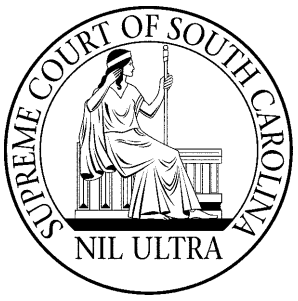

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
August 4, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lucille H. Ray, Respondent,

v.

City of Rock Hill, South Carolina, a Municipal Corporation, and South Carolina Department of Transportation, an agency of the State of South Carolina, Defendants,

Of which City of Rock Hill is the Petitioner.

Appellate Case No. 2019-002074

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
D. Garrison Hill, Circuit Court Judge
S. Jackson Kimball III, Special Circuit Court Judge

Opinion No. 28045
Heard January 12, 2021 – Filed August 4, 2021

AFFIRMED AS MODIFIED

W. Mark White and Jeremy D. Melville, of Spencer & Spencer, P.A., of Rock Hill, for Petitioner.

Richard B. Fennell, of James McElroy & Diehl, P.A., of Charlotte, NC, and Charles S. Bradford, of Bradford Espinoza, P.A., of York, for Respondent.

JUSTICE JAMES: Lucille Ray sued the City of Rock Hill (the City) for inverse condemnation, claiming her property was taken as a result of stormwater flowing through pipes under City streets and into a terra cotta pipe that runs underneath and behind her property. The circuit court granted summary judgment to the City, and the court of appeals reversed, holding a genuine issue of material fact exists as to whether the City engaged in an affirmative, positive, aggressive act sufficient to support Ray's claim. *Ray v. City of Rock Hill*, 428 S.C. 358, 834 S.E.2d 464 (Ct. App. 2019). We affirm the court of appeals as modified.

Background

Ray purchased a house and lot on College Avenue (the Property) in Rock Hill in 1985. The house was built by one of Ray's predecessors-in-title in the 1920s. Before the house was built, someone—there is no evidence in the record as to who—installed a 24-inch underground terra cotta pipe (the Pipe) under the Property.

The Property and the Pipe are located at the topographical low point of a 29-acre watershed. Three stormwater pipes installed and owned by the City collect stormwater and transport it under various streets in the neighborhood. Stormwater runs through the pipes to a catch basin situate under College Avenue directly in front of the Property. The Pipe is in turn connected to the catch basin, and when water reaches the catch basin, it is channeled through the Pipe, under Ray's house, and to the back of the Property. The Pipe has been channeling stormwater in this fashion for roughly 100 years. The record contains no evidence of an easement for piping water under the Property.

Ray acknowledges a history of sinking and settling on the Property. In 1992, Ray saw her gardener fall waist-deep into a sinkhole ten to twelve feet from the back of her home. Ray was aware of bending and movement in the roof frame of her home in 1995 and again in 2007. Ray hired a contractor to fix the damage to her home on both occasions. In 2008—and this is critical to our discussion of the City's statute of limitations defense—Ray noticed the steps on the front porch of her home were sinking. That year, Ray contacted the City, and City employees told her of the Pipe running underground from College Avenue toward those steps.

On November 6, 2012, Ray commenced this action against the City alleging causes of action for inverse condemnation and trespass; she also sought injunctive relief and attorney's fees.[1] Ray alleged foundational shifting of her home was caused by water running through the century-old Pipe, which she claimed was deteriorating. Sometime around the date Ray filed her lawsuit, the City began maintenance work on a sewer line beneath College Avenue (the Sewer Project). The sewer line was underneath the three City stormwater pipes that run into the catch basin in front of the Property. To get to the sewer line, the City had to dig up part of College Avenue in front of the Property and had to sever the three City stormwater pipes from the catch basin. This temporarily stopped the flow of water into the catch basin and through the Pipe. The Sewer Project was completely unrelated to the transport of water through the stormwater pipes to the catch basin. The City did not disturb the Pipe or the catch basin during the Sewer Project, and the Pipe remained connected to the catch basin.

On November 13, 2012, shortly after the City severed its three City pipes from the catch basin and one week after this suit was filed, Ray's attorney sent a letter to the City demanding that it not reconnect the three stormwater pipes to the catch basin, as that would resume the flow of water into the catch basin and through the Pipe. Shortly thereafter, the City reconnected the three stormwater pipes, resuming the flow of water into the catch basin and through the Pipe. As the basis of her inverse condemnation claim, Ray alleges the City's reconnection of its three pipes to the catch basin was an affirmative, positive, aggressive act.[2]

The City moved for summary judgment. After a hearing, the circuit court granted partial summary judgment to the City, dismissing Ray's claims for inverse condemnation, injunctive relief, and attorney's fees but allowing Ray's trespass claim to go forward.[3] The circuit court ruled Ray's inverse condemnation claim failed

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[1] Ray also sued the South Carolina Department of Transportation, but that claim is not relevant to this appeal.

[2] Ray did not mention the City's reconnection of its pipes in her amended complaint; however, it is clear the City has consented to the consideration of this issue by the circuit court, the court of appeals, and this Court. We appreciate the City's commonsense approach to the amendment of Ray's complaint.

[3] Ray's trespass, injunctive relief, and attorney's fees claims are irrelevant to this appeal, but all have been dismissed.

because the City committed no affirmative, positive, aggressive act. In a 2-1 decision, the court of appeals reversed the grant of summary judgment on Ray's inverse condemnation claim. *Ray v. City of Rock Hill*, 428 S.C. 358, 834 S.E.2d 464 (Ct. App. 2019). The majority held a genuine issue of material fact existed as to whether the City engaged in an affirmative, positive, aggressive act. The dissent concluded the City's actions during the Sewer Project were mere "maintenance to an existing system" and did not support an inverse condemnation claim. *Id.* at 373, 834 S.E.2d at 472 (Short, J., concurring in part and dissenting in part). This Court granted the City's petition for a writ of certiorari to review the court of appeals' decision.

Standard of Review

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham*, 349 S.C. at 361-62, 563 S.E.2d at 333. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 362, 563 S.E.2d at 333.

Discussion

"An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain." *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "To establish an inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence.'" *Id.* (quoting *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002); *Gray v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1992), *overruled on other grounds by Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007)).

"Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006); *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request."). Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law. If a genuine issue of material fact exists as to whether the government entity committed an affirmative, positive, aggressive act causing damage to private property, summary judgment is not proper. *See* Rule 56(c), SCRCP.

The court of appeals cited two grounds in support of its holding that a genuine issue of material fact existed as to whether the City engaged in an affirmative, positive, aggressive act by reconnecting its stormwater pipes and resuming the flow of water through the Pipe. First, the court of appeals held "questions of fact exist as to which pipes were damaged and in need of repair [during the Sewer Project]." *Ray*, 428 S.C. at 367, 834 S.E.2d at 469. Second, the court of appeals held a genuine issue of material fact existed as to whether the City engaged in an affirmative, positive, aggressive act "in reconnecting City pipes to the Pipe after the City admitted it did not have an easement and Ray told the City not to reconnect." *Id.* We will discuss these holdings below.

I. The Sewer Project

At the court of appeals, there was some confusion as to the number of stormwater pipes the City severed in order to get to the sewer line below. Ray argued the City committed an affirmative, positive, aggressive act during the Sewer Project when it "disconnected several pipes as part of a construction project on College Avenue, including the pipe running beneath Ray's house," and later reconnected those pipes over her objection. During oral argument before the court of appeals, the City maintained that it severed only one of the three City pipes running into the catch basin. The City mistakenly contended that the flow of water into the Pipe did not cease during the Sewer Project because the other two City stormwater pipes remained connected to the catch basin. The court of appeals held there was a genuine issue of material fact as to which of the City's stormwater pipes "were damaged and in need of repair." *Id.* The court of appeals also held there was a genuine issue of material fact as to how many of the City's three stormwater pipes remained connected to the catch basin during the Sewer Project. The court of appeals held

these two questions in turn created a genuine issue of material fact as to whether the City committed an affirmative, positive, aggressive act when it reconnected its pipe(s) to the catch basin.

The City now confirms that during the Sewer Project, it severed all three pipes running into the catch basin. The City also acknowledges the flow of stormwater from the catch basin through the Pipe ceased during the Sewer Project, and the City acknowledges stormwater flow into the Pipe resumed when it reconnected its three pipes to its catch basin. Since there is now no dispute all three City pipes were severed and reconnected, the only question pertinent to our review of the grant of summary judgment is whether there is a genuine issue of material fact as to whether the City's reconnection of the City's three pipes to the catch basin—which allowed water to resume flowing through the Pipe—constituted an affirmative, positive, aggressive act by the City resulting in damage to the Property.

II. Affirmative, Positive, Aggressive Act

As noted above, a plaintiff in an inverse condemnation proceeding must prove (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence. *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562. In *WRB*, we noted that to prevail in an inverse condemnation action, "a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." 369 S.C. at 32, 630 S.E.2d at 481 (quoting *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); *Kline v. City of Columbia*, 249 S.C. 532, 536, 155 S.E.2d 597, 599 (1967)). "Allegations of mere failure to act are insufficient." *Hawkins*, 358 S.C. at 291, 594 S.E.2d at 563.

