The Supreme Court of South Carolina

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N O T I C E

In the Matter of Steven Robinson Cureton

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

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 24, 2017, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

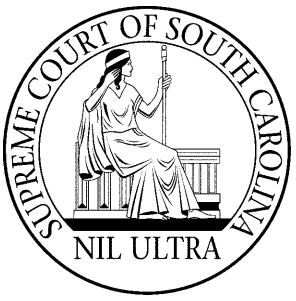
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 19, 2017

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



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 26, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina Corporation; Heritage Magnolia North, Inc., a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; Magnolia North Horizontal Property Regime; Magnolia North Property Owners Association, Inc., a South Carolina Corporation; and National Surety Corp., Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Magnolia North, Inc., a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; and National Surety Corp. are Respondents,

and Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., a South Carolina Corporation, are Respondents/Appellants.

Appellate Case No. 2013-001281

And

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina

Corporation; Heritage Riverwalk, a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina Corporation; National Surety Corp.; and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Riverwalk, a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; National Surety Corp.; and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, are Respondents,

and Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc. are Respondents/Appellants.

Appellate Case No. 2013-001291

ORDER

After careful consideration of the cross-petitions for rehearing, the Court grants the petition for rehearing filed by Appellant/Respondent, dispenses with further briefing, and substitutes the attached opinions for the opinions previously filed in this matter. As to the petition for rehearing filed by Respondents/Appellants, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and therefore, the petition for rehearing filed by Respondents/Appellants is denied.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ James E. Moore A.J.

I would grant rehearing. Because a majority of the Court has voted to file a substituted opinion, I have revised my dissent.

s/ Costa M. Pleicones A.J.

Columbia, South Carolina

July 26, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina Corporation; Heritage Magnolia North, Inc., a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; Magnolia North Horizontal Property Regime; Magnolia North Property Owners Association, Inc., a South Carolina Corporation; and National Surety Corp., Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Magnolia North, Inc., a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; and National Surety Corp. are Respondents,

and Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., a South Carolina Corporation, are Respondents/Appellants.

Appellate Case No. 2013-001281

And

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina Corporation; Heritage Riverwalk, a South Carolina

Corporation; Buildstar Corporation, a South Carolina Corporation; Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina Corporation; National Surety Corp.; and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, Defendants,

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and Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc. are Respondents/Appellants.

Appellate Case No. 2013-001291

Appeal from Horry County
John M. Milling, Special Referee

Opinion No. 27698
Heard January 14, 2016 – Refiled July 26, 2017

AFFIRMED AND AFFIRMED AS MODIFIED

C. Mitchell Brown, William C. Wood, Jr., and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia and Robert C. Calamari, of Nelson Mullins Riley & Scarborough, LLP of Myrtle Beach, for Appellant/Respondent.

John P. Henry and Philip C. Thompson, both of Thompson & Henry, P.A., of Conway, for Respondents/Appellants.

Elliott B. Daniels of Murphy & Grantland, P.A., of Columbia, and Laura A. Foggan, of Crowell & Moring LLP, of Washington, D.C., for Amici Curiae Complex Insurance Claims Litigation Association and Property Casualty Insurers' Association of America.

JUSTICE KITTREDGE: These cases present cross-appeals from declaratory judgment actions to determine coverage under Commercial General Liability (CGL) insurance policies issued by Harleysville Group Insurance (Harleysville). These cases arise from separate actions, but we address them in a single opinion as they involve virtually identical issues regarding insurance coverage for damages stemming from the defective construction of two condominium complexes in Myrtle Beach: Magnolia North Horizontal Property Regime (Magnolia North) and Riverwalk at Arrowhead Country Club Horizontal Property Regime (Riverwalk). The Special Referee found coverage under the policies was triggered and calculated Harleysville's pro rata portion of the progressive damages based on its time on the risk. We affirm the findings of the Special Referee in the Magnolia North matter, and we affirm as modified in the Riverwalk matter.

I.

The Riverwalk and Magnolia North developments were constructed between 1997 and 2000. After construction was complete and the units were sold, the purchasers became aware of significant construction problems, including building code violations, structural deficiencies, and significant water-intrusion problems. In 2003, the purchasers filed suit to recover damages for necessary repairs to their homes.

The lawsuits were filed by the respective property owners' associations (the POAs), which sought actual and punitive damages for the extensive construction defects under theories of negligent construction, breach of fiduciary duty, and breach of warranty.[1] As to the Riverwalk development, individual homeowners also filed a class action to recover damages for the loss of use of their property during the repair period.[2] The defendants in the underlying suits were the related corporate entities that developed and constructed the condominium complexes: Heritage Communities, Inc. (the parent development company), Heritage Magnolia North, Inc. and Heritage Riverwalk, Inc. (the project-specific subsidiary companies for each separate development), and Buildstar Corporation (the general contracting subsidiary that oversaw construction of all Heritage development projects), to which we refer collectively as "Heritage."

During the period of construction from 1997 to 2000, the various Heritage entities each maintained several liability insurance policies with Harleysville with per-occurrence limits totaling between $3,000,000 and $4,000,000 on the primary policies and between $9,000,000 and $13,000,000 on the excess liability policies.[3]

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[1] The Magnolia North trial involved claims of negligent construction, breach of implied warranty of workmanlike service, and breach of fiduciary duty for failing to repair or fund repairs needed in the common areas at the time the property was turned over to the POA. In the Riverwalk litigation, the POA asserted similar claims of negligence and breach of fiduciary duty.

[2] This class action was consolidated for trial with the Riverwalk POA suit.

[3] Between August 1997 and November 1999, Heritage Communities, Inc. maintained various policies with $1,000,000 in primary liability coverage and $4,000,000 in excess coverage. From April 1997 to August 2000, BuildStar Corporation maintained $1,000,000 of coverage in both primary and excess policies. From June 1997 to June 2001, Heritage Riverwalk, Inc. maintained policies of $1,000,000 in primary coverage and $4,000,000 in excess coverage. From September 1998 to November 2000, Heritage Magnolia North maintained $1,000,000 in liability coverage and $4,000,000 in excess coverage.

Heritage was uninsured after the last policy lapsed in 2001, and the financial strain of numerous construction-defect lawsuits caused Heritage to go out of business in 2003.[4]

After receiving notice of the lawsuits, Harleysville informed its insureds that it would provide for their defense; however, Harleysville contends this was done under a full reservation of rights. Harleysville's efforts to reserve its rights were generic statements of potential non-coverage coupled with furnishing most of the Heritage entities with copies (through a cut-and-paste method) of the insurance policies. There is no dispute that Harleysville would control the litigation. Harleysville contends that all coverage issues would be litigated following the entry of any adverse jury verdict.

At the outset of each trial, Harleysville's counsel for Heritage conceded liability, and in both trials, the trial court directed a verdict in favor of the POA on the negligent construction cause of action. *See Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys.*, 397 S.C. 348, 369–70, 725 S.E.2d 112, 123–24 (Ct. App. 2012) (observing that "during opening arguments, counsel [for Heritage] conceded liability" and affirming the trial court's decision to direct a verdict in favor of the POA); *Pope v. Heritage Cmtys*., 395 S.C. 404, 429–30, 717 S.E.2d 765, 778–79 (Ct. App. 2011) (quoting Heritage's concessions of liability during opening statements and finding no error in the trial court's decision to direct a verdict in favor of the POA). Thus, the only contested issue in the underlying trials was the nature and extent of the damages resulting from the admitted negligent construction.

In this regard, the parties presented various experts who offered widely different estimates of the costs to correct the construction defects. According to the POAs'

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[4] In January 2001, Heritage Communities, Inc., the parent development company, filed for protection under Chapter 11 of the United States Bankruptcy Code and thereafter was administratively dissolved by the South Carolina Secretary of State in June 2011. *See* S.C. Code Ann. § 33-14-210(d) (2006) ("A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs.") The remaining corporate entities similarly became insolvent.

experts, the cost of necessary repairs totaled approximately $9,200,000 at Magnolia North and $8,600,000 at Riverwalk. In contrast, defense experts testified the necessary repairs would cost much less—approximately $2,400,000 at Magnolia North and $2,500,000 at Riverwalk. Ultimately, the juries declined to adopt any one expert's estimate, instead returning verdicts somewhere between the parties' figures. In the Magnolia North matter, the jury returned a general verdict for $6,500,000 in actual damages and $2,000,000 in punitive damages, and in the Riverwalk suit, the jury returned a general verdict of $4,250,000 in actual damages and $250,000 in punitive damages in favor of the POA and $250,000 in loss-of-use damages and $750,000 in punitive damages in the class action.

Following these general jury verdicts against its insureds, Harleysville filed the present declaratory judgment actions to determine what portion of the judgments in the underlying construction-defect lawsuits would be covered under Heritage's CGL policies. In filing these suits, Harleysville contended that, under the terms of the policies, it has no duty to indemnify Heritage for these judgments. Alternatively, if any of the damages were found to be covered, Harleysville sought an accounting to somehow parse the jury verdicts and determine which portion of the juries' general verdicts constituted covered damages. Harleysville further argued it could be responsible for only that portion of damages occurring during the period of time its policies provided coverage.

The matter was referred to a Special Referee, who held an evidentiary hearing in December 2010. Because this Court's decision in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co*.[5] was pending at the time, the parties agreed for the Special Referee to stay the matter until *Crossmann* was resolved. After *Crossmann* was decided in August 2011, the parties agreed for the Special Referee to reopen the evidentiary hearing in December 2011 to hear arguments and testimony regarding the applicability of the time-on-the-risk formulation as set forth in *Crossmann*. The POAs objected to the admission of evidence regarding time on the risk, arguing that it was inappropriate to parse the juries' general, unallocated verdicts by evaluating Harleysville's time on the risk.

Ultimately, the Special Referee found coverage under the policies was triggered because the juries' general verdicts included some covered damages. Although the Special Referee found that the costs to remove and replace the faulty workmanship

[5] 395 S.C. 40, 717 S.E.2d 589 (2011).

were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk. The Special Referee made factual findings regarding the dates of the progressive damages period and the period during which Harleysville provided coverage. The Special Referee thereafter calculated Harleysville's pro rata portion of the progressive damages based on Harleysville's time on the risk. Lastly, the Special Referee found punitive damages were covered and that no policy exclusion applied to preclude coverage for any portion of those damages.

The parties subsequently filed cross-appeals. Harleysville is the primary Appellant. Upon the parties' joint motion, these matters were certified from the court of appeals to this Court pursuant to Rule 204(b), SCACR.

II.

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id*. (citing *Auto-Owners Ins. Co. v. Hamin,* 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006)). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* Indeed, this Court's scope of review "'is limited to correcting errors of law.'" *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (quoting *State Farm Mut. Auto. Ins. Co. v. James,* 337 S.C. 86, 93, 522 S.E.2d 345, 348–49 (Ct. App. 1999)).

The threshold question in determining coverage under a CGL policy is whether the claim at issue is for "property damage" caused by an "occurrence" within the general grant of coverage in the CGL insuring agreement. Specifically, the CGL policies at issue in these cases provide:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage" . . . to which this insurance applies. . . .
>
> a. This insurance applies only:
>
> (1) To "bodily injury" or "property damage":
>
> (a) That occurs during the policy period; and
>
> (b) That is caused by an "occurrence." [6]

The CGL policies define "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[7] Applying these terms to ascertain the scope of coverage in construction-defect cases has resulted in considerable litigation, not just in South Carolina, but across the country.

In *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), this Court explored the issue in determining whether costs to repair negligently constructed roadways were covered under the general contractor's CGL policy. *Id.* at 122, 621 S.E.2d at 35. Observing there was no claimed damage to

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[6] The language of the excess liability policies is similar and provides:

> We will pay on behalf of the insured the "ultimate net loss" in excess of the "applicable underlying limit" which the insured becomes legally obligated to pay as damages because of:
>
> a. "Bodily injury" or "property damage" covered by this policy and caused by an "occurrence" which occurs during the policy period . . . .

[7] The definitions of "property damage" and "occurrence" are identical in the primary and excess policies.

property other than to the defectively constructed roadway—in other words, the completed work itself—this Court held the claimed losses were not covered by the CGL policy. *Id*. at 123–24, 621 S.E.2d at 36–37. However, in *L-J*, we foreshadowed that the coverage question would be resolved differently under different circumstances. Specifically, we explained that where a claimed loss is for damage to property other than the faulty workmanship itself, such as where continuous or repeated water intrusion causes damage to otherwise non-defective construction components, then the claim may be covered under the terms of the policy, as it would not constitute a mere allegation of faulty or defective workmanship. *Id*. at 123–24, 621 S.E.2d at 36 (citing *High Country Assocs. v. N.H. Ins. Co*., 648 A.2d 474 (N.H. 1994)). *L-J* was decided prior to the trials in this case.

Consistent with our projection in *L-J*, several years later in *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), we held that a subcontractor's negligent application of stucco, which allowed water to seep into the plaintiff's home causing damage to the home's framing and exterior sheathing, constituted an occurrence under the builder's CGL policy. Although the Court found the damages caused by the continuous moisture intrusion resulting from this negligent construction were covered by the CGL policy, the Court emphasized that the costs of removing and replacing the defective stucco itself amounted to faulty workmanship, which was not covered.[8] *Id*. at 194, 684 S.E.2d at 544–45.

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[8] On March 10, 2008, this Court issued an initial decision in *Newman* in which we found all damages caused by water intrusion resulting from defectively installed stucco were covered under the terms of the CGL policy. In so holding, we initially affirmed the trial court's finding that the cost of repairing and replacing the defectively installed stucco itself was included in the covered damages, as the underlying damage could neither be assessed nor repaired without first removing the exterior sheathing. Thereafter, Auto Owners filed a petition for rehearing on April 21, 2008; on that same day, Harleysville filed a motion with this Court seeking leave to file a brief as Amicus Curiae in support of Auto Owners' petition for rehearing, which was subsequently granted. In its Amicus brief, citing numerous cases from other jurisdictions in support, Harleysville urged this Court to grant rehearing and argued, among other things, that the Court should reverse its decision finding repair or replacement costs for the faulty workmanship to be covered under the CGL policy, even if the Court ultimately determined other resulting damage was covered. Auto Owners' petition for rehearing was granted on

Two years later, in *Crossmann*, the Court reaffirmed the result in *Newman*—that costs to repair faulty workmanship itself are not covered under a CGL policy but costs to repair resulting damage to otherwise non-defective components are covered—while clarifying that the relevant policy term in the insuring agreement is "property damage," rather than "occurrence." 395 S.C. at 48–50, 717 S.E.2d. at 593–94 (explaining the use of the phrase "physical injury" in defining property damage suggests that such property was "not defective at the outset, but rather was initially proper and injured thereafter"). We clarified that faulty workmanship was not covered because it did not constitute property damage—not because it did not meet the definition of "occurrence." *Id*. (explaining the ongoing water penetration fell within the expanded definition of occurrence—namely, the "continuous or repeated exposure to substantially the same general harmful conditions"—and thus constituted the relevant occurrence). This Court further found the scope of an insurer's duty to indemnify was limited to damages accrued during the insurer's time on the risk, overruling earlier case law that held an insurer's liability was joint and several. *Id*. at 59–64, 717 S.E.2d at 599–01.

In so holding, the Court acknowledged that, when property damage is progressive (as is the case with damages resulting from water intrusion), "it is often 'both scientifically and administratively impossible'" to determine precisely what quantum of property damage occurred during each policy period. *Id*. at 64, 717 S.E.2d at 601 (quoting *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 301 (Mass. 2009)). Thus, the Court determined that where it is impracticable to calculate the exact measure of damages attributable to the injury that triggered

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August 22, 2008, and the case was reheard on November 6, 2008, prior to the underlying Magnolia North and Riverwalk trials. On September 8, 2009, the Court refiled its decision in *Newman*, this time determining that the cost to remove and replace the defective stucco was not covered under the CGL policy; however, the Court concluded that because there was no evidence in the record indicating which portions of the arbitrator's award of damages may be attributed to the removal and replacement of defective stucco, the entire damages award was covered. A key point here is that Harleysville's presence in, and corresponding knowledge of, the *Newman* litigation illustrates Harleysville's understanding at the time of the underlying Riverwalk and Magnolia North trials of the distinction between faulty workmanship and resulting property damage and the importance of that distinction for purposes of determining coverage.

each policy, the default rule is that an insurer's pro rata share of the damages is a function of the total number of years damages progressed and the portion of those years a particular insurer provided coverage. *Id*. at 64–65, 717 S.E.2d at 602.

Although *Crossmann* represented a sea change in terms of adopting the time-on-the-risk approach (and abandoning the "joint and several" approach), *Crossmann* left unchanged the basic concept, first signaled in *L-J* then formally adopted in *Newman*, that the cost of repairing faulty workmanship is not covered under CGL policies but resulting property damage beyond the defective work product itself is covered. With these principles in mind, we turn to the legal issues presented on appeal.

III.
Coverage Issues

Harleysville and the POAs each contend the Special Referee made various errors in declaring the scope of coverage under the policies. We disagree.

A. Reservation of Rights to Contest Coverage

Harleysville first contends the Special Referee erred in finding it failed to properly reserve the right to contest coverage. The question presented is whether a reservation of rights letter that merely provides the insured with a copy of the policy, coupled with a general statement that the insurer reserves all of its rights, is sufficient. We hold it is not.

On appeal, Harleysville first argues the POAs lack standing to assert any deficiencies in Harleysville's reservation of rights letters because the POAs are not parties to the insurance contract. While we acknowledge that generally a third party will have no basis to assert any perceived inadequacies in an insurer's purported reservation of rights, under the unique facts of this case, we find the Special Referee did not err in allowing the POAs to raise these issues.

Here, Heritage was defunct, and despite having received proper service of process, Heritage failed to appear or otherwise defend in this action. Moreover, the POAs have acquired final judgments against Harleysville's insureds "obtained after an actual trial." By virtue of these final judgments, the express terms of the policy itself provide the POAs are entitled to sue Harleysville directly to recover their

judgments against its insured. It would defy logic to conclude that the POAs had the ability to sue Harleysville directly on the policy but lacked the ability to assert in the insured's stead that Harleysville is precluded from denying coverage based on alleged deficiencies in its reservation letters, especially since the POAs and the insureds share an identical interest in maintaining coverage. Indeed, courts have recognized that, under certain circumstances, third parties may be permitted to contest whether an insurer effectively reserved the right to contest coverage. *See Transamerica Ins. Co. v. Int'l Broad. Corp.*, 94 F.3d 1204, 1208–09 (8th Cir. 1996) (finding injured third party was not precluded from asserting that insurer was precluded from denying coverage where insured was insolvent and injured third party sought to assert insured's interest in precluding insurer from denying coverage); *Stoneridge Dev. Co., Inc. v. Essex Ins. Co.*, 888 N.E.2d 633, 641–50 (Ill. Ct. App. 2008) (recognizing that where insured was insolvent and injured third party held final judgment against insured, the third party could assert a claim that the liability insurer was barred from denying coverage based on insurer's purportedly inadequate reservation of rights). We do recognize, however, that allowing a third party to challenge the adequacy of an insurer's reservation of rights is the exception and not the rule. However, based on the specific circumstances in this case, we conclude the Special Referee did not err in allowing the POAs to stand in the shoes of Harleysville's insured to challenge the adequacy of the reservation of rights letters.

Turning to the sufficiency of a reservation of rights letter, it is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage. We agree with the Special Referee that generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) is not sufficient. That is precisely what happened here, with the exception of the coverage dispute concerning punitive damages.

We begin by analyzing the foundational purpose a reservation of rights letter is designed to serve. "A 'unilateral reservation of rights' is a notice given by the insurer that it will defend [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy . . . ." 14 Couch on Ins. § 202:38. A reservation of rights is a way for an insurer to avoid breaching its duty to defend and seek to suspend operation of the doctrines of waiver and estoppel prior to a determination of the insured's liability. *Id.* "Although a reservation of rights may protect an insurer's interests, it also is intended to benefit the policyholder by

alerting the policyholder to the potential that coverage may be inapplicable for a loss; that conflicts may exist as between the policyholder and the insurer; and, that the policyholder should take steps necessary to protect its potentially uninsured interests." 12 New Appleman on Insurance § 149.02[2][a].

"A reservation of rights letter must give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date." *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996). Moreover, because an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated, courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 348 (1933) (observing that where an insurer reserves the right to control the defense, the insured is "directly deprived of a voice or part in such negotiations and defense" and noting that if an insurer's interests conflict with those of its insured, the insurer is " bound, under its contract of indemnity, and in good faith, *to sacrifice its interests in favor of those of the* [insured]"); *see also Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (holding that "when an insurer notifies its insured that it accepts the defense of a[] [] claim under a reservation of rights that includes covered and noncovered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each"); *id*. (reasoning that the "insurer is in a unique position to know the scope of coverage and exclusions in its policies" and "the duty to notify [the insured] is not onerous").

"If the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense on its own." *Desert Ridge Resort LLC v. Occidental Fire & Cas. Co. of N.C.*, 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). Indeed without knowledge of the bases upon which the insurer might dispute coverage, "the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between itself and the insurer." *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (internal

quotation marks and citation omitted). Thus, "[t]he general rule precluding an insurer from raising new grounds contesting coverage in a subsequent action is justified in th[is] []context." *Id*.

"For a reservation of rights to be effective, the reservation must be unambiguous; if it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured." *Id.* at 10. (citations and internal quotation marks omitted); *see Desert Ridge Resort*, 141 F. Supp. 3d. 966–68 (explaining that where an insurer undertakes and exclusively controls the defense of the insured under a reservation of rights, prior to undertaking the defense, the insurer must specify in detail any and all bases upon which it might contest coverage in the future since "[g]rounds not identified in the reservation of rights may not be asserted later by the insurer"); *id*. (explaining the existence of a potential conflict of interest between insured and insurer is what requires the insured to set forth the bases upon which it might contend damages are not covered in a greater amount of detail than would otherwise be required); *Weber v. Biddle*, 483 P.2d 155, 159 (Wash. Ct.App. 1971) (underscoring that when an insurer controls the defense of the action against its insured, "a high fiduciary duty [i]s owed by the insurer to the insured" and observing a "general notice of reservation of rights failing to refer specifically to the policy provision upon which the insurer wished to rely may be insufficient").

At the hearing before the Special Referee, Harleysville produced letters it sent to former Heritage principals and counsel between December 2003 and February 2004.[9] These letters explained that Harleysville would provide a defense in the underlying suits and listed the name and contact information for the defense attorney Harleysville had selected to represent Heritage in each matter. These letters identify the particular insured entity and lawsuit at issue, summarize the allegations in the complaint, and identify the policy numbers and policy periods for policies that potentially provided coverage.[10] Additionally, each of these letters

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[9] The Magnolia North lawsuit was filed on May 28, 2003, but it was not until more than six months later that Harleysville sent "reservation of right" letters—one to Heritage Communities, Inc. on December 11, 2003, and another to Heritage Magnolia North, Inc. on December 12, 2003.

[10] Notwithstanding the production of various letters at the hearing, Harleysville conceded it could not find a reservation of rights letter addressed to Buildstar

(through a cut-and-paste approach) incorporated a nine- or ten-page excerpt of various policy terms, including the provisions relating to the insuring agreement, Harleysville's duty to defend, and numerous policy exclusions and definitions. Despite these policy references, the letters included no discussion of Harleysville's position as to the various provisions or explanation of its reasons for potentially denying coverage. With the exception of the claim for punitive damages, the letters failed to specify the particular grounds upon which Harleysville did, or might thereafter, dispute coverage.

Concerning punitive damages, Harleysville did provide the basis for the potential denial of coverage:

> The complaint filed against you seeks punitive damages. [Harleysville] reserves the right to disclaim coverage for these since under all of your policies, they would not arise from an "occurrence," do not fit the definition of "bodily injury" or "property damage," and/or were "expected and intended" within the meaning of exclusions in the policies.

The fact that Harleysville stated the specific grounds for contesting coverage for punitive damages stands in stark contrast to the otherwise non-specific—"we will let you know later"—purported reservation of rights. It is reasonable to conclude that Harleysville knew precisely how to protect its interests, but elected to be purposefully vague on all coverage matters except punitive damages.

Significantly, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses or referenced a possible conflict of interest or Harleysville's intent to pursue a declaratory judgment action following any adverse jury verdicts in the underlying lawsuits. "The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (citations omitted) (explaining "[i]f the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the

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specifically regarding the Magnolia North litigation or any letter regarding the individual homeowners' class action.

defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories" (citing *Duke v. Hoch,* 468 F.2d 973, 979 (5th Cir. 1972))). Therefore, by "virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation," and "it would be unreasonable to permit the insurer to not disclose potential bases for denying coverage." *Id*. (internal citations and quotation marks omitted); *see Desert Ridge Resort*, 141 F. Supp. 3d. 966–68 (explaining that where an insurer undertakes and exclusively controls the defense of the insured under a reservation of rights, prior to undertaking the defense, the insurer must specify in detail any and all bases upon which it might contest coverage in the future since "[g]rounds not identified in the reservation of rights may not be asserted later by the insurer"); *id*. (explaining the existence of a potential conflict of interest between insured and insurer is what requires the insured to set forth the bases upon which it might contend damages are not covered in a greater amount of detail than would otherwise be required); *Weber v. Biddle*, 483 P.2d 155, 159 (Wash. Ct.App. 1971) (underscoring that when an insurer controls the defense of the action against its insured, "a high fiduciary duty [i]s owed by the insurer to the insured" and observing a "general notice of reservation of rights failing to refer specifically to the policy provision upon which the insurer wished to rely may be insufficient").

The Special Referee thoroughly analyzed the letters to determine whether Harleysville properly reserved its rights. As to the substance of Harleysville's letters to Heritage, the Special Referee found the letters were not sufficiently specific to put Heritage on notice of Harleysville's specific defenses, particularly as to the need for an allocated verdict.

Perhaps in recognition of the inadequacy of the letters, Harleysville additionally relied on an oral reservation of rights based on conversations with representatives of Heritage. The Special Referee considered this argument (and the evidence advanced by Harleysville) and concluded that even if an oral reservation is permitted in South Carolina, the oral reservations Harleysville claimed to have communicated to the principals of the defunct Heritage entities "fall short of the specificity [required] and are ambiguous at best," noting "[p]roviding timely and specific policy defenses and disclosing actual or potential conflicts are important fiduciary duties of the insurer[,] especially when, as here, Harleysville is controlling the defense of its insured." The Special Referee concluded that

Harleysville failed to properly reserve its rights to dispute coverage as to actual damages and, thus, Harleysville was precluded from attempting to do so in this action.

