, Razor Enterprises, Inc., a Texas Corporation and DJ Construction Co., LLC, Defendants,

Of Whom Georgia-Pacific Corporation and/or Georgia Pacific LLC and Del Webb Communities, Inc., an Arizona Corporation, are the Petitioners.

Appellate Case No. 2013-000175

ORDER

This matter is before the Court by way of a petition for a writ of certiorari filed by petitioner Georgia-Pacific Corporation to review the Court of Appeals' dismissal of the underlying appeals. Petitioner Del Webb Communities, Inc. has received an extension of time to serve and file a petition for a writ of certiorari.

Del Webb has now filed a motion to stay "all appellate timelines" because "[t]he parties have reached and are preparing settlement documents for presentation to and approval by the trial court." That motion was followed by a joint motion to stay, filed by all of the parties, in which the parties state they have reached a tentative agreement to settle this matter, "but further steps must be taken and the

trial court and this Court must approve the settlement to the extent required by law." Accordingly, the parties request an order staying the proceedings before this Court and requiring petitioners to inform the Court every thirty days in writing of the status of the matter before the trial court until the matter is resolved and a request for dismissal is made to this Court.

Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.

In the case at hand, the remittitur has not been sent to the circuit court because Georgia-Pacific has filed a petition for a writ of certiorari and Del Webb has sought an extension of time to file a petition for a writ of certiorari. *See* Rule 221, SCACR ("Where a petition for rehearing has been denied, the Court of Appeals shall not sent the remittitur to the lower court . . . until the time to petition for a writ of certiorari under Rule 242(c) has expired."). Therefore, the trial court cannot take action as contemplated by the parties unless the case is remanded to that court.

We hereby grant the motion to stay this matter, but only for a period of sixty days. If at the expiration of that period of time the parties require additional time, they can file another motion which sets forth their progress and explains why a further stay is necessary. However, no action may be taken by the circuit court with regard to the case except with regard to matters not affected by the appeal, unless the case is remanded to the circuit court.

Finally, because the issue of parties submitting settlement agreements to the lower court while the matter is pending before this Court has arisen with increasing frequency of late, we hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court. The parties must first seek to have the matter remanded to the lower court.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 20, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kendrick Taylor, Appellant.

Appellate Case No. 2009-143506

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

Opinion No. 5084
Heard September 11, 2012 – Filed February 20, 2013
Withdrawn, Substituted and Refiled May 22, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, for Respondent.

THOMAS, J.: Kendrick Taylor appeals his conviction for murder, arguing the trial court erred in (1) refusing to allow him to cross-examine the State's chief witness regarding unrelated charges against the witness that the State dismissed

after the witness gave a statement implicating Taylor in the present case and (2) allowing the State to introduce a SLED report prepared in connection with the matter. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 13, 2008, at 2:20 a.m., Forrest Johnson, a patrol officer with the North Charleston Police Department, received a call about a shooting in a residential neighborhood. Upon arriving at the scene, Johnson noticed the lifeless body of a middle-aged male, who was later identified as Scott Yelton. Yelton bled profusely on the left side of his face, and a great deal of blood soaked through his clothes. Johnson learned that Yelton had been involved in a disagreement involving a car and ended up either exiting the car or being forcibly ejected from it.

After examining contact numbers stored in Yelton's telephone, police located Joshua Wilder at his grandmother's house. Wilder voluntarily went to the police station; however, he did not provide truthful information about his involvement in Yelton's death and told police that he was asleep at his girlfriend's house when the incident occurred.

The day after Wilder met with the police, a pistol was found on the premises of AAA Rentals by Denise Berto, whose family owned the business. Berto gave the pistol to the North Charleston Police Department. Swabs taken from the pistol were sent to SLED on October 1, 2008. SLED test-fired the weapon and found it matched shell casings found at the scene. In addition, a detective with the North Charleston Police Department learned that the pistol had been in Taylor's possession. Both Wilder and Taylor were developed as suspects in the crime.

In October 2008, police arrested both Wilder and Taylor in connection with Yelton's death and charged them with murder. While in police custody, Wilder agreed to cooperate with the authorities. The charges against Wilder regarding his involvement in Yelton's death were then changed to accessory after the fact of murder.

According to Wilder, he and other drug dealers would give Yelton money or drugs in exchange for the use of Yelton's truck. During the early morning hours immediately preceding Yelton's death, Wilder drove his car, with Taylor in the front passenger seat, to Yelton's residence to "rent the truck." Yelton, who was drunk and high when he met Wilder and Taylor, told them he had already lent his

truck to someone else and was waiting for its return. Yelton then got into the back seat of the car that Wilder was driving and demanded money. Wilder and Taylor asked Yelton to leave, but Yelton refused.

At trial, Wilder testified that Taylor turned and struck Yelton with a gun in order to make him exit the vehicle. Yelton began bleeding, but resisted efforts to pull him from the car. By this time, Yelton's cousin arrived at the scene and attempted without success to extricate Yelton. According to Wilder, Taylor, already worried about blood inside the car, "flipped out" when Yelton threatened to call the law and shot Yelton several times after both Taylor and Yelton had exited the car. Taylor returned to the passenger seat of the car, and Wilder, in shock from the incident, drove away. As they proceeded, Taylor cautioned Wilder to "keep everything silent" and not to say anything to the police. A few days later, Taylor told Wilder that "he [Taylor] had to throw the gun" and wanted Wilder to look for it.

In July 2009, Taylor was indicted for Yelton's murder. His trial took place that same month. Wilder appeared as a witness for the State. Taylor did not take the stand; however, family members testified he was asleep at the time of the shooting.

The jury found Taylor guilty of murder, and the trial judge sentenced him to life imprisonment. Taylor then filed this appeal.

ISSUES

I. Did the trial court abuse its discretion in refusing to allow Taylor to cross-examine Wilder about charges against him that had been dismissed a few months before trial but were pending when Wilder gave a statement implicating Taylor in Yelton's murder?

II. Should the trial court have excluded a SLED ballistics report on the ground that it constituted impermissible bolstering of trial testimony?

STANDARD OF REVIEW

An appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Adams*, 354 S.C.

361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). "We review a trial court's decision regarding Rule 403, [SCRE] pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.* As with any issue regarding the admissibility of evidence, a trial court's decision to admit evidence notwithstanding an objection that it amounts to improper bolstering is to be reviewed on appeal under an abuse of discretion standard. *State v. Whitner*, 399 S.C. 547, 563, 732 S.E.2d 861, 867 (2012).

LAW/ANALYSIS

I. Cross-Examination Regarding Dismissed Charges

Taylor first argues the trial court should have allowed him to cross-examine Wilder about unrelated charges that were pending against Wilder when Wilder implicated Taylor in Yelton's murder and about the dismissal of those charges before Taylor's case was called to trial. We disagree.

Before Wilder's testimony began, both sides agreed that Taylor could cross-examine Wilder about prior convictions for breach of trust and shoplifting and that Wilder's convictions for simple possession of marijuana and driving under suspension would not be admissible. The trial court also stated it would admit a conviction for felony possession of cocaine and allow Taylor to (1) question Wilder about his pending charges, including any charges related to the present case and certain unrelated drug offenses and (2) suggest that Wilder might be testifying for the State to obtain a better deal for himself.

The only dispute concerned the admissibility of unrelated charges that were pending against Wilder when he agreed to cooperate in prosecuting Taylor for Yelton's murder. The pending charges included three counts of assault with intent to kill, one count of discharging a firearm into a car, and two counts of unlawful possession of a gun. These charges were dismissed in May 2009 by the same solicitor who was prosecuting Taylor in the present case. Taylor argued the dismissals were probative of Wilder's bias, further noting the disposition sheet said only that the charges were "nol prossed in the interest of justice."

The solicitor opposed allowing Taylor to question Wilder about the May 2009 dismissals or the corresponding charges, stating he dropped the charges because they were old and the lead officer on the cases had been arrested and indicted. The solicitor further advised the trial court that Wilder would testify that no promises or

threats had been made to influence his testimony. Although Taylor offered to stipulate that the officer had been arrested and the arrest may have been a reason for the dismissals, the solicitor refused to agree to the stipulation, explaining he "cut these cases loose" as soon as the officer was indicted and the dismissals were not part of any deal with Wilder.

The trial court ruled Taylor could not impeach Wilder with the dismissed charges. In so ruling, the court stated the information was unfairly prejudicial. The court further found that neither the charges nor their dismissals were related to the present case; therefore, to allow information about them was likely to confuse the jury and require the solicitor to testify under oath about his reasons for dismissal.

