N O T I C E

IN THE MATTER OF CYNTHIA E. COLLIE, PETITIONER

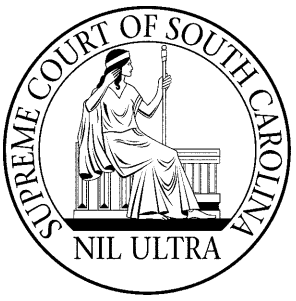
Petitioner was definitely suspended from the practice of law for two (2) years. *In the Matter of Cynthia E. Collie,* 410 S.C. 556, 765 S.E. 2d 835 (2014). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
June 10, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 10, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

John Kenneth Massey Jr., Respondent.

Appellate Case No. 2019-000842

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 27981
Heard March 11, 2020 – Filed June 10, 2020

REVERSED AND REMANDED

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Senior Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor Kevin S. Brackett, of York, for Petitioner.

Appellate Defender David Alexander, of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: The State indicted John Kenneth Massey Jr. ("Massey") for first-degree burglary, grand larceny, and criminal conspiracy. The circuit court granted a defense motion to quash the indictment for first-degree burglary on the basis the premises entered did not qualify as a dwelling. The court of appeals affirmed. *State v. Massey*, 426 S.C. 90, 825 S.E.2d 717 (Ct. App. 2019). We granted the State's petition for a writ of certiorari and now reverse and remand.

I. FACTS

This case has an unusual procedural history that dictates our result. The indictment for first-degree burglary against Massey alleged as follows:

> The Defendant, John Kenneth Massey Jr., did in York County, South Carolina, on or about January 12, 2014, while acting in concert with another person, willfully and unlawfully *enter the dwelling* of Kristopher Callahan, *when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house* establishment of Kristopher Callahan, all located at [redacted] in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein and said entering and remaining did occur during the nighttime hours, all in violation of Section 16-11-311, Code of Laws of South Carolina (1976, as amended).

(Emphasis added.) Before the jury was sworn, defense counsel moved to quash the indictment, stating, "Your Honor, the indictment that the [S]tate has provided *is correctly in line with the statute*[1] but I would argue *is faulty with regards to the facts of this case*." (Emphasis added.)

Defense counsel asserted the State had the burden of showing the outbuilding was both within 200 yards of *and* appurtenant to the victim's residence (based on

[1] *See* S.C. Code Ann. § 16-11-311(A)(3) (2015) ("A person is guilty of burglary in the first degree if the person enters a *dwelling* without consent and with intent to commit a crime in the *dwelling*, and . . . the entering or remaining occurs in the nighttime." (emphasis added)).

South Carolina's definitional statutes).[2] Defense counsel maintained the building does not qualify as a dwelling for purposes of the first-degree burglary statute because it is not appurtenant to the residence of the burglary victim, Kristopher Callahan ("Callahan"). Defense counsel alleged the building is not appurtenant because it actually houses a business, so its use is not related to the residence, and it is on a separate parcel owned by another individual, stating "[a]t least [that is] what the county records indicate." Counsel submitted county tax records indicating the residence is located on a parcel owned by Callahan's parents, and the building is on a parcel owned by Callahan's uncle. The county records also show the residence and the building share a common driveway that provides the only access to an adjacent road.

The State opposed the motion, arguing the building is within 200 yards of and appurtenant to the victim's residence. The State pointed out South Carolina case law has long held that South Carolina's burglary statutes safeguard a person's right of possession, not ownership, so ownership of the burglarized property is not required. The State proffered the testimony of Callahan, who stated he lives with his parents and a family friend in the residence, and a red storage building is "roughly 45/48 feet" (i.e., no more than 16 yards) from the residence. Callahan testified the home and the storage building are both located on land once owned by his grandfather. When Callahan's parents got married, his grandfather gave them five acres of property to build a home. After Callahan's grandfather passed away, the land became his mother's, but it was never formally placed in her name. Rather, the property was simply treated as "family land" and the parties "left it in the farm name," which Callahan stated is held by his uncle, "who lives on the other side of [Callahan and his parents]."

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[2] *See* S.C. Code Ann. § 16-11-10 (2015) (defining "dwelling house" in cases of burglary, arson, and other criminal offenses and stating "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property *shall be deemed a dwelling house*, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within *two hundred yards of it and are appurtenant to it* or to the same establishment of which it is an appurtenance *shall be deemed parcels*" (emphasis added)); *see also id.* § 16-11-310(2) (stating "dwelling" for purposes of the state's burglary statutes "means its definition found in Section 16-11-10 and also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person").

Callahan also testified as to his use of the building. He explained the building was primarily used by himself and his father, and that he treated the building like a garage to store his personal items, such as four-wheelers (one of which was taken in the burglary), boats, beds, and tools. He acknowledged having some work items on the premises from a small waterproofing and grading business that he ran from the home, meeting other workers outside the building to travel to various job sites, and having a sign on the building. However, he stated all work was done at the job sites, and the sign was not visible from the road. Rather, the sign was from his sponsorship of the family friend at a rodeo event, and he kept it because it has his name on it. Callahan testified he did not handle the taxes on the building, but he thought it was taxed with the land on which it is situated.

The State asserted South Carolina law does not provide a precise definition of appurtenant in this context, but there is precedent stating a building can be devoted partially to a business use and still qualify as a dwelling. Defense counsel, in contrast, contended the precedent cited by the State applied when a single structure is used for both sleeping and business purposes, but the current situation is distinguishable because the building is a separate structure from the residence. Defense counsel argued that "practically and legally," the building is not appurtenant to the residence because it is used for a business and there are no legal rights running between the parcels; thus, all of the elements of a first-degree burglary offense were not established.

At the conclusion of the arguments, the circuit court asked the parties, "Does anybody suggest it's a factual question?" Defense counsel stated he did not believe it was factual. The State did not respond. The circuit court took the matter under advisement. The next morning, the circuit court asked the parties if they would like to be heard further. The State reiterated several of its arguments, noting under South Carolina's statutory law, if a building is within 200 yards of and appurtenant to a dwelling, it is itself a dwelling, and court precedent holds burglary is a crime against possession, not ownership, so it did not matter that the building "might" have been in the name of another person. The State maintained the building is used by Callahan to store items that do not "have anything to do with his business," so the building is appurtenant to the residence and constitutes a dwelling for purposes of a first-degree burglary charge.

The circuit court granted the motion to quash the indictment, finding the building is located on a separate piece of property that is taxed separately and titled in the name of a different owner, Callahan does not have an ownership interest in either of the properties, and no testimony was presented that anyone was sleeping in

the building. The circuit court noted Callahan might own the land "one day, if it's family land," but "he doesn't right now." The circuit court observed that it had specifically asked the parties if they thought the case presented a factual question, and stated it believed this to be "a legal issue." The circuit court thereafter stated it did not believe the building is "appurtenant to the residence owned by the victim's parents, *factually*." (Emphasis added.)

The State advised the circuit court that it wanted to place on the record that burglary is not a crime against ownership, "not who owns plats of lands," but that it understood the ruling and could not go forward with the trial. The circuit court noted it was not suggesting "that this is not a burglary," based on "all the facts being presented thus far," but a ruling that the offense was not shown to be first-degree burglary. The circuit court opined, however, that "there would be factually plenty to support a burglary-second indictment."