In *Hawkins*, the court of appeals discussed the affirmative, positive, aggressive act requirement in detail. In that case, Hawkins brought an inverse condemnation action against the City after his property was damaged by floodwater. The lower court granted summary judgment to the City, and the court of appeals affirmed, holding Hawkins "failed to allege any affirmative acts by the City which damaged the . . . property or otherwise diminished his rights in the property." *Id.* at 291, 594 S.E.2d at 562. The court of appeals explained most of the acts Hawkins alleged were mere "failures to act," such as his claim the City improperly allowed the development of neighboring parcels without replacing drainage pipes in the area. *Id.* at 291, 594 S.E.2d at 562-63. However, the court of appeals recognized Hawkins alleged two affirmative acts as the basis for his inverse condemnation claim: the

City's replacement of a double-box culvert with a large arched pipe in a drainage creek near his property, and the City's installation of riprap material along the banks of the creek. Despite recognizing these two projects as "affirmative acts" rather than mere failures to act, the court of appeals held neither act amounted to an affirmative, positive, aggressive act because Hawkins failed to prove either act caused the flooding on his property. *Id.* at 291, 594 S.E.2d at 563.

The City argues that under *Hawkins*, its refusal to comply with Ray's demand that it not reconnect the three pipes to its catch basin in November 2012 was, as a matter of law, merely a "failure to act," not an affirmative, positive, aggressive act. We disagree. When the City reconnected its three pipes to the catch basin, it directed water into the catch basin and through the Pipe. This is sufficient evidence to overcome summary judgment on the issue of whether the City merely "failed to act" with respect to the water flowing through the Pipe. We also conclude Ray has presented sufficient evidence that the City's reconnection of its three pipes to the catch basin and the resumption of the flow of water through the Pipe caused damage to her property. *See WRB Ltd. P'ship*, 369 S.C. at 32, 630 S.E.2d at 481 (noting an inverse condemnation plaintiff must prove the affirmative, positive, aggressive act "caused the alleged damage to the plaintiff's property").[4]

Under the unique facts and procedural history of this case, this is where the City's statute of limitations defense comes into play. While the City argued the three-year statute of limitations in its brief to the court of appeals and in its petition for rehearing, the court of appeals did not rule upon the issue. Ray does not dispute she became aware she might have a claim against the City as early as 2008 when she noticed her front porch steps were sagging. That year, she contacted the City, and City employees told her of the Pipe running underground from College Avenue toward those steps. Ray's right of action against the City for inverse condemnation is limited to three years from the date she discovered, or by the exercise of reasonable diligence should have discovered, she might have a claim against the City. *See* S.C. Code Ann. § 15-3-530(3) (2005); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468

[4] The City also argues the circuit court properly granted summary judgment because there is no evidence the City installed the Pipe or originally caused stormwater to flow under the Property via the Pipe. Though the City is correct no evidence in the record suggests the City installed the Pipe, the City has been transporting water into the Pipe via its stormwater pipes and catch basin beneath College Avenue for decades.

S.E.2d 645, 647 (1996) ("According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered."). Ray did not commence this action until November 2012, so her claim for damages occurring more than three years prior to that date is barred by the statute of limitations. Ray conceded this point during oral argument before this Court. There is also no evidence that any damage occurring during the three years before this action was commenced was any greater than the damage that occurred before that time. The twist in this case is that within days or a few weeks after Ray commenced this action, the City severed its three stormwater pipes from the catch basin in front of the Property as part of the Sewer Project, and at some point thereafter, reconnected the pipes. Ray agrees that any claim for damages for inverse condemnation is limited to damage to the Property occurring as a result of the City's reconnection of its three severed pipes to its catch basin.

The City argues Ray has not presented any evidence of damage to the Property attributable to the City's November 2012 reconnection of the three pipes to the catch basin. We disagree. Ray submitted the affidavit of Michael Leonard, a structural engineer, in opposition to the City's motion for summary judgment. Attached as an exhibit to Leonard's affidavit was a "supplemental report" Leonard prepared while the Sewer Project was ongoing. In his supplemental report, Leonard opined there would be increased water flow through the Pipe after the City reconnected its three pipes to the catch basin, which Leonard claimed would create a risk of increased structural damage to Ray's home. Viewed in the light most favorable to Ray, Leonard's report creates a genuine issue of material fact as to whether the City's reconnection of its pipes in November 2012 caused damage to the Property distinct from the damage caused by the flow of water through the Pipe up until that time. Of course, the circuit court will make the final determination whether Ray is able to carry her burden of proof on this issue at trial.

Conclusion

We affirm the court of appeals as modified. We remand this matter to the circuit court for a determination on the merits as to whether the City's reconnection of its three stormwater pipes to the catch basin and the resumed flow of water through the Pipe constituted an affirmative, positive, aggressive act causing damage to the Property over and above any damage that had occurred before the three pipes were severed and reconnected. Given the posture of this case and the above discussion, Ray cannot recover for any damage to the Property caused by the flow

of water though the Pipe before the City reconnected its three pipes to the catch basin in November 2012.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I write separately to make two points. First, the City of Rock Hill should not be piping storm water under the plaintiff's house. It is wrong. It does not matter to me who built the pipe or whose fault it is the plaintiff's house is sinking because of the water. The City should do the right thing and fix this problem.

Second, not all wrongs are subject to redress in our civil courts. The plaintiff's theory for inverse condemnation is the storm water running under her house constitutes a taking. To the extent that theory is valid, the taking occurred many years ago, either when the pipes were first installed or when the deterioration of the pipes began to harm her property. Under no circumstances did that taking occur later than 2008. As the majority concludes, therefore, the plaintiff failed to bring her action within the applicable limitations period. It makes no difference the City reconnected the pipes in 2012. The effect of that act was to continue to run storm water under property the plaintiff claims had already been taken. Whether it is correct to call this act "maintenance," as Judge Short did at the court of appeals, does not matter. There is simply no right of action available to this plaintiff under an inverse condemnation theory.

It is my opinion, therefore, the circuit court correctly dismissed the inverse condemnation claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Ernest Perry, Jr., Appellant.

Appellate Case No. 2017-002107

Appeal From York County
Paul M. Burch, Circuit Court Judge

Opinion No. 5816
Heard June 3, 2020 – Filed April 21, 2021
Withdrawn, Substituted and Refiled August 4, 2021

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Respondent.

KONDUROS, J.: John Ernest Perry Jr. appeals his conviction of attempted murder. He maintains because he told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase, the trial court erred in charging the jury "when the intent to do an act that violates the law exists, motive

becomes immaterial," because attempted murder was a specific intent crime and this was essentially a general intent instruction. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Officers Dalton Taylor and Shaun Bailey of the Rock Hill Police Department were conducting a night patrol on June 22, 2016. Officer Taylor observed a vehicle turn without using a turn signal and in response initiated a traffic stop. The driver of the vehicle jumped out of the vehicle, without putting the vehicle into park, and ran from the scene. Officer Bailey and Officer Taylor pursued the driver on foot. The driver jumped a fence, and the officers followed him. As the driver was running, he pulled a firearm from his waistband. The driver fired two shots, which did not strike anyone.[1] According to Officer Taylor, he and the driver were about five to seven feet apart, and the area was sufficiently lit. Officer Taylor returned fire, striking the driver, but the driver continued to flee, and Officer Taylor lost sight of him.

Officers identified the driver as Perry from paperwork found in the vehicle and a video recording from a nearby convenience store. Law enforcement officers later took Perry into custody outside a camper in Fairfield County. Officers discovered in the camper the weapon Perry had fired.

A grand jury indicted Perry for attempted murder. At trial, Officer Taylor testified Perry fired directly at him once. Officer Taylor opined that it was not an accidental discharge and Perry was trying to shoot him in order to escape. On cross-examination, Officer Taylor acknowledged that his written statement about the incident provided that Perry fired the first shot in the air. He indicated he perceived Perry as pointing the weapon at him with the intent to kill. Officer Bailey testified he also pursued Perry and observed Perry fire twice in the air.

Special Agent Melissa Wallace from South Carolina Law Enforcement Division (SLED) testified she became involved with this case because it was an officer involved shooting. She provided she rode with Perry in the ambulance to the hospital after he had been apprehended. During the ambulance ride, she read Perry

[1] The evidence conflicts as to whether the first shot was fired in the air or in a "bladed position," whether the second shot was fired directly at Officer Taylor, and whether the gun accidentally went off.

his *Miranda*[2] rights. He answered her questions during the ride and while he was at the hospital. He informed her that he had been involved in a shooting with police. He provided he had run because he had some unpaid warrants outstanding and he possessed the gun and knew he could not be caught with it. According to Special Agent Wallace, Perry stated "[h]e was jumping what he called the gate and the gun accident[al]ly went off while he was trying to get it out of his pants." She further noted Perry stated that as he was pulling the gun out, he had it "in front of his waist pointed towards the left-hand side of his body" when it went off. Perry also told Special Agent Wallace he threw the gun he used in the shooting in a field. SLED searched the field but did not recover a weapon there. Perry admitted in a subsequent interview the gun found in the camper was the gun he used in the incident.

Following the close of the State's case, Perry moved for a directed verdict, which the trial court denied. Perry did not present a defense. Following closing arguments, the trial court charged the jury on attempted murder and the lesser included offenses of assault and battery in the first, second, and third degree. The trial court informed the jury the attempted murder statute states, "A person who with intent to kill attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." The court also described to the jury what malice meant.