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[1] We agree with the trial court that the probative value of the information that Taylor sought to elicit from Wilder did not justify making the solicitor take the stand to testify about his reasons for dismissing the charges.[2] The probative value of the information in dispute was limited at best. Other than the fact that the charges were dismissed after Wilder implicated Taylor, there was no evidence linking the dismissals to Wilder's decision to cooperate with the police. To the contrary, the record indicates Wilder gave a statement against Taylor soon after his arrest, but the unrelated charges pending against him were not dismissed until several months later. Furthermore, Taylor was allowed to impeach Wilder on other felony charges that were still pending as well as on certain prior convictions; thus, he already had the means to attack Wilder's credibility and emphasize his motive to testify untruthfully. Balancing the limited probative value of the information against the possible confusion of the issues that would arise from requiring the solicitor to testify under

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[1] At oral argument, counsel for both sides agreed that a determination of this issue should be analyzed under Rule 403, SCRE.

[2] As the State notes in its brief, the South Carolina Rules of Professional Conduct allow a lawyer to act as an advocate in a trial in which the lawyer is likely to be a necessary witness only in certain limited circumstances, none of which are applicable here. Rule 3.7, RPC, Rule 407, SCACR.

oath about why he dismissed the charges and the delay that would result if such testimony required a substitution of counsel for the State, we hold the trial court acted within its discretion in refusing to allow Taylor to question Wilder about them.[3]

II. Admissibility of SLED Ballistics Report

Taylor also challenges the admission of a SLED report, arguing it constituted impermissible bolstering of the trial testimony of the SLED firearm and tool-mark examiner. We find no error.[4]

The State called Suzanne Cromer, a SLED firearm and tool-mark examiner. Cromer examined seven fired cartridge casings, four fired bullets, and the pistol found by Berto. The pistol had four unfired .40 S&W cartridges. Cromer testified the unfired rounds were the same brand as the fired cartridge casings, but she ultimately determined only that she could not rule out the pistol as the firearm from which the fired projectiles were shot. After Cromer testified about these results, the State offered her report, Exhibit 40, into evidence. Taylor objected, arguing

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[3] We are aware that in the recent decision of *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012), the Supreme Court of South Carolina reversed and remanded the defendant's conviction, holding "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." (emphasis in original). In *Gracely*, however, it appears undisputed that the minimum sentences avoided by the cooperating witnesses were for charges that were reduced in exchange for those witnesses' cooperation with the State.

[4] As noted in the opinion, the State proffered two reports prepared by Suzanne Cromer, its firearm and tool-mark identification examiner. Exhibit 40 noted only that the pistol could not be excluded as the weapon from which the fired projectiles were shot, and Exhibit 41 contained Cromer's findings that the seven fired cartridge casings came from the pistol. The State contends that Taylor purports to challenge the admission of only Exhibit 40, but gives record citations corresponding to Exhibit 41 and suggests that for this reason, we should hold the argument unpreserved for appeal. Based on our reading of Taylor's brief, we find that Taylor is challenging the admission of Exhibit 41 and that he has preserved this issue for appeal.

that Cromer already testified about the results and the report would be either cumulative or impermissible bolstering. The trial court overruled Taylor's objections and admitted the report.

Based on further testing, Cromer also determined that the seven fired cartridge casings were fired from the pistol. The State offered the corresponding report, Exhibit 41, into evidence, and Taylor objected to this evidence on the ground that it was cumulative or impermissible bolstering. The trial court admitted the report over Taylor's objection as well.

On appeal, Taylor argues "the SLED report constituted impermissible bolstering of [Cromer's] testimony because it unduly emphasized her ballistics opinion, which remained her *opinion* about the critical 'match' of the gun that was found where [Taylor] told his friends it would be found." (emphasis in original). We disagree.

"Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Here, Cromer's report was relevant to her own testimony, not that of any other witness. Nor did the report vouch for her credibility; rather, it was a written representation of the findings on which her opinions and testimony were based.

CONCLUSION

We hold the trial court did not abuse its discretion in refusing to allow Taylor to cross-examine Wilder about the pending charges against him that were dismissed after Wilder agreed to cooperate with the State. We also affirm the trial court's admission of the SLED report documenting the link between Taylor's pistol and the cartridge casings found at the crime scene.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia Richardson, Appellant,

v.

Piggly Wiggly Central, Inc., Respondent.

Appellate Case No. 2012-207446

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge

Opinion No. 5134
Heard April 4, 2013 – Filed May 22, 2013

AFFIRMED

Garryl Deas, of the Garryl Deas Law Firm, of Sumter, for Appellant.

Thomas E. Player, Jr., of Player & McMillan, LLC, of Sumter, for Respondent.

KONDUROS, J.: Cynthia Richardson appeals the circuit court's reversal of the magistrate court's denial of Piggly Wiggly Central, Inc.'s motion for judgment notwithstanding the verdict (JNOV). We affirm.

FACTS

On the morning of October 11, 2008, Richardson went to Piggly Wiggly. It was raining as she entered the store. Richardson purchased a loaf of bread and was leaving when she slipped on the wet concrete outside of the store. She suffered pain to her right knee and back.

Richardson filed an action in magistrate's court alleging Piggly Wiggly was negligent for failing to warn of the dangerous condition created by the rain on the sidewalk. At trial, Richardson testified she slipped outside of the store. She described the flooring inside Piggly Wiggly as tile and outside as concrete. When asked, she specifically stated she slipped on the concrete. At the close of Richardson's case, Piggly Wiggly moved for a directed verdict on the grounds that Richardson failed to present any evidence the store had created an unsafe condition. The magistrate denied the motion. The jury found Piggly Wiggly negligent and awarded Richardson $3,870 in damages. Piggly Wiggly filed a JNOV motion, which the magistrate denied.

Piggly Wiggly appealed. The circuit court reversed the denial of the JNOV motion, finding Richardson slipped outside of the store and the mere fact she slipped was not evidence of an unreasonably dangerous condition. Richardson filed a motion for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

In reviewing a magistrate's decision, the circuit court is not bound by the lower court's findings of fact. *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). The circuit court must give judgment according to the justice of the case. S.C. Code Ann. § 18-7-170 (1985).

A motion for a JNOV is merely a renewal of the directed verdict motion. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). When reviewing the circuit court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The circuit court must deny a motion for a directed verdict or JNOV if the evidence yields

more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

LAW/ANALYSIS

Richardson contends the circuit court erred in granting JNOV. She maintains because she was an invitee, Piggly Wiggly owed her a duty to keep its premises reasonably safe. She alleges it breached that duty by failing to warn of a dangerous condition of which it had actual or constructive knowledge. We disagree.

In South Carolina, a merchant owes a customer a duty of ordinary care to keep his premises in a reasonably safe condition. *Wimberley v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 120-21,165 S.E.2d 627, 628 (1969) ("[O]ne who operates a store is not an insurer of the safety of its customers, the duty owed them is rather the duty of exercising ordinary care to keep parts of the store as are ordinarily used by customers in a reasonably safe condition."). However, "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991) (emphasis omitted).

At trial, Richardson testified she knew it was raining when she entered Piggly Wiggly. The fact that the sidewalk was wet and slippery when she left the store should have been apparent. In a similar case, the Supreme Court of South Carolina held an owner did not have a duty to warn an invitee about the danger of wet grass "because it was a natural condition, the peril of which was obvious. In contrast, a latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is *reasonably* unaware. It is one which a reasonably careful inspection will not reveal." *Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 378, 409 S.E.2d 349, 351 (1991).

Piggly Wiggly did not breach its duty to provide reasonably safe premises. Furthermore, Richardson's testimony conclusively shows she slipped on the ground outside of the store and she knew it was raining and the sidewalk was uncovered. When viewed in a light most favorable to Richardson, she presented no evidence Piggly Wiggly was negligent.

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MicroClean Technology, Inc., Appellant,

v.

EnviroFix, Inc., Respondent.

Appellate Case No. 2011-193786

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5135
Heard December 12, 2012 – Filed May 22, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Terry A. Finger, of Finger & Fraser, PA, of Hilton Head Island, for Appellant.

Robert Ernest Sumner, IV, and Trudy Hartzog Robertson, both of Moore & Van Allen, PLLC, of Charleston, for Respondent.