The State filed a post-trial motion under Rule 29, SCRCrimP, asserting the circuit court did not have the authority to quash the indictment because a motion to quash is appropriate only when there are defects apparent on the face of the indictment. The State also incorporated its prior arguments made at the hearing. In a written order, the circuit court summarily denied the State's motion: "The court holds the State's arguments to be without merit. The Defendant is alleged to have entered an out building that was used as a business on a separate piece of property from the victim's mother's home. Therefore, the State's motion is denied." The circuit court did not specifically address the State's challenge to a court's authority to quash a facially valid indictment, although it noted the State had advanced this argument in its Rule 29 motion.

The court of appeals affirmed. *State v. Massey*, 426 S.C. 90, 825 S.E.2d 717 (Ct. App. 2019). First, the court found the State's argument that the circuit court did not have the authority to dismiss a facially valid indictment was raised for the first time on appeal; therefore, any error was waived by the State and was not preserved for review. *Id.* at 95–96, 825 S.E.2d at 720.

Second, the court of appeals observed that "[a]pplying the plain language of section 16-11-10 establishes that the storage building is not a dwelling for the purposes of our first-degree burglary statute." *Id.* at 96, 825 S.E.2d at 720. The court found that "a storage building unattached to a residence and located on a separate parcel of land is not 'usually considered as a necessary appendage of a dwelling house.'" *Id.* at 96, 825 S.E.2d at 721 (quoting *State v. Evans*, 18 S.C. 137, 140 (1882)). Here, the court found the storage building is "separate from Victim's

dwelling" and appropriated to a distinct use, "as reflected by the commercial signage and Victim's storage of his business tools there." *Id.* The court further found "*there was no evidence* that the storage building was used as a dwelling or was in any way *'annexed to' or 'attached to'* the home," so the circuit court did not err in quashing the indictment. *Id.* (emphasis added).

The State filed a petition for a writ of certiorari posing questions (1) challenging the circuit court's authority to quash a facially valid indictment, and (2) asking whether the court of appeals erred in affirming the circuit court on fact-based grounds where the pretrial evidence showed the first-degree burglary charge was both "legally and factually appropriate." This Court granted the State's petition solely as to the second question.

II. DISCUSSION

The State contends that, beyond the fact that the circuit court did not have the authority to quash a facially valid indictment on sufficiency-of-the-evidence grounds,[3] the court of appeals committed an error of law in affirming the circuit court's ruling on the merits. We agree.

The State notes defense counsel's challenge to the sufficiency of the evidence was an improper, fact-based challenge raised before the evidentiary phase of the trial had even begun, so the circuit court erred in the first instance by "addressing what functionally amounted to a pre-trial directed verdict motion and proceeding to analyze the sufficiency of the State's evidence supporting the first-degree burglary charge." However, even if a sufficiency-of-the-evidence analysis were somehow appropriate prior to the evidentiary phase of trial, the State asserts that, viewing the "limited evidence and testimony" it sought to introduce during the pretrial hearing in the light most favorable to the State,[4] the evidence presented in support of the first-degree burglary charge showed the building was well within 200 yards of and appurtenant to Callahan's residence and thus qualified as a "dwelling," so the charge

[3] Although the petition for a writ of certiorari was denied on this question, the State reiterates that the circuit court clearly erred in quashing a facially valid indictment. It acknowledges, however, that this argument was first raised in its Rule 29 motion and was likely precluded by error preservation rules.

[4] The State applies, by analogy, the standard used to evaluate the sufficiency of the evidence for purposes of a directed verdict motion at trial.

was "legally and factually appropriate," contrary to the decision of the court of appeals.

In support of its assertions, the State cites cases holding a burglary victim need not be the owner of the dwelling burglarized, and it argues ownership of the parcels is not determinative of whether a structure is appurtenant to a victim's residence. *See, e.g.*, *State v. Singley*, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011) ("We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership."); *id.* at 277, 709 S.E.2d at 606–07 ("It is instructive that our statutes do not define burglary in terms of who owns the property, but rather in light of who possesses it."). The State also cites cases holding certain outbuildings to be appurtenant to a victim's residence in a variety of factual settings. *See, e.g.*, *State v. Johnson*, 45 S.C. 483, 23 S.E. 619 (1896) (stating the undisputed fact that a fowl house was separated from a public roadway does not show that it was not appurtenant, as the only question is whether the structure is within the requisite distance and appurtenant thereto, the separation by a roadway is immaterial); *State v. Evans*, 18 S.C. 137 (1882) (observing a gin-house that was used to store cotton and to shelter stock was an appurtenance of the dwelling that was located eighty yards away).

Massey, in contrast, argues the court of appeals properly affirmed the circuit court's ruling quashing the indictment. Massey acknowledges "[a] person does not have to be the titled property owner to be a victim of burglary," but asserts "the question is whether the scope of the first-degree burglary statute includes parcels legally separate from the victim's dwelling." Massey contends the circuit court "properly recognized that an outbuilding cannot be appurtenant to a dwelling if it is situated on a distinct and separate parcel *owned by someone other than the victim*." (Emphasis added.) He notes none of the cases cited by the State involve the question of separate parcels, so they are not controlling here. Massey, however, also cites no authority directly on point, and he does not address the import of the court's (arguably factual) finding regarding the use of the building as a business. As noted previously, the circuit court's order on the Rule 29 motion ultimately cited the building's separate ownership and distinct use as grounds for quashing the indictment.

As an initial matter, we note multiple procedural irregularities have obstructed consideration of the singular issue that should have been the focus of the motion to quash the indictment. We will review these procedural points for the benefit of the parties in this appeal and to provide clarity in future cases.

A motion to quash an indictment tests only the facial validity of the indictment. *See* S.C. Code Ann. § 17-19-90 (2014) ("Every objection to any indictment for any defect *apparent on the face thereof* shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." (emphasis added)). A motion to quash does not test the sufficiency of the State's evidence; the sufficiency of the evidence can properly be challenged only by a motion for a directed verdict following the State's presentation of its case at trial. *See generally Gibson v. United States*, 244 F.2d 32, 34 (4th Cir. 1957) (stating there is "no doubt" that the only question to be addressed in a pretrial challenge to an indictment is "not whether it was supported by the facts of the case, but whether it sufficiently charged a crime"); *Evans*, 18 S.C. at 138 (stating the question regarding the adequacy of the indictment "is not as to the facts proved, but as to the sufficiency of the allegations in the indictment").

In light of the foregoing, the only question that should have been addressed at the pretrial hearing was whether the first-degree burglary indictment set forth the necessary elements of the offense. *See* S.C. Code Ann. § 17-19-20 (2014) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Defense counsel effectively admitted at the pretrial hearing that the State's indictment was facially valid when he made his motion to quash and stated "the indictment that the [S]tate has provided *is correctly in line with the statute* but . . . *is faulty with regards to the facts of this case*." (Emphasis added.)