Following deliberations, the jury requested to be recharged on attempted murder and the various degrees of assault and battery. The trial court repeated the jury charge it had previously given for those offenses, including the description of malice. After the jury resumed deliberations, the jury requested a copy of the charge on malice. The jury then asked if malice was only associated with the attempted murder charge or if it was also associated with the assault and battery charges. The attorneys and the court agreed it was only an element of attempted murder. The jury also asked, "What is meant by intent? It was not charged." The trial court proposed charging the jury with the definition of intent from *Black's Law Dictionary*, which stated: "The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists motive becomes immaterial." Perry stated, "I don't like the end of that with motive being in there," and the trial court indicated the last

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

sentence could be left off. Perry continued, arguing "that's almost implying that use of a deadly weapon," before the trial court cut him off and stated it did not "see any need for that" sentence. However, the State argued because motive was not an element it had to prove, charging that sentence would not be prejudicial to Perry. The State asserted, "It says motive is immaterial, which we think motive is immaterial under the attempted murder statute . . . ." The trial court stated, "I mean as far as the last sentence. So the defense objects to the last sentence. I agree with the State, motive becomes immaterial so we'll note your objection and after I charge it be sure and preserve the record again on it, okay?" The trial court charged the jury: "Intent. The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists motive becomes immaterial." The jury returned to its deliberations. Perry renewed his objection, stating:

> Your Honor, I just to renew my objection to the intent that you just read based on about the motive being immaterial. Also my concern is that attempted murder with case law out there saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so that's my -- I'm objecting to the charge.

The court asked, "Your objection is with the last sentence?" and Perry responded, "That's correct, Your Honor." The court stated "based on what we've already discussed I see no reason to recharge and adjust that charge. But it is on the record."

Following a note from the jury, the trial court gave the jury an *Allen*[3] charge. The jury resumed its deliberations and ultimately reached a verdict. The jury convicted Perry of attempted murder. The trial court sentenced him to life imprisonment. This appeal followed.

[3] *Allen v. United States*, 164 U.S. 492 (1896).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Perry argues the trial court erred in instructing the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," as attempted murder is a specific intent crime, and this was essentially a general intent instruction and was highly prejudicial because he told the police his gun went off accidentally as he attempted to dispose of it during the police chase. We agree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). The trial court is required to charge the law as determined from the evidence presented at trial. *State v. Gates*, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). If any evidence supports a charge, it should be given. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). A charge is correct if it adequately explains the law and contains the correct definition when read as a whole. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge [that] is substantially correct and covers the law does not require reversal." *Id*. "The substance of the law is what must be charged to the jury, not any particular verbiage." *Adkins*, 353 S.C. at 318-

19, 577 S.E.2d at 464. "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)).

"[S]ome principles of law should not always be charged to the jury." *State v. Perry*, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters appropriate for jury argument are not proper for charging the jury). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); *see also id.* at 205, 208 n.1, 573 S.E.2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial"). "The impression is sometimes gained that any language from an appellate court opinion is appropriate for a charge to any jury, but this is not always true." *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980). "Oftentimes a sentence, or sentences, taken from an appellate opinion must be supplemented by additional relevant statements of the law because of the particular factual situation." *Id.* "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error." *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000).

When a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and that the information relayed by the trial court to the jury is given "special consideration." *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978).

Attempted murder is codified as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied . . . ." S.C. Code Ann. § 16-3-29 (2015). In *State v. King*, 422 S.C. 47, 50, 810 S.E.2d 18, 19-20 (2017), our supreme court affirmed as modified this court's decision to reverse a conviction of attempted murder when the trial court charged the jury a specific intent to kill was not an element and "a general intent to commit serious bodily harm" was all that was required. The supreme court "agree[d] with the [c]ourt of

[a]ppeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'" *Id.* at 55, 810 S.E.2d at 22 (quoting *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled on other grounds by Burdette*, 427 S.C. at 504 n.3, 832 S.E.2d at 583 n.3). The supreme court found:

> Because the phrase "with intent to kill" in section 16-3-29 does not identify what level of intent is required, the [c]ourt of [a]ppeals properly looked to the legislative history of section 16-3-29 and appellate decisions holding that "attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime." *King*, 412 S.C. at 409, 772 S.E.2d at 192. Further, while we agree with the State that the statement referenced from *Sutton*[4] constitutes dicta, it is still an accurate statement of law. *Id.* ("'Attempted murder would require the specific intent to kill,' and 'specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.'" (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

King, 422 S.C. at 55-56, 810 S.E.2d at 22 (last alteration by court).

The supreme court determined the two parts of section 16-3-29—"with intent to kill" and "malice aforethought"—needed to be addressed as they demonstrate "the General Assembly created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either express or implied' to require a higher level of *mens rea* for attempted murder than that of murder." *Id.* at 61, 810 S.E.2d at 25.

The supreme court further explained:

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[4] *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000).

> "The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act." Thus, "[a]s the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter."

Id. at 56, 810 S.E.2d at 22-23 (alteration by court) (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156 (2016)).[5]

"Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)). "State of mind is an issue any time malice or willfulness is an element of the crime." *Id.* at 124-25, 606 S.E.2d at 512 (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).

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[5] The lesser included offenses charged in this case were also attempt crimes. *See* S.C. Code Ann. § 16-3-600(C)(1) (2015) ("A person commits the offense of assault and battery in the first degree if the person unlawfully: . . . (b) offers or attempts to injure another person with the present ability to do so . . . ."); S.C. Code Ann. § 16-3-600(D)(1) (2015) ("A person commits the offense of assault and battery in the second degree if the person . . . offers or attempts to injure another person with the present ability to do so . . . ."); S.C. Code Ann. § 16-3-600(E)(1) (2015) "(A person commits the offense of assault and battery in the third degree if the person . . . offers or attempts to injure another person with the present ability to do so."). Therefore, they also required specific intent. *See State v. McGowan*, 430 S.C. 373, 380, 845 S.E.2d 503, 506 (Ct. App. 2020) (holding for the attempt alternative of the statutory offense of assault and battery in the first degree, our case law provides "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent" (quoting *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011))).

In *United States v. Hammond*, 642 F.2d 248, 249-50 (8th Cir. 1981), the Eighth Circuit Court of Appeals found a "prosecutor's statement of the law was misleading" when "[i]t suggested that motive had no relevance to the issues in this case, when in fact motive may have been very relevant to a determination of whether [the defendant] knowingly committed the acts charged in the indictment and purposely intended to violate the law by so doing." Additionally, the Eighth Circuit found "somewhat confusing" the following jury instruction by the trial court:

> I advise you that intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two recognized motives for much of human conduct. These laudable motives or others may prompt one person to do voluntary acts of good, and others to do voluntary acts of crime.
>
> Good motive alone is never a defense where the act done or admitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of the state of mind or intent of the defendant.

Id. at 250. However, the Eighth Circuit ultimately affirmed the trial court, finding that when the instructions were read together with earlier portions of the charge, they correctly stated the law and sufficiently presented that element of the offenses to the jury. *Id.* at 250-51. It noted that although the trial court asked for any misstatements or errors and objections to any instructions it had given or had failed to give, the defendant did not object or request additional instructions and had earlier endorsed most of the instructions. *Id.*

In the present case, the trial court erred in the definition of intent it provided the jury. The State contended at trial because motive was not an element it had to prove, charging the last sentence of the definition would not be prejudicial to Perry. The State argued, "It says motive is immaterial, which we think motive is immaterial under the attempted murder statute . . . ." Because motive was not

material, the mention of it in the definition of intent could have confused the jury. *See Washington*, 338 S.C. at 400, 526 S.E.2d at 713 ("Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error."); *see also Hicks*, 330 S.C. at 218, 499 S.E.2d at 215 ("The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean."). The jury could have found the sentence unclear when it had asked for the definition of intent. Because motive had not been mentioned during the trial, the jury could have been confused by the definition.

The trial court only referenced intent in the original jury instructions when describing the offense of attempted murder, defining the offense as when a "person who with intent to kill attempts to kill another person with malice aforethought, either express or implied."[6] The trial court repeated this same statement when the jury asked to be recharged on the offenses. In light of these limited statements about intent, we cannot say the trial court's later definition of intent in response to the jury's question was not misleading. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."); *see also Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (providing that in reviewing jury charges, a charge is correct if when read as a whole, it adequately explains the law and contains the correct definition); *id.* ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 463)).

Further, because the definition of intent was given in response to the jury's question, it was unduly emphasized as well, instead of just being part of the original instructions given. *See Blassingame*, 271 S.C. at 46-47, 244 S.E.2d at 529-30 (noting when a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and the information relayed by the trial court to the jury is given "special consideration"). Additionally, because attempted murder and the pertinent subsections of the lesser included offenses with which Perry was charged are all specific intent crimes, the definition of intent could have been confusing for

[6] Perry did not object to this charge nor request a *King* specific intent charge.

the jury as only specific intent was applicable here. Therefore, the trial court erred in its response to the jury's question about intent. Accordingly, the trial court is

REVERSED AND REMANDED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel Lee Davis, individually and on behalf of all those similarly situated, Respondent,

v.

ISCO Industries, Inc., Appellant.

Appellate Case No. 2018-000857

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5840
Heard December 8, 2020 – Filed August 4, 2021

AFFIRMED

Jeffrey Andrew Lehrer, of Ford & Harrison, LLP, of Spartanburg, for Appellant.

John S. Simmons, of Simmons Law Firm, LLC, of Columbia; John Belton White, Jr., Ryan Frederick McCarty, and Marghretta Hagood Shisko, all of Harrison White P.C., of Spartanburg, for Respondent.

KONDUROS, J.: ISCO Industries, Inc. appeals the circuit court's denial of its motion to compel arbitration in a suit its former employee, Daniel Lee Davis, brought against it following a data breach. ISCO contends the circuit court erred in determining an arbitration agreement did not apply due to the unforeseeable and

outrageous tort exception and because Davis's negligence claim did not arise out of or relate to his employment relationship with ISCO. We affirm.