THOMAS, J.: Appellant MicroClean Technology, Inc. brought this action against Respondent EnviroFix, Inc. for breach of contract, claim and delivery, and quantum meruit arising out of a dispute between the parties about the performance of two licensing agreements. EnviroFix counterclaimed for breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, negligent

misrepresentation, and fraudulent misrepresentation. After a bench trial, the Beaufort County Master-In-Equity issued an order in which he found EnviroFix had terminated one of the agreements and owed MicroClean only those license fees accruing during the notice period on that agreement. The Master also allowed EnviroFix to retain possession and ownership of certain items that MicroClean sought in its claim and delivery action and awarded MicroClean the security deposit paid by EnviroFix as liquidated damages for the property. Although the Master also granted MicroClean damages for breach of contract, he offset this award by a greater amount of damages granted to EnviroFix on its breach of contract counterclaim. MicroClean appeals. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Background

MicroSweep, a Delaware corporation with its principal place of business in Texas, is a manufacturer of certain proprietary products. In 2004, MicroSweep began to distribute the BioTower, a machine used to clean and purify the air in cars, homes, and commercial establishments.

MicroClean, a South Carolina corporation with its principal place of business in Hilton Head, is a licensor of the BioTower. Ansley Cohen and Jim Bragonier were its principals and officers during the events in question. On August 2, 2004, MicroSweep and MicroClean entered into a written distributorship agreement granting MicroClean a license to distribute the BioTowers.

EnviroFix, a North Carolina corporation with its principal place of business in Raleigh, provides cleaning services and uses MicroSweep's proprietary products. During the events in question, David Stoner was the principal of the company.

The Parties' Agreements

On July 14, 2004, about two weeks before its agreement with MicroSweep was final, MicroClean entered into a License Agreement with EnviroFix in which EnviroFix received a non-exclusive right and license to use proprietary products manufactured by MicroSweep in certain geographic locations for six years.

Under Section 3 of the License Agreement, EnviroFix was to pay to MicroClean a territory fee of $25,000 when the parties signed the Agreement. Thereafter, for a

six-year term, EnviroFix was to pay MicroClean a monthly license fee for the use of four BioTowers provided by MicroClean. The license fee was $1,000 per month and due on the first day of each month for the first twelve months. After that time, the fee was to increase to $1,250 per month. The parties further agreed "the License Fee for the BioTowers shall be due on each machine for no more than six years after delivery, and once License fees have been made for six years[,] ownership of such BioTower will be deemed transferred to [EnviroFix], with no further payment being due for such machine."

Section 3 also provided that during the six-year term, MicroClean would "have the responsibility for maintenance and repairs on the Proprietary Products, except to the extent that any such repairs are necessitated by the neglect or wrongful actions of [EnviroFix], in which case [EnviroFix] was to make the repairs at its own cost." Furthermore, during any period that a proprietary product was under repair by MicroClean and the repair was not necessitated by neglect or wrongful actions attributable to EnviroFix, MicroClean was to waive the monthly license fee and provide a substitute product if one was available.

Pursuant to Section 4, EnviroFix paid a security deposit of $15,000 for the four BioTowers when the parties executed the agreement. This deposit "was to be returned at the end of the six year term, provided [EnviroFix] has been in full compliance with all terms hereof."

Section 7(c) of the License Agreement addressed the issue of late payments and provided that "[EnviroFix] will promptly pay to [MicroClean] the Monthly License Fee. Any payment not received by the tenth day of any month will bear a late fee of $100, and will thereafter bear interest at an annual rate of 18%."

Several sections of the License Agreement addressed the parties' rights and obligations in the event the agreement was to be terminated.

Section 2 gave EnviroFix the right to terminate the agreement without cause, provided it gave "60 days advance written notice of its desire to terminate this Agreement, unless this Agreement shall have been sooner terminated by [MicroClean] as a result of breach hereof by [EnviroFix]."

Under Section 9, MicroClean had the right at its election to declare the License Agreement "immediately terminated" in the event of noncompliance by EnviroFix

with any provision in the agreement and EnviroFix's failure to cure the breach within twenty days following written notice of the breach.

Under Section 10, upon termination or expiration of the License Agreement, MicroClean was to take possession of all proprietary products that were provided to EnviroFix for less than six years. EnviroFix was to "fully cooperate with [MicroClean] in the delivery of all such Proprietary Products used by [EnviroFix], which delivery shall be at the expense of [MicroClean]." The parties further agreed that MicroClean "shall have the right to pick up such items without having to resort to legal process of any kind." EnviroFix had the right to request that MicroClean purchase any equipment licensed for the full six-year term at fair market value. This value was to be determined by an accountant or other financial professional regularly employed by MicroClean; however, EnviroFix had the right to have its own financial professional value the equipment as well. If the parties disagreed on the fair market value, they were to have this determination made by an independent appraiser.

Section 12 provided that "[a]ll notices, requests, demands, tenders and other communications required or permitted hereunder shall be in writing and shall be deemed to have been duly given if hand delivered, if sent by reputable overnight delivery service, or if mailed, by certified mail, return receipt requested, postage prepaid." Section 12 also gave specific addresses for both MicroClean and EnviroFix. In addition to a post office box address for MicroClean, Section 12 also gave MicroClean's street address for notices sent by overnight delivery.

On May 9, 2005, the parties executed a second document, entitled "Equipment Schedule," whereby EnviroFix obtained two additional BioTowers from MicroClean at a total cost of $7,000 plus monthly payments of $373. The monthly payments were due on the tenth day of each month from July 10, 2005, until July 10, 2008. Upon receipt of the thirty-sixth monthly payment, ownership of these two BioTowers would be deeded to EnviroFix. The Equipment Schedule referenced the License Agreement, stating in part: "It is agreed that as each new piece of licensed equipment is provided to [EnviroFix], the parties will sign a new copy of this page, detailing the equipment and terms and will attach same to the License Agreement, intending to incorporate the Schedule into the License Agreement."

Events Leading to Litigation

Although the BioTowers were effective in removing odors, EnviroFix complained the caps on the machines warped and the digital timers did not work. MicroClean characterized the complaint about the caps as a cosmetic issue that did not impair the performance of the BioTowers; however, EnviroFix maintained the problem adversely affected consumer confidence. Similarly, whereas MicroClean contended the timers were an optional feature that increased the convenience of the BioTowers but did not affect the actual operation of the equipment if they did not operate as expected, EnviroFix asserted proper functioning of the timers was important for safety and quality control.

On December 4, 2005, Stoner wrote a letter to MicroClean in which he expressed dissatisfaction with MicroClean's performance. In his letter, Stoner stated he informed MicroClean as early as December 2004 about mechanical problems EnviroFix was experiencing with the BioTowers, including not only the malfunctioning of the timers and the warping of the tower caps, but also a motor fan failure. Stoner also asserted that MicroClean: (1) failed to respond to his complaints in a timely manner; (2) never inspected or tested the BioTowers to ascertain whether they were in good working order; (3) failed to perform periodic maintenance on the machines; and (4) did no repairs or maintenance except for recent repairs made by MicroSweep on one machine. Stoner's letter ended as follows:

> This letter references only a few of the things you have not done as provided for by the terms [of] our agreement. Some may argue that these breeches [sic] of contract may be viewed as having already terminated our agreement. I do not know. I do know that due to your actions, or the lack thereof, that the spirit of the agreement has been violated and is dead.
>
> Please be advised I am not going to pay my monthly fees this month, nor will I pay any future monthly fees until my machines are repaired. I also ask that you remit to me $13,377.00 that I have paid in monthly fees on machines that are in disrepair and requiring maintenance. Remittance of the referenced fees and maintenance to

> repair my machines will enable me to consider forgiving your breech [sic] of our agreement.

Beginning in December 2005, EnviroFix did not pay the monthly fees required under the License Agreement and the Equipment Schedule.

On December 10, 2005, Cohen and Bragonier sent Stoner a letter asserting MicroClean advised MicroSweep about the problem with the warping caps soon after Stoner reported it. They also advised that MicroSweep immediately started researching the situation and changed its supplier and materials. Cohen and Bragonier also attempted to explain the changes were expensive and could not be made quickly. They also advised Cohen that the manufacturer did not require or suggest any preventive maintenance, MicroClean did not have trained technicians on staff, and the manufacturer discouraged third-party involvement. They also reminded Cohen that MicroClean did not expect the monthly license payment to be made for the number of days that a specific piece of equipment was "out of service." In closing, Cohen and Bragonier stated:

> MicroClean Technology, Inc. does not consider the agreement with EnviroFix, Inc. breached or "dead" and would again suggest that all parties take a practical approach to the solution to [the] problems. For the month of December 2005, MicroClean will extend a ten day grace period to EnviroFix before the established payment is considered late. *We would expect future payments will be made according to our agreement* and we will agree to work more closely with EnviroFix in an effort to get all future issues resolved quickly and to the satisfaction of all. (emphasis added).

