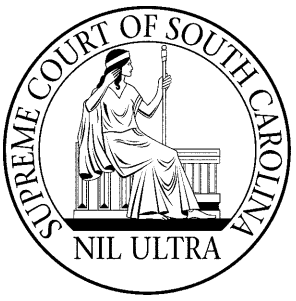

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 11, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael T. McCoy and Arcada J. McCoy, Plaintiffs,

v.

Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I; Al C. Browder, Jr., a/k/a Al C. Browder, Kelly J. Browder, Douglas M. Miles and South Carolina Department of Health and Environmental Control, Defendants,

Of whom Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I, Al C. Browder, Jr., a/k/a Al C. Browder and Kelly J. Browder are, Appellants,

and Douglas M. Miles, is Respondent.

Appellate Case No. 2012-212498

Appeal from Dorchester County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27397
Heard February 4, 2014 – Filed June 11, 2014

REVERSED AND REMANDED

Lee W. Zimmerman and Amber B. Carter, of McNair Law Firm, PA, of Columbia, and Robert C. Lenhardt, Jr., of Lenhardt Law Firm, LLC, of Charleston, for Appellants.

Andrew T. Shepherd and Katherine H. Hyland, of Hart Hyland Shepherd, LLC, of Summerville, for Respondent.

JUSTICE KITTREDGE: This case involves a claim for equitable indemnification, which was denied by the trial court. Appellants were sued by adjacent property owners regarding environmental contamination. Appellants denied responsibility for the contamination and cross-claimed against the previous property owner, who was responsible for the damage. Because Appellants were not responsible for the ground contamination, the trial court granted summary judgment in favor of Appellants but declined to award Appellants the attorney's fees and costs incurred in defending the lawsuit. We reverse and remand.

I.

In 1981, Respondent Douglas M. Miles purchased a parcel of property (Property) in Dorchester County, South Carolina, and began operating a service station. In July 1989, Miles discovered a petroleum leak from the underground storage tanks on the property. Shortly thereafter, the Department of Health and Environmental Control (DHEC) confirmed the release, for which it determined Miles was responsible, and began remediation activities. Subsequently, DHEC continued to monitor the site through periodic groundwater sampling. In 2003, DHEC discovered that several groundwater monitoring wells were destroyed and demanded that Miles replace them.[1]

In May 2004, Miles entered into a purchase agreement to sell the Property and service station to Appellants. Despite his knowledge of the groundwater and environmental contamination of the Property, as well as DHEC's monitoring of the situation, Miles failed to disclose this information to the Appellants. Miles represented in the purchase agreement that no claim, litigation, proceeding, or investigation was pending or threatened that would materially and adversely affect the Property.

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[1] Miles did not replace the destroyed wells until September 2006.

II.

In 2007, adjacent property owners (the McCoys) filed an action against DHEC and Appellants alleging that their property was damaged by the petroleum release. Appellants cross-claimed against Miles for breach of the purchase agreement and equitable indemnification for the attorney's fees and costs they incurred defending the McCoys' lawsuit. After discovery concluded, the trial court granted summary judgment in favor of Appellants as to the McCoys' claims and as to Appellants' cross-claim against Miles. Specifically, the trial court found that Miles breached the purchase agreement by failing to disclose the petroleum release and destruction of the monitoring wells.[2] The trial court found Miles was liable for "all costs and expenses incurred by the [Appellants] resulting from the [McCoys] instituting this action against the [Appellants]." However upon Miles's motion for reconsideration, the trial court modified its earlier order to exclude the award of attorney's fees. Appellants filed an appeal, which we certified pursuant to Rule 204(b), SCACR.

III.

"[A] right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (citations omitted). In cases of either contractual or equitable indemnification, "reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971) (quotations and citations omitted).

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[2] In its order granting summary judgment for Appellants, the trial court found that Miles breached the purchase agreement. Miles has not appealed from this portion of the trial court's order. Thus, Miles's breach of the purchase agreement is the law of the case. *See Austin v. Specialty Transp. Servcs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.").

We have imposed two requirements on parties seeking equitable indemnification for attorney's fees. First, "[t]he attorney['s] fees and costs must be the natural and necessary consequence of the defendant's act." *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) (citations omitted). Second, "[i]n order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established." *Toomer v. Norfolk S. Ry. Co.*, 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct. App. 2001). We address these in turn.

Under our law, "where the wrongful act of [Miles] has involved [Appellants] in litigation with others or placed [them] in such relation with others as makes it necessary to incur expenses to protect [their] interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages." *Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (quotation omitted). "In order to recover attorneys' fees under this principle, [Appellants] must show: (1) that [Appellants have] become involved in a legal dispute either because of a breach of contract by [Miles] or because of [Miles's] tortious conduct; (2) that the dispute was with a third party—not with [Miles]; and (3) that [Appellants] incurred attorneys' fees connected with that dispute." *Id*. at 33, 183 S.E.2d at 709–10. "If the attorneys' fees were incurred as a result of a breach of contract between [Appellants and Miles, Miles] will be deemed to have contemplated that his breach might cause [Appellants] to seek legal services in [their] dispute with the third party." *Id*. at 33, 183 S.E.2d at 710.

The facts of this case clearly demonstrate that the attorney's fees and costs incurred by Appellants in defending the McCoys' lawsuit were the natural and probable consequences of Miles's breach of the purchase agreement.

First, Appellants were involved in the lawsuit filed by the McCoys only because of the petroleum release during the time period Miles owned the property and Miles's subsequent breach of the purchase agreement. Second, the underlying dispute was with a third party—the McCoys—rather than with Miles. Finally, Appellants have incurred attorney's fees and costs in connection with the lawsuit filed by the McCoys. Thus, we conclude that Appellants' attorney's fees and costs were the natural and probable consequence of Miles's breach of the purchase agreement.

There is no serious challenge whether the purchase agreement between Appellants and Miles provides a sufficient relationship to support a claim for equitable indemnification for attorney's fees and costs. This contractual relationship is similar to other relationships that are of a sufficient nature to warrant equitable indemnification. *See, e.g.*, *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) ("We hold that the relationship of contractor/subcontractor is a sufficient basis to support a claim of equitable indemnity." (citations omitted)); *Addy*, 257 S.C. at 34, 183 S.E.2d at 710 (finding that landlords were entitled to indemnification from a contractor for damage caused to a tenant's property).

Miles asserts the trial court properly denied Appellants' claim for attorney's fees, "as [Miles] was never found liable for the damages caused to the [McCoys]." (Resp't's Br. at 2). We reject Miles's argument for two reasons. First, this argument was not presented to the trial court and is not preserved for appellate review. Second, and in any event, the argument is without merit. It is true Miles reached a settlement with the McCoys, thereby precluding entry of a judgment on the underlying claim. The absence of a judgment, however, does not preclude Appellants' equitable indemnification claim. On the record before us, it is clear the groundwater and environmental contamination occurred during Miles's ownership of the Property. Moreover, Appellants' equitable indemnification claim is grounded in Miles's breach of the purchase agreement, which is the law of this case.

Because Appellants have established their entitlement to equitable indemnification, including the recovery of attorney's fees and costs, the judgment of the trial court is reversed.

IV.

Appellants are entitled to equitable indemnification for the attorney's fees and costs that they incurred in defending the lawsuit brought by the McCoys. We reverse the decision of the trial court. The case is remanded for further proceedings and entry of judgment for Appellants on their claim for attorney's fees and costs.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

5 Star, Inc., Petitioner,

v.

Ford Motor Company, Respondent.

Appellate Case No. 2012-206187

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27398
Heard January 23, 2014 – Filed June 11, 2014

REVERSED AND REMANDED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of North Charleston, for Petitioner.

C. Mitchell Brown, William C. Wood, Jr., and Michael J. Anzelmo, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Carmelo B. Sammataro and David C. Marshall, of Turner Padget Graham & Laney, PA, of Columbia, for Respondent.

JUSTICE KITTREDGE: The court of appeals reversed a jury verdict awarding $41,000 in actual damages in a negligent design products liability action based on the failure of the trial court to grant a directed verdict. *5 Star, Inc. v. Ford Motor Co.*, 395 S.C. 392, 397, 718 S.E.2d 220, 223 (Ct. App. 2011). We granted certiorari and now reverse.

I.

Petitioner 5 Star, Inc. is a lawn maintenance and pressure washing company owned by Stan Shelby. In February 2005, 5 Star purchased a used 1996 Ford F-250 pickup truck. Several months later, Shelby parked the truck for the weekend in 5 Star's North Charleston warehouse. Two days later, Shelby returned to the warehouse and discovered that a fire had occurred. The truck was destroyed, and the warehouse was severely damaged. Benjamin Norris, the Chief Fire Investigator for the North Charleston Fire Department, performed an investigation and observed that the truck was located in the middle of the warehouse, where the most extensive damage occurred. Chief Norris noted the engine compartment of the truck was the likely origin of the fire.

5 Star filed a products liability action against Ford Motor Co. for negligent design of the speed control deactivation switch (deactivation switch), seeking actual and punitive damages. In support of its claim, 5 Star relied on the testimony of Leonard Greene, an expert in electrical engineering and fire origin and cause. Greene testified the fire originated in the engine compartment and, due to numerous problems with the design of the deactivation switch, he further opined that the fire was caused by a malfunction in the deactivation switch.[1] Specifically, in terms of the flawed design, Greene stated it was "very foreseeable" that the thin membrane separating the electrical component, which is constantly energized, from the flammable brake fluid, would leak and create a significant risk for an engine fire.

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[1] The deactivation switch "serves as a mechanism to deactivate the cruise control when the driver presses the brake pedal." *5 Star*, 395 S.C. at 398, 718 S.E.2d at 223. "The [deactivation] switch is wired into the brake light circuit, which, for safety reasons, must remain energized at all times." *Id*. The electrical component of the deactivation switch is separated from flammable brake fluid by a thin membrane.

Ford moved for a directed verdict at the close of 5 Star's case and renewed the motion at the close of all of the evidence, claiming that 5 Star failed to prove the essential elements of a negligent design defect claim. The trial court denied both motions. The jury found Ford liable for the negligent design of the deactivation switch and awarded 5 Star $41,000 in actual damages.

On appeal, the court of appeals reversed, finding the trial court erred by refusing to direct a verdict in favor of Ford because 5 Star offered no evidence that Ford's conduct in designing the deactivation switch was negligent.[2] *5 Star, Inc.*, 395 S.C. at 397–99, 718 S.E.2d at 222–24. We issued a writ of certiorari to review the court of appeals' decision.