Here, except as to punitive damages, Harleysville's reservation letters gave no express reservation or other indication that it disputed coverage for any specific portion or type of damages. Nor did the letters or testimony indicate that, in the event Heritage was found liable in the construction-defect suits, Harleysville intended to file the instant lawsuit to contest various coverage issues. Specifically, Harleysville did not expressly put its insureds on notice that it intended to litigate the issues of whether any damages resulted from acts meeting the definition of occurrence, whether any damages occurred during the applicable policy periods, and what damages were attributable to non-covered faulty workmanship. And in no way did the letters inform the insureds that a conflict of interest may have existed or that they should protect their interests by requesting an appropriate verdict. As the Fifth Circuit found in *Duke v. Hoch*, Harleysville's reservation "was no more than a general warning" and "too imprecise to shield [the insurer]." 468 F.2d 973, 979 (5th Cir. 1972). We find there is evidence in the record to support the Special Referee's finding that Harleysville's reservation letters were insufficient to reserve its right to contest coverage of actual damages,[11] and therefore, we affirm.[12] Because we find Harleysville did not effectively reserve the

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[11] In addition to finding Harleysville's attempted reservation of rights to be insufficient, the Special Referee also found "the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict" as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to "engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making." *See Newman*, 385 S.C. at 198, 684 S.E.2d at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award).

[12] The dissent also suggests that the timing of this Court's decision in *Newman* somehow precludes Harleysville from having set forth in its reservation of rights letters the faulty workmanship versus covered damages distinction upon which it

right to contest coverage, we need not address Harleysville's claims of error regarding various policy exclusions.

We turn now to the issue of punitive damages, the coverage of which Harleysville effectively reserved the right to contest.

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now seeks to parse the general jury verdict. As noted, any claim that Harleysville was not aware of this very distinction borders on frivolity because Harleysville appeared in other earlier cases (e.g., *Newman*) for the express purpose of urging the very distinction it now asserts. Moreover, as early as December 2004, Harleysville had formally taken the position that faulty workmanship was not covered in a dispute with a different insured in a South Carolina federal court. Specifically, Harleysville filed a complaint seeking a declaration that it had no duty to defend its insured, a Beaufort County homebuilder and general contractor, in thirteen state-court actions, and arguing the damages at issue in those lawsuits arose from the insured's faulty workmanship and, thus, were not covered under the CGL policy. *Harleysville Mut. Ins. Co. v. Cambridge Bldg. Corp.*, 66 Fed. R. Serv.3d 811 (D.S.C. 2006) (quoting Harleysville's description of the coverage questions presented as "'whether the claims arise from an "occurrence"; whether they constitute "property damage"; and whether the claims allege only damage to property arising from a defect, deficiency, inadequacy or dangerous condition in [the insured's] work'"). Moreover, Harleysville further asserted that "'the law of South Carolina is settled: there is no insurance coverage for construction defects.'" *Id*. (quoting Harleysville's pleadings). Thus, regardless of any decisions by this Court in the interim, the position taken by Harleysville—that faulty workmanship is not covered under the insuring agreement— has been consistent since 2004, and Harleysville demonstrated that it understood how to articulate its position in detail; it simply failed to do so in the cases presently before the Court. Moreover, the relevant language in Harleysville's policies has, at all times, remained unchanged, as has South Carolina's common law regarding conflicts of interest and the high standards of conduct an insurer owes to its insureds. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965); *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Thus, the suggestion in the dissent that Harleysville is being held to a standard of clairvoyance must be rejected.

B. Punitive Damages—Insuring Agreement

Harleysville argues it has no duty to indemnify Heritage for punitive damages, which it contends are not covered under the insuring agreement in the first instance. Specifically, Harleysville contends that by awarding punitive damages, the jury necessarily found that Heritage's wrongdoing and the results therefrom were not accidental, which is required for losses to amount to an occurrence. We disagree.

The insuring language in the CGL policies provides Harleysville will indemnify Heritage for "those sums" Heritage becomes legally obligated to pay as damages arising from an occurrence. The policies include the standard CGL definition of an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In arguing punitive damages are not "accidental" and therefore not an occurrence, Harleysville ignores that the progressive water intrusion constitutes the relevant occurrence. Further, Harleysville disregards not only the progressive-damage aspect of the occurrence definition (i.e., "continuous or repeated exposure to substantially the same general harmful conditions") but also this Court's holding in *Crossmann* that the insuring language of a CGL policy is triggered by progressive damages caused by repeated water intrusion. *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 593. Thus, Harleysville is contractually obligated to indemnify Heritage for those sums Heritage becomes legally obligated to pay as a result of that progressive water intrusion, and the policy does not limit "those sums" to compensatory or actual damages.

Properly looking to the terms of the applicable policies, the Special Referee found that if Harleysville intended to preclude coverage for punitive damages, it could have easily written the policy to explicitly exclude coverage for punitive damages. For example, the Special Referee noted that Harleysville could simply have added the word "compensatory" before the word "damages" in the policies' insuring language. Because the policies' language did not unambiguously exclude punitive damages, the Special Referee applied well-established law and construed the policy language in favor of the insured, finding Harleysville was required to indemnify Heritage for punitive damages.

"[A]mbiguities in an insurance contract must be construed in favor of the insured." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615–16, 732 S.E.2d 626, 628 (2012). Moreover, this Court has previously found punitive damages are covered as they constituted a sum the insured was "legally obligated to pay as damages." *Carroway v. Johnson*, 245 S.C. 200, 204, 139 S.E.2d 908, 910 (1965); *see S.C. State Budget & Control Bd. v. Prince*, 304 S.C. 241, 249, 403 S.E.2d 643, 648 (1991) ("Here, as in *Carroway,* the policy does not limit recovery to actual damages. Instead, the policy uses broader language which, under the rules of construction and interpretation of insurance policies, must be read as encompassing punitive damages."). Because the policy does not unambiguously exclude punitive damages, we construe the policy language in favor of the insured to include punitive damages, and we therefore affirm the Special Referee's finding that punitive damages are covered. *See, e.g.*, *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 593–94 (noting that an ambiguity in a CGL policy must be construed in favor of the insured).

C. Punitive Damages—"Expected or Intended" Exclusion

Harleysville next argues the Special Referee erred in failing to find punitive damages fall within the policy exclusion barring coverage for acts that are "expected or intended." Harleysville contends that by awarding punitive damages, the jury *necessarily* found that Heritage's wrongdoing was a "conscious failure" and involved a "present consciousness of wrongdoing," and thus, Heritage's wrongdoing and the results thereof were intended or at least expected damages, which would be excluded under the policy.[13] We disagree.

An insurance company bears the burden of establishing the applicability of policy exclusions. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.,* 272 S.C. 460, 252 S.E.2d 565 (1979)). For an act to be excluded from coverage under the policy exclusion for losses "expected or intended from the standpoint of the insured," this Court has held that "not only the act causing the loss must have been intentional but [] the

[13] On each jury verdict form, the jury answered "Yes" to the question, "Does the Jury find by clear and convincing evidence that the Defendants' actions were willful, wanton, reckless, and/or grossly negligent?"

results of the act must also have been intended." *Miller v. Fidelity-Phoenix Ins. Co.*, 268 S.C. 72, 75, 231 S.E.2d 701, 702 (1977) (explaining the insured must be shown to have acted intentionally and to have intended the specific type of loss or injury that resulted for the exclusion to apply). These questions of the insured's intent are factual in nature. *Id.* "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Newman*, 385 S.C. at 191, 684 S.E.2d at 543 (citing *Hamin,* 368 S.C at 540, 629 S.E.2d at 685).

The Special Referee found Heritage intended to construct quality condominiums and that Harleysville failed to meet its burden of proving Heritage expected or intended its subcontractors to perform negligently or expected or intended the property damage that resulted from the negligent construction. In so finding, the Special Referee relied upon evidence that Heritage expected its subcontractors to be reliable and skilled, that Heritage was actively addressing construction and water-intrusion concerns to determine the source of the problems, and that post-construction testing revealed a portion of the water intrusion was the result of defectively manufactured components rather than improper installation. In this regard, the Special Referee relied upon *Pennsylvania Thresherman & Farmer's Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957), a Fourth Circuit decision applying South Carolina law, in finding that an insured's negligent conduct may be so gross as to form a basis for punitive damages yet not rise to the level of an intentional act such that it would come within the ambit of the expected-or-intended policy exclusion. Ultimately, the Special Referee concluded there was nothing in the record demonstrating Heritage intended to injure the POAs or homeowners and, thus, punitive damages were not excluded from coverage.

Although Harleysville produced some testimony suggesting Heritage was aware of certain instances of post-construction water intrusion around various windows, there is other evidence that suggests Heritage was attempting to find the source of the leaks and stop them. We recognize the counter-argument propounded by Harleysville that Heritage approached the construction of these condominium projects with the aim of doing as little as possible. The evidence of shoddy workmanship would tend to support the argument that Heritage had knowledge that the projects were substandard. But our standard of review as to this factual issue of intent is not de novo. Because there is evidence in the record to support the Special Referee's findings, we are constrained by the standard of review to

affirm the finding that Harleysville failed to meet its burden of showing the expected-or-intended policy exclusion operates to exclude punitive damages from coverage. *See S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (observing that the determination of a party's intent is a question of fact); *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (explaining that the issue of intent is a question for the factfinder); *see also Miller*, 268 S.C. at 75, 231 S.E.2d at 702 (noting that an insurer must demonstrate not only that the insured acted intentionally but also that the insured intended the specific type of loss or injury that resulted for the damages to be excluded from coverage as "expected or intended" losses); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976) (explaining that in an action at law tried without a jury, an appellate court reviews the evidence, "not to determine the preponderance thereof but to determine whether there is any evidence which reasonably supports the factual findings of the judge").

IV.
Allocation Issues: Time on the Risk

Both Harleysville and the POAs contend the Special Referee made various errors in allocating damages based on the time-on-the-risk formula set forth in *Crossmann*. For the reasons below, we affirm the Special Referee's time-on-the risk computation as to Magnolia North and affirm as slightly modified as to the loss-of-use damages in the Riverwalk litigation.

In December 2011, the Special Referee reopened the evidentiary hearing to allow the parties to present arguments and evidence regarding the application of *Crossmann*'s time-on-the-risk formula. During the hearing, the parties presented evidence that following construction, the last certificate of occupancy was issued in January 2000 at Riverwalk and August 2000 at Magnolia North. The evidence also revealed that Heritage maintained insurance coverage through June 2001 at Riverwalk and November 2000 at Magnolia North.

Additionally, the POAs offered the testimony of Drew Brown, an expert in building diagnostics and general contracting, who testified that the water intrusion damage at the Riverwalk and Magnolia North developments began at the time of the first rain event following improper installation of the building components. In terms of the progressive nature of the damages, Brown further explained:

> [D]amage and decay are two different things. Damage begins with the water entering the sensitive, the moisture[-]sensitive building products, and that's the standard of the [building] code. The [building] code indicates that we must protect these building components from damage, from water intrusion, which then will—that water intrusion begins, the wood products begin to uptake that water, that damage cycle has begun. Eventually, decay will begin, which is a microbial process that will, will actually begin to destroy the ability of the wood to carry any load . . . .

Brown testified that by the time he conducted site visits between December 2003 and April 2004, many of the building components at the developments were damaged to the point they required replacement and that subsequent decay eventually caused structural failure and collapse at both developments.[14]

In conducting the time-on-the-risk analysis, the Special Referee, mindful of the general jury verdicts, specifically declined to conduct a per-building calculation because the jury verdicts were not rendered on a per-building basis. The Special Referee concluded that the most equitable way to proceed in these specific cases would be to compare the total number of days in the damage period to the total number of days of coverage under the Harleysville policies.

In determining the proper progressive-damages period, the Special Referee found the damages began thirty days after the first certificate of occupancy was issued at each development. As to the progressive-damages period end date, the Special

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[14] At the hearing, Harleysville proffered the testimony of a general-contracting construction expert, who conducted site visits to survey the construction deficiencies and prepared a report to estimate the percentage of damage attributable to faulty workmanship at each development. Although this evidence was ultimately excluded because the site visits and subsequent reports long post-dated the jury verdicts and did not correspond with the evidence of damages presented to the juries, we emphasize that even Harleysville's own expert testified it was impossible to determine when the damage began or ended at either development. Thus, even had the Special Referee admitted this evidence, it nevertheless would not support the point Harleysville now urges—namely, that the progression of damages was reasonably ascertainable.

Referee used the date of Brown's last site visit prior to the underlying trials as the damages cut-off point, reasoning that by that date, the building components identified in Brown's report were sufficiently damaged to require replacement, notwithstanding any further progression and decay. Using those dates, the Special Referee determined that damages progressed for a period of 2,347 days at Riverwalk and 1,943 days at Magnolia North. The Special Referee further determined that Harleysville provided coverage for 1,300 days in the Riverwalk matter and 691 days in the Magnolia North matter. The Special Referee used those figures to calculate a time-on-the-risk multiplier for each development, which he then applied to calculate Harleysville's pro rata portion of the progressive damages.

On appeal, both parties take issue with the dates the Special Referee used in his calculations, and Harleysville contends the Special Referee erred in failing to conduct a per-building analysis and in refusing to include loss-of-use and punitive damages in the figure to be reduced by the time-on-the-risk multiplier. Additionally, the POAs contend application of the time-on-the-risk formula at all is inappropriate because the jury rendered general verdicts, and therefore Harleysville should be required to indemnify Heritage for the entire amount of all jury verdicts—not a reduced amount proportionate to Harleysville's time on the risk.

A. Loss of Use—Actual Damages

Harleysville contends the actual damages awarded for loss of use in the Riverwalk class action should be deemed to be progressive in nature and, thus, included in the amount subject to allocation based on Harleysville's time on the risk. We agree and modify the Special Referee's Riverwalk calculation slightly to include allocation of the actual damages resulting from loss of use.

"An insurance policy is a contract . . . and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (citing *Estate of Revis v. Revis,* 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997)). "Where [a] contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.,* 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "It is a question of law for the court whether the language of a contract is ambiguous." *Id*. (citing *Town of McClellanville,* 345 S.C. at 623, 550 S.E.2d at 302–03).

The policies provide "'[p]roperty damage' that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the 'occurrence' that caused it."[15] In this case, the relevant occurrence is the repeated infiltration of water into the improperly constructed buildings, which is a progressive injury. *See Crossmann*, 395 S.C. at 52 n.8, 717 S.E.2d at 595 n.8 (explaining a progressive injury "results from an event or set of conditions that occurs repeatedly or continuously over time, such as . . . the continual intrusion of water into a building"). Because the underlying occurrence is progressive in nature, we find the language of the policies unambiguously provides that loss-of-use damages must be deemed to have progressed over the same period of time. Accordingly, we modify the Special Referee's time-on-the risk calculation for Riverwalk as follows:

Riverwalk	
Actual damages—POA	$4,250,000
Actual damages—Class Action	$250,000
Setoff[16]	($1,028,821)
Adjusted actual damages	$3,471,179
Time-on-the-risk multiplier	0.5538
Harleysville's pro rata share of actual damages	$1,922,338
Punitive damages—POA	$250,000
Punitive damages—Class Action	$750,000
Total amount covered by Harleysville's policies	$2,922,338

In sum, we affirm the findings of the Special Referee as modified above, and find the policies covered $2,922,338 as to the Riverwalk litigation.

[15] The excess liability policies contain a similar provision: "All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

[16] By way of post-trial motion in the underlying construction-defect suit, Harleysville was granted a setoff as a result of settlement amounts paid by defendants other than Heritage.

B. Punitive Damages

Turning to the issue of punitive damages, Harleysville argues that punitive damages, like actual damages, are subject to allocation based on time on the risk. Without establishing a categorical rule, we disagree with Harleysville in these circumstances and affirm.

In the construction-defect trials, the POAs presented evidence that during the construction process at both Riverwalk and Magnolia North (as well as several of Heritage's other large-scale condominium developments in Horry County), Heritage chose not to employ an inspecting architect to evaluate and approve or disapprove any modifications and substitutions to the original construction plans and specifications. The POAs contended the absence of an inspecting architect resulted in the widespread and unchecked substitution of inferior building products and improper structural modifications that ultimately led to the pervasive structural and water-intrusion problems, all of which could have been avoided had the original specifications been followed or properly modified. Further, the POAs argued that although Heritage was aware of significant water-intrusion problems at the other developments before beginning construction at Riverwalk and Magnolia North, Heritage nevertheless continued the same inadequate construction practices at these developments. The POAs presented additional evidence that despite knowledge of the ongoing construction problems, Heritage also deliberately targeted its sales efforts toward elderly, out-of-state residents and marketed its condominiums on the basis of quality and luxurious amenities, such as swimming pools and tennis courts, that were never constructed. The POAs contended that all of this evidence demonstrated Heritage willfully and repeatedly sold improperly constructed condominiums to innocent purchasers and that such conduct justified the imposition of punitive damages. As noted, the jury verdicts included punitive-damage awards of $2,000,000 in the Magnolia North suit, $250,000 in the Riverwalk POA suit, and $750,000 in the Riverwalk class action.

Although the Special Referee determined the time-on-the-risk principles set forth in *Crossmann* were applicable to the actual damages awarded by the juries, the Special Referee rejected Harleysville's argument that punitive damages were likewise subject to time-on-the-risk allocation, observing that the formula set forth in *Crossmann* referred only to damages that were deemed to be progressive.

On appeal, Harleysville argues that punitive damages are necessarily predicated upon the underlying progressive damages and, therefore, are also subject to time-on-the-risk allocation. Harleysville further avers that, like actual damages, punitive damages also serve a compensatory role, and since the pattern of reprehensible conduct justifying the imposition of punitive damages took place over a period of several years, "basic principles of fairness" require that Harleysville not be saddled with the entire punitive damages award.

Initially, we find Harleysville seeks to blur the distinction between actual and punitive damages and conflates the underlying purposes of these two different types of damages. "The purpose of *actual or compensatory damages* is to compensate a party for injuries suffered or losses sustained." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (emphasis added) (examining the fundamental differences between actual damages and punitive damages and rejecting the argument that punitive damages should be reduced by the proportion of the plaintiff's comparative negligence). "The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Id.* (citations omitted).

In contrast, punitive damages relate not to the plaintiff, but rather to the "the *defendant's* reckless, willful, wanton, or malicious conduct." *Id.* at 379, 529 S.E.2d at 533 (emphasis added); *see also Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (observing that an award of punitive damages "'further[s] a state's legitimate interests in punishing *unlawful conduct* and deterring its repetition'" (emphasis added) (quoting *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 568 (1996))); *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784) (focusing on the conduct of the defendant in affirming an award of "very exemplary damages" and finding such damages were warranted where the defendant's conduct was found to be "very wanton," particularly in light of the defendant's special training and experience). "Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes." *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001). "The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Id.* (citations omitted). "The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Id.*

Although this Court has acknowledged punitive damages may also "compensate . . . for the willfulness with which the [plaintiff's] right was invaded," this Court has unequivocally rejected the attempt to "blur all distinctions between actual and punitive damages by unduly emphasizing [any] compensatory aspect." *Clark*, 339 S.C. at 379, 529 S.E.2d at 533 (citations and internal quotation marks omitted). Indeed, "'[i]t is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view *the enormity of his offence rather than the measure of compensation* to the plaintiff.'" *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15–16 (1991) (emphasis added) (quoting *Day v. Woodworth,* 54 U.S. 363, 371 (1852)); *see also id.* at 54 (O'Connor, J., dissenting) ("Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible."). We therefore reject Harleysville's attempt to mischaracterize the punitive damages in these cases as compensatory.

We turn now to the question of whether punitive damages, though not compensatory in nature, are nevertheless subject to time-on-the-risk allocation. The concept of time on the risk is a judicially created, equitable method of allocating progressive damages "where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy," as is the case here. *Crossmann*, 395 S.C. at 64, 717 S.E.2d at 602; *see id*. at 64–67, 717 S.E.2d at 601–03 (explaining that the time-on-the-risk method is the "equitable approach [that] best harmonizes" the language of CGL policies with the scientific and administrative impossibility of identifying the precise quantum of property damage occurring during each policy period). Ultimately, this method of allocation "addresses a problem of proof" in cases involving progressive property damages "where it is not feasible to make a fact-based allocation of losses attributable to each policy period." *Boston Gas Co*., 910 N.E.2d at 316. At the heart of the time-on-the-risk theory is the idea that the policy period is a temporal limitation upon an insurer's indemnity obligation. *See Crossmann*, 395 S.C. at 60, 717 S.E.2d at 599 (rejecting the "joint and several" allocation approach because, *inter alia*, that approach ignores "critical language" limiting the insurer's indemnity obligation to those losses occurring during the policy period). As we explained in *Crossmann*, the time-on-the-risk allocation is a determination of "how much coverage [is to] be provided by each triggered policy." *Id*. at 59, 717 S.E.2d at 599. In other words, the analysis begins with a determination of when coverage-triggering losses

occurred, then allocates losses based on the period of time each insurer was on the risk.

A key point to the time-on-the-risk analysis is that this allocation method was developed as a means of apportioning actual, compensatory damages where the injury progressed over time. S*ee Crossmann*, 395 S.C. at 45, 717 S.E.2d at 591 ("Where proof of the *actual property damage* distribution is not available, the allocation formula adopted herein will serve as an appropriate default method for dividing the loss . . . ." (emphasis added)). As such, the logic and policy considerations underlying the time-on-the-risk method may not as easily lend themselves to the application of this concept to punitive damages. Nevertheless, the parties have presented this Court (and the Special Referee) with a paucity of legal authority to inform our decision as to the allocability of punitive damages, thus forcing us to resort to these policy considerations as our guide in navigating this novel issue. We emphasize it is not our intent to create a bright-line rule that punitive damages may never be subject to allocation based on time on the risk. However, we conclude the punitive-damage awards are not subject to reduction under the facts of these cases.

Specifically, the difficulty here is that Harleysville does not contend, and has presented no evidence, that any of the reprehensible acts upon which punitive damages are predicated occurred outside the relevant policy periods. To the contrary, the evidence in the record demonstrates that all of Heritage's reprehensible acts that justified the juries' imposition of punitive damages took place entirely during the period of time Harleysville's policies were effective. Thus, we conclude the Special Referee did not err in finding punitive damages were not subject to reduction based on the time-on-the-risk multiplier in these cases.

C. Time-on-the-Risk Allocation of the General Verdict

We next turn to the POAs' contention that it was error to apply the time-on-the-risk allocation to the general verdicts based on the possibility that some portion of the jury awards might include losses which are attributable to non-progressive damages stemming from the POAs' breach of fiduciary duty or breach of warranty claims. We affirm.

In rejecting this argument, the Special Referee determined that both covered and non-covered (faulty workmanship) claims were submitted to the jury and concluded that it would be too speculative and inappropriate to allocate the jury verdicts between progressive damages subject to time-on-the-risk allocation and fixed losses not subject to time-on-the-risk allocation. Thus, the Special Referee concluded the entire amount of actual damages would be reduced in proportion to Harleysville's time on the risk.

Essentially, the POAs attempt to use the general verdict rule as both a shield and a sword, arguing first that the general verdict rule shields any evaluation of covered versus non-covered damages, yet thereafter arguing application of time-on-the-risk principles is wholly precluded by the possibility that some portion of the jury verdicts might be attributable to non-progressive damages. We find the Special Referee properly rejected this argument; the general verdict rule may not serve as a basis for the POAs to obtain coverage for non-covered claims and simultaneously serve as a basis to avoid time-on-the-risk apportionment of any aspect of the jury verdicts. *See Mitchell v. Fed. Intermediate Credit Bank*, 165 S.C. 457, 164 S.E. 136, 140 (1932) (noting a party may not use the same argument as both a shield and a sword) (citations omitted).

D. Factual Determinations

Lastly, we do not believe the Special Referee abused his discretion in refusing to conduct a per-building analysis or in setting the policy period or progressive-damages period dates, as there is evidence in the record to support those findings. *See Crossmann*, 395 S.C. at 65–66, 717 S.E.2d at 602 (finding it is within the sound discretion of the trial court to determine, in light of the particular facts and circumstances of each case, the most appropriate manner for applying the basic time-on-the-risk formula to reasonably approximate each insurer's time on the risk); *Newman*, 385 S.C. at 191, 684 S.E.2d at 543 ("In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them."); *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006) (explaining that when a determination lies within the sound discretion of the trial court, the standard of review on appeal is limited to determining whether there was an abuse of discretion); *see also Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 756–57 (Ill. Ct. App. 1996) (refusing to disturb the trial court's exercise of discretion in apportioning progressive damages).

Based on the foregoing, we affirm the Special Referee's time-on-the-risk calculation as to Magnolia North and affirm as slightly modified as to Riverwalk.

V.
Miscellaneous Trial Issues

Harleysville argues the Special Referee erred in excluding certain evidence and in making various factual findings. After a full review of the record, we find the Special Referee did not abuse his discretion and affirm pursuant to Rule 220, SCACR. *See Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174–75, 467 S.E.2d 439, 442 (1996) ("Conduct of a trial, including admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal unless appellant can show abuse of such discretion, commission of legal error in its exercise, and resulting prejudice to appellant's rights." (citing *Fetner v. Aetna Life Ins. Co.,* 199 S.C. 79, 18 S.E.2d 521 (1942))).

Additionally, Harleysville contends it was error for the Special Referee not to construe its motion for judgment as a matter of law as being made pursuant to Rule 41(b), SCRCP. Rule 41(b), SCRCP, provides that, in a non-jury action, after the plaintiff "has completed the presentation of his evidence, *the defendant* . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." (emphasis added). Here, Harleysville was the plaintiff—not the defendant. Moreover, Harleysville in no way sought a ruling that it, as "the plaintiff[,] has shown no right to relief." Indeed, Harleysville's motion sought a ruling to the contrary, namely that Harleysville was entitled to relief as a matter of law. Thus, we find the argument that the Special Referee erred in failing to construe Harleysville's motion as one made pursuant to Rule 41(b), SCRCP, is without merit. *Cf. Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) (construing *defendant's* "directed verdict" motion in a non-jury action as a motion for involuntary non-suit under Rule 41(b), SCRCP, and reviewing it as such). In any event, there can be no prejudicial error here, for it is manifest the Special Referee rejected most of Harleysville's arguments and had no intention of summarily ruling in favor of Harleysville.

VI.

In sum, we find the Special Referee correctly found Harleysville failed to reserve the right to contest coverage of actual damages and that punitive damages are covered under the CGL policies. We also find there is evidence in the record to support the Special Referee's factual findings as to the progressive damages periods and that the Special Referee did not abuse its discretion in determining Harleysville's time on the risk at Magnolia North. We find loss-of-use actual damages at Riverwalk are subject to time-on-the-risk allocation but that punitive damages at both developments are not. We thus affirm in the Magnolia North matter and affirm as modified in the Riverwalk matter.
AFFIRMED AND AFFIRMED AS MODIFIED.