In reply, Stoner sent a letter dated December 20, 2005, to MicroClean reiterating EnviroFix's position that the agreement with MicroClean was "void" and indicating that EnviroFix would consider the possibility of entering into a new agreement with MicroClean "[u]pon receipt of money from overpayment of licensing fees and return of EnviroFix's deposit."

In a letter dated January 24, 2006, Cohen acknowledged Stoner took the position that the parties' agreement was "terminated." Although Cohen indicated MicroClean was still willing to resolve the parties' differences and continue the

agreement, he also notified Stoner that MicroClean intended to pick up the six BioTowers in EnviroFix's possession on February 1, 2006, and requested that Stoner let him know where to retrieve them. Cohen also advised that MicroClean expected to receive a check to cover EnviroFix's use of the equipment through the end of January 2006.

The record on appeal does not indicate any clear response from EnviroFix to MicroClean's request to collect its equipment. Stoner testified only that "[t]hey told me they were coming up but they never showed up." In any event, it appears MicroClean did not attempt to retrieve the BioTowers on February 1, 2006, or any other time thereafter.

In March 2006, MicroSweep terminated its distributorship contract with MicroClean.[1] In its letter advising of the termination of the distributorship, MicroSweep also required that MicroClean terminate all prior agreements and commitments that it made with other resellers and distributors concerning MicroSweep equipment and services. MicroClean could continue to purchase BioTower machines from MicroSweep, but at a higher cost. Furthermore, MicroClean was still able to coordinate any repair requests from EnviroFix with MicroSweep.

The Lawsuit

On October 24, 2006, MicroClean filed this action for breach of contract, claim and delivery, and quantum meruit against EnviroFix, requesting $83,813 in damages under the License Agreement. MicroClean also sought an order requiring EnviroFix to return the six BioTowers that were provided under the License Agreement and Equipment Schedule. EnviroFix answered, denying the allegations in the complaint, and counterclaimed for breach of contract, breach of covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, and fraudulent misrepresentation.

The Master heard the matter on February 24, 2011, and issued an order on April 12, 2011.

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[1] The distributorship agreement required MicroClean to buy a certain number of BioTowers from MicroSweep in a stated period. MicroSweep terminated this agreement because MicroClean was unable to meet that quota.

As to MicroClean's breach of contract action, the Master found: (1) the parties entered into two separately enforceable contracts, namely, the License Agreement of July 14, 2004, and the Equipment Schedule dated May 9, 2005, (2) pursuant to Section 2, on December 4, 2005, EnviroFix gave a sixty-day notice of its desire to terminate the License Agreement, (3) MicroClean could not recover for breach of the License Agreement because it had been terminated by EnviroFix; however, EnviroFix owed MicroClean monthly license payments totaling $2,500 for December 2005 and January 2006, and (4) MicroClean was entitled to $11,190 for breach of the Equipment Schedule, representing thirty unremitted monthly payments. Adding the damages for breach of the Equipment Schedule to the unpaid license fees on the License Agreement, the Master awarded MicroClean $13,690.

The Master also denied MicroClean's claim for quantum meruit and EnviroFix's actions for breach of covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, and fraudulent misrepresentation. As to MicroClean's claim and delivery action, the Master found: (1) return of the BioTowers was impractical because the property was essentially a perishable item with no marketable resale value, (2) MicroClean could retain the $15,000 security deposit as liquidated damages for the four BioTowers it provided under the Licensing Agreement, and (3) upon payment of the thirty outstanding monthly payments due under the Equipment Schedule, EnviroFix could retain full possession and ownership of the remaining two BioTowers.

The Master granted EnviroFix's action for breach of contract, finding MicroClean failed to comply with the provisions in the License Agreement on maintenance and repair. Based on Stoner's testimony and written correspondence, the Master assessed the total value of the time that EnviroFix lost from mechanical failures of the BioTowers at $13,377. After subtracting this amount from $13,690, the damages awarded to MicroClean arising out of the Equipment Schedule, the Master granted MicroClean judgment of $313. MicroClean appeals.

ISSUES ON APPEAL

I. Did the Master err in (1) finding that MicroClean failed to prove a breach of the License Agreement and (2) limiting MicroClean's recovery on the License Agreement to unpaid fees for the two months immediately following EnviroFix's communication of its intent to end its relationship with MicroClean?

II. Did the Master err in resolving MicroClean's action for claim and delivery by allowing EnviroFix to retain possession of the BioTowers and allowing MicroClean to keep the security deposit as liquidated damages?

III. Did the Master err in awarding damages to EnviroFix on its breach of contract action?

STANDARD OF REVIEW

The issues raised in this appeal concern only the legal claims asserted by the parties; therefore, our standard of review is that applicable for actions at law. "When reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court's jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence." *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011).

LAW/ANALYSIS

I. Termination of the License Agreement

MicroClean first contends the Master erred in finding the two letters Stoner wrote in December 2005, were sufficient to satisfy the requirement in the License Agreement that EnviroFix provide sixty days' advance notice if it desired to terminate the License Agreement. In support of its position, MicroClean argues the letters did not provide sixty days' notice of termination and were not delivered in a manner designated as acceptable under the License Agreement. MicroClean also asserts EnviroFix's purported notice was ineffective to terminate the parties' agreement because EnviroFix refused to cooperate when MicroClean expressed its desire to regain possession of the BioTowers.

A. Error Preservation

We first address EnviroFix's argument that MicroClean raised the issue of nonconformance with the notice provisions of the License Agreement for the first time on appeal and therefore has failed to preserve this issue. We hold MicroClean preserved its argument that the notice EnviroFix provided was insufficient to effectuate a termination of the License Agreement. We agree with EnviroFix that MicroClean did not preserve its argument that the manner of delivery of the notice

was unacceptable, but hold that this failure does not affect the outcome of MicroClean's appeal.

1. Sufficiency of Notice

As to MicroClean's position that the letters were ineffective in providing written notice that EnviroFix was terminating the License Agreement, we disagree with EnviroFix that MicroClean failed to raise this issue at trial. In its complaint, MicroClean asserts that "without 60 days written notice as required by the License Agreement, [EnviroFix] unilaterally declared the Agreement void." On direct examination, when asked by MicroClean's attorney whether Stoner stated "his opinion" in the letter of December 20, 2005 that the parties' agreement was "void," Cohen answered in the affirmative. Moreover, in their letter of December 10, 2005 to Stoner, Cohen and Bragonier expressly stated that "MicroClean Technology, Inc. does not consider the agreement with EnviroFix, Inc. breached or 'dead' and would again suggest all parties take a practical approach to the solution to problems." Finally, the Master stated "[t]he Court denies [MicroClean's] cause of action for breach of the License Agreement because [EnviroFix] properly terminated the License Agreement," thus, ruling on MicroClean's argument that EnviroFix failed to provide notice of termination as required by the License Agreement. *Cf. Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (holding that although a summary judgment order did not restate the ground on which the petitioner opposed the summary judgment motion, the ruling in the appealed order was sufficient to address that argument).

2. Delivery of Notice

We agree with EnviroFix's argument that MicroClean failed to preserve for appeal the issue of whether the manner of delivery of Stoner's letters was sufficient to effectuate a termination of the License Agreement. The record on appeal does not include any information as to how these letters were sent to MicroClean. We further note, however, the provisions in the License Agreement governing how notices under the agreement were to be sent specify only that "[a]ll notices, requests, demands, tenders and other communications required or permitted hereunder . . . shall be *deemed* to have been duly given if hand delivered, if sent by reputable overnight delivery service, or if mailed, by certified mail, return receipt requested, postage prepaid . . . ." (emphasis added). This provision does not necessarily exclude other means of transmission as appropriate to deliver a notice of termination.

B. Sufficiency of EnviroFix's Letters

As to the letters themselves, we agree with MicroClean they were insufficient to convey a sixty-day notice of termination according to the License Agreement. Nowhere in either letter did Stoner indicate EnviroFix was giving notice of its intent to terminate the agreement in sixty days as required by Section 2. *See Edisto Island Historical Soc'y, Inc. v. Gregory*, 354 S.C. 198, 202, 580 S.E.2d 141, 143 (2003) ("[N]otice of termination must be given in accordance with the terms of the contract.").

In his letter of December 4, 2005, Stoner advised MicroClean that he would not pay his monthly fees "until my machines are repaired." This statement evidences acknowledgment on his part that the License Agreement was still in effect. We interpret the other letter, in which Stoner asserted the agreement was "void" and expressed a willingness to enter into a new agreement only if MicroClean refunded EnviroFix's security deposit as well as certain alleged overpayments, as an intent to restore the pre-agreement status quo rather than to terminate the License Agreement in the manner specified in the agreement itself. Moreover, as the Master recognized, EnviroFix paid no monthly fees for December 2005 and January 2006, as it would have been required to do under the License Agreement if its letters constituted a notice of termination. Therefore, we reverse the Master's finding that EnviroFix properly terminated the License Agreement.