The State, however, did not contemporaneously challenge the circuit court's authority to quash a facially valid indictment based on the sufficiency of the facts. Rather, the discussion at the hearing devolved into an analysis of whether the burglarized building was appurtenant to the victim's residence and qualified as a dwelling. The State itself engaged in an evidentiary analysis in this regard, making a proffer of testimony from the victim, all before the jury was sworn. The State did not advance any argument regarding the circuit court's authority until it filed its Rule 29 motion. Consequently, we denied the petition for a writ of certiorari as to the State's first question because we agreed with the court of appeals that the issue was

waived by the State and was not preserved for appellate review.[5] Moreover, the State effectively concedes in its brief to this Court that it failed to timely assert this challenge. Thus, any issue regarding the circuit court's authority is not properly before the Court, so we shall turn our consideration to the issue on which we granted the State's petition.[6]

The State asserts that, even if a sufficiency-of-the-evidence analysis were somehow appropriate prior to trial, viewing the "limited evidence and testimony" it sought to introduce at the pretrial hearing in the light most favorable to the State, it showed the building was well within 200 yards of and appurtenant to Callahan's residence and, thus, qualified as a "dwelling," so the first-degree charge was "legally and factually appropriate."

Whether a structure is appurtenant to a dwelling is a factual question. *See Johnson*, 45 S.C. at 489, 23 S.E. at 621 (stating a trial court may not "pass upon a question of fact, to wit, whether the [burglarized structure] was an appurtenance to the dwelling house"). The circuit court specifically asked the parties whether they believed this to be a factual issue and, hearing a response only from defense counsel, the court indicated it believed the issue to be legal. Further adding to the uncertainty, however, the circuit court proceeded to rule (ostensibly as a matter of law) that the building was not a dwelling for purposes of a first-degree burglary charge, but then found the building was not "appurtenant to the residence owned by the victim's parents, *factually*," based on the evidence presented "thus far." (Emphasis added.)

In our view, this dichotomy in the court's characterization developed because the General Assembly, while defining other related terms, has not defined "appurtenant" as used in section 16-11-10, and the parties offered varying opinions as to its meaning, but they also engaged in arguments regarding the use of the

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[5] Although the issue regarding the circuit court's authority was not raised for the first time on appeal, as stated by the court of appeals, but in the State's Rule 29 motion, we agree that the issue was untimely asserted.

[6] The State acknowledged at oral argument that "authority" in this context does not implicate the circuit court's subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (observing subject matter jurisdiction and the sufficiency of an indictment are two distinct concepts, as subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong, and "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters").

building, its location, and its ownership, all of which are questions of fact. *Compare Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009) (stating the interpretation of a statute presents a question of law) *with Singley*, 392 S.C. at 278, 709 S.E.2d at 607 (stating whether a person has a "possessory interest in the dwelling burglarized is highly factual") *and Johnson*, 45 S.C. at 489, 23 S.E. at 621 (stating whether a structure is appurtenant is a question of fact).

While the definition of the statutory term "appurtenant" might present purely a question of law, the parties and the courts below have cited no authority directly on point, and we find whether a particular structure is appurtenant to a dwelling is inextricably intertwined with the facts of the case. Consequently, in this unique procedural posture, this case presents a mixed question of law and fact. *See Boggero v. S.C. Dep't of Revenue*, 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015) (stating "[c]ertain situations involve a mixed question of law and fact"; "[s]tatutory interpretation is a question of law," but "whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard" (second alteration in original) (citations omitted)).

The circuit court issued a ruling predicated on limited facts elicited during a pretrial hearing, and then attempted to address what appears to be a novel issue of law using those limited facts. The State asserts the result was not unlike a ruling on a directed verdict, so it asks this Court to apply the standard for reviewing a directed verdict by analogy and to hold there was sufficient evidence—viewed in the light most favorable to the State—to support the indictment "legally and factually." *Cf. 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. 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.").

This Court may pronounce the law without deference to the circuit court. *See S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014) (stating, in a case involving "solely a question of statutory interpretation," that "[q]uestions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."). However, this case does not involve solely a question of law, as any definition of appurtenant must be applied to the facts of the case to determine if a first-degree burglary charge is appropriate. Because this case involves a mixed question of law and fact, those facts will necessarily inform this Court's analysis. We cannot adequately analyze a novel question of law based on evidence that a party *might* have introduced at trial or consider whether the evidence supported a charge of first-degree burglary on an

incomplete record. *See generally Chestnut v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015) ("The creation of a factual record will allow us to decide whether to adopt a 'no stigma damages rule[';] an 'all stigma damages rule[';] or a modified rule."); *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. App. 2018) ("As we have noted, a voluntarily dissolved business trust's amenability to suit may be a novel issue, which should not be decided on a motion to dismiss when further facts might add form and structure. As T.S. Eliot said: it is easy to carve a goose when there are no bones." (citation omitted)).

Although Massey asserts in his brief that, as a matter of law, the building "was not appurtenant to the dwelling because it was located on a different parcel of land owned by someone other than the victim," the fact that the parcel was *not owned by Callahan* is not determinative. *See Singley*, 392 S.C. at 274, 709 S.E.2d at 605 (stating "burglary is a crime against possession and habitation, not a crime against ownership"). Further, we disagree with Massey to the extent he more narrowly argues the case should be decided as a matter of law because the evidence that creates a question for the Court—that the outbuilding was on a legally separate parcel from the dwelling—was undisputed.[7] The separation of the parcels does not, standing alone, decide the issue of appurtenance. *Cf. Johnson*, 45 S.C. at 489, 23 S.E. at 621 (stating the undisputed fact that a fowl house was separated from a dwelling by a public roadway does not necessarily show that it was not appurtenant to a dwelling).

"Appurtenant" has multiple meanings, depending on the context and the statutory language, so any extensive pronouncements regarding the law of burglary should be arrived at upon due consideration of a complete record. While Massey focuses on the import of separate parcels, it has also been recognized that appurtenancy, a factual question, has been widely equated with use. *See* C.S. Parnell, *Burglary: outbuildings or the like as part of "dwelling house*," 43 A.L.R.2d 831, 834–35 (1955) (observing the curtilage concept, which requires an outbuilding to lie within a common enclosure or wall, originated in England, and it has not met with general approval in America; thus, while some American authorities still use a version of this concept by relying on plats or the requirement that they be within sight of the dwelling, "the dominant factor used in a large group of American cases to test whether an outbuilding may be subject to burglary appears to be appurtenancy or use"; if the outbuilding "contributes materially to the comfort and convenience of habitation in the dwelling house, it will be considered a part of the dwelling house

[7] In its Rule 29 motion, the State itself indicated the outbuilding was on a separate parcel.

with respect to the law of burglary"); *cf. Unseld v. Kentucky*, 31 S.W. 263, 264 (Ky. 1910) ("The test is the use and proximity. It is no longer, as it was once thought to be, a matter of inclosure, or fence. Nor is it ever one of title.").

Both the circuit court and the court of appeals cited the alleged use of the building as a business (which Callahan disputed), along with separate ownership (parcels), as factors in deciding the building was not appurtenant to the residence as a matter of law. In our view, further development of the record as to use would certainly inform our analysis of the definition of the term appurtenant.

We also disagree with the court of appeals to the extent its opinion can be read to require an appurtenant structure to be *physically* attached to a dwelling. The court of appeals cited the definitions of "appurtenant" and "annex" in *Black's Law Dictionary* (10th ed. 2014) and combined this with an excerpt of an early decision of this Court, *Evans*, 18 S.C. at 140, to reach this conclusion. However, the excerpt in *Evans* was discussing the offense of common law burglary, not the statutory offense. The physical attachment to a dwelling is not a requirement under South Carolina's current burglary law. This point can be confirmed by reference to the statutory definition of a dwelling house in section 16-11-10. If outbuildings can be up to 200 yards from a residence (double the length of a 100-yard football playing field) and yet appurtenant at the same time, it is apparent that outbuildings need not be physically attached. *See* S.C. Code Ann. § 16-11-10 (defining dwelling house); *see also Johnson*, 45 S.C. at 490, 23 S.E. at 622 (holding the relevant considerations under the statute are whether a structure is within 200 yards of a dwelling and appurtenant thereto and noting whether the structure is separated from the dwelling is immaterial).

