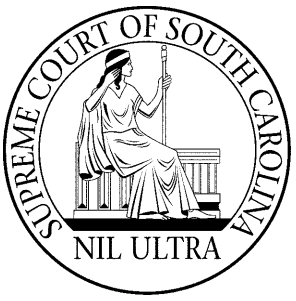

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 5, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2014-001337

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27554
Heard June 3, 2015 – Filed August 5, 2015

AFFIRMED AS MODIFIED

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

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

JUSTICE BEATTY: The State appeals the Court of Appeals' affirmation of the circuit court's interpretation of section 56-5-2953 of the South Carolina Code. The Court of Appeals found that section 56-5-2953 requires officers to record the head of the motorist when administering the Horizontal Gaze Nystagmus (HGN) field sobriety test and that Cody Gordon's head was not sufficiently visible. The State posits that a plain reading of the statute makes no mention of the motorist's "head." We affirm the Court of Appeals' conclusion that the statute requires that the motorist's head be recorded in the video; however, we vacate the mandate to remand to the magistrate court for further consideration. We reinstate Gordon's conviction as we find that the officer complied with the statute in recording Gordon's HGN test.

I. Factual/Procedural History

On October 29, 2011, Gordon was stopped at a license and registration checkpoint by a South Carolina Highway Patrol Officer. The officer administered several field sobriety tests. The test at issue in this case is the HGN test. The dashboard camera on the officer's patrol car recorded the entire incident, including all field sobriety tests, with continuous recording. The stop occurred at night, so the lighting was not perfect, but the officer had Gordon stand in the light of his patrol car's headlights and further illuminated Gordon by shining a flashlight directly on his face.

Following the tests, Gordon was placed under arrest. Gordon was charged with driving under the influence (DUI) for violating section 56-5-2930. The case was presented to a magistrate judge and a jury. The jury found Gordon guilty as charged. Gordon timely appealed his conviction.

Using still-shot photos of the video, Gordon argued that the video violated section 56-5-2953(A) because he was out of sight and in the dark during the HGN test. The circuit court concluded that section 56-5-2953(A) requires the motorist's head to be visible during the administration of the HGN field sobriety test. Section 56-5-2953(A) reads in pertinent part:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his ***conduct*** at the incident site and breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:

> (i) not begin later than the activation of the officer's blue lights;
> (ii) ***include any field sobriety tests administered***; and
> (iii) include the arrest of a person for violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2011) (emphasis added). The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." The circuit court reversed his conviction and dismissed the DUI charge. The State timely appealed to the Court of Appeals.

The Court of Appeals affirmed in part, vacated in part, and remanded the case to the magistrate court. *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). The court concluded that "the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding." *Gordon*, 408 S.C. at 543, 759 S.E.2d at 758. The Court of Appeals remanded the case to the magistrate court with the instruction to "make factual findings in light of the circuit court and our determination that the test must be recorded on the camera; specifically for the HGN test, the head has to be visible on the recording." *Gordon*, 408 S.C. at 543-44, 759 S.E.2d at 759.

The Court of Appeals denied the State's petition for a rehearing.[1] This Court granted the State's petition for a writ of certiorari to review the Court of Appeals' decision.

II. 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 cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there

[1] Additionally, the Court of Appeals withdrew its original opinion and substituted a new published one. *Gordon*, 408 S.C. at 536, 759 S.E.2d at 755.

is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459.

III. Discussion

Whether the Court of Appeals erred in affirming the circuit court's decision to reverse Gordon's magistrate court conviction for driving under the influence?

A. Argument

The State argues the Court of Appeals misconstrued the decision of the magistrate as lacking sufficient findings of fact. Specifically, the State contends that the Court of Appeals "misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement that 'the head must be visible on the recording' of an HGN field sobriety test."

B. Analysis

The State would have us review this case using the analytical framework of *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). The court in *Murphy* held that section 56-5-2953 only requires that the conduct of the motorist be recorded. *Murphy*, 392 S.C. at 631, 709 S.E.2d at 688. The Court of Appeals and the circuit court correctly distinguished *Murphy* from Gordon's case. In *Murphy*, the prior version of the statute at issue in this case was in effect. The prior version of the statute did not include the explicit requirement that the videotape include "any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii)(Supp. 2011). The current version of the statute, which applies to Gordon, specifically requires that the officer record "any field sobriety tests administered." Based on this distinction, the magistrate erred as a matter of law in finding that the officer's recording was only required to show Gordon's conduct generally.

The statute at issue in this case is clear and unambiguous and, therefore, this Court must give its words their ordinary meaning. The statute states that the video recording "must include any field sobriety test administered," which necessarily

includes the HGN test. Considering the fact that the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video. Accordingly, the circuit court's finding that the head must be visible does not amount to a hyper-technicality, but merely states the obvious. The Court of Appeals did not err in affirming this requirement.

Here, the officer's administration of the HGN test is visible on the video recording. It is undisputed that Gordon's face is depicted in the video; it is axiomatic that the face is a part of the head. The officer's flashlight and arm are visible as he administers the test. Also, the officer's instructions were audible. Thus, the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied. Therefore, the per se dismissal of the charge as discussed in *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), and *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) is not appropriate.

Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test.[2] If that remedy is applied here, there is still sufficient evidence to present this case to a jury for resolution. The evidence included the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers.

Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.[3]

The remaining issues raised by Gordon concerning discrepancies with the breath test site video's date and time stamp are without merit.

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[2] It appears the solicitor unintentionally led the circuit court to believe that the HGN test was the only evidence against Gordon.

[3] Of course, this would not be the case if actual eye movement is recorded.

IV. Conclusion

The Court of Appeals' decision is affirmed as to the requirements for video recording the HGN field sobriety test. The mandate to remand to the magistrate court for further consideration is vacated. Gordon's conviction is reinstated.

TOAL, C.J., HEARN, J., and Acting Justice Alison Renee Lee, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Regions Bank, Petitioner,

v.

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

Appellate Case No. 2012-213178

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27555
Heard September 23, 2014 – Filed August 5, 2015

AFFIRMED

Harold P. Threlkeld, of The Office of Harold P. Threlkeld, of Anderson, for Petitioner.

Samantha Nelson Murphy, of Epps, Nelson & Epps, of Anderson, for Respondents.

JUSTICE BEATTY: This matter is before the Court by way of a petition for a writ of certiorari seeking review of the Court of Appeals' decision in *Regions Bank v. Strawn*, 399 S.C. 530, 732 S.E.2d 230 (Ct. App. 2012). Regions Bank

contends that the Court of Appeals erred when it affirmed the trial court's award of statutory damages for the bank's failure to satisfy a mortgage. We affirm.

I. FACTUAL / PROCEDURAL HISTORY

In 2006, Regions Bank brought a foreclosure action against Robert and Nancy Borchers seeking to foreclose on the property the Borchers purchased from Cammie Strawn in 2003. The Borchers counterclaimed seeking to recover damages from Regions Bank pursuant to section 29-3-320[1] of the South Carolina Code based on the bank's failure to enter satisfaction of the mortgage within the three-month time period required by section 29-3-310[2].

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[1] Section 29-3-320 provides in pertinent part:

> 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.

S.C. Code Ann. § 29-3-320 (2007).

[2] Section 29-3-310 reads:

> 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 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,

Marie Borchers purchased the home in question from Cammie Strawn. Cammie acquired the home, by deed, from her then-husband, Richard Strawn. Richard Strawn had previously given a mortgage to Regions Bank to secure a line of credit. At the time that the house was sold to Marie Borchers, there was an outstanding balance of $32,240.42 on the credit line.

On the day of closing, Marie Borchers' attorney, James Belk, had an employee deliver a payoff check and a mortgage satisfaction transmittal letter to Regions Bank. The check had the words "Payoff of first mortgage" typed on it. Regions Bank applied the check to the line of credit debt bringing its balance to zero; however, Regions Bank did not satisfy the mortgage. Instead, Regions Bank provided Richard Strawn with new checks on the line of credit even though the public record reflected that Richard Strawn had not owned the property for more than two years. Richard Strawn accrued new debt in excess of $72,000.

Regions Bank attempted to collect Strawn's debt by foreclosing on the Borchers' home. The Borchers answered, counterclaimed and moved for summary judgment on the foreclosure action. The Borchers claimed that they were bona fide purchasers, they complied with section 29-3-310, and, as a result, they were entitled to damages pursuant to section 29-3-320. Regions Bank countered that the mortgage represents a revolving line of credit, which should be handled differently than a conventional mortgage, and that it could not satisfy the mortgage without instructions from Strawn himself.

On August 18, 2008, Circuit Court Judge J.C. Nicholson, Jr., granted the Borchers' motion. Citing admissions from Regions Bank employees, Judge Nicholson concluded that based on "these admissions by the Bank it is clear that the closing day payoff should have been processed as a payoff instead of a paydown and that the bank should have had the mortgage satisfied of record." Additionally, Judge Nicholson specifically cited section 29-3-320 and its imposition of liability for mortgage lenders that do not satisfy mortgages within three months after payoff.

Subsequently, on September 30, 2008, Regions Bank moved for summary judgment on the Borchers' counterclaims. Regions Bank's motion was heard in May of 2010. Circuit Court Judge R. Lawton McIntosh referenced the 2008 order

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> request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

S.C. Code Ann. § 29-3-310 (2007).

and denied Regions Bank's motion for summary judgment. Judge McIntosh then heard testimony and granted judgment in favor of the Borchers based on Regions Bank's failure to satisfy the mortgage within three months. Regions Bank then appealed to the Court of Appeals. The Court of Appeals affirmed, finding that the Borchers presented evidence to demonstrate that the Bank failed to satisfy the mortgage as required by section 29-3-310 and was subject to the penalty under section 29-3-320. *Regions Bank v. Strawn*, 399 S.C. 530, 544, 732 S.E.2d 230, 237 (Ct. App. 2012).

II. DISCUSSION

Regions Bank posits multiple arguments in support of its contention that the Court of Appeals erred. However, the gist of the arguments present two questions for the Court's consideration: 1) whether "open-end" mortgages, as contemplated by section 29-3-50[3], are an exception to section 29-3-310 in that only the grantor may request satisfaction or cancellation of the mortgage; and 2) whether the Borchers or any other mortgagor may assert a violation of sections 29-3-310 and 29-3-320 when their attorney had the authority to timely cancel or satisfy the mortgage pursuant to section 29-3-330. For reasons discussed below, we answer the first question "no" and the second question "yes".

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[3] Section 29-3-50 reads in part:

> 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).

Initially, we note that there is sufficient evidence in the record to support the trial court's finding that the Borchers' attorney requested the mortgage be satisfied and tendered any necessary fees.