BEATTY, C.J., HEARN, J., and Acting Justice James E. Moore concur. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I respectfully dissent and would reverse and remand to the special referee with instructions.

In my view, the critical dates necessary to the determination of the merits here are these:

May 2003: Magnolia North POA sues Heritage

December 2003: Riverwalk POA sues Heritage

December 2003 - January 2004: Harleysville informs Heritage it will defend under a reservation of rights

November 10, 2005: *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005) becomes final. Holds that faulty workmanship that damages only the work itself is not an "occurrence" within the meaning of a CGL policy.

January 2009: Riverwalk verdict

May 2009: Magnolia North verdict

October 29, 2009: *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) becomes final. Holds that progressive damage to other materials as the result of subcontractor's faulty workmanship is "property damage" and therefore a covered occurrence under CGL policy, and interprets two policy exclusions.

A. Reservation of Rights

The majority finds Harleysville's notices of its reservation of rights insufficient because they (1) failed to notify the insureds of the particular grounds upon which it might dispute coverage; (2) did not advise of the need to allocate damages between covered and non-covered losses; and (3) did not inform the insureds that Harleysville would seek a declaratory judgment if there were adverse jury verdicts. I note four things at the outset: (1) the majority cites no South Carolina authority that requires this type of information be included in a reservation of rights letter; (2) these letters were sent almost two years before *L-J* became final in November

2005, and more than eight months before the initial *L-J* opinion was filed in August 2004, at a time when 'occurrence' and 'property damage' definitions were unsettled; (3) the letters were sent more than five and a half years before *Newman* held that 'progressive' damages to other materials were property damage, and interpreted two standard CGL policy exclusions; and (4) the reservation of rights letters were sent by Harleysville to its sophisticated insured, Heritage Builders, and not to the POAs who now purport to contest the sufficiency of these notices.

Unlike the majority, I would hold that the POAs lack standing to challenge the sufficiency of the reservation of rights letters. While the majority recognizes that permitting this type of third party challenge is the exception rather than the rule, they offer no explanation of the "specific circumstances "or "unique circumstances" that distinguish this case from any other beyond, apparently, the developer's bankruptcy. Further, they support the decision to uphold the Special Referee's standing ruling by citing two cases, each of which I find distinguishable. In both *Transamerica Ins. Co, v. Int'l Broad Corp*., 94 F.3d 1204 (8th Cir. 1996) and *Stoneridge Dev. Co., Inc. v. Essex Ins. Co.*, 888 N.E.2d 633 (Ill. Ct. App. 2008), the third party's right to stand in the shoes of the insured was predicated on an equitable estoppel theory, in *Transamerica* where the allegation was that the third party had been induced to sign a waiver based upon the insurance company's misrepresentation to him and in *Stoneridge* based upon an allegation that the insurance company was acting under an undisclosed conflict of interest. Insofar as I can discern, there is no claim here that the POAs could prevail on a claim of equitable estoppel against Harleysville. In my opinion, these POAs lack standing to challenge the sufficiency of the reservation of rights letters.

Were I to reach the merits, I would find the reservation of rights letters adequate. In support of my conclusion, I quote from a letter sent by Harleysville ("HMIC") on January 23, 2004:

RESERVATION OF RIGHTS

> This letter is not intended to waive any of HMIC's rights under any HMIC insurance policy or at law. HMIC continues to reserve it [sic] rights as set forth in its prior reservation of rights, and as set forth herein, including but not limited to the following issues:

1) Whether property damage or bodily injury was caused by an occurrence as defined by any policy or policies and happened during an HMIC policy period;

2) Whether notice was provided to HMIC in compliance with the notice provision of the policy or policies;

3) Whether the cooperation clause of any policy or policies has been complied with;

4) Whether the applicable limits of any and all applicable primary or excess policies of insurance have, in fact, been exhausted;

5) Whether or not any exclusion applies to preclude coverage under any policy or policies; and

6) Any additional coverage defenses which may arise during the investigation of this matter.

The pleadings seek punitive damages. HMIC reserves the right to disclaim coverage for these since under all of your policies, they would not arise from an "occurrence," do not fit the definition of "bodily injury" or "property damage," and/or were "expected and intended" within the meaning of exclusions in the policies.

If there is available to you coverage from any other insurance carrier or source in addition to that provided by HMIC, you should immediately notify the carrier or source of all the facts and circumstances surrounding this matter, and that you have been named as a defendant in this lawsuit. Please notify HMIC of the name and address of any such other insurance carrier, and of the policy number under which this additional coverage is available to you.

Nothing contained in this letter should be deemed a waiver of the terms and conditions of the HMIC policy. HMIC expressly

> reserves the right to rely upon any term or condition of the insurance contract or any other ground which may be found to limit or preclude coverage.
>
> In the event that it is determined that there is no coverage for this action under the HMIC policy, HMIC expressly reserves the right to recover the amounts incurred in the defense of this action from you or any of your other insurers that may be liable for these costs.
>
> Please advise us of any information that you have that you believe may affect our determination concerning the coverage available under the HMIC policy.
>
> HMIC's position is based upon the facts which have been made available to it to date. HMIC expressly reserves the right to modify its determination concerning the potential for coverage under this policy if the information developed during our investigation of this claim warrants the modification.

In my opinion, the majority's conclusion - that this language was insufficient to put the builder on notice, and its suggestion that an insurance company must explain its position or its reasons in order to reserve its rights, or must specify which types of damages it might dispute - is unwarranted. This is especially so when one considers these letters and conversations took place between sophisticated commercial entities long before *L-J* had settled (for a time) the meaning of the terms "occurrence." Further, as the majority acknowledges, it was approximately four years later that the Court finally adopted "the basic concept . . . that the cost of repairing faulty workmanship is not covered . . . but resulting property damage beyond defective work product itself is" in *Newman*, *supra*. Finally, I find nothing in the punitive damages reservation of rights language that distinguishes it from the language quoted above-indeed, that section merely recites certain defined terms from the policy itself.

I would reverse the Special Referee's finding that the POAs have standing to challenge the sufficiency of the reservation of rights letters, and, were I to reach the merits, his conclusion that Harleysville did not effectively reserve its rights. To the extent the majority relies upon *Newman* to suggest Harleysville is "at fault in not seeking an allocation of covered damages," I point out the verdicts in

Riverwalk (January 2009) and in Magnolia North (May 2009) predate *Newman* (October 2009) by at more than five months. Moreover, there is no suggestion how Harleysville could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965). In my view, nothing in the general verdicts bars Harleysville from now litigating its liability under its reservation of rights letters.

For the reasons given above, I would allow Harleysville to litigate its liability, including any liability for the punitive damages award, in these declaratory judgment actions. I would also reverse and remand the allocation of damages as any "time on risk" analysis is necessarily affected by the proper allocation of damages, and a determination of their "progression."

I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Doe, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001726

IN THE ORIGINAL JURISDICTION

Opinion No. 27728
Heard March 23, 2016 – Filed July 26, 2017

DECLARATORY JUDGMENT ISSUED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., and Bakari T. Sellers and Alexandra Marie Benevento, both of Strom Law Firm, L.L.C., all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith, Jr., and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, for Respondent.

ACTING JUSTICE PLEICONES: We agreed to hear this matter in our original jurisdiction. The issue in this case arises from the classifications contained in

South Carolina's domestic violence statutes. Specifically, the classifications provide that only "Household member[s]," defined as, *inter alia*, a "*male and female* who are cohabiting or formerly have cohabited," are protected under the statutes. (Emphasis supplied). Petitioner challenges these classifications, arguing they unconstitutionally exclude unmarried, cohabiting or formerly cohabiting, same-sex couples from the protection of the domestic violence statutes—the very protections afforded their opposite-sex counterparts. Petitioner therefore asks this Court to declare that the subsections which exclude same-sex couples—S.C. Code Ann. § 16-25-10(3)(d) (effective June 4, 2015), of the Domestic Violence Reform Act, and S.C. Code Ann. § 20-4-20(b)(iv) (effective June 4, 2015), of the Protection from Criminal Domestic Violence Act (collectively "the Acts")—violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. We agree the definitional subsections at issue offend the Equal Protection Clause, and, therefore, strike the subsection from each Act.[1]

FACTS

The General Assembly originally passed the Acts in 1984. At that time, while § 20-4-20 did not provide protection for any unmarried, cohabiting couples, § 16-25-10 stated: "As used in this article, 'family or household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, and *persons cohabitating or formerly cohabitating.*" (Emphasis supplied). Thus, as initially enacted, there were no gender-based classifications as to persons protected under the Acts.

In 1994, the original definitions of "Household member[s]" were amended and replaced with more narrow definitions providing domestic violence protection for, *inter alia*, "a *male and female who are cohabiting or formerly have cohabited*."[2]

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[1] We decline to address petitioner's Due Process argument as we find the Equal Protection issue dispositive. *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 address remaining issues on appeal when the disposition of an independent issue is dispositive (citation omitted)).

[2] In full, the 1994 provisions at issue read:

> As used in this article, 'household member' means spouses, former spouses, parents and children, persons

See Act No. 484, 1984 S.C. Acts 2029; Act No. 519, 1994 S.C. Acts 5926, 5926–27; 5929 (emphasis supplied). Subsequent amendments to the Acts in 2003 and 2005 retained the gender-based distinctions made in 1994. *See* Act No. 92, 2003 S.C. Acts 1538, 1541, 1550; Act No. 166, 2005 S.C. Acts 1834, 1836, 1842.

In June 2015, the General Assembly substantially amended the Domestic Violence Reform Act,[3] which provided harsher penalties for offenders, including a partial gun ban, and authorized judges to issue permanent Orders of Protection.[4] *See* Act No. 58, 2015 S.C. Acts 225 (effective June 4, 2015). These most recent amendments left intact the gender-based designations of "Household member[s]" first adopted in 1994. The distinction—affording protection under the Acts to unmarried, cohabiting or formerly cohabiting, opposite-sex couples only—is challenged as a violation of Equal Protection.

In this case, following an alleged domestic violence incident between petitioner and her former same-sex partner, petitioner sought an Order of Protection from the Richland County Family Court. The Family Court denied her request, finding she was not entitled to protection under the Protection from Criminal Domestic Violence Act due to the statutory definitions of "Household member." We agreed

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> related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited. § 16-25-10.
>
> 'Household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited. § 20-4-20.

[3] Prior to 2015, the Domestic Violence Reform Act was designated the "Criminal Domestic Violence Act." Act No. 58, 2015 S.C. Acts 225 (effective June 4, 2015).

[4] "'Order of protection' means an order of protection issued to protect the petitioner or minor household members from the abuse of another household member where the respondent has received notice of the proceedings and has had an opportunity to be heard." S.C. Code Ann. § 20-4-20(f) (2014) (emphasis supplied).

to hear petitioner's constitutional challenges to these definitional statutory subsections in our original jurisdiction.

ISSUE

Do the subsections at issue, which exclude from domestic violence protection unmarried, cohabiting or formerly cohabiting, same-sex couples, violate the Equal Protection Clause?

LAW/ANALYSIS

The Acts provide remedies for victims of domestic violence who meet the statutory definition of "Household member[s]," currently defined as: a spouse, a former spouse, persons who have a child in common, or a "*male and female* who are cohabiting or formerly have cohabited." § 16-25-10(3); § 20-4-20(b) (emphasis supplied). In affording protection to victims of domestic violence, both Acts protect persons in an unmarried, cohabiting or formerly cohabiting relationship, but only if the relationship is between a male and a female. Petitioner contends the definitions of "Household member[s]," delineating into classes unmarried, cohabiting or formerly cohabiting couples based on the gender of the persons in the relationship, offend the Equal Protection Clause. We agree.

It is undeniable that in 1994, the General Assembly divided the original class designated "persons cohabiting or formerly cohabiting" into two sub-classes. The members of the first sub-class—consisting of unmarried, cohabiting or formerly cohabiting, opposite-sex couples—remain entitled to seek protection under the Acts if they become victims of domestic violence. To the contrary, since 1994, similarly situated same-sex couples are no longer afforded such protection.

The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause applies to government classifications, which occur when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others. *See* Russell W. Galloway, Jr., Basic Equal Protection Analysis, 29 Santa Clara L. Rev. 121, 123 (1989) (citing S*an Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) ("The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.")). A government classification does not violate the Equal Protection Clause, however, if the classification can

survive the applicable level of scrutiny. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) (citing 16B Am.Jur.2d Constitutional Law § 812 (1998)). While the applicable level of scrutiny may be unclear,[5] we find the statutory subsections cannot survive even the most government-friendly, deferential level of scrutiny—the rational basis standard.

A statutory classification does not violate the Equal Protection Clause under the rational basis standard if: (1) the classification bears a reasonable relation to the legislative purpose sought to be achieved; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *See Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 599–600 (2001) (citing *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999)). In this case, we cannot find a reasonable basis for providing protection to one set of domestic violence victims—unmarried, cohabiting or formerly cohabiting, opposite-sex couples—while denying it to others.[6] Accordingly, we find no constitutionally valid rational basis for the

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[5] The United States Supreme Court has unquestionably found discrimination against same-sex couples is violative of Equal Protection; however, the Supreme Court has provided little guidance as to the level of scrutiny such cases should be afforded. *Cf. Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (failing to apply any level of scrutiny in striking down the ban on gay marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

[6] We disagree with Justice Few that the language at issue is ambiguous. Without citing the language of the Acts or their legislative history, Justice Few concludes that "male and female" can reasonably include all same-sex cohabiting or formerly cohabitating couples. The plain language is clear and the intent is unmistakable: the legislative history of the Acts unequivocally demonstrates the General Assembly intentionally excluded same-sex couples from the protections of the Acts. *Cf. Obergefell*, 135 S.Ct. at 2590.

We further disagree with Justice Few's reliance on the parties' positions in this action rather than on the law. In deciding legal issues, we err when we abdicate our judicial responsibilities and instead defer to a party's argument. *See Joytime Distributors*, 338 S.C. at 654, 528 S.E.2d at 657 ("Although we may view the task

statutory classifications created by the definitional subsections at issue under the Acts.

Having found the definitional subsections excluding unmarried, cohabiting or formerly cohabiting, same-sex couples violate the Equal Protection Clause, the inquiry then becomes: What is the remedy?

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *See Thayer v. South Carolina Tax Comm'n*, 307 S.C. 6, 12–13, 413 S.E.2d 810, 814–15 (1992) (citing *Strom v. Amvets*, 280 S.C. 146, 311 S.E.2d 721 (1984)). Where a portion of a statute is deemed unconstitutional, courts should determine whether the unconstitutional portion may be severed from the remainder of the statute. *See Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959) (citation omitted). The test for severability is whether the constitutional[7] portion of the statute remains "complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution. . . ." *Id.* (quoting *Shumpert v. South Carolina Dep't of Highways*, 306 S.C. 64, 409 S.E.2d 771 (1991) (citation omitted)). The existence of a severability clause within a piece of legislation indicates the General Assembly's intent that the several parts of the legislation be treated independently, and that in the event a portion of the legislation is found unconstitutional, the remainder be allowed to stand. *See State v. Dykes*, 403 S.C. 499, 509, 744 S.E.2d 505, 510 (2013); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999).

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with disfavor, and may have varying personal views on the merits of the controversy . . . we cannot ignore precedent and our duty to interpret the constitution."). The important constitutional question in this case requires each member of this Court exercise his or her own legal judgment, and reach his or her own conclusion rather than acceding to the positions expounded by the parties. *Cf. McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (noting an issue regarding the constitutional interpretation of a legislative enactment is a question of law to be decided by the Court).

[7] We do not intend by this analysis to imply the remaining subsections of the Acts are constitutional. As no issue pertaining to the remaining subsections is currently before this Court, we express no opinion as to their constitutionality.

In this case, the test for severability is met. Specifically, all provisions of the Acts, save the discriminatory definitions, are capable of being executed in accordance with the legislative intent. *Thayer*, 307 S.C. at 12–13, 413 S.E.2d at 814–15. Further, it may be fairly presumed the General Assembly would have passed each Act absent the offending provision, and both Acts contain severability clauses. *See Joytime Distributors*, 338 S.C. at 648–49, 528 S.E.2d at 654; *Thayer*, 307 S.C. at 12–13, 413 S.E.2d at 814–15. Therefore, the remedy for this constitutional infirmity is to sever the discriminatory provision from each Act.[8] *See Thayer*, 307 S.C. at 13, 413 S.E.2d at 814–15. The remainder of each Act—providing domestic violence protection to "Household member[s]" defined as a spouse, former spouse, or persons who have a child in common—remain in effect. *See* § 16-25-10(3)(a–c); § 20-4-20(b)(i–iii).

CONCLUSION

Accordingly, because the subsections at issue violate the Equal Protection Clause, we hold § 16-25-10(3)(d), of the Domestic Violence Reform Act, and § 20-4-20(b)(iv), of Protection from Criminal Domestic Violence Act, must be, and are, stricken, particularly in light of the fact that each Act contains a severability clause.

The Declaratory Judgment is therefore

ISSUED

HEARN, J., concurs. KITTREDGE, J., concurring in result only. BEATTY, C.J., concurring in part and dissenting in part in a separate opinion. FEW, J., concurring in part and dissenting in part in a separate opinion.

[8] Specifically, the severed provisions are: § 16-25-10(3)(d) of the Domestic Violence Reform Act; and S.C. Code Ann. § 20-4-20(b)(iv) of the Protection from Criminal Domestic Violence Act.

CHIEF JUSTICE BEATTY: I respectfully concur in part and dissent in part. I agree with the majority that the definition of "household member" in South Carolina Code section 16-25-10(3) of the Domestic Violence Reform Act and section 20-4-20(b) of the Protection from Domestic Abuse Act[9] (collectively "the Acts") violates Doe's rights under the Equal Protection Clause of the Fourteenth Amendment[10] to the United States Constitution due to the non-inclusive scheme. Yet, unlike the majority, I would not sever these offending provisions. Instead, in order to remain within the confines of the Court's jurisdiction and preserve the validity of the Acts, I would declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe.

I. Type of Constitutional Challenge

In reaching this conclusion, my analysis differs from the majority as I believe it is necessary to first determine the type of constitutional challenge posed by Doe.

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[9] The Acts define "household member" as:

> (a) a spouse;
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> (b) a former spouse;
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> (c) persons who have a child in common; or
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> (d) *a male* ***and*** *female* who are cohabiting or formerly have cohabited.

S.C. Code Ann. § 16-25-10(3) (Supp. 2015) (emphasis added); *id.* § 20-4-20(b) (2014) (defining "household member" identical to section 16-25-10(3), but designating provisions with lowercase Roman numerals rather than letters).

[10] U.S. Const. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.").

In her brief and the allegations in the declaratory judgment pleadings, it appears that Doe claims the statutes are facially invalid *and* invalid "as applied" to her. However, as will be discussed, I would find that Doe can only utilize an "as-applied" challenge.

"The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." 16 C.J.S. *Constitutional Law* § 153, at 147 (2015). Further, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Rather, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the *remedy* employed by the Court, not what must be pleaded in a complaint." *Id*. (emphasis added).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (citing *City of Los Angeles, Calif. v. Patel*, ___U.S. ___, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015)). Consequently, in analyzing a facial challenge to the constitutional validity of a statute, a court "considers only the text of the measure itself and not its application to the particular circumstances of an individual." 16 C.J.S. *Constitutional Law* § 163, at 161 (2015).

One asserting a facial challenge claims that the law is "invalid *in toto* – and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). This type of challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, "[u]nless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality." *Travelscape, L.L.C. v. S.C. Dep't of Revenue*, 391 S.C. 89, 109 n.11, 705 S.E.2d 28, 39 n.11 (2011) (quoting *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2001)); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (recognizing that a facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case).

In an "as-applied" challenge, the party challenging the constitutionality of the statute claims that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia,

J., Rehnquist, C.J., and White, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir. 1992). However, "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." *Travelscape,* 391 S.C. at 109, 705 S.E.2d at 39; *see Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 (1984) (discussing "as-applied" challenges and stating, "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct" (internal quotation marks and citation omitted)). Instead, "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada*, 506 U.S. at 1011.

Here, Doe contends that by failing to include unmarried, same-sex couples within the definition of "household member," the statutes are not only facially invalid, but invalid "as applied" because they excluded her from consideration for an Order of Protection in family court based on her sexual orientation. I find that Doe has failed to establish that the statutes are facially unconstitutional.

Initially, I note that Doe has not launched a wholesale attack on the Acts or the definition of "household member" nor does she advocate for invalidation of the statutory provisions in their entirety. Rather, she merely seeks to be included with those eligible to receive an Order of Protection. While this fact is not dispositive of a facial challenge, as it is necessary to focus on the text of the statutes, it is significant given the judicial preference to remedy any constitutional infirmity in the least restrictive way possible.

Turning to the text of the definition of "household member," I would find that it is facially valid because it does not overtly discriminate based on sexual orientation. Though not an all-inclusive list, the statutes would be valid as to same-sex married couples, opposite-sex married couples, and unmarried opposite-sex couples who live together or have lived together. Because there are numerous valid applications of the definition of "household member," it is not "invalid *in toto*." Consequently, I believe Doe must use an "as-applied" challenge to present her claim that she was intentionally excluded as a qualifying "household member" for an Order of Protection in family court. Thus, the question becomes whether the statutory definition of "household member" as applied denied Doe equal protection of the laws.

II. Equal Protection Analysis

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978)). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

"Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and; (3) the classification rests on some reasonable basis." *Id.* "Those attacking the validity of legislation under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 128, 712 S.E.2d 401, 403-04 (2011) (citations omitted).

Turning to the facts of the instant case, Doe has met her burden of showing that similarly situated persons received disparate treatment. Doe suggests that this case should be subject to the intermediate level of scrutiny as a result of "gender classification"; however, she seems to concede that the appropriate standard is the rational basis test. While there is some limited authority to support the application of intermediate scrutiny, such a determination is unnecessary because the definition of "household member" as applied to Doe cannot even satisfy the rational basis test.

Defining "household member" to include "a male **and** female who are cohabiting or formerly have cohabited," yet exclude (1) a male and male and (2) a female and female who are cohabiting or formerly have cohabited," fails this low level of scrutiny. Specifically, the definition: (1) bears no relation to the legislative

purpose of the Acts; (2) treats same-sex couples who live together or have lived together differently than all other couples; and (3) lacks a rational reason to justify this disparate treatment.

Based on an interpretation of the Acts, the overall legislative purpose is to protect victims from domestic violence that occurs within the home and between members of the home. *See Moore v. Moore*, 376 S.C. 467, 476, 657 S.E.2d 743, 748 (2008) ("The Protection from Domestic Abuse Act was enacted to deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence." (quoting 17 S.C. Jur. *Criminal Domestic Violence*, § 14 (Supp. 2007)).

Statistics, as identified by the State, reveal that "women are far more at risk from domestic violence at the hands of men than vice versa." Thus, the State maintains the General Assembly defined "household member" as "a male *and* female who are cohabiting or formerly have cohabited" to address the primary problem of domestic abuse within opposite-sex couples.

Without question, the statistics relied on by the State are accurate. However, a *victim* of domestic abuse is neither defined by gender, as the word is non-gender specific,[11] nor limited by the type of relationship within a home. For example, the abuse may occur between a mother and adult daughter or a father and adult son.

Moreover, although the Acts may have been originally enacted to address traditional findings of domestic abuse, new research shows that individuals within same-sex couples experience a similar degree of domestic violence as those in opposite-sex couples. *See* Christina Samons, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government*, 22 S. Cal. Rev. L. & Soc. Just. 417, 430-35 (2013) (recognizing recent reform to criminal and family laws for domestic abuse involving same-sex couples at the federal level and identifying need for similar reform at state level); Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 St. Thomas L. Rev. 544 (2012) (discussing similarities of domestic violence in same-sex versus opposite-sex couples;

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[11] *Cf.* S.C. Const. art. I, § 24 (outlining Victims' Bill of Rights and providing that it is intended to "preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status").

recognizing disparity in remedies afforded by the courts to victims of domestic violence in same-sex versus opposite-sex couples).

Because the Acts are intended to provide protection for all victims of domestic abuse, the definition of "household member," which eliminates Doe's relationship as a "qualifying relationship" for an Order of Protection, bears no relation to furthering the legislative purpose of Acts.

Additionally, the definition of "household member" treats unmarried, same-sex couples who live together or have lived together differently than all other couples. As I interpret the definition of "household member" a person, who fits within one of the following relationships, would be eligible for an Order of Protection: (1) a same-sex married or formerly married couple;[12] (2) a same-sex couple, either married or unmarried, who have a child in common;[13] (3) an opposite-sex married or formerly married couple; (4) an opposite-sex couple, either married or unmarried, who have a child in common; and (5) an unmarried opposite-sex couple who is living together or who has lived together.

Thus, while Doe and her ex-fiancé were similarly situated to other unmarried or formerly married couples, particularly unmarried opposite-sex couples who live together, Doe was precluded from seeking an Order of Protection based on the definition of "household member." There is no reasonable basis, and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabited.

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[12] Judicial declarations have eliminated, for the most part, disparate treatment between same-sex and opposite-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that states' ban on same-sex marriages violated the Equal Protection and Due Process Clauses).

[13] Sections 16-25-10(3)(c) and 20-4-20(b)(iii) identify a "household member" as including "*persons* who have a child in common." Thus, arguably an unmarried, same-sex couple who has a child in common would constitute a "qualifying relationship" for an Order of Protection. *See*, *e.g.*, *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (holding the Alabama Supreme Court erred in refusing to grant full faith and credit to a Georgia decree of adoption, which was between an unmarried, same-sex couple who had three children in common but did not reside together).

III. Remedy

Having concluded that the definition of "household member" is unconstitutional as applied to Doe, the question becomes what is the appropriate remedy.

Clearly, in the context of the statutory scheme of the Acts, this Court cannot construe and effectively amend the statutes to change the plain language of "and" to "or" as proposed by the State. *See Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include."); *cf. State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (declining to alter statutory definition of "household member" in section 16-25-10; stating, "[i]f it is desirable public policy to limit the class to those physically residing in the household, that public policy must emanate from the legislature").

Also, even though the Acts include severability clauses,[14] there is no reason to employ them as the sections containing the definition of "household member" are not facially invalid. Rather, the constitutional infirmity is based on their application to Doe, i.e., not including unmarried, same-sex couples in the definition of "household member." Thus, severance cannot rectify the under inclusive nature of the definition.