II.

"When reviewing a ruling on a motion for a directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005) (citing *F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 458, 567 S.E.2d 842, 843 (2002)). "If the evidence as a whole is susceptible of more than one reasonable inference, the trial judge must submit the case to the jury." *Id.* (citing *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998)).

III.

In a products liability action based on a negligent design theory, the plaintiff must establish, among other things, that the defendant failed to exercise due care in designing the product.[3] *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701

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[2] The court of appeals did not reach the merits of Ford's remaining assignments of error regarding spoliation of evidence, improper measure of damages for lost profits, the denial of Ford's motion for a mistrial, and Ford's claim that the truck was not in essentially the same condition as when it left Ford's control. *5 Star*, 395 S.C. at 394 n.2, 718 S.E.2d at 221 n.2 (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)).

[3] A plaintiff must also prove: "(1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when

S.E.2d 5, 9 (2010) (citing *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995)). On appeal to the court of appeals, one of Ford's contentions was that 5 Star failed to show that Ford was negligent in designing the deactivation switch. The court of appeals agreed and held that Greene was not qualified to offer an opinion as to whether Ford breached its duty to exercise due care in designing the deactivation switch. *5 Star*, 395 S.C. at 397, 718 S.E.2d at 223. Thus, in the absence of Greene's testimony, the court of appeals found that 5 Star failed to present any evidence that Ford's conduct was negligent, and the trial court erred by not directing a verdict for Ford. *Id*. We granted certiorari to review the court of appeals' holding that Greene was not qualified to offer expert testimony as to whether Ford exercised due care in designing the deactivation switch.[4]

A.

The trial court qualified Greene as an expert in electrical engineering and fire origin and cause. The court of appeals, however, found that Greene was not "qualified as an expert in automotive design or any other area of expertise that would enable [him] to offer opinions as to whether Ford's conduct was negligent." *5 Star*, 395 S.C. at 397, 718 S.E.2d at 223. 5 Star claims that the court of appeals erred and that Greene's extensive qualifications in electrical engineering related to automobiles were sufficient to enable him to testify regarding Ford's exercise of due care. We agree.

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it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985) (citing W. Prosser, Law of Torts 671–72 (4th ed. 1970)). Additionally, a plaintiff has the burden of presenting evidence of a reasonable alternative design. *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). 5 Star presented evidence of a reasonable alternative design, which Ford has not challenged in these appellate proceedings.

[4] Ford claims that 5 Star did not properly preserve the issue of Greene's qualifications for our review. We reject Ford's issue preservation argument as meritless.

Greene is a licensed electrical engineer in South Carolina who earned a Bachelor of Science degree in Electrical Engineering from the Georgia Institute of Technology. He is a member of a number of professional associations, including the National Fire Protection Association, the Society of Automotive Engineers, the National Academy of Forensic Engineers, and the International Association of Arson Investigators. He has been qualified as an expert in fire origin and cause, electrical engineering, and defective products and has testified between 50 and 100 times, serving as an expert for both plaintiffs and defendants. Greene testified that he has conducted investigations on an electrical component as a possible cause of fire many times during his career.

While Greene has never worked directly for an automotive manufacturer, he has a vast amount of experience related to automotive engineering and has designed many component parts that were used in vehicles and other products. For example, he worked for companies that designed component parts—such as integrated circuits and timers—for use in vehicles. Additionally, component manufacturers have hired Greene to determine the cause and origin of fires in boats, buses, and other large commercial vehicles. Moreover, Greene has investigated a number of fires caused by the deactivation switch in Ford vehicles, including reviewing the relevant scientific literature.

We find that Greene was properly qualified by the trial court as an expert to render an opinion as to whether Ford breached its engineering standard of care in designing the deactivation switch. *Compare Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009) (finding that plaintiffs' mechanical engineering expert in a deactivation switch design defect case was qualified to "give his opinion as to whether Ford breached its engineering standard of care"), *with Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (finding that an electrical engineer with no experience in the automobile industry who employed an unreliable theory that was uniformly rejected in the scientific community was not qualified to testify about an alleged design defect in a Ford automobile). Accordingly, we hold that the court of appeals erred in finding Greene unqualified as an expert to testify as to whether Ford was negligent in designing the deactivation switch. We turn now to the merits of whether Greene's testimony relating to Ford's exercise of due care was sufficient to create a question of fact for the jury.

B.

When addressing the element of due care in a negligence action,[5] "'the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.'" *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 (quoting *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326). "[T]he judgment and ultimate decision of the manufacturer must be evaluated based on what was known or 'reasonably attainable' at the time of manufacture." *Id*. at 227, 701 S.E.2d at 17–18 (quoting Restatement (Third) of Torts: Products Liability § 2, cmt. a (1998)). In evaluating a negligence claim, the focus may be either on the presence of conduct or the absence of conduct. *See Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 549 (N.Y. 1981) (stating that, in a products liability claim predicated on negligence, the central inquiry is whether there is "affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences"); 72A C.J.S. *Products Liability* § 22 ("The duty of ordinary care owed by a manufacturer of a product embraces such questions as whether . . . the manufacturer knew, *or* should have known, that its design was defective . . . ." (emphasis added)).

Relying on foundational scientific principles known at least since the invention of the combustion engine, Greene testified that the deactivation switch design was defective in three ways. First, Greene testified that the deactivation switch was designed to be constantly energized, and "[i]t would have been inherently safer to have designed it so that it only had power on it when the ignition was on." Second, Greene testified that the deactivation switch, rated for two amperes, was protected only by a fifteen-ampere fuse, which allowed the deactivation switch to "overheat and start a fire before the 15-ampere fuse would ever blow." Finally, Greene testified that the deactivation switch was designed to have an electrical component next to flammable hydraulic brake fluid, separated only by a thin membrane. This makes it "very foreseeable that this thin membrane will leak eventually, because when you apply the brakes on the vehicle, brake pressure increases dramatically

[5] Unlike a negligence claim, the focus in a strict liability action "is on the condition of the product, without regard to the action of the seller or manufacturer." *Bragg*, 319 S.C. at 540, 462 S.E.2d 326 (citing *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1196 (4th Cir. 1982)). Although strict liability and negligence claims may co-exist, we emphasize that our focus is on Ford's conduct in designing the deactivation switch. *See Branham*, 390 S.C. at 211, 701 S.E.2d at 9 (noting that negligence and strict liability may co-exist).

and pushes against this membrane." When flammable brake fluid leaks into a constantly energized, overheated electrical circuit, a fire is a foreseeable result. Greene testified that this obvious risk could have been avoided by installing a $2 fuse in series with the deactivation switch in order to limit the current to one or two amperes.

During cross-examination, Ford's counsel asked Greene whether Ford "should have called [him] and got[ten] [his] input on how to design the switch." Greene responded, "No. [Ford] should have had some internal review that would have caught the fact that there [were] some serious potential failure issues with this switch." 5 Star claims that the court of appeals erred by not finding that this opinion testimony, coupled with Greene's testimony that it was "very foreseeable" that the deactivation switch would fail, is sufficient to create a jury question as to whether Ford failed to exercise due care in designing the deactivation switch. We agree.

Ford postulates a false premise, that is, the absence of direct evidence of Ford acknowledging a design flaw at the time this 1996 pickup truck was manufactured precludes a negligence claim. We hold that the absence of direct evidence that Ford knew of the design defect in the deactivation is not dispositive of a negligence claim. As the above-cited law makes clear, a negligence claim may be established, as here, by circumstantial evidence showing that, through the exercise of reasonable diligence, Ford should have known of the design flaw in the deactivation switch. *See Sunvillas Homeowners Ass'n., Inc. v. Square D Co.*, 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct. App. 1990) ("[N]egligence may be proved by circumstantial evidence."). To require an admission of a design defect by a manufacturer as a prerequisite for a negligence claim is not only contrary to law, but also is at odds with the policy of encouraging manufacturers to design products safely based on well-understood principles of safety and science. The design defect concerning the deactivation switch is grounded in basic science, which, according to Ford's expert, is known to high school science students and, we think, should have been know to Ford engineers. A manufacturer may not avoid negligence liability by turning a blind-eye to the obvious.

In sum, we believe that Greene was properly qualified as an expert witness and that his testimony provided a sufficient basis to deny Ford's directed verdict motion and submit the case to the jury.

IV.

We reverse and remand the case to the court of appeals for resolution of the remaining issues that Ford raised in its appeal.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CoastalStates Bank, Respondent,

v.

Hanover Homes of South Carolina, LLC; Hanover Homes, Inc.; and George Cosman, Defendants,

Of Whom George Cosman is the Appellant.

George Cosman, Third-Party Plaintiff,

v.

Phillip Petrozzelli, Third-Party Defendant.

Appellate Case No. 2012-213154

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5211
Heard January 14, 2014 – Filed March 26, 2014
Withdrawn, Substituted and Refiled June 11, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Richard R. Gleissner, of Gleissner Law Firm, LLC, of Columbia, for Appellant.

Russell P. Patterson, of Russell P. Patterson, PA, of Hilton Head Island, for Respondent.

SHORT, J: This is an appeal from an order granting partial summary judgment to CoastalStates Bank (the Bank) in its breach of contract action against Hanover Homes of South Carolina, LLC, Hanover Homes, Inc., and George Cosman. Cosman appeals, arguing the trial court erred in: (1) finding the statute of limitations had not expired; (2) finding personal guaranties were controlling; and (3) granting the Bank summary judgment while also finding a genuine issue of material fact existed as to Cosman's defenses to the Bank's breach of contract claim. We affirm in part, reverse in part, and remand.

BACKGROUND FACTS

Cosman, a residential builder, entered into a series of business deals with Phillip Petrozzelli in 2007. Cosman and Petrozzelli formed the company, Hanover Homes of South Carolina, LLC (Borrower) to pursue real estate development. Petrozzelli was the managing partner of Borrower and was the "point man" for the Traditions, a development in Jasper County. According to Cosman, Petrozzelli had a previous longstanding relationship with the Bank and with a bank employee, Buzzy Lawson. Cosman explained his role was to "watch over the construction of [the two model homes]" at Traditions and to oversee the Borrower's other development.