III. CONCLUSION

For all of the foregoing reasons, we conclude the court of appeals erred in upholding the circuit court's quashing of the indictment for first-degree burglary. Accordingly, we reverse the decision of the court of appeals and remand the matter to the circuit court for further proceedings.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dwayne Cameron Tallent, Appellant.

Appellate Case No. 2017-001585

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

Opinion No. 5729
Heard March 17, 2020 – Filed June 10, 2020

AFFIRMED

Matthew J. Kappel, of Law Office of Matthew J. Kappel, PC, and J. Falkner Wilkes, both of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

HEWITT, J.: This case is chiefly about whether the trial court abused its discretion in declining to sever criminal charges from being tried together. The State alleged that Dwayne C. Tallent sexually abused his minor stepdaughter for several years and he gave her and one of her brothers (the only brother who was a

minor at the time) illegal drugs and alcohol after the brothers moved into the house Tallent shared with the siblings' mother. Tallent was charged with first and second degree criminal sexual conduct with a minor; lewd act upon a child; and a single count of contributing to the delinquency of stepdaughter and brother. A jury convicted him of the charges. The trial court ordered concurrent sentences of thirty years' imprisonment.

Here, Tallent argues the trial court erred in denying his motion to sever the contributing to the delinquency of a minor charge from the other charges. He also argues the trial court erred in admitting evidence of his manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine. In his view, allowing the more egregious drug-related testimony into evidence violated Rule 403 of the South Carolina Rules of Evidence.

We reject these arguments for the same basic reason: both decisions are reviewed under the abuse of discretion standard, and the record reveals no abuse of discretion. Thus, we affirm.

FACTS

This was a delayed reporting case. The abuse allegedly began in the early 1990s when stepdaughter was five or so years old. Stepdaughter testified Tallent's abusive conduct escalated over several years. Details of the abuse need not be repeated here.

Stepdaughter said the abuse ended when she was approximately fourteen years old and went to live with her biological father. She reported the abuse to authorities when she was twenty-six.

Stepdaughter also recalled being around illegal drugs in the household as early as five years old. She testified Tallent let her try marijuana when she was twelve and continued providing her with marijuana and alcohol until she moved out. Stepdaughter also testified crack cocaine and other drugs were present in the home.

The brothers moved into the home some years after their sister. Tallent allegedly exposed both brothers to illegal drugs and alcohol. Both brothers also testified to witnessing Tallent's odd behavior with their sister and, eventually, his abuse of her.

For example, the younger brother stated marijuana use was common in the house. He recalled that Tallent provided all of the children with marijuana, gave the brothers cocaine and other drugs, and taught the brothers how to make crack cocaine.
The younger brother also recalled Tallent frequently touched stepdaughter and rubbed her inner thigh in ways that seemed awkward and inappropriate. He stated it was not uncommon for stepdaughter to be in bed with Tallent. He additionally testified that on one occasion he looked through the keyhole of the bedroom door, witnessed Tallent sexually abusing stepdaughter, kicked the door open, and confronted Tallent.

Older brother corroborated this account about the illegal drug activity and the episode where younger brother witnessed his sister being sexually abused.

Before trial, Tallent moved to sever the contributing to the delinquency of a minor charge from the remaining charges on the ground that trying the charges together would cause undue prejudice by allowing evidence that would otherwise be inadmissible if the trial only involved the CSC and lewd act charges. Tallent argued his involvement in manufacturing, selling, and using cocaine, crack cocaine, and methamphetamine had no substantial connection to the CSC or lewd act charges and would have never passed the probative versus prejudicial threshold if offered as "prior bad acts" in a trial solely concerning the alleged sexual abuse.

The trial court disagreed and found that the charges were interconnected and interwoven. Therefore, the court determined it was appropriate to try them together. The court nevertheless reserved the right to exclude certain testimony if it was unduly prejudicial and specifically mentioned that it was not ruling evidence of drug *transactions* and *manufacturing* would be admitted.

Prior to stepdaughter's testimony regarding drug activity in the house, the State requested that the jury be sent out of the courtroom to seek clarification on the trial court's ruling. The State said it planned to introduce testimony that Tallent provided stepdaughter with marijuana and alcohol, provided cocaine and other drugs to other people in the household, and manufactured crack cocaine in front of stepdaughter. The State argued this evidence was relevant to the contributing to the delinquency of a minor charge.

Tallent objected, arguing the drug evidence was so prejudicial that he would not be able to receive a fair trial and its admission would violate Rule 403. Tallent acknowledged evidence that he gave stepdaughter marijuana and alcohol was relevant to the contributing to the delinquency of a minor charge and admissible. However, Tallent claimed testimony and evidence regarding drug manufacturing, drug transactions, extortion, and firearms was more prejudicial than probative and inadmissible.

The trial court held testimony regarding drug activity was relevant to the contributing to the delinquency of a minor charge and admissible. However, and as before, the court noted Tallent should object if he felt specific testimony violated Rule 403 or went "beyond simply proving the elements of contributing to the delinquency of a minor."

The trial court and the parties continued addressing this issue throughout the trial as various drug-related testimony came out. The court generally allowed testimony regarding drug use and manufacturing in which stepdaughter and her brothers were personally involved. The court also sustained objections and provided curative instructions as to testimony of drug transactions with third parties and other evidence not directly related to Tallent's charges.

Multiple witnesses testified in Tallent's defense, generally stating they did not witness any inappropriate conduct by Tallent toward stepdaughter or other minors. The jury convicted Tallent of all four charges.

SEVERANCE

Tallent argues the trial court erred in denying his motion to sever the contributing to the delinquency of a minor charge. Tallent contends this charge was not "the same general kind of charge, or related in kind, place or character sufficiently to be tried with the sexual offense charges." Additionally, Tallent claims the evidence related to his manufacture, sales, and use of cocaine, crack cocaine, and methamphetamine was unrelated and overly prejudicial with regard to the CSC and lewd act charges. In his view, the court improperly focused on whether the drug-related evidence was relevant to the contributing to the delinquency of a minor charge rather than asking whether this evidence would be admissible if the CSC and lewd act charges were tried alone.

In simple terms, the law explains that multiple charges can be tried together when they have a logical relationship to each other and when there is no prejudice. The "test" is that the charges must "(1) arise out of a single chain of circumstances, (2) [be] proved by the same evidence, [and] (3) [be] of the same general nature . . . ." *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). Further, no real right of the defendant can be prejudiced. *Id.* "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial [court] has the power, in [its] discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." *State v. Rice*, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006).

Decisions on severance and joinder are reviewed under a deferential standard. These rulings "should not be disturbed unless an abuse of discretion is shown." *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Rice*, 368 S.C. at 613, 629 S.E.2d at 395.

Cases use variants of the same general language to describe when the joinder of charges is appropriate. Recent precedent describes joinder as being appropriate for crimes that involve "connected transactions closely related in kind, place, and character." *State v. Beekman*, 415 S.C. 632, 637, 785 S.E.2d 202, 205 (2016) (quoting *State v. Cutro*, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)). This same decision rejected a restrictive reading of the phrase "a single chain of circumstances." *Beekman*, 415 S.C. at 636, 785 S.E.2d at 204.