FACTS/PROCEDURAL HISTORY

ISCO is a Kentucky based corporation, which provides global customized piping solutions. It has locations and employees in over thirty-five states. Davis worked for ISCO as a mechanic and fusion technician in South Carolina from March 2007 until March 2015. At the start of his employment, ISCO required Davis to provide personal identifying information including his Social Security number. He also signed an arbitration agreement. In the arbitration agreement, he agreed to exclusively settle by arbitration "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO."

On March 2, 2016, an employee in ISCO's human resources department received an e-mail requesting employees' "2015 IRS Form W-2 data" purportedly from a senior executive at ISCO. The employee gathered and e-mailed the requested data. The information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. Shortly thereafter, an employee at ISCO realized the e-mail was actually from an outside third party who had fraudulently disguised his e-mail address. On March 4, 2016, ISCO notified the affected employees of the data breach. ISCO provided these employees with free identity theft protection services through LifeLock, which it later renewed. The data breach affected 449 current and former employees throughout thirty-five states.

Davis filed an action against ISCO on September 13, 2017, alleging claims for breach of implied contract and negligence. Davis filed the action on behalf of all current and former ISCO employees whose personal identifying information was released as a result of the data breach. He alleged ISCO had a duty to exercise reasonable care in holding, securing, and protecting that personal identifying information; it was foreseeable Davis and the others would suffer substantial harm if ISCO employed inadequate safety practices for securing personal identifying information; and as a result of ISCO's negligence, Davis and others suffered and will continue to suffer damages and injury, including out-of-pocket expenses and the loss of productivity and enjoyment as a result of spending time monitoring and correcting consequences of the data breach.

ISCO filed a motion to dismiss and compel arbitration. Davis filed an amended complaint removing his cause of action for breach of contract. ISCO filed a motion to dismiss Davis's complaint in the event the court did not compel arbitration, asserting Davis lacked standing and failed to state facts sufficient to establish a negligence claim or to support an award of punitive damages or attorney's fees. Davis filed a response in opposition to ISCO's motions.

The circuit court held a hearing on both of ISCO's motions on February 23, 2018. The court determined the arbitration agreement was not applicable to Davis's cause of action.[1] The court found:

> The arbitration agreement that [Davis] signed applied to claims "arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO," but [Davis's] claims in this case arise out of [ISCO's] release of the personal identifying information of [Davis] and others to cyber-criminals. The [c]ourt finds that there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment. Like the [c]ourt in *Aiken*,[2] this [c]ourt holds that [Davis's] claims in this case are "for unanticipated and unforeseeable tortious conduct" and are, therefore, not within the scope of the arbitration agreement.

(citation omitted).

This appeal followed.

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[1] The circuit court also denied ISCO's motion to dismiss, but ISCO did not appeal that ruling.

[2] *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007) (providing an outrageous torts exception to arbitration enforcement in South Carolina).

STANDARD OF REVIEW

Unless the parties otherwise provide, "[t]he question of the arbitrability of a claim is an issue for judicial determination." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

ISCO asserts the circuit court erred by denying its motion to compel arbitration by ruling Davis's negligence claim did not arise out of or relate to his employment relationship with ISCO. It argues there was a significant relationship between Davis's employment relationship and the conduct in this case. We disagree.

> [S]tate law determines questions "concerning the validity, revocability, or enforceability of contracts generally," *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987), but the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)[, *superseded by statute on other grounds as stated in Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th. Cir. 1997)].

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (citations omitted). "These statutes constitute 'a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

"We must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41,

524 S.E.2d 839, 846 (Ct. App. 1999). "Therefore, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "'the construction of the contract language itself.'" *Id.* (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-74 (4th Cir. 1997)). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Id.* at 41-42, 524 S.E.2d at 846. However, our supreme court recently noted that "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021.

"Generally, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Int'l Paper Co.*, 206 F.3d at 416 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Berry v. Spang*, 433 S.C. 1, 11-12, 855 S.E.2d 309, 315 (Ct. App. 2021) (quoting *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44), *reh'g denied*, S.C. Ct. App. Order dated Mar. 26, 2021, *petition for cert. filed*. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001). "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." *Id.* "The construction of a clear and unambiguous contract is a question of law for the court to determine." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (emphasis omitted). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)).

"When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's

authority extends beyond the termination of the contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* at 597, 553 S.E.2d at 118.

> [T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties. For example, a clause compelling arbitration for any claim "arising out of or relating to this agreement" may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement. On the other hand, if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause; it matters only that the claim concerns the relationship of the parties. Under *Zabinski*, such a clause would have the broadest scope because it could be interpreted to apply to every dispute between the parties.

Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 209-10, 588 S.E.2d 136, 140 (Ct. App. 2003) (citations omitted).

"Whether a particular claim is subject to arbitration has been examined in many cases . . . ." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629 n.7, 667 S.E.2d 1, 5 n.7 (Ct. App. 2008). In *Zabinski*, the supreme court found "any claim pursuant to the partnership agreement is arbitrable" because the arbitration agreement provided "'any controversy or claim arising out of the partnership agreement' should be settled by arbitration." 346 S.C. at 597, 553 S.E.2d at 119. The court determined "any tort claims between the partners that relate to the partnership agreement are arbitrable." *Id.* Further, the court held "the

winding up of the partnership is covered by the arbitration agreement because it concerns issues that are the direct result of the partnership agreement." *Id.* at 597-98, 553 S.E.2d at 119. However, the court also determined "[d]espite South Carolina's presumption in favor o[f] arbitration, . . . the remaining . . . claims are not subject to arbitration because a significant relationship does not exist between the . . . claims and the partnership agreement." *Id.* at 598, 553 S.E.2d at 119. Those remaining claims included "the action between [two of the partners] involv[ing] a dispute over the purchase agreement, which is completely unrelated to the partnership agreement. . . . The facts involved in this controversy are completely independent of any dispute arising out of the partnership agreement and are not arbitrable." *Id.*

In *Landers v. Federal Deposit Insurance Corp.*, an employee, Landers, "claim[ed] he was constructively terminated from his employment as a result of [the CEO's] tortious conduct towards him. [The employer and the CEO] moved to compel arbitration pursuant to the employment contract." 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013). "The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause." *Id.* Our supreme court "reverse[d] the trial court's order and h[e]ld that all of Landers' causes of action must be arbitrated," stating "Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement." *Id.* The court determined "the claims are within the scope of the agreement's broad arbitration provision." *Id.*

The supreme court explained:

> Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution in [ ] powers, responsibilities, duties or compensation."

> Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract. Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

Id. at 111-12, 739 S.E.2d at 215 (alteration in original) (footnote omitted).

> We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated. In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

Id. at 115-16, 739 S.E.2d at 217 (footnote omitted).

In the present case, the court found "there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment." The arbitration agreement stated it applied to "any and all claims, disputes or controversies arising out of or relating to [Davis's] candidacy for employment, employment and/or cessation of employment with ISCO." Even though ISCO had Davis's personal identifying information only due to his previous employment with it, the grounds for his negligence claim—the human resources employee disclosing his information to hackers—do not truly relate to his employment. At the time Davis supplied his employer with his information in starting his employment, he would not have been expected to anticipate employer would reveal that information to hackers.

Landers is distinguishable from the present case as the facts underlying Landers's causes of action are completely different than those here. *See id.* at 112, 739 S.E.2d at 215 ("[I]n light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract."); *id.* at 115, 739 S.E.2d at 217 ("Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement.").

There was not a significant relationship between Davis's employment relationship and the conduct in this case. Therefore, the circuit court did not err in finding the arbitration agreement did not apply here. Accordingly, we affirm the circuit court's decision.[3]

[3] Based on our determination of this issue, we need not address ISCO's remaining arguments on appeal, which concern the denial of its motion to compel arbitration on the basis of the unforeseeable and outrageous tort exception. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

The circuit court's decision to deny the motion to compel arbitration is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Passio, Jr., Appellant.

Appellate Case No. 2018-001488

Appeal From Jasper County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5841
Heard June 17, 2021 – Filed August 4, 2021

AFFIRMED

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Frederick Schumacher, IV, all of Columbia, for Respondent.

LOCKEMY, C.J.: Richard Passio Jr. appeals his conviction for the murder of his wife, Michelle Passio (Victim), and sentence of thirty years' imprisonment. On appeal, Passio argues the trial court erred by denying his motion for a directed verdict and by admitting a screenshot of his Facebook page. We affirm.

FACTS/PROCEDURAL HISTORY

Passio and his family owned and managed a restaurant in Ridgeland. Victim occasionally worked as a server when she was not taking care of their eight children. At 5:52 a.m. on June 3, 2019, Passio called 911 to report Victim had shot herself in their home.

Lieutenant Joey Ginn responded to Passio's home around 6:00 a.m. and met Passio on the porch. Passio had blood on his hands and dried blood on his clothing. Upon entering the home, Lieutenant Ginn found Victim deceased on the couch. He observed Victim had a gunshot wound under her chin and an exit wound at the top of her head. He saw a pool of blood on the floor and a child sleeping in a bassinet a few feet away. Law enforcement found a 9mm handgun, which had a spent shell casing in its chamber, on the floor next to Victim and an empty black case in the trunk of Passio's car.

Corporal Chris McIntosh testified he found three bullet strikes throughout the home: one in the ceiling of the room where he found Victim and two in an adjacent room. He stated Victim's body was cold to the touch, the room smelled of the early stages of decomposition, and the blood on the floor had coagulated. He testified Passio had a gash on his hand from the slide of the firearm.