On July 19, 2007, the Bank made three loans totaling $3.632 million to Borrower as follows:

Loan 203611	$2.6 million to purchase 21 vacant lots in the Traditions, a community in Jasper, South Carolina
Loan 203613	$520,000 to construct a model home
Loan 203583	$512,000 to construct a second model home

Cosman and Petrozzelli each signed a personal guaranty to secure each loan. The guaranties provided the following:

> 1. **Agreement to Guaranty.** For value received, . . . [the Guarantor] . . . absolutely and unconditionally guaranties . . . the payment . . . of: (a) all liabilities and obligations of the Borrower to the Bank . . . . The liability of the Guarantor shall be joint and several for the

> payment in full of the entire amount of the Guarantied Obligations with that of the Borrower . . . or any other guarantor.
>
> 2. **Absolute and Unconditional Guaranty; Waiver of Defenses.** This Guaranty is an absolute and unconditional guaranty of payment . . . . This Guaranty creates a direct and primary obligation of the Guarantor to the Bank without regard to any other guarantor or obligor to the Bank or the value of any security or collateral held by the Bank. . . . [T]he Guarantor's obligations hereunder may be enforced with or without joinder of the Borrower or any other guarantor and without proceeding against the Borrower, any other guarantor or against any collateral held by the Bank. Guarantor expressly waives, to the fullest extent permitted by applicable law, each and every defense which under principles of guaranty or suretyship would otherwise operate to impair or diminish the Guarantor's direct and primary liability . . . . Guarantor acknowledges and understands that nothing except the full and final payment . . . shall release and discharge the Guarantor from his obligations and liability hereunder.

Section 2(a) provided the following:

> Guarantor agrees that the Bank may take . . . the following actions without diminishing, impairing, limiting or abridging the Guarantor's obligations hereunder, and the Guarantor expressly waives any defense . . . arising out of any of the following actions taken by the Bank, whether with or without notice to, or consent by, the Guarantor: . . . (iii) any release or discharge by the Bank of the Borrower, or any . . . other guarantor; . . . (v) any settlement made with . . . the Borrower, or . . . any other guarantor.
>
> 3. **Waiver of Notices; Additional Waivers.** Guarantor expressly waives, to the fullest extent permitted by applicable law, each and every notice to

> which it would otherwise be entitled under principles of guaranty or suretyship law. . . . including but not limited to: . . . notice of any default or nonpayment . . . by the Borrower[,] notice of the obtaining or release of any guaranty or surety agreement[, and] notice of nonpayment.

By the end of 2008, Borrower was experiencing financial difficulty. The notes were renewed on October 28, 2009. Thereafter, Cosman alleges he negotiated for both he and Petrozzelli to be released on loans for the other property they developed. As to the Traditions property at issue in this case, Borrower made three short sales to third parties with the Bank's consent and applied the proceeds to the loan balances. The first short sale, one of the model homes, was made in September 2010, and the Bank netted just over $220,000.

Unbeknownst to Cosman, the Bank entered into an agreement (the Agreement) with Borrower and Petrozzelli on October 22, 2010. The Agreement released Borrower and Petrozzelli from liability under the loans and guaranties in exchange for cooperation with any further sales of the property. The Agreement also provided the following:

> **No Release of Other Guarantors.** Lender does not release or discharge any obligations, liabilities or guaranties of any other guarantor of the Notes and nothing provided for in this Agreement shall be construed as a waiver of any of Lender's rights and remedies with regard to any other guarantor of the Notes.

The second model home was then sold as a short sale in April 2011, and the Bank netted approximately $181,000. In October 2011, a short sale of the 21 lots netted the Bank approximately $604,000.

The Bank filed this action against Cosman on the guaranties. In his answer and counterclaim, Cosman alleged, *inter alia*, a conspiracy between the Bank and Petrozzelli and breach of contract accompanied by a fraudulent act.[1] Cosman also

[1] Cosman alleged, *inter alia*, that Petruzzelli fraudulently transferred assets; created self-settled trusts; and conspired with the Bank to sell the property under market value to a "friend of the [B]ank." Cosman produced appraisals indicating that at the time the documents were signed in 2007, the value of the lots was $4.3 million,

raised numerous defenses, including the expiration of the statute of limitations and Bank's discharge of Borrower's liability under the notes.

On August 10, 2012, and September 7, 2012, the trial court held hearings on the parties' cross-motions for summary judgment. At the time of the hearings, the Bank claimed a balance due on the notes of $3.299 million. The trial court: (1) dismissed Cosman's statute of limitations defense; (2) granted the Bank partial summary judgment, finding the release by the Bank of Borrower and Petrozzelli did not result in the release or discharge of Cosman under the three guaranties; (3) denied the Bank's motions for summary judgment as to Cosman's breach of contract accompanied by a fraudulent act and conspiracy causes of action; (4) granted judgment to the Bank for $3,299,665.51; and (5) awarded reasonable attorney fees and costs to be determined at a subsequent hearing. This appeal follows.

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "'Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

"Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Id.* "In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party." *Pee Dee*, 381 S.C. at 240, 672 S.E.2d at 802. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-

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and the value of each model home was $650,000, for a combined value of $5.6 million. Cosman also produced emails and made other allegations of wrongdoing that are relevant only to the conspiracy and breach of contract accompanied by a fraudulent act causes of action.

moving party." *Id.* Further, "'[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.'" *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting *Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692).

LAW/ANALYSIS

A. The Statute of Limitations

Cosman argues the trial court erred in finding the Bank was not barred from bringing the action based on the expiration of the statute of limitations. Cosman argues the statute of limitations began to run at the time the notes were made in July 2007.[2] We disagree.

Section 1 of the guaranty provides for "payment when and as due upon maturity." The maturity dates of the loans were August 2009 and April 2010. The Bank filed this action in December 2011.

An action for breach of contract must be commenced within three years. S.C. Code Ann. § 15-3-530(1) (2005). Under "the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The discovery rule applies to breach of contract actions." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010). "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). "[T]he statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults." 38 Am.Jur.2d *Guaranty* § 96, at 1040 (2010).

Cosman argues the guaranties are demand notes, which are due immediately; thus, the statute of limitations runs in favor of the maker from the date of the execution

[2] The notes were renewed in 2009.

of the instrument.[3] *See Coleman v. Page's Estate*, 202 S.C. 486, 488-89, 25 S.E.2d 559, 559-60 (1943) (stating "the law is well settled that a promissory note payable on demand, with or without interest, is due immediately, and that the statute of limitations runs in favor of the maker from the date of the execution of the instrument"). However, we agree with the trial court that the guaranties in this case were not demand notes because they all had specific maturity dates. We likewise agree with the trial court that to accept Cosman's theory that the statute of limitations begins to run on the date the guaranty is signed could result in "virtually no guarantee ever being enforceable in our State" and is "inconsistent with . . . South Carolina law." Accordingly, we affirm the trial court's finding that the Bank was not barred from bringing the action based on the expiration of the statute of limitations.

B. The Guaranties

Cosman also argues the trial court erred in interpreting the guaranties as imposing liability on him when Borrower's obligations were fully satisfied. We agree.

"A guaranty is a contract." *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "'Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.'" *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

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[3] Cosman also argues for the first time on appeal that the guaranties and notes should be considered demand notes because they are perpetual contracts with no specific duration, and perpetual contracts are not favored in South Carolina. *See Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) (stating "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract"). This argument is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

"The law in this state regarding the construction and interpretation of contracts is well settled." *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

"On the other hand, a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46-47, 747 S.E.2d 178, 184 (2013). "[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

"A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity." *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). "The general rule in South Carolina . . . is that a guaranty of payment is an obligation separate and distinct from the original note." *Id.* at 544, 443 S.E.2d at 551 (internal citation omitted). In *Lanford*, our supreme court further defined a guaranty as follows:

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral.

Id. (quoting 38 Am.Jur.2d *Guaranty* § 4). The court in *Lanford* "adhere[d] to the principle that the guaranty of payment and the promissory note are two separate contracts" and concluded the guarantor, who was not a party to the note, could not avail himself of defenses available to the debtor. *Id.*; *see* Frank S.H. Bae & Marian E. McGrath, *The Rights of A Surety (or Secondary Obligor) Under the Restatement of the Law, Third, Suretyship & Guaranty*, 122 Banking L.J. 783, 783 (2005) (("The Bible warned against becoming a surety (secondary obligor), stating that

'[h]e who is a surety for a stranger will surely suffer for it, but he who hates going surety is safe.'") (quoting Proverbs 11:15))).

Citing the Restatement (Third) of Suretyship & Guaranty §§ 37-41(1996), Cosman argues, "The law developed so that a guarantor may be discharged under certain circumstances if modifications of the obligations between the bank and the borrower are made without the consent of the guarantor." For instance, Cosman relies on sections 37, 38, and 41, which provide protection to guarantors. Restatement (Third) of Suretyship & Guaranty §§ 37-41 (1996) (providing for protection of a guarantor when the principal obligor is released). Cosman also argues the Restatement provides for (1) the protection of a guarantor when an agreement between the bank and the borrower provides for a reservation of a right of action against the guarantor, and (2) the prevention of opportunistic behavior by the bank and the borrower without regard to the consequences to the guarantor.

Cosman maintains that amendments to South Carolina's UCC after our supreme court's decision in *Lanford* indicate our Legislature intended to provide the Restatement protections to guarantors. Cosman argues our Legislature has recognized this development in the law by enacting the current versions of Articles 3 and 4 of the UCC, found in S.C. Code Ann. §§36-3-101, 36-4-101 (2003 & Supp. 2013). Cosman contends that reading the guaranties as the trial court did, which results in guarantors being forever obligated on a debt that is forgiven, is unconscionable.

The Bank argues section 36-3-605(a), providing for the discharge of secondary obligors, only applies to an "instrument," which is a negotiable, unconditional promise to pay a fixed sum. *See* S.C. Code Ann. § 36-3-605(a) (Supp. 2013).[4] The

[4] Section 36-3-605(a) provides: "If a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

> (1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under this chapter.

Bank further argues the protection of section 36-3-605(a) does not apply if the guarantor expressly waives the defenses based on the law of suretyship, and Cosman waived his defenses in the guaranties. *See* S.C. Code Ann. § 36-3-605(f) (Supp. 2013) (stating "[a] secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge . . . or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicat[es the waiver of] defenses"). Finally, the Bank argues the South Carolina Legislature did not adopt all of the provisions of the Restatement, and the Official Comment 9 to section 36-3-605 of the South Carolina Code provides that the release of a guarantor will occur "only in the occasional case" and "[t]he importance of the suretyship defenses provided . . . is greatly diminished by the fact that the right to discharge can be waived . . . ." S.C. Code Ann. § 36-3-605 cmt. 9 (Supp. 2013).