Regions Bank asserts the original grantor of the mortgage did not request that the mortgage be satisfied. Therefore, Regions Bank claims that it was neither authorized nor required to satisfy the mortgage. In support of this claim, Regions Bank cites section 29-3-50, *Central Production Credit Association v. Page*, 268 S.C. 1, 231 S.E.2d 210 (1977), and a mortgage provision. Regions Bank's reliance on this authority is misplaced.

A provision in the mortgage states, in relevant part, "upon request of Grantor, Lender will cause the mortgage to be released and cancelled of record." Regions Bank argues that this language restricts authority to request cancellation of the mortgage to the grantor, Strawn. However, Regions Bank conveniently overlooks the "Successors and Assigns" provision of the mortgage which states in relevant part:

> **Successors and Assigns.** Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon **and inure to the benefit of the parties, their successors and assigns.** If ownership of the Property becomes vested in a person other than Grantor, **Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage** and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Mortgage or liability under the indebtedness. (Emphasis added).

The mortgage contemplates the possibility that the property would be sold. As successors to Strawn, the Borchers acquired Strawn's rights and benefits under the mortgage. As such, the Borchers, through their attorney, could request satisfaction of the mortgage. Moreover, Regions Bank was authorized to deal with Strawn's successors without Strawn's permission.

Regions Bank cannot seek solace in *Central Production Credit Association*. *Central Production Credit Association* does not say or infer that a request to satisfy an open-end mortgage can only be made by the grantor. To the contrary, Justice Littlejohn, writing for the Court, opined that the law requires that an open-end mortgage be cancelled upon request when there is no outstanding debt. *Cent. Prod. Credit Ass'n v,* 268 S.C. at 8, 231 S.E.2d at 214. Significantly, the Court

said that "section 45-61 provides for such cancellation." *Id*. Section 45-61[4] is the precursor to section 29-3-310. Both sections allow anyone with an interest in the mortgaged property to request cancellation or satisfaction of the mortgage. There is no exception for open-end mortgages. Regions Bank offers section 29-3-50 to create a pseudo-special status for open-end mortgages as it relates to mortgage satisfaction methods. No such status exists in our jurisprudence.

Finally, Regions Bank argues that the Borchers cannot assert a claim for violation of section 29-3-310 because the Borchers' attorney could have timely satisfied or cancelled the mortgage himself pursuant to section 29-3-330(e). This argument is without merit. Section 29-3-330(e) authorizes an attorney to enter an affidavit of satisfaction when a mortgage holder fails to do so. However, there is nothing in section 29-3-330(e) that exempts a mortgage holder from the penalty provisions of section 29-3-320.

III. CONCLUSION

Open-end mortgages are cancelled and satisfied in the same manner as other mortgages. Section 29-3-310 controls the method to do so. The law and the mortgage itself required Regions Bank to satisfy the mortgage as requested. Accordingly, the Court of Appeals' decision is

AFFIRMED.

TOAL, C.J., PLEICONES and HEARN, JJ., concur. KITTREDGE, J., concurring in result only.

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[4] Section 45-61 reads:

> Any person who shall have received full payment or satisfaction or to whom a legal tender shall have been made of his debts, damages, costs and charges secured by the mortgage of real estate or personal property shall, at the request 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 such mortgage and on tender of the fees of office for entering such satisfaction, within three months after such request made, enter satisfaction in the proper office on such mortgage which shall forever thereafter discharge and satisfy such mortgage.

Section 45-61 of the 1962 Code of Laws (currently codified as section 29-3-310).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Latoya Brown, Petitioner,

v.

Dick Smith Nissan, Inc. and Old Republic Surety Company, Respondents.

Appellate Case No. 2013-000417

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27556
Heard February 3, 2015 – Filed August 5, 2015

REVERSED

William T. Toal, of Johnson, Toal & Battiste, P.A., of Columbia, for Petitioner.

Joseph Gregory Studemeyer, of Columbia, for Respondents.

JUSTICE BEATTY: Latoya Brown entered a contract to purchase a Mazda 6 automobile from Dick Smith Nissan, Inc. ("Dick Smith") with the assistance of salesman Robert Hiller. The purchase was contingent on acquiring third-party financing. Due to continuing and unresolved issues with financing, Brown returned the vehicle to Dick Smith. The car was later repossessed and sold by Sovereign Bank with a deficiency against Brown. Brown filed a complaint against Dick Smith and Old Republic Surety Company ("Old Republic"), the surety on Dick Smith's licensing bond, alleging violations of the South Carolina Dealers Act[1] ("Dealers Act"). The trial judge, in a bench trial, found in favor of Brown and awarded damages plus interest as well as attorney's fees and costs. Dick Smith and Old Republic appealed and the Court of Appeals reversed, concluding that any misconceptions that Brown had about her financing were caused by Sovereign Bank, not Dick Smith. *Brown v. Dick Smith Nissan, Inc.*, Op. No. 2012-UP-688 (S.C. Ct. App. filed Dec. 28, 2012). We granted Brown's petition for a writ of certiorari to review the decision of the Court of Appeals and now reverse.

I. Factual / Procedural History

Shortly after graduating from college, Brown went to Dick Smith to buy a car and was assisted by Hiller. She informed him that she wanted to pay no more than $250 per month for a car payment. Hiller showed Brown pictures of pre-owned cars on his computer. Brown selected a Mazda 6 and Hiller prepared a buyer's order for the Mazda 6. He then directed Brown to the finance department. Brown talked to Kent Guthrie in the finance department and signed an installment contract, which identified the Mazda 6, the payment amount, the total number of payments, and when the first monthly payment would be due. The contract also included a clause that the contract was contingent on financing by a third-party source. After providing proof of insurance, Brown took possession of the Mazda 6.

Initially, Dick Smith told Brown that BB&T would finance her purchase. Brown, however, received a denial letter from BB&T. Brown then contacted Hiller to inquire about financing. Hiller told Brown that Dick Smith would

[1] The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the "Dealers Act") is codified at S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2014).

continue to seek financing for the Mazda 6. Thereafter, Brown received denial letters from multiple financial institutions, including Nissan Motor Acceptance Corporation. As a result, Brown called Hiller again concerning her financing. Hiller reassured her that he was still working on securing financing for her. Brown told Hiller that if he could not get her financed, she would return the Mazda 6.

Sovereign Bank was one of the many financial institutions originally solicited by Kent Guthrie. Because his initial attempts were not successful, Guthrie again contacted Sovereign Bank. In negotiating with Sovereign Bank, Guthrie misrepresented that Brown was the relative of a long-time Dick Smith employee and that Guthrie needed a favor on the deal. Sovereign Bank approved financing for a Nissan Altima as requested by Guthrie.[2] However, Sovereign Bank requested proof of income of $2,800 per month. At the time, Brown's monthly income was approximately $1,800.

Hiller called Brown and told her that Sovereign Bank had approved her financing. After Hiller told Brown that she was approved by Sovereign Bank, Brown received a denial letter from Sovereign Bank. Brown went back to Dick Smith and spoke with Hiller. She showed him her denial letter and he responded that Sovereign Bank had approved her application and would finance the car. Brown requested proof of financing. Hiller then went to Guthrie and returned with a form entitled "Sovereign Bank Application Status." The document indicated that: (1) Brown's financing was approved for a Nissan Altima, (2) Brown was Hiller's relative, and (3) proof of income of $2,800 per month was required in order to finance the purchase.

Brown called Sovereign Bank to verify the status of her financing request. A representative from the bank informed her that financing was approved for a Nissan Altima. Brown then advised the bank that she was buying a Mazda 6, not a Nissan Altima, and asked to change the paperwork to reflect the correct car. Sovereign Bank refused to do so and told her to contact Dick Smith. Brown contacted Dick Smith and it inexplicably refused to take any corrective action. Unbeknownst to Brown, Dick Smith had accepted payment from Sovereign Bank for the Nissan Altima.

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[2] The different application numbers on Brown's denial letter and approval letter demonstrates that Brown was initially denied financing by Sovereign Bank. The second application indicated that the loan was for a Nissan Altima.

The day after Brown received the denial letter from Sovereign Bank, she returned the Mazda 6 and its keys to the Dick Smith dealership. She indicated that she returned the Mazda 6 because she did not believe it was financed. Shortly thereafter, Sovereign Bank sent Brown a letter informing her that it had repossessed the Mazda 6 and sold it, resulting in a deficiency of $3,843 for which Brown was responsible. Brown filed suit against Dick Smith and Dick Smith's licensing bond issued by Old Republic, alleging violations of section 56-15-30(a) of the Dealers Act.[3]

II. Standard of Review

An action brought under the Dealers Act is an action at law. *See Adams v. Grant*, 292 S.C. 581, 582, 358 S.E.2d 142, 143 (Ct. App. 1986) (recognizing that an action under the Dealers Act is an action at law). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.*

III. Discussion

A.

The Dealers Act prohibits a motor vehicle dealer from, *inter alia*, engaging in "any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code Ann. § 56-15-40(1) (2006). "Arbitrary conduct is readily definable and includes acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). Bad faith is "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *State v. Griffin*, 100 S.C. 331, 331, 84 S.E. 876, 877 (1915) (citation

[3] Section 56-15-30(a) states, "Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful." S.C. Code Ann. § 56-15-30(a) (2006).

omitted). "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

B.

For several reasons, Brown contends the Court of Appeals erred in reversing the decision of the trial judge. First, Brown argues the Court of Appeals erred in finding the inaccuracies[4] on the financing application were "puffing"[5] and that those inaccuracies did not amount to bad faith, fraud, or a deceptive act. She states the inaccuracies were false statements, which constituted a clear violation of both federal and state law.[6] Second, Brown alleges the Court of Appeals failed to identify that Dick Smith received funding for a Nissan Altima, not a Mazda 6. Because the financing of the Mazda 6 was a condition precedent for the installment contract she signed, Brown submits that she was never obligated to make monthly payments on the car and was entitled to return it.

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[4] Brown was falsely listed as a family member, the collateral was incorrect, and Brown made less than the required monthly income.

[5] "Puffing" is defined as:

> The expression of an exaggerated opinion ─ as opposed to a factual misrepresentation ─ with the intent to sell a good or service. Puffing involves expressing opinions, not asserting something as a fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say they have attributes that they do not possess.

Black's Law Dictionary 1353 (9th ed. 2009).

[6] *See* 18 U.S.C. § 1005 (2002) (proscribing thirty years' imprisonment for anyone who intends to defraud any bank and receives money); S.C. Code Ann. § 16-13-10 (2003) (providing that it is unlawful for a person to publish as true any false writing or instrument of writing).