Ryan Altman, a responding EMT, testified Victim's arm was cold to the touch and the blood on the floor had begun to coagulate. He testified the cut on Passio's hand was "crusty" and dry. Altman stated Victim had a workable cardiac rhythm but her injuries were inconsistent with life. Michael Singleton, the responding paramedic, testified Victim's skin was cyanotic and ashen,[1] and her blood had begun to coagulate. He explained Victim had no blood movement and no electrical activity.

Victim's hands tested positive for gunshot residue. The firearm's trigger had a mixture of Passio's and Victim's DNA on it. The firearm's slide and the gun case tested positive for Passio's DNA but not Victim's.

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[1] Cyanotic and ashen skin is a bluish or purplish discoloration of the skin and mucous membranes caused by deficient oxygenation of the blood.

Ivey Bryan, a neighbor, testified that between 1:00 a.m. and 3:00 a.m., he heard arguing in Passio's home. He recalled that shortly after the argument, he heard four gunshots. Juanita Patrum, Victim's friend and neighbor, stated she was awake between 4:30 a.m. and 5:00 a.m. but did not hear any gunshots.

Jordan Moser testified she was bartending at Schooner's bar in Ridgeland the night Victim died. She explained Victim came to Schooner's that night, and appeared to be in good spirits. Sometime after midnight, Passio called the bar asking for Victim because he expected her to be home by midnight. Moser explained that a few minutes later Passio arrived and began arguing with Victim. She stated he was so angry he slapped a cigarette out of Victim's hand. Angel Rose, a friend of Victim who was in the bar that night, testified similarly to Moser.

Brandon Ashcraft, one of Passio's former employees, testified he had an affair with Victim. He explained Passio heard rumors of the affair and confronted him about them. Ashcraft stated he denied those rumors to Passio. Ashcraft stated Passio kept a firearm in a black case in the restaurant's office and that it was kept there because Passio was afraid Victim was suicidal. Ashcraft testified that on the night of the incident, he was in the bar with Victim, Moser, and Rose, when Passio came in and began to argue with Victim. He recalled Passio angrily slapped a cigarette out of Victim's hand, and Victim left the bar. Ashcraft testified Passio told him he was going to go back to his restaurant to grab alcohol. Ashcraft believed this was weird because there was no alcohol there after the restaurant lost its liquor license. Surveillance video showed Passio enter his restaurant and retrieve a black case at 1:55 a.m. Ashcraft explained that around 2:00 a.m., Passio came to Ashcraft's house to borrow a baby bottle. Ashcraft testified Passio told him about how bad Passio's and Victim's relationship was and stated, "I hope tonight's not the night," referring to Victim killing herself.

Lisa and Otto Helbig, former employees at the restaurant, also testified Passio kept a handgun in a black case in the restaurant's office. Carla Ashcraft, Victim's friend, testified she referred Victim to Catherine Badgett, a divorce attorney. Badgett stated she referred Victim to a domestic abuse shelter and to South Carolina Legal Services. The State rested, and Passio moved for a directed verdict arguing the State failed to present substantial circumstantial evidence of his guilt. The trial court denied Passio's motion.

Dr. Sarah Stuchell testified she was Victim's and Passio's psychologist and marital counselor. She stated Victim denied suicidal ideation, but explained she suffered from bipolar disorder and anxiety. She testified Passio suffered from anxiety, obsessive-compulsive disorder, and relationship distress.

Passio and Victim's eleven-year-old daughter (Daughter) testified on the night of the incident, she heard two loud bangs and then Victim angrily say, "Do you want me to do it again?" Daughter stated she heard another shot followed by Passio crying. Daughter did not state what time she heard the shots.

Richard Passio Sr. (Father) testified that he knew Passio "as well as any father can know his son." During cross-examination, the State asked Father about parts of Passio's life that he did not know about, such as Passio's Craigslist ad looking for love and Passio lying about being a police officer. The State asked if Father was familiar with Passio's Facebook. The State showed him a screenshot of Passio's Facebook profile, and Father testified he recognized the photograph but not the caption. Passio objected based on relevance and lack of authentication. The trial court admitted the screenshot of Passio's Facebook into evidence. The caption read, "I know who I am. I'm a dude, playing a dude, disguised as another dude."[2] At the close of Passio's case-in-chief, he renewed his directed verdict motion, which the trial court denied.

During the State's closing argument, the State repeated Passio's Facebook caption and stated, "Well, he does know who he is, and he does know what he did. He knows the monster inside that he has tried to disguise. Don't be fooled by that disguise." The jury found Passio guilty of murder, and the trial court sentenced him to thirty years' imprisonment.

ISSUES ON APPEAL

1. Did the trial court err by denying Passio's motion for a directed verdict?

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[2] This was a quote from the 2008 comedy, *Tropic Thunder*. *See Tropic Thunder* (DreamWorks 2008). In the film, Robert Downey Jr. plays Kirk Lazarus, an Australian method actor playing an African-American sergeant during the Vietnam War. *Id.* In one scene, he is asked, "Who are you," to which Downey Jr. responds, "Me? I know who I am. I'm a dude, playing a dude, disguised as another dude."

2. Did the trial court err by admitting a screenshot from Passio's Facebook profile because it was irrelevant and unduly prejudicial?

STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." *Id.* "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Frazier*, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." *Id*.

"The relevancy of evidence is an issue within the trial [court's] discretion." *State v. Gillian*, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (quoting *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *Wise*, 359 S.C. at 21, 596 S.E.2d at 478).

LAW/ANALYSIS

I. DIRECTED VERDICT

Passio argues the trial court erred by denying his motion for a directed verdict because the State did not offer substantial circumstantial evidence of his guilt. Passio argues witnesses' testimony that Victim was cold to the touch, had coagulated blood, and had ashen skin was pseudo-scientific evidence that should have been discredited. Passio asserts no testimony proved the black case he retrieved from his restaurant contained the firearm used to kill Victim.

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). However, "[t]he trial [court] should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Frazier*, 386 S.C. at 531, 689 S.E.2d at 613. "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Pearson*, 415 S.C. 463, 469-70, 783 S.E.2d 802, 805 (2016) (quoting *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). "[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis*." *Id.* at 470, 783 S.E.2d at 805 (2016) (quoting *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996)).

> [A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016).

An examination of the following directed verdict cases is illustrative. In *Bostick*, the victim was knocked out inside her home and the home was then set on fire. 392 S.C. at 136-37, 708 S.E.2d at 775. After interviewing appellant, investigators charged him with her murder. *Id.* at 137, 708 S.E.2d at 775. Investigators found blood on his jeans and gasoline on his shoes, and gasoline was the accelerant used to light the house on fire. *Id.* at 142, 708 S.E.2d at 778. The DNA test from the blood on his jeans was inconclusive but did not rule out the victim's DNA. *Id.* at 137, 708 S.E.2d at 775-76. Investigators also found some of the victim's personal items in a burn pile behind appellant's mother's home. *Id.* at 137, 708 S.E.2d at 775. On appeal, our supreme court reversed the trial court's denial of appellant's

directed verdict motion. *Id.* at 141, 708 S.E.2d at 778. It held the evidence presented at trial merely raised a suspicion appellant committed the crime. *Id.* at 141-42, 708 S.E.2d at 778.

In *State v. Arnold*, the victim was shot and left off a dirt road in Colleton County. 361 S.C. 386, 388, 605 S.E.2d 529, 530 (2004). Victim drove a friend's car to go to a dentist's appointment on the last day he was seen alive. *Id.* Evidence showed he withdrew money from an ATM that day, but he was not seen again until his body was discovered. *Id.* The car was found in a parking lot in Johnson City, Tennessee, and one of the State's witnesses testified that appellant called him from a phone ten miles from where the car was found. *Id.* at 389, 605 S.E.2d at 530. In the center console of the car, investigators found a coffee cup lid containing appellant's fingerprint. *Id.* Our supreme court affirmed this court and held appellant's fingerprint on the lid only established he was in the borrowed car on the last day the victim was seen alive, there was no evidence that appellant was at the scene of the crime, and while both appellant and the car were found in Tennessee, this only raised a suspicion of guilt and was not sufficient circumstantial evidence to show that appellant killed the victim. *Id.* at 390, 605 S.E.2d at 531.

In *Bennett*, a community center was burglarized. 415 S.C. at 234, 781 S.E.2d at 353. Evidence showed that a window had been shattered to facilitate entry; a television in the community room was tampered with, as if someone attempted to remove it; and a television and computer were stolen from the computer room. *Id.* Bennett was a frequent lawful visitor of the center, but testimony indicated he did not frequent the community room. *Id.* at 234-35, 781 S.E.2d at 353. Following the burglary, law enforcement lifted Bennett's fingerprint from the television in the community room. *Id.* at 234, 781 S.E.2d at 353. Additionally, law enforcement found two drops of blood matching Bennett's DNA where another television had been stolen. *Id*. The trial court denied Bennett's motion for a directed verdict, and the jury convicted him. *Id.* at 235, 781 S.E.2d at 353. Bennett appealed, and this court reversed his conviction, finding the evidence created only a suspicion of guilt. *Id.* Our supreme court reversed, holding this court had weighed the evidence and found a plausible alternate theory inconsistent with Bennett's guilt instead of determining whether any circumstantial evidence supported his guilt. *Id.* at 236-37, 781 S.E.2d at 354. It held forensic evidence placed Bennett inside of the community center, "and, more specifically, at the two places where the crimes had occurred," and that "[T]estimony suggested Bennett would have no reason to be in the community room." *Id.* at 237, 781 S.E.2d at 354.

Given these cases and the standard this court applies when reviewing a motion for a directed verdict, we find the trial court did not err in denying Passio's directed verdict motion. *See Frazier*, 386 S.C. at 531, 689 S.E.2d at 613 ("When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State.").