The general rule releasing a guarantor when a creditor is released provides:

> Generally, acts of the guarantee which have the effect of discharging the principal debtor despite the lack of complete payment or of complete performance of the guaranteed contract also operate as a discharge of the guarantor.
>
> Where the principal debtor has not made complete payment or has not completely performed the guaranteed contract, but the effect of the creditor's acts is nevertheless to release or discharge him or her, the

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> (2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument. . . .
>
> (3) If the secondary obligor is not discharged under Paragraph (2), the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.

> guarantor is also discharged, unless the guarantee's right of recourse against the guarantor is expressly reserved in the contract releasing the principal, or in the guaranty contract . . . . Thus, where the creditor enters into a compromise agreement with the debtor, the effect of which is to release the debtor from further liability, the guarantor can no longer be held liable, unless the guaranty contract or the compromise agreement provides otherwise.

38A C.J.S. *Guaranty* § 111, 720-21 (2008); *see Poole v. Bradham*, 143 S.C. 156, 166, 141 S.E. 267, 270-71 (1927) (stating "in equity[,] the discharge of one surety operates to discharge all others 'in the like relation to the debt,' unless it be shown by competent testimony that the parties intended otherwise," and further explaining that equity "construes a release according to the intention of the parties").

However, in *Cochran*, 324 S.C. at 294, 478 S.E.2d at 65, this court found the guarantor unconditionally agreed to pay all sums due and all losses the lender suffered due to the creditor's default. The court found "[t]he terms of the guaranty provided that [the guarantor's] obligation to [the lender] would be unaffected if [the lender] decided to release [the creditor's] obligation." *Id.* This court found the release of the creditor from liability did not relieve the guarantor of liability. *Id.*

Cosman distinguishes his guaranties from those in *Cochran*. In *Cochran*, the lender loaned money to a used car dealership, and three corporate officers and a company guarantied the loan. *Id.* at 292, 478 S.E.2d at 64. A collection action by the lender resulted in a confession of judgment against all parties except one guarantor, Ralph Cochran. *Id.* Many years later, the lender filed an action against Cochran to collect the judgment. *Id.* at 292-93, 478 S.E.2d at 64. The trial court directed a verdict in favor of Cochran; however, this court reversed, finding the ten-year expiration of the confession of judgment did not extinguish Cochran's obligation to the lender under his guaranty, which was an independent contractual obligation. *Id.* at 293-95, 478 S.E.2d at 65.

The relevant provisions of Cochran's guaranty provided:

> [E]ach of us as primary obligor jointly and severally and unconditionally guarantees to you that Dealer will fully, promptly and faithfully perform, pay and discharge all Dealer's present, existing and future obligations to you;

> and agrees, without your first having to proceed against Dealer . . . , to pay on demand all sums due and to become due to you from Dealer and all losses, costs, attorney's fees or expenses which you may suffer by reason of Dealer's default . . . .

Id. at 294, 478 S.E.2d at 65 (alteration in original). As the guarantor, Cochran "unconditionally agreed to pay 'all sums due' and 'all losses' that [the lender] suffered due to [the car dealership's] default. The terms of the guaranty provided that Cochran's obligation to [the lender] would be unaffected if [the lender] decided to release [the car dealership's] obligation." *Id.* This court found the lender suffered "a loss" due to the dealership's default, and Cochran's obligation to the lender was unaffected by the release of the dealership's obligation. *Id.*

Cosman argues the guarantor in *Cochran* guarantied more than the obligations of the borrower; whereas in this case, he provided a guaranty only for the liabilities of Borrower, and the Agreement extinguished those obligations. Cosman also distinguishes *Cochran*, arguing the debt in *Cochran* was no longer enforceable against the borrower; thus, the obligation of the guarantor was not extinguished. In this case, the underlying debt is satisfied.

Under our reading of the relevant authorities, we must review the terms of the guaranty and the Agreement to determine if Cosman was released from liability with the release of Borrower. Cosman argues section 1 of the guaranty is controlling: The guarantor "absolutely and unconditionally guaranties to the Bank . . . the payment . . . of: (a) all liabilities and obligations of the Borrower to the Bank . . . ." Cosman maintains the release of Borrower released him as a guarantor under this section of the guaranty because there is no longer an obligation of Borrower to the Bank.

Cosman also argues that section 2, in which he "acknowledges and understands that nothing except the full and final payment . . . shall release and discharge the Guarantor from his obligations and liability hereunder" supports his interpretation of the guaranties because the Bank's acceptance of the proceeds of the short sales and release of Borrower acted as "full and final payment" of Borrower's debts. Cosman argues that at a minimum, the guaranties are unclear about whether he is released from liability when Borrower is released; thus, there is a genuine issue of material fact precluding summary judgment.

As to the waiver portion of section 2(a), Cosman argues that interpreting it to provide that the guarantor is obligated would lead to the ridiculous and unconscionable outcome of requiring Cosman to pay the full amount of the notes regardless of any amounts already paid to the Bank. Cosman maintains the trial court erred in relying on cases that consider guaranties with materially different terms than the guaranties in this case.

Section 2(a) provided the following:

> Guarantor agrees that the Bank may take . . . the following actions without diminishing, impairing, limiting or abridging the Guarantor's obligations hereunder, and the Guarantor expressly waives any defense . . . arising out of any of the following actions taken by the Bank, whether with or without notice to, or consent by, the Guarantor: . . . (iii) any release or discharge by the Bank of the Borrower, or any . . . other guarantor; . . . (v) any settlement made with . . . the Borrower, or . . . any other guarantor.

We agree the guaranties in this case can reasonably be read to limit Cosman's liability to "all liabilities and obligation of the Borrower to the Bank." Because the Bank has accepted full and final payment from the Borrower, the guaranties can reasonably be interpreted to conclude there is no longer any liability of the Borrower to the Bank. Viewing the evidence in the light most favorable to Cosman, as we must do in reviewing the trial court's grant of the Bank's motion for summary judgment, we find the guaranties created an ambiguity. *See Hard Hat Workforce Solutions, LLC v. Mech. HVAC Servs., Inc.*, 406 S.C. 294, 750 S.E.2d 921, 923-24 (2013) (reviewing the grant of a motion for summary judgment in the light most favorable to the nonmoving party in an action for a claim against a payment bond). Thus, we find the trial court erred in finding Cosman's liability was not extinguished as a matter of law. *See Progressive Max Ins. Co.*, 405 S.C. at 46-47, 747 S.E.2d at 184 (finding a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement); *Mathis*, 389 S.C. at 309, 698 S.E.2d at 778 (construing ambiguities in an agreement against the drafter of the agreement). Accordingly, we reverse the trial court's order granting summary judgment, which concluded the release of the Bank and Petrozzelli did not release Cosman.

C. The Breach of Contract Claim

Cosman lastly argues the trial court erred in granting summary judgment on the breach of contract cause of action while also finding a genuine issue of material fact existed as to his "defenses" to the breach of contract claim. Based on our disposition of the trial court's grant of summary judgment on the guaranties, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

IV. CONCLUSION

For the foregoing reasons, the order granting summary judgment is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2013-000515

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5226
Heard March 6, 2014 – Filed April 23, 2014
Withdrawn, Substituted, and Refiled June 11, 2014

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Appellant.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla, for Respondent.

KONDUROS, J.: The State appeals the circuit court's reversal of the magistrate court's conviction of Cody Roy Gordon for driving under the influence (DUI). It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A) of the South Carolina Code (Supp. 2013) because Gordon's head was

not visible on the required recording during one of the field sobriety tests administered. We affirm in part, vacate in part, and remand.

FACTS

On October 29, 2011, the South Carolina Highway Patrol stopped Gordon at a license and registration checkpoint. Officers administered three tests to determine if Gordon was under the influence: the Horizontal-Gaze Nystagmus (HGN) test[1], the walk and turn test, and the one-leg stand test. Following the tests, the officers charged Gordon with DUI. The dashboard camera in the arresting officer's car recorded the events leading to the arrest.

Prior to a trial before the magistrate court, Gordon moved to dismiss the charge on several grounds, including the State's failure to sufficiently record the HGN test because Gordon's head was not visible on the recording during the test. The magistrate denied the motion to dismiss, finding the State properly captured Gordon's conduct on the recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2013) and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Following a trial, a jury convicted Gordon of DUI.

Gordon appealed his conviction to the circuit court. At the hearing before the circuit court, Gordon argued the HGN test could not be seen on the recording. Gordon provided black and white photographs ("stills") of the recording to the circuit court without objection by the State. Following the conclusion of arguments, the circuit court granted Gordon's motion to dismiss. The court found section 56-5-2953(A) requires the defendant's head be visible during the administration of the HGN test, unless an exception in section 56-5-2953(B) applies. The court noted Gordon was "so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark[,] which

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[1] "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system." *State v. Sullivan*, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). "The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." *Id.*

prevented [Gordon's] head from being sufficiently visible through the entire administration of the [HGN] test." This appeal followed.

STANDARD OF REVIEW

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (2014) ("The appeal [from the magistrate court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). This court will review the decision of the circuit court for errors of law only. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); *Henderson*, 347 S.C. at 457, 556 S.E.2d at 692. "[Q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013) (internal quotation marks omitted). The circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *Id.*

LAW/ANALYSIS

The State argues the circuit court erred in reversing the magistrate court's conviction of Gordon for DUI. It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2013) because Gordon's head was not visible during the HGN test.[2] It

[2] The State also contends the circuit court did not review the recording. However, the record does not indicate whether the circuit court reviewed the recording or not. Gordon indicated at the hearing that all of the evidence had been submitted to the circuit court. The record provides the circuit court conferred with its law clerk off the record after receiving the stills. Gordon asserts that at this time, the circuit court appeared to review the recording on its laptop on the bench with the assistance of its law clerk. The transcript of the hearing states no exhibits were introduced. The State did not put on the record the fact that the circuit court

asserts the statute requires the recording include the field sobriety tests but not that the defendant's head must be visible. It further maintains that even if it is a requirement of the statute, the circuit court's factual finding that Gordon's head was not sufficiently visible during the HGN test lacked evidentiary support.

Section 56-5-2953(A) provides:

> A person who [commits the offense of DUI] must have his conduct at the incident site . . . video recorded.
> (1)(a) The video recording at the incident site must . . .
> (ii) include any field sobriety tests administered . . . .

"As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests." *Murphy v. State*, 392 S.C. 626, 632 n.4, 709 S.E.2d 685, 688 n.4 (Ct. App. 2011) (citing S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2010) ("The video recording at the incident site must: . . . include any field sobriety tests administered." (alteration by court))).