"Offenses are considered to be of the same general nature where they are interconnected." *Rice*, 368 S.C. at 614, 629 S.E.2d at 395. "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." *Id.*

Mindful of these principles, we do not see an abuse of the trial court's discretion in denying Tallent's motion to sever the charges. In our view, one can sensibly say that these charges arose out of a single chain of circumstances, were proved by the same evidence, and were of the same general nature and Tallent was not unfairly prejudiced. *See Tucker*, 324 S.C. at 164, 478 S.E.2d at 265.

First, Tallent's abuse of stepdaughter covered a period of years in various homes where the family lived. During parts of this same period, Tallent supplied stepdaughter and her brothers with illegal drugs and alcohol. He also taught the brothers how to manufacture crack cocaine during this same time period. Although the charges did not arise out of a single isolated incident, the CSC, lewd act, and contributing to the delinquency of a minor charges "arose from, in substance, a single course of conduct or connected transactions." *Beekman*, 415 S.C. at 636-37, 785 S.E.2d at 204 (quoting *State v. Beekman*, 405 S.C. 225, 231, 746 S.E.2d 483, 486 (Ct. App. 2013)). In short, there was evidence that this improper conduct was continuous and spanned several years.

Second, the charges were proved by common evidence. All four charges were proved by the same witnesses—stepdaughter and her brothers. *See Beekman*, 415 S.C. at 638, 785 S.E.2d at 205 (stating that although the defendant's charges were distinct crimes, testimony from many of the same witnesses was used to prove both charges, and rejecting the defendant's argument that joinder required the charges to rely on identical evidence).

Third, the charges were of the same general nature. *See Rice*, 368 S.C. at 614, 629 S.E.2d at 395 ("Offenses are considered to be of the same general nature where they are interconnected."). The State presented evidence showing Tallent abused stepdaughter in the same locations and during the same time periods that he supplied her and her younger brother (the only brother mentioned in the indictment) with drugs and alcohol.

The State's witnesses also testified Tallent's providing stepdaughter with marijuana and alcohol was evidence of Tallent "grooming" stepdaughter so he could abuse her. Although the charges in this case technically differ from each other in that some were sexual in nature and the contributing to the delinquency of a minor charge was drug-related, all are more broadly of the same general nature and could be fairly characterized as involving abusive conduct toward minors.

Fourth, and critically, it is hard to say the joinder of these charges caused unfair prejudice. Tallent contends he was harmed by the drug evidence because it was not relevant to the CSC and lewd act charges. But the test is not so narrow, and precedent says "there may be evidence that is relevant to one or more, but not all, of the charges." *Beekman*, 415 S.C. at 638, 785 S.E.2d at 205. Additionally, and as discussed below, we fail to see how evidence of Tallent's use, manufacture, and

sale of cocaine, crack cocaine, and methamphetamine would have a tendency to suggest an improper basis upon which a jury would rely upon in finding he committed CSC or a lewd act. The evidence was harmful to be sure. But we do not think it was unfairly harmful.

In addition to *Beekman*, the present case strikes us as fairly similar to *State v. Davis*, 422 S.C. 472, 812 S.E.2d 423 (Ct. App. 2018). There, the defendant was charged with a property crime—burglary—and possession of methamphetamine with intent to distribute. *Id.* at 476, 812 S.E.2d at 426. The charges stemmed from an incident in which the defendant broke into a home, fled the scene, but left a vehicle behind. *Id.* at 477, 812 S.E.2d at 426. When officers searched the vehicle, they discovered drug paraphernalia and two bags of methamphetamine. *Id.* at 478, 812 S.E.2d at 426-27.

Davis argued the charges should have been severed because the methamphetamine was unrelated to the burglary, not proved by the same evidence, and the joinder of the charges would cause significant prejudice. *Id.* at 481, 812 S.E.2d at 428. This court disagreed, finding the possession with intent to distribute charge arose from the same chain of circumstances as the burglary and was proved through testimony of many of the same witnesses and the defendant did not suffer any prejudice due to the joinder. *Id.* at 481-82, 812 S.E.2d at 428-29.

If there was no winning case for joinder causing unfair prejudice in *Davis*, we think there is not a winning case for unfair prejudice here. Tallent's basic argument seems to be that certain types of especially harmful drug-related evidence would necessarily sway a jury to improperly convict a defendant on charges that are not drug-related. Although that may be true in some individual cases, we respectfully disagree with such a blanket proposition and note that if it were true, the result in *Davis* would be different.

ADMISSION OF DRUG EVIDENCE

Tallent argues the trial court erred in admitting evidence of his manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine because the danger of unfair prejudice from this evidence substantially outweighed its probative value.

Rule 403, SCRE, is a familiar one and provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Precedent explains "[u]nfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

As already noted, a deferential standard of review applies here as well. "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.* (quoting *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)).

We find the trial court acted within its discretion in admitting evidence of Tallent's use, manufacture, and sale of cocaine, crack cocaine, and methamphetamine. Tallent was charged with contributing to the delinquency of stepdaughter and one of her brothers. The statute says it is unlawful "for any person over eighteen years of age to . . . cause or influence a minor: (1) [t]o violate any law or any municipal ordinance . . . ." S.C. Code Ann. § 16-17-490 (2015). Stepdaughter and both brothers testified Tallent provided them with various drugs and taught the brothers how to make crack cocaine.

This testimony was obviously probative of the contributing to the delinquency charge. Indeed, we are unable to formulate a sensible argument that this testimony is not probative.

Tallent's core argument is unfair prejudice, but we think the danger of unfair prejudice from this testimony was relatively low. Although evidence of drug activity is admittedly not relevant to the elements of the CSC and lewd act charges, we fail to see how evidence of drug-related activity would have a tendency to suggest an improper basis for the jury to convict Tallent of CSC or committing a lewd act. *See Huckabee*, 419 S.C. at 423, 798 S.E.2d at 589 ("Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (quoting *Lyles*, 379 S.C. at 338, 665 S.E.2d at 206)). Nothing suggests the jury would be tempted to find Tallent guilty of sexual abuse if it believed Tallent exposed stepdaughter and her brothers to drugs and alcohol.

A holding in Tallent's favor here would be tantamount to a holding that certain drug-related evidence that is probative on one charge inherently causes unfair prejudice on other charges that are not drug-related. We are not aware of any support for that proposition. Accordingly, we find the trial court did not abuse its discretion in admitting testimony regarding Tallent's drug activity.

CONCLUSION

The trial court did not abuse its discretion in denying Tallent's motion to sever and in admitting evidence related to drug use and manufacturing. Thus, Tallent's convictions and sentences are

AFFIRMED.

LOCKEMY, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

Appellate Case No. 2016-002339

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

Opinion No. 5730
Heard February 19, 2020 – Filed June 10, 2020

REVERSED AND REMANDED

James Lynn Werner and Katon Edwards Dawson, Jr., both of Parker Poe Adams & Bernstein, LLP, of Columbia, and Jenna Brooke Kiziah McGee, of Parker Poe Adams & Bernstein, LLP, of Charleston, all for Appellant.

Thomas Frank Dougall, William Ansel Collins, Jr., and Michal Kalwajtys, all of Dougall & Collins, of Elgin, for Respondent Ozzy Construction, LLC.

Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC.