Viewing the evidence in the light most favorable to the State, evidence showed Victim was in good spirits and spending time with friends at a bar on the night of the incident. Later that evening, Passio went to the bar and fought with Victim and was angered enough to slap a cigarette out of Victim's hand. Passio left the bar and went to his restaurant, where he retrieved a black case, which was where he kept his handgun. Passio argues the State presented no evidence that the case from the surveillance video and his trunk held the gun used to kill Victim. However, witnesses testified Passio kept a firearm in the restaurant's office in a case similar to the one he carried out of the restaurant. In the light most favorable to the State, the jury could use this evidence to find Passio carried his firearm out of his restaurant on the night Victim died. The jury could also infer this was strong evidence of Passio's guilt because the firearm was involved in Victim's death on the first night it came back to the house.

Moreover, the firearm had Passio's DNA on the trigger and slide and he admitted he was present when the fatal shot was fired. The jury could also reasonably infer Passio waited between two and four hours before calling 911 after Victim was shot. This timeline was evidenced by the dried blood on his pants, the blood coagulated on the floor, Bryan's testimony he heard four gunshots between the hours of 1:00 a.m. and 3:00 a.m., and Patrum's testimony she did not hear any gunshots between 4:30 a.m. and 5:00 a.m.[3] Furthermore, Dr. Stuchell testified Victim denied suicidal ideation. The foregoing represents evidence from which a reasonable juror could find Passio guilty beyond a reasonable doubt. *See State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("[T]he court must

[3] Passio argues this court should discredit the blood evidence because it is pseudo-scientific testimony. However, the witnesses testified to the condition of Victim's blood and body as lay witnesses, not as expert witnesses. Moreover, the evidentiary value was cumulative to the direct testimony the State elicited from Bryan that he heard shots were fired between 1:00 a.m. and 3:00 a.m.

determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.").

Finally, Passio asserts the State failed to supply evidence of motive because it failed to show that he knew Victim had an affair. However, evidence was presented that Passio knew of the rumors of the affair and found both Victim and Ashcraft at the same bar that night. Thus, the State presented evidence of motive regardless of whether he knew if those rumors were true. Moreover, motive is not an element of murder. *See State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct. App. 1992) ("[I]t is well settled that motive is not an element of murder and, therefore, the State need not prove motive."). We find all of this evidence establishes substantial circumstantial evidence that supported the trial court's denial of Passio's directed verdict motion.

II. FACEBOOK SCREENSHOT

Passio argues the trial court erred by admitting a screenshot of his Facebook profile because it was irrelevant. He asserts the movie quote was used to raise suspicion that Passio was lying about murdering Victim. We disagree.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence showing a witness's bias is relevant impeachment evidence. *See* Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

"I know who I am. I'm a dude, playing a dude, disguised as another dude." In its closing, the State used this quote to paint Passio as a man disguising the truth. In our view, the State is donning the disguise. The State argues its purpose for admitting this quote was to impeach Father's testimony and show bias; specifically, that he did not know Passio as well as he testified. Although the State used the vehicle of impeachment to admit this evidence, it seems its true guise was to show

Passio was "disguised as another dude." Regardless, we affirm the trial court's ruling because this evidence was relevant to the State's asserted purpose.

We find the trial court did not abuse its discretion because this evidence could be used to impeach Father's testimony and show his bias. When the State cross-examined Father, it asked questions that sought to illicit evidence Father was not as well acquainted with Passio's life as he testified he was. The State asked Father if he knew about Passio's Craigslist ad looking for love and if Father knew Passio had lied about being a police officer. Following those questions, the State asked Father if he was familiar with Passio's Facebook page. Father said he was familiar with it, and the trial court admitted the screenshot over Passio's objection. This screenshot was relevant to show Father did not know Passio as well as he testified. This evidence impeached Father's testimony by showing Father's potential bias and motive to misrepresent. Thus, we find the trial court did not abuse its discretion in admitting the screenshot because it had some probative value as to Father's bias.

CONCLUSION

Based on the foregoing, we find the trial court did not err in denying Passio's motion for a directed verdict and by admitting a screenshot of Passio's Facebook profile. According, Passio's conviction is

AFFIRMED.

HUFF and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Cromey, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2018-001739

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5842
Heard June 8, 2021 – Filed August 4, 2021

AFFIRMED

Joshua Madison Tyler Felder and Richard L. Few, Jr., both of Parker Poe Adams & Bernstein, LLP, of Greenville, for Appellant.

Nicole Martin Wooten, of Columbia, for Respondent.

GEATHERS, J.: Appellant Mary Cromey (Taxpayer) challenges an order of the Administrative Law Court (ALC) upholding a determination by Respondent South Carolina Department of Revenue (the Department) that Taxpayer does not qualify as a surviving spouse of a disabled veteran for purposes of the property tax

exemption set forth in section 12-37-220(B)(1) of the South Carolina Code (2014).[1] We affirm.

---

[1] Section 12-37-220(B)(1) allows disabled military veterans or their surviving spouses to claim a property tax exemption for:

> (a) the house owned by an eligible owner in fee or jointly with a spouse;
>
> (b) the house owned by a qualified surviving spouse acquired from the deceased spouse and a house subsequently acquired by an eligible surviving spouse. The qualified surviving spouse shall inform the Department of Revenue of the address of a subsequent house;
>
> . . .
>
> (e) As used in this item:
>
> (i) "eligible owner" means:
>
> (A) a veteran of the armed forces of the United States who is permanently and totally disabled as a result of a service-connected disability **and** who files with the Department of Revenue a certificate signed by the county service officer certifying this disability;
>
> . . .
>
> (iii) "qualified surviving spouse" means the surviving spouse of an individual described in subsubitem (i) while remaining unmarried, who resides in the house, and who owns the house in fee or for life. . . . .

(emphasis added).

FACTS/PROCEDURAL HISTORY

The parties agree that the facts in this case are undisputed. Therefore, we adopt the following recitation of facts from the order on appeal:

> [Taxpayer] is the surviving spouse of Lloyd D. Cromey (Mr. Cromey). In February 2004, the United States Veterans Administration (VA) deemed Mr. Cromey to be permanently and totally disabled. [Taxpayer] and Mr. Cromey lived in a jointly owned home in Owing Mills, Maryland, until his death in 2005. *Mr. Cromey has never been a resident of South Carolina or owned real property in South Carolina*.
>
> In 2010, several years after Mr. Cromey's death, [Taxpayer] moved to South Carolina and purchased real property located at 1551 Ben Sawyer Blvd., Unit 6B, Mount Pleasant, South Carolina. [Taxpayer] submitted an application to the Department for the disabled veteran property tax exemption as a surviving spouse on this property beginning with tax year 2011. The Department granted [Taxpayer]'s application.[2]
>
> In 2016, [Taxpayer] sold the property located at 1551 Ben Sawyer Blvd., Unit 6B, Mount Pleasant, South Carolina, and purchased a new property located at 1885 Carolina Towne Court (Towne Court), Mount Pleasant, South Carolina. [Taxpayer] was, and is, the sole owner of Towne Court. Thereafter, on February 17, 2017, [Taxpayer] applied for the disabled veteran property tax exemption as a surviving [spouse] for Towne Court. The Department denied [Taxpayer's] application. [Taxpayer] has never remarried.

(emphasis added). Taxpayer protested the Department's denial of the exemption, and the Department ultimately issued a final agency determination upholding the denial. Taxpayer then sought a contested case hearing before the ALC. The

[2] The Department now asserts that it made a mistake in granting this application.

Department and Taxpayer filed cross-motions for summary judgment, and the ALC granted summary judgment to the Department. This appeal followed.

ISSUE ON APPEAL

Did the ALC err by concluding that Taxpayer did not qualify as a surviving spouse of a disabled veteran for purposes of section 12-37-220(B)(1)?

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review on appeal from a decision of the ALC, allowing this court to

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

S.C. Code Ann. § 1-23-380(5) (Supp. 2020).

Further, when a trial court grants summary judgment on a question of law, such as statutory interpretation, the appellate court must review the ruling de novo. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019); *see Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) ("An issue regarding statutory interpretation is a question of law." (quoting *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005))).

LAW/ANALYSIS

Taxpayer argues that she qualifies as a surviving spouse of a disabled veteran for purposes of the property tax exemption set forth in section 12-37-220(B)(1) because the statute's plain language does not condition eligibility on first acquiring an exempt house from the deceased veteran. We disagree.

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 8, 809 S.E.2d 223, 226 (2018) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. "Where the statute's language is plain and unambiguous[] and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*; *see also State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute.").

"Th[e appellate c]ourt looks beyond a statute's plain language only when applying the words literally would lead to a result so patently absurd that the General Assembly could not have intended it." *Boulware*, 422 S.C. at 8, 809 S.E.2d at 226. Although our supreme court has expressed a policy of strictly construing tax exemption statutes against the taxpayer, "[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). "It does not mean that [the appellate court] will search for an interpretation in [the Department]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* at 74–75, 716 S.E.2d at 881.