In *Murphy*, the defendant contended "the videotape of the incident [s]ite d[id] not comply with the statute because it fail[ed] to 'record most of the field sobriety tests.'" *Id.* at 631, 709 S.E.2d at 688. The court applied the prior version of section 56-5-2953, which was in effect at the time of the defendant's arrest, and found "the plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct." *Id.* at 632, 709 S.E.2d at 688. The version of the statute applied in *Murphy* did not include the explicit requirement that it "include any field sobriety tests administered" as the current version does. § 56-5-2953(A)(1)(a)(ii).

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allegedly did not view the recording or raise any objection to the court allegedly not reviewing the recording. The appellant has the burden of providing a sufficient record. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). Generally, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Accordingly, we cannot consider the State's assertion the circuit court did not review the recording.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, 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 a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "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." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

The purpose of section 56-5-2953 is to create direct evidence of a DUI arrest. *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

The circuit court properly found the magistrate erred in finding the recording was only required to show the conduct of the defendant. The magistrate relied on *Murphy* in making that determination. Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "The video recording at the incident site must . . . include any field sobriety tests administered . . . ." § 56-5-2953(A)(1)(a)(ii). Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless. Accordingly, the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding.

However, because the magistrate court found the recording only needed to capture the conduct, it did not make any findings as to whether the entire test, including the head, was on camera. The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." But "'the circuit court, sitting in its appellate capacity, may not engage in fact finding.'" *City of Greer v. Humble*, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013) (quoting *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004)). Because the circuit court engaged in fact finding and the magistrate never made such findings due to its misconstruction of the statute, we vacate the circuit court's finding Gordon's head was not visible and remand the case to the magistrate court.[3] The magistrate court is to make factual findings in light of the circuit court and our determination that the test must be recorded on camera; specifically for the HGN test, the head has to be visible on the recording.[4]

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[3] The dashcam recording that was available to the circuit court and the magistrate court was part of the record on appeal. This court viewed the recording, but our standard of review, just like the circuit court's standard of review in this matter, does not allow us to make findings of fact. That duty is left solely to the magistrate court. Accordingly, we will not make findings as to what the recording shows.

[4] Because we find the circuit court erred in making findings of fact, we need not address the State's argument the circuit court erred in reviewing the stills. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Nezar Abraham, Respondent.

Appellate Case No. 2012-213136

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5238
Heard January 6, 2014 – Filed June 11, 2014

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Appellant.

Michael O. Hallman, of Greenville, and C. Austin McDaniel, of Anderson, both of Cole Law Firm, for Respondent.

THOMAS, J.: In this driving under the influence (DUI) case, the State appeals the circuit court's reversal of Nezar Abraham's conviction in magistrate court. The State contends it presented sufficient independent evidence corroborating Abraham's extra-judicial confession to establish a jury question as to Abraham's guilt. We reverse.

FACTS/PROCEDURAL HISTORY

Shortly after midnight on July 7, 2011, Trooper Kevin Brown was called to the scene of a one-car accident in Oconee County, S.C. The accident occurred in the Keowee Key neighborhood on South Flagship Drive, which passes by the local country club. Upon arriving at the scene, Brown noticed the presence of emergency vehicles and a vehicle wrecked into a tree. Brown would later testify the wrecked vehicle was a dark-colored, newer model vehicle with "front-end damage consistent with running into a tree." Brown testified he believed the vehicle's license plate was traced to a rental car company. According to Brown, Abraham was the only person present at the collision scene aside from emergency personnel. Abraham told Brown he was from Chicago and living with his brother. Abraham indicated he had left the country club, where he had been drinking wine, and was headed to his brother's house inside Keowee Key. He also admitted to driving the wrecked vehicle. Brown noted Abraham was unsteady on his feet, slurred his speech, and smelled strongly of alcohol. Brown administered three field sobriety tests. The horizontal gaze nystagmus test result could not be used due to Abraham's congenital eye condition; however, the other two tests showed signs of impairment. Brown subsequently arrested Abraham for DUI. After being transported to the police station, Abraham submitted to a breath test, which registered a .22 percent blood alcohol level.

Abraham was tried in magistrate court for DUI. The State called Brown as the only witness at trial. Abraham motioned for a directed verdict during and after the State's case, contending the State failed to present sufficient evidence corroborating Abraham's extra-judicial confession to establish the *corpus delicti* of DUI. These motions were denied, and a jury convicted Abraham. On appeal to the circuit court, the court reversed Abraham's conviction, ruling the evidence at trial was insufficient to establish the *corpus delicti* of DUI. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in reversing Abraham's conviction because the evidence at trial was insufficient to establish the *corpus delicti* of DUI?

STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged." *Id.* "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the [S]tate." *Id.* "'If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.'" *State v. Bailey*, 368 S.C. 39, 45, 626 S.E.2d 898, 901 (Ct. App. 2006) (quoting *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). "The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law." *State v. Branham*, 392 S.C. 225, 228, 708 S.E.2d 806, 808 (Ct. App. 2011) (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007)).

LAW/ANALYSIS

"It is well-settled law that a conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof *aliunde* of the *corpus delicti*." [1] *State v. Osborne*, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999)

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[1] Given our supreme court's holding in *State v. Osborne*, we find our state's law is consistent with the "trustworthiness" approach delineated in *Opper v. United States*, 348 U.S. 84 (1954). *See Osborne*, 335 S.C. 172, 179-80, 516 S.E.2d 201, 204-05 (1999) ("We clarify the law in this State that, consistently with *Opper* and its progeny, the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."); *see also Opper*, 348 U.S. at 93 ("[W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.").

(footnote omitted). "[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."[2] *Id.* at 180, 516 S.E.2d at 205.

Subsection 56-5-2930(A) of the South Carolina Code (Supp. 2013)[3] states, "It is unlawful for a person to drive a motor vehicle within this State while under the

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In *Osborne*, 335 S.C. at 179-80, 516 S.E.2d at 204-05, our supreme court cited *State v. Trexler*, 342 S.E.2d 878 (N.C. 1986), in clarifying this state's law to be consistent with "*Opper* and its progeny." *See Osborne*, 335 S.C. at 179, 516 S.E.2d at 204 ("This standard enunciated in *Opper* has been adopted in other jurisdictions, including our sister state of North Carolina."). In *Trexler*, the Supreme Court of North Carolina held "[t]he *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. The independent evidence must touch or be concerned with the *corpus delicti*." *Trexler*, 342 S.E.2d at 880-81 (internal citation omitted). The court held that "[t]he rule does not require that the *evidence aliunde* the confession prove any element of the crime." *Id.* at 880.

[2] According to the Fourth Circuit, the United States Supreme Court in *Opper* rejected the *corpus delicti* rule and adopted the "trustworthiness approach." *See United States v. Abu Ali*, 528 F.3d 210, 235 (4th Cir. 2008) (noting the Supreme Court in *Opper* "reject[ed] the *corpus delicti* rule and adopt[ed] the trustworthiness approach, which it found to be the 'better rule.'" (citing *Opper*, 348 U.S. at 93)). As our supreme court in *Osborne* clarified this state's law to be consistent with the rule outlined in *Opper*, we speculate that continued reference to the requirement that a defendant's extra-judicial statements must be corroborated by "proof *aliunde* of the *corpus delicti*" has caused confusion amongst the bench and bar. We anticipate that this confusion could be avoided by ceasing reference to "proof *aliunde* of the *corpus delicti*" and similar terms, and instead echoing the language in *Opper*, in that the State must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." *Opper*, 348 U.S. at 93.

influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired . . . ." In its order granting a reversal, the circuit court cited *State v. Townsend*, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996), in support of reversing Abraham's conviction. However, the holding in *Townsend* weighs against such a reversal. *See id.* at 58, 467 S.E.2d at 140-41. In *Townsend*, this court held the following facts merited the submission of a DUI case to a jury:

> In the case before us, the state relied on the following circumstances to prove its case. Townsend was at the scene where his car had been involved in a wreck. He smelled like alcohol, failed field sobriety tests, and appeared to be intoxicated. A breathalyzer test showed his blood alcohol level to be .21. This is enough evidence, albeit circumstantial evidence, to submit the case to the jury. Accordingly, the circuit court judge erred in reversing Townsend's conviction on this ground.

Id. (internal citations omitted). All of the above-listed facts of *Townsend* are present in this case. Abraham was found at the accident scene of a wrecked vehicle in the presence of emergency personnel. He smelled of alcohol, failed field sobriety tests, and appeared to be intoxicated. A breathalyzer test showed his blood alcohol level to be .22 percent. Trooper Brown noted the wrecked vehicle had "front-end damage consistent with running into a tree." Additionally, the wrecked vehicle was located in Keowee Key, Abraham's stated destination, on a road that passes by the local country club, where Abraham claimed to have previously been. Abraham also admitted to driving the wrecked vehicle. The State provided sufficient independent evidence to support the trustworthiness of Abraham's statements to the police. Furthermore, this independent evidence, taken together with the statements, allowed a reasonable inference that the crime of DUI was committed.

Therefore, we hold the magistrate court properly denied Abraham's motion for a directed verdict and submitted the case to the jury. *See Osborne*, 335 S.C. at 180, 516 S.E.2d at 205 (finding a DUI case was properly submitted to a jury when the

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[3] The code provision in effect at the time Abraham committed the offense in 2011 has not since been amended; thus, we cite to the current version of section 56-5-2930.

State presented sufficient independent evidence supporting the trustworthiness of the defendant's statements and that evidence, taken together with the defendant's statements, allowed a reasonable inference that the crime of DUI was committed); *see also State v. White*, 311 S.C. 289, 296-97, 428 S.E.2d 740, 744 (Ct. App. 1993) (holding that precise questions of whether the defendant drove the vehicle in question under the influence of alcohol or drugs were properly left to the jury as factfinders). Accordingly, the circuit court erred as a matter of law in reversing Abraham's conviction. The decision of the circuit court is hereby reversed and Abraham's conviction is reinstated.

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mildred H. Shatto, Employee/Claimant, Respondent,

v.

McLeod Regional Medical Center and Key Risk Management Services, Inc., Employer/Carrier, Appellants,

and

Staff Care, Inc., and Travelers Insurance, Employer/Carrier, Respondents.

Appellate Case No. 2009-130166

ON REMAND FROM THE SUPREME COURT

Appeal From The Workers' Compensation Commission

Opinion No. 5239
Submitted December 18, 2013 – Filed June 11, 2014

AFFIRMED

Weston Adams, III, and Helen Faith Hiser, both of Columbia, and Walter Hilton Barefoot, of Florence, all of McAngus Goudelock & Courie, LLC; Carmelo Barone Sammataro, of Turner Padget Graham & Laney, PA, of Columbia, for Appellant.