C. Breach of Contract Action and Damages

Whether MicroClean is ultimately entitled to prevail on its breach of contract action and the amount, if any, of its damages, however, would depend on matters that the Master did not decide after ruling that EnviroFix terminated the License Agreement. These include EnviroFix's arguments concerning MicroClean's capacity to enter into and continue to honor the License Agreement and questions concerning whether MicroClean's own actions amounted to a termination of the agreement. Therefore, we remand this matter for the Master to determine on the present record whether MicroClean's right to recover for breach of contract is affected by any other issues presented at trial.[2]

[2] EnviroFix did not challenge either the Master's finding that it breached the terms of the Equipment Schedule or the $11,690 judgment for this breach. Therefore, on

II. Claim and Delivery Action

MicroClean further argues it should have prevailed on its action for claim and delivery because the License Agreement stated it had the right to take possession of the BioTowers and other proprietary products provided to EnviroFix if the applicable contract was terminated before the expiration of the six-year term. MicroClean further argues that that it is entitled to actual and punitive damages from EnviroFix for its refusal to surrender possession of the BioTowers as well as compensation for loss of use, depreciation, and injury to the BioTowers. We remand this matter to the Master to determine (1) whether repossession of the BioTowers by MicroClean is an appropriate remedy and (2) the amount of compensation, if any, to which MicroClean is entitled because of EnviroFix's alleged failure to relinquish the equipment.

"[An] action for claim and delivery contemplates the recovery of the specific property claimed when possible or its value when delivery is not possible." *Nat'l Bank of South Carolina v. Daniels*, 283 S.C. 438, 442, 322 S.C. 689, 692 (Ct. App. 1984). "Proof of title, or right of possession, is a prerequisite to a plaintiff prevailing in action in Claim and Delivery." *Manship v. Newsome*, 188 S.C. 6, 10, 198 S.E. 428, 430 (1938).

A determination of whether MicroClean's right to possession of the BioTowers would be contingent on when the contract is deemed "terminated." Under Section 10, upon termination or expiration of the License Agreement, MicroClean was to "take possession of all Proprietary Products provided to [EnviroFix] . . . and licensed by [MicroClean] to [EnviroFix] for less than six years." Furthermore, EnviroFix was not entitled to compensation for any BioTowers licensed by MicroClean to EnviroFix for less than six years.

If the License Agreement is found to have been terminated before the end of the six-year contract period, MicroClean may be entitled to take possession of the BioTowers without having to pay compensation to EnviroFix. On the other hand, if MicroClean is allowed to enforce payment of the monthly license fees until the end of the six-year term, it could be argued that under Section 3 of the License Agreement the BioTowers would rightfully belong to EnviroFix once it has paid all required monthly license fees, late fees, and interest, such expenses representing

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remand, the Master shall revisit only the issue of damages on the License Agreement.

its costs to procure a license to use the equipment for six years. Section 10 allowed MicroClean to "take possession of all Proprietary Products . . . *licensed to* [EnviroFix] for less than six years." (emphasis added). EnviroFix was not required to retain physical possession of the equipment for any specific length of time to avoid having to surrender it to MicroClean.

We agree with MicroClean that if it is entitled to return of the BioTowers, it may also be entitled to actual and punitive damages. *See* Rule 49(c), SCRCP (allowing the finder of fact "[i]n an action for the recovery of specific personal property" to assess actual and punitive damages sustained by the prevailing party "which the prevailing party has sustained by reason of the detention or taking and withholding of such property"); *McLean v. Godwin Props., Inc.*, 292 S.C. 518, 521, 357 S.E.2d 473, 475 (Ct. App. 1987) ("Actual and punitive damages are available in a claim and delivery action.").

Here, the Master disposed of this issue by finding the parties "agreed that $15,000.00 would serve as liquidated damages in the event that the four (4) [B]io[T]owers were not returned upon request." Liquidated damages, however, have been defined as "'damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof.'" *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (2007) (quoting 22 Am. Jur. 2d *Damages* § 489 (2003)). Here, other provisions in the License Agreement suggest the parties did not recognize the amount of the security deposit to be a sum that cannot be changed by proof. Notably, under Section 10, EnviroFix "ha[d] the right to request that [MicroClean] purchase the equipment at the conclusion of the contract term at "fair market value," which, if the parties could not agree on this amount, would be determined by an independent appraiser. Furthermore, neither the License Agreement nor the Equipment Schedule designate the security deposits as liquidated damages or otherwise restrict MicroClean's recovery to such deposits in the event the BioTowers were not returned. *See Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (1984) ("The presence of a liquidated damages clause in a contract does not in itself limit the remedies available to the nonbreaching party.").

Based on the foregoing, we remand MicroClean's claim and delivery action to the Master for further proceedings.

III. EnviroFix's Breach of Contract Action

Finally, MicroClean takes issue with the Master's award of $13,377 to EnviroFix on its counterclaim for breach of contract. We find no error.

The Master found in favor of EnviroFix on its breach of contract action, noting that MicroClean failed to comply with those portions of the license agreement related to maintenance and repair. MicroClean asserts the repairs that EnviroFix requested concerned matters that either did not affect the actual performance of the BioTowers or were attended to promptly. In addition, MicroClean maintains (1) it did not charge EnviroFix license fees for the dates that the BioTowers were being repaired and (2) the contract term specifying it would not charge a license fee for a BioTower during any interval that the particular BioTower was under repair should be characterized as a liquidated damages clause. We hold the record supports the Master's determination of EnviroFix's damages.

Stoner testified that his complaints reflected legitimate concerns regarding safety, consumer confidence, and quality control. He determined he was entitled to $13,377 based on the number of days for which he claimed MicroClean owed him credit for repair issues and arrived at this figure by examining the e-mails he had sent advising MicroClean about equipment failures "and figured out how many months forward that they did nothing while they were in disrepair."[3] Although Stoner conceded MicroClean made efforts to have his equipment repaired and gave him credit on several occasions when the BioTowers were being repaired, he also testified that MicroClean's representatives appeared dismissive of his concerns and that the credit they gave him did not cover the entire time the equipment was in disrepair or the time it took MicroClean to transport it to the repair site.

We therefore hold EnviroFix presented evidence at trial supporting the Master's finding that MicroClean did not give him sufficient credit for the intervals during which the BioTowers were in need of repair. Although MicroClean correctly points out that the License Agreement expressly stated it would not charge any license fee for a BioTower during the period of time in which that BioTower was "under repair by [MicroClean]," the agreement does not specify that the waiver of such fees was a liquidated damages provision or limit EnviroFix's recovery to this waiver. *See id.* ("In the absence of clear language in the contract to the contrary, a

[3] The record does not indicate that EnviroFix claimed revenue lost because of the alleged equipment failures.

nonbreaching party may normally elect either to pursue a remedy specified in the contract or to sue for any other remedy available for breach.").

CONCLUSION

We reverse the Master's findings that EnviroFix terminated the License Agreement and was therefore not liable for the monthly license fees for the balance of the six-year term; however, we remand this matter to the Master to determine (1) the merit of any of the alternative defenses that EnviroFix asserted at trial, (2) the damages, if any, to which MicroClean is entitled for breach of the License Agreement, (3) which party is entitled to possession of the BioTowers, and (4) any damages to which MicroClean is entitled on its claim and delivery action. We affirm the damages award to EnviroFix on its breach of contract counterclaim and direct that this judgment shall be an offset to any damages awarded to MicroClean. Finally, we hold the judgment of $11,690 awarded to MicroClean for EnviroFix's breach of the Equipment Schedule is a final determination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AnMed Health, Appellant,

v.

South Carolina Department of Employment and Workforce and Pamela S. Crowe, Respondents.

Appellate Case No. 2012-207906

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

Opinion No. 5136.
Heard March 13, 2013 – Filed May 22, 2013

AFFIRMED

Stuart M. Andrews, Jr. and Gary L. Capps, Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Debra S. Tedeschi, of Columbia, for Respondent South Carolina Department of Employment and Workforce.

Alexander D. Paterra, Paterra & Osmer, LLC, of Greenville, for Respondent Pamela S. Crowe.

FEW, C.J.: AnMed Health fired Pamela Crowe because she refused to comply with its policy requiring her to get a flu shot. When Crowe applied for unemployment benefits, AnMed claimed it fired her for cause and she was disqualified from receiving benefits. The South Carolina Department of Employment and Workforce found Crowe was not discharged for cause and therefore was eligible to receive benefits without disqualification. We affirm.