Steven L. Smith, Zachary James Closser, and Samuel Melvil Wheeler, all of Smith Closser, PA, of Charleston; and Rogers Edward Harrell, III, of Murphy & Grantland, PA, of Columbia, all for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Ronald G. Tate, Jr., and Robert Batten Farrar, both of Gallivan, White & Boyd, PA, of Greenville, for Respondent Volkmar Consulting Services, LLC.

Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.

David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson & Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.

John Calvin Hayes, IV, of Hayes Law Firm, LLC, Jesse Sanchez, of The Law Office of Jesse Sanchez, both of Charleston; Michael J. Jordan, of The Steinberg Law Firm, LLP, of Goose Creek; and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, of Charleston, all for Respondents Patricia Damico, Joshua Buetow, Brettany Buetow, Bryan Camara, Cynthia Camara, Matthew Collins, Ellen Davis Morrow, Jonathan Douglass, Theresa Douglass, Czara England, Chad England, Lenna Lucas, and Danny Morrow.

Brent Morris Boyd, Timothy J. Newton, and Rogers Edward Harrell, III, all of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC, and Coastal Concrete Southeast II, LLC.

David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC.

Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, P.A., of Beaufort, for Respondents LA New Enterprises, LLC, and Raul Martinez Masonry, LLC.

Christine Companion Varnado, of Seibels Law Firm, PA, of Charleston; and Alan Ross Belcher, Jr., and Derek Michael Newberry, both of Hall Booth Smith, PC, of Mt. Pleasant, all for Respondent Guaranteed Framing, LLC.

Stephen Lynwood Brown and Catherine Holland Chase, both of Young Clement Rivers, of Charleston; and Preston Bruce Dawkins, Jr., of Aiken Bridges Elliott

Tyler & Saleeby, P.A., of Florence, all for Respondent Alpha Omega Construction Group, Inc.

David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, and Everett Augustus Kendall, II, and Brian Lincoln Craven, both of Murphy & Grantland, PA, of Columbia, all for Respondent Construction Applicators Charleston, LLC.

Shanna Milcetich Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.& A. Concrete, Inc.

Robert Trippett Boineau, III, Heath McAlvin Stewart, III, and John Adam Ribock, all of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.

Bachman S. Smith, IV, of Haynsworth Sinkler Boyd, PA, of Charleston, for Respondent Southern Green, Inc.

John Elliott Rogers, II, of The Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA, of Columbia, and Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Mt. Pleasant for Respondent Decor Corporation.

Jenny Costa Honeycutt, of Best Honeycutt, P.A., of Charleston, for Respondent South Carolina Exteriors, LLC.

Michael Edward Wright, of Robertson Hollingsworth Manos & Rahn, LLC, and Michael Wade Allen, Jr., and R. Patrick Flynn, both of Pope Flynn, LLC, all of Charleston, all for Respondent Super Concrete of SC.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent Manale Landscaping, LLC.

Kathy Aboe Carlsten, of Copeland, Stair, Kingma & Lovell, LLP, and Keith Emge, Jr., of Resnick & Louis, P.C., both of Charleston, for Respondent Civil Site Environmental, Inc.

HILL, J.: Certain homeowners in a Berkeley County development sued the general contractor Lennar Carolinas, LLC (Lennar), the developer, and various subcontractors, alleging defective construction. Lennar impleaded other subcontractors as third party defendants and moved to compel arbitration of the entire dispute. The circuit court denied the motion, finding the arbitration agreement included not just the arbitration section of the parties' sales contract but also sections from a separate warranty agreement (as well as parts of the deeds and covenants), and that the arbitration agreement was unconscionable. The circuit court further found the South Carolina Uniform Arbitration Act (SCUAA) applied, not the Federal Arbitration Act (FAA), and there had not been compliance with the SCUAA's conspicuous notice requirements. Lennar now appeals. We conclude the FAA, rather than the SCUAA, applies, and the circuit court erred in not considering the arbitration section as an independent arbitration agreement. We further hold the arbitration section constituted a valid agreement to arbitrate, which the FAA requires us to enforce.

I.

All of the Respondent homeowners, except Lenna Lucas, purchased new homes to be constructed in the development. As part of the transaction, they signed a ten page Purchase and Sales Agreement (PA) containing an arbitration section. Lucas is the second owner of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the PA. Section 16 of the PA is entitled "Mediation/Arbitration," and begins as follows:

> The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any

> Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. . . .

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability de novo but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016).

A. Whether the FAA Applies

We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA provides the parties "specifically agree that this transaction involves interstate commerce." We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Id.* at 538, 542 S.E.2d at 363. In deciding whether a transaction involves "commerce in fact" sufficient to trigger the FAA, we examine the agreement, the complaint, and the surrounding facts. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999). The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), but here the transaction also involved the

construction of residential homes. As *Bradley* acknowledged, "our appellate courts have consistently recognized that contracts for construction are governed by the FAA." *Id*. at 458 n.8, 730 S.E.2d at 318 n.8; s*ee also Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). The affidavit of Lennar's Controller states the construction involved interstate commerce, specifically the use of out-of-state contractors and materials and equipment manufactured outside South Carolina. *See Cape Romain Contractors*, 405 S.C. at 123, 747 S.E.2d at 465 (holding FAA applied where out of state materials used in dock construction were "instrumentalities of interstate commerce" and parties' contract specifically invoked FAA). We hold the transaction here involved interstate commerce, and the FAA therefore applies.

B. Whether the Arbitration Agreement is valid and enforceable

We next consider whether there was a valid arbitration agreement. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). Because an arbitration provision is often one of many provisions in a contract, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (arbitrator rather than court must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced, but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 of the FAA requires the court to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"). Building from *Prima Paint*, the United States Supreme Court has developed a body of federal substantive law interpreting the FAA that applies in State and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Two of these substantive laws are central to our decision here, and they reaffirm *Prima Paint*:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (citation omitted); *see Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.").

In deciding whether the parties have a valid agreement to arbitrate we must therefore isolate the arbitration clause from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; attacking the validity of the contract as a whole is not enough. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) ("We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause."). We admit this is an artificial, abstract way to view the issue, but the lens has been fixed by federal substantive law and we are not free to adjust it.

The circuit court acknowledged this lens but sought to widen the scope, bringing the multiple arbitration and warranty provisions in other documents into the frame. It then found the provisions so comingled as to be inseparable and declared all of the comingled provisions to be "the" arbitration agreement. This was not in keeping with *Prima Paint*. Nor was it, as the circuit court stated, consistent with *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48–49, 790 S.E.2d 1, 4 (2016), where a 3-2 majority held an arbitration clause found in one subsection of a contract paragraph was so "intertwined" with other subsections of the same paragraph that the entire paragraph constituted the arbitration provision for purposes of the *Prima Paint* analysis. Unlike the contract in *D.R. Horton*, the arbitration agreement here was contained in a distinct, separate section of the PA. The circuit court's finding that the arbitration provision encompassed more than this section lacks adequate factual support. We therefore conclude the circuit court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing only on the discrete arbitration provision. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) (reversing circuit court's denial of motion to compel arbitration where circuit court violated *Prima Paint* by

considering separate warranty provision as part of arbitration agreement). Because the parties' arbitration provision is valid, § 2 of the FAA requires that we enforce it.