Further, the majority's decision to remedy the constitutional infirmity through severance of the entire phrase "a male **and** female who are cohabiting or formerly have cohabited," is unavailing since the constitutional infirmity still remains. Specifically, protection afforded by the Acts would still be elusive to Doe and would no longer be available to opposite-sex couples who are cohabiting or formerly have cohabited. Yet, it would be available to unmarried persons such as former spouses (same-sex or not) and persons (same-sex or not) with a child in common. Absent an "as-applied" analysis, the "household member" definitional sections must be struck

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[14] Act No. 58, 2015 Acts 225, 265-66 (providing a severability clause in 2015 Domestic Violence Reform Act); Act No. 166, 2005 Acts 1834, 1846 (providing a severability clause in 2005 Act amending Protection from Domestic Abuse Act, which includes definition of "household member" in section 20-4-20).

down. As a result, the Acts would be rendered useless. Such a drastic measure is neither necessary nor desired. *See Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 13, 413 S.E2d 810, 814-15 (1992) ("The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution." (internal quotation marks and citation omitted)). Consequently, in contrast to the majority, I would reject the State's suggestion to sever the Acts as it is inconsistent with our rules of statutory construction and would contravene the intent of the General Assembly.

Finally, I would decline to invalidate the Acts in their entirety. Such a decision would result in grave consequences for victims of domestic abuse. To leave these victims unprotected for any length of time would be a great disservice to the citizens of South Carolina.

Consequently, in order to address the important issue presented in this case and remain within the confines of the Court's jurisdiction, I would declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe. Accordingly, I would hold that the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection. *Cf. Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (concluding that presumption of parentage statute, which expressly referred to a mother, father, and husband, violated equal protection as applied to a married lesbian couple to whom a child was born to one of the spouse's during the couple's marriage; identifying appropriate remedy by stating, "Accordingly, instead of striking section 144.13(2) from the [Iowa] Code, we will preserve it as to married opposite-sex couples and require the [Iowa Department of Public Health] to apply the statute to married lesbian couples").

JUSTICE FEW: Jane Doe, the State, and all members of this Court agree to this central point: *if* the Acts exclude unmarried same-sex couples from the protections they provide all other citizens, they are obviously unconstitutional. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person . . . the equal protection of the laws."); S.C. CONST. art. I, § 3 ("nor shall any person be denied the equal protection of the laws"); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004) ("To satisfy the equal protection clause, a classification must . . . rest on some rational basis.").

For two reasons, I would not declare the Acts unconstitutional. First, Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and thus, there is no controversy before this Court. Second, Doe and the State are correct: ambiguity in both Acts—particularly in the definition of household member—requires this Court to construe the Acts to provide Doe the same protections they provide all citizens, and thus, the Acts are not unconstitutional.

I. There is no Controversy before the Court

Our courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, we stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not pass on . . . academic questions or make an adjudication where there remains no actual controversy." *Id.*; *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and therefore, there is no controversy.

Jane Doe filed an action in the family court seeking an order of protection from a threat of domestic violence pursuant to section 20-4-40 of the Protection from Domestic Abuse Act. S.C. Code Ann. § 20-4-40(a) (2014). By its terms, the Act applies to "any household members in need of protection." *Id.* By filing the action seeking the protection of the Act, Doe necessarily took the position that the definition of "household member" includes partners in unmarried same-sex couples, and thus includes her. Doe argues to this Court that the definition should be interpreted to include her. Her alternative argument—that the Act is unconstitutional—is based on the family court ruling she chose not to appeal. Rather than appeal, she filed this action naming the State as the only defendant.

The State, however, agrees with the position Doe took in family court—the definition of household member includes partners in unmarried same-sex couples, and thus includes Doe. In its Answer, the State contends that any "constitutional problem associated with the definitions at issue . . . may be addressed through interpretation to encompass unmarried same-sex couples." In its return to Doe's petition for original jurisdiction, the State wrote, "There is . . . no evidence that the Legislature intentionally discriminated against same-sex couples." At oral argument before this Court, the State disagreed with the statement "it is clear it is the legislative intent to exclude homosexual couples."[15] Also at oral argument, the State was asked—referring to the Protection from Domestic Abuse Act—"You're saying the statute covers Jane Doe?" to which the State responded, "Yes." In making these statements, the State asks this Court to interpret the definition of "household member" to include Doe and partners in other non-marital same-sex domestic relationships.

If Doe had appealed the family court's ruling that the Protection from Domestic Abuse Act did not apply to her, she would have presented a justiciable controversy to this Court. Doe chose not to appeal, and she filed this action. When the State agreed with Doe that the Act should be interpreted to protect her, it eliminated any controversy. The majority and concurring opinions overlook this important detail, and the majority suggests that my "reliance on the parties' positions" is contrary to the law. *See supra* note 6. In *Byrd*, we stated the law: "there must exist a justiciable controversy." 321 S.C. at 430, 468 S.E.2d at 864. When both sides agree, there is no controversy.

II. The Acts are *not* Unconstitutional

In *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999), this Court declared we would not construe an act of the General Assembly to be unconstitutional unless there was no choice but to do so.

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[15] A justice of the Court stated, "Following the legislative history of this statute, it is clear it is the legislative intent to exclude homosexual couples. Otherwise, they would not have changed the word 'person' to 'male and female.'" The State responded, "I respectfully disagree."

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

338 S.C. at 640, 528 S.E.2d at 650; *see In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014) (same); *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013) (same); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935) (same); *see also Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 628, 767 S.E.2d 157, 161 (2014) (reciting the principle that "we will not find a statute unconstitutional unless 'its repugnance to the Constitution is clear beyond a reasonable doubt'").

Under *Joytime Distributors*, we are constrained to interpret the Acts to include unmarried same-sex couples unless the Acts "so clearly" exclude them "as to leave no room for reasonable doubt." In other words, if the definition of "household member" in the Acts is clear, and if the definition so clearly excludes unmarried same-sex couples as to leave no reasonable doubt they are excluded, then the Court is correct to find the Acts unconstitutional. In my opinion, however, the definition of household member is not clear, and therefore the Acts are ambiguous. Because of this ambiguity, the Court is not correct to find the Acts unconstitutional. Rather, we should construe the Acts to protect partners in unmarried same-sex couples, and find them constitutional. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.").

To demonstrate the ambiguity, in 1994, "household member" was defined in terms of pairs or groups of people, "spouses, former spouses, parents and children, persons related . . . ." *See supra* note 2. In that context, the Acts logically applied when domestic violence occurred *between* the members of a defined pair or group.

In 2005, however, the definitions were amended[16] so that the primary subsections of each definition are now framed in terms of individual people: "a spouse; . . . a former spouse." *See supra* note 9. Under this current structure, the Acts apply when domestic violence is committed *upon* the members of the defined group.

The Protection from Domestic Abuse Act follows this structure. The Act "created an action known as a 'Petition for an Order of Protection' in cases of abuse *to* a household member." § 20-4-40 (emphasis added). The "petition for relief must allege the existence of abuse *to* a household member." § 20-4-40(b) (emphasis added). Under the current version of the Protection from Domestic Abuse Act, therefore, it is not necessary to imply the term "between" to understand how the Act operates.

The majority and concurring opinions overlook this important detail. In fact, the majority continues to rely on the pre-2005 structure of the Acts and holds the Protection from Domestic Abuse Act affords protection "only if the relationship is *between* a male and a female." Under the current structure of the Acts, however, the majority's statement is unjustified. The word "between" is simply not in the Acts. The fact the majority must read the term into the Acts demonstrates the definition of household member is not clear.

The ambiguity is further demonstrated by comparing the operation of the Acts regarding individuals included in the first and second subsections of the definition—"a spouse" and "a former spouse"—to those included in the fourth subsection—"a male and female . . ."—the subsection the majority finds unconstitutional. A person may seek an order of protection under the Protection from Domestic Abuse Act "in cases of abuse to a household member." If we apply that provision using the first subsection of the definition, an order of protection is available "in cases of abuse to [a spouse]." This construction makes perfect sense. Using that same construction when applying the provision using the subsection at issue here, an order of protection is available "in cases of abuse to [a male and female . . .]." This application makes no sense. Reading the text literally, there must be two victims before an order of protection is available.

It also makes no sense to apply the majority's "between" construction to the first and second subsections of the definitions of household member after the 2005

[16] Act No. 166, 2005 S.C. Acts 1834, 1836.

amendments. The following is a sentence from the majority opinion substituting the text of the first subsection where the majority used the text of the fourth, "In affording protection to victims of domestic violence, both Acts protect persons . . . , but only if the relationship is between [a spouse]." The "between" construction worked in 1994 because the text of the subsection was "spouses," but the construction does not work in the post-2005 version because the General Assembly changed the text.

However, the majority's constitutional analysis is not driven by its interpretation of the text of the Acts. Rather, the majority's analysis is driven by its interpretation of the *actions* the General Assembly took in 1994, and the improper motives the majority believes may be inferred from those actions. The majority states "the legislative history of the Acts unequivocally demonstrates the General Assembly intentionally excluded same-sex couples from the protections of the Acts." *See also supra* note 15. According to this Court's own jurisprudence, however, the majority's consideration of legislative history is itself improper. Rather, the Court may not consider legislative history unless the text of the statute is ambiguous. *See Smith v. Tiffany*, 419 S.C. 548, ___, 799 S.E.2d 479, 483 (2017) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (quoting *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970))). "Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith*, 419 S.C. at ___, 799 S.E.2d at 483.

If the statutory text truly was clear and unambiguous, the majority would not need to consider legislative history to determine the motives of the General Assembly. The statutory text is not clear, and therefore, this Court must find a way to construe the Acts as constitutional. *Abbeville Cty. Sch. Dist.*, 410 S.C. at 628, 767 S.E.2d at 161; *Stephen W.*, 409 S.C. at 76, 761 S.E.2d at 232; *S.C. Pub. Interest Found.*, 403 S.C. at 645, 744 S.E.2d at 523; *Joytime Distributors*, 338 S.C. at 640, 528 S.E.2d at 650; *Clarke*, 177 S.C. at 435, 181 S.E. at 484.

I respectfully believe Doe and other members of same-sex unmarried couples are covered by the Acts and the Acts are therefore constitutional.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daufuskie Island Utility Company, Inc., Appellant,

v.

South Carolina Office of Regulatory Staff, Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, Respondents.

Appellate Case No. 2016-000652

Appeal From The Public Service Commission

Opinion No. 27729
Heard December 14, 2016 – Filed July 26, 2017

REVERSED AND REMANDED

George Trenholm Walker and Thomas P. Gressette, Jr., both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Appellant.

Lyndey Ritz Zwingelberg and John Julius Pringle, Jr., both of Adams and Reese LLP, Shannon Bowyer Hudson and Andrew McClendon Bateman, both of South Carolina Office of Regulatory Staff, all of Columbia, for Respondents.

JUSTICE HEARN: Petitioner Daufuskie Island Utility Company ("DIUC") appeals an order of the South Carolina Public Service Commission ("Commission") granting only thirty-nine percent of the additional revenue requested in its application. We reverse and remand to the Commission for a new hearing.

FACTUAL/PROCEDURAL BACKGROUND

DIUC is the only provider of water and wastewater services to residential and commercial customers on Daufuskie Island in Beaufort County, South Carolina. In June 2015, DIUC applied to the Commission for approval of a new rate schedule which would provide a 108.9% revenue increase based upon a 2014 test year. Pursuant to Section 58-4-10(B) of the South Carolina Code (2015), the South Carolina Office of Regulatory Staff ("ORS") was automatically joined as a party to the matter. Additionally, a number of property owners' associations on Daufuskie Island—Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association (collectively "POAs")—petitioned to intervene in the case.[1]

DIUC last requested a rate increase in June 2011. The same POAs intervened in that case and, during the merits hearing, were able to negotiate a settlement agreement with DIUC to which ORS did not object. Under the terms of the agreement, DIUC stipulated it would not file another application for rate increases before July 1, 2014. Based upon the evidence at the hearing and the parties' agreement that DIUC would be able to provide services to its customers while earning a fair and reasonable operating margin and return on equity ("ROE") under the proposed rates, the Commission approved the settlement in July 2012.

Prior to and while the 2011 rate case was pending, DIUC encountered a few unanticipated tax issues. Because the South Carolina Department of Revenue did not initially recognize DIUC as a utility, it did not begin assessing the ten and a half percent utility property tax against DIUC until 2012. Thus, instead of its expected property tax bill of approximately $10,000, in August 2012 DIUC received a bill for

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[1] Beach Field Properties, LLC also submitted a petition to intervene in this case which was granted. However, Beach Field did not actively participate in the case—it submitted no pre-filed testimony, presented no evidence at the hearing, refused to cross examine witnesses, nor was it party to the Settlement Agreement between ORS and the POAs—and it is not a party to this appeal.

$132,398, with back taxes for 2010 and 2011 exceeding $230,600. Due to the substantial increase in its tax liability and its inability to seek further revenue increases until July 2014, DIUC entered into an agreement with Beaufort County to pay the back taxes for years 2012, 2013, 2014, and the projected tax for 2015.[2] Specifically, Beaufort County agreed to allow DIUC to pay the full $526,843.39 in monthly installments of $5,487.95 ($65,856 a year) over eight years, with no interest. In addition to the $65,856 DIUC owes annually pursuant to its settlement with Beaufort County, DIUC presented testimony at the hearing that its annual property tax bill going forward will be approximately $192,300. Therefore, in total, DIUC requested additional revenue of $258,158 to cover its taxes for at least the next eight years.

DIUC faced a second tax problem when the county sent one of its property tax bills to the wrong address. As a result, the tax was never paid and Beaufort County initiated tax sale proceedings. The DIUC property in question contained a 125,000 gallon elevated water storage tank and a number of related facilities including a well, water pump, and system pipes. The property ("Elevated Tank Site") was sold at a tax sale in October 2010 to Mamdouh Sabry Abdelrahman (Sabry), however, DIUC did not discover the property had been sold until early 2012.[3]

Critical to this case is the ownership of the elevated water tank, well, water pump, system pipes, and other DIUC equipment located on the Elevated Tank Site. Although the tax deed purported to convey the property "all and singular . . . with the appurtenances," DIUC presented testimony from the Beaufort County Treasurer, Maria Walls, that the tax deed did not convey "the elevated water tank, the well, the water pump, system pipes, or other DIUC property located on the Elevated Tank[] Site." According to Walls, DIUC's ownership of all the equipment located on the property remained unaffected by the tax sale to Sabry. Despite providing no

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[2] Although utility property taxes were also assessed against DIUC for 2010 and 2011, as part of the settlement agreement Beaufort County agreed to write-off the taxes for those two years.

[3] After numerous attempts to negotiate with Sabry for the return of the Elevated Tank Site, DIUC instituted a condemnation action. The circuit court granted summary judgment in favor of DIUC to pursue condemnation, and the court of appeals affirmed in an unpublished opinion. *Sabry Abdelrahman v. Daufuskie Island Util. Co.*, No. 2016-UP-301 (Ct. App. June 15, 2016).

evidence to the contrary to support its recommendation, ORS nevertheless proposed excluding the value of the utility equipment located on the property when calculating DIUC's rate base[4] and property taxes.

A hearing on the merits of DIUC's application was held in October 2015. The day before the hearing, the POAs filed a Settlement Agreement they had entered with ORS for the Commission's consideration. Pursuant to the Agreement, ORS and the POAs stipulated to each party's testimony and exhibits in the record, and the parties agreed to accept all of ORS's adjustments and recommendations, with the exception of the bad debt expense for which they agreed to adopt DIUC's proposal.[5] At the hearing, DIUC objected to the admission of the Settlement Agreement, arguing it was irrelevant and prejudicial because it bolstered ORS's recommendations without providing any new or additional evidence to support them. Over DIUC's objection, the Commission admitted the Agreement, reasoning it was more probative than prejudicial.

Following the hearing, the Commission issued an order explicitly adopting the Settlement Agreement and granting DIUC a revenue increase subject to all of ORS's adjustments, except for the bad debt expense. Shortly thereafter, DIUC filed a petition for reconsideration and/or rehearing, arguing it would be forced into default and bankruptcy if compelled to implement the rates specified in the

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[4] "'[R]ate base' is the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return," and "represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n of S.C.*, 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978) [hereinafter *Southern Bell*].

[5] Somewhat ironically, the bad debt expense was one of the ORS adjustments which DIUC was willing to accept. ORS originally recommended the bad debt expense be raised to $108,349. Although DIUC's calculations also indicated the bad debt expense to be over $100,000, in an effort to be conservative in its request, DIUC only proposed to recoup $30,852 of the bad debt expense. Despite ORS's original determination that the bad debt expense exceeded $100,000 and the uncontroverted evidence presented at the hearing supported the higher amount, the Commission held DIUC to its original request of $30,852.

Commission's order. Additionally, DIUC requested the Commission reconsider adopting ORS's adjustments to the property taxes, management fees, rate case expenses, bad debt expense, and rate base.[6]

The Commission denied DIUC's petition, holding (1) the issue of inevitable default could not be raised for the first time in a petition for rehearing; and (2) ORS's accounting methods and adjustments were in keeping with accepted regulatory principles and supported by substantial evidence. DIUC then filed a direct appeal to this Court to review the Commission's order.

ISSUES PRESENTED

1) Did the Commission err by admitting into evidence and adopting the proposed Settlement Agreement between ORS and the POAs to which DIUC was not a party and which granted only thirty-nine percent of DIUC's requested revenue increase?

2) Were the Commission's findings of fact and conclusions with respect to property taxes, management fees, rate case expenses, rate base, and bad debt supported by substantial evidence in the record?

3) Did the Commission err in denying DIUC's petition for rehearing on the grounds that DIUC will inevitably default on its loans if the rates established in the Commission's order are not modified?

STANDARD OF REVIEW

This Court affords great deference to the Commission's ratemaking decisions and "'will not substitute [its] judgment for that of the [Commission] where there is room for a difference of intelligent opinion.'" *Utils. Servs. of S.C., Inc. v. S.C. Off. of Reg. Staff*, 392 S.C. 96, 103, 708 S.E.2d 755, 759 (2011) (quoting *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004)) [hereinafter *Utilities Services*]. "The [Commission] is considered the 'expert' designated by the legislature to make policy determinates regarding utility

[6] DIUC makes the same arguments with respect to each of these issues in the instant appeal. For the sake of clarity, the facts pertaining to each will be presented more fully *infra*.

rates . . . ." *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986)) (internal quotations omitted). Thus, the Commission's decision shall be affirmed as long as it is supported by the substantial evidence in the record. *S.C. Energy Users Comm'n v. S.C. Electric & Gas*, 410 S.C. 348, 353, 764 S.E.2d 913, 915 (2014). Nevertheless, the Court may reverse or modify the Commission's order if it is based upon an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," such that Petitioner's substantial rights have been prejudiced. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2016); *Utilities Services*, 392 S.C. at 103–04, 708 S.E.2d at 759.

LAW/ANALYSIS

I. SETTLEMENT AGREEMENT

DIUC first argues the Commission committed reversible error in admitting the Settlement Agreement into evidence and adopting the Agreement in toto. Specifically, DIUC contends the Commission violated S.C. Code Ann. Regs. 103-846 (2012), SCRE 401, 402, 403, and the Commission's Settlement Policies and Procedures (2006).[7] We agree.

Regulation 103-846 states that "[i]rrelevant, immaterial or unduly repetitious evidence shall be excluded" and the civil rules of evidence shall apply in the hearings before the Commission. S.C. Code Ann. Regs. 103-846. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." SCRE 401. Although all relevant evidence is generally admissible, subject to certain exceptions, irrelevant evidence is never admissible. SCRE 402. Additionally, relevant evidence must be excluded when its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or needless repetition. SCRE 403.

[7] DIUC offers two additional arguments on this issue. However, because our analysis under DIUC's first argument is dispositive, it is unnecessary for us to reach the merits of the remaining two. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when the disposition of the first issue is dispositive).

DIUC's arguments under Regulation 103-846 and Rules of Evidence 401, 402, and 403 are practically identical. Because the Settlement Agreement was entered into by only ORS and the POAs, DIUC rightly asserts the agreement did not resolve any of the issues before the Commission. Additionally, DIUC notes the Settlement Agreement contains no evidence related to the rate adjustments at issue, and is therefore irrelevant and immaterial. Furthermore, DIUC argues the Settlement Agreement was unfairly prejudicial in that it bolstered ORS's proposals and attempted to usurp the Commission's fact-finding power to determine the appropriate rates.

We agree the Settlement Agreement was not relevant evidence as defined in Rule 401, and was therefore inadmissible at the hearing. S.C. Code Ann. Regs. 103-846; SCRE 401. The Settlement Agreement contained no factual evidence or stipulations related to DIUC's revenue increase requests. Moreover, the Settlement Agreement did not resolve any issues before the Commission because DIUC, the applicant seeking rate increases, was not party to the agreement. At most, the Settlement Agreement indicated to the Commission that were it to adopt ORS's recommended adjustments, the POAs would not appeal. However, a party's agreed reaction to a speculative future order of the Commission is irrelevant to the pivotal issue at the hearing—the necessity and reasonableness of DIUC's requested revenue increases. Therefore, the Commission erred in admitting and considering the Settlement Agreement.

DIUC also contends the Commission violated its own Settlement Policies and Procedures by adopting the Settlement Agreement. According to the Commission's revised settlement guidelines, it may approve settlements "[w]hen all parties to a proceeding reach agreement with regard to all issues in the form of a settlement signed by all parties or their representatives . . . ." Additionally, the Commission may not approve a settlement unless it is supported by substantial evidence presented to the Commission at a hearing.

As discussed above, this agreement was not a true settlement because all parties did not embrace it. Even the POAs' counsel recognized at the hearing that the Settlement Agreement did not resolve *any* issues between the parties, but rather was merely an agreement between the POAs and ORS not to object to one another's pre-filed testimony, and to accept ORS's recommendations and adjustments should the Commission adopt them. Furthermore, the Settlement Agreement contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission. Therefore, we hold the Commission erred in approving and

adopting the Settlement Agreement and DIUC is entitled to a new hearing in which the parties may present any additional evidence.[8] While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal.

II. COMMISSION'S FINDINGS ON THE MERITS

A. Rate Base Includes Elevated Tank Site

In its order, the Commission expressly rejected DIUC's proposed rate base, which included the value of the equipment on the Elevated Tank Site, due to the "murky" impact of the tax sale on the ownership of that equipment. DIUC argues this was an error of law in light of Walls' uncontroverted testimony that the tax deed to Sabry did not convey the water tank or other utility equipment on the property. We agree.

In reaching its decision, the Commission must consider all the testimony and evidence presented to it. *Southern Bell*, 270 S.C. at 598, 244 S.E.2d at 282. The credibility and weight of the evidence submitted is particularly within the Commission's purview. *Id.* However, "evidence should be believed unless there is some reason for discrediting it." *Id.* Moreover, if all the evidence points to one conclusion or the Commission's findings "are based on surmise, speculation or conjecture, then the issue becomes one of law for the court . . . ." *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968); *see also Randolph v. Fiske-Carter Constr. Co.*, 240 S.C. 182, 189, 125 S.E.2d 267, 270 (1962) (holding where there is absolutely no evidence to support the Commission's findings, the issue becomes a question of law).

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[8] Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

We find the Commission's conclusion that the "murky" ownership of the equipment located on the Elevated Tank Site precludes DIUC from including the value of that property in its rate base is unsupported by the substantial evidence in the record. The only evidence submitted regarding ownership of the equipment came from Walls, who unequivocally stated the tax deed did not convey the utility equipment. Thus, we discern nothing in the record to suggest the ownership status of the water tank and utility property is "murky." Rather, the evidence before the Commission is quite clear—DIUC owns the utility equipment located on the Elevated Tank Site, and is therefore entitled to include the value of this property in its rate base. On remand when the Commission recalculates DIUC's rate base, it should take into account its ownership of the water tank, well, pipes, and other utility equipment located on the Elevated Tank Site.

B. Property Tax Expense

Pursuant to its settlement with Beaufort County to discharge back taxes assessed from 2012 through 2015, DUIC requested $526,848 amortized over eight years—$65,856 annually. Additionally, DUIC calculated its annual property tax bill for 2016 to be $192,302. Therefore, DUIC proposed a total property tax expense of $258,158.

ORS recommended only allowing DIUC to recover back taxes for 2012 and 2013, receiving $244,899 amortized over eight years—$30,612 annually. ORS also proposed an additional $140,880 for the 2014 property taxes, since that was DIUC's test year. Specifically, ORS declined to recommend a separate or additional amount for the 2015 property taxes because DIUC had not yet been billed for the 2015 taxes, despite the fact the 2015 taxes were included in the Beaufort County settlement amount. The Commission adopted ORS's proposed property tax expenses, finding they were based on "known and measurable amounts." With respect to the 2015 taxes, the Commission stated:

> [W]e do not believe the 2015 amounts should be covered by ratepayers. The 2015 tax bill is not due until 2016 and this Commission notes that [DIUC's] settlement agreement with Beaufort County has already been amended once, and could be amended in the future.

DIUC argues the Commission erred as a matter of law by ignoring the known and binding tax expenses under the settlement agreement with Beaufort County as well as the calculable property taxes for 2016. DIUC further asserts the

Commission's conclusion that the settlement agreement could be amended in the future to reduce DIUC's tax liability is not only speculative, but directly contrary to the evidence in the record. We agree.

When considering test-year data, "the Commission should make any adjustments for known and measurable changes in expenses, revenues and investments occurring after the test year, in order that the resulting rates will reflect the actual rate base, net operating income, and cost of capital" of an applicant. *Southern Bell*, 270 S.C. at 602, 244 S.E.2d at 284. Similarly, atypical situations or events occurring in the test year should be normalized to reflect usual conditions. *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984). Furthermore, if the Commission's findings are "predicated on unforeseeable future events, [they] must be reversed as speculative." *S.C. Energy Users Committee v. Pub. Serv. Comm'n of S.C.*, 332 S.C. 397, 399, 505 S.E.2d 342, 343 (1998).

By adopting ORS's adjustments, the Commission completely disregarded DIUC's binding obligation under the settlement agreement with Beaufort County in order to conform more closely to the 2014 test year. However, as this Court made clear in *Parker* and *Southern Bell*, significant known expenses incurring after the test year must be taken into account to give the Commission the most accurate view of the applicant's status. *See Parker*, 280 S.C. at 312–13, 313 S.E.2d at 292; *Southern Bell*, 270 S.C. at 602, 244 S.E.2d at 284. An annual bill of $65,856 for back taxes alone is a substantial expense for which the Commission should have adjusted the test year data. Moreover, the Commission's suggestion that DIUC may be able to reduce its tax liability by renegotiating with Beaufort County in the future is purely speculative, especially in light of Walls' testimony indicating the County would not be willing to amend the terms of the settlement agreement. Therefore, we would reverse the Commission's adoption of ORS's property tax expense adjustment.[9]

[9] We note the Commission rejected DIUC's property tax expense in part due to the "questionable ownership status" of the utility equipment located on the Elevated Tank Site. Because the substantial evidence indicates DIUC owns the utility property on that site, any additional property taxes attributable to that equipment should also be taken into account in the assessment of future taxes.