I. Facts and Procedural History

AnMed is a hospital in Anderson. Crowe began working for AnMed in 1984. As a benefits coordinator, she had no direct contact with patients. Crowe is fifty-eight years old and has never had a flu shot.

In 2001, Crowe's then nineteen-year-old daughter Nicole got a flu shot. Within a few days, numbness spread through Nicole's body. When the numbness reached Nicole's chest, she had trouble breathing. An ambulance took her to a hospital, where she stayed for ten days. Nicole's neurologist first told the family Nicole had a disease called Guillain–Barré syndrome. He later determined she had a different disease, multiple sclerosis. The neurologist told Crowe that Nicole's flu shot "very well could have activated" the disease.

Nicole suffered over the next several years while she attempted to live a normal life. The medications she took to treat her disease eventually caused liver failure. Nicole died in 2007 from complications caused by her medications.

In 2010, AnMed adopted a policy entitled, "Influenza Immunization Protocol." The first sentence of the policy states, "To protect patients, visitors, and other health care workers [], the influenza vaccination will be viewed as a health competency and patient safety requirement." Under the policy, each employee must get a flu shot unless AnMed grants the employee an exemption. The policy provides an employee

> may request an exemption from vaccination based on guidelines from the Centers for Disease Control (CDC). Those CDC guidelines for exemptions currently include, severe egg allergy, severe allergy to any component of the vaccine, a past severe reaction to the influenza vaccine, or a history of Gillian-Barre [sic] syndrome.

NO OTHER FORM OF OR REASON FOR
EXEMPTION WILL BE MADE.

The policy provides that each exemption request will be considered "on a case by case basis." Finally, the policy requires that an employee be fired if she does not get a flu shot or an exemption.

At the time Crowe refused to get a flu shot, she believed her daughter Nicole's disease was a genetic disorder that became active when Nicole got her flu shot. Crowe's doctor, Erin Cooksey, told her she should not get a flu shot. Dr. Cooksey wrote a note saying, "This patient must be medically exempt from the flu shot. She has a strong family history of Guillian-Burr [sic] and MS. The flu shot can activate these processes and must be avoided!" Crowe testified she was afraid that if she got a flu shot, what happened to Nicole would happen to her.

Crowe asked AnMed for an exemption. In her exemption application, Crowe gave AnMed a copy of Dr. Cooksey's note and a letter in which Crowe explained what happened to Nicole. Crowe wrote that "for genetic and medical reasons I don't want to put the flu shot into my body and possibly activate the same gene that could eventually cause death!"

Crowe's request did not meet any of the policy's grounds for an exemption, so AnMed denied the request. AnMed instructed Crowe to get a flu shot, but she did not do so. As she later testified, "Why would I want to put something in my system, even if it meant me being able to keep my job, that eventually killed my child when we have the same genes?"

AnMed fired Crowe for not getting a flu shot. Crowe filed a claim with the South Carolina Employment Security Commission for unemployment benefits. A commission claims adjudicator found AnMed discharged Crowe for cause and ruled she was disqualified from receiving benefits for ten weeks.

Crowe filed an appeal to the commission's appeal tribunal. While the appeal was pending, the commission's functions were transferred to the Department of Employment and Workforce. *See* Act No. 146, 2010 S.C. Acts 1168. A department appeal tribunal held a hearing and issued an order reversing the claims adjudicator's decision. AnMed filed an appeal to the department's appellate panel,

which affirmed the tribunal's decision. The appellate panel found AnMed failed to prove it discharged Crowe for cause:

> The employer's policy requiring immunization for continued employment was unreasonable, particularly as applied to the claimant's unique circumstances. The claimant worked for the employer for 26 years without an immunization requirement, did not have patient contact in the performance of her duties, and presented credible medical documentation that such an immunization would jeopardize her health. Therefore, we find the claimant was discharged without cause connected with her employment.

AnMed appealed to the administrative law court. The ALC found substantial evidence supported the appellate panel's decision, and affirmed.

II. Whether AnMed Discharged Crowe for Cause

Under subsection 41-35-120(2) of the South Carolina Code (Supp. 2010),[1] if the department finds that an insured worker "has been discharged for cause connected with h[er] most recent work," she is ineligible for unemployment benefits for a period of time between five and twenty-six weeks.

The issue in this case is very narrow. It is not whether AnMed's policy is reasonable as it applies to other AnMed employees, or even whether AnMed acted reasonably in applying it to Crowe. It is not whether Guillain–Barré syndrome or multiple sclerosis are genetic disorders, or whether getting a flu shot can, in fact, cause someone to suffer from those diseases. To determine whether Crowe was disqualified from receiving unemployment benefits, the only question for the department to answer was whether Crowe's refusal to comply with AnMed's policy was reasonable under her unique circumstances.

[1] The current version of section 41-35-120 reads differently. We are applying the version of the statute in effect when Crowe filed her unemployment benefits claim.

A. The Reasonableness of AnMed's Application of Its Policy to Crowe

The department's appellate panel found AnMed's decision to require Crowe to get a flu shot was unreasonable. As part of its decision to affirm the department's order, the ALC found substantial evidence to support that ruling. We disagree.

The standard of review the ALC must apply to a factual determination by the department is set forth in section 1-23-380 of the South Carolina Code (Supp. 2012). Subsection 1-23-380(5)(e) provides the ALC "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." We have carefully examined the record before the department, and we do not find "reliable, probative, and substantial evidence" to support a ruling that a hospital's "health competency and patient safety requirement," designed "to protect patients, visitors, and other health care workers" by requiring all employees to have a flu shot, is unreasonable. The determination of how to protect patients from life-threatening illnesses such as influenza is a complicated medical and scientific evaluation that should be made by hospitals, not the Department of Employment and Workforce, the ALC, or this court. In fact, AnMed was required to make this evaluation. *See* 42 C.F.R. § 482.42 (2012) (mandating that hospitals maintain an "active program for the prevention, control, and investigation of infections and communicable diseases" to receive funding through Medicare and Medicaid). We find the department's decision that the application of the policy to Crowe was unreasonable is clearly erroneous and affects a substantial right of AnMed. We vacate the department's finding that AnMed's application of the policy to Crowe was unreasonable.

Vacating that finding, however, does not require us to reverse the ALC's judgment. Under the circumstances of this case, the department's finding was not a prerequisite to its ruling in Crowe's favor. In *Mickens v. Southland Exchange-Joint Venture*, 305 S.C. 127, 406 S.E.2d 363 (1991), our supreme court stated a "general rule" for analyzing whether an employee was discharged for cause—"where the employer's request is *reasonable*, a refusal to comply will constitute misconduct, justifying a discharge for cause. What is 'reasonable' will vary according to the

circumstances of each case. Not only must the reasonableness of the employer's request be evaluated, but also the employee's reason for noncompliance." 305 S.C. at 130, 406 S.E.2d at 365 (emphasis in original) (internal citations and quotation marks omitted). In *Mickens*, the Employment Security Commission considered the reasonableness of both the employer's request and the employee's refusal. However, *Mickens* involved a situation that differs significantly from the one before us. In that case, Mickens signed a document in which he agreed not to disclose confidential company information. 305 S.C. at 128-29, 406 S.E.2d at 364. He later attended a press conference, but there was no evidence that he said anything at it. 305 S.C. at 129, 406 S.E.2d at 364. In response, Southland issued Mickens a written warning stating his attendance violated the confidentiality agreement and "further violation" may result in his termination. *Id.* When Mickens refused to sign the warning, he was fired. *Id.* Noting the confidentiality agreement did not prohibit Mickens' attendance at press conferences, the supreme court found Southland's request for Mickens to sign the warning was unreasonable and Mickens' refusal to sign was "justified." 305 S.C. at 130-31, 406 S.E.2d at 365.

Mickens involved an employer making a request that was unique to one employee and was based on the employer's perception of one specific act in which the employee had engaged. Accordingly, it was necessary to consider both the reasonableness of Southland instructing Mickens to sign a document indicating he had violated the confidentiality agreement and the reasonableness of Mickens' refusal to do so. In contrast, this case involves one employee's response to a hospital's companywide patient-safety policy that the hospital applied uniformly and according to the policy's terms. Under these circumstances, the reasonableness inquiry from *Mickens* necessarily focuses on the employee's refusal to comply with the policy.

B. The Reasonableness of Crowe's Refusal to Comply

We affirm the department's decision that Crowe is not disqualified from receiving unemployment benefits because we find substantial evidence to support the department's determination that her refusal to comply with the policy was reasonable under her unique circumstances. *See Mickens*, 305 S.C. at 130, 406 S.E.2d at 365.