That ends our inquiry into Lennar's motion to compel the homeowners to arbitrate. There is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed and the Covenants. The PA's arbitration provision states, "All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)." Whether the disputes alleged in this lawsuit are covered by the PA's arbitration provision is therefore a question the parties clearly and unmistakably delegated to the arbitrator. *Schein*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding delegation of questions of arbitrability to arbitrator must be "clear and unmistakable").

Accordingly, we reverse the order of the circuit court denying the motion to compel arbitration. We express no view as to the validity or enforceability of other sections of the PA or any other documents at issue as those questions are for the arbitrator. Because it appears the circuit court did not specifically rule on Lennar's motions to compel the subcontractors and the developer, Spring Grove Plantation, Inc., to arbitration, we remand those motions to the circuit court for a ruling.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

Of which Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

and Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2017-001646

Appeal From Horry County
Karl A. Folkens, Special Referee

Opinion No. 5731
Heard February 6, 2020 – Filed June 10, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Fred B. Newby, Sr., and C. Scott Masel, both of Newby Sartip & Masel LLC, of Myrtle Beach, for Appellants.

Demetri K. Koutrakos, of Callison Tighe & Robinson, LLC, of Columbia, for Respondent.

HILL, J.: We are presented with the question of whether a reservation of a right-of-way on an official county map—as authorized by section 6-7-1220 of the South Carolina Code (2004) and a county ordinance—constitutes a defect in or encumbrance on the title to the affected land or renders its title unmarketable so as to come within the coverage of two title insurance policies. Based on the specific circumstances of this case, we hold it does. We further conclude none of the policies' coverage exclusions apply. We therefore reverse the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract and breach of the covenant of good faith and fair dealing. We affirm, however, the order granting summary judgment to Chicago Title on Appellants' bad faith claim.

I. FACTS

South Carolina law allows counties and municipalities to "establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public space open for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces." § 6-7-1220. In 1999, the Horry County Council established an official map by passing Ordinance 107-98 or the Official Map Ordinance (Ordinance).

The Ordinance created the official map to "show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces." The Ordinance further provided that after the official map was adopted, "no building, structure, or other improvement, shall hereinafter be erected, constructed, enlarged or placed within the reservation area . . . without prior exemption or exception . . . ." The purpose of the Ordinance and the official map was to provide for the public welfare and Horry County's financial convenience by "designating and reserving" such locations. The Ordinance established a procedure

for landowners to appeal land use restrictions and provided a criminal penalty for violating the Ordinance. Later in 1999, Horry County created the index map, which included the proposed locations for segments of the Carolina Bays Parkway.

In 2002, Horry County Council adopted Ordinance 88-202 (the 2002 Amendment), which amended the official map to add "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway . . . as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The roadway plan was attached to the 2002 Amendment, and the amended index map showed the Parkway bisecting the property at issue in this appeal and crossing the intracoastal waterway. Both the Ordinance and the 2002 Amendment were recorded with the Register of Deeds and indexed under Horry County.

In 2006, Peachtree Properties of North Myrtle Beach, LLC (Peachtree) purchased 131.40 acres in Horry County (the Property), which it planned to develop as a residential subdivision along the waterway, from the McClam family for $22,500,000. Peachtree financed the purchase with two mortgage loans, granting a first mortgage to R.E. Loans, LLC (REL) and a second mortgage to Jericho. Both REL and Jericho received title insurance from Chicago Title. The title insurance policies are printed on the 1992 standard form of the American Land Title Association and contain the following identical language and provisions:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE . . . AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY . . . insures, as of Date of Policy . . . against loss or damage . . . sustained or incurred by the insured by reason of: . . .
>
> ***
>
> 2. Any defect in or lien or encumbrance on the title;
>
> 3. Unmarketability of the title . . . .

In 2007, Peachtree defaulted on its loans. Jericho foreclosed, successfully bid on the Property at sale, and received a master's deed subject to the REL mortgage. In 2009, the South Carolina Department of Transportation (SCDOT) filed an eminent domain action against Jericho to take 10.18 acres of the Property for the Carolina Bay Parkway. Meanwhile, for reasons not pertinent here, the REL mortgage was

assigned to Lynx Jericho. In 2014, a jury awarded Jericho and Lynx Jericho $2.1 million as just compensation for the taking. During the five-year condemnation litigation, Jericho and Lynx Jericho submitted title insurance claims to Chicago Title, which Chicago Title denied.

In response to the denial of coverage, Jericho and Lynx Jericho sued Chicago Title for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay insurance benefits. The cases were consolidated and referred to the special referee, who heard arguments on the parties' cross motions for summary judgment and conducted the proceedings expertly. The special referee denied Appellants' motion for summary judgment and granted Chicago Title summary judgment, ruling: 1) the Ordinance did not create a defect or encumbrance on the Property; 2) the Ordinance did not make title to the Property unmarketable; 3) exclusions 1, 2 and 3(d) barred coverage; and 4) Chicago Title did not act in bad faith by contesting Appellants' claims. This appeal followed.

II. STANDARD OF REVIEW

We review grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). We view the facts in the light most favorable to Appellants, the non-moving parties, and draw all reasonable inferences in their favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Chicago Title is entitled to summary judgment only if "there is no genuine issue as to any material fact". Rule 56(c), SCRCP. Summary judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. COVERAGE UNDER THE TITLE INSURANCE POLICIES

A. General considerations regarding title insurance policy coverage

Title insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to "place the insured in the position he thought he occupied when the policy was issued." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). "Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may

affect or burden his title when he takes it." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C. 1980)); *see also Loflin v. BMP Dev., LP*, 427 S.C. 580, 595–96, 832 S.E.2d 294, 302 (Ct. App. 2019). One court has well explained:

> The sole object of title insurance is to cover possibilities of loss through defects that may cloud the title. . . . Some defects will be disclosed by a search of the public transfer records; others will be disclosed only by a physical examination or a survey of the property itself. Often the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes. Since the average purchaser has neither the skill nor the means to discover or protect himself against the myriad of defects, he must rely upon an institution holding itself out as a title insurer.

United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972).

As a leading commentator notes:

> [T]itle insurance policies usually cover risks arising from errors in title examination, some known defects, defects that would be disclosed by examination, and some undisclosed defects that would remain hidden even after competent examination of public records . . . . In that sense, title insurance is "all-risks" coverage, under which a loss must fall within the basic description of the covered peril—such as a "defect in or a lien or encumbrance on the title"—and not be within any explicit exclusions.

11A Maldonado et al., *Couch on Ins*. § 159:20 (3d ed. 2019) (footnotes omitted).

We interpret the language of title insurance policies like other contracts and enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). Whether coverage exists under an insurance policy is a matter of law.

Id. at 593, 762 S.E.2d at 709. The insured bears the burden of proving its claim falls within the policy's coverage. *Gamble v. Travelers Ins. Co*., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

B. Defect, lien, or encumbrance

The policies insure Appellants from damages incurred by any "defect in or lien or encumbrance on title." Appellants assert the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree.

The policies do not define the term "encumbrance," but we have. An early case, noting encumbrance was a catch-all term found in English conveyances, defined it as any weight on the land that lowers its value without conflicting with passing of the fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652–53 (1844). More recent decisions have said the same thing in different ways, defining an encumbrance as "a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)); *see also Pres. Capital Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 ("[D]efects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). An encumbrance is a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903); *see* 21 C.J.S. Covenants § 18 (2020) ("[A]n 'encumbrance' is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. That is, an 'encumbrance,' within the meaning of a covenant against encumbrances, is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of property or constitutes a burden or limitation upon the rights of the fee title holder." (footnotes omitted)).