C. Bad Debt Expense

When DIUC originally calculated its bad debt expense at the end of the 2014 test year, it totaled $105,667. Nevertheless, in an attempt to be conservative in its application, DIUC only requested revenue increases to cover $30,852 of the bad debt expense. ORS calculated DIUC's bad debt at $108,349 and initially recommended DIUC's proposed amount be adjusted upward, which, unsurprisingly, DIUC was willing to accept. However, in the Settlement Agreement with the POAs, ORS revised its recommendation to conform to DIUC's requested amount of $30,852.[10] The Commission accepted DIUC's bad debt request of $30,852, concluding it was a reasonable amount "because it encourages DIUC to collect those debts it is owed." DIUC now contends the Commission erred in awarding only $30,852 to cover its bad debt expense because all the evidence in the record establishes DIUC's bad debt expense exceeds $100,000. We agree.

There is no evidence in the record indicating DIUC's actual bad debt expense is anywhere near $30,852. Rather, all the testimony and exhibits presented by DIUC and ORS show DIUC had been unable to collect well over $100,000 in bad debt. DIUC explained the reason it requested such a low bad debt recovery amount was to achieve some balance in its rate increase requests. Additionally, we are troubled by the fact that this is the only request for which the Commission did not accept ORS's adjustment, especially in light of DIUC's pre-filed testimony agreeing to ORS's recommended $108,349. Therefore, we find the Commission's decision to allow a bad debt expense of $30,852 is unsupported by the evidence in the record.

CONCLUSION

For the foregoing reasons, we conclude the Commission erred in admitting into evidence and adopting the Settlement Agreement between ORS and the POAs. Therefore, we reverse and remand to the Commission for a de novo hearing.

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[10] We note DIUC submitted pre-filed testimony accepting ORS's bad debt adjustment more than two and half weeks before the Settlement Agreement was filed. Presumably, DIUC intended to concede ORS's bad debt expense proposal of $108,349 at the hearing, but was blind-sided by the Settlement Agreement in which ORS and the POAs adopted DIUC's previously requested bad debt expense.

BEATTY, C.J., KITTREDGE and FEW, JJ., concur. Acting Justice Costa M. Pleicones, concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angela Patton, as Next Friend of Alexia L., a minor, Petitioner,

v.

Gregory A. Miller, M.D., Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, d/b/a Piedmont Medical Center, Respondents.

Appellate Case No. 2015-002135

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27730
Heard December 14, 2016 – Filed July 26, 2017

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED

John Layton Ruffin, Edward L. Graham, and Diane M. Rodriguez, of Graham Law Firm, PA, all of Florence, for Petitioner.

Ashby W. Davis, of Davis, Snyder, Williford & Lehn, P.A., of Greenville; R. Hawthorne Barrett and Thomas C. Salane, both of Turner Padget Graham & Laney, PA, of Columbia; William U. Gunn and Joshua Tate Thompson,

both of Holcombe Bomar, PA, of Columbia, all for Respondents.

JUSTICE FEW: The question posed in this appeal is whether a minor may bring an action for her own medical expenses. The answer depends on whether she is the "real party in interest," and any dispute over the answer is governed by Rule 17(a) of the South Carolina Rules of Civil Procedure.

I. Facts and Procedural History

Alexia L. was born on April 5, 2007, at Piedmont Medical Center in Rock Hill. Gregory A. Miller, M.D., was the obstetrician who delivered her. Alexia's mother—Angela Patton—filed a medical malpractice lawsuit in November 2009 against Dr. Miller and the professional association where he practiced, Rock Hill Gynecological & Obstetrical Associates, P.A. Patton filed the lawsuit only in her capacity as Alexia's "next friend."[1] She sought damages from Dr. Miller and Rock Hill Obstetrical for Alexia's injuries and past and future medical expenses.

In March 2012, Patton filed a separate medical malpractice lawsuit against Amisub of South Carolina, which owns and does business as Piedmont Medical Center. She also filed the Amisub lawsuit only in her capacity as Alexia's next friend, and sought the same damages she sought in the first lawsuit. In July 2012, the parties consented to consolidate the two cases, and Patton—again acting only as Alexia's next friend—filed an amended complaint naming Dr. Miller, Rock Hill Obstetrical, and Amisub as defendants. In the amended complaint, as in the first two, Patton did not make any claim in her individual capacity. The only claims she made were Alexia's claims, which she made in her representative capacity as Alexia's next friend.

Patton's theory of liability was that the defendants—primarily Dr. Miller—"improperly managed the resolution of shoulder dystocia[2] . . . and that such

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[1] "If a minor . . . does not have a duly appointed representative he may sue by his next friend . . . ." Rule 17(c), SCRCP.

[2] Dystocia is the "slow or painful birth of a child." *Dystocia*, BLACK'S MEDICAL DICTIONARY (42d ed. 2010). Shoulder dystocia is "a difficult childbirth marked by

mismanagement caused permanent injury to Alexia's left-sided brachial plexus[3] nerves." Patton sought damages for Alexia's pain and suffering, disability, loss of earning capacity, and other harm she contends resulted from this injury. Patton also sought damages for Alexia's medical expenses.

The fact that Patton brought the claim for medical expenses only in her representative capacity as Alexia's next friend—and not in Patton's own capacity—is at the center of this appeal. Dr. Miller, Rock Hill Obstetrical, and Amisub moved for partial summary judgment on the basis of this fact. They argued the circuit court should dismiss the claim for medical expenses because only a parent—not the child—has the right to recover damages for a minors' medical expenses. The defendants argued, in other words, Patton could recover for Alexia's medical expenses if she sued in her own capacity, but she may not recover them in her capacity as Alexia's representative. The circuit court agreed and granted partial summary judgment to all three defendants. The court found "the minor plaintiff may not maintain a cause of action for [her medical] expenses in her own right."

Patton filed two motions in response to the circuit court's order. First, she filed a motion to alter or amend the summary judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. She also filed a motion to amend her complaint pursuant to Rule 15 to "change [her] capacity . . . from Next Friend to her individual capacity." She asked that the amendment relate back to the date of her original complaint, as provided for in Rule 15(c). The circuit court denied both motions.

Patton appealed to the court of appeals, which affirmed in an unpublished opinion. *Patton v. Miller*, Op. No. 2015-UP-367 (S.C. Ct. App. filed July 22, 2015). We granted Patton's petition for a writ of certiorari to review the court of appeals' decision. We reverse that portion of the circuit court's order that awards partial

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the inability to deliver the shoulders of the fetus after the head has emerged." J.E. Schmidt, 5 *Attorneys' Dictionary of Medicine* S-141 (Matthew Bender 2016).

[3] Brachial means "belonging to the upper arm." The brachial plexus is the network of nerves that lies "along the outer side of the armpit" and contains all the nerves to the arm. *Brachial*, BLACK'S MEDICAL DICTIONARY (42d ed. 2010); *Plexus*, BLACK'S MEDICAL DICTIONARY (42d ed. 2010).

summary judgment to Dr. Miller and Rock Hill Obstetrical, affirm the award of partial summary judgment to Amisub, and remand to the circuit court.

II. Rule 17, SCRCP—The Proper Plaintiff

By claiming that only a parent—not the child—may bring a claim for the child's medical expenses, the defendants invoked the "real party in interest" requirement of Rule 17(a) of the South Carolina Rules of Civil Procedure, which provides, "Every action shall be prosecuted in the name of the real party in interest." A real party in interest is "the party who, by the substantive law, has the right sought to be enforced. It is ownership of the right sought to be enforced which qualifies one as a real party in interest." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013); *see also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1541 (3d ed. 2010) (stating Rule 17(a) provides "that the action should be brought in the name of the party who possesses the substantive right being asserted under the applicable law . . . ."); 6 *Cyclopedia of Federal Procedure* § 21.7 (3d ed., rev. 2017) ("The 'real party in interest' . . . is defined as the person holding the substantive right to be enforced, and not necessarily the person who will ultimately benefit from the recovery.").

The requirement that an action must be brought by the real party in interest is not a new requirement. Section 134 of our 1867 Code provided, "Every action must be prosecuted in the name of the real party in interest . . . ." S.C. Code § 134 (1867). The "real party in interest" requirement can be found in all subsequent versions of the Code including the 1976 Code. S.C. Code Ann. § 15-5-70 (1976) (repealed 1985). As the Reporter's Note to Rule 17(a) indicates, "The first sentence . . . [is] substantially the same as Code §§ 15-5-70 and 80."

The defendants and the circuit court rely primarily on two cases in which we applied the real party in interest requirement to a claim for a minor's medical expenses. In *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839 (1967), we stated "the amount paid for medical care and treatment by the parent is not an element of damage" in a cause of action brought by the minor, but rather "the parent has a cause of action for the recovery of the medical expenses which he has incurred for the care and treatment of such minor." 249 S.C. at 475, 154 S.E.2d at 841; *see* S.C. Code § 10-207 (1962) (stating the real party in interest requirement). In *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907), we stated a

"father suing merely as guardian ad litem for injuries to his infant child cannot recover for [the child's medical] expenses" because "the father himself is personally liable" to pay those expenses. 76 S.C. at 542, 57 S.E. at 627; *see* Code of Civil Procedure of South Carolina § 132 (1902) (stating the real party in interest requirement). *See also Hughey*, 249 S.C. at 476, 154 S.E.2d at 841 (explaining that the basis of the parent's right to recover the damages is the parent's obligation to pay the child's medical expenses); 67A C.J.S. *Parent and Child* § 352 (2013) ("The parental right to recover expenses when a child is injured stems from the parents' legal obligation to support a child."). Applying the real party in interest requirement to the facts of those cases, we recognized that the legal obligation to pay a medical bill renders the person who holds that obligation the proper party to bring a claim, or the "real party in interest." This is the principle of law relied on by the defendants and the circuit court, and it is the same principle embodied in the definition of real party in interest set forth in *Draper*.

We must determine, therefore, whether Patton—in her capacity as Alexia's next friend and not in her own capacity—meets the real party in interest requirement on her claim for Alexia's medical expenses. In particular, we must determine whether Patton's representative claim for Alexia's medical expenses is consistent with our application of the real party in interest requirement to similar claims in *Hughey* and *Tucker*. We begin our analysis with Patton's description in her briefs to the court of appeals and this Court of the medical expenses she sought to recover:

> Following her injuries, Alexia has received necessary and proper treatment from a host of healthcare providers, including a nerve resection surgery. Alexia will need additional surgeries and other treatment continuing until her eighteenth birthday, as well as continued treatment after she reaches the age of majority. Accordingly, she will incur future medical bills during her entire lifetime.

These medical expenses fall into three categories. First, Patton seeks to recover for medical expenses that will have been incurred at the time of trial. These include the cost of the nerve resection surgery that has already been performed. Second, Patton seeks to recover for expenses that will be incurred in the future, but before Alexia turns eighteen. Third, Patton seeks to recover for expenses Alexia will incur after she reaches the age of eighteen, which Patton contends Alexia will incur "during her entire lifetime."

Applying *Hughey*, *Tucker*, and *Draper* to the third category of medical expenses Patton seeks to recover—those Alexia will incur after turning eighteen—Alexia is clearly the real party in interest on a claim for those expenses. At that time she will be an adult, and the medical services provider may legally seek payment for the services from Alexia herself. Because Alexia will be obligated to pay the bills for those services, she owns the right to recover them as damages. The circuit court apparently recognized this, and specifically granted summary judgment only on "Plaintiff's claims for her own medical or injury-related expenses incurred to date, and to be incurred during her minority." Thus, Patton—acting on behalf of Alexia and not in her individual capacity—is the real party in interest for future medical expenses Alexia will incur after she turns eighteen, and properly brought the claim.

Turning to the second category of expenses Patton seeks to recover—those incurred between the time of trial and Alexia's eighteenth birthday—*Hughey*, *Tucker*, and *Draper* require that we determine who has the legal obligation to pay those expenses, which in turn informs us who owns the right to recover them as damages, and thus who meets the real party in interest requirement. Patton—in her individual capacity—is a real party in interest. Under South Carolina law, Patton's parental responsibilities include the legal obligation to pay her child's medical expenses. S.C. Code Ann. §§ 63-5-20 & -30 (2010). Because of that obligation, Patton owns a substantive right to recover damages for those expenses. Therefore, Patton—in her individual capacity—satisfies the Rule 17(a) requirement that the claim be brought by the real party in interest. *Draper*, 405 S.C. at 220, 746 S.E.2d at 481.

The question before us, however, is whether the circuit court correctly concluded that Patton—in her representative capacity—is not the real party in interest. As the following discussion demonstrates, the analysis of whether a representative qualifies as the real party in interest for future medical expenses is not as simple as the analysis for past medical expenses was in 1907 in *Tucker* and in 1967 in *Hughey*. In fact, none of the cases relied on by the defendants or the circuit court involved claims for future medical expenses. *Cf. Sox v. United States*, 187 F. Supp. 465, 469-70 (E.D.S.C. 1960) (permitting a minor to recover her own future, pre-majority, medical expenses).

If Patton recovers Alexia's future medical expenses, for any recovery above a minimal amount, the funds paid by these defendants must be paid to a conservator, or some other adult fiduciary representative. *See* S.C. Code Ann. § 62-5-433(B)(3) (2009) (requiring payment of settlement funds to a conservator); S.C. Code Ann. § 62-5-401 (Supp. 2016) (permitting the appointment of a conservator for a "minor [who] owns money or property that requires management or protection").[4] The "conservator [must] act as a fiduciary," and thus the funds must remain in the custody of the conservator until they are used for Alexia's benefit, or until she turns eighteen. S.C. Code Ann. § 62-5-417 (2009). For medical expenses actually incurred while Alexia is a minor, the conservator has a legal obligation to pay them. S.C. Code Ann. § 62-5-428(a)(1) (Supp. 2016).

If Patton is now or later becomes Alexia's conservator, then her fiduciary obligation to pay Alexia's medical expenses will make her the real party in interest—in her representative capacity. However, whether a particular plaintiff is a real party in interest must be determined at the time of filing, and the identity of the conservator is often not known until the time a recovery is made. It is clear, however, that Alexia's representative—or conservator—will have a legal obligation to pay future medical expenses before Alexia's eighteenth birthday. Under *Hughey*, *Tucker*, and *Draper*, therefore, the conservator's legal obligation to pay the expenses renders the representative who brought the action a real party in interest.

Turning to the first category of medical expenses—those already incurred at the time of trial—Patton is a real party in interest in her individual capacity because of her obligation to pay them. §§ 63-5-20 & -30. The circuit court correctly concluded, therefore, that Patton may sue in her individual capacity to recover medical expenses that have already been paid for the care and treatment of Alexia.

The circuit court's partial summary judgment order, however, was not based on that conclusion. Rather, the order was based on the circuit court's categorical determination that Patton may not sue for those expenses in any representative capacity. The circuit court stated, "Neither of her parents have sued individually to recover [Alexia's medical] expenses, and the minor plaintiff may not maintain a

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[4] *See also* S.C. Code Ann. § 62-5-103 (2009) ("Facility of payment or delivery"); S.C. Code Ann. § 62-5-409 (2009) ("Protective arrangements and single transactions authorized").

cause of action for [her medical] expenses in her own right." To determine whether the circuit court's statement was correct, and thus whether it correctly granted partial summary judgment based on it, *Hughey*, *Tucker*, and *Draper* require that we analyze whether Patton—in her representative capacity—has a legal obligation to pay the medical bills.

As we did with the second category of expenses, we question whether this analysis may be conducted in 2017 with the simplicity with which we analyzed it in *Tucker* and *Hughey*. To illustrate this point, we turn to Patton's representation to the circuit court that "Alexia is covered by Medicaid, which has paid vast sums on her behalf for medical care." To the extent Alexia's medical bills were paid by Medicaid, they were not paid by either of her parents. In both *Tucker* and *Hughey*, the injured child's father paid the medical bills.[5] *Tucker*, 76 S.C. at 542, 57 S.E. at 627; *Hughey*, 249 S.C. at 475, 154 S.E.2d at 841. The collateral source rule preserves the parent's right to recover the damages, even though the parent did not pay the medical expenses.[6] However, federal and state law provides Medicaid an automatic right of subrogation. *See generally* 42 U.S.C. § 1395y(b)(2) (2012 & Supp. II 2014); 42 C.F.R. § 411.24(e) & (g) (2016); S.C. Code Ann. § 43-7-430 (2015) (collectively defining federal subrogation rights to third-party recovery of medical expenses paid by Medicaid, and the Medicaid recipient's legal obligation to repay). A similar right of subrogation often exists pursuant to the insurance contract when the medical expenses are paid by a private insurer. *See* S.C. Code Ann. § 38-71-190 (2015) ("Any policy or contract of accident and health insurance issued in this State may include provision for subrogation by the insurer to the insured's right of recovery against a liable third party . . . ."). Therefore, a child's representative who seeks damages for a child's medical expenses that were paid by

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[5] Medicaid did not exist before July 30, 1965. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (enacted July 30, 1965). Therefore, it could not have been a factor in *Tucker*. In *Hughey*, the minor was injured on March 10, 1965 and the case was tried in May 1966. 249 S.C. at 474, 154 S.E.2d at 840. There is no indication any of her expenses were paid by Medicaid.

[6] "The collateral source rule provides 'that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer.'" *Covington v. George*, 359 S.C. 100, 103, 597 S.E.2d 142, 144 (2004).

Medicaid or some other insurer is almost certainly under a legal duty to reimburse the actual payor for at least part of the recovery. In this scenario, the minor's representative has a legitimate claim that she is a real party in interest. In other scenarios, such as when there is no third-party payor and the medical expenses were actually paid by a parent, there may be no right of subrogation, and the representative has no obligation for reimbursement. In such a situation, the parent may be the only real party in interest.[7]

The circuit court analyzed the real party in interest question on a motion for partial summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure. Rule 56(c) provides that summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The uncertainties discussed above cause us to doubt whether it is appropriate to enter summary judgment on the question of whether a particular plaintiff is a real party in interest. The circuit court did not consider any of this uncertainty. Rather, the circuit court applied what it considered to be a categorical principle of law that a minor may not recover her own medical expenses.

However, this Court has not applied *Hughey* and *Tucker* categorically, and we have not held that a minor may never recover her own medical bills. To the contrary, in *Johnston v. Bagger*, 151 S.C. 537, 149 S.E. 241 (1929), we permitted it. The plaintiff in *Johnston* was the father acting only as the child's guardian ad litem—not in his individual capacity. 151 S.C. at 539, 149 S.E. at 242. The

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[7] Rule 17(a) refers to "the" real party in interest. It is possible, however, that there may be more than one proper party to bring a claim. To illustrate, consider that two divorced parents with joint legal custody seek to bring a claim for their minor child's medical expenses. If one parent paid all of a child's medical bills out of pocket, and the other parent paid none, the paying parent would appear to be the only proper party on a claim for the child's past medical bills. If each parent paid half, each parent would appear to be the proper party on that parent's claim to recover the bills that parent paid. However, if neither parent paid the bills, nor was there any insurance, then both parents would remain under a legal obligation to pay the bills. §§ 63-5-20 & -30. In this scenario, under *Hughey*, *Tucker*, and *Draper*, both parents would separately meet the Rule 17(a) real party in interest requirement.

evidence indicated the father "actually paid . . . $45" toward the child's medical bills, which totaled "approximately $1,000." 151 S.C. at 541, 149 S.E. at 243. As to the unpaid bills, the father testified he "had not been able to pay these bills, and . . . in all likelihood he never will be able to make the payments." *Id.* The appellant, citing *Tucker*, claimed the trial court erred in "that the jury were permitted to consider as an element of damages sums of money paid out by the father of the infant." *Id.* We permitted the bulk of the jury verdict in favor of the minor to stand, despite the fact the damages were for her own medical expenses. 151 S.C. at 542, 149 S.E. at 243.

Other courts have recognized that there is no categorical prohibition against a minor recovering her own medical bills. In *McNeil v. United States*, 519 F. Supp. 283 (D.S.C. 1981), the plaintiff filed suit only in his capacity as the legal representative of a minor. 519 F. Supp. at 284. "The parents . . . did not institute suit" and the statute of limitations "expired." *Id.* The court explained, "The issue of [the minor] being able to collect for his own medical expenses was hotly contested" because the parents "have not filed suit, and the time when suit could be filed is past." 519 F. Supp. at 290. Relying on South Carolina law, the district court in *McNeil* stated, "Medical expenses on behalf of a child are *usually* included in a parent's cause of action." *Id.* (emphasis added) (citing *Tucker*, *Hughey*, and *Kapuschinsky v. United States*, 259 F. Supp. 1, 7 (D.S.C. 1966)). The district court went on to explain that "this general rule is not an absolute bar" to a child recovering his own medical expenses, and awarded damages for those expenses to the child through his legal representative. *Id.*

The district court also awarded a minor damages for his own medical expenses in *Sox*. 187 F. Supp. at 469-70. The court explained that the injured child's parents previously brought their own lawsuits for their own damages and settled those suits. 187 F. Supp. at 469. Subsequently, the district court heard the child's claim for "prenatal injuries," brought "by her guardian ad litem." 187 F. Supp. at 467. The child's damages claim included "compensation for the cost of care necessitated by the injury and impairment including the cost of probable future care." 187 F. Supp. at 469. The district court stated it is "settled law that the primary right of recovery . . . lies with the parents," but then found "it is equally well settled that this right may be waived in favor of a recovery by the infant." *Id.* The district court observed, "The underlying reason for these rules is to prevent double recoveries. It is not to excuse liability." *Id.* The court then held the parents' failure to assert the claim for medical expenses amounted to a waiver of the

parents' claim, and awarded the child damages—through his representative—for the medical costs. 187 F. Supp. at 469-70.

Our analysis of Patton's three categories of claims, our holding in *Johnston* allowing a minor's claim for her own medical expenses to stand, and the district court's reasoning in *McNeil* and *Sox* demonstrate that the summary judgment procedure of Rule 56 is not appropriate for resolving a dispute over the identity of the real party in interest. As Professor Flanagan explained years ago, "motions that do not go to the merits are not appropriately classified as summary judgment." James F. Flanagan, *South Carolina Civil Procedure* 445 (2d ed. 1996). As we will explain, the circuit court should have analyzed the issue under the Rule the defendants invoked when they claimed Patton as representative was the wrong party to bring the claim for Alexia's medical expenses—Rule 17(a) of the South Carolina Rules of Civil Procedure. *See Jaramillo v. Burkhart*, 999 F.2d 1241, 1246 (8th Cir. 1993) (holding in an indistinguishable scenario that partial summary judgment in favor of the defendants was improper and the issue should have been resolved pursuant to Rule 17(a)).

III. Rule 17(a), SCRCP—Disputes Over the Real Party in Interest

Under Rule 17(a), the definition of the proper party is the same as it has always been—the proper party is any "real party in interest." As Judge Bell observed in *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992), "The adoption of the South Carolina Rules of Civil Procedure has not changed the law. Where, as here, the named plaintiff has suffered an actionable loss at the hand of the defendant, he is a real party in interest and the requirement of Rule 17(a) is met." 308 S.C. at 62, 416 S.E.2d at 665.

However, when the question is how to resolve a dispute as to whether a plaintiff is the real party in interest, the procedure we follow for resolving that dispute changed significantly under Rule 17(a). Formerly, the failure to bring suit in the name of the real party in interest was a jurisdictional failure requiring dismissal of the lawsuit. *See Wilson v. Gibbes Mach. Co.*, 189 S.C. 426, 430, 1 S.E.2d 490, 492 (1939) (stating "unless the real party in interest institutes the suit and is before the Court, the Court is without jurisdiction" (citing *Hodges v. Lake Summit Co.*, 155 S.C. 436, 447-48, 152 S.E. 658, 662 (1930))). Under the Rules of Civil Procedure, however, it is improper to immediately dismiss a lawsuit simply because it was not brought in the name of the real party in interest. Rule 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 17(a), SCRCP.

The purpose of this provision is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits. As the Reporter's Note to the rule indicates, this sentence "is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." *See also* 6A Wright, Miller & Kane, *supra*, at § 1541 (stating the last sentence of Rule 17(a) was added "to provide that the failure to join the real party in interest at the commencement of the action does not require dismissal").

Therefore, the circuit court in this case erred by dismissing Patton's claims for Alexia's medical expenses under Rule 56—summary judgment. Rather, the court should have resolved the dispute under Rule 17(a), which provides three mechanisms to avoid forfeiture: "ratification, joinder, or substitution." In this case, Patton attempted to use all three mechanisms. First, she attempted ratification by arguing in her Rule 59(e) motion that she "assigned and waived her right to recover tort-related pre-majority medical expenses in favor of her child, Alexia." Ratification under Rule 17(a) is the formal approval by the proper party of another party bringing the action. In this scenario, Patton is both parties. It is impossible that Patton—in her individual capacity—did not approve of the claim she made in her representative capacity. Her Rule 59(e) motion was the formal expression of that approval—ratification. Patton also attempted joinder and substitution by moving to amend her complaint. She attached to her Rule 15 motion to amend a proposed "amended pleading [that] changes the capacity in which Angela Patton [sues] from Next Friend to her individual capacity."

The defendants contend that any argument under Rule 17(a) is not preserved for our review because Patton never specifically mentioned Rule 17. We find this argument troubling. It was the defendants who first invoked the Rule 17(a) requirement that "Every action shall be prosecuted in the name of the real party in interest" by claiming Patton in her representative capacity was not the proper party to bring the claim for Alexia's medical expenses. In doing so, it was the defendants who first failed to mention Rule 17. While Patton also did not specifically rely on Rule 17, she did specifically ask to take advantage of each of the three provisions contained in Rule 17(a) to address the alleged failure to bring a claim by the correct party: "ratification, joinder, [and] substitution." The provision upon which the defendant sought partial summary judgment and the provision upon which Patton defended the motion are both expressed in Rule 17(a), in adjoining sentences. It is not possible to address the issue of who is the proper party to bring a claim without addressing Rule 17(a). As we will discuss more fully in section IV explaining our analysis under Rule 15 of the South Carolina Rules of Civil Procedure, the Rules were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principal. This is particularly true when the trap was set by the opposing parties who themselves did not properly name the applicable principle.