John S. Nichols, Margaret Miles Bluestein, and Blake Alexander Hewitt, all of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Respondent Mildred Shatto; Candace G. Hindersman, of Willson Jones Carter & Baxley, PA, of Columbia, for Respondent Staff Care, Inc.

WILLIAMS, J.: This case comes before this court on remand after our supreme court's decision in *Shatto v. McLeod Regional Medical Center*, 406 S.C. 470, 753 S.E.2d 416 (2013), with instructions to address whether Mildred Shatto's fall while in the operating room at McLeod Regional Hospital (McLeod) was idiopathic in nature. After a review of the record, we affirm the order of the Appellate Panel of the Workers' Compensation Commission (the Appellate Panel) and find Shatto suffered a compensable, work-related injury.

FACTS/PROCEDURAL HISTORY

The facts surrounding Shatto's employment with McLeod are largely set forth in *Shatto v. McLeod Regional Medical Center*, 394 S.C. 552, 716 S.E.2d 446 (Ct. App. 2011). Shatto secured employment at McLeod after procuring the services of Staff Care, Inc. (Staff Care), a temporary medical service staffing company. Staff Care placed Shatto with McLeod as a certified registered nurse anesthetist (CRNA) to provide temporary medical services as a CRNA from November 2007 until February 2008. On December 21, 2007, Shatto fell on the operating room floor while assisting in the anesthetization of a patient. Shatto was treated in McLeod's emergency room and diagnosed with a contusion to the right eye. At the end of December 2007, Shatto's assignment with McLeod was terminated.

On April 30, 2008, Shatto filed a Form 50 against McLeod and Staff Care. After a hearing, the single commissioner concluded Shatto was an employee of McLeod and sustained an injury by accident in the course of her employment. McLeod appealed the single commissioner's decision, and the Appellate Panel affirmed the single commissioner. In McLeod's initial appeal to this court, it presented the following two questions: (1) whether Shatto was an employee of McLeod; and (2) whether Shatto's fall was compensable and not idiopathic in nature. After concluding Shatto was not an employee, this court declined to address McLeod's

remaining contention regarding the compensability of her fall. *Shatto*, 394 S.C. at 567, 716 S.E.2d at 454. Shatto then appealed to our supreme court, which concluded "the evidence, although not one-sided, preponderate[d] in favor of an employment relationship." *Shatto*, 406 S.C. at 472, 753 S.E.2d at 417. Our supreme court then instructed this court to address McLeod's additional assignment of error initially presented to, but not reached by, this court.

STANDARD OF REVIEW

The Appellate Panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Appellate Panel are presumed correct and will only be set aside if unsupported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (internal citation omitted).

LAW/ANALYSIS

McLeod contends Shatto's fall was not compensable because it was idiopathic in nature. We disagree.

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2013).

> The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Also, both parts must exist simultaneously before a court will allow recovery. "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. For an injury to "arise out of" employment, the injury must be proximately caused by the employment. An injury arises out of employment when there is a causal connection

> between the conditions under which the work is required to be performed and the resulting injury. An injury occurs "in the course of" employment when it happens within the period of employment at a place where the employee reasonably may be in the performance of the employee's duties and while fulfilling those duties or engaging in something incidental to those duties.

Ardis v. Combined Ins. Co., 380 S.C. 313, 320-21, 669 S.E.2d 628, 632 (Ct. App. 2008) (internal citations omitted).

When an employee has an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, furniture, or other objects that would otherwise contribute to the effect of the fall, the majority of jurisdictions deny compensation. *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 256 (Ct. App. 1998) (citing 1 Arthur Larson & Lex K. Larson, *Workers' Compensation Law* § 12.14(a) (1997)). "The reasoning behind this viewpoint is that the basic cause of the harm is personal, and the employment does not significantly add to the risk." *Id.* As a result, an injury resulting from an idiopathic or unexplained fall is generally not compensable unless the employment contributed to either the cause or the effect of the fall. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 452-53, 88 S.E.2d 611, 614-15 (1955). To be compensable, the injury is not required to be foreseen or expected, but after the event, it must appear to have originated in a risk connected with the employment and to have come from that source as a rational consequence. *Ardis*, 380 S.C. at 321, 669 S.E.2d at 632.

We find there is substantial evidence to support the Appellate Panel's decision that Shatto's injury was not a result of an idiopathic fall. In support of its conclusion, the Appellate Panel noted Shatto was preparing to "anesthetize a patient and was walking around the patient's bed when her foot became caught on something and she fell." Moreover, the Appellate Panel further stated, "[a]lthough [Shatto] does not know the exact item she tripped over, her shoe was still at the head of the bed when [Shatto] tried to stand up after her fall."

Shatto's testimony before the single commissioner supports the Appellate Panel's conclusion as well. Specifically, Shatto testified as follows:

> [McLeod]: Tell me exactly --- you say you were walking around to the side of the bed. Do you know exactly what you fell on? How would you describe what happened to you?
>
> [Shatto]: The patient's bed was an electric one, so it had an electrical cord to connect it. There was an I.V. pole with the patient, and it had a pump on it, so that had a cord to be plugged in, and there was an extra I.V. pole on it at the head of the bed towards the left side of the bed. I don't know for sure what my foot caught on, but it was one of those three things: the I.V. pole or cords from the bed or the pump.

Based on the foregoing, we hold the Appellate Panel properly found Shatto's injury was compensable. Although Shatto did not directly and unequivocally testify to what specifically caused her to fall, there is ample circumstantial evidence in the record that Shatto's fall was the result of conditions of her employment. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 341, 513 S.E.2d 843, 846-47 (1999) (holding proof that workers' compensation claimant sustained an injury may be established by circumstantial and direct evidence); *Taylor*, 368 S.C. at 36, 627 S.E.2d at 752 (stating evidence is substantial if, considering the record as a whole, it "would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action" (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 54, 547 (2005)); *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994) (holding the circuit court's reversal of the Appellate Panel was error because although the evidence conflicted, the Appellate Panel's findings were supported by substantial evidence). Shatto had an explanation for her fall, and although she was not absolutely certain as to what caused her fall, she identified specific, non-internal reasons for tripping. *Cf. Crosby*, 330 S.C. at 495, 499 S.E.2d at 256 (finding claimant failed to present any evidence as to what caused her to fall and concluding it would be wholly conjectural to conclude her employment was a contributing cause of her injury). Because Shatto presented satisfactory evidence that "the origin of the risk was connected with [her] employment," we hold her injury flowed as a natural consequence of her work at the hospital and thus arose out of and in the course of her employment with McLeod. *See Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965) ("[The

causative danger] need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." (internal quotation marks and citation omitted)).

CONCLUSION

Based on the foregoing, we hold Shatto sustained a compensable, work-related injury, and she was entitled to workers' compensation benefits for her injuries. Accordingly, the Appellate Panel's decision is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Henry Gray, Appellant.

Appellate Case No. 2012-209426

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5240
Heard May 13, 2014 – Filed June 11, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

FEW, C.J.: The State indicted Henry Gray for murder and first-degree lynching, and the jury convicted him of both charges. Gray argues the trial court erred by

not excluding graphic autopsy photographs under Rule 403, SCRE. We find the trial court acted within its discretion, and affirm.[1]

I. Facts and Procedural History

On the afternoon of February 13, 2010, Kenneth Mack was severely beaten during the course of two fights. The first fight occurred on McDuffie Street near Gonzales Gardens—a public housing complex in Columbia consisting of thirty apartment buildings. The second fight occurred moments later between two buildings in Gonzales Gardens. Mack died several days later from injuries he received during the fights.

Multiple eyewitnesses testified to the details of the two fights. According to their accounts, Gray and his co-defendant Robin Reese, who is also his sister, were involved only in the second fight. They were both charged with murder and first-degree lynching. The following testimony was presented at their joint trial.

A. Testimony Regarding the First Fight

Issac Weathers, who lived in Gonzales Gardens, testified the first fight began when Mack and a "young lady," later identified as Reese's thirteen-year-old daughter and Gray's niece, started "arguing . . . and they fell" to the ground. Weathers testified that after they fell, "a bunch of guys went and jumped on [Mack]" and began attacking him.

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[1] Gray also appeals the trial court's refusal to charge involuntary manslaughter. Gray's trial counsel asserted no argument in support of an involuntary manslaughter charge but simply told the court, "I made some . . . requests for charges, if you would please deny those on the record, I would appreciate it." We decline to address this issue because we find it is not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); *Gilchrist v. State*, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (finding "trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve [his argument] for review" because "[w]hen given the opportunity, counsel must articulate a reason for the requested charge").

Amber Hardy testified she called 911 when she witnessed four men and a girl "beating up [Mack]." She described the fight as "brutal" and claimed the group members "took turns" kicking and punching Mack. Hardy testified that after the fight ended, Mack stood up and walked away, but was unsteady on his feet and kept "reaching out to . . . brace himself."

Two men involved in the first fight—Marcellius Brooks, who lived in Gonzales Gardens, and Angelo Boyd, who lived in a house next to Gonzales Gardens—testified they were walking down McDuffie Street when they saw Reese's daughter arguing with Mack. Brooks claimed that when Mack "pick[ed her] up and slam[med] her to the ground," Brooks "tackled [Mack] off her." Brooks admitted hitting Mack twice with a "closed fist," but denied kicking him and stated no one else was involved in the fight. Boyd admitted kicking Mack once, and stated Reese's daughter hit him "a couple times," but similarly denied that anyone else was involved. Both testified that after the fight, Mack got up and ran toward Gonzales Gardens.

B. Testimony Regarding the Second Fight

Reese, who lived in Gonzales Gardens, testified she learned about the assault on her daughter shortly after it occurred and became upset. Although Reese initially denied calling Gray, she later admitted she called Gray and told him "some grown man [was on] my daughter." She then decided to search for the man who attacked her daughter. According to Reese, she discovered Mack lying on the ground in front of her father's apartment building in Gonzales Gardens. Reese testified she "tried to kick [Mack] but [she] slipped and fell." She then "reached over and slapped him across his face and told him 'you stay away from my kid.'" At that point, Gray arrived and pulled her off Mack and told her "let the police handle it." She testified she was still angry, so she grabbed a chair, which other witnesses described as a "metal lawn chair," and "slung it" at Mack, although "[i]t didn't even come in contact with his body."