The Ordinance described the location of the highway as a "right-of-way," and defined "right-of-way" as "land reserved . . . for a road." The Ordinance declared its intention to "reserve" future locations of highways and proscribed any use of the Property that would interfere with the County's future acquisition of the highway

parcel, and the Ordinance and amended map showing the location of the proposed highway were publicly recorded. As Chicago Title argues, the Ordinance allowed affected property owners to appeal their property's inclusion on the map, but that proves Appellants' point that the Ordinance encumbered the Property.

Ordinances may regulate land use without encumbering title, but the Ordinance here went beyond regulating use and created a third-party interest in the property in favor of the County. The enabling statute separates the concept of right-of-way from land use. *See* § 6-7-1220 (noting one purpose of official map is to "regulate structures or changes in land use in such rights-of-way"). We agree with Appellants that the Ordinance, including its provisions regarding the appeal procedures and penalties for violations, constituted an encumbrance within the meaning of the policy coverage. Although Chicago Title is correct that the Ordinance did not create a right-of-way, the policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance.

We find the Ordinance similar to the acquisition map at issue in *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962). There, a 1949 county map marked a strip of certain land for public acquisition. When Plaintiff purchased the land in 1960, he applied to the zoning authority for a building permit. The permit was denied because, without the marked strip, plaintiff's lot was not large enough to meet setback requirements. When plaintiff then tried to sell the land, a purchaser refused to close, citing the map. Plaintiff's title insurer denied his claim, pointing to the exclusion from coverage for "[z]oning restrictions or ordinances imposed by any governmental body." The court, however, held plaintiff's loss was covered because the acquisition map qualified as a lien or encumbrance not excepted by the policy.

We conclude the Ordinance constituted a defect and an encumbrance. We therefore reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

C. Unmarketability of title

The policies define unmarketability of title as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle . . . the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." This opaque definition—a model of circularity—is unenlightening. We are confident,

though, that a purchaser who discovered a portion of the real estate he was about to buy purportedly in fee simple absolute had been reserved by ordinance in favor of a governmental right-of-way may be entitled to rescind the sale. "To be marketable, a title need not be flawless. Rather, a marketable title is one free from encumbrances and any reasonable doubt to its validity. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Delivery of marketable title requires title be free of not only defects and encumbrances but also the reasonable probability of litigation. *Sales Int'l Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 398, 242 S.E.2d 432, 435 (1978) (providing a "reasonable probability of litigation" renders title unmarketable). The Ordinance created a reasonable probability of litigation concerning the title because the right-of-way was reserved for acquisition, making future condemnation reasonably probable.

The Ordinance differs from land use and zoning regulations, which can restrict development and impose an economic burden on the owner but do not create a third-party interest in property. *See McMaster v. Strickland*, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) (holding wetlands designation did not render title unmarketable); *Patel*, 339 S.C. at 49, 528 S.E.2d at 429 ("Because the wetland designation does not render the title unmarketable, Patel cannot rescind the contract based upon an encumbrance."); *Martin*, 282 S.C. at 52, 317 S.E.2d at 136 ("While marsh or water might be a burden upon property, it is certainly not a lien, easement, or a right existing in a third party."). We recognize the Ordinance resembled zoning and other land use tools, given it was to be enforced by the zoning administrator and the enabling statute described the official maps as "instruments of land use control." § 6-7-1220. In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable.

A marketable title is one free from doubt and any reasonable threat of litigation. Unmarketability cannot be based on just any doubt or defect, for almost any title can be flyspecked. But if the doubt is an objectively reasonable one concerning a material defect, then the title is unmarketable. A material defect is one that interferes or conflicts with the rights and incidents of title—the insured's fee simple absolute's "bundle of rights"—to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect. 1 Palomar, *Title Ins.*

Law § 5.7 (2019 ed.). This meshes with the policy definition of marketability, which explains coverage extends to any "alleged or apparent" matter affecting title.

Chicago Title argues the Ordinance did not affect marketability of the title because it only regulates use of the Property. We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that a matter that affects use cannot also affect title. *Id*. No one would contend, for example, that a covenant restricting use does not also affect title and, therefore, marketability. Because the Ordinance created an interest in the land by reserving a right-of-way and restricting use of the reserved land, we conclude it diminished the owner's bundle of rights and, consequently, affected title. And the diminishment was enough to cause a reasonable buyer to decline or discount a sale for a price less than what an unclouded title would demand on the market.

There is no factual dispute the Ordinance created a reasonable probability of litigation, thereby making the title unmarketable as a matter of law. The Ordinance, which, again, was publicly recorded, reserved the future site of the highway and took steps to minimize the County's future acquisition costs. Although we agree with Chicago Title that in general all landowners are at risk of eminent domain proceedings at any given time, the County's intent and preliminary steps set forth in the Ordinance foreshadowed a reasonable probability of condemnation. *Black River Farms, Inc.*, 270 S.C. at 398, 242 S.E.2d at 435 (mere possibility or remote probability of litigation is not sufficient to make title unmarketable). Therefore, we hold the Ordinance rendered Appellants' title unmarketable and reverse the special referee's grant of summary judgment to Chicago Title.

IV. EXCLUSIONS FROM COVERAGE

In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.").

A. Exclusion 1

In relevant part, Exclusion 1 bars coverage for losses arising by reason of:

> Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land . . . .

In granting Chicago Title summary judgment, the special referee ruled Exclusion 1 excluded coverage because the Ordinance merely affected the use of the land. As we have just discussed, the Ordinance related to and affected the title of the land, not just its use. Exclusion 1 therefore does not apply as a matter of law. We reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

B. Exclusion 2

Exclusion 2 bars coverage for losses arising by reason of:

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action, and Appellants are not seeking coverage for the 2009 condemnation action, which began after the effective date of the policies. The special referee noted the exclusive procedure for eminent domain in this state is the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). But this misses the mark. Appellants are not seeking recovery of loss for the 2009 condemnation action but for loss the Ordinance caused to the value of their title when they took it in 2007. Appellants contend these losses exceed and are different in kind from those sought in the condemnation action. Therefore, Exclusion 2 does not apply, and the special referee erred in granting Chicago Title summary judgment based on Exclusion 2.

C. Exclusion 3(d)

Exclusion 3(d) excludes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of the Policy." The Ordinance and the 2002 Amendment were filed years before the effective date

of the policies, and therefore clouded the title as of the Date of the Policy. The special referee therefore erred in finding this exclusion applied.

Parties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit. Chicago Title's inability to pigeonhole this unique Ordinance into an exclusion to coverage is unsurprising. Real estate investors buy title insurance to protect against such unforeseen "off the record" risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts.

V. BAD FAITH

The special referee ruled Chicago Title had a reasonable, good faith basis for contesting Appellants' claims. We agree.

Appellants' bad faith cause of action fails because they did not demonstrate Chicago Title acted unreasonably in denying Appellants' claims. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) ("The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured."). The unusual nature of the Ordinance presented close policy interpretation issues. Chicago Title had a reasonable basis for denying the claims, and we affirm summary judgment to them as to this issue. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) ("[W]here an insurer has a reasonable ground for contesting a claim, there is no bad faith.").

VI. CONCLUSION

Accordingly, we affirm the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims and remand to the special referee for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.