IV. Rule 15, SCRCP

In both her Rule 59(e) motion and her motion to amend the complaint, Patton did specifically rely on Rule 15 of the South Carolina Rules of Civil Procedure, and particularly the relation back provisions of Rule 15(c). As we will explain, we reach the same conclusion under Rule 15 that the circuit court should have reached under Rule 17.

A. Rule 15(a)

Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). "Rule 15(a) is substantially the same as the Federal Rule," Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's "freely given"

provision as a "mandate" that "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). The *Foman* Court continued:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. (citing Fed. R. Civ. P. 15(a)); *accord Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

In this case, the circuit court never considered Rule 15(a). While we have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion,[8] a court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). Under Rule 15(a), the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it. Instead, the circuit court denied the motion to amend based solely on its mistaken belief that the amendments could not relate back under Rule 15(c). The circuit court thus denied the motion to amend the complaint on its perception of the merits of the amended claims, not under the criteria for amendment the court was required to consider under Rule 15(a). This was error, regardless of the soundness of the Rule 15(c) analysis. *See Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999) (analogizing a Rule 15(d) motion to supplement a complaint to a motion to amend a complaint

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[8] *See, e.g.*, *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) ("A motion to amend is within the sound discretion of the trial judge . . . ." (citing *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993))).

under Rule 15(c) and finding the trial court erred in denying the plaintiff's motion to supplement his complaint because the trial court should not have relied on the merits-related question of whether the defendant was immune under the Tort Claims Act). *Cf.* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1487 (3d ed. 2010) (stating "numerous courts have held that a proposed amendment that clearly is frivolous, advancing a claim or defense that is legally insufficient on its face, or that fails to include allegations to cure defects in the original pleading, should be denied").

The record before us contains no basis for a finding of prejudice under Rule 15(a) because the defendants did not argue prejudice[9] and the circuit court did not conduct a prejudice analysis. At oral argument, however, the defendants argued,

> The prejudice, Your Honor, is . . . essentially allowing a way around the rule that was in place. The rule that they could have followed. The rule that is not hard to follow. Certainly no[] . . . reason has been given as to why it wasn't followed in this case. And so it is allowing this claim to come in from some, essentially from someone who did not pursue it originally, but could have. And that is the problem. We have never had an explanation at any of the levels as to why the rule was not followed.

We find the argument betrays a misunderstanding of prejudice under Rule 15. The prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim. Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend. *See Lee v. Bunch*, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007) ("The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it." (citing *Collins Entm't, Inc. v. White,* 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005))); *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235-36, 754 S.E.2d 714, 719 (Ct. App.

[9] "The burden is . . . on the party opposing the motion to show how it is prejudiced." *Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2004).

2014) (affirming the denial of a proposed amendment after the conclusion of discovery and the case had been placed on the trial roster because it would cause significant delay and impose substantial additional discovery costs that would not have been necessary if the plaintiff had timely made the motion to amend).

In this case, all three defendants were well aware of the claim for medical expenses because the claim was included in each original complaint. It made no difference to the defendants as to the merits of the claim whether Patton brought it in her own or her representative capacity. There is no indication defendants' procedural or evidentiary presentation would have varied at all if Patton had been allowed to amend the complaint to assert the claim in her individual capacity. While permitting the amendment would cause the defendants to face the merits of the amended claim, the defendants' opportunity to defend the claim on the merits was no different than it would have been if Patton had originally brought the claim in her own capacity. There was no new issue presented by Patton's proposed amendment, the amendment would have caused the defendants no disadvantage as to the merits they did not already face, and therefore, there is no prejudice.

When we decided *Tucker*, *Hughey*, *Wilson*, and the other pre-Rules cases upon which the defendants rely for their argument the circuit court properly dismissed Patton's claims, we operated under the technical confines of code pleading. Today, however, we operate under the far more flexible notice pleading provisions of the Rules of Civil Procedure. As Professor Flanagan observed, "The purpose of the rules is to secure justice, and consequently, they reduce formalities and technicalities." Flanagan, *supra*, at 3. Disallowing the amendment draws us back to the technical pitfalls of code pleading we thought we escaped in 1985 when we adopted the Rules. As the Supreme Court of the United States wrote in 1962,

> It is too late in the day and entirely contrary to the spirit of the . . . Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The . . . Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Foman, 371 U.S. at 181–82, 83 S. Ct. at 230, 9 L. Ed. 2d at 225 (quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 86 (1957)); *see also Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." (citing *Gardner v. Newsome Chevrolet–Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991))); 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed. 2015) ("The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."); 3 *Cyclopedia of Federal Procedure* § 8.2 (3d ed., rev. 2017) ("The spirit of the Rules is to settle controversies upon their merits rather than to dismiss actions on technical grounds, to permit amendments liberally, and to avoid, if possible, depriving a litigant of a chance to bring a case to trial.").

Because the record contains no basis for a conclusion the defendants would have been prejudiced by allowing Patton to amend her complaint, we find the circuit court erred in not allowing the amendment.

B. Rule 15(c)

If the circuit court had allowed the amendment, the court would then have been required to address Rule 15(c)—whether the amendment related back to the time of Patton's initial complaints against the parties. In March 2012 when Patton filed her lawsuit against Amisub, and in August 2013 when Patton moved to amend her complaint to assert claims in her individual capacity, the three year statute of limitations on Patton's individual claims had expired. *See* S.C. Code Ann. § 15-3-545(A) (2005) (setting the statute of limitations on a medical malpractice action at three years). In November 2009, however, when Patton filed suit against Dr. Miller and Rock Hill Obstetrical, the statute of limitations had not expired. Therefore, for Patton's individual claims to comply with the statute of limitations, her amended complaint must relate back to when she filed Alexia's claim against Dr. Miller and Rock Hill Obstetrical.

Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or

> occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

Patton's individual claim against Dr. Miller and Rock Hill Obstetrical for Alexia's medical expenses satisfies Rule 15(c) because it is the exact claim she made in the representative capacity. In fact, there is no difference between the old claim and the new claim except the capacity of the person bringing it. Therefore, Patton's amended claims against Dr. Miller and Rock Hill Obstetrical for Alexia's medical expenses relate back to the November 2009 filing and comply with the statute of limitations.

The defendants rely on *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995), for their contention that Rule 15 does not permit amendments "to add a new plaintiff to the case." In *Valentine*, after a complicated procedural history involving claims in state and federal court, there remained one state court action with three plaintiffs, and one federal action in which the Valentines were plaintiffs, all against the same defendant—the Davis group. 319 S.C. at 170-71, 460 S.E.2d at 219. The three state court plaintiffs were Shelly and Larry Williams, whose claims concerned repairs to the Williams' home, and Thomas Slother, whose claim concerned an alleged debt the defendant owed Slother. *Id.* The Valentines, who had previously been plaintiffs in the state court action, had a similar—but separate—claim pending in federal court concerning repairs to the Valentines' home. *Id.* When the federal court later dismissed the Valentines' claims, "Slother and the Williams filed a motion to amend the state court complaint to reinstate the Valentines to the action." 319 S.C. at 171, 460 S.E.2d at 219. The circuit court "denied the motion finding no basis under the South Carolina Rules of Civil Procedure to join the Valentines as plaintiffs." *Id*. On appeal from that ruling, the court of appeals held Rule 15 does not allow a new plaintiff to assert a new and separate claim. 319 S.C. at 172, 460 S.E.2d at 219. The court of appeals stated,

> The proposed amended complaint shows the allegations asserted by the Valentines, Slother, and the Williams do not arise out of the same transaction or series of transactions or occurrences. In fact, the only connection between the claims is that the Valentines, Slother, and the Williams are represented by the same attorney and they

> all assert different personal claims against the Davis group.

319 S.C. at 172, 460 S.E.2d at 220.

Contrary to the situation in *Valentine*, Patton sought to amend *her own* complaint to maintain *the same* claim in a different capacity. The reasoning in *Valentine* is sound, but the decision stands only for the proposition that Rule 15 does not contemplate adding a new plaintiff to assert a new claim, and thus *Valentine* is inapplicable to this case.

Patton, on the other hand, relies on *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995). In *Thomas*, the plaintiff brought a wrongful death and survival action in the federal district court of South Carolina alleging medical negligence in causing the death of her husband. 318 S.C. at 84, 456 S.E.2d at 378. She did so, however, only in her capacity as personal representative appointed by the probate court of her home state of Michigan. *Id.* "The defendants answered claiming that Mrs. Thomas lacked capacity to sue because she failed to allege her qualification and/or appointment as personal representative in South Carolina." 318 S.C. at 85, 456 S.E.2d at 378. The plaintiff was subsequently appointed personal representative by a South Carolina probate court and moved to amend her complaint to assert the same claims in her new capacity. *Id.* "However, this was done after the three year period for commencing an action under the wrongful death statute had expired." *Id.* When the "defendants moved for dismissal" on the ground the "plaintiff was not duly qualified as a personal representative under South Carolina law when the complaint was filed," the district court certified three questions to this Court. *Id.* One of the questions was, "Would the . . . adoption of Rules 15(c) . . . and 17(a) . . . of the South Carolina Rules of Civil Procedure allow for the relation back of any amendment to the complaint to assert the qualification in South Carolina of the foreign personal representative in an action which was otherwise timely?" 318 S.C. at 84, 456 S.E.2d at 378.

Mrs. Thomas—like Patton—was the original plaintiff who sought to amend her complaint to assert the same claim in a new capacity. Also like Patton, Mrs. Thomas did not attempt the amendment until the statute of limitations had run for any new party asserting a claim. The situation in *Thomas*, therefore, is the same as the situation here.

Discussing the impact of the adoption of the Rules of Civil Procedure on the issues we faced in *Thomas*, we began with Rule 17(a). We stated,

> Rule 17(a) has changed the result when the amended pleading merely amplifies the old cause of action, provided that the defending party was originally placed on notice of the events involved. The real party in interest is no longer precluded from being named plaintiff, after the statute of limitations has run on a claim timely filed by one who lacked capacity to sue because he was not the real party in interest. Instead a reasonable time must be allowed after objection for ratification of commencement of the action and it has the same effect as if the action had been commenced in the name of the real party in interest. We find that the current Rule 17(a) changes existing State law where the action was brought within the applicable limitations and the real party in interest joined and ratified the action shortly thereafter in accordance with the requirements of Rule 17(a).

318 S.C. at 87, 456 S.E.2d at 380.

We then turned to Rule 15, and held Rule 15 also permits the amendment, and the amendment relates back to the original complaint under Rule 15(c). 318 S.C. at 88-89, 456 S.E.2d at 380. We stated, "The test . . . under Rule 15(c) . . . is . . . whether the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading," and then,

> Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.

318 S.C. at 88, 456 S.E.2d at 380.

Patton's amended claim is indistinguishable from the amended claim in *Thomas*. It is the same claim asserted by the same person in a new capacity. The defendants argue, however, that *Thomas* is distinguishable from this case because all the plaintiff's amended claims in that case were made in the plaintiff's new capacity, but in this case Patton makes the amended claims in her individual capacity, while some of the original claims remain in her representative capacity. Thus, the defendants argue, Patton seeks to add a new capacity, but *Thomas* permits only the substitution of one capacity for another. The defendants also argue *Thomas* is distinguishable because the plaintiff sought to change from one representative capacity to another representative capacity, while Patton sought to change from a representative capacity to her own individual capacity.

We find no basis for the defendants' arguments in Rule 15 or in *Thomas*. Considering the defendants' arguments in light of *Thomas*, however, we are convinced that our Rule 15(c) analysis is inseparable from a Rule 17(a) analysis when the dispute concerns the identity of the proper plaintiff. In *Thomas*, we stated, "The subsequent adoption of Rules 15(c) and 17(a), SCRCP allow for the relation back of an amendment to the complaint," and we permitted the same person to assert the same claim in a new capacity. 318 S.C. at 88, 456 S.E.2d at 380; *see also* 6 *Cyclopedia*, *supra*, at § 21.11 ("When an action is brought by someone other than the real party in interest within the limitations period, and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time suit was originally filed and the action need not be dismissed as time barred . . . .").

The defendants also argue the court of appeals' decision in *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999), supports their position that a new plaintiff may be added only when there is a clear substitution, not when the original plaintiff remains for some claims. We read *Twelfth RMA* to support Patton's right to amend her complaint. First, the court of appeals considered both Rule 15(c) and Rule 17(a) in its analysis. 335 S.C. at 641, 518 S.E.2d at 47. In addition, the court distinguished *Valentine* on the same basis we have distinguished it—that *Valentine* involved a new claim, whereas the case before it involved a new plaintiff to assert the same claim. *Id.* Relying on both Rule 15(c) and Rule 17(a), the court of appeals permitted an amendment similar to the amendment Patton sought to make. *Twelfth RMA* does not support the defendants' position.

We find the circuit court erred by refusing to permit the amendment as to Patton's individual claims against Dr. Miller and Rock Hill Obstetrical. We also find the circuit court erred in not recognizing that the amendment relates back to November 2009. Patton's individual claim against Amisub, however, must be treated differently. Patton has effectively conceded that she may not pursue a claim for pre-majority medical expenses against Amisub.

V. Conclusion

The parties framed the question posed in this appeal as whether this Court should change the common law rule expressed in *Tucker*, *Johnston*, *Hughey*, and others. We frame the question differently, and in this opinion we have done nothing more than apply the South Carolina Rules of Civil Procedure. Pursuant to Rule 17(c), "Whenever a minor . . . has a representative, . . . the representative may sue . . . on behalf of the minor . . . ." If a dispute arises as to whether that representative is "the real party in interest," Rule 17(a) governs the dispute. If the representative seeks to amend the complaint, Rules 15(a), 15(c), and 17(a) provide there should be no unnecessary dismissal, but rather the parties and the trial court should work to reach the merits. In this case, the circuit court failed to apply these Rules, and unnecessarily dismissed a claim it should have tried on the merits.

We **REVERSE** the circuit court's award of partial summary judgment to Dr. Miller and Rock Hill Obstetrical, **AFFIRM** partial summary judgment to Amisub, and **REMAND** to the circuit court for the completion of discovery and trial.

BEATTY, C.J., and KITTREDGE, J., concur. HEARN, J., concurring in a separate opinion. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

JUSTICE HEARN: I concur in result with the majority. However, I would limit resolution of the case to Justice Few's thorough analysis of Rule 15, SCRCP, and would not reach the discussion of Rule 17, SCRCP. Because the parties did not advance any arguments regarding the application or interpretation of Rule 17, I find the issue is not properly before us at this time. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (repeating the maxim, "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

ACTING JUSTICE PLEICONES: I respectfully dissent and would dismiss the writ of certiorari as improvidently granted as I agree with the opinion of the Court of Appeals. *See Patton v. Miller*, Op. No. 2015-UP-367 (S.C. Ct. App. filed July 22, 2015).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Preston Ryan Oates, Appellant.

Appellate Case No. 2014-001404

Appeal From Beaufort County
R. Markley Dennis, Jr., Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5502
Heard June 7, 2017 – Filed July 26, 2017

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

GEATHERS, J.: Appellant Preston Ryan Oates seeks review of his convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime. Appellant also challenges the denial of his motion for immunity from

prosecution pursuant to the Protection of Persons and Property Act (the Act).[1] Appellant argues the circuit court erred in denying his motion for immunity because (1) there was evidence that the victim, Carlos Olivera (Victim), was attempting to forcibly remove Appellant from his occupied vehicle, and (2) the circuit court's finding that the conflict had resolved at the time of the shooting was not supported by the evidence.

Appellant also challenges the circuit court's refusal to direct a verdict of acquittal on the ground that the State failed to disprove self-defense. Finally, Appellant assigns error to the circuit court's decision to give a voluntary manslaughter instruction to the jury on the ground that there was no evidence of sudden heat of passion. We affirm.

FACTS/PROCEDURAL HISTORY

On December 24, 2010, at approximately 8:00 p.m., Victim and his family visited his brother, Nelson Olivera (Nelson), and Nelson's family at their home in the Edgefield neighborhood near Bluffton. Although the Edgefield Homeowner's Association (the HOA) had prohibited parking on the streets in the subdivision, Victim parked his minivan on the street in front of the house of Nelson's neighbor, Steve Varedi. While Victim, Nelson, and their two families were visiting inside Nelson's house, Appellant, who had been hired by the HOA to tow illegally parked vehicles, noticed Victim's minivan and placed an automotive disabling device, i.e., a "boot," on the minivan's left front wheel. By the time Appellant was proceeding to hook up the minivan to the tow truck, Varedi had notified Victim that Appellant was about to tow Victim's minivan.

Victim, Nelson, and Varedi approached Appellant to ask him to refrain from towing the minivan because it was Christmas Eve and Victim was going to leave at that moment. When Appellant saw the three men approaching him, he felt intimidated and went back into the cab of his truck, shut the door, and locked it. Subsequently, Appellant rolled down the driver's side door window to speak with the men. According to Nelson, he was pleading for Appellant to release the minivan.

However, Appellant told investigators that when the three men approached him, they were running "a little abruptly" and were "hooting" and "hollering." He stated both Nelson and Victim jumped up on the truck's running board and started talking to him through the window and Victim told Varedi, "Go get my shotgun."

[1] S.C. Code Ann. §§ 16-11-410 to -450 (2015).

Appellant recounted Nelson saying, "Take that off his vehicle," to which Appellant responded, "Okay[,] let me call my office and see what they [want to] do and we'll get a handle . . . . It's not a problem, we can work this out."

Appellant then heard "a round being chambered" as well as Victim stating, "You're [going to] take this off right now and I'm leaving," to which Appellant responded, "[T]hat's fine." Appellant further stated he stalled to regain his composure by fumbling with his set of keys and dropping them twice and he "kept kind of freaking out a little bit." Nelson's testimony was consistent with these two statements. Nelson admitted that Victim pulled a gun out of his pants, ratcheted the gun, and stated, "Nobody's going to take my car." Nelson stated Appellant "seemed very nervous, moving some keys and touching some papers," although he indicated this was already occurring when Victim pulled out his gun.

Appellant indicated that as he was fumbling with his keys, Nelson "grabbed" them along with the lock tool that releases the boot and took them to the front of the minivan.[2] According to Appellant, while Victim was still "in the window," he asked Appellant if he had any paperwork on the minivan and stated he did not want law enforcement to "come look" for him. This dialogue frightened Appellant; he recounted, "[T]hat threw up a major red flag because he wants to make sure there's nothing in my vehicle that will connect me to his car." Appellant then pulled out his ledger and showed it to Victim to reassure him that Appellant had no paperwork on the minivan. While he was showing Victim the ledger, Appellant opened his glove box and pulled out his gun along with some papers on top of it to hide it.

At this point, another neighbor, Reba Bryan, offered to call 911, but both Appellant and Nelson told her it was unnecessary. According to Appellant, he stated, "Don't worry about it, everything's fine, go back inside, he's got a gun, so everything's okay here" in an attempt to give her the message to call 911 without alerting the other men to his message. Appellant then heard Nelson yell out something in Spanish to Victim. At that moment, Victim "look[ed] at [Appellant] and he [stated], '[O]kay you're [going to] come get this s**t off . . . . Come get this s**t off now.'" Appellant described the next few moments in the following manner:

> [Victim] unlocked the door of my truck and pulled the handle and opened it, and as he opened it, he was stepping down off of the running board . . . so he was opening it with his left hand . . . . As he stepped back, I saw him with

[2] Appellant stated the set of keys had no relationship with the boot.

his right hand reach and grab the pistol that was . . . kind of stuffed in his belt in the front. Well, [with] my line of sight and where he was, I didn't [want to] just cross through the cab, so as he opened it, just to play along like I was [going to] exit the vehicle to unlock the boot, [because] he was already in draw, in motion . . . . And . . . as he was stepping down[,] the door was open and he was starting to draw, I came around and I rotated and actually . . . I [exited] the [cab] and as I was [exiting] the [cab], since I had a little bit of [a] height advantage on him, as I [exited] out straight instead of toward him, I [exited] straight out my door stepping off of the metal running boards . . . and I was [exiting] out, and I looked and my line of sight was through him straight down to the ground. It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any information on his vehicle and . . . ah, bye, bye, Preston . . . regardless, he was in motion, he was in draw and I reacted. I know . . . I remember the very first shot. I caught him on the left side. . . .

And that made him rotate left. Well, I didn't know if I grazed his . . . the edge of his arm, if I grazed him under his . . . I don't . . . I didn't see [the] impact. I just know that I . . . right when I was able to lock my elbows and squeeze the trigger . . . I hit him on the left side. . . . And so it may have caused him to rotate. . . . so he turned towards the yard . . . . And as he . . . went that way, I remember seeing this part of his shoulder right here . . . . He was still a threat to me. You're a threat until you're disarmed or you're unconscious. I discharged again. I . . . don't know how many times I pulled the trigger. . . .

I remember two shots . . . . So as he's turning, . . . that would be counter-clockwise, . . . and his shoulder was here . . . I . . . let go a second round . . . [because] my line of sight was clear, . . . I still had a little bit of [a] height advantage because I was . . . still progressing down from my elevated position. . . . And then when I stopped, I saw

> the gun slide across the asphalt and stop . . . and I . . . stopped and I landed on the ground at low ready and I froze there.

Several witness accounts of the entire incident conflicted with Appellant's statement that Victim ordered him out of the truck while he was drawing his pistol. According to Nelson, after Victim first ratcheted his gun and stated, "Nobody's going to take my car," Nelson told Victim to put his gun away, Victim then placed the gun back into his waistband, and Victim never pulled it back out. Nelson expressly stated there was "no arguing, . . . no fighting, . . . no bad words" and Victim never talked to, threatened, or "attempt[ed] to do anything to [Appellant]." Victim's widow, Dhayan Olivera, testified Victim was directing traffic that was partially blocked by his minivan and the tow truck when Appellant shot him. Nelson's wife, Claudia Olivera, gave similar testimony. The testimony of Victim's widow, Nelson's wife, and Nelson's neighbors, as well as a video from Varedi's home surveillance camera, indicated Victim was walking or running away from Appellant when Appellant began shooting him. Nelson's wife and Victim's widow also testified Appellant continued shooting Victim even after he fell onto the street.

Several of the eyewitnesses, including Appellant, immediately called 911 to report the incident. The paramedic who later arrived on the scene detected no signs of life in Victim. Dr. Ellen Riemer, a forensic pathologist, conducted an autopsy on Victim and prepared a report revealing that Victim had been shot six times. In her report and at trial, she described the following gunshot wounds, not necessarily in the order in which Victim sustained them: (1) to the right side of the posterior neck; (2) to the right side of the abdomen; (3) to the middle of the back; (4) to the left side of the back; (5) to the posterior aspect of the right arm; and (6) to the left side of the upper back. Dr. Riemer confirmed there was only one gunshot wound that was not on the posterior aspect of Victim's body.

Dr. Riemer's report also noted she found no gunpowder residue near any of Victim's wounds. However, she testified that rather than characterizing the wounds as "distant gunshot wounds," she called them "indeterminate" because "even if it's at very close range, if there's an intermediate object that could absorb the stippling, . . . it's not deposited on the skin" and she could not "say for certain, based on all the findings on the body, . . . if it was shot at a distant range." Dr. Riemer also testified she examined Victim's clothing and saw "no obvious signs of any type of soot on the clothing."

Appellant was indicted for voluntary manslaughter and possession of a weapon during the commission of a violent crime. Appellant filed a motion for immunity under the Act, and the Honorable R. Markley Dennis, Jr. conducted a hearing on the motion, which he later denied. Appellant filed a motion for reconsideration, which Judge Dennis denied after a hearing. Appellant filed an appeal from these rulings; however, this court dismissed the appeal as interlocutory.[3]

Subsequently, Appellant was indicted for murder, and the solicitor dismissed the voluntary manslaughter indictment at the beginning of the murder trial before the Honorable Brooks P. Goldsmith. At the State's request and over Appellant's objection, the circuit court instructed the jury on the lesser-included offense of voluntary manslaughter. The jury found Appellant guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The circuit court sentenced Appellant to twenty-six years of imprisonment for voluntary manslaughter and five years of imprisonment for the weapon possession conviction, to run concurrently. The circuit court denied all of Appellant's post-trial motions, with the exception of his motion to reduce his sentence. The circuit court reduced the sentence for voluntary manslaughter to twenty-four years of imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court abuse its discretion in declining to grant Appellant immunity from prosecution under the Act when there was evidence that Victim attempted to forcibly remove Appellant from his occupied vehicle?

2. Was the circuit court's finding that the conflict had resolved at the time of the shooting supported by the evidence?

3. Did the circuit court err in refusing to direct a verdict of acquittal on the basis of self-defense?

4. Was there evidence of sudden heat of passion to justify the circuit court's jury instruction on voluntary manslaughter?

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[3] Our supreme court has held that the denial of a motion for immunity from prosecution under the Act is not immediately appealable but may be raised on appeal only after the subsequent prosecution, conviction, and sentencing. *See State v. Isaac*, 405 S.C. 177, 181–85, 747 S.E.2d 677, 679–81 (2013).

LAW/ANALYSIS

I. Immunity

Appellant argues the circuit court committed an error of law in declining to find he was entitled to immunity under section 16-11-440(A) of the South Carolina Code (2015) because there was evidence that Victim was attempting to forcibly remove Appellant from his occupied vehicle. Appellant also argues the circuit court abused its discretion in declining to find Appellant was entitled to immunity under section 16-11-440(C) because the circuit court's finding that the conflict had resolved at the time of the shooting was not supported by the evidence. We disagree.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* "In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237–38 (Ct. App. 2014). Further, "the General Assembly did not intend" to require the circuit court "to accept the accused's version of the underlying facts" in determining a motion for immunity under the Act. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266.

Section 16-11-440 provides, in pertinent part,

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he *removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle*; and

> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> . . .
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, *if he reasonably believes it is necessary to prevent death or great bodily injury to himself* or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

(emphases added).

Here, the circuit court reviewed (1) Appellant's December 24, 2010 videotaped interview with Sergeants John Adams and Laurel Albertin of the Beaufort County Sheriff's Office; (2) the audio recording of Appellant's December 27, 2010 interview with Captain Robert Bromage of the Beaufort County Sheriff's Office; (3) witness statements from Nelson, Nelson's wife, Victim's widow, and Nelson's neighbors (Varedi and Elizabeth Reyes Sorto); (4) a video from Varedi's home surveillance camera showing a portion of the incident;[4] (5) the autopsy report; (6) an audio recording of several 911 calls, including a call from Appellant; and (7) a Supplemental Incident Report authored by Angela Viens with the Sheriff's Office, which included summaries of on-the-scene statements given by Nelson, Varedi, and Reba Bryan. The circuit court also heard testimony from Investigator Viens and David Rice, a former concealed weapons permit instructor.[5]

After considering all of the evidence before it, the circuit court concluded section 16-11-440(A) did not apply to Appellant's case because "[t]he facts presented

[4] The quality of the video is poor.