Section 12-37-220(B)(1) allows disabled military veterans or their surviving spouses to claim a property tax exemption for:

> (a) the house owned by an eligible owner in fee or jointly with a spouse;
>
> (b) the house owned by a qualified surviving spouse acquired from the deceased spouse *and* a house subsequently acquired by an eligible surviving spouse. The qualified surviving spouse shall inform the Department of Revenue of the address of a subsequent house;

> . . .
>
> (e) As used in this item:
>
> (i) "eligible owner" means:
>
> (A) a veteran of the armed forces of the United States who is permanently and totally disabled as a result of a service-connected disability **and** who files with the Department of Revenue a certificate signed by the county service officer certifying this disability;
>
> . . . .
>
> (iii) "qualified surviving spouse" means the surviving spouse of an individual described in subsubitem (i) while remaining unmarried, who resides in the house, and who owns the house in fee or for life. . . .
>
> (iv) "house" means a dwelling and the lot on which it is situated classified in the hands of the current owner for property tax purposes pursuant to Section 12-43-220(c)[.[3]]

(emphases added). Therefore, a surviving spouse's eligibility for this exemption is derivative of the disabled veteran having been eligible for the exemption. Pursuant to the statute's clear terms, a disabled veteran's eligibility for the exemption requires his ownership of the house in question "in fee or jointly with a spouse" and his having filed with the Department "a certificate signed by the county service officer certifying [a service-connected] disability." § 12-37-220(B)(1)(e)(i). It is undisputed that Taxpayer's husband neither owned property in South Carolina nor filed the required certificate with the Department as he and Taxpayer resided in Maryland at the time of his death. Curiously, Taxpayer asserts the certification requirement does not apply to her because she is an "eligible surviving spouse" as

[3] This property is classified as an owner-occupied legal residence and is taxed at a rate of four percent of its fair market value. S.C. Code Ann. § 12-43-220(c)(1) (Supp. 2020).

set forth in item (1), subitem (b), and "there is no textual link . . . between an eligible surviving spouse and the certification requirement."

Subitem (b) identifies the property for which a surviving spouse may claim the exemption in the following manner: "the house owned by a qualified surviving spouse acquired from the deceased spouse *and* a house subsequently acquired by an eligible surviving spouse." § 12-37-220(B)(1)(b) (emphasis added). The legislature's inclusion of the conjunction "and" rather than "or" indicates there was no intent to allow an alternative exemption for a surviving spouse who does not first acquire an exempt house from the disabled veteran. Likewise, the inclusion of the term "subsequently" indicates a relationship to the term "acquired" within the preceding phrase: "the house owned by a qualified surviving spouse *acquired* from the deceased spouse and a house *subsequently* acquired by an eligible surviving spouse." § 12-37-220(B)(1)(b) (emphases added). In other words, "subsequently acquired" means subsequent to the qualified surviving spouse's acquisition of an exempt house from the deceased veteran. Otherwise, the legislature would not have included the term "subsequently." *See CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (citation omitted) (second and third alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008))). It logically follows that the entire phrase "and a house subsequently acquired by an eligible surviving spouse" relates back to the preceding phrase, conditioning eligibility for the exemption on first acquiring an exempt house from the deceased veteran.

Despite the absence of a logically separate and symmetrical subitem expressing a third class of persons eligible for the exemption, Taxpayer essentially seeks to carve out a third class from subitem (b). Taxpayer asserts that the legislature intended "eligible surviving spouse" to mean merely a surviving spouse who remains unmarried. Taxpayer attempts to support this assertion with the argument that the term "subsequently" relates back to the veteran's death (meaning subsequent to the veteran's death) rather than the surviving spouse's acquisition of the veteran's exempt house and, thus, a surviving spouse who does not first acquire an exempt house from the deceased veteran is eligible for the exemption when she acquires a residence from another source. Taxpayer states: "Any house acquired by a surviving spouse after the death of the [veteran] would thus be a 'subsequently acquired' house qualifying for the [e]xemption under the third category." This is a strained interpretation of item (1) that takes its terms out of their critical context to reach a

result the legislature did not intend. *See Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context."). The term "subsequently" is an adverb that modifies the past tense of the verb "acquire." Further, although the surviving spouse's acquisition of the deceased veteran's exempt house presumably occurs on the same date as the date of the veteran's death, the noun "death" does not appear as the event of reference for "subsequently" in subitem (b).

Therefore, the legislature's use of the words "eligible surviving spouse" does not indicate a third class of persons who may claim the exemption. If the legislature had intended to create such a class, it would have added a separate subitem within item (1) setting forth the third class and a separate definition for "eligible surviving spouse" as it did for "qualified surviving spouse" and "eligible owner." Rather, the context in which the word "eligible" is used in subitem (b) indicates the word is to be understood in its plain sense, which is synonymous with "qualified"[4] and simply means eligible for the exemption. Accordingly, "eligible surviving spouse" is simply a reference to the qualified surviving spouse who has become eligible for the exemption on a subsequently acquired house after first acquiring the deceased veteran's exempt house. The connection between "the qualified surviving spouse" and "subsequent house" in the last sentence of subitem (b) confirms this plain reading of the statute: "The qualified surviving spouse shall inform the Department of Revenue of the address of a *subsequent* house[.]" § 12-37-220(B)(1)(b) (emphasis added); *see Singletary*, 316 S.C. at 162, 447 S.E.2d at 236 ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context."). Under Taxpayer's interpretation of subitem (b), the qualified surviving spouse would be required to inform the Department of the address of a subsequently acquired house but an "eligible surviving spouse" who does not meet the definition of qualified surviving spouse would not have to inform the Department. The legislature could not have intended this incongruous result.

We view section 12-37-220(B)(1)(b) as unambiguous because the only reasonable interpretation of the statute is that of the ALC and the Department. *Cf. S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation." (emphasis added)).

[4] *See* Merriam-Webster Online Dictionary, *Eligible*, https://www.merriam-webster.com/dictionary/eligible (June 24, 2021) ("1a: qualified to participate or be chosen").

Nonetheless, even if the statute could be considered ambiguous, the interpretation of the ALC and the Department better harmonizes with the legislature's expressed intent to require proof of a disability before allowing a tax exemption for it. *See CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 ("We . . . should not concentrate on isolated phrases within the statute. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." (citation omitted)); *see also S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." (quoting *Hardee v. McDowell*, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009))); *Boulware*, 422 S.C. at 8, 809 S.E.2d at 226 ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581)). Taxpayer's interpretation allows an "eligible surviving spouse" to obtain the exemption even if the corresponding deceased veteran never provided the Department with proof of his disability during his lifetime. Yet, this same interpretation requires a living disabled veteran to submit such proof before he may obtain the exemption for himself under subitem (a). The legislature could not have intended this incongruous result, especially given the derivative nature of the exemption for surviving spouses.

Further, we note the Department's representation that it has consistently interpreted and applied section 12-37-220(B)(1)(b) in the same way it has applied the statute to Taxpayer for her residence at 1885 Carolina Towne Court.[5] Therefore, this court may defer to this interpretation. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32–33, 766 S.E.2d 707, 717 (2014) ("Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." (citations omitted) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984))); *id.* at 34, 766 S.E.2d at 718 ("[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations."); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("[T]he construction

[5] The Department asserts that it made a mistake in granting the exemption for the property located at 1551 Ben Sawyer Blvd.

of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." (quoting *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987))).

Finally, Taxpayer asserts that the legislative history of section 12-37-220(B)(1) supports her position. We disagree. Prior to 2004, item (1) identified the property for which a disabled military veteran could claim the exemption in the following manner:

> The dwelling house in which he resides and a lot not to exceed one acre of land owned in fee or for life, or jointly with a spouse, by a veteran who is one hundred percent permanently and totally disabled from a service-connected disability, if the veteran or qualifying surviving spouse files a certificate, signed by the county service officer, of the total and permanent disability with the Department of Revenue. The exemption is allowed the surviving spouse of the veteran and also is allowed to the surviving spouse of a serviceman or law enforcement officer as defined in Section 23-6-400(D)(1) killed in action in the line of duty who owned the lot and dwelling house in fee or for life, or jointly with his spouse, so long as the spouse does not remarry, resides in the dwelling, and obtains the fee or a life estate in the dwelling. *A surviving spouse who disposes of the exempt dwelling and acquires another residence in this State for use as a dwelling house . . . may apply for and receive the exemption on the newly acquired dwelling, but a subsequent dwelling of a surviving spouse is not eligible for exemption pursuant to this item*. The spouse shall inform the Department of Revenue of the change in address of the dwelling. To qualify for the exemption, the dwelling house must be the domicile of the person who qualifies for the exemption.

Act No. 399, 2000 S.C Acts 3463 (emphasis added). The legislature amended item (1) in 2004 to read as it does today. *See* Act No. 224, 2004 S.C. Acts 2022.

The plain meaning of the language in the 2000 Act (Act No. 399) simply allowed a qualified surviving spouse who chose to move to a new residence to claim an exemption for the newly acquired house after relinquishing ownership of the exempt house acquired from the deceased spouse. The language also expressly limited the exemption to the house acquired from the deceased spouse and one subsequently acquired house. If the qualified surviving spouse relinquished ownership of the second house and acquired a third house to live in, she could not claim an exemption for the third house or any other future residences.

The plain language of the current version of the statute indicates that the legislature extended the exemption to all subsequently acquired residences by (1) substituting the phrase "a house subsequently acquired by an eligible surviving spouse" for the statement "A surviving spouse who disposes of the exempt dwelling and acquires another residence in this State for use as a dwelling house . . . may apply for and receive the exemption on the newly acquired dwelling" and (2) deleting the language limiting the exemption to the house acquired from the deceased spouse and one subsequently acquired house.

We disagree with Taxpayer's intimation that the 2004 amendment created a third class of persons eligible for the exemption, i.e., "an eligible surviving spouse." The 2004 amendment simply retained the term "eligible" from the version enacted in 2000, which states, in pertinent part:

> A surviving spouse who disposes of the exempt dwelling and acquires another residence in this State for use as a dwelling house . . . may apply for and receive the exemption on the newly acquired dwelling, but a subsequent dwelling of a surviving spouse is not *eligible* for exemption pursuant to this item.