Several eyewitnesses described the second fight much differently.[2] Donnetti Perry, who lived in Gonzales Gardens, testified he saw Gray and Mack talking in front of the building where Gray and Reese's father lived. According to Perry, Gray received a phone call during this conversation, and when he hung up, Gray "swept

[2] Gray did not testify at trial.

[Mack's] feet out from under him," causing him to fall and hit his head on the ground. He claimed Gray kicked Mack "all over" and yelled, "[W]hat [did] you do to my niece?" He testified Reese arrived at that point and said to Gray, "[T]hat's him," and started kicking Mack and yelling, "I'm going to teach you for messing with my daughter." He claimed Reese then "got [the] chair and hit him" two or three times, and Gray also hit Mack with the chair a couple of times. Perry testified Mack remained on the ground throughout the fight and did not "resist" or otherwise defend himself.

Kara Chase, who was staying with a friend in Gonzales Gardens, gave a statement to police shortly after the second fight. In this statement, which was introduced into evidence, she claimed Gray "swept [Mack] from under his feet causing [him] to hit his head on the pavement." Afterward, Reese "[ran] up the street saying 'that's him'" and "kick[ed] [Mack] repeatedly, picking up an old metal chair and throwing it on top of [him]." Gray "continued to kick and stomp [Mack] in his face," and Mack "laid on the ground the whole time this was occurring." At trial, however, Chase testified to a different version of events. She denied Gray kicked Mack's legs out from under him, or that Reese hit Mack with the metal chair. She also claimed Mack got up during the fight and did not remain on the ground the entire time.

C. Medical Testimony

The State called Dr. Bradley Marcus, the pathologist who performed Mack's autopsy, as an expert witness. During Dr. Marcus's testimony, the State offered into evidence eleven photographs taken before and during the autopsy. Both Gray and Reese objected to the admission of the photos under Rule 403, SCRE, arguing the danger of unfair prejudice substantially outweighed their probative value. After a hearing outside of the jury's presence, the trial court admitted the photos.

Dr. Marcus continued his testimony and relied on the photos to describe Mack's injuries to the jury. He testified "the cause of death was a closed head injury due to blunt head trauma." He explained that during the autopsy, he discovered Mack suffered a skull fracture to the back right side of his head and had "a massive amount of subdural hemorrhage" where the skull fracture was located. He testified this was "a significant injury" and the "ultimate cause of death." Although he could not determine if the fatal injury occurred during the first or second fight, Dr.

Marcus testified the brain injury was consistent with someone "having their feet swept out from under them and landing on their head."

Gray and Reese each called forensic pathologists to testify regarding Mack's death. Both pathologists agreed with Dr. Marcus's testimony that blunt force trauma caused Mack's death. However, Gray's pathologist, Dr. Adel Shaker, commented on the thoroughness of the autopsy, stating it "was a hospital autopsy, not a forensic one," and explained "there is a great difference" between the two in regard to the level of detail. While Dr. Shaker did not know whether the first or second fight caused Mack's skull fracture, he stated, "[A]ll of the attacks that [Mack] experienced earlier . . . [left] an impact" and ultimately caused "the final result"—death. Dr. Shaker further testified a person could receive fatal head injuries and experience a "lucid interval," during which the person may "be unsteady on [his] feet" but can otherwise "walk, talk, [and] do regular activities for a few minutes" before succumbing to his injuries. He testified Mack could have suffered a fatal brain injury during the first fight and experienced a lucid interval at the time of the second fight, which caused him to "los[e] his balance, and hit his head."

In reply, the State called Dr. Clay Nichols, the chief medical examiner for Richland County at the time of Mack's death, to refute Dr. Shaker's testimony casting doubt upon the reliability of the autopsy. Dr. Nichols also testified he believed Mack's skull fracture occurred during the second fight when "[Mack] fell and hit the concrete."

D. Verdicts and Sentencing

The jury found Gray and Reese guilty of murder and first-degree lynching.[3] The trial court sentenced them to thirty years in prison for each conviction, with the sentences to run concurrent.

[3] The former crime of lynching was defined in section 16-3-210 of the South Carolina Code (2003). The section was amended effective June 2, 2010 and redefined first-degree lynching as "assault and battery by mob in the first degree." S.C. Code Ann. § 16-3-210(B) (Supp. 2013).

II. Admission of Autopsy Photos

Gray contends the trial court erred in admitting the autopsy photos. He argues the court should have excluded them under Rule 403, SCRE because their probative value was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE (stating relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

A. Standard of Review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We . . . are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

B. Description of the Photos

There are eleven autopsy photos at issue in this appeal. Eight of these—Exhibits 51 through 57 and 82—were taken before the autopsy began and show Mack's external injuries to his face, back, and legs. It was important for the jury to see the nature and location of these injuries in order to understand the witnesses' testimony about the fights and the pathologists' testimony about the injuries. These eight photographs contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice. Because Exhibits 51 through 57 and 82 had high probative value and minimal danger of unfair prejudice, it was clearly within the trial court's discretion to admit them.

The other three photos—Exhibit 80, 81, and 83—were taken during the autopsy and show Mack's exposed skull and brain. Exhibit 81 is a side view of Mack's head that shows his inside-out scalp pulled down over his face. At first glance, it appears Mack is wearing a mask over his face. In explaining what the viewer sees in Exhibit 81, Dr. Marcus testified:

> The way we do the head is . . . we make an incision along the back of the scalp here. . . . We pull the scalp over this way. You just literally just pull it over [the face] and that's what you're actually seeing here.

Exhibit 83 is a side view of Mack's exposed brain protruding from his open skull after the top part of his skull—referred to as the "skull cap"—was cut off. A gloved hand is holding the sawed-off skull cap, which is filled with blood on one side. Exhibit 80 is a close-up image of the hand holding Mack's skull cap, showing the details of the inside of his skull. The remainder of our discussion focuses on whether the trial court acted within its discretion to admit these three photos.

C. Probative Value

Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not *necessary* to substantiate *material* facts or conditions." 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. *See State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When [balancing the danger of unfair prejudice]

against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

So that we may analyze the probative value of these three photos in the practical context of the issues at stake in this trial, we summarize Dr. Marcus's testimony and the evidence upon which he relied to explain his opinions to the jury.

Before the State introduced the autopsy photos, Dr. Marcus relied on two diagrams he made during the autopsy. These diagrams, which Dr. Marcus characterized as "crude," consist of hand-drawn depictions of a human form with markings to identify the location of Mack's external and internal injuries. Dr. Marcus testified the diagrams would "assist [him] in explaining [his findings] to the jury."

The State then offered the autopsy photos, which Dr. Marcus described as "crucial" and "necessary" for helping the jury understand his testimony. Dr. Marcus testified Exhibits 51 through 57 illustrated Mack's external injuries and were "helpful in determining the cause of death in this case." He described the injuries depicted in each photo and stated they were "consistent with blunt force trauma to the head." As for Exhibits 80, 81, and 83, Dr. Marcus explained these photos were taken during the autopsy and "depict the cause of death" in a manner that he could not diagram. He testified the photos "actually illustrate what happened to this man's brain" and "would . . . aid [him] in describing the injuries to the jury."

Dr. Marcus then explained each step of the autopsy and his associated findings. He told the jury he first examined Mack's skull by removing the scalp, at which point he discovered Mack suffered a skull fracture to the back right side of the head. He stated it would take a "[s]ignificant amount of force" to cause this skull fracture, and it was consistent with someone "having their feet swept out from under them and landing on their head." He then explained the next step in the autopsy process—removing the skull cap to observe the brain—and discussed his findings. Dr. Marcus testified that when he removed Mack's skull cap, he found "a significant injury" that was "the ultimate cause of death." He explained there was "a massive amount of subdural hemorrhage" and "cerebral contusions" where the skull fracture was located. He testified cerebral contusions indicate a significant amount of trauma and often occur in high-impact car collisions.

At this point in his testimony, Dr. Marcus began describing Exhibits 80, 81, and 83 and explaining what each photo depicted. Starting with Exhibit 81, he testified this photo showed Mack's skull with the scalp removed, and allowed the jury to see "some of the hemorrhage area" caused by the blunt force trauma. The bloody hemorrhage area shown in Exhibit 81 clearly demonstrates the location of the skull fracture Dr. Marcus was attempting to explain. He stated, "That area should be clean with no hemorrhage or anything." Although he did not specifically identify Exhibits 80 and 83 on the record, it is apparent from the context of his testimony and the content of the photos that he was showing the jury these two exhibits to explain his findings:

> A. The next part we do is actually removing the skull cap itself and *that's* showing all the hemorrhage in the brain that should not be there, having the brain hemorrhage like that is incompatible to life.
>
> Q. And in order for the brain itself to suffer this kind of hemorrhage, is that more significant than ---
>
> A. Yes, yes. You can live with trauma on the scalp. You cannot live with that hemorrhage on the brain. That's incompatible with life. *That is just a close-up* showing that [the hemorrhage has] been there -- it's probably been there about three days.

(emphasis added). Following this testimony, the photos were handed to the jury. Dr. Marcus continued his testimony, stating "the cause of death was a closed head injury due to blunt head trauma." Although he could not determine if the fatal injury occurred during the first or second fight, Dr. Marcus testified the cerebral contusions were "consistent with someone falling" onto a hard surface.

Dr. Marcus's testimony as summarized above increased the probative value of the photos because his use of the photos to explain Mack's injuries demonstrated "the extent and nature of the injuries in a way that would not be as easily understood based on [expert] testimony alone." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). The medical testimony related to Mack's brain injuries and the severity of these injuries, which we do not consider to be a matter readily understood by most jurors, who are typically "unversed in medical matters." 382

S.C. at 291, 676 S.E.2d at 697. We also rely on Dr. Marcus's own testimony that the photos would help him explain to the jury the medical significance of Mack's injuries. *See* 382 S.C. at 290-91, 676 S.E.2d at 697 (relying on pathologist's testimony that autopsy photos would help him demonstrate certain "anatomic relationships" that could not otherwise be explained to the jury); *Dial*, 405 S.C. at 261, 746 S.E.2d at 502 (finding no abuse of discretion to admit autopsy photos when the expert "testified the photographs would aid in her testimony").