[5] In response to evidence that Victim had a concealed weapons permit, the defense offered the testimony of Rice regarding the instruction he gave his students on the permissible use of a concealed weapon.

[did] not show that at the time of the shooting[, Victim] was unlawfully or forcibly entering, or had entered, [Appellant's] vehicle. [Victim] was walking away from [Appellant's] tow truck at the time [Appellant] got out of his vehicle and shot [Victim]." The circuit court also concluded section 16-11-440(C) did not apply to Appellant's case because "his use of deadly force against [Victim] was not necessary to prevent his own death or great bodily injury[] or the commission of a violent crime."

Subsection (A)

Appellant argues the circuit court committed an error of law in failing to address the part of subsection (A) that allows the presumption of having "a reasonable fear of imminent peril or death or great bodily injury" when the person against whom deadly force is used "removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle." Appellant contends there was evidence that Victim was either attempting to remove, or had forcibly removed, Appellant from his truck at gunpoint.

However, the circuit court adequately addressed the language highlighted by Appellant. In its order denying Appellant's motion for immunity, the circuit court addressed the last phrase in subsection (A) in the "Facts" section of the order. In the order's recitation of the facts, the circuit court stated, "[Appellant] alleges that [Victim] was forcing him from the car at gunpoint. However, there are at least three other witnesses to the incident who state that the argument between the two men had subsided and that everyone present was calm at the time [Appellant] shot [Victim]."[6]

Admittedly, the circuit court did not address the last phrase in subsection (A) in its legal analysis. Nonetheless, because the circuit court addressed Victim's alleged attempt to force Appellant from his truck in the fact section of the order and implicitly found this version of the incident incredible, the failure to address this precise question in the order's legal analysis does not constitute reversible error. *See*

[6] In the hearing on Appellant's motion for reconsideration, the circuit court commented on its review of Appellant's two interviews with law enforcement, stating, "[T]here was much of his logic that . . . I did not believe. I don't concur. I didn't agree with it. I didn't think that it was logical." The circuit court also stated, "In this particular case, I believed the version of facts testified [to] by the other witnesses, corroborated by scientific evidence of the gunshot wounds[, a]nd the witnesses' testimony of how it all happened, uh, -- just simply it doesn't -- it's more consistent with the other witnesses than it is his version."

State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.").

Subsection (C)

In its order denying immunity, the circuit court applied subsection (C) to the facts of the present case in the following manner:

> The Act is specific that a person attacked in a place in which he has a right to be has no duty to retreat. The issue presented in this case, however, is whether this statute protects a person who shoots and kills another if the confrontation has ended and the victim is walking away. The Act allows a person to stand his ground and meet force with force if he *reasonably* believes it is necessary to prevent death or great bodily injury or to prevent the commission of a violent crime. In this case, while [Appellant] was in a place that he was allowed to be, his use of deadly force against [Victim] was not necessary to prevent his own death or great bodily injury[] or the commission of a violent crime.
>
> Assuming that there was an "attack" previously, there was no such event at the time of the shooting. In short, there was no force to be met. [Victim] was walking away from [Appellant] when he was shot five times in the back and once in the side. Other evidence presented supports the [c]ourt's finding that the argument had ended at the time [Appellant] fired the fatal shots. The [c]ourt will not interpret the language of the statute to mean that a person may shoot and kill another when a perceived attack has ended.

Appellant argues the record does not support the circuit court's conclusion that the attack had ended and, therefore, the circuit court abused its discretion in declining to find Appellant was entitled to immunity under subsection (C). Appellant asserts Victim intended to force Appellant to unlock the boot on Victim's minivan and Victim "had already made his intentions clear by either brandishing or pointing a

firearm at Appellant." Appellant also asserts he reasonably believed deadly force was necessary to prevent death or great bodily injury.[7] Appellant states,

> This is not a situation where [Victim] had given up on trying to convince Appellant not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. [Victim] was determined to prevent his van from being towed and threatened Appellant with a gun.

While these arguments are compelling, this court cannot "reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *Douglas*, 411 S.C. at 316, 768 S.E.2d at 238. A review of the order denying immunity indicates the circuit court was not convinced of the reasonableness of Appellant's asserted belief that deadly force was necessary to prevent death or great bodily injury. *See id.* at 320 n.7, 768 S.E.2d at 239 n.7 ("[T]he standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective."). Even if the uncontroverted facts show Victim was still intent on preventing his minivan from being towed when he had his back turned to Appellant, this is not necessarily inconsistent with the circuit court's perception that the aggression had abated at that precise moment. Such a finding supports the circuit court's conclusion that it was unreasonable for Appellant to believe deadly force was necessary at that particular point in time.

In sum, our deferential standard of review requires us to affirm the circuit court's denial of Appellant's motion for immunity from prosecution under the Act. *See Jones*, 416 S.C. at 290, 786 S.E.2d at 136 ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." (quoting *Curry*, 406 S.C. at 370, 752 S.E.2d at 266)); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 (holding the General Assembly did not intend to require the circuit court "to accept the accused's version of the underlying facts" in determining a motion for

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[7] Appellant does not argue that deadly force was necessary to prevent the commission of a violent crime. *See* § 16-11-440(C) (granting a person "who is attacked in another place where he has a right to be" the right to "stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to . . . prevent the commission of a violent crime as defined in Section 16-1-60").

immunity pursuant to the Act); *Douglas*, 411 S.C. at 316, 768 S.E.2d at 238 ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility.").

II. Directed Verdict/Self-Defense

Appellant maintains the circuit court erred in declining to direct a verdict of acquittal because the State failed to disprove self-defense. We disagree.

Directed Verdict/Self-Defense Standard

"On appeal from the denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Pearson*, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "If the [S]tate has presented 'any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,' this [c]ourt must affirm the [circuit] court's decision to submit the case to the jury." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (quoting *State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004)). "The case should be submitted to the jury if there is any substantial evidence [that] reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly or logically deduced." *State v. Robinson*, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). An appellate court may reverse the circuit court only if "there is no evidence to support" the circuit court's ruling. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

Recently, there has been confusion among the bench and bar regarding what standard the circuit court should apply to a directed verdict motion when self-defense has been asserted. *Butler*, 407 S.C. at 383–85, 755 S.E.2d at 461–62 (Beatty, J., concurring). In *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011), our supreme court held that the defendant was entitled to a directed verdict on the ground of self-defense. The court began its discussion with the following language:

> "A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged." "If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury." However, when a defendant claims self-defense, the State is required to

> disprove the elements of self-defense beyond a reasonable doubt. We find the State did not carry that burden.

Id. (citations omitted) (quoting *State v. Weston*, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006)). Many have reasonably understood this language as requiring the State to disprove self-defense beyond a reasonable doubt at the directed verdict stage.[8]

However, in *Butler*, the majority reaffirmed the principle that when ruling on a directed verdict motion, the circuit court "is concerned with the existence of evidence, not its weight." 407 S.C. at 381, 755 S.E.2d at 460 (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)); *see id.* (rejecting the defendant's argument that the circuit court should have required the State to disprove self-defense beyond a reasonable doubt at the directed verdict stage). The majority also expressed its disagreement with the defendant's reliance on *Dickey* "to support her contention that the [circuit] court applied an incorrect standard at the directed verdict stage." *Id.* The court responded that it held in *Dickey* "the defendant was entitled to a directed verdict on the issue of self-defense because the *uncontroverted* facts established self-defense *as a matter of law*." *Id.* (citing *Dickey*, 394 S.C. at 501, 716 S.E.2d at 102).

Based on the foregoing, we interpret *Butler* to stand for the proposition that our well-established directed verdict standard is not altered by a defendant's claim of self-defense.

Elements of Murder and Self-defense

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2015). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (quoting *State v.*

[8] Clearly, "[w]hen self-defense is properly *submitted to the jury*, the defendant is entitled to a *charge*, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (emphases added) (quoting *State v. Addison*, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000)). The charge should also inform the jury that the State's burden "is carried by disproving any one of the four elements by proof beyond a reasonable doubt." *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). "It is the doing of a wrongful act intentionally and *without just cause or excuse*." *Id.* (emphasis added) (quoting *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002)).

> Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*. In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies "a general malignant *recklessness of the lives and safety of others*, or a condition of the mind [that] shows a heart regardless of social duty and fatally bent on mischief."

Id. (emphases added) (citation omitted) (quoting *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957)).

The elements of self-defense are:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, *a reasonably prudent man of ordinary firmness and courage would have entertained the same belief*. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant *had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did* in this particular instance.

Douglas, 411 S.C. at 318, 768 S.E.2d at 238–39 (emphases added) (quoting *Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4).

Application

At trial, the jurors viewed Appellant's December 24, 2010 videotaped interview and the home surveillance video and listened to the recordings of (1) Appellant's December 27, 2010 interview; (2) his statements to Deputy Erick Hardy while being transported to the Hilton Head substation of the Sheriff's Office; and (3) several 911 calls, including a call from Appellant. The jurors also heard testimony from Nelson, Nelson's wife, Victim's widow, Nelson's neighbors, Dr. Riemer, and those employees of the South Carolina Law Enforcement Division investigating the case.

Among these recordings and testimony was evidence from which the jury could have inferred not only a degree of recklessness that rises to the level of malice but also the unreasonableness of Appellant's stated belief that he was in imminent danger of losing his life or sustaining serious bodily injury. *See Douglas*, 411 S.C. at 318, 768 S.E.2d at 238–39 (setting forth the elements of self-defense); *In re Tracy B.*, 391 S.C. at 69, 704 S.E.2d at 80 ("Malice can be inferred from conduct [that] is so reckless and wanton as to indicate a depravity of mind and general disregard for human life."); *id.* ("[M]alice . . . signifies 'a general malignant recklessness of the lives and safety of others, or a condition of the mind [that] shows a heart regardless of social duty and fatally bent on mischief.'" (quoting *Mouzon*, 231 S.C. at 662, 99 S.E.2d at 675–76)).

Several witness accounts of the entire incident omitted any reference to an extended heated argument. According to Nelson, when he and Victim first approached Appellant, Victim ratcheted his gun and stated, "Nobody's going to take my car," but when Nelson told Victim to put his gun away, Victim placed the gun back into his waistband and never pulled it back out. Nelson expressly stated there was "no arguing, . . . no fighting, . . . no bad words" and Victim never talked to, threatened, or "attempt[ed] to do anything to [Appellant]."

When asked if she heard any of the conversation between Victim and Appellant, Victim's widow replied, "No. [Victim] . . . used to talk very soft[ly]." She also testified Victim was directing the traffic that was partially blocked by his minivan and the tow truck when Appellant shot him, and Nelson's wife gave similar testimony. The testimony of Nelson, Nelson's wife, Nelson's neighbors, Victim's widow, and Dr. Riemer established that most of the six shots fired by Appellant hit Victim in his back. Based on all of this testimony, the jury could have concluded that Appellant's belief that his life was in danger was unreasonable.

Further, Dr. Riemer testified that an exit wound from Victim's chest was "shored," indicating that Victim was pressed against a hard object when the bullet exited his body. This is consistent with the testimony of Nelson's wife and Victim's widow that Appellant continued shooting Victim even after he fell onto the street. The jury could have concluded that Appellant's recklessness rose to the level of malice. Moreover, the jury could have inferred from the evidence that Appellant could have avoided the danger by continuing to cooperate with Victim and then driving away and calling 911 to report the incident.[9]

While there was enough evidence of self-defense to warrant a jury instruction, the evidence was conflicting. Given the starkly contrasting versions of events provided by the witnesses and by Appellant,[10] witness credibility was a critical factor in this case as it was in *Butler* and *State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968). In *Richburg*, our supreme court held that the question of self-defense should be submitted to the jury when the credibility of the witnesses is in play:

> Appellant contends . . . that the [circuit court] should have directed a verdict, as a matter of law, of not guilty in favor of the defendant on the plea of self-defense. When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury. We think jury issues were made by the whole of the evidence. Among other considerations is the credibility of the witnesses, including that of the appellant himself. When there is reason to discredit a witness because of interest or otherwise[,] the [circuit court] is not required to take the case from the jury as a matter of law but may and should submit the issues, including credibility of the witnesses, to the jury.

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[9] While a person seeking immunity from prosecution under section 16-11-440(C) may use deadly force to prevent the commission of a violent crime, there is no comparable language in our case law discussing the elements of self-defense. *See, e.g.*, *Douglas*, 411 S.C. at 318, 768 S.E.2d at 238–39.

[10] Although Appellant did not testify at trial, the jury viewed his recorded interviews with police.

250 S.C. at 459, 158 S.E.2d at 772. The court added, "We do not think the [circuit court] would have been justified in telling the jury that reasonable men could not disagree as to the truthfulness of appellant's version of the killing." *Id.* at 459–60, 158 S.E.2d at 772. Likewise, in *Butler*, our supreme court noted that the defendant's credibility problems distinguished the nature of the evidence in her case from the uncontroverted nature of the evidence in *Dickey* and concluded the credibility issues had "*to be resolved by the jury*." 407 S.C. at 382, 755 S.E.2d at 460 (emphasis added).

Based on the foregoing, the circuit court properly declined to direct a verdict of acquittal. *Cf. Dickey*, 394 S.C. at 503, 716 S.E.2d at 103 (concluding "the *uncontroverted* facts establish[ed] as a matter of law that Petitioner had no other probable means of avoiding the danger other than to act as he did" (emphasis added)); *State v. Long*, 325 S.C. 59, 63, 480 S.E.2d 62, 63–64 (1997) ("While self-defense can be inferred even from the State's version of the evidence, the evidence of self-defense is not conclusive. Whether [the] appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury and whether an ordinary person would have entertained the same belief were questions for the jury.").

III. Jury Instruction

Appellant argues the circuit court erred in charging the jury on the lesser-included offense of voluntary manslaughter because there was no evidence of the element of "sudden heat of passion," i.e., that Appellant was acting under an uncontrollable impulse to do violence and was incapable of cool reflection as a result of fear. Appellant maintains, "[b]ased on the facts of this case, Appellant either shot in self defense or he acted with malice." We disagree.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). "To warrant the court eliminating the charge of manslaughter, there must be *no evidence whatsoever tending to reduce the crime from murder to manslaughter*. If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." *Id.* (emphasis added) (citation omitted).

"Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge *must* be given." *Id.* at 597, 698 S.E.2d at 608 (emphasis added).

> [F]ear resulting from an attack can constitute a basis for voluntary manslaughter. Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "*must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection*, and produce what, according to human experience, may be called an *uncontrollable impulse to do violence*." While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," it *must cause a person to lose control*.
>
> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, *the defendant's fear must manifest itself in an uncontrollable impulse to do violence*.
>
> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.

Id. at 598–99, 698 S.E.2d at 609 (emphases added) (citations omitted) (quoting *State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007)).

"In determining whether the act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

In *Cook v. State*, 415 S.C. 551, 555, 784 S.E.2d 665, 667 (2015), as in the present case, the defendant objected to the State's request for a voluntary manslaughter instruction. The circuit court had relied on the following facts in determining that a charge on voluntary manslaughter was supported by the evidence: (1) the defendant was in fear, (2) he shot the victim twice, and (3) he stated "before I knew it, I fired a shot." *Id.* at 557, 784 S.E.2d at 668. However, our supreme court held that the defendant's actions did not suggest he was acting in the sudden heat of passion. *Id.* at 559, 784 S.E.2d at 669. The court explained, "We do not believe the fact that Cook shot Victim twice or his statement 'before I knew it, I fired a shot' is evidence that Cook's fear manifested in an uncontrollable impulse to do violence." *Id.* at 558, 784 S.E.2d at 668. The court also stated,

> Here, Cook stated he tried to walk away from Victim, but Victim kept cutting him off. The fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off. In addition, Bridges testified that Cook and Victim were talking softly and that he could hardly tell they were arguing. This too does not suggest that Cook was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during Cook's statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668. The court also noted there was no physical altercation involved. *Id.* at 559, 784 S.E.2d at 669.

Likewise, our supreme court concluded there was no evidence of sudden heat of passion in *Starnes* and, therefore, upheld the circuit court's refusal to charge the jury on voluntary manslaughter. 388 S.C. at 599–600, 698 S.E.2d at 609. The defendant and the two victims, Bill and Jared, were engaged in a drug purchase with a fourth individual, Jody, at the defendant's home when Jared "pulled a gun on" Jody.

Id. at 595, 698 S.E.2d at 607. The defendant testified Jared's action "scared" him, and he went into his bedroom to retrieve his gun. *Id.* at 595, 599, 698 S.E.2d at 607, 609. As the defendant exited his bedroom, "Bill said 'whoa' and was pointing a gun at him." *Id.* at 595, 698 S.E.2d at 607. The defendant then shot Bill and Jared. *Id.* On appeal, the court acknowledged the evidence of the defendant's fear but concluded there was no evidence that the defendant was "out of control as a result of his fear or was acting under an uncontrollable impulse to do violence." *Id.* at 599, 698 S.E.2d at 609. The court stated the evidence showed that the defendant " deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." *Id.*

In the present case, however, the jury could have reasonably inferred from the evidence that when Appellant shot Victim six times, he was acting under "an uncontrollable impulse to do violence" even if the jury could have drawn an equally reasonable inference that Appellant acted in a "deliberate, controlled manner." *Id.* Admittedly, several witness accounts of the entire incident are comparable to witness accounts of the defendant and the victim "talking softly" in *Cook*. 415 S.C. at 557, 784 S.E.2d at 668. Further, Appellant told police that before he fired the fatal shots, he was in "conservation mode." When asked how many shots he fired, Appellant initially stated he remembered two shots and then compared his reaction during the incident to his reaction during a prior incident: "But I don't know when I . . . I know . . . I knew the first time on Hilton Head, I remember I emptied it . . . Well, that . . . that was a panic fire . . . the first time. *This time, I had a little bit more composure*." (emphasis added). Appellant also explained to police that the numerous shots fired at Victim were his attempt to disable Victim from killing Appellant and that he kept shooting until he saw Victim's gun slide across the road beneath him. The jury could have reasonably inferred from all of this evidence that Appellant was acting in a "deliberate, controlled manner." *Starnes*, 388 S.C. at 599, 698 S.E.2d at 609.

However, unlike the lack of *any* evidence of sudden heat of passion in *Cook* and *Starnes*, there is some evidence in the present case from which the jury could have reasonably inferred that Appellant was "incapable of cool reflection" and was acting under an "uncontrollable impulse to do violence." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 ("[S]udden heat of passion upon sufficient legal provocation is defined as an act or event that 'must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.'" (quoting *Pittman*, 373 S.C. at 572, 647 S.E.2d at 167)). First, neither *Cook* nor *Starnes* involved six gunshots to the same victim as does the

present case. Further, one of Nelson's neighbors, Elizabeth Sorto, was sitting in her family's car in their driveway after returning from a restaurant when she heard "a lot of people outside yelling." She testified she saw "one of the guys" stepping onto the truck's "side rail" and "they were just getting very argumentative and just going back and forth." Her husband, Edwin Sorto, testified that as he was going into his house to obtain some personal belongings and returning to the car, he "could hear a dispute" and when he was back in the car, he heard gunshots fired in "rapid succession."

Moreover, Nelson testified Appellant was very nervous even before Victim ratcheted his gun. Appellant told Sergeants Adams and Albertin that after he heard Victim's gun ratchet, he tried to buy some time by fumbling with his set of keys and he "kept kind of *freaking out* a little bit." (emphasis added). He also stated that when Victim asked if Appellant had any paperwork documenting Victim's vehicle, "that's when I got *really scared*. That's when you get that little pain, like right below your sternum that kind of presses inward." (emphasis added). Appellant quoted Victim as stating that he did not want law enforcement "to come look for" him. Appellant understood this statement to mean that Victim wanted to make sure there was nothing in the tow truck that would connect Appellant to Victim's vehicle. He continued, "Yeah, I've been in this business a long time[,] so now I'm *really nervous*. I knew I had my Glock in the glove box. His friend was on the way to retrieve a shotgun and I heard a pistol ratchet already . . . ." (emphasis added).

Appellant also gave the following account of his reaction to Victim ordering him to exit his truck:

> I [exited] straight out my door stepping off of the metal running boards . . . and I looked and my line of sight was through him straight down to the ground. *It's now or never*. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any information on his vehicle and . . . Ah, bye, bye, Preston . . . regardless, he was in motion, he was in draw and *I reacted*.[11]

[11] In requesting the voluntary manslaughter charge, the assistant solicitor distinguished the present case from *Starnes* by noting Appellant's numerous descriptions of the emotions he felt during the incident and arguing that, collectively, all of these expressions showed heat of passion. The circuit court relied on this argument in granting the State's request.

(emphases added).

The jury could have reasonably inferred from all of this evidence that when Appellant shot Victim six times, he was "incapable of cool reflection" and was acting under an "uncontrollable impulse to do violence" such that there was sufficient evidence of Appellant's sudden heat of passion. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 ("[S]udden heat of passion upon sufficient legal provocation is defined as an act or event that 'must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.'" (quoting *Pittman*, 373 S.C. at 572, 647 S.E.2d at 167)).

Finally, in addition to the above-referenced evidence, Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting.[12] Nelson testified that immediately

[12] *See State v. Martin*, 94 S.C. 92, 94, 77 S.E. 721, 721 (1913) ("The language and behavior of the defendant at the time of the shooting, or immediately afterwards, showing his attitude of aggression or of regret, clearly tended to enlighten the jury on the issue as to whether the shooting was done with malice, or in heat and passion, or in self-defense."); *see also Ramsey v. State*, 233 Ga. App. 810, 811, 505 S.E.2d 779, 781–82 (1998) (determining the admissibility of a defendant's after-the-fact admission to being under the influence of drugs at the time of the alleged battery and highlighting the defendant's claim of self-defense in holding, "the relevant inquiry is whether the evidence tends to show the accused's state of mind shortly before, during, or shortly after the commission of the crimes"); *cf. State v. Quick*, 107 S.C. 435, 438, 93 S.E. 127, 128 (1917) (holding the defendant's capture and return of a frightened horse to its owner at the scene of a gunfire exchange between the defendant and the victim was "part of the transaction," and the defendant's remark concerning being shot by the victim or his brother, which occurred "only a few minutes" after the shooting as he was returning the horse, "was a part of the res gestae"); *State v. McDaniel*, 68 S.C. 304, 310, 47 S.E. 384, 386 (1904) (stating that in order to be admissible into evidence, "declarations must be substantially contemporaneous with the litigated transaction, and be the instructive, spontaneous utterances of the mind *while under the active, immediate influences of the transaction*; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations" (emphasis added)); *id.* (holding that the circumstances of time and place surrounding the defendant's shooting of the victim "do not alone necessarily prevent a declaration from being

after shooting Victim, Appellant was "waving [his pistol] around and saying, ['whoever comes] near me, I [will] kill you, don't move.[']" Nelson also testified that when he asked Appellant why he killed Victim, Appellant "was just saying bad words" and "put his gun . . . on my forehead . . . [a]nd he said, [']You make another step, I [will] kill you.[']" Nelson's neighbor, Steve Varedi, recounted that immediately after Appellant shot Victim, Appellant "was waving the firearm around just erratically at everyone, myself included." Claudia Olivera gave a similar account: "[Appellant] pointed the gun at me and at everyone, and he pointed the gun to my husband's head." She testified that when she tried to get near Victim's body, Appellant told her "[']don't move or I'll shoot.[']"

The jury could have reasonably inferred from all of this testimony that when Appellant shot Victim six times, he was incapable of cool reflection and was acting under an uncontrollable impulse to do violence. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (defining sudden heat of passion upon sufficient legal provocation).

Based on the foregoing, we affirm the circuit court's decision to give the jury a voluntary manslaughter instruction. *See id.* at 596, 698 S.E.2d at 608 ("To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter. If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." (citation omitted)).

CONCLUSION

We affirm the denial of Appellant's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act. We also affirm Appellant's convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime.

AFFIRMED.

MCDONALD and HILL, JJ., concur.

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part of the res gestae, but they are factors, with other circumstances, in determining whether the declarations were the *spontaneous utterances of the mind under the immediate influence of the transaction*" (emphasis added)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wallace Steve Perry, Appellant.

Appellate Case No. 2014-002654

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

Opinion No. 5503
Heard April 11, 2017 – Filed July 26, 2017

AFFIRMED

Kerri Brown Rupert, of Murphy & Grantland, PA, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Vann Henry Gunter, Jr., both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Wallace Steve Perry appeals his convictions for two counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree CSC. He argues the trial court erred in (1) finding his former stepdaughter's testimony was

admissible as evidence of a common scheme or plan and (2) allowing a doctor to improperly comment on the veracity of his daughter's testimony. We affirm.

FACTS/PROCEDURAL HISTORY

In 1993, Perry met and began dating Laura Jones (Mother). Perry and Mother had two sets of twins: Daughter One and Daughter Two born in 1994 and Daughter Three and Son born in 1996. After Mother and Perry separated in August 2000, they agreed Perry would have visitation with the children on weekends and holidays. In March 2012, Daughter Three revealed to Mother that Perry had sexually abused her during visitation. After Daughter Three's disclosure, Daughter Two informed Mother that she had also been sexually abused by Perry.[1] Mother later contacted the Department of Social Services (DSS) to report the abuse, and DSS reported the incident to the Greenville Police Department. Perry was subsequently indicted for two counts of first-degree CSC and two counts of second-degree CSC. His trial was held in December 2014.

Before the trial began, the State proffered the testimony of Brandy Newcomer, Perry's stepdaughter from a prior marriage, regarding abuse Perry allegedly inflicted on her. The State proffered this testimony under Rule 404(b), SCRE, as evidence of a common scheme or plan. During a discussion with the trial court before the proffer, the solicitor noted that unlike with Daughter Two and Daughter Three, Perry's abuse of Newcomer "progress[ed] on into actual vaginal/penile penetration." However, the solicitor acknowledged that portion of Newcomer's account of the abuse would "not be admissible because it [went] beyond the scope of similar" and could be excluded by the court pursuant to *State v. Wallace*.[2]

During the proffer, Newcomer[3] testified her mother married Perry when Newcomer was five years old. She stated that when she was nine years old, Perry entered her room one night and digitally penetrated her vagina. According to Newcomer, Perry continued to abuse her periodically over the next four years, and

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[1] Daughter One and Son never alleged they were abused by Perry.

[2] 384 S.C. 428, 434–35, 683 S.E.2d 275, 278–79 (2009) (finding evidence that the appellant abused the victim's older sister was properly admitted under Rule 404(b), SCRE, as evidence of a common scheme or plan and permitting the trial court to redact dissimilar particulars of sexual conduct to avoid unfair prejudice).

[3] Newcomer was thirty-six years old at the time of Perry's trial.

she estimated he digitally penetrated her about twenty times. Newcomer testified the abuse progressed when she was thirteen or fourteen. She stated, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." Newcomer testified that around that time, Perry also came into the bathroom while she was taking a bath and "had to bathe [her] before [she] could go." She stated the abuse ended when she was fourteen.

Newcomer stated she did not disclose the abuse right away because Perry had told her no one would believe her and her accusations would hurt the family. Newcomer told her mother about the abuse when she was fourteen years old, and her mother divorced Perry shortly thereafter. When asked why the case did not go to trial, Newcomer stated she had told her mother she did not want to go to court because she was afraid Perry would kill her family.

According to the State, Newcomer's testimony was proper under the common scheme or plan exception of Rule 404(b) because of the similarities between Perry's abuse of Newcomer and his abuse of Daughter Two and Daughter Three. In response, Perry contended Newcomer's testimony was inadmissible propensity evidence. When the court inquired whether DSS had any records of Perry's abuse of Newcomer, the State said it had some records that indicated the allegations were investigated. However, the State noted Perry was not tried for the charges of abuse against Newcomer because, at the time, Newcomer was pregnant, she suffered from some mental health issues, and there were concerns that the defense would characterize her as sexually promiscuous. As a result, Perry completed a pretrial intervention program and did not admit any guilt. After hearing the proffer and the parties' arguments, the trial court decided to reserve its ruling on whether Newcomer would be permitted to testify.

During the trial, Daughter Three[4] testified that after Mother and Perry separated, Perry moved into a three-bedroom apartment and she shared a room and an air mattress with Daughter One and Daughter Two. According to Daughter Three, around five or six o'clock in the morning, Perry would come into the bedroom Daughter Three shared with her sisters and would get in bed with them. When asked to describe the abuse, Daughter Three recalled Perry digitally penetrating her vagina about five times but stated the abuse did not progress beyond that. According to Daughter Three, the abuse occurred when she was around ten or eleven years old.

[4] Daughter Three was eighteen years old at the time of the trial.

After the abuse ended, Daughter Three continued visiting Perry on the weekends until she disclosed the abuse when she was around sixteen years old. Daughter Three explained that she waited to tell Mother what was going on because Perry had told her "that if we told anybody, we would be the ones who got in trouble and [would] get taken away from my mom." Daughter Three stated she initially disclosed the abuse to her youth group leader, who encouraged her to tell Mother.

Daughter Two[5] subsequently testified. She stated Perry first molested her when she was between five and seven years old.[6] When asked about the first time Perry abused her, Daughter Two stated she was lying on Perry's bed watching television when he entered the room, lay down next to her, and digitally penetrated her vagina. According to Daughter Two, Perry stated that if she told anyone about what had happened, she "would get in just as much trouble as he would" and would be taken away from Mother. Daughter Two testified that after the first incident, Perry began molesting her almost every weekend during visitation. She stated that around five or six a.m. on Saturday and Sunday mornings, Perry would get in the bed Daughter Two shared with her sisters or lie on the floor next to the bed and digitally penetrate her. Daughter Two testified she never tried to wake up her sisters because she was scared they would tell Mother.

Daughter Two recalled Perry moved into a two-bedroom apartment in 2007, where she shared a room and a bed with Daughter Three, Perry shared a room with Son, and Daughter One slept on the couch. Daughter Two testified Perry continued digitally penetrating her in the early morning hours at the new apartment; however, the abuse also progressed to oral sex on two occasions. According to Daughter Two, Perry orally penetrated her vagina late one night while she was sitting in a chair and early one morning while she was in bed with Daughter Three. Daughter Two stated

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[5] Daughter Two was twenty years old at the time of the trial.

[6] Daughter Two initially testified Perry began molesting her when she was seven years old. However, on cross-examination, Perry's counsel asked Daughter Two whether she "testified earlier that [she was] accusing [Perry] of starting to touch [her] inappropriately at age [five]." Daughter Two replied, "Yes, ma'am. I think there is some kind of blockage there from the ages of [five] to [seven]. I tried to block it out for so long. I can't really remember." She later admitted she was not sure of the age and stated she remembered Perry first sexually abusing her when she was seven years old.

the abuse ended when she was fifteen years old, and she disclosed the abuse to Mother after Daughter Three's disclosure.

Before beginning the second day of trial, the trial court informed the parties that after considering Newcomer's proffer, it was inclined to allow her to testify. Perry again objected, arguing Newcomer's testimony was prejudicial and would confuse the jury. He further argued Newcomer's testimony was inadmissible to show a common scheme or plan because it was not similar enough to Daughter Two's and Daughter Three's testimony. Additionally, Perry argued he could not determine whether Newcomer had changed her story about the abuse because the records from the solicitor's office relating to the previous charges against him had been destroyed. The trial court subsequently found there was clear and convincing evidence that the prior bad act had occurred and Newcomer's testimony was probative and admissible under the 404(b) exception.

Newcomer's testimony before the jury was substantially similar to her proffered testimony, including that (1) the abuse began when she was nine years old and ended when she was fourteen; (2) Perry was her stepfather at the time of the abuse; (3) the abuse typically occurred in her bedroom, except for one incident when she was fourteen when Perry bathed her; (4) Perry told her that if she disclosed the abuse, no one would believe her and her accusations would hurt the family; and (5) the abuse typically consisted of digital penetration. However, Newcomer added that the abuse had progressed to oral sex one time, which she failed to specifically discuss in her proffer. She also estimated Perry had digitally penetrated her five times, rather than the estimate of twenty she made during the proffer.

The State also called Dr. Nancy Henderson, a pediatrician for Greenville Health System, to testify. After being qualified as an expert in the field of pediatric medicine and child sexual assault examinations, Dr. Henderson testified about examining Daughter Two and Daughter Three after they disclosed the sexual abuse. Dr. Henderson stated that before the examinations, she spoke to Daughter Two and Daughter Three about what had occurred.

During her discussion of her examination of Daughter Three, Dr. Henderson testified the results were normal and noted "[i]t would have been very unlikely . . . to find anything on the exam" because of the delayed disclosure. Dr. Henderson was subsequently asked whether her findings were consistent with Daughter Three having experienced sexual abuse. She responded, "Yes." Perry objected, arguing

Dr. Henderson was improperly vouching for Daughter Three. The trial court noted the issue was "close"; however, it ultimately overruled the objection, stating Dr. Henderson had merely "testified that [her] findings were consistent."

After the State rested, Perry took the stand and denied molesting Daughter Two and Daughter Three. At the conclusion of the trial, the jury found Perry guilty of all charges. The trial court sentenced Perry to concurrent sentences of thirty years' imprisonment for each conviction of first-degree CSC and twenty years' imprisonment for each conviction of second-degree CSC. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in finding Newcomer's testimony was admissible as evidence of a common scheme or plan?

II. Did the trial court err in finding Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony?

STANDARD OF REVIEW

In criminal cases, an appellate court may review only errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Newcomer's Testimony

Perry argues the trial court erred in finding Newcomer's testimony admissible as evidence of a common scheme or plan. He further contends the trial court erred in finding Newcomer's testimony more probative than prejudicial under Rule 403, SCRE. We disagree.

To admit evidence of prior bad acts, the trial court must first determine whether the proffered evidence is relevant.[7] *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the trial court finds the evidence relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) to show, *inter alia*, the existence of a common scheme or plan. *Id.* Even if the testimony is relevant and admissible under Rule 404(b), the trial court must apply Rule 403 and exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.* at 155–56, 682 S.E.2d at 896.

A. Rule 404(b), SCRE

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* For evidence of a prior bad act to be admissible to show the existence of a common scheme or plan, the trial court must find the evidence (1) is clear and convincing and (2) bears a close degree of similarity to the crimes charged. *Clasby*, 385 S.C. at 155, 682 S.E.2d at 895–96.

i. Clear and Convincing Evidence

Perry contends there are "clear issues with whether the prior bad act occurred." He points to the fact that there was no trial and the solicitor's office did not have any records for the charges related to Newcomer's allegations.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "[W]e do not review a trial [court's] ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of the bad act evidence, the trial [court's] ruling will not be disturbed on appeal." *Id.*; *see also Wallace*, 384 S.C. at

[7] Perry did not challenge the relevance of Newcomer's testimony during his trial or on appeal. Therefore, we have not addressed this issue. *See State v. Scott*, 405 S.C. 489, 498 n.10, 748 S.E.2d 236, 241 n.10 (Ct. App. 2013) (declining to address the issue because the appellant "never argued the bad act testimony was not relevant").

432 n.2, 683 S.E.2d at 277 n.2 ("Bad act evidence that is not subject to a conviction must be shown by clear and convincing evidence and is reviewed under an 'any evidence' standard on appeal.").

In *Wilson*, our supreme court applied the any evidence standard of review and found a witness's testimony that she saw the defendant give a woman a plastic bag containing a white rock substance in exchange for twenty dollars was admissible evidence of a prior bad act. 345 S.C. at 6–7, 545 S.E.2d at 829–30. Focusing on the contents of the witness's testimony, our supreme court found the testimony amounted to "evidence of a prior drug transaction" and determined the issue of the witness's credibility was for the jury's consideration. *Id.*

Here, the trial court found there was clear and convincing evidence that the prior bad act had occurred. During the proffer, Newcomer provided a detailed description of the abuse, including where and when the abuse occurred and specific details of the sexual battery. As in *Wilson*, Newcomer's testimony was sufficient to provide evidence of the prior bad act and her credibility was an issue for the jury's consideration. *See id.* Thus, there is evidence to support the trial court's ruling.

ii. Close Degree of Similarity

Perry argues the trial court erred in finding Newcomer's testimony was admissible under Rule 404(b), SCRE, because there was not a close degree of similarity between the alleged abuse of Newcomer and the alleged abuse of Daughter Two and Daughter Three. We disagree.

If the trial court concludes there is clear and convincing evidence that the defendant committed the prior bad act, the court must determine whether the prior bad act falls within the common scheme or plan exception. *Clasby*, 385 S.C. at 155, 682 S.E.2d at 896. "When determining whether evidence is admissible as [part of a] common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 277–78. "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *Id.* at 433, 683 S.E.2d at 278.

In cases involving sexual abuse, the trial court should consider the following non-exhaustive list of factors when determining whether there is a close degree of

similarity between the prior bad act and the charged crime: "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." *Id.* at 433–34, 683 S.E.2d at 278.

Our supreme court applied the above factors in *Wallace* and found that because of the close degree of similarity between the abuse suffered by both the victim of the charged offense and her sister, the sister's testimony about the prior bad act was admissible under Rule 404(b). *Id.* at 434, 683 S.E.2d at 278. Specifically, the court noted the similarities included the defendant's "relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it." *Id.*

The *Wallace* court noted there was a difference in the type of sexual battery inflicted on the victim and her sister. *Id.* The victim testified the defendant had touched her breasts and had digitally penetrated her before she reported the abuse. *Id.* at 431, 683 S.E.2d at 276–77. However, the sister testified during an in camera hearing that digital penetration and oral sex eventually progressed to sexual intercourse. *Id.* at 434, 683 S.E.2d at 278. The trial court determined that to avoid unfair prejudice to the defendant, any testimony regarding sexual intercourse would not be allowed when the sister testified before the jury. *Id.* Our supreme court agreed with the trial court's decision to redact a portion of the sister's testimony and found it did not make the two acts seem more similar than they actually were. *Id.* Rather, our supreme court noted the trial court had "redacted only the last step in a progressive course of abuse" and "[t]he fact that [the victim's] abuse was interrupted before it could culminate in intercourse [did] not diminish the similarity between the progression the abuse took in each case." *Id.* at 435, 683 S.E.2d at 278. Our supreme court also approved of trial courts redacting "dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant." *Id.*

In the instant case, there was a close degree of similarity between the testimony of Newcomer and that of Daughter Two and Daughter Three. Applying the *Wallace* factors to Perry's abuse of all three victims, we find the following similarities: (1) the abuse primarily occurred during the victims' preteen and early teenage years; (2) Perry had a parent-child relationship with the victims; (3) the abuse always occurred at Perry's house and typically occurred in the victims'

bedrooms while they were sleeping; (4) Perry used threats to prevent the victims from disclosing the abuse; and (5) the abuse primarily involved digital penetration.

Perry contends there are several dissimilarities between the charged crimes and the prior bad act. In terms of his first argument regarding the victims' ages, we acknowledge the victims' abuse did not occur for an identical length of time or at the exact same ages: (1) Newcomer stated she was abused between the ages of nine and fourteen; (2) Daughter Three testified she was ten or eleven years old when Perry abused her; and (3) Daughter Two stated the abuse began when she was between five and seven years old and ended when she was fifteen years old.[8] There was a discrepancy regarding when Daughter Two was first abused—Daughter Two stated the abuse could have begun when she was five years old but explained that she remembered Perry first sexually abusing her when she was seven years old. Regardless of whether the abuse began when Daughter Two was five or seven, her abuse began at an earlier age than the abuse of Newcomer and Daughter Three. However, we find this factor still amounts to a similarity in light of the fact that the abuse of all three victims primarily occurred during the victims' preteen and early teenage years.

Perry also asserts (1) the abuse allegedly occurred at different locations and times and (2) the content of the threats he allegedly made was different. All of the abuse took place at Perry's then-current home and primarily occurred in the victims' bedrooms. The abuse also occurred at night or early in the morning[9] when the victims were in bed. In terms of threats, we note that Newcomer testified Perry told her that no one would believe her and that her accusations would hurt the family, while the threats to Daughter Two and Daughter Three focused on the fact that they would get into trouble and would be taken away from Mother. These threats all share

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[8] According to Perry, Daughter Two claimed she was abused until she was almost seventeen years old. However, Daughter Two was explaining how old she was when Perry moved to Columbia when she referred to being almost seventeen years old. Daughter Two stated Perry did not abuse her when he lived in Columbia, and she explicitly stated on cross-examination that the abuse ended when she was fifteen years old. We note other witnesses stated she informed them the abuse ended when she was sixteen years old.

[9] Newcomer never stated a specific time the abuse occurred, only that it occurred at night; however, Daughter Two and Daughter Three testified the abuse occurred between five and six a.m., when it was still dark outside.

a common thread—potential harm to the family unit. Furthermore, although the threats were not identical, the wording is less important than the fact that all of the threats were made in an attempt to prevent the victims from disclosing the abuse.

Finally, Perry points to the fact that Newcomer and the State "indicated the sexual abuse progressed to intercourse" and the court redacted that portion of her testimony, but Daughter Two and Daughter Three did not make similar allegations. However, Newcomer never testified that intercourse occurred. During a discussion with the trial court before the proffer, the solicitor noted that unlike with Daughter Two and Daughter Three, Perry's abuse of Newcomer "progress[ed] on into actual vaginal/penile penetration." The solicitor acknowledged that portion of Newcomer's account of the abuse would "not be admissible because it [went] beyond the scope of similar" and could be excluded by the court pursuant to *Wallace*. During the proffer, Newcomer testified that Perry had digitally penetrated her numerous times and then stated the abuse progressed when she was thirteen or fourteen. She stated, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." Before the jury, Newcomer testified regarding the digital penetration and included the fact that the abuse had progressed to oral sex once. Although Newcomer's proffered testimony regarding the abuse progressing and the penetration starting could have been a reference to sexual intercourse, it is not clear from her testimony whether sexual intercourse occurred. Because the only information in the record about Perry and Newcomer engaging in sexual intercourse came from the solicitor, this court cannot consider that information when determining whether Newcomer's testimony was admissible under Rule 404(b). *See Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."). However, even assuming arguendo that sexual intercourse occurred and can be considered by this court, it was permissible for the trial court to redact any dissimilar portions of Newcomer's testimony in light of all of the existing similarities. *See Wallace*, 384 S.C. at 435, 683 S.E.2d at 278 ("[T]he trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant.").

In light of the foregoing, the similarities of the prior bad act and the charged crimes outweigh the dissimilarities. *See id.* at 433, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)."). Accordingly, the trial court did not abuse its discretion in finding Newcomer's testimony was admissible under Rule 404(b), SCRE. *See Saltz*, 346

S.C. at 121, 551 S.E.2d at 244 (stating "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion").

B. Rule 403, SCRE

Perry next contends that if this court finds Newcomer's testimony admissible under Rule 404(b), it should still be excluded because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. We disagree.

Once the prior bad act is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. Rule 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." "[E]ven though we have already considered, pursuant to Rule 404(b), whether the similarities outweighed the dissimilarities, we must now reconsider the similarities and dissimilarities, as well as temporal remoteness and other factors, pursuant to Rule 403 . . . ." *Scott*, 405 S.C. at 506, 748 S.E.2d at 245; *see also State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601–02 (Ct. App. 2012) (reconsidering the similarities of the prior bad act and the charged crime to ascertain total probative value and, subsequently, comparing this probative value to the danger of unfair prejudice).

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Perry first argues the trial court, when performing its Rule 403 analysis, failed to consider the fact that Newcomer testified the abuse progressed to intercourse, which was different from Daughter Two's and Daughter Three's testimony. As noted above, the only information in the record about Perry and Newcomer engaging in sexual intercourse came from the solicitor during a discussion with the trial court before the proffer; Newcomer never explicitly testified intercourse occurred. Therefore, the trial court was not permitted to consider this information. *See Ex*

parte Morris, 367 S.C. at 64, 624 S.E.2d at 653 ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

Perry also contends the prior bad act testimony was inadmissible under Rule 403 because there was an issue regarding whether the prior bad act actually occurred. We are cognizant of the fact that Perry was never convicted of the prior bad act; however, as stated above, the trial court correctly found there was clear and convincing evidence that the prior bad act occurred.

Perry next asserts the prior bad act testimony was inadmissible under Rule 403 because of the temporal remoteness between the prior bad act and the charged offenses. When remoteness is an issue in a case, it "is pertinent to determining total probative value." *Scott*, 405 S.C. at 506, 748 S.E.2d at 245. Nonetheless, the trial court does not necessarily err when it permits testimony about a bad act occurring many years prior to the charged crime. *See State v. Tutton*, 354 S.C. 319, 332 n.5, 580 S.E.2d 186, 193 n.5 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."); *see also Scott*, 405 S.C. at 509, 748 S.E.2d at 247 ("The trial court did not abuse its discretion in admitting evidence of [the appellant's] bad acts, occurring some eleven to twenty years prior to the crimes charged."); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) ("That the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of [the victim] is not alone dispositive."). Although the prior bad act occurred seven to nine years before the abuse of Daughter Two and fourteen or fifteen years before the abuse of Daughter Three,[10] we do not believe this gap diminishes the probative value of Newcomer's testimony, especially when considering the fact that Daughter Two and Daughter Three were not born until approximately two and four years, respectively, after the abuse of Newcomer ended.

Furthermore, the similarities between the prior bad act and the charged crimes outweigh the dissimilarities, and the dissimilarities do not result in the danger of

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[10] Newcomer was thirty-six at the time of the December 2014 trial and testified the abuse ended when she was fourteen years old, or in approximately 1992. Daughter Two testified she was born in 1994 and the abuse began when she was between five and seven years old, or between approximately 1999 and 2001. Daughter Three testified she was born in 1996 and the abuse began when she was about ten or eleven years old, or in approximately 2006 or 2007.

unfair prejudice substantially outweighing the probative value. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."). Accordingly, the trial court did not abuse its discretion in admitting Newcomer's testimony. *See Saltz*, 346 S.C. at 121, 551 S.E.2d at 244 (stating "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion").

II. Improperly Commenting on Veracity of Testimony

Perry argues the trial court erred in finding Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony. We disagree.

"While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013).

In *State v. Jennings*, our supreme court considered the admission of a forensic interviewer's reports, which included statements that each child victim had provided "a compelling disclosure of abuse" and had provided details that were consistent with the background information the forensic interviewer had received from their mother, the police report, and the other children. 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Our supreme court found the trial court erred in admitting the reports, stating, "There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *Id.*; *see also Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (finding the forensic interviewer's testimony about a "compelling finding" was inappropriate because it "was the equivalent of [the forensic interviewer] stating [the victim] was telling the truth"); *State v. Dawkins*, 297 S.C. 386, 387, 393–94, 377 S.E.2d 298, 299, 302 (1989) (finding improper a psychiatrist's affirmative response when asked his opinion as to whether the victim's symptoms of sexual abuse were "genuine"); *State v. Dempsey*, 340 S.C. 565, 568–69, 571, 532 S.E.2d 306, 308–09 (Ct. App. 2000) (finding an expert in child sexual abuse improperly vouched for the victim when he testified that children are truthful in ninety-five to ninety-nine percent of the instances in which sexual abuse is alleged).

However, when the expert witness gives no indication about the victim's veracity, it does not amount to bolstering. In *State v. Douglas*, a forensic interviewer described the method she generally used to interview child sexual abuse victims and stated that after she interviewed Douglas's victim, she recommended the victim be taken for a medical examination. 367 S.C. 498, 516–17, 626 S.E.2d 59, 68–69 (Ct. App. 2006). This court considered the forensic interviewer's testimony and found "[t]he only reasonable inference the jury could have drawn from [the interviewer's] testimony [was] that she believed the victim told the truth about being sexually assaulted." *Id.* at 520, 626 S.E.2d at 71. Despite this finding, this court determined the defendant had not shown the jury's verdict was influenced by the interviewer's testimony, and it ultimately affirmed the defendant's conviction. *Id.* at 520–21, 527, 626 S.E.2d at 71, 74. Our supreme court granted certiorari and affirmed the result; however, it determined the court of appeals erred in concluding the only reasonable inference to be drawn from the forensic interviewer's testimony was that she believed the victim was telling the truth. 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009). Our supreme court noted the forensic interviewer described her general procedure for conducting a forensic interview, stating she and the child she was interviewing would talk "a lot about telling the truth" and would make "an agreement with each other that [she would] tell [the child] the truth and that [the child would] tell [her] the truth[;] if [they got] past that, if the child [agreed] to do that, [they would] go on." *Id.* at 504, 671 S.E.2d at 609. However, our supreme court noted that when the forensic interviewer described her interview with the victim in the case at issue, she "never stated she believed [the victim]; she did not even state the [victim] . . . agreed to tell her the truth, and she gave no indication concerning [the victim's] veracity." *Id.* at 503–04, 671 S.E.2d at 609; *see also State v. Smith*, 411 S.C. 161, 172–73, 767 S.E.2d 212, 218 (Ct. App. 2014) (finding the State's question regarding whether the length of a delay affects the credibility of a disclosure of abuse was inappropriate because it invited vouching and the social worker's initial response, when viewed in isolation, would constitute vouching, but ultimately finding no reversible error after considering the entirety of the social worker's testimony and recognizing the social worker had qualified his response and had never given an opinion regarding whether the victim was telling the truth).

In the instant case, the following exchange occurred during Dr. Henderson's discussion of her examination of Daughter Three:

Q. Okay. Based on what Daughter Three shared with you, did you expect to find any indications of injury?

A. It would have been very unlikely based on the information that she had shared to find anything on the exam. . . . The incidents had happened at least three years prior. So the genital area has incredibly good blood supply and even small tears or even larger tears can heal very, very quickly. So with there being years delay between the last incident and the time of the exam, it would make it unlikely to find something on the exam. . . .

Q. [W]hat were the findings of your examination?

A. She had a little bit of discharge. . . . [T]he rest of her exam was normal.

Q. And what is -- what does normal mean?

A. Normal means that there were no tears, no scars, . . . and there were no specific findings on her exam that in and of itself would have linked to allegations of abuse. But in light of what she had shared with me and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case.

Q. So in your opinion, were your findings consistent with Daughter Three having experienced sexual abuse?

A. Yes.[11]

[11] Dr. Henderson also testified that Daughter Two had a normal examination, which she said was "quite common . . . with those type of allegations." When asked whether her findings regarding Daughter Two were consistent with the possibility that Daughter Two had also experienced sexual abuse, Dr. Henderson stated, "Yes, a normal exam would be consistent with those types of findings, with those allegations that she had made." She explained that even with long-term abuse, it is very

Although the "consistent with sexual abuse" question was inartfully worded, the response it elicited did not amount to improper bolstering. Arguably, when considered in isolation, Dr. Henderson's response could be interpreted as she believed Daughter Three's allegations and, therefore, also believed Daughter Three could have been sexually abused despite her normal examination. However, when reviewing the entirety of Dr. Henderson's testimony, it is unlikely her response would reasonably be viewed by the jury as a comment on the credibility of Daughter Three. *See Smith*, 411 S.C. at 172–73, 767 S.E.2d at 218 (considering the objected-to response of the expert witness in the context of his entire testimony and finding the expert's testimony did not improperly bolster the victim's credibility). Dr. Henderson explained that Daughter Three's examination was normal and "there were no specific findings on her exam that . . . would have linked to allegations of abuse." She also noted that normal results are common in instances where there is a delayed disclosure. In light of this testimony, the most likely interpretation of Dr. Henderson's response to the "consistent with sexual abuse" question is that normal examination results do not rule out a sexual assault in delayed disclosure cases. *Cf. Chavis*, 412 S.C. at 109, 771 S.E.2d at 340 (finding the expert's recommendation that the appellant not be around the victim for any reason could "*only be interpreted* as [the expert] believing [the victim's] claim that [the appellant] sexually abused her" (emphasis added)); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding the trial court erred in admitting the forensic interviewer's reports because "*[t]here [was] no other way to interpret* the language used in the reports other than to mean the forensic interviewer believed the [child victims] were being truthful" (emphasis added)).

Moreover, although Dr. Henderson mentioned that she considered Daughter Three's history, Dr. Henderson did not comment on the truthfulness of that history or repeat to the jury the details of what Daughter Three had told her. Additionally, she never commented on Daughter Three's veracity. *See Douglas*, 380 S.C. at 503–04, 671 S.E.2d at 609 (finding the forensic interviewer did not vouch for the victim's veracity when the interviewer never stated she believed the victim and gave no other indication concerning the victim's veracity). Furthermore, Dr. Henderson was permitted to provide this opinion, as it could assist the jury in understanding the effect of a delayed disclosure on the results of a medical examination. *See* Rule 702, SCRE ("If . . . specialized knowledge will assist the trier of fact to understand the

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uncommon to see evidence of the abuse during the examination. Perry did not object to this testimony during the trial and has not challenged this testimony on appeal.

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Accordingly, we affirm the trial court's determination that Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony.

CONCLUSION

For the foregoing reasons, we affirm Perry's convictions.

AFFIRMED.

MCDONALD and HILL, JJ., concur.