Crowe refused to get a flu shot because she believed doing so could cause her to suffer and die from a debilitating disease. Crowe watched that happen to Nicole several years earlier, and Nicole's doctor said the flu shot Nicole received just weeks before her symptoms began "very well could have" caused them. When Crowe asked Dr. Cooksey, her own doctor, for advice about getting a shot, Dr. Cooksey wrote that the vaccination "must be avoided!" These facts support the department's finding that Crowe's refusal was reasonable under the circumstances. Therefore, we affirm the ALC's conclusion that the department's finding is not clearly erroneous because it is supported by reliable, probative, and substantial evidence.

AnMed argues Crowe's subjective beliefs about getting a flu shot were incorrect and Dr. Cooksey's opinion was not reliable. However, our analysis focuses on whether Crowe's actions were reasonable under her circumstances. The correctness of Crowe's subjective beliefs and the reliability of Dr. Cooksey's opinion are relevant to the objective reasonableness of Crowe's decision, but are not dispositive. Considering the record as a whole, we affirm the department's finding.

III. Conclusion

The judgment of the ALC is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ritter and Associates, Inc., Respondent/Appellant,

v.

Buchanan Volkswagen, Inc. and David Buchanan, Appellants/Respondents.

Appellate Case No. 2011-198469

Appeal From Berkeley County
William L. Howard, Sr., Special Referee

Opinion No. 5137
Heard December 12, 2012 – Filed May 22, 2013

AFFIRMED

Steven L. Smith, of Smith Closser PA, of Charleston, for Appellants/Respondents.

Robert B. Varnado, of Brown & Varnado LLC, of Mount Pleasant, for Respondent/Appellant.

WILLIAMS, J.: Ritter and Associates, Inc. ("Ritter") brought this claim to recover payment for twenty vehicles sold to Buchanan Volkswagen, Inc. ("BVW") through BVW's agent, Todd Taylor ("Taylor"). Taylor, who purchased vehicles on behalf of various parties at a used automobile auction in Florida, conducted a check kiting scheme that defrauded several entities within the automobile

dealership industry, including BVW and Ritter. BVW appeals the special referee's order finding for Ritter on its breach of contract cause of action, arguing that Taylor was not acting exclusively as BVW's agent when he purchased the vehicles and that Ritter's own negligence was the proximate cause of Ritter's damages. Ritter cross-appeals, arguing that the special referee erred in finding that the South Carolina Motor Vehicle Dealer's Act did not apply to its causes of action. We affirm.

FACTS / PROCEDURAL HISTORY

Ritter is a Florida corporation that operates as a licensed used car wholesaler. Ritter's offices are in close proximity to the Florida Auto Auction of Orlando ("FAAO"). The FAAO is a used automobile auction located in Ocoee, Florida, where hundreds of wholesalers and dealers purchase vehicles for resale. The FAAO is not open to the public. In order to be authorized to purchase vehicles at auction, dealers must be registered with the FAAO. In addition to buying vehicles directly from the auction, participants often conduct "outside" deals between one another. BVW was a South Carolina Subchapter S Corporation that operated a car dealership in Charleston County. David Buchanan ("Buchanan") was its principal shareholder.

In 1993, BVW ceased doing business as a car dealership and remained in existence only to rent out the parcel of real property held by BVW. In 2000, Buchanan was advised that to retain its Subchapter S status, BVW needed to generate more than just "passive" rental income. To remedy this problem, Buchanan entered into a business relationship with one of BVW's former employees, Todd Taylor. In 2000, BVW began operating a wholesale used car dealership whereby Taylor would purchase cars for BVW from the FAAO, and then Taylor would resell those cars on BVW's behalf to other dealers in the Charleston area. To facilitate this arrangement, Buchanan obtained a South Carolina Wholesale Dealer License for BVW from the South Carolina Department of Public Safety. The license listed Taylor as its employee/agent.

Prior to resuming work for BVW, Taylor regularly purchased used vehicles on behalf of a number of automobile dealers in the Charleston area from various sellers at the FAAO. During the time he was working for BVW, Taylor continued to act on behalf of other dealers to purchase automobiles from sellers at the FAAO.

Because Taylor was not authorized to purchase directly from the FAAO, he maintained relationships with several dealers who were authorized to purchase vehicles at auction. These authorized dealers would purchase vehicles from the FAAO at Taylor's instruction; these dealers would then resell the vehicles to Taylor in "outside" deals. Ritter was an authorized dealer with whom Taylor frequently transacted. Taylor would pay Ritter for vehicles with checks from various bank accounts, including accounts held by BVW and a separate company owned by Taylor. Over time, Taylor and Ritter's relationship became more familiar and, consequently, more casual. As a result of this increased familiarity, Ritter allowed Taylor to directly deposit checks into Ritter's account to serve as payment for vehicles sold to Taylor in the outside deals.

Beginning in February 2003, Taylor used this ability to deposit checks to initiate an elaborate check kiting scheme, which involved the checking accounts of BVW, Ritter, a separate company owned by Taylor, and at least one other dealer in the Charleston area, Cumbee Chevrolet ("Cumbee"). During the duration of Taylor's kiting scheme, Ritter sold twenty vehicles to BVW through Taylor.

On February 6, 2004, BVW filed a lawsuit against Taylor and several banks involved in the transactions. Thereafter, on April 5, 2004, Cumbee filed suit against Ritter, BVW, Buchanan, Taylor, and several banks involved in the transactions. These two suits were consolidated and, following this consolidation, Ritter cross-claimed against BVW and Buchanan to recover payment for the twenty unpaid vehicles sold to BVW through Taylor.

All claims were resolved, except the cross-claims between Ritter, BVW, and Buchanan. Ritter brought claims against BVW for breach of contract, negligence, negligent supervision, and violation of the South Carolina Dealer's Act[1] ("Dealer's Act"). BVW brought counterclaims against Ritter for negligence per se, negligence, civil conspiracy, and aiding and abetting. The case was ultimately referred to William L. Howard, as special referee, by a consent order signed by the Honorable R. Markley Dennis, Jr., on June 25, 2010. The case was tried without a jury on January 24-26, 2011 and February 10, 2011.

On May 19, 2011, the special referee issued an order granting judgment in favor of Ritter on its breach of contract claim and awarding Ritter $434,000.00 in damages

[1] *See* S.C. Code Ann. §§ 56-15-10 to -600 (Supp. 2012).

and $280,286.71 in prejudgment interest. In this order, the special referee concluded that Ritter's allegations of negligence and negligent supervision were merely examples of the nonperformance of the contractual obligations between the parties, and therefore, granted judgment in favor of BVW on these causes of action. In addition, the special referee ruled that the Dealer's Act did not apply to the business dealings between Ritter and BVW and granted judgment in favor of BVW on that cause of action. Finally, the special referee granted judgment for Ritter with regard to BVW's counterclaims for negligence, negligence per se, and civil conspiracy.

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *McCall v. IKON*, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008). "An action in tort for damages is an action at law." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012). "[W]hen reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the [special referee]'s findings of fact as long as they are reasonably supported by the evidence." *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009).

LAW/ANALYSIS

I. BVW's Appeal

On appeal, BVW argues the special referee erred in three respects: (1) in concluding that Taylor was an exclusive agent of BVW; (2) in failing to apportion liability for damages to Ritter due to its own negligence; and (3) in concluding that Ritter's accounting expert demonstrated a nexus between Ritter's damages and the specific vehicles for which this suit was brought. We address each argument in turn.

A. Exclusivity of Taylor's Agency

BVW argues that the special referee erred in concluding that Taylor was exclusively an agent of BVW and in failing to consider agency relationships that Taylor had with others. We disagree.

In his order, the special referee found that "Taylor acted on behalf of, and as the agent of BVW throughout the dealings with Ritter." The special referee did not find that Taylor was an exclusive agent of BVW and did not make any findings related to Taylor's agency relationship with other dealers. BVW argues that the special referee "at least impliedly made" a finding that Taylor was exclusively BVW's agent due to the special referee's holding that BVW was liable for the contracts formed by Taylor. BVW argues that because Taylor acted on behalf of multiple dealerships when transacting at the FAAO, the contracts Taylor signed could have been intended for other dealerships. BVW's position is that "[t]he finding of liability [under the breach of contract claim brought by Ritter] rests not on the existence of an agency, but on the exclusivity of that agency." We disagree.