In response, Dick Smith claims that Brown abandoned the Mazda 6 against its advice. Dick Smith also maintains that Brown was not harmed by any of its actions. However, even if she was harmed, it was because of Sovereign Bank's "erroneous letter" and not any statements from Dick Smith.

The factual findings of the trial judge, which are supported by the record, demonstrate that Sovereign Bank received a credit application to finance a Nissan Altima and approved financing for a Nissan Altima. The record does not reflect an error on the part of Sovereign Bank. In contrast, Dick Smith made false statements to Sovereign Bank and Brown regarding the financing for the Mazda 6. Dick Smith also made no effort to correct the problem after receiving the credit application approval that listed the Nissan Altima instead of the Mazda 6. In fact, even after Brown advised Dick Smith that Sovereign Bank refused to substitute the Mazda 6 for the Nissan Altima, Dick Smith took no corrective action. As a result, Brown was erroneously required to pay Sovereign Bank for a car that she did not agree to buy and did not possess.

The subsequent repossession of the Mazda 6 and deficiency against Brown were the result of Dick Smith's failure to timely take corrective action to ensure that the Mazda 6 (versus the Nissan Altima) was financed by Sovereign Bank. Even assuming that Sovereign Bank would agree to substitute collateral in this case, there is no evidence that there was ever an attempt by Dick Smith to substitute collateral prior to Brown returning the vehicle. The likely conclusion is that the collateral was not substituted until the Mazda 6 was repossessed months after Brown returned it to Dick Smith.

Further, we disagree with the Court of Appeals that the inaccuracies in the information provided to Sovereign Bank was merely "puffing" used to assist Brown in getting financing and that the inaccuracies did not cause her damage. Inaccuracies in a financing application are a serious cause for concern. Financing a car that Brown did not purchase was neither "puffing" nor helpful to Brown. The fact that Brown was required to pay for a car that she did not possess was actually damaging as is shown by Sovereign Bank's collection efforts. Moreover, Dick Smith's refusal to timely assist in transferring the collateral resulted in Brown being expected to pay for a car for which she would not be able to obtain title.

Additionally, we reject Dick Smith's argument that it was absolved of culpability under the Dealers Act because it affirmatively warned Brown that her vehicle would be repossessed. The violation of the Dealers Act occurred in the methods it employed to procure financing for Brown and the fact that it failed to assist Brown in correcting its mistakes that caused the issues with the Mazda 6. In the words of the trial judge:

> Dick Smith failed to verify the financing on the Mazda or provide Plaintiff with any additional information regarding the financing. Instead, Dick Smith showed Plaintiff an approval letter[7] from Sovereign Bank based on incorrect information and correlating to a loan in a different amount, pertaining to a different vehicle, and incorrectly listing Brown's income as $2,800 per month. Dick Smith did not inform Plaintiff that it had received the payment from Sovereign Bank. Dick Smith made no effort to assist Plaintiff regarding the paperwork on the Mazda. By failing to verify the financing of the proper vehicle and representing to Plaintiff that she was approved for financing on the vehicle she possessed, Plaintiff was treated in an unfair and deceptive manner by representatives of Dick Smith. Thus, irrespective of Plaintiff's interactions with Sovereign Bank, Dick Smith failed to act in good faith in its dealings with Plaintiff.

As evidenced by the above-quoted language, the trial judge concluded that Dick Smith acted in bad faith when it made no effort to assist Brown in correcting the financing paperwork or transferring collateral on the loan. We agree with this conclusion as Dick Smith failed to fulfill its obligation to timely arrange for substituting collateral or correcting Brown's loan documents.

Without dispute, the installment contract was contingent on third-party financing for a Mazda 6. Here, the record establishes that Dick Smith knowingly applied for, and received, financing for a Nissan Altima and not a Mazda 6. Assuming, without deciding, that this was an oversight on the part of Dick Smith, Dick Smith refused to assist in correcting the alleged mistake even after being advised that their assistance was necessary. Notably, Dick Smith's finance

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[7] The "approval letter" was actually just a computer print-out from the "DealerTracker" website.

manager testified that a telephone call from Dick Smith was sufficient to transfer collateral. Yet, Dick Smith failed to perform this simple act.

Based on the foregoing, we agree with the trial judge's conclusion that Dick Smith violated the Dealers Act as it acted in bad faith and Brown was damaged by this action.

IV. Conclusion

Despite evidence in the record to support the trial judge's findings of fact, the Court of Appeals ignored those findings and substituted its own. By doing so, the Court of Appeals exceeded its standard of review. Accordingly, we reverse the Court of Appeals and reinstate the trial judge's decision.

REVERSED.

KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur. PLEICONES, Acting Chief Justice, concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clint A. Chestnut, Rebatt Frankie Jefford, Mary Lou Nance, Margaret Ramsey, Nicholas Ramsey, Harold Cushman, Julia Edwards, Don Emery, Eula Cooke, and Glenda Rabon Harper, Individually, and as Class Representatives, Appellants,

v.

AVX Corporation, Respondent.

Appellate Case No. 2012-212143

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27557
Heard January 23, 2014 – Filed August 5, 2015

AFFIRMED IN PART; REVERSED IN PART

Gene McCain Connell, Jr., and Lawrence Sidney Connor, IV, both of Kelaher Connell & Connor, PC, of Surfside Beach, for Appellants.

Samuel W. Outten, of Womble Carlyle Sandridge and Rice, LLP, of Greenville, Richard E. Morton, Brad A. DeVore and Todd Billmire, all of Womble Carlyle Sandridge and Rice, LLP, of Charlotte, North Carolina, and Evan Slavitt, of Myrtle Beach, for Respondent.

JUSTICE PLEICONES: This is an appeal from an order granting respondent's Rule 12(b)(6), SCRCP, motion, and dismissing appellants' claims for trespass, nuisance, negligence, and strict liability. Appellants contend on appeal that the court erred in dismissing the nuisance, negligence, and strict liability claims.[1] We affirm the circuit court's dismissal of appellants' nuisance and strict liability causes of action, but reverse the dismissal of the negligence claim.

FACTS

Respondent manufactures electronic parts at a plant in North Myrtle Beach, South Carolina. In 1980, respondent began using a chemical called trichloroethylene (TCE)[2] as a degreaser to clean machine tools and parts. At some point, TCE escaped respondent's plant and migrated beyond the boundaries of respondent's property, contaminating surrounding properties and groundwater.

In December 1996, respondent entered into a consent order with the South Carolina Department of Health and Environmental Control (DHEC), in which respondent admitted that it had violated certain state environmental statutes and regulations. DHEC required respondent to implement a plan to clean up the TCE. In 2007, environmental testing performed in a ten block section north of respondent's plant showed levels of TCE greater than considered safe.

On November 27, 2007, a group of residents who own real property near respondent's plant filed suit alleging causes of action for trespass, nuisance, negligence, and strict liability. The residents brought the suit both individually and as class representatives pursuant to Rule 23, SCRCP.

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[1] They do not appeal the dismissal of their trespass claim.

[2] The Environmental Protection Agency has designated TCE as a volatile organic compound. Because TCE is slightly heavier than water, it is difficult to extract if spilled into the ground.

The complaint describes two subclasses within the general class definition. Subclass A includes "all persons, partnerships, [or] corporations who own real property in the area defined in paragraph 15 and whose property is contaminated by chemicals which have escaped or have been spilled and left [respondent's] plant property." Subclass B includes:

> all persons partnerships or corporations who own real property in the areas defined in paragraph 15 of the Complaint *but are not contaminated*; however these properties adjoin the contaminated area and are in such close proximity that the real property value has been affected or devalued by the chemical release at [respondent's] plant.
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> (Emphasis supplied).

Appellants are Subclass B individuals.

The circuit court granted respondent's Rule 12(b)(6) motion and dismissed appellants' claims with prejudice. In dismissing appellants' trespass, negligence, and strict liability claims, the circuit court stated that such claims "cannot be maintained when there is no evidence that alleged contamination has physically impacted [appellants'] properties." Further, with respect to appellants' nuisance claim, the circuit court noted that a claimant must plead an unreasonable interference with the use and enjoyment of his or her property in order to state a claim for nuisance. Therefore, the circuit court found that because their properties are not contaminated, appellants' allegations did not state a claim for nuisance. Appellants appealed.

ISSUE

> Did the circuit court err in dismissing appellants' nuisance, negligence, and strict liability claims?

ANALYSIS

On appeal from the grant of a Rule 12(b)(6) motion, we are concerned only with whether the allegations of the complaint, which we must accept as true, state a cause of action. *E.g.*, *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494

(2014). Further, novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion. *E.g.*, *Madison v. Am. Home Prod. Corp.*, 358 S.C. 449, 595 S.E.2d 493 (2004). Finally, this Court can affirm a lower court's order for any reason appearing in the record. Rule 220(c), SCACR.

We affirm the circuit court's dismissal of both appellants' nuisance and strict liability claims because the complaint alleges actual contamination of the property in pleading both of these causes of action. Since each of these claims was pled only on behalf of the Subclass A plaintiffs and not on behalf of appellants, we uphold the circuit court's dismissal of these two causes of action pursuant to Rule 220(c), SCACR. As explained below, however, we find the complaint sufficiently pleads a negligence cause of action on behalf of appellants, and therefore reverse the dismissal of this claim.

In *Babb v. Lee County Landfill S.C., LLC*, 405 S.C. 129, 747 S.E.2d 468 (2013), we held a plaintiff could maintain an environmental negligence suit based upon offensive odors if the complaint alleged either "physical injury [to the plaintiff] or property damage." *Id*. at 153, 747 S.E.2d at 481. Here, appellants have pled all four elements of a negligence claim: duty, breach, proximate cause, and damages. In alleging damages, appellants contend that their property is "worthless," "damaged," and "devalued" by the "harmful" and "dangerous" chemicals on the real property that adjoins their properties. This pleading raises the novel question[3] whether South Carolina will recognize "stigma damages." We reverse the circuit court's dismissal under Rule 12(b)(6), SCRCP, because this case raises a novel question of law. *Madison v. Am. Home Prod. Corp.*, 358 S.C. at 451, 595 S.E.2d at 494.

Further development of the facts may demonstrate that appellants' property has in fact lost value due to its proximity to the property contaminated by TCE, or that the contamination has been remediated and the alleged stigma ameliorated. The creation of a factual record will allow us to decide whether to adopt a "no stigma damages rule;" an "all stigma damages rule;" or a modified rule. *See Diminished Property Value Due to Environmental Contamination*, 33 Am. Jur. 3d *Proof of*

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[3] *Compare Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971) (holding that appellant failed to prove that the stigma damages to his real property were attributable to the single act of the named defendant and therefore does not decide whether we will allow recovery for this type of property damage).

Facts § 163 (1995 and Supp. 2014) (explaining the differing approaches to stigma damages).

CONCLUSION

For the reasons given above, the circuit court's order is

AFFIRMED IN PART AND REVERSED IN PART.

BEATTY and HEARN, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I respectfully concur in part, and dissent in part. While I concur in the majority's decision to affirm the circuit court's dismissal of Appellants' claims for nuisance and strict liability, I would also affirm the dismissal of Appellants' negligence claim.

I. Negligence, Strict Liability, and Nuisance Claims

Appellants appeal the circuit court's dismissal of their negligence, strict liability, and nuisance claims. Despite the distinctions between these three causes of action, when applied to cases involving environmental contamination, each is defined by—and requires—a common element: actual damage or injury caused by the source of contamination. *See Babb v. Lee Cnty. Landfill SC, L.L.C.*, 405 S.C. 129, 145, 153, 747 S.E.2d 468, 476, 481 (2013) (stating that a negligence claim "requires a plaintiff to establish physical injury or property damage," and that "recovery under a nuisance claim requires proof of actual and substantial injury by demonstrating that the defendant unreasonably interfered with his ownership or possession of land"); *Clark v. Greenville Cnty.*, 313 S.C. 205, 437 S.E.2d 117 (1993) (dismissing property owners' negligence and strict liability claims because there was no evidence of damages caused by the contamination).

As to Appellants' negligence and strict liability claims, I would affirm the dismissal of both claims because Appellants did not allege facts indicating that their properties are either actually damaged,[4] or contaminated by TCE—a fact which Appellants concede. *See Babb*, 405 S.C. at 145, 747 S.E.2d at 476. Further,

I agree with the majority's decision to affirm the dismissal of Appellants' nuisance claim, because Appellants failed to allege actual injury which interfered with the ownership of their properties.[5] *See id.* at 153, 747 S.E.2d at 481.

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[4] The majority states that Appellants' negligence claim should survive because Appellants assert claims that their properties are "worthless," unable to be sold, and that their property has been "devalued" because of the nearby contamination. I view these assertions as relative to Appellants' stigma damages argument and as discussed, *infra*, South Carolina has not adopted stigma damages.

[5] Appellants assert they "have shown that by owning adjoining property to contaminated property their enjoyment of their property has been affected." However, Appellants do not identify how the contamination has interfered with the use and enjoyment of their properties. *Ravan v. Greenville Cnty.*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993) ("[A] nuisance [cause of action requires]

Into the equation, Appellants have introduced the concept of stigma damages as a possible vehicle for their recovery. However, as discussed below, this Court has not yet recognized stigma damages in South Carolina and I would decline to do so here.

II. Stigma Damages

Despite the lack of contamination on Appellants' properties, they claim that their properties are in such close proximity to the contaminated area that their property values have been "affected or devalued." Based on this allegation, they argue that this Court should recognize stigma damages. In the environmental context, stigma damages are defined as:

> the negative perceptions associated with property that is contaminated, that was once contaminated or that lies in proximity to contaminated or previously contaminated property. Stigma represents a loss in value apart from the cost of curing the contamination itself, and it can be based upon actual or perceived risks or fear, such as "possible public liability," "fear of additional health hazards" and "simple fear of the unknown." Additionally, stigma is based upon perceptions about risks and liabilities associated with owning, or holding property interests in, contaminated property. The perceptions on which society bases the stigma need not be reasonable or substantiated.

E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. Envtl. L. & Pol'y 185, 185 (1997) (internal footnotes omitted). Thus, stigma damages are not damages for actual physical

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a substantial and unreasonable interference with the plaintiff's use and enjoyment [of his property]."). Appellants do not allege, for instance, that the contamination prevents them from using their properties in any particular way, affects their day-to-day enjoyment of their properties, or interferes with their health. Instead, Appellants merely contend that *because their properties are located in close proximity* to the contamination, TCE has "affected" the enjoyment of their property.

contamination, but for negative perceptions associated with the contamination. *Id.* Some jurisdictions recognize stigma damages in limited circumstances;[6] however, this Court has not permitted the recovery of stigma damages.

Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971), is the only South Carolina case that directly acknowledges stigma damages, albeit generally. *See* 256 S.C. at 567–71, 183 S.E.2d at 442–44. In *Gray*, the appellant alleged that a nearby fire caused his property to depreciate, even though the fire did not physically damage the property. *Id.* at 568, 183 S.E.2d at 443. The basis of the appellant's claim for damages was "predicated upon an asserted diminution in market value resulting, not from any physical injury, but from a psychological factor, in that prospective buyers allegedly would be reluctant to purchase the property due to the fear of a similar occurrence in the future." *Id.* at 569, 183 S.E.2d at 443. This Court noted that "'injury to the reputation of . . . property has been held not to be a proper element of damages,'" but acknowledged that no general or firmly established rule had been developed at that point. *Id.* (quoting 22 Am. Jur. 2d *Damages* § 136).

Ultimately, this Court held that the appellant in *Gray* could not recover because his evidence as to the diminution of market value was speculative. *Id.* at 571, 183 S.E.2d at 444. Therefore, the Court found it unnecessary to decide whether or not, or under what circumstances, stigma damages might be recovered. *Id.* at 570, 183 S.E.2d at 443.

Like the appellant in *Gray*, Appellants pled no physical damage to their properties, but instead present speculative claims of a diminution in market value and damages to the reputation of their properties that *may* be realized *if* Appellants ever attempt to sell their properties. *See id.* at 571, 183 S.E.2d at 444. For example, in their complaint, Appellants state that because of the nearby TCE contamination, they are "unable to sell their homes/real property," "their property has now become distressed property," and their property has been devalued.

Due to the speculative nature of their claims, Appellants have provided no

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[6] *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 463 (3d Cir. 1997); *Adams v. Star Enter.*, 51 F.3d 417, 424 (4th Cir. 1995) (applying Virginia law); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 744–45 (W.D. Ky. 1998); *Walker Drug Co. v. La Sol Oil Co.*, 972 P.2d 1238, 1246 (Utah 1998).

reason for the Court to depart from the requirement of actual damage in claims involving environmental contamination. Although the majority defers a discussion on whether to adopt the doctrine of stigma damages under further factual developments, I would hereby decline Appellants' request to adopt stigma damages in any form as an appropriate measure of damages in South Carolina.

III. Conclusion

In sum, my conclusion is rooted in the simple fact that Appellants' properties have not been damaged by any contamination. The only injury Appellants allege in their complaint is the possible devaluation of their properties, i.e., stigma damages, which I would decline to recognize as a sufficient allegation of damages in South Carolina for purposes of negligence, strict liability, or nuisance claims. Therefore, I would affirm the circuit court's dismissal of Appellants' nuisance and strict liability claims, as well as the dismissal of Appellants' negligence claim.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Isaac Antonio Anderson, Appellant.

Appellate Case No. 2012-212905

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 27558
Heard April 9, 2015 – Filed August 5, 2015

REVERSED

Joshua Shaheen Nasrollahi, of Greenwood, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General William M. Blitch, Jr., and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of first degree criminal sexual conduct with a minor, his girlfriend's daughter, and received a life sentence without

the possibility of parole (LWOP).[1] On appeal, he challenges the constitutionality of S.C. Code Ann. § 17-23-175 (2014) on Confrontation Clause[2] grounds, and contends the trial court erred in qualifying Witness Smith as an expert in both forensic interviewing and child abuse assessment. Further, he alleges Witness Smith's testimony impermissibly bolstered that of the minor. We find the statute constitutional, but agree with Appellant that the trial court erred in qualifying Witness Smith as an expert, and in allowing bolstering testimony. We reverse Appellant's conviction and sentence.

The minor lived with Appellant and her mother for approximately six years from the time she was five years old until she was eleven. Appellant and the child had a close relationship, even as her mother's and Appellant's relationship ended. In November 2009, when she was eleven years old, the victim told her mother that Appellant had been sexually abusing her, including intercourse, since she was seven years old. There was no physical evidence of abuse, and Appellant denied the accusations.

ISSUES

(1) Does S.C. Code Ann. § 17-23-175 (2014) violate the Confrontation Clause because it does not permit contemporaneous cross-examination of the individual being videotaped?

(2) Did the circuit court err in qualifying Witness Smith as an expert and permitting her to improperly bolster the minor's credibility?

ANALYSIS

A. Constitutionality of § 17-23-175

[1] Appellant had a 1993 conviction that made him eligible for an LWOP.
[2] *See* U.S. Const. am. VI.

Appellant contends that § 17-23-175, which permits the admission of a child's videotaped forensic interview under certain circumstances,[3] violates the Sixth Amendment's Confrontation Clause. We disagree.

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[3] Subsections (A) through (D) of the statute are reproduced here:

> **SECTION 17-23-175. Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party.**
>
> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
>
> > (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> >
> > (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> >
> > (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> >
> > (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.
>
> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> > (1) whether the statement was elicited by leading questions;
> >
> > (2) whether the interviewer has been trained in conducting investigative interviews of children;

Appellant contends that the statute violates the Confrontation Clause because it does not afford the accused the opportunity to cross-examine the witness during the videotaping. Further, he argues that where, as here, the child testifies before the videotape is introduced, the defendant has no opportunity to cross-examine the child on the statements made in the videotape since it is not yet in evidence. Appellant asserts that were the defendant to cross-examine the child about the videotape prior to its introduction into evidence, he would waive any objection to the videotape itself. Finally, Appellant argues that because the minor was not recalled by the State after the playing of the videotape, he was denied his constitutional right to contemporaneous cross-examination, a right he contends was established by *Maryland v. Craig*, 497 U.S. 836 (1990).

> (3) whether the statement represents a detailed account of the alleged offense;
>
> (4) whether the statement has internal coherence; and
>
> (5) sworn testimony of any participant which may be determined as necessary by the court.
>
> (C) For purposes of this section, a child is:
>
> (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and
>
> (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.
>
> (D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

In *Craig*, the child testified at the trial from a remote location on a one-way closed circuit television: Persons in the courtroom could observe the child, but she could not see the people, including the defendant. The issue in *Craig* was whether this one-way procedure violated the component of the Confrontation Clause that prefers a face-to-face encounter between the witness and the defendant during the testimony. Appellant relies on the following language from *Craig* upholding the one-way camera arrangement:

> [The] procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant **retains full opportunity for contemporaneous cross-examination**; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation -- oath, cross-examination, and observation of the witness' demeanor -- adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.
>
> *Craig*, 490 U.S. at 851 (emphasis supplied).

Appellant's reliance on *Craig* as requiring contemporaneous cross-examination during the statutory videotaping process or at trial immediately following the playing of the videotape, is misplaced. Here, the minor testified under oath in open court and was subject to cross-examination. Thus, Appellant's right to the opportunity for effective cross-examination was satisfied during the minor's actual trial testimony. That is all the Confrontation Clause requires. *Crawford v. Washington*, 541 U.S. 36 (2004). That Appellant would have to recall the child as an adverse witness in order to examine her about her videotaped statement does not render the statute or the procedure followed here violative of a defendant's Sixth Amendment right to cross-examination. *See State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011).

B. Expertise and Bolstering

Appellant first contends the trial court erred in qualifying Witness Smith as an expert in "child abuse assessment." We agree. Prior to the commencement of trial, an *in camera* hearing was conducted following which the trial court found Smith to be an expert in forensic interviewing. When the State called Smith at trial, and after reviewing her expert qualifications, the State offered her as "an expert in forensic interviewing and child abuse assessment." Appellant immediately objected, but the judge overruled the objection, stating the qualification was "as a forensic interviewer in child abuse assessment." Appellant respectfully renewed his objection, rightfully pointing out that there had been no previous determination that Smith possessed expertise in "child abuse assessment." The trial judge declined to hold a hearing on the existence of this expertise, much less whether Smith possessed the necessary qualifications.

The trial judge's refusal to determine Smith's qualification as a "child abuse assessment" expert was patent error. Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims. *See*, *e.g.*, *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); *see also State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child). The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.[4] *Compare State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.

[4] The separate writing erroneously equates the testimony of an expert who offers his opinion on a fact in issue, such as whether a product was defectively designed or manufactured, with that of an expert whose testimony may intrude upon the jury's sole province to determine the credibility of a witness. *E.g.*, *State v. Taylor*, 255 S.C. 268, 178 S.E.2d 244 (1970).

Appellant also contends the circuit court erred in qualifying Witness Smith as an expert in forensic interviewing, arguing that South Carolina courts do not recognize this type of expertise, and that a forensic interviewer is restricted to testifying to facts. We agree. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) fn. 5; *see also State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015) (Toal, C.J., dissenting) (finding error in qualifying forensic interviewer as an expert harmless). Having found error in qualifying Witness Smith as an expert in child abuse assessment and in forensic interviewing, the critical question becomes whether these two errors so prejudiced Appellant that we must reverse his conviction. We find that they did.

This case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse. We note that the solicitor and Witness Smith (a very experienced witness) repeatedly pushed the boundaries of the parties' common understanding of the permissible limits of Smith's trial testimony. For example, when testifying about the interview guidelines, Smith testified "[w]e will have a conversation with the children about the importance of truth-telling and how important it is that we . . . if we make a mistake we want . . . ." Appellant objected, and after a bench conference, his objection was overruled. There were two other objections and bench conferences before the jury was excused. At this juncture, Appellant moved for a mistrial based, in part, on the volume of the solicitor's voice at the bench hearings. The judge denied the mistrial, but not before remarking "I did have to tell [the solicitor] a couple of times to hold her voice down."

The State introduced the video through Witness Smith, then asked her what was meant by the terms delayed reporting or delayed disclosure. Appellant immediately objected, a bench conference was held, and Smith was permitted to begin explaining the terms' meaning. Appellant again objected, and the trial judge agreed to dismiss the jury in order to have the objection placed on the record. The judge overruled this objection, yet found herself sustaining Appellant's objections as the solicitor continued to elicit improper vouching testimony, and Smith continued to offer it. The prejudice on this record is overwhelming.

The record in this case and in the child sex abuse cases that have come before us in recent years demonstrate that the common practice is to present the forensic interviewer to jurors as a "human lie-detector." *See State v. Kromah*, *supra*, at fn.

4. In order to alleviate the prejudice inuring from this type of improper testimony and to clarify the procedure to be used at trial, we take this opportunity to set forth the appropriate scope of the testimony of a forensic interviewer who has conducted a videotaped interview pursuant to § 17-23-175.[5]

First, the statute requires that the interviewer be called to testify *in camera*. *See* § 17-23-175(A)(4). At that *in camera* hearing, the interviewer must testify to establish the types of factors set forth in § 17-23-175(B), such as her training and background, whether she utilized the RATAC procedure or the ChildFirst protocol, as well as any other testimony that will assist the trial court in determining whether the child's statement possesses the "particularized guarantees of trustworthiness" and thus the admissibility of the video. § 17-23-175(B). Assuming the court determines that the interview is admissible under the statute, the forensic interviewer will be called to testify before the jury. The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. This type of testimony, which establishes the "particularized guarantees of trustworthiness," necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility. We hold none of the evidence necessary for the trial court's determination of "whether a statement possesses particularized guarantees of trustworthiness" and thus admissible under § 17-23-175(A)(4) and (B) is to be presented to the jury, as such evidence necessarily vouches for the credibility of the alleged victim. [6]

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[5] Much of what we say today would apply to an "electronically recorded statement" under § 17-23-175(F).

[6] Of course, like any other fact witness, the forensic interviewer may testify to her observations. This fact-based testimony can include, despite the concerns expressed in the separate writing, the "particulars of their examinations, and their personal observations." Since the interviewer is not an expert, however, she cannot testify to "issues of delayed reporting." *See In re Thomas S.*, 402 S.C. 373, 741 S.E.2d 27 (2013). This improper expression of expert opinion by a lay witness is prohibited by Rules 602 and 701, SCRE.

We recognize the difficulty of the work performed by the dedicated employees of Child Advocacy Centers,[7] and nothing in our opinion today should be read as critical of the important service they provide for the children of the State. We simply hold that the testimony of the factors that are relevant to the trial court's determination whether the interviewee's statement is trustworthy is not appropriate for the jury, which is charged with determining for itself the credibility of each witness.

CONCLUSION

For the reasons given above, Appellant's conviction and sentence are

REVERSED.

BEATTY and HEARN, JJ., concur. TOAL, C.J., concurring in a separate opinion in which KITTREDGE, J., concurs.

[7] S.C. Code Ann. § 63-11-310 (2010).

CHIEF JUSTICE TOAL: I concur in Part A of the majority's opinion, as I agree that section 17-23-175 is constitutional. Further, I agree with the majority that the expert in child abuse assessment may have committed reversible error in this case by attesting to the veracity of the minor child. However, I disagree strongly with the majority's suggestion in Part B that there is no place for expert testimony by child abuse experts who actually examined the victim in child sex abuse trials.

While the State is not permitted to use experts in RATAC or other methods of forensic interviewing to bolster the minor child's testimony, it is my opinion that forensic interviewers have a legitimate role to play in these cases, and may be qualified as experts in child abuse assessment.[8] In this setting, forensic interviewers may testify about the particulars of their examinations and their personal observations, and may also testify as experts regarding matters in their expertise, such as delayed disclosure of the abuse. Nothing in our Rules of Evidence or jurisprudence prohibits this type of testimony by qualified experts. As I have noted in previous cases, the majority has again taken our line of cases limiting this kind of expert testimony too far. *See State v. Chavis*, 412 S.C. 101, 112–14, 771 S.E.2d 336, 342–43 (2015) (Toal, C.J., concurring in part, dissenting in part). Thus, I especially disagree with the majority's suggestion that the better practice in these cases is to hire an independent expert who has never interviewed the child.[9] Again, the only testimony our cases prevent is testimony that bolsters

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[8] It is well-established across the country that an expert in child abuse assessment may testify regarding behavioral characteristics, such as delayed disclosure of the abuse. I fear that the majority is creating dangerous precedent, whereby a forensic interviewer may not be qualified as an expert in child abuse assessment, for the mere fact that the witness is either a practicing forensic interviewer or the person who examined the victim.

[9] In other contexts, we have refused to approve of the qualification of an expert who lacked sufficient knowledge about the facts of the particular matter in which the expert was requested to render an opinion. *See, e.g., Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (finding certain experts should not have been qualified where they lacked sufficient knowledge about the area in which they were called to testify). In this case, we are condemning the proposed expert because she has *too much* knowledge about the case.

the minor child's testimony. The only error here is that Smith's testimony did just that. However, the trial court did not err in qualifying Smith as an expert in child abuse assessment, and I am gravely concerned with the majority's curtailment of this type of expertise.

Although I agree that Appellant's conviction should be reversed, I disagree strongly with these points in the majority's reasoning.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby Lee Tucker, Sr., Respondent,

v.

John Doe, individually, and d/b/a Doe Trucking Company, Appellant.

Appellate Case No. 2014-000134

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

Opinion No. 5338
Heard June 3, 2015 – Filed August 5, 2015

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., Michael J. Anzelmo, and Graham Ross Billings, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Thomas J. Keaveny II, of Charleston, for Appellant.

Robert Norris Hill, of Law Office of Robert Hill, of Lexington, and William P. Hatfield, of Hatfield Temple, LLP, of Florence, for Respondent.

THOMAS, J.: John Doe, individually, and d/b/a Doe Trucking Company (collectively referred to as Doe), argues the circuit court erred in denying Doe's motions for directed verdict and judgment notwithstanding the verdict (JNOV) because (1) the sworn witness affidavit of Anthony Bernardo failed to satisfy the

requirements of section 38-77-170(2) of the South Carolina Code (2015), (2) Respondent Bobby Lee Tucker, Sr. failed to present sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road, and (3) the evidence of recklessness was insufficient to sustain an award of punitive damages. We affirm.

II. FACTS/PROCEDURAL HISTORY

On April 30, 2010, at approximately 12:15 a.m., Tucker lost control of the tractor-trailer he was driving southbound on Interstate 95 (I-95) and struck a concrete column in the median of the highway. Tucker, a part-time truck driver, had been driving from Darlington, South Carolina, to deliver cars to Jacksonville, Florida. He testified he was driving in the right lane on cruise control at about sixty-eight miles per hour when the car in front of him braked and switched lanes. Because Tucker could not see what was ahead, he decided to follow the car and switch lanes; however, a passing car in the left lane prevented him from being able to switch. At that point, Tucker observed an object "that looked just like a cardboard box" lying in the right lane, approximately two feet from the center line. He was unable to avoid the object and the truck's left front rim struck it, causing him to lose control of the truck, which collided with a concrete column in the median of the road supporting an overpass.

According to Tucker, two men from New York stopped to assist him. One of those men was Bernardo, who submitted an affidavit (the Affidavit) attesting to the following, in pertinent part:

> 2. On Friday, April 30, 2010[,] I was traveling to Florida with Dan Valenza in my 1998 Dodge Durango automobile.
>
> 3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, following a truck pulling a car carrier at a distance of approximately 150 feet.
>
> 4. As I approached exit 153, the truck and car carrier suddenly veered to the left as if to avoid something

in the roadway and in doing so struck a cement pillar supporting the overpass.

5. I pulled over into the inside lane and turned around in the median so my vehicle's headlights would illuminate the accident scene.

6. When I reached the cab of the truck it was wrapped around the column and the driver, an elderly white male, who I later learned was Bobby Lee Tucker, Sr., stated that something was in the road. He remained conscious until EMS arrived on scene.

7. When I looked at the truck cab it was raised up as if it was on top of something.

A paramedic, Billie Collins, assessed Tucker, who was stuck inside the crushed cab of the truck, and treated his injuries. Collins spoke to the two men who had stopped to help Tucker. They "didn't know exactly what had taken place but they saw the accident occur." According to Collins, Tucker claimed "[h]e swerved to miss something that was on I-95 and hit the support [column]."

A highway patrolman, Bradley Suggs, arrived at the accident scene at 12:52 a.m. Suggs testified he did not notice any objects in the road at the crash site, and he was unaware at the time that Tucker had struck an object in the road. Later, Suggs was informed that another witness found an object near the crash site.

Albert Vereen arrived between 4:00 a.m. and 4:30 a.m. to tow the wrecked tractor-trailer. Vereen testified he "walked back down the roadway and noticed the skidmarks in the road, some seventy-five to a hundred feet back, and the skidmarks went kinda from the inside lane into an angle almost to the column, and then ten or fifteen feet to the right is when we noticed the block of metal." The block, which Vereen estimated was "five or six hundred pounds," was too heavy for two men to lift and had to be loaded into Vereen's trailer using a front-end loader. Vereen testified he had no doubt the crash resulted from Tucker striking the block and consequently losing control of his truck. At trial, Tucker identified the block as the object he hit and testified he had no doubt his truck struck the block.

During the trial, Tucker's expert, Roger Harris, identified the block as a steel bearing block, approximately eighteen inches square, eleven inches tall, and estimated to weigh 650 pounds. Harris, an expert in machine design, material science, metallurgy, and fracture analysis, also testified that marks in the road at the crash site were "consistent with something like [the bearing block] making contact and making that mark on the concrete." He further explained the scrape marks on the bearing block were consistent with sliding down concrete. According to Harris, the damage on the inside rim of Tucker's left front tire was consistent with striking the block. Harris also stated that, in his estimation, the bearing block could have traveled "tens of feet" had it been struck by Tucker's tractor-trailer traveling at a speed of approximately seventy miles per hour.

Earlier that same night between 10:00 p.m. and 11:00 p.m., truck driver Donald Wilson noticed a blue freightliner truck at a truck stop at the junction of Highway 52 and I-95. Wilson also observed the freightliner turn onto I-95 South. The truck caught Wilson's attention because he had previously driven a blue freightliner. The freightliner's flatbed was loaded with pipes, rebar, and an object that "looked just like" the bearing block that was located near the crash site.

Wilson explained that the block was secured in the flatbed by a yellow nylon strap but did not have a chain going through the middle of the block, which he recognized "could be a problem." He also stated "you've got a lot of them out there running them flatbeds, and if you stop in time, man, the stuff will come off of them. . . . Because if that metal ever starts sliding, you're in trouble." Harris testified without objection that a single nylon strap running across the top of the bearing block would not be adequate to secure the block in the flatbed. He explained the block would easily overcome the strap as the truck accelerated to interstate speeds, and he stated maneuvering turns in the road would cause the object to move in the flatbed.

According to Gilbert George, a District Maintenance Engineer with the South Carolina Department of Transportation (SCDOT), it is not unusual for objects to fall off a flatbed truck. George also examined a picture of a mark in the road at the crash scene and testified the bearing block could have made the mark had it fallen from a flatbed. He further testified that, because the object weighed 650 pounds and was located in an area where pedestrian traffic is not permitted, he could only assume this object came to be on I-95 South by way of a vehicle.

Tucker filed this "John Doe" action on May 14, 2010, seeking actual damages, punitive damages, and costs from the operator of the unknown vehicle that allegedly carried the bearing block. Tucker's uninsured motorist insurance carriers answered the complaint on behalf of Doe.

On July 14, 2010, Tucker filed Bernardo's affidavit pursuant to the witness affidavit requirement of section 38-77-170(2) of the South Carolina Code (2015) for an accident caused by an unknown vehicle without physical contact. Because that affidavit did not include statutorily required language, on March 3, 2011, Tucker served a second affidavit that included the statutory language.[1]

The trial in this action began on April 15, 2013. Bernardo did not testify at trial, and no witness aside from Tucker testified to observing the accident. At the close of Tucker's case, Doe moved for a directed verdict based on Tucker's failure to (1) satisfy the affidavit requirements of section 38-77-170(2), (2) satisfy the plaintiff's burden of proof for negligence, and (3) present sufficient evidence such that the jury could consider punitive damages. Doe also moved for a directed verdict based on the defense of comparative negligence. The circuit court denied these motions at this point in the trial and again at the close of all of the evidence.

The jury returned a verdict in favor of Tucker and awarded him $2.5 million in actual damages and $2.5 million in punitive damages. Doe filed post-trial motions for JNOV, new trial absolute, and new trial *nisi* remittitur, and on December 16, 2013, the circuit court remitted the punitive damages award to $500,000 and denied the remaining motions. This appeal followed.

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[1] During oral argument, Doe took issue with the fact that Bernardo's second affidavit indicated Tucker's truck veered to the left, while Bernardo's first affidavit stated the truck veered to the right. This point was never raised or ruled upon in the circuit court and Doe never addressed this issue in his appellate briefs. Thus, this issue is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (noting an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief).

ISSUES ON APPEAL

I. Did the circuit court err in denying Doe's motions for directed verdict and JNOV because Bernardo's sworn witness affidavit failed to satisfy the requirements of section 38-77-170(2) of the South Carolina Code (2015)?

II. Did the circuit court err in denying Doe's motions for directed verdict and JNOV because Tucker failed to present sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road?

III. Did the circuit court err in denying Doe's JNOV motion as to punitive damages because the evidence of recklessness was insufficient?

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* at 300, 536 S.E.2d at 418. "This Court will reverse the trial court only when there is no evidence to support the ruling below." *Id.* "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* at 300, 536 S.E.2d at 419.

LAW/ANALYSIS

I. Witness Affidavit Requirement of Section 38-77-170(2)

Doe contends Bernardo's sworn witness affidavit did not satisfy section 38-77-170(2) of the South Carolina Code (2015) because it failed to suggest the driver of the unknown vehicle proximately caused the accident and the affiant did not swear to the existence of an object in the roadway. We disagree.

We find the Affidavit satisfied the requirements of section 38-77-170(2), which states in relevant part:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless . . .
>
> the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit . . . .

"Section 38-77-170(2) is clear on its face." *Bradley v. Doe*, 374 S.C. 622, 629, 649 S.E.2d 153, 157 (Ct. App. 2007). "It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident." *Id.* "The plain language of § 38-77-170(2) requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident must have been witnessed by someone other than the owner or operator of the insured vehicle and the witness must sign an affidavit attesting to the truth of the facts of the accident contained therein." *Id.* (internal quotation marks omitted).

In *Gilliland v. Doe*, our supreme court provided a historical review of the unknown driver statute:

> The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.
>
> Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent

> person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

357 S.C. 197, 199-200, 592 S.E.2d 626, 627 (2004). Our supreme court further stated in *Collins v. Doe*:

> The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, so as to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439 . . . .

352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002) (emphasis omitted).

In *Gilliland*, our supreme court determined to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in "John Doe" actions. 357 S.C. at 200, 592 S.E.2d at 628. The court held the witness "must be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Id.* at 201, 592 S.E.2d at 628 (internal quotation marks omitted).

Applying the analysis in *Gilliland*, we hold the Affidavit complied with section 38-77-170(2). In *Gilliland*, the petitioner was leaving a grocery store when two men waved at her from a pick-up truck. *Id.* at 198, 592 S.E.2d at 627. As she drove from the store, the men began to pursue her vehicle and "rode her bumper" for a two-mile stretch. *Id.* The petitioner sped up in a frightened attempt to get away from the truck, and as she accelerated she lost control of her car, ran off the road, and hit a tree. *Id.* She testified the truck never made contact with her car and the men "backed off" once she began to lose control. *Id.*

During the accident, a witness was stopped at a nearby intersection. *Id.* The witness testified she saw the lights of two cars as the cars came around a curve.[2] *Id.* at 198-99, 592 S.E.2d at 627. She also testified that after the accident, she saw the lights of the car behind the petitioner's "arc through a field" as if it were making a U-turn. *Id.* at 199, 592 S.E.2d at 627. This court described the witness's testimony regarding the accident as:

> [The witness] testified that Gilliland's car "came around the curve and come [sic] almost completely around the curve and then it just kind of went straight into a tree and a ditch." [The witness] also testified she saw the headlights of another vehicle shining on Gilliland's bumper just before Gilliland ran off the road.

Gilliland v. Doe, 351 S.C. 497, 499, 570 S.E.2d 545, 546-47 (Ct. App. 2002) (second alteration by court), *rev'd*, 357 S.C. 197, 592 S.E.2d 626 (2004).

This court held the witness's testimony was insufficient to meet the affidavit requirements of section 38-77-170(2). *Id.* at 502, 570 S.E.2d at 548. Our supreme court reversed, holding the testimony of this witness provided circumstantial evidence that supported the petitioner's testimony that an unknown driver contributed to her accident and therefore satisfied section 38-77-170(2). *Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629.

Here, Bernardo attested to the following in the Affidavit, in pertinent part:

> 3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina,

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[2] Our supreme court noted the issue in *Gilliland* concerned whether the witness's testimony met the requirements of section 38-77-170(2). 357 S.C. at 201, 592 S.E.2d at 628. Throughout the opinion, the court referred to the witness's "testimony." Pursuant to our supreme court's decision in *Collins v. Doe*, a plaintiff cannot substitute trial testimony for the statutory affidavit requirement. 352 S.C. at 471, 574 S.E.2d at 743. Given that our supreme court in *Gilliland* acknowledged that holding in *Collins*, we find the relevant witness observations discussed in *Gilliland* must have been included in the witness's affidavit.

following a truck pulling a car carrier at a distance of approximately 150 feet.

4. As I approached exit 153, the truck and car carrier suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.

Bernardo witnessed the accident here in a manner similar to the witness in *Gilliland.* The witness in *Gilliland* offered no explanation as to if or how an unknown driver caused the accident. *Id.* at 198-99, 592 S.E.2d at 627. Instead, the witness merely described observing headlights of two cars as the cars came around a curve, and after the accident, the witness saw the lights of the car behind Gilliland's "arc through a field" as if it were making a U-turn. *Id.* Here, Bernardo described how Tucker "suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass." While this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident. *See id.* at 202, 592 S.E.2d at 629 ([T]he [witness's] testimony . . . contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident."); *id.* ("[The witness's] testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury. . . . *We believe that the record includes sufficient circumstantial evidence* for the jury to find the requisite causation necessary to satisfy § 38-77-170(2)." (emphasis added)); *id.* ("[T]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty." (internal quotation marks omitted)); *id.* at 199, 592 S.E.2d at 627 (stating the issue in *Gilliland* was whether the witness's testimony met the requirements of section 38-77-170(2)).

At oral argument, Doe essentially contended the Affidavit itself must fully explain the unknown vehicle's involvement in the accident. This argument attempts to impose requirements beyond the plain language of section 38-77-170(2). The

Affidavit satisfies the requirement that the accident be "witnessed by someone other than the owner or operator of the insured vehicle" who "sign[ed] an affidavit attesting to the truth of the facts of the accident contained in the affidavit." § 38-77-170(2); *see also Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014) (reversing this court for reading requirements into a statute that were not present in the text of the statute itself). Furthermore, as explained above, this argument does not comport with our supreme court's holding in *Gilliland*.

Doe asserts that under *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007), the Affidavit is deficient. In that case, Bradley swerved to avoid an object in the road, lost control of his vehicle, veered off the road, and struck a tree. *Id.* at 624, 649 S.E.2d at 154. About fifteen minutes later, a witness drove past Bradley, turned his vehicle around, and headed toward the accident scene. *Id.* The witness observed a "large white garbage can bag" in the lane in which Bradley had previously been traveling. *Id.* While helping Bradley, the witness saw another passing vehicle strike and drag the garbage bag down the road. *Id.* at 624, 649 S.E.2d at 155. Bradley's son and daughter subsequently arrived and noted the trash bag and trash scattered on the roadway. *Id.* Another witness who drove home minutes before Bradley stated he saw a large trash bag in the middle of the road. *Id.* That witness claimed he narrowly avoided the bag and continued driving about another quarter-mile when he encountered a "white street sweeper's truck," which "drop[ped] another similar trash bag onto the public roadway." *Id.*

This court held none of the above-mentioned witnesses could satisfy the affidavit requirement of section 38-77-170(2) because "none of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree." *Id.* at 633, 649 S.E.2d at 159. None of Bradley's affiants had personal knowledge of the facts of the accident, and their observations before and after the accident did not establish with reasonable certainty a causal connection between Bradley's injury and an unknown vehicle. *Id.* at 634-35, 649 S.E.2d at 160. The court noted "[a] plaintiff's strict compliance with the affidavit requirement is mandatory." *Id.* at 634, 649 S.E.2d at 160. Ultimately, the court concluded "the affidavits of independent witnesses must contain some independent evidence of an unknown vehicle's involvement in the accident. Bradley failed to comply with the statute's mandate." *Id.* at 635, 649 S.E.2d at 160.

We find *Bradley* distinguishable from the present case because Bernardo, unlike any of the affiants in *Bradley*, actually witnessed the accident. Bernardo observed Tucker swerving as if to avoid an object in the roadway and then colliding with the concrete column. This satisfies the affidavit requirement of section 38-77-170(2). Additionally, because the Affidavit is based upon Bernardo's personal knowledge, this case is distinguishable from *Shealy v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct. App. 2006), in which this court held two affidavits failed to satisfy section 38-77-170(2) because the affiants did not attest to facts they perceived but merely restated the perceptions of the vehicle's operator.

Doe points to the language in *Bradley* that "affidavits of independent witnesses must contain some independent evidence of an unknown vehicle's involvement in the accident." 374 S.C. at 635, 649 S.E.2d at 160. Here, Bernardo observed Tucker "[veer] to the left as if to avoid something in the roadway," but Bernardo did not swear to the actual existence of an object in the roadway or attest to the manner in which such an object arrived in the roadway. In certain instances, such as *Bradley* and the case at hand, a witness could not observe the object falling from the unknown vehicle because the object fell at some time prior to the accident. In such cases, if it was required that a witness affidavit describe both (1) the accident and (2) the manner in which the object in the road came from the unknown vehicle, a plaintiff would effectively be barred from recovery when the unknown vehicle exits the scene before the fallen object causes the accident. This court could have taken such a position in *Bradley* but did not and instead focused on the fact the witnesses did not observe the swerving and the collision. *Id.* at 633, 649 S.E.2d at 159.

In *Wausau Underwriters Insurance Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109-10 (1992), our supreme court indicated section 38-77-170(2) required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. "The Court [in *Howser*] provided that the adequacy of the 'causal connection' should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle." *Gilliland*, 357 S.C. at 200, 592 S.E.2d at 628. "The Court explained that this test regarding the sufficiency of the evidence is 'something less than proximate cause and something more than the vehicle being the mere site of the injury.'" *Id.* at 201, 592 S.E.2d at 628 (quoting *Howser*, 309 S.C. at 272, 422 S.E.2d at 108). "Based on the test set forth in *Howser*, § 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear

answer to the question of proximate cause." *Id.* Hence, the Affidavit satisfied section 38-77-170(2) even though it did not, by itself, provide a clear answer to the question of proximate cause.

Doe next contends section 38-77-170(2) required Bernardo to testify at trial. This issue is not preserved for appellate review. At trial, Doe admitted "[Tucker] did not depose [Bernardo] but I understand he is not required to. Under the statute he has to submit an affidavit, and we have challenged the sufficiency of the affidavit." Thus, Doe conceded Tucker was not required to do anything more than submit an affidavit to satisfy section 38-77-170(2). *See City of Greer v. Humble*, 402 S.C. 609, 614, 742 S.E.2d 15, 18 (Ct. App. 2013) (stating an issue conceded in the trial court cannot be argued on appeal). Nowhere at trial did Doe contest Tucker's failure to call Bernardo as a witness. In his post-trial motions memorandum, Doe mentioned that "Plaintiff produced no witnesses who saw any object in the road let alone any witness who observed Plaintiff striking any object in the road." However, this statement pertained to Doe's argument that the evidence of negligence was insufficient, not that Bernardo was required to testify under section 38-77-170(2). Only on appeal has Doe advanced that position; accordingly, this issue is not preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Doe further asserts the revised Affidavit, which was submitted nearly ten months after the commencement of the suit, was untimely. We find this argument is not preserved for review because it was never raised to or ruled upon by the circuit court. *See id.* ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

II. Sufficiency of the Evidence

Doe further asserts Tucker failed to present sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road. We disagree.

On the same evening as Tucker's accident, Wilson observed a blue freightliner truck at a truck stop at the junction of Highway 52 and I-95, and he witnessed the

freightliner turn onto I-95 South. On the freightliner's flatbed was a block that "looked just like" the bearing block that Tucker testified he hit while driving down I-95 South. A tow truck operator located the block near the crash scene. Wilson explained the block he observed in the flatbed had a yellow nylon strap across it but did not have a chain going through the middle of the block. He recognized at the time this "could be a problem," and he explained objects can slide off flatbed trucks due to deceleration.

Harris testified as an expert in machine design, material science, metallurgy, and fracture analysis. Harris testified without objection that a single nylon strap running across the top of the bearing block would not be adequate to secure the block in the flatbed. He explained the block would easily overcome the strap as the truck accelerated to interstate speeds, and he stated maneuvering turns in the road would cause the object to move in the flatbed. Doe never argued at trial that Harris's testimony on this topic was improperly based on hypotheticals. *See Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967) (noting testimony received without objection becomes competent and its sufficiency is for the jury); *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."); *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 536-37, 389 S.E.2d 164, 165 (Ct. App. 1990) (holding even if the basis of the opinion is incomplete, a jury can rely on a witness's opinion that is admitted without objection). Likewise, Doe's argument that Harris's expert testimony was not probative is not preserved for review because Doe never made that contention at trial. *See Holroyd*, 361 S.C. at 60, 603 S.E.2d at 426 ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

Gilbert George, a District Maintenance Engineer with SCDOT, admitted on cross-examination it is not unusual for objects to fall off a flatbed truck. He also examined a picture of a mark in the road at the crash scene and testified the bearing block could have made the mark if it fell from a flatbed. He further testified that, because the bearing block weighed 650 pounds and was located in an area where pedestrian traffic is not permitted, he could only assume the block came to be on I-95 South by way of a vehicle.

Viewing the evidence in the light most favorable to Tucker, we find he presented sufficient evidence to deny the motions for directed verdict and JNOV. *See Welch*, 342 S.C. at 299, 536 S.E.2d at 418 ("When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."); *id.* at 300, 536 S.E.2d at 418 ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *id.* ("This Court will reverse the trial court only when there is no evidence to support the ruling below."); *id.* at 300, 536 S.E.2d at 419 ("When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.").

Doe correctly asserts South Carolina does not recognize res ipsa loquitur. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 453 n.7, 699 S.E.2d 169, 179 n.7 (2010) ("*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence."); *Snow v. City of Columbia*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) (noting that because South Carolina does not recognize *res ipsa loquitur*, a plaintiff is required to prove affirmatively each element of his cause of action). However, Tucker did not rely on res ipsa loquitur to prove Doe was negligent, and he put forth circumstantial evidence the bearing block caused his accident because it was inadequately strapped in the flatbed of the blue freightliner and consequently fell into the road. *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (Ct. App. 2013) ("A plaintiff must prove three elements to recover on a claim for negligence: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.").

Doe alleges this case is analogous to *Tuttle v. Allstate Insurance Co.*, in which the Washington Court of Appeals concluded the trial court properly granted Allstate summary judgment because Tuttle offered no evidence her collision with a wheel and tire was an accident caused by a phantom vehicle. 138 P.3d 1107, 1113 (Wash. Ct. App. 2006). However, in *Tuttle*, no witness could attribute the tire in the roadway to a particular vehicle or explain how the tire might have come from a vehicle, and therefore, Tuttle provided no evidence to support an inference a driver negligently caused the wheel and tire to be in the road. *Id.* at 1111-12. In contrast, Tucker presented evidence the bearing block caused his accident after it was

inadequately secured in the bed of a blue freightliner and consequently fell into the road. Hence, *Tuttle* is distinguishable from the present case.

In his brief, Doe contends the facts of *Bradley* are analogous to the case at hand and establish Tucker failed to present sufficient evidence to create a question of fact for the jury. However, the only issue in *Bradley* was whether the petitioner's affidavits complied with section 38-77-170(2). *See Bradley*, 374 S.C. at 633, 649 S.E.2d at 159 ("The sole issue for consideration in the case *sub judice* is whether the circumstantial evidence provided by Bradley's affiants complies with the statutory mandate in section 38-77-170(2)."). Furthermore, as previously discussed, we find this case distinguishable from the facts of *Bradley*. Therefore, the circuit court did not err in denying Doe's motions for directed verdict and JNOV based on the sufficiency of the evidence.

III. Punitive Damages

Doe argues punitive damages should not have been submitted to the jury because Tucker presented no evidence Doe acted recklessly, willfully, or wantonly. Doe acknowledges that a violation of a statute constitutes evidence of recklessness or willfulness under South Carolina law; however, Doe contends that principle of law should not apply when a statute is a strict liability law and may be violated regardless of the intent of the defendant. Doe maintains the submission of punitive damages to the jury for a violation of a strict liability statute with no other evidence of recklessness is contrary to the purpose behind punitive damages. We find Doe did not preserve this argument for appeal.

At the close of Tucker's case, Doe motioned for a directed verdict on the ground that "there is no clear and convincing evidence . . . of any recklessness, willfulness, [or] wantonness." The circuit court denied that motion on the basis that evidence Doe violated section 56-5-4100 of the South Carolina Code constituted evidence of recklessness. *See* S.C. Code Ann. § 56-5-4100(A) (2006) (prohibiting the driving or moving of a vehicle on a public highway "unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle"). Doe never asserted the violation of section 56-5-4100 should not be evidence of recklessness because that statute is a strict liability statute. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Before

charging the jury, the circuit court specifically asked the parties if they agreed with language in the charge that the violation of a statute "may be considered as evidence in deciding if the Defendant was reckless, [willful], or wanton in consideration of punitive damages." Doe informed the court he had no objection to that language. The circuit court later charged the jury on punitive damages without objection from either party. *See Vaughn v. City of Anderson*, 300 S.C. 55, 60, 386 S.E.2d 297, 300 (Ct. App. 1989) ("Failure to object to the charge at trial waives any alleged error in the charge."). In his "Post-Judgment Punitive Damage Review Memorandum," Doe cited *Wise v. Broadway* for the proposition that "[v]iolation of a statute does not constitute recklessness, willfulness, and wantonness *per se, but is some evidence that the defendant acted recklessly, willfully, and wantonly*." 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). Doe now urges this court to depart from a legal principle he himself cited and never contested at trial. *See Humble*, 402 S.C. at 614, 742 S.E.2d at 18 (stating an issue conceded in the trial court cannot be argued on appeal); *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) (holding a party may not present one ground at trial and then change his theory on appeal; the same ground argued on appeal must have been argued at trial).

Doe contends it would have been futile to argue against precedent to the circuit court because the circuit court is required to charge South Carolina law in its current form. Therefore, he maintains he was not required to raise his argument on punitive damages to the circuit court. *See Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) (noting appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review). However, he has provided no authority for the proposition that an argument against precedent is preserved for appellate review when the argument was never raised at trial and the precedent was conceded. Instead, "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (internal quotation marks omitted). As such, Doe's argument on punitive damages is not preserved for appeal.

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

I'Tesha C. Briggs and Danny L. Johnson, Defendants,

Of whom I'Tesha C. Briggs is the Appellant.

In the interests of minor children under the age of 18.

Appellate Case No. 2014-002147

Appeal From Richland County
Tommy B. Edwards, Family Court Judge

Opinion No. 5339
Heard July 1, 2015 – Filed August 3, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Benjamin Reynolds Elliott, of Stevens B. Elliott, Attorney At Law, of Columbia, for Appellant.

Kathleen J. Hodges, of South Carolina Department of Social Services, of Walhalla, for Respondent.

Angela L. Kohel and Samantha Monique Luck, both of Richland County CASA, of Columbia, for the Guardian ad Litem.

PER CURIAM: In this appeal from a permanency planning order and a removal order, I'Tesha C. Briggs argues the family court erred in (1) changing the permanent plan from reunification to relative custody concurrent with termination of parental rights (TPR) and adoption, (2) allowing the Department of Social Services (DSS) to forego reasonable efforts at reunification, and (3) removing her infant child based on the alleged abuse and neglect of her three older children. We affirm in part, reverse in part, and remand for a new permanency planning hearing.

I. Facts and Procedural History

On August 2, 2013, Briggs's older three children were placed in emergency protective custody due to allegations of physical abuse by Briggs.[1] After a contested merits hearing,[2] the family court determined Briggs physically abused the children and adopted a placement plan prepared by DSS pursuant to section 63-7-1680 of the South Carolina Code (Supp. 2014). The placement plan required Briggs to complete a psychological evaluation, attend various forms of counseling, obtain and maintain stable housing and income, and complete a drug and alcohol assessment. The placement plan also set forth specific goals for behavioral changes and parenting skills. The placement plan stated DSS would "arrange or provide" the counseling and evaluation services. The family court ordered—in addition to the placement plan—a psychologist evaluate Briggs's oldest child, a counselor observe Briggs interact with the children, and a psychologist evaluate whether Briggs could parent the children considering their special needs.

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[1] The children were born in 2010, 2011, and 2012.

[2] Whenever DSS files a removal petition, the family court must hold a hearing on the merits of the removal petition to determine if the allegations in the removal petition are supported by a preponderance of the evidence. S.C. Code Ann. § 63-7-1660(D) (2010).

The family court held the initial permanency planning hearing[3] on February 6, 2014, six months after the children entered foster care. At that time, Briggs had obtained stable employment and housing, completed parenting classes, and completed a psychological evaluation. She had been assessed by a counselor at a drug and alcohol treatment center, who wrote in a report that Briggs was "receptive to feedback" and "a pleasure to work with." Briggs had also begun individual counseling. The family court amended Briggs's placement plan to add several additional requirements, including that "Briggs successfully complete family counseling at the Nurturing Center[4] or a similar type facility." The court determined the permanent plan for the children would be reunification and ordered a reevaluation in three to six months.

In April 2014, Briggs completed additional parenting classes and individual counseling. In a letter, Briggs's counselor wrote Briggs's mood had improved and "[h]er insight and judgment appear[ed] to be appropriate."

On April 15, 2014, Briggs began therapy with the Nurturing Center. Briggs had perfect attendance and attended for five hours each day, although she was often tardy. After participating for one month, Briggs was discharged. At the second permanency planning hearing, Jameka Hemming, an employee of the Nurturing Center, explained the reason for Briggs's discharge. She stated the Nurturing Center temporarily closed on May 9 due to a lapse in its liability insurance, and when it reopened on May 15, its clients—including Briggs—were required to sign new consent forms. According to Hemming:

> Ms. Briggs said she wasn't signing anything unless her lawyer looked at it because we were telling lies on her.

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[3] A permanency planning hearing must be held no later than one year after the children are first placed in foster care. S.C. Code Ann. § 63-7-1700(A) (Supp. 2014).

[4] Nurturing Center is a private organization whose goal is to "[p]rovide comprehensive, family-focused, behavioral health services to prevent and treat child abuse and neglect." *The Nurturing Center Mission, Goals, and Beliefs*, The Nurturing Ctr., http://www.thenurturingcenter.org/index.php/about-us (last visited July 24, 2015).

> We tried to address what lies [she was] talking about. She didn't want to talk about it. But she then went to . . . talk to my supervisor and another staff [member]. I stayed in the classroom, so I don't know the conversation. She came back and got her stuff and then she left.
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> . . . .
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> . . . After Ms. Briggs left, she did call back. And talked to my supervisor and another director. She then called me. She wanted to come back to the center. We did do a staffing and the clinical staff found that she wasn't appropriate for our services at that time, just due to her aggressive behavior [and] not being able to be redirected and just not being receptive to any changes[] to her parenting or trying to improve her parenting.

Hemming justified Briggs's discharge by explaining Briggs was difficult to deal with even before the incident involving the consent form and Briggs "didn't really like to be redirected or told what to do." She stated Briggs had previously been discharged from the Nurturing Center in October 2013—before the court adopted her placement plan—after getting into a fight with another parent. Hemming stated her comments in group sessions were off-topic and she became aggressive when redirected. Hemming explained, "She would get an attitude. She would be disruptive in group with her cell phone, sucking her teeth, a lot of rolling her eyes. There were instances when we got into altercations in group." Hemming elaborated: "I . . . got into an altercation with her [during] a group [session]. She stood up, she started to approach me. A lot of yelling, a lot of pointing, a lot of times she would always say, 'I'm grown. I'm grown.'"

Hemming also testified Briggs was "extremely preoccupied" with her second child's foster parent and threatened to sue DSS because he was often dressed in old clothes and shoes that had holes in them even though Briggs sent him clothes and shoes. Hemming stated Briggs ranted about that during group sessions, which Hemming believed was inappropriate. Hemming recounted an incident when Briggs gave one of her children gum during nap time. When staff at the Nurturing Center approached Briggs about it, Briggs's response was "it's sugar free."

Hemming also observed Briggs asking her children if they were being abused or neglected in their foster home.

Even though Hemming believed Briggs was difficult to deal with, she believed Briggs was appropriate with her children. Hemming acknowledged Briggs's oldest child was hyper but stated his behavior had improved. She also stated Briggs began attending on time "towards the end" and had not had any physical altercations since becoming Hemming's client.

In the same timeframe Briggs was discharged from the Nurturing Center, she was making good progress in other areas. Three days prior to being discharged from the Nurturing Center—May 12, 2014—Briggs began family therapy with her oldest child through the Department of Mental Health. In a July 25, 2014 letter, a counselor from the Department of Mental Health wrote that Briggs consistently kept weekly appointments and followed treatment recommendations. The counselor wrote Briggs "show[ed] insight into [her oldest child's] behaviors, show[ed] concern about [his] recent exhibiting of sexually explicit behavior, and ha[d] been nurturing towards [him]." He stated Briggs's oldest child could "successfully be returned home" if Briggs obtained "external support, continued family therapy, and continued practic[ing] parenting techniques learned in therapy."

Briggs gave birth to her fourth child in July 2014, and the family court issued an ex parte order placing the child in emergency protective custody. At the probable cause hearing pursuant to section 63-7-710 of the South Carolina Code (2010), the family court determined probable cause existed for the youngest child to remain in foster care based on Briggs's abuse of the older children and the fact Briggs had not completed the court-ordered treatment services.

On July 28, 2014, the family court held the second permanency planning hearing for Briggs's older children. At the hearing, DSS sought a permanent plan for the children of TPR and adoption concurrent with "custody with a fit and willing relative" ("relative custody"). DSS also sought to be relieved of offering further services to Briggs. DSