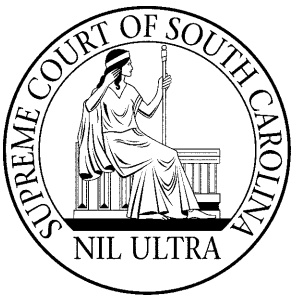

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
August 22, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Dutch Fork Development Group II, LLC and Dutch Fork Realty, LLC, Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb, Defendants, of whom Stephen E. Lipscomb is the, Appellant.

Appellate Case No. 2008-087486

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we withdraw our original opinion and substitute it with a revised opinion.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ James E. Moore A.J.

Columbia, South Carolina
August 22, 2012

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Dutch Fork Development Group II, LLC and Dutch Fork Realty, LLC, Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb, Defendants, of whom Stephen E. Lipscomb is the, Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27139
Heard May 2, 2012 – Refiled August 22, 2012

REVERSED

A. Camden Lewis and Keith M. Babcock, both of Lewis and Babcock, of Columbia, for Appellant.

Carmen Vaughn Ganjehsani and Charles E. Carpenter, Jr., both of Carpenter Appeals and Trial Support, of Columbia; Glenn E. Bowens, of Blythewood, and Anthony S. H. Catone, of Lexington, for Respondents.

JUSTICE BEATTY: Stephen E. Lipscomb ("Appellant"), the manager of SEL Properties, LLC ("SEL") appeals a jury verdict against him for tortious interference with a contract entered into by SEL with Dutch Fork Development Group, II, LLC and Dutch Fork Realty, LLC (collectively "Respondents"). Appellant contends that he, as the manager of the limited liability company, cannot be held individually liable in tort for a contract that was breached by SEL. Alternatively, Appellant challenges the jury's award of $3,000,000 in actual damages to Respondents on the grounds: (1) the trial judge erred in charging the jury that lost customers and lost goodwill were elements of damages as there was no evidence of such damages; and (2) the award was improper and should have been reduced as the actual damages for the tort claim were "coextensive" with or subsumed in the jury's award of actual damages to Respondents for the breach of contract claim against SEL. After we issued our original opinion finding that Appellant was entitled to a directed verdict as to the claim of tortious interference with a contract and, in turn, reversing the jury's award of damages, Respondents petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion, and substitute it with this opinion that revises the conclusion section of the original opinion.

I. Factual/Procedural History

As a result of discussions with Donald and William Melton, members of Dutch Fork Development Group, II, LLC ("DFDG") and Dutch Fork Realty, LLC ("DFR"), SEL purchased a 122.28-acre piece of property in Richland County for $800,000 on August 8, 2000. The property, which was to be known as Rolling Creek Estates, was the subject of two contracts entered into between SEL and Respondents for the development of residential subdivisions.

The parties entered into the first contract on November 14, 2000, which involved the development of the Courtyards at Rolling Creek ("Courtyards") in Phases I, II, and III. The second contract, which was entered into on October 17, 2002 and contained substantially the same terms as the first contract, involved the development and marketing of a 14.9-acre parcel that was to be known as Rolling Creek Phase 4 ("Rolling Creek").

Pursuant to the first contract, the parties agreed to develop the Courtyards in three phases over the five-year term of the contract. SEL was responsible for: securing financing for the purchase of the property; securing engineering studies, surveying, and landscaping; and the costs related to the infrastructure. SEL also had "final approval of all costs pertaining to the development of the property."

In terms of Respondents, DFDG was responsible for the development of the property. In consideration of adequate performance, SEL was to pay DFDG: (1) a development fee of $54,000 for each phase of the development, which was contingent upon the sale of 60% of the lots developed in the phase and the "letting" of the contract of the next phase; and (2) 25% of the net profits received from the sale of the lots sold in each of the three phases.

DFR was granted the "exclusive right to sell" for "a period of five (5) years provided that DFR [sold and closed] no less than twenty (20%) percent of the lots available for sale per year in each Phase of the development." Additionally, DFR was granted the "exclusive right to sell new homes constructed in the development at a sales commission not to exceed seven (7) percent" for a period of "twelve (12) months after construction is commenced on the home." DFR was also entitled to a real estate commission of 10% upon the closing of the sale of developed lots to non-builders; however, DFR would not receive a commission for any lot sales to builders.

On November 19, 2001, SEL obtained a loan from the National Bank of South Carolina ("NBSC") in the amount of $2,001,375 to provide for the development of Phase I of the Courtyards. Shortly thereafter, SEL was

reimbursed $800,000 from the loan proceeds for the original land acquisition. Appellant, however, personally guaranteed that the development loan would be repaid and that expenses would be covered.

According to Respondents, the sale of lots was delayed for nearly a year due to SEL's failure to obtain a bonded plat until August 22, 2002, which, in turn, prevented DFR from initiating sales until the infrastructure was completed. After the infrastructure was installed, it was discovered that the roads were subject to isolated pavement failures. Because the repairs were not made expeditiously, a decision Respondents attributed to SEL's failure to fund, the road sustained significant deterioration that resulted in costly reconstruction and delays in sales.

In addition to these structural delays, Respondents discovered that Appellant, without the knowledge of DFDG, contacted the project engineer to redesign the development plans for Phases II and III. SEL's failure to promptly pay the engineering firm delayed the final approval of the redesigned plans until March 1, 2007 and, in turn, DFR's sale of the lots in this portion of the Courtyards.

These delays were compounded by financial problems as Phase I incurred expenses that exceeded the original budget and proceeds from the development loan. Due to the resultant cash flow problem, SEL incurred overdraft charges and work delays stemming from the failure to promptly pay the engineering firm and contractors.

Respondents' dissatisfaction with SEL's handling of the project was exacerbated by the discovery that lots were being sold at a price below fair market value to K&L Contracting, LLC ("K&L"), a home construction company that was managed in part by Appellant. According to Respondents, these sales from SEL to K&L circumvented its "exclusive right to sell" and prevented them from receiving commissions on homes that were sold by K&L.

By letter dated May 28, 2004, SEL terminated the development contract. In the letter, SEL referenced the "numerous road problems and

budget problems throughout the development." As the primary basis for termination, SEL cited "[t]he failure of DFDG and DFR to sell at least twenty (20%) percent of the available lots in any one year period." Respondents challenged the termination, asserting the requisite number of lots had been sold.

Following the termination, SEL continued to sell and close lots. Ultimately, SEL entered into a contract on September 15, 2006 with Essex Homes, SE, Inc. ("Essex Homes") in the amount of $7,633,000 for the development of Phases II and III.

In February 2005, Respondents filed an action against SEL and Appellant. As to SEL, Respondents alleged causes of action for breach of contract and breach of contract accompanied by a fraudulent act. Respondents further alleged against Appellant, in his individual capacity, causes of action for conversion and tortious interference with a contract.

At trial, Appellant admitted that Respondents were owed money as a result of SEL's breach of the two contracts.[1] Appellant, however, disputed that Respondents were entitled to $3,030,667[2] in total damages,[3] which was

[1] Appellant acknowledged that Respondents had in fact complied with the sales requirement of the contract and were only three lots short of reaching the 60% mark to proceed to the next phase. He, however, claimed that at the time the termination letter was written he mistakenly believed Respondents were required to sell two lots per month.

[2] This amount represents: $162,000 (Development Fees) + $1,121,950 (Profit Split) + $1,746,717 (Real Estate Commissions) = $3,030,667

[3] In his closing argument, defense counsel claimed the damages should total $242,717. According to counsel, this amount represented Phase I and Phase IV damages plus the development fee for Phase IV. This amount was based on the testimony of SEL's expert witness, Marty Ouzts, who limited his calculation of damages to those that were incurred prior to the intended expiration of the contract in November 2005.

the amount claimed by Respondents' expert witness, Lynn Richards. Appellant also maintained that his decisions and actions regarding the project were not made for his personal benefit but, rather, on behalf of SEL.

Prior to the submission of the case to the jury, the judge directed a verdict in favor of Appellant as to Respondents' cause of action for conversion. Additionally, the judge directed a verdict in favor of Respondents as to SEL's breach of the contract in failing to pay Respondents the Phase I development fees in the amount of $54,000. In the charge, the judge noted this ruling and instructed the jury on the remaining breach of contract claims against SEL and recoverable damages. The judge also instructed the jury regarding the separate claim of tortious interference with a contract against Appellant and the recoverable damages.

Ultimately, the jury returned a verdict in favor of Respondents against SEL in the amount of $299,144[4] in actual damages for the breach of contract cause of action and $1,000,000 in punitive damages for the breach of contract accompanied by fraudulent act claim. The jury returned a verdict in favor of Respondents against Appellant in the amount of $3,000,000 in actual damages and $1,000,000 in punitive damages for the tortious interference with a contract cause of action.

Following the denial of post-trial motions, SEL and Appellant appealed the jury's verdicts to the Court of Appeals. Two months later, SEL settled the claims for breach of contract and breach of contract accompanied by a fraudulent act by paying $1.5 million to Respondents. As a result of the settlement, SEL dismissed its appeal. This Court certified Appellant's appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

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[4] In addition to the general verdict form, the jury was given special interrogatories with respect to the actual damages for the breach of contract claim. The question posed was as follows: "For the Breach of Contract cause of action, does the amount of actual damages include an award for Phase 2 and/or Phase 3?", to which the jury answered "Yes." The jury noted that it attributed $54,000 of the total actual damage award to Phase 2.

II. Discussion

A.

Although Appellant identifies three issues and raises multiple theories, his primary contentions are that: (1) he, as the manager of SEL, cannot be held individually liable for the claim of tortious interference with the contract; and (2) even if he is liable, the award of actual damages was improper. Essentially, Appellant claims Respondents' only form of recovery was for a breach of contract claim, a claim that has now been satisfied through a settlement agreement. For reasons that will be discussed, we agree with Appellant.

B.

Appellant contends that as a matter of law he, as the manager of an LLC, may not be held individually liable for a claim of tortious interference with a contract. Citing section 33-44-303(a) of the South Carolina Code,[5] Appellant asserts that he is statutorily protected against "this type of individual liability."

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[5] Section 33-44-303(a) provides:

> Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

S.C. Code Ann. § 33-44-303(a) (2006).

Alternatively, Appellant avers that even if he can be found individually liable in tort, he was immune from liability as he acted on behalf of SEL and, thus, was a party to the contract that was breached by SEL. Citing the general rule that one cannot be held liable for tortious interference with a contract to which he is a party, Appellant argues the trial judge erred in denying his motions for a directed verdict and judgment notwithstanding the verdict ("JNOV") as to the claim of tortious interference with a contract.

Recently, a majority of this Court rejected Appellant's contention that a manager of an LLC may not be held individually liable for torts of the LLC. 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 728 S.E.2d 448 (2012), rehearing granted, (May 4, 2012). Jade Street, however, is not dispositive as the instant case involves a separate question of whether Respondents could sustain a claim of tortious interference with a contract. In answering this question, we must examine the general rule that a claim for tortious interference with a contract cannot be made against one who is a party to the contract at issue. Specifically, we must decide whether Appellant was a party to the contract that was admittedly breached by SEL. In analyzing this question, it is necessary to identify the elements of the tort and the privileges afforded a corporate agent whose corporation is a party to the contract.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id.

"It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable." Bradburn v. Colonial Stores, Inc., 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979).

Thus, "[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract." CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004). See generally Thomas G. Fischer, Annotation, Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract with Another, 72 A.L.R. 4th 492, §§ 3-8 (1989 & Supp. 2012) (analyzing state cases involving the question of whether a director, officer, or employee could be held personally liable for tortious interference with a corporate contract where individual was considered a party to the contract, acted to serve the corporate interests, or acted on behalf of personal interests).

"The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract." CGB Occupational Therapy, Inc., 357 F.3d at 385. "The agent's privilege is qualified, however, because it applies only when the agent is acting within the scope of its authority." Id. "Conversely, an agent may be liable for tortious interference, just as if the agent were an outside third party, if the allegedly interfering acts were conducted outside the scope of the agent's authority." Id.; Kia v. Imaging Scis. Int'l, Inc., 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010) ("[A] corporate officer can be liable for tortious interference only if he was acting in a personal capacity or outside the scope of his authority." (citations omitted)); see 3A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, Chapter 11, XXVIII, § 1117 (West 2012) ("[A] director is not personally liable for the corporation's contractual breaches unless he or she assumed personal liability, acted in bad faith, or committed a tort in connection with the performance of the contract."). "Scope of authority" is defined as "[t]he range of reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Black's Law Dictionary (9th ed. 2009).

Therefore, as a matter of law, a manager of a limited liability company can wrongfully interfere with his company's contracts and be held individually liable for his acts. In light of this holding, the question becomes whether Appellant could be held liable under the facts of the instant case.

As a threshold matter, we find Respondents' failure to include SEL's operating agreement as part of the record constitutes a significant impediment to establishing a claim of tortious interference with a contract as we are unable to discern the precise parameters of Appellant's authority.[6] Without an identifiable scope of authority, we are left to speculate whether Appellant's actions exceeded his authority as the managing agent of SEL.[7] Furthermore, we find that each of the actions relied upon by Respondents to support their claim can only be attributed to SEL and not to Appellant personally.

In support of their claim, Respondents primarily relied upon the sale of lots to K&L, the redesign of the development plans for Phases II and III, the termination of the contract, and the sale of the project to Essex Homes. Respondents maintain there was no legitimate business justification for these

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[6] The operating agreement governs:

> (1) relations among the members as members and between the members and the limited liability company;
> (2) the rights and duties of a person in the capacity of manager;
> (3) the activities of the company and the conduct of those activities; and
> (4) the means and conditions for amending the operating agreement.

51 Am. Jur. 2d Limited Liability Companies § 4 (2011) (emphasis added); see S.C. Code Ann. § 33-44-103(a) (2006) (providing that under the Uniform Limited Liability Company Act of 1996, members of an LLC may enter into an operating agreement, "to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company").

[7] We disagree with Respondents' contention that the contract established the limitations on Appellant's authority. The contract established the rights and duties of SEL and Respondents with respect to the development project and not the authority of Appellant with respect to SEL. See 17A Am. Jur. 2d Contracts § 1 (2004) ("[A] 'contract' has been defined as a private, voluntary, allocation by which two or more parties distribute specific entitlements and obligations.").

actions and, thus, did not serve the corporate interests of SEL. In turn, Respondents contend the only logical inference is that Appellant acted in his personal capacity as his actions would not have been authorized by SEL.

With respect to each of these actions, the documentation in the record establishes that SEL was the entity that sold the lots, signed off on change orders for the development plans, terminated the contract, and entered into the contract with Essex Homes. Although Appellant was the principal actor in these transactions, there is no evidence to refute that he acted within his authority as the manager of SEL.

Even if Appellant, as a member of K&L, received financial benefit from the sale of the lots to K&L, the sales were nevertheless done on behalf of SEL. Notably, Respondents relied on these lot sales to establish that they had in fact satisfied the sales requirement prior to SEL's breach of the contract. Furthermore, the sale of Phases II and III to Essex Homes was entered into by SEL after it terminated the contract with Respondents. Even though Appellant engaged in negotiations during the term of the contract, these actions were also done on behalf of SEL and only provide evidence to support the breach of contract claim. The jury recognized this fact as it compensated Respondents for their losses in Phases II and III by awarding damages for the breach of contract cause of action.

Finally, by personally guaranteeing the development loan, Appellant became personally liable for the repayment of that particular financial obligation. The personal guarantee did not, however, render him personally liable in tort. See Hester Enters., Inc. v. Narvais, 402 S.E.2d 333, 335 (Ga. Ct. App. 1991) ("[A] corporate officer who does personally guarantee an obligation may be personally liable for the performance of *that* particular obligation, but such a personal guarantee does not render him personally liable on *any and all* corporate obligations.").

We conclude Respondents failed to identify how Appellant exceeded his authority as the managing agent of SEL. Because Appellant's actions can only be attributable to SEL, there is an absence of evidence to establish a separate claim that Appellant was individually liable in tort. Accordingly, we hold the trial judge erred in denying Appellant's motions for a directed

verdict and JNOV on the cause of action for tortious interference with a contract. See Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (recognizing that an appellate court will reverse the trial judge's ruling with respect to the denial of motions for a directed verdict or JNOV only when there is no evidence to support the ruling or when the ruling is controlled by an error of law).

In view of our holding, we need not address Appellant's remaining issues regarding the award of damages. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

III.

Based on the foregoing, we hold the trial judge erred in denying Appellant's motions for a directed verdict and JNOV as there is no evidence to support the cause of action for tortious interference with a contract. Specifically, we find Respondents' failure to include SEL's operating agreement as part of the record precludes us from being able to discern the precise parameters of Appellant's authority. Furthermore, Respondents failed to identify how Appellant exceeded his authority as the managing agent of SEL. Thus, because Appellant's actions can only be attributable to SEL, there is an absence of evidence to establish a separate claim that Appellant was individually liable for the cause of action for tortious interference with a contract. Accordingly, we reverse the award of damages on this cause of action.

REVERSED.

TOAL, C.J., KITTREDGE, HEARN, JJ., and Acting Justice James A. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Randy Vickery, Respondent.

Appeal From Greenwood County
Eugene Griffith, Circuit Court Judge

Opinion No. 5025
Heard March 20, 2012 – August 22, 2012

REVERSED AND REMANDED

Assistant Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., of Columbia, for Appellant.

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

KONDUROS, J.: In this criminal case, the State appeals the trial court's suppression of evidence arising out of a driver's license checkpoint because it alleges the checkpoint was constitutional. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Sometime between 9 p.m. April 25, 2009, and 3 a.m. April 26, 2009, officers with the Greenwood Police Department conducted a license checkpoint at the intersection of New Market Street and Milwee Avenue in Greenwood, South Carolina. During that checkpoint, while detaining Randy Jason Vickery for suspicion of driving under the influence, officers spotted methamphetamines and drug paraphernalia in his vehicle and arrested him. That same night, the Greenwood Police Department conducted three other checkpoints in the same vicinity from 9 p.m. until 3 a.m. The four checkpoints produced a total of fifty-six violations, including forty-eight traffic cases and eight criminal cases.

Vickery was indicted for possession of methamphetamine with intent to distribute and possession of methamphetamine with intent to distribute within proximity of a school. At trial, Vickery made a motion to suppress the evidence discovered as a result of the stop, challenging the stop's constitutionality, arguing it violated the Fourth Amendment. The State presented the testimony of Officer Robbie Byrd. Officer Byrd testified he was employed by the Greenwood Police Department in the traffic unit. He stated that on the night of April 25, 2009, through the morning of April 26, he conducted traffic safety checkpoints. He testified that checkpoint locations were determined based on "traffic flow, speeding complaints, loud music complaints, anything such as that nature, primarily just involving traffic." He indicated that the checkpoint locations were selected by Lieutenant Jennifer Bass, who was over the traffic unit, and Major James Marshall. He stated that they had contact with the citizens who were complaining about speeding and loud music coming from cars. Officer Byrd stated the primary purpose of the checkpoints was to check for traffic safety, such as child restraints,

seatbelts, driver's licenses, vehicle tags, and the proper credentials. He testified the officers would stop each car that came through the checkpoint and check each driver's license. He further testified the four checkpoints that night resulted in forty-eight traffic cases and two drug cases. He testified the stops that produced no violations lasted no longer than a minute.

Following Officer Byrd's testimony, Vickery argued the State had not laid the proper foundation to establish the checkpoint's constitutionality under Brown v. Texas, 443 U.S. 47 (1979), and Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). He argued State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008), was "adamant" the State must present empirical data gathered prior to the checkpoint to justify setting up the checkpoint. He maintained the State only provided empirical data on the "back side, what the results were, but they have produced nothing to indicate why the Greenwood Police Department wanted to set up a checkpoint here." He asserted the State needed to provide information as to how many tickets were written and people had been arrested on the road in the month or year prior to the checkpoint. He stated those who established the checkpoints needed to testify and supply the empirical data.

The State responded and agreed Sitz, while critical of the searching examination of effectiveness by trial courts, "retains the requirement that the State produce empirical data to support the roadblock." It argued the report marked Court Exhibit Number 1 established how the checkpoint was effective and what the results were. Vickery argued that report "would probably be very good empirical data for the next checkpoint that they want to have at this location." He asserted that the State was arguing that if it set up a checkpoint and arrested forty-eight people, then it was a good checkpoint. Vickery argued, "It's data on the front side [that case law requires], not on the back side."

Before adjourning for lunch, the trial court stated it was going to take the matter under advisement and would leave the record open if the State wished to see if the file contained any additional empirical data. Following the break, the State called Major Urban Mitchell to testify. He stated he was

in charge of the administration division of the Greenwood Police Department. He stated that the position involved records, training, evidence, and crime scenes and included gathering statistics. The State introduced, for the purposes of the hearing, several traffic enforcement activity reports that included the intersection of New Market and Milwee or an intersection located two blocks away. Major Mitchell testified that the police department had determined that conducting traffic safety checkpoints was an effective way to manage traffic problems. On cross-examination, Major Mitchell could not say how many of the fifty-six violations on April 26 occurred at the intersection of New Market and Milwee but admitted fifty-six tickets at the police headquarters could be obtained to show which of the incidents occurred at that intersection.

The trial court found the State presented

> insufficient empirical data justifying the authorization and implementation of the roadblock in question . . . . Except for the traffic testimony offered by Major Mitchell, no testimony was offered by the State about the number of tickets, wrecks, and/or citizen complaints related to traffic concerns at the intersection of New Market Street and Milwee Avenue prior to the roadblock in question. Testimony by the State's witnesses indicates that the Greenwood Police Department relied on general knowledge of the neighborhood to justify the roadblock in question.

The trial court further found:

> [T]he Traffic Enforcement Activity Reports contain some empirical data regarding the intersection of New Market Street and Milwee Avenue, but the data presented is insufficient to constitutionally justify the roadblock on April 25, 2009, at which [Vickery] was

> stopped and arrested. The record is absent of any specific evidence for the Court to determine the number of cases which resulted from the roadblock in question. Furthermore, the evidence in the record is insufficient for the Court to determine the effectiveness of the roadblock in question. No testimony was presented about how many vehicles passed through the roadblock in question.

The court determined the roadblock "did not violate [Vickery's] Fourth Amendment rights because its primary purpose was traffic safety enforcement." However, the court found the roadblock did violate his Fourth Amendment rights because

> the State provided insufficient empirical data to support the effectiveness of the roadblock in question. Without sufficient empirical data to justify the implementation of the roadblock and without sufficient data derived from conducting this roadblock, the Court is unable to do the necessary comparison analysis to determine the effectiveness of this roadblock as required under Brown v. Texas, 443 U.S. 47 (1979).

Accordingly, the trial court granted Vickery's motion to suppress and suppressed all drugs and drug paraphernalia located in Vickery's vehicle and on his person, as well as all statements made, observations of his behavior, and recordings. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The South Carolina Supreme Court has articulated the

standard of review to apply to Fourth Amendment search and seizure cases. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The court has specifically rejected the de novo standard the United States Supreme Court set forth in Ornelas v. United States, 517 U.S. 690 (1996), for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures. State v. Williams, 351 S.C. 591, 597, 571 S.E.2d 703, 706 (Ct. App. 2002). The Brockman court determined the trial court's ruling would be reviewed like any other factual finding: reversed if there is clear error and affirmed if any evidence supports the ruling. 339 S.C. at 66, 528 S.E.2d at 666.

> On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.

State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citation omitted). Under the clear error standard, "an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Rather, the appellate court must determine whether, based on the evidence, it is left with the definite and firm conviction the trial court committed a mistake. Id. Accordingly, we will apply an any evidence standard to the trial court's ruling. Williams, 351 S.C. at 597, 571 S.E.2d at 707.

LAW/ANALYSIS

The State contends the trial court erred in suppressing the stop by finding the State failed to produce sufficient empirical data to justify the effectiveness of the checkpoint. We agree.

The Fourth Amendment guarantees a person the right to be secure from unreasonable searches and seizures. U.S. Const. amend IV; State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000). "[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980)). "[S]topping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000) (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976)).

> Constitutional challenges to checkpoint seizures turn on whether the initial stop at the checkpoint was reasonable. . . . Whether particular checkpoint seizures are reasonable is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped.

Id. (citing Sitz, 496 U.S. at 449-55).

The United States Supreme Court has applied this balancing analysis and "upheld the constitutionality of government checkpoints set up to detect drunken drivers, see [Sitz, 496 U.S. at 454], and illegal immigrants, see Martinez-Fuerte, 428 U.S. at 556–67 . . . , so long as they involve no more than an 'initial stop . . . and the associated preliminary questioning and observation by checkpoint officers.'" Id. at 356-57 (quoting Sitz, 496 U.S. at 450-51) (second ellipses added by court). "The seizure at the sobriety checkpoint upheld in Sitz lasted approximately twenty-five seconds, and the seizures at the immigration checkpoint upheld in Martinez-Fuerte lasted three to five minutes." Id. at 357 (citations omitted).

"The [United States] Supreme Court has also recognized that a state has a substantial interest in enforcing licensing and registration laws, though that interest is not substantial enough to justify roving patrol stops as an enforcement mechanism." Id. (citing Prouse, 440 U.S. at 658-59). However, the Court suggested in Prouse, "checkpoints to check driver's licenses would be permissible even in the absence of articulable and reasonable suspicion that a driver was unlicensed." Id. (citing Prouse, 440 U.S. at 663; Texas v. Brown, 460 U.S. 730, 743 (1983) (plurality opinion) (noting that the circumstances surrounding stop at driver's license roadblock gave "no suggestion that the roadblock was a pretext whereby evidence of a narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses")).

> Drawing on these authorities, courts have concluded that a brief stop at a checkpoint for the limited purpose of verifying a driver's license, vehicle registration, and proof of insurance is a reasonable intrusion into the lives of motorists and their passengers even in the absence of reasonable suspicion that a motorist or passenger is engaged in illegal activity.

Id. (citing United States v. Galindo-Gonzales, 142 F.3d 1217, 1221 (10th Cir. 1998) (finding brief detention of motorist to inspect driver's license, vehicle registration, and insurance information at an established license checkpoint comports with the Fourth Amendment); United States v. McFayden, 865 F.2d 1306, 1310-13 (D.C. Cir. 1989) (finding a roadblock to inspect drivers' licenses and vehicle registrations met the Fourth Amendment standard of reasonableness)).

> [T]he Court has determined that the gravity of the public interests that such stops seek to advance and the general efficacy of checkpoint stops in advancing those interests outweigh the minimal intrusions on protected Fourth Amendment liberty interests that are

> caused by the brief stops required for such limited questioning and observation. But, the Court has also cautioned that "[d]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard."

Norwood v. Bain, 143 F.3d 843, 848 (4th Cir. 1998) (ellipsis and last set of brackets by court) (quoting Sitz, 496 U.S. at 451), vacated, aff'd this ground on reh'g en banc, 166 F.3d 243, 245 (4th Cir. 1999). "[A] claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." Martinez-Fuerte, 428 U.S. at 559.

In State v. Groome, 378 S.C. 615, 619, 664 S.E.2d 460, 462 (2008), the trial court found a roadblock violated the Fourth Amendment under Brown v. Texas, 443 U.S. 47 (1979). The Groome court noted "Brown established a three part balancing test for determining the constitutionality of a traffic checkpoint: 1) the gravity of the public interest served by the seizure; 2) the degree to which the seizure serves the public interest; and, 3) the severity of the interference with individual liberty." Id. at 619, 664 S.E.2d at 462. The trial court held the first and third factors easily weighed in the State's favor but found the State presented no evidence on the second factor. Id.

On appeal, the State argued the trial court abused its discretion in finding the State failed to meet the second Brown factor, the "effectiveness" requirement. Id.

> The State argues that it need not introduce evidence about the specific effectiveness of this roadblock because, by its very nature, every license check roadblock determines whether the driver is legally licensed. The State's position that license check roadblocks are ipso facto constitutional, thereby eliminating the requirement of effectiveness from the Brown formula relies upon [Sitz]. While Sitz does

> criticize "searching examination of effectiveness" by trial courts, it retains the requirement that the State produce empirical data to support the effectiveness of its roadblock. Sitz, [496 U.S.] at 454 ("unlike [Prouse], this case [does not involve] a complete absence of empirical data. . . ."). The record supports the trial court's finding that the State failed to produce any evidence satisfying the second prong of the Brown test.