Act No. 399, 2000 S.C Acts 3463 (emphasis added). When the legislature expanded the exemption in 2004 to all subsequent dwellings, it connected their acquisition to a surviving spouse who had become eligible for that exemption after she first acquired the deceased veteran's exempt house, resulting in the current language found in section 12-37-220(B)(1)(b): "the house owned by a qualified surviving spouse acquired from the deceased spouse and a house *subsequently acquired* by an *eligible surviving spouse*." (emphases added). Therefore, this language did not create a third class of persons who may claim the exemption.

Moreover, we note that the 2004 amendment deleted language allowing the surviving spouse to file the certificate verifying the veteran's service-connected disability with the Department so that the exemption is not allowed if the veteran himself did not file the certificate. This indicates the legislature's intent to ensure that the surviving spouse's ability to obtain the exemption is merely derivative. She may not obtain the exemption on a house she purchases after the disabled veteran's death unless she first acquired a previously exempt house from the deceased veteran.

We also disagree with Taxpayer's contention that her interpretation is supported by the following language in the preamble to Act No. 224: "An Act . . . to continue the exemption to subsequent homesteads of surviving spouses and provide the requirements for this extended exemption . . . ." We view this language as simply expressing the legislature's intent to extend the exemption to all houses acquired by the qualified surviving spouse after she leaves the exempt house she acquired from the deceased veteran. Prior to Act No. 224, the exemption extended to only one subsequently acquired house.

Based on the foregoing, the ALC correctly ruled that the Department was entitled to judgment as a matter of law. *See* Rule 56(c), SCRCP (providing that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

CONCLUSION

Accordingly, the ALC's order is

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Quincy Allen, #6019, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2018-002046

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5843
Heard May 5, 2021 – Filed August 4, 2021

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Annie Laurie Rumler and Christina Catoe Bigelow, both of the South Carolina Department of Corrections, of Columbia, for Respondent.

LOCKEMY, C.J.: Quincy Allen appeals the Administrative Law Court's (ALC's) dismissal of his inmate grievance appeal. On appeal, he argues the ALC erred by holding it lacked jurisdiction to hear his case because the South Carolina Department of Corrections's (SCDC's) denial of his visitation with persons he did not know prior to his incarceration implicated a state-created liberty interest. We affirm.

FACTS/PROCEDURAL HISTORY

Allen is a death-sentenced inmate who has been incarcerated for nearly nineteen years. On March 21, 2018, Allen submitted a Step 1 Inmate Grievance Form requesting that SCDC permit him to see visitors whom Allen had not met prior to his incarceration. SCDC denied his Step 1 Grievance stating, "SCDC feels that not knowing an inmate prior to incarceration is a security concern." Allen filed a Step 2 Inmate Grievance Form repeating this request. SCDC denied his Step 2 Grievance citing SCDC Policy OP-22.09.[1]

Allen appealed SCDC's denial of his inmate grievances to the ALC, arguing SCDC (1) used arbitrary and capricious unwritten policies and procedures to disapprove visitors, (2) disregarded and overlooked its written policies regarding visitation, (3) misapplied its written policies, and (4) failed to provide due process. SCDC filed a motion to dismiss, which the ALC granted. The ALC ruled its jurisdiction regarding inmate appeals was limited to state-created liberty interests and SCDC restricting Allen's visitation did not implicate a state-created liberty interest. This appeal followed.

ISSUE ON APPEAL

Did the ALC err by holding Allen did not have a state-created liberty interest in visitation with the general public?

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard of review in appeals from the ALC. S.C. Code Ann. § 1-23-610(B) (Supp. 2020). An appellate court may reverse or modify a decision if the ALC's findings or conclusions are:

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[1] S.C. Dep't of Corr. Policy/Procedure, No. OP-22.09, Inmate Visitation § 1.4 (Aug 1, 2016) ("Inmate visitation is considered to be a privilege and is **not** considered a guaranteed right. Therefore, the SCDC reserves the right to suspend, restrict, deny, or terminate an inmate's or visitor's visitation privileges . . . due to legitimate concerns regarding the security and safety of the institution.").

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

LAW/ANALYSIS

Allen argues he has a state-created liberty interest in rehabilitation, which includes visitation with members of the general public. He asserts that a ban on visitors he did not know prior to his incarceration implicates the due process clause. We disagree.

State-Created Liberty Interest in Visitation

"Admittedly, prisoners do not shed all constitutional rights at the prison gate but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (citation omitted) (quoting *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 125 (1977)).

An inmate who seeks to challenge a final decision of SCDC may seek review of an administrative matter under the APA. *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). However, the ALC only has jurisdiction of matters implicating a state-created liberty interest. *See Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) ("The only way for the [ALC] to obtain subject matter jurisdiction over [an inmate's] claim is if it implicates a state-created liberty interest."). "[S]tate law may create enforceable liberty interests in the prison setting." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 461 (1989).

An inmate "claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests 'may arise from two sources[:] the Due Process Clause itself and the laws of the States.'" *Id*. at 460 (quoting *Hewitt v.*

Helms, 459 U.S. 460, 466 (1983)). In order to establish a state-created liberty interest, a regulation must "contain 'explicitly mandatory language,' *i.e.,* specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Id.* at 463 (quoting *Hewitt*, 459 U.S. at 472).

"Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.'" *Id.* at 462 (quoting *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983)). This language means if the regulation explicitly mandates an outcome based on the existence of relevant criteria then the State has created a liberty interest. *Id.* at 462. Based on this, we must examine whether SCDC's policy mandates SCDC to permit inmate visitation with persons the inmate did not know prior to incarceration when relevant criteria are met. We find it does not.

SCDC's visitation policy lacked "explicitly mandatory language" requiring a particular outcome when factual predicates are met. SCDC's policy expressly states visitors deemed to be a security risk will not be permitted to visit inmates and that visitation is not a guaranteed right. *See* S.C. Dep't of Corr. Policy/Procedure, No. OP-22.09, Inmate Visitation § 1.4 (Aug 1, 2016). This policy vests SCDC with wide discretion; thus, it does not mandate an outcome. Since there is no mandated outcome there was no state-created interest in visitation with persons Allen did not know prior to his incarceration.

States may also create liberty interests protected by the Due Process Clause by limiting an inmate's freedom from restraint in such a way that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sullivan*, 355 S.C. at 442, 586 S.E.2d at 126 (quoting *Sandin*, 515 U.S. at 484). The denial of Allen's visitation with persons not known to him prior to incarceration was not a violation of his right to freedom from restraint that is atypical, nor did it create a significant hardship on Allen in relation to ordinary prison life because the record contains no indication SCDC treats other inmates differently. *Cf. Sullivan*, 355 S.C. at 445, 586 S.E.2d at 128 ("[D]enying Sullivan access to [phase two of the Sex Offender Treatment Program (SOTP II)] or any other sex offender program does not impose an 'atypical or significant hardship' on Sullivan as all other inmates designated as sex offenders are afforded the same access to treatment.").

Rehabilitation

Allen further argues these visitors are necessary for his rehabilitation; thus, the ALC had jurisdiction to hear this case because his visitation implicates a state-created liberty interest in rehabilitation. We disagree.

The South Carolina Constitution enumerates prisoner rehabilitation. *See* S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."). However, our supreme court has held the South Carolina Constitution does not create a liberty interest in specific forms of that rehabilitation. *Sullivan*, 355 S.C. at 444, 586 S.E.2d at 127.

In *Sullivan*, our supreme court held the South Carolina Constitution does not impose a duty of rehabilitation on SCDC. Sullivan, an incarcerated sex offender, sought SOTP II immediately after he completed SOTP I through the SCDC grievance process. *Id.* at 440, 586 S.E.2d at 125. SCDC denied his requests. *Id.* Sullivan appealed to the ALC, and the ALC dismissed the case because it lacked subject matter jurisdiction. *Id.* Sullivan appealed to our supreme court arguing, "the South Carolina Constitution guarantee[d] him a right to rehabilitation, which require[d] the SCDC to give him access to sex offender treatment while incarcerated" and that the deprivation of SOTP II implicated a state-created liberty interest in rehabilitation. *Id*. at 444, 586 S.E.2d at 127. Our supreme court affirmed the ALC's dismissal and held Sullivan did not raise a state-created liberty interest and declined to impose a duty of specific forms of rehabilitation on SCDC. *Id.* Our supreme court held, "Even if [the South Carolina Constitution] is read to require *some* rehabilitation for inmates, it does not mandate any specific programs that must be provided by the General Assembly or the SCDC . . . ." *Id.*

The South Carolina Constitution did not create a liberty interest in specific programs of rehabilitation; thus, it does not mandate specific types of visitation in the interest of rehabilitation. *See id.* at 445, 586 S.E.2d at 127–28 (holding that if the court required specific programs of rehabilitation it "would conflict with the hands-off approach that this Court has taken towards internal prison matters."). Allen failed to raise a state-created liberty interest in rehabilitation that required the State to provide visitation with persons he did not know prior to his incarceration.

Thus, the ALC lacked jurisdiction to hear Allen's appeal from his Step 2 Grievance.[2]

CONCLUSION

Based on the foregoing, we affirm the ALC's dismissal of Allen's appeal of his Step 2 Grievance based on lack of jurisdiction because there was no state-created liberty interest in visitation.

AFFIRMED.

WILLIAMS and HEWITT, JJ., concur.

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[2] Allen argues in his reply brief that SCDC's interpretation of its policy was arbitrary and capricious. Because he failed to raise this issue in his initial brief we find this issue abandoned. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").