The State argues the photos had probative value because they corroborated Dr. Marcus's findings concerning the extent and location of Mack's head injuries, as well as the cause of death. We agree. *See Dial*, 405 S.C. at 260-61, 746 S.E.2d at 502 (finding autopsy photos "were highly probative" to the issue of cause of death because they corroborated expert testimony that victim's injuries were "inconsistent with an accidental injury"); *State v. Jarrell*, 350 S.C. 90, 106-07, 564 S.E.2d 362, 371 (Ct. App. 2002) (affirming admission of autopsy photos that "corroborated . . . the pathologist's testimony regarding the extent of th[e] injuries"). When a photo derives probative value from its tendency to corroborate testimony, the measure of this value varies depending on the facts of each individual case. Photos that corroborate important testimony on issues significant to the case may have very high probative value, while photos that corroborate only testimony related to collateral issues will have less probative value. Therefore, we discuss the two reasons this corroborative effect was important on the facts of this case.

First, Gray and Reese each retained their own pathologist to testify at trial. The State knew before trial that Gray and Reese intended to call pathologists to testify, and it must have known the general nature of the testimony they would give. However, the State did not know the substance of their opinions, nor the effect their testimony would have on the credibility of its own pathologist's testimony. This uncertainty affects our analysis of probative value because it made it more important for the State to present evidence to corroborate Dr. Marcus's testimony.

Moreover, as Gray conceded at oral argument, the State reasonably anticipated Gray's pathologist would testify Mack died as a result of injuries he received in the first fight. In fact, while Dr. Shaker testified he could not conclude whether Mack's death resulted from the first or second fight, he clearly suggested the injuries from the first fight would have been fatal. To explain how Mack was able to walk around after these fatal injuries, and even have a conversation with Gray,

Dr. Shaker put forth a theory that Mack may have experienced a "lucid interval" at the time of the second fight. However, because the lucid interval was only temporary, Mack would have succumbed to his injuries regardless of Gray's conduct. From such evidence, Gray could argue his actions did not cause Mack's death. *See State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) (stating "one who inflicts an injury on another is deemed by law to be guilty of [murder] *where the injury contributes . . . to the death* of the other" (emphasis added)). Thus, the corroborative effect of the photos served to rebut testimony the State reasonably anticipated Gray's pathologist would offer.

The second reason the corroborative effect of these photos was important is that it aided the State in proving the fatal brain injury occurred during the second fight. Perry testified Gray "swept [Mack's] feet out from under him," which caused Mack to hit his head on the ground. The autopsy photos and Dr. Marcus's testimony link this act—Gray causing Mack to fall—with the fatal brain injury in two ways. First, the photos show extensive cranial bleeding on the back of Mack's head, and Dr. Marcus testified this fatal injury was "consistent with someone falling" onto a hard surface. Second, there was no testimony regarding the first fight that specifically mentioned any blow to the back of Mack's head. Thus, to prove Mack died as a result of Gray's actions during the second fight, it was important for the State to show the jury the significance and exact location of the injury that caused Mack's death.

The State also argues the photos were important to prove malice. *See* S.C. Code Ann. § 16-3-10 (2003) (defining "murder" as "the killing of any person with *malice* aforethought, either express or implied" (emphasis added)). According to the testimony of the pathologists, a significant amount of force was necessary to cause Mack's injuries. The photos show Mack had a massive amount of cranial bleeding in the back part of his brain, which demonstrated the severity of the force needed to inflict this injury. Thus, the photos were important to the State's ability to establish that Gray and Reese acted with malice. *See State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (finding photos of the victim's stab wounds were "relevant to the issue of malice, an element of assault and battery with intent to kill"); *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 371 (1995) (finding photos of the crime scene "depicted the excess nature of the killing" and were

probative to "the issue of malice");[4] *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) (stating the autopsy photos were relevant to prove "the [child] abuse manifested an extreme indifference to human life"—the required mental state for homicide by child abuse).

Gray argues, however, that any probative value of the photos was minimal because cause of death was not disputed. Gray explains that neither his nor Reese's pathologist contested the cause of death to which Dr. Marcus testified. We find the argument unpersuasive. Neither the State nor the trial court knew at the time the photos were offered and admitted into evidence that the defense pathologists would agree with Dr. Marcus as to the cause of death. In fact, Gray concedes the State—and presumably the trial court—reasonably anticipated that the defense pathologists were called for the purpose of disputing Dr. Marcus's testimony, which focused primarily on cause of death. The record supports Gray's concession. When Gray objected to the introduction of the photos, the State argued they were necessary because "cause of death is an issue in this case" and Gray and Reese "have hired two . . . pathologists to dispute the [autopsy] findings." Gray and Reese did not respond, leaving the trial court with the clear impression the State's argument was correct. Therefore, at the time the trial court analyzed probative value, the court was unaware of the primary circumstance Gray relies upon for his argument that the photos lacked probative value—that the defense pathologists agreed with the State as to cause of death.

Gray also asserts the photos were unnecessary for the jury to understand Dr. Marcus's testimony because, prior to their introduction, Dr. Marcus relied on diagrams to explain Mack's injuries and the cause of death to the jury. Given the use of these diagrams, Gray argues the probative value of the photos was minimal. We find Dr. Marcus's use of the photos served a different purpose and corroborated different findings than the diagrams. Dr. Marcus described the diagrams as

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[4] *Kelley* and *Nance* were tried before the Rules of Evidence were effective, and thus Rule 403, SCRE, did not apply. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, both cases were tried after *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991), in which our supreme court "adopt[ed] the language . . . of Federal Rule of Evidence 403 that, 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" 303 S.C. at 382, 401 S.E.2d at 149.

"crude" drawings, and our examination of them convinces us they demonstrated to the jury only the general location of the injuries. In fact, Dr. Marcus stated, "I can't diagram this," in referencing why the photos were necessary to his testimony. The photos demonstrated what the diagrams could not: the significance of the head injury and the specific location of the primary injury—the skull fracture. Thus, we find the admission of the photos was necessary in combination with the diagrams "to substantiate material facts" regarding the extent of the injuries that caused Mack's death. *Dial*, 405 S.C. at 260, 746 S.E.2d at 502.

For these reasons, we find the probative value of Exhibits 80, 81, and 83 was high.

D. Unfair Prejudice

The probative value of the photos must be balanced against "the danger of unfair prejudice." Prejudice that is "unfair" is distinguished from the legitimate impact all evidence has on the outcome of a case. "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "'All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].'" *Id.* (quoting *United States v. Rodriguez–Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)); *see also United States v. Mohr*, 318 F.3d 613, 619-20 (4th Cir. 2003) ("Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion . . . .").

Photos pose a danger of unfair prejudice when they have "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Holder*, 382 S.C. at 290, 676 S.E.2d at 697 (internal quotation marks omitted). This definition of unfair prejudice was taken originally from the Advisory Committee Notes to the formerly identical federal rule 403.[5] *See State v.*

[5] Rule 403 and other federal rules of evidence were amended on December 1, 2011, "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." Fed. R. Evid. 403 advisory committee's note to the 2011 amendment. The changes

Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (adopting the definition of unfair prejudice recited in the Notes of the Federal Rules Advisory Committee). Regarding this definition, the Supreme Court of the United States stated: "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574, 587-88 (1997). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case. *See State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

The color photos contained in Exhibits 80, 81, and 83 are graphic. Exhibit 81 shows Mack's scalp folded from the back of his head over his face, exposing the surface of his entire skull. Exhibits 80 and 83 show Mack's exposed brain and the inside of his skull cap. These photos pose a danger of unfair prejudice because their graphic quality has some "tendency to suggest a decision on an improper basis." *Holder*, 382 S.C. at 290, 676 S.E.2d at 697.

However, the objective manner in which Dr. Marcus presented the photos mitigated this tendency. Dr. Marcus's technical explanation of the autopsy process followed by his scientific description of the photos—both prior to the jury seeing them—resulted in an overall discussion that was detached from the emotions of the case and educational to the jury. Although graphic, these particular autopsy photos do not evoke intense emotional or sympathetic reactions to the favor or detriment of either party. Thus, we find the danger of unfair prejudice from Exhibits 80, 81, and 83 was no more than moderate.

E. Balancing Probative Value and Unfair Prejudice

In ruling on a Rule 403 objection, the trial court "must balance the [unfair prejudice] of graphic photographs against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted). In a pretrial hearing in which the parties and the court discussed the admissibility of these photos, the trial court clearly indicated it would "review them" and evaluate their probative value "at the proper

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to Rule 403 are "stylistic only," with "no intent to change any result in any ruling on evidence admissibility." *Id.*

time." When the State offered the photos into evidence during Dr. Marcus's testimony, the trial court excused the jury from the courtroom and conducted a hearing into their admissibility. The trial court allowed the State to proffer the testimony of Dr. Marcus as to how he would use the photos to explain his testimony, and allowed Gray and Reese to cross-examine him.

We have noted a trial court has "particularly wide discretion in ruling on Rule 403 objections." *Lee*, 399 S.C. at 527, 732 S.E.2d at 228. Moreover, a trial court "is not required to exclude relevant evidence merely because it is unpleasant or offensive." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted). Based on our previous findings regarding the high probative value of the photos and the moderate danger of unfair prejudice, we find the trial court acted within its discretion in admitting them into evidence. *See* Rule 403 (providing "relevant[] evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice" (emphasis added)).

Gray argues, however, the photos should have been excluded based on *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012), *cert. granted*, (Aug. 8, 2013). We find Gray's reliance on *Collins* to be misplaced. In that case, a ten-year-old boy was killed after being attacked by dogs. 398 S.C. at 201, 727 S.E.2d at 753. At trial, the court allowed the State to introduce autopsy photos of the boy's remains, which were "graphic and shocking" and "depict[ed] a ten-year-old boy's body on an autopsy table after being partially eaten by dogs." 398 S.C. at 202, 208, 727 S.E.2d at 754, 757. This court reversed, finding based on the unique facts of that case, "the probative value of the photos is minimal," 398 S.C. at 207, 727 S.E.2d at 756, "[t]he danger of unfair prejudice of the admitted photos is extreme," 398 S.C. at 209, 727 S.E.2d at 757, and "the trial court abused its discretion in admitting the photos." 398 S.C. at 210, 727 S.E.2d at 758.

As we noted in *Collins*, and reaffirm here, both "probative value [and] unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." 398 S.C. at 202, 208, 727 S.E.2d at 754, 757. Focusing on the facts of this case and putting them in the practical context of the issues at stake in this trial, we hold the trial court acted within its discretion to admit the autopsy photos.

III. Conclusion

Accordingly, the trial court's decision to admit the photos, and Gray's convictions for murder and lynching in the first degree, are **AFFIRMED**.

SHORT and GEATHERS, JJ., concur.