Generally, "[a]gency is a question of fact." *Gathers v. Harris Teeter Supermarket*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). We believe there is evidence in the record that shows Taylor was BVW's agent and had authority to bind BVW in contract. *See Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal."); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) ("[A] principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption."). As noted in the special referee's order, Buchanan specifically testified at the hearing that Taylor had the power to purchase vehicles, sign contracts, and issue checks on behalf of BVW. Because Buchanan had knowledge of Taylor's acts on BVW's behalf, BVW is bound by Taylor's acts as its agent and the contracts with Ritter are valid and enforceable.

In addition, the contracts for all twenty vehicles identify BVW as the "Buyer (Transferee)" and contain Taylor's signature on the signature line labeled "Transferee's Signature - Buyer." Because Taylor had undisputed authority to enter into contracts on behalf of BVW at the time Ritter sold these vehicles to

BVW, Taylor bound BVW in those contacts. Taylor's relationship with other parties does not affect the validity of these contracts. Additionally, we find nothing in the record indicating that Taylor intended to enter into the purchase agreements listing BVW as the "Buyer (Transferee)" on behalf of some other principal, despite BVW's claims to the contrary.

Based on the foregoing, we find that the special referee properly found that an agency relationship existed between Taylor and BVW. Further, we find that Taylor's agency relationships with other dealerships are immaterial as to whether the contracts signed by Taylor on behalf of BVW are binding. Accordingly, we affirm on this issue.

B. Failure to Apportion Liability for Ritter's Negligent Conduct

BVW additionally argues that the special referee erred in failing to apportion liability to Ritter based upon Ritter's negligent business practices in dealing with Taylor. We disagree.

BVW argues Ritter negligently conducted business with Taylor and that "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." BVW argues that, under the doctrine of comparative negligence, Ritter's damages should be reduced based on the amount of fault attributable to Ritter's action or inaction.

However, under South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action. *See Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) ("[A] plaintiff *in a negligence action* may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." (emphasis added) (internal quotation marks and citations omitted)). In the current case, comparative negligence is inapplicable because the special referee found for Ritter under a breach of contract cause of action. Thus, the special referee was correct in not reducing the award to Ritter. Accordingly, we affirm on this issue.

C. Failure to Establish Damages

In its final argument, BVW argues the special referee erred in concluding Ritter presented adequate evidence that Ritter had not received payment for the twenty cars that form the basis for Ritter's damages. We disagree.

BVW specifically argues that the testimony of Ellison Thomas ("Thomas"), Ritter's forensic accounting expert witness, was inadequate to establish that Ritter had not received payment for the twenty cars. BVW contends that neither Thomas nor Ritter can trace with any degree of specificity the unpaid vehicles purchased by BVW from Ritter. BVW maintains that Thomas assigned responsibility for payment for these vehicles to BVW simply because "it's the end of a kiting scheme, and somebody had to get burned" and this unfounded assertion should not form the basis for a damages award against BVW.

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes*, 266 S.C. at 86, 221 S.E.2d at 775.

Evidence in the record supports the special referee's finding that Ritter had not been paid for the twenty vehicles. Specifically, the special referee found, based upon testimony from Ritter and Thomas, that "between the dates of August 12, 2003 and September 30, 2003, Ritter and BVW, acting through Taylor, contracted for the sale by Ritter to Taylor of twenty motor vehicles" and "that Ritter has not been paid for those cars." For example, Thomas testified, "I reviewed the records, and I reviewed the way [Ritter] tracked things and through process of elimination, these are the vehicles that [Ritter] purchased and didn't get paid for." Additionally, Robert Ritter described the contents of an exhibit that listed the twenty vehicles forming the basis for the actual damages award as "the vehicles that I sold to Buchanan Volkswagen that I was never paid for." Accordingly, we find that there is ample testimony in the record from Robert Ritter and Thomas to support the special referee's finding that Ritter was not paid for these vehicles; thus, we affirm on this issue.

II. Ritter's Arguments

On cross-appeal, Ritter argues that the special referee erred in three respects: (1) in determining the Dealer's Act did not apply to the business dealings between BVW and Ritter; (2) in declining to address Ritter's statute of limitations defense; and (3) in rejecting BVW's assertion that Florida's "open titles" statute was a ground for voiding the sales contracts between the parties without first expressly determining that the statute relied upon did not apply to the facts of this case. We address each argument in turn.

A. Dealer's Act

Ritter argues that the special referee erred in holding that the Dealer's Act was inapplicable to Ritter and BVW's business dealings. It argues that sufficient purposeful contacts within South Carolina existed for the Dealer's Act to apply. We disagree.

The Dealer's Act prohibits motor vehicle dealers and manufacturers from participating in unfair methods of competition and deceptive trade practices. In particular, subsection 56-15-40(1) of the South Carolina Code (Supp. 2012) declares it unlawful "for any . . . wholesaler . . . or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." The Dealer's Act applies to "[a]ny person who engages directly or indirectly in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale [of a motor vehicle] or has business dealings with respect to a motor vehicle within [South Carolina]." S.C. Code Ann. § 56-15-20 (Supp. 2012). The Dealer's Act provides "[i]n addition to temporary or permanent injunctive relief . . . , any person who shall be injured in his business or property by reason of anything forbidden in [the Dealer's Act] may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." S.C. Code Ann. § 56-15-110(1) (Supp. 2012).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to

its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

The special referee found the clear language of the Dealer's Act requires either purposeful contacts within South Carolina or business dealings with respect to a motor vehicle within South Carolina. Based on the finding that the entirety of the business dealings occurred and were consummated in Florida, the special referee held that the Dealer's Act would not apply to the business dealings between Ritter and BVW.

Ritter now argues that "there need only be a sufficient nexus to South Carolina entities or South Carolina vehicles for the [Dealer's] Act to apply." Ritter argues that this nexus was established because: (1) BVW was a South Carolina corporation; (2) the parties understood that BVW intended to bring the vehicles back to South Carolina for resale to other dealerships; (3) BVW used checks issued by South Carolina banks to pay for the vehicles; and (4) South Carolina body shops performed work on the vehicles once they were transported from Florida. We find these arguments unpersuasive.

Section 56-15-20 creates two scenarios when the Dealer's Act will apply: (1) when a "person . . . engages directly or indirectly in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale" of a motor vehicle; and (2) when a person has "business dealings with respect to a motor vehicle within [South Carolina]." The facts of this case do not fit within either of these scenarios. These vehicles were selected by Taylor from the FAAO, which is located in Florida; the contracts and bills of sale were written and signed in Florida; payment was surrendered by Taylor to Ritter in Florida; and, finally, Ritter delivered possession of the vehicles to Taylor in Florida. Therefore, any purposeful contacts within South Carolina which would put these dealings under the first scenario contemplated by section 56-15-20 would not have occurred until after the business dealings between Ritter and BVW were concluded. Further, at the time the business dealings between the parties occurred, the motor vehicles were in Florida. Therefore, the second scenario contemplated by section 56-15-20 is also inapplicable.

We find that BVW's status as a South Carolina corporation and South Carolina banks providing the checks used to complete these transactions does not amount to "engaging . . . in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale" of a motor vehicle. S.C. Code Ann. § 56-15-20 (Supp. 2012). Further, we find that BVW's intention to transfer these vehicles back to South Carolina after completion of the sale fails to create a sufficient purposeful contact within South Carolina that would render the Dealer's Act applicable.

Because the entirety of the business dealings between Ritter and BVW occurred in Florida, we hold the special referee properly decided the Dealer's Act does not apply. Thus, we affirm on this issue.

B. Ritter's Additional Arguments

In addition to its argument regarding the Dealer's Act, Ritter makes two additional arguments relating to the special referee's treatment of BVW's counterclaims against Ritter. First, Ritter argues the special referee erred in declining to address Ritter's statute of limitations defense after concluding that BVW failed to prove the merits of its counterclaims. Secondly, Ritter argues the special referee erred in rejecting BVW's assertion that Florida's "open titles" statute was a ground for voiding the sales contracts between the parties without first expressly determining that the statute relied upon did not apply to the present circumstances. We decline to address these arguments.

The special referee found in Ritter's favor with regard to BVW's counterclaims; therefore, Ritter was not aggrieved by the special referee's order with regard to those rulings. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

In its reply brief, Ritter argues these issues are sustaining grounds. As sustaining grounds, Ritter contends it must raise these issues or risk abandoning its claims.[2]

[2] In making this argument, Ritter relies upon *I'on LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), which holds "a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief." 338 S.C. at 420, 526 S.E.2d at 723.

While Ritter properly cites the law, BVW has not appealed the special referee's rulings regarding BVW's counterclaims. Because those rulings are not on appeal, the sustaining grounds that further support those rulings need not be considered. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Accordingly, we decline to address these arguments.

CONCLUSION

Based on the foregoing, the order of the special referee is

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.