Groome, 378 S.C. at 619-20, 664 S.E.2d at 462 (ellipsis and last set of brackets added by court).

In Sitz, 496 U.S. at 453, the Michigan Court of Appeals "consider[ed] as part of the balancing analysis the 'effectiveness' of the proposed checkpoint program." The United States Supreme Court found the court of appeals erred in concluding the checkpoint program failed the effectiveness part of the test and the failure materially discounted the State's strong interest in implementing the program. Id. The court noted, "The actual language from Brown v. Texas, upon which the Michigan courts based their evaluation of 'effectiveness,' describes the balancing factor as 'the degree to which the seizure advances the public interest.'" Id. (quoting Brown, 443 U.S. at 51). "This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Id. "But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." Id. at 453-54. "Brown's rather general reference to 'the degree to which the seizure advances the public interest' was derived, as the opinion makes clear, from the line of cases culminating in Martinez-Fuerte, ... Neither Martinez-Fuerte nor [Prouse], however, the two cases cited by the Court of Appeals as providing the basis for its 'effectiveness' review, . . .

supports the searching examination of 'effectiveness' undertaken by the Michigan court." Id. at 454.

The Sitz court further noted:

> In Delaware v. Prouse, we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."

Id. (quoting Prouse, 440 U.S. at 659-60) (alteration by court). The court "observed that the random stops involved the 'kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'" Id. (quoting Prouse, 440 U.S. at 661) (alteration by court).

The Sitz court found that "[u]nlike Prouse, this case involves neither a complete absence of empirical data nor a challenge to random highway stops." Id.

> During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at

> the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. By way of comparison, the record from one of the consolidated cases in Martinez-Fuerte showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent. We concluded that this "record . . . provides a rather complete picture of the effectiveness of the San Clemente checkpoint," and we sustained its constitutionality. We see no justification for a different conclusion here.

Id. at 454-55 (alteration by court) (citations omitted). The court determined "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program" and found it consistent with the Fourth Amendment. Id. at 455.

In State v. Larson, 485 N.W.2d 571, 573 (Minn. Ct. App. 1992), the Minnesota Court of Appeals found "the state failed to present any evidence of the effectiveness of the checkpoint." (citing Brown, 443 U.S. at 51 (holding the court must balance "the degree to which the seizure advances the public interest"); Prouse, 440 U.S. at 659-60 (finding the State presented no empirical evidence that random driver's license checks were effective)). It noted, "Here, there was no testimony on how many driver's license or equipment violations were uncovered or other empirical data on the effectiveness of the checkpoint in advancing the public interest." Id. (emphasis added) (citing Chock v. Comm'r of Pub. Safety, 458 N.W.2d 692,

694 (Minn. Ct. App. 1990) (approving legality of sobriety checkpoint on which empirical data of effectiveness was presented)).

Vickery argued and the trial court found the State presented no evidence of empirical evidence that led to the determination of the location of the checkpoint.[1] However, the cases on point do not require the State to present pre-existing empirical data to justify setting up the checkpoint. The case law does require some basis for the location of the checkpoint. Here, Officer Byrd testified the checkpoint was placed in that location due to citizen complaints about speeding and loud music. Major Mitchell also testified he had personal knowledge of the problems at the intersection before the checkpoint was set up from seeing incident reports, traffic tickets, and statistics. Additionally, the Traffic Enforcement Activity Reports for dates prior to April 26 show that license checkpoints in the same area resulted in thirty to sixty traffic and criminal offenses on each occasion. Therefore, the trial court committed an error of law in requiring the State to present empirical data to justify the authorization and implementation of the checkpoint.

The trial court also suppressed the search because the State's empirical data regarding the effectiveness of the checkpoint was insufficient. The trial court acknowledged the State presented some empirical data regarding the intersection, but that it was insufficient to justify the roadblock. Prouse, Groome, and Sitz all require some empirical data that supports the second prong of Brown, that the seizure serves the public interest. However, none of these cases state how much evidence is considered enough. The United States Supreme Court, as well as our own supreme court, has stressed that no evidence is not enough. Here, we do have some evidence, lying somewhere between Prouse and Sitz. The two facts that seem to be lacking to paint the entire picture are how many vehicles came through this stop or all of the stops and how many of the tickets were specific to this stop location.

[1] The State also had the burden of showing the purpose of the stop and that it served the public interest. The checkpoint was not established by the officers conducting it but rather by their supervisors. Also, this was not a roving stop. None of these factors are at issue in this case.

According to Groome, the question before us is whether the record supports the trial court's finding that the State's empirical data was insufficient to satisfy the second prong of Brown. By showing the stops resulted in a total of forty-eight traffic violations and eight criminal cases including two drug arrests, the State met its burden under the second prong of Brown and the trial court erred in determining the State had to put up more evidence to show the checkpoint's effectiveness.

The purpose of the empirical data on the effectiveness is to be able to balance the effectiveness of the checkpoint with the other two prongs set forth in Brown, (1) the gravity of the public interest served by the seizure and (3) the severity of the interference with individual liberty. Here, the point of the checkpoint was to prevent traffic offenses and people driving without a license. This serves the public interest in that traffic violations and people driving without a license can cause injury to others. The severity with individual liberty was low in that the stops were marked so drivers could anticipate it and each stop lasted under a minute, if there was no violation. Weighing those two factors with the data provided as to the second factor, effectiveness, the license checkpoint did not violate the Fourth Amendment. Accordingly, the trial court's decision is

REVERSED AND REMANDED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Glenn R. Lee, Appellant.

Appellate Case No. 2009-147706

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Published Opinion No. 5026
Heard March 28, 2012 – Filed August 22, 2012

REVERSED AND REMANDED

Jack B. Swerling, of Columbia, Katherine Carruth Goode, of Winnsboro, and Paul V. Cannarella, of Hartsville, all for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor William B. Rogers, Jr., of Bennettsville, for Respondent.

LOCKEMY, J.: In this criminal action, Glenn R. Lee contends the trial court made many evidentiary errors throughout the trial. Specifically, Lee argues the

trial court erred in: (1) admitting testimony concerning Lee's alleged prior bad acts; (2) admitting a videotape and transcript of an interview with Victim and testimony concerning the statements made in that interview; (3) qualifying a witness as an expert in forensic interview and assessment and delayed reporting; (4) denying a motion to suppress all evidence seized in the search of Lee's residence and all fruits of that search; (5) admitting evidence of alleged flight by Lee and his co-defendant (Donna Buie); (6) admitting evidence concerning involvement of the Department of Social Services (DSS); and (7) admitting photographs depicting nudity. In the alternative, Lee contends this case should be reversed and remanded because of cumulative error resulting in prejudice to him and a denial of his right to a fair trial. We reverse and remand.

FACTS

Lee was indicted in Darlington County in 2009 on charges of criminal sexual conduct (CSC) with a minor under the age of eleven years, committing or attempting to commit a lewd act upon a child under the age of sixteen years, and two counts of unlawful conduct toward a child. Buie, the mother of Victim, was also charged with two counts of unlawful conduct toward a child.

Lee's charges stem from allegations by Victim, first reported to law enforcement on November 12, 2007. Victim lived in the home of Lee, with Buie, her younger brother, and Lee, until July 7, 2007, when she left to live with her father. Victim alleged that while she was living in Lee's home, Lee touched her "lower private part" and penetrated her with his finger and made her touch his "lower private" as well. Victim also alleged she saw Lee and Buie engage in sexual activity with each other and with other individuals, and observed both Buie and Lee engage in drug activity in the home. Further, she alleged she watched pornographic material on television with Lee.

Arrest warrants were issued for Buie and Lee on January 23, 2008, and the U.S. Marshals' (Marshals) services were employed on January 26. At the pre-trial hearing, Stuart Cottingham, a member of the Marshals, testified Lee was found in Sumter, South Carolina, on February 6, 2008. The Marshals located Buie in Clarendon County living in a camper.

Lee and Buie were tried by a jury the week of October 25, 2009. During the trial, the State proffered twenty-five graphic images recovered from a digital camera.

However, they requested that only two of the photographs, Exhibits 149 and 150, be published to the jury. The two photographs were taken on February 6, 2008, in the camper where Marshals located Buie. The State argued the photographs portrayed an ongoing course of conduct directly related to Victim's testimony of events as alleged in the indictment, which states Lee participated in sexual activity in the presence of Victim. Lee argued the conduct depicted in the photographs was not relevant on any issue regarding the children or the elements of the indictment. Further, he maintained the evidence was unduly prejudicial. The trial court admitted the two photographs over his objection, stating it found the evidence probative because it corroborated the testimony of the Victim as to what events were occurring in the home. Further, the trial court found the State lessened the prejudicial effect of all the digital camera's contents by selecting only two photographs.

Lee was found guilty of all four charges and sentenced to concurrent terms of thirty years for the CSC offense, fifteen years for the lewd act offense, and ten years each for the unlawful conduct offenses. Lee moved for a new trial based on multiple alleged evidentiary issues, and the trial court denied his motion. This appeal followed.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Kirton*, 381 S.C. 7, 22, 671 S.E.2d 107, 114 (Ct. App. 2008) (quoting *State v. Preslar*, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005)). "'This court is bound by the trial court's factual findings unless they are clearly erroneous.'" *Id.* (quoting *Preslar*, 364 S.C. at 472, 613 S.E.2d at 384). "The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 23, 671 S.E.2d at 114 (citing *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *Preslar*, 364 S.C. at 472, 613 S.E.2d at 384; *State v. Mattison*, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003)).

"'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.'" *Id.* (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "'A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which

results in prejudice to the defendant.'" *Id.* at 23, 671 S.E.2d at 115 (quoting *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). "'An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.'" *Id.* (quoting *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)).

"'To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.'" *Kirton*, 381 S.C. at 24, 671 S.E.2d at 115 (quoting *State v. White*, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct. App. 2007)). "'Error is harmless when it could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

LAW/ANALYSIS

Admission of Sexually Graphic Photographs

Lee contends the trial court erred in admitting Exhibits 149 and 150 into evidence. Specifically, Lee argues these pictures were taken seven to eight months after the last alleged incident; thus, they were irrelevant, had no connection to the children or the crimes charged, and were unduly prejudicial. We find the trial court erred in the admission of the challenged photographs because of their unduly prejudicial nature.

Rule 403, SCRE states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has particularly wide discretion in ruling on Rule 403 objections. *See State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We . . . are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "[A] court analyzing probative value

considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751, 754 (Ct. App. 2012).

Lee was charged pursuant to section 16-3-655(A)(1) of the South Carolina Code (Supp. 2011), which specifically states "[a] person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age." Lee was also charged under section 16-15-140 of the South Carolina Code (2003), which states

> [i]t is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

Additionally, he was charged with two counts of unlawful neglect of a child pursuant to section 20-7-50 of the South Carolina Code (1985 & Supp. 2011),[1] which provides

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.

[1] Section 20-7-50 of the South Carolina Code (1985 & Supp. 2011) was repealed with the former Children's Code and is now section 63-5-70 of the South Carolina Code (2010). 2008 Act No. 361.

"The probative value of the photos must be balanced against 'the danger of unfair prejudice.'" *Collins*, 398 S.C. at __, 727 S.E.2d at 757. "Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." *Id.* "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" *Id.* (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "'All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].'" *Id.* (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429).

"Photographs pose a danger of unfair prejudice when they have 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (quoting *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)). "Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Id.*; *see State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

The photographs at issue were taken at least seven months after the last possible incident with the Victim. Lee's subsequent conduct is not necessarily indicative of any conduct before or during the time period of the alleged incident. Further, Cottingham already testified to finding sexually graphic images on a digital camera and described them in detail. Admission of these other sexually graphic photographs was cumulative in nature and further lessened their probative value. The photographs' probative value was minimal at best.

While the photographs may have been relevant to the Victim's testimony about conduct in Lee's home during the time she lived there, we find the prejudicial nature of these photographs outweighed the probative value. Both photographs portrayed nude adults in suggestive positions. In one of the photographs, Lee was lying on a bed with another nude female, his genitalia in full view. The other photograph showed two nude females from their chests to their faces. There are no children shown in the photographs. We find their primary purpose was to raise the emotions of the jury and to establish that Lee had a general sexually deviant disposition. After reviewing these photographs, we hold their admission was

highly prejudicial in light of their sexually graphic nature. Accordingly, we find it was in error for the trial court to admit these two photographs.

The State's case was heavily based on the Victim's word against Lee's word; thus, we cannot find that the photographs were not harmful beyond a reasonable doubt. Accordingly, we reverse the trial court.

Because the determination of this issue is dispositive, we decline to address Lee's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand this case to the trial court.

REVERSED AND REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Regions Bank, Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as personal representative of the Estate of Marie Borchers, and Nancy Davidson Borchers, Respondents.

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5027
Heard January 11, 2012 – Filed August 22, 2012

AFFIRMED

Harold P. Threlkeld, of Anderson, for Appellant.

Samantha Nelson Murphy, of Anderson, for Respondents.

KONDUROS, J.: Regions Bank (the Bank) appeals the trial court's award of damages to subsequent purchasers of real property (the Property) under section 29-3-320 of the South Carolina Code (2007) for the Bank's failure to mark satisfied a mortgage on the Property. We affirm.

FACTS/PROCEDURAL HISTORY

Richard Strawn owned the Property, which was located in Anderson, South Carolina. He gave the Bank a home equity mortgage (the Mortgage) on the Property to secure a credit line of $50,000. The mortgage provided that it would be "governed by and interpreted in accordance with federal law and the laws of the State of South Carolina." On December 12, 2001, he deeded the Property to his wife at the time, Cammie Strawn. On October 31, 2003, Marie Borchers purchased the Property from Cammie through a cash sale. On the day of the closing of the sale, James Belk, the closing attorney for the sale, had one of his employees, Cathy Slaton Curtis, hand deliver a trust account check to the Bank for the payoff amount on the Mortgage. The check had the words "Payoff of first Mortgage" typed on the check. The Bank processed the check but did not mark the Mortgage as satisfied. Several weeks later, the Bank issued Strawn a new set of checks for the line of credit. He used the checks, resulting in a debt of $72,787.95 including interest and penalties.

On December 22, 2005, Belk executed a mortgage lien satisfaction affidavit after the Bank's attorney informed him the Mortgage had not been satisfied. On March 1, 2006, the Bank instituted an action against Strawn for the collection of the debt and a foreclosure action against Robert K. Borchers, individually and as personal representative of the estate of Marie Borchers, and Nancy Davidson Borchers (collectively the Borchers).[1] The Borchers filed an answer and counterclaim against the Bank, a crossclaim against Strawn, and a third-party complaint against Belk. As to the counterclaim against the Bank, the Borchers sought the statutory penalties set forth in

[1] Marie had died since purchasing the Property, and Robert and Nancy were her devisees and succeeded her interest in the Property.

section 29-3-320 of the South Carolina Code for failure to satisfy the mortgage within ninety days.

On August 20, 2008, the circuit court granted summary judgment to the Borchers as to the Bank's foreclosure action, finding the Bank was estopped from foreclosing on the Property because the Bank should have processed the check as a payoff instead of a paydown on Strawn's line of credit and should have had the Mortgage satisfied as of record.

In March 2010, a nonjury trial was held on the Borchers' counterclaim against the Bank. At trial, Belk testified that as part of the closing, a transmittal letter was prepared, stating the trust account check was enclosed as final payment of the loan. The letter further stated, "PLEASE FORWARD SATISFIED DOCUMENTS (with a copy of this letter) TO THIS OFFICE TO BE REMOVED OF RECORD." Curtis testified that she was involved in the payoff for this closing. She testified that when she was handling a payoff, she would take the check, the payoff letter, and the payoff statement that comes from the bank and staple all three of them together, so they would not get separated in case there were multiple payoffs at the same bank at one time. She then would go to the bank and give them the packet, and she would get the bottom part of the check once it had been run through the bank's machine to show the date and time the payoff was made and a receipt. Curtis had sworn an affidavit on April 14, 2008, she had taken the letter to Bank.

Pamela H. Harbin, a former employee of the Bank, testified she researched the Bank's records to determine what it received with the payoff check. She testified she had seen no evidence the Bank had received the letter. She also provided that if the Bank had received the letter, it would have followed the instructions in the letter and would have probably contacted Strawn to ask if he wanted the equity line cancelled.

The trial court found the testimony conflicted as to whether or not the Bank received notice of the request to satisfy the Mortgage. It found the Bank's review of its records, which occurred more than two years after the

closing date, was remote, making it just as likely the document was lost as it was never received. It noted Belk and Curtis's testimonies were clear that for a local bank, like the Bank, their standard practice was to personally deliver a payoff letter with the payoff check, which specifically requested the Mortgage be satisfied within three months, and Curtis believed she did so in this instance. The court found that testimony to be credible. The court determined the Bank violated section 29-3-310 of the South Carolina Code, making it subject to the penalty under section 29-3-320 of the South Carolina Code and awarded the Borchers $25,000 and attorney's fees and costs from the Bank. This appeal followed.

STANDARD OF REVIEW

On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Additionally, the appellate court can correct errors of law. Okatie River, L.L.C. v. Se. Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003). The trial court's findings in a law action are equivalent to a jury's findings. Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." Id. "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

LAW/ANALYSIS

I. Timely Satisfaction of the Mortgage

The Bank argues because the Mortgage was timely cancelled as required by section 29-3-310 of the South Carolina Code (2007), the trial court erred in ruling the Bank failed to timely satisfy the Mortgage. We disagree.

Section 29-3-310 provides:

> Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

Section 29-3-320 of the South Carolina Code (2007) addresses the liability for failure to enter satisfaction. It states:

> Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other

> form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.
>
> Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

Id.

To trigger the penalty and related relief provided in section 29-3-320, section 29-3-310 requires the mortgagor or purchaser under him to establish (1) he has made full payment of his debts, including any applicable damages,

costs, and charges; (2) he has made a request by certified mail or other form of delivery with a proof of delivery the mortgage be satisfied of record; (3) he has made a tender of fees of office for entering satisfaction; and (4) the mortgagee has failed to enter satisfaction in the proper office on the mortgage within three months of the request. Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009).

"For liability to attach under the applicable statutes, payment of the mortgage is 'only the first step in the mortgage satisfaction process. In order for Bostic to recover the statutory penalty under section 29-3-320, he had to satisfy the condition precedent of making a request for [the mortgagee] to record his mortgage as satisfied.'" Id. at 339, 673 S.E.2d at 807 (alterations by court) (quoting Bostic v. Am. Home Mortg. Servicing, Inc., 375 S.C. 143, 154, 650 S.E.2d 479, 485 (Ct. App. 2007)). "A request, to trigger the statutory penalty, may not be implied or inferred. The request must affirmatively convey to the mortgagee that a recording of the satisfaction is sought." Id. (citation omitted). However, section 29-3-310 does not mandate a written request. Bostic, 375 S.C. at 155, 650 S.E.2d at 485. The statute is satisfied if the aggrieved party (1) makes a verbal or written request expressing his desire for the mortgagee to satisfy the mortgage and (2) demonstrates that the mortgagee has received or agreed to this request. Id.

In Dykeman, the Dykemans relied exclusively on their compliance with the "borrower's responsibilities" document Wells Fargo furnished as their request for satisfaction, which the court found to be insufficient. 381 S.C. at 339 n.3, 673 S.E.2d at 807 n.3. In Bostic, the court found "Bostic's payoff check sent by certified mail was insufficient to constitute a 'request' within the meaning of the statute." 375 S.C. at 155, 650 S.E.2d at 485. The court determined:

> Clearly, the cashier's check without additional correspondence, either verbal or written, did not affirmatively convey to American Home that Bostic expressly desired to have his mortgage recorded as satisfied. By sending the payoff check, Bostic

> effectively satisfied his mortgage. However, this check was only the first step in the mortgage satisfaction process. In order for Bostic to recover the statutory penalty under section 29-3-320, he had to satisfy the condition precedent of making a "request" for American Home to record his mortgage as satisfied.

Id.

Bostic asserted telephone conversations he alleged to have had with American Home after he mailed the payoff check could be construed as a "request." Id. at 155, 650 S.E.2d at 485. However, the court found the record contained no evidence an American Home representative spoke with Bostic. Id. at 155, 650 S.E.2d at 485-86. The court further determined "[b]ecause this case was presented to the circuit court at the summary judgment stage and there is no definitive evidence that a verbal agreement was reached during these telephone conversations, we cannot find that American Home was given a sufficient 'request' which obligated it to mark the mortgage satisfied within the statutory time period." Id. at 155-56, 650 S.E.2d at 486.

The Bank seems to argue that it did not have to cancel the Mortgage until the first circuit court issued its order and by that point, the Mortgage had already been cancelled. However, the trial court actually found the Bank failed to timely cancel the Mortgage based on when the closing attorney sent the satisfaction check. In Bostic, the court found Bostic's sending the payoff check and alleged phone calls to the bank did not constitute a request as required by the statute. In the present case, some evidence supports the trial court's finding the closing attorney had requested the Mortgage be marked as satisfied when he sent the check; both Curtis and Belk testified they generated a satisfaction letter as part of standard procedure for a closing, and Belk stated he reviewed the closing packet and the letter was included in it. The trial court found their testimonies credible and found it likely the Bank had misplaced the letter in its records based on the length of time before it checked its records. Because we leave matters of credibility to the trial court,

we conclude the record contains evidence supporting the trial court's finding that the Borchers complied with the statute by Curtis's delivering the satisfaction letter with the check.

II. Open-Ended Mortgage

The Bank contends because it had agreed to satisfy the Mortgage only by the request of the grantor and no such request was made, the trial court erred by ruling the Bank failed to satisfy the Mortgage as required by section 29-3-310. We disagree.

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. The best evidence of legislative intent is the text of the statute. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). When "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). In some cases, legislative history may be probative

in determining the legislature's intent. Eagle Container Co. v. Cnty. of Newberry, 366 S.C. 611, 630, 622 S.E.2d 733, 743 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008).

> Any mortgage or other instrument conveying an interest in or creating a lien on any real estate, securing existing indebtedness or future advances to be made, regardless of whether the advances are to be made at the option of the lender, are valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien creditors or simple contract creditors, or purchasers for valuable consideration without notice to the same extent as if the advances were made as of the date of the execution of the mortgage or other instrument for the total amount of advances made thereunder, together with all other indebtedness and sums secured thereby, the total amount of existing indebtedness and future advances outstanding at any one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney's fees and court costs.

S.C. Code Ann. § 29-3-50(A) (2007).

> The statute clearly sanctions the right of parties to give and to accept open-end mortgages to secure future advances. There is nothing express or implied, in the statute to infer that it was the intent of the legislature that the mortgage be dead once there is no debt momentarily existing. The statute permits the parties to agree that the mortgage live on until the mortgagor requests its cancellation. [Former section 29-3-310] provides for such cancellation. In addition, the parties in the mortgage (as quoted hereinabove) have expressly agreed that the mortgage live on until

> canceled of record. A holding that an open-end mortgage dies when there is currently no debt for it to secure, would severely limit its beneficial use and defeat the legislative intent. As long as the mortgage is of record, any subsequent lien holder or purchaser takes with notice of the impact of the Code section.

Central Prod. Credit Ass'n v. Page, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977).

A plain reading of section 29-3-310 does not specify any special procedures that lessen a bank's obligation when a mortgage is open ended. Because the requirements under the statute are met, the trial court did not err in finding the Bank violated section 29-3-310.

III. Clear and Convincing Evidence

The Bank maintains the trial court erred by ruling it failed to satisfy the Mortgage because the Borchers did not present clear and convincing evidence any request to satisfy the Mortgage was made. We disagree.

As we have noted above, the trial court found the Bank failed to timely cancel the Mortgage based on when the closing attorney sent the satisfaction check. Some evidence supports the trial court's finding the closing attorney had requested the Mortgage be marked as satisfied when he sent the check; Belk testified he reviewed the documents and Curtis testified she delivered the transmittal letter with the payoff check, which the trial court found more reliable than Harbin's testimony. Accordingly, the record does contain evidence to support the trial court's finding that the Borchers met the requirements of the statute.

IV. Closing Attorney's Ability to Cancel and Satisfy

The Bank argues the trial court erred by ruling it failed to satisfy the Mortgage because the closing attorney had the authority under section 29-3-

330(e) of the South Carolina Code (Supp. 2011) to satisfy and cancel the Mortgage. We disagree.

> (e) Any licensed attorney admitted to practice in the State of South Carolina who can provide proof of payment of funds by evidence of payment made payable to the mortgagee, holder of record, servicer, or other party entitled to receive payment may record, or cause to be recorded, an affidavit, in writing, duly executed in the presence of two witnesses and acknowledged pursuant to the Uniform Recognition of Acknowledgments Act in Chapter 3, Title 26, which states that full payment of the balance or payoff amount of the mortgage or other instrument securing the payment of money and being a lien upon real property has been made and that evidence of payment from the mortgagee, assignee, or servicer exists. This affidavit, duly recorded in the appropriate county, shall serve as notice of satisfaction of the mortgage and release of the lien upon the real property. The filing of the affidavit shall be sufficient to satisfy, release, or discharge the lien. Upon presentation of the instrument of satisfaction, release, or discharge, the officer or his deputy having charge of the recording of instruments shall record the same. This section may not be construed to require an attorney to record an affidavit pursuant to this item or to create liability for failure to file such affidavit.

§ 29-3-330(e).

Although section 29-3-330(e) does allow an attorney to enter an affidavit of satisfaction, nothing in section 29-3-310 or our case law suggests that because an attorney has the ability to satisfy a mortgage, the penalty under section 29-3-320 does not apply if a bank does not complete a proper

request to satisfy the mortgage. Accordingly, the trial court did not err in finding the Bank violated section 29-3-310.

CONCLUSION

Evidence supports the trial court's finding the Borchers met the requirements under section 29-3-310 of the South Carolina Code to demonstrate the Bank failed to satisfy the Mortgage, thus subjecting it to the penalty under section 29-3-320 of the South Carolina Code. Therefore, the trial court's decision is

AFFIRMED.

THOMAS, J., concurs.

FEW, C.J., dissenting: I would reverse the circuit court's decision to award the Borchers a penalty under sections 29-3-310 and -320 of the South Carolina Code (2007) because there is no evidence in the record the Bank received a cancellation request from Richard C. Strawn—the only person entitled to make that request. Because no request to cancel was made, section 29-3-310 did not require cancellation of the mortgage and the section 29-3-320 penalty does not apply.

This case involves an open-ended mortgage. Section 29-3-50 of the South Carolina Code (2007) provides that an open-ended mortgage survives a sale of the underlying property and is binding on a subsequent purchaser. Our courts have recognized that open-ended mortgages serve a valid purpose and the occasional incidence of a seemingly-unfair result like the one in this case is justified by the purpose the open-ended mortgage was designed to serve. See Cent. Prod. Credit Ass'n v. Page, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977) ("A holding that an open-end mortgage dies when there is currently no debt for it to secure, would severely limit its beneficial use and defeat the legislative intent."). Therefore, the mere fact that the balance of the loan secured by the mortgage is paid off does not require cancellation of the mortgage. Rather, the mortgage may not be cancelled unless the proper

person requests it. Under some circumstances, a "person . . . having an interest in any estate bound by the mortgage" may request cancellation. § 29-3-310. Here, however, the terms of the mortgage provided the only person with authority to request cancellation of the mortgage was Richard Strawn. See Cent. Prod. Credit Ass'n, 268 S.C. at 8, 231 S.E.2d at 214 (stating the predecessor to section 29-3-310 "permits the parties to agree that the mortgage live on until the mortgagor requests its cancellation"). This information was filed in the public record of Anderson County, and thus was readily available to the Borchers and their closing attorney. Viewing the evidence in the light most favorable to the Borchers, no person or entity even purporting to speak on behalf of Richard Strawn made any request to have the mortgage cancelled. The October 31, 2003 letter incorrectly states the mortgagor is "Cammie B. Strawn," who had been divorced from Richard Strawn since 2001. Cammie Strawn had no authority to request cancellation of the mortgage. The closing attorney who made the request relied on by the majority did not represent Richard Strawn, who was not a party to the real estate transaction, and therefore the attorney's request was not made on Richard Strawn's behalf. There is no evidence in the record of any other request to cancel the mortgage. Because no evidence exists that a proper request for cancellation was made, there can be no liability under section 29-3-320 for failure to honor the request. The circuit court's award of punitive damages and attorney's fees is dependent on the validity of the statutory penalty. I would reverse and enter judgment for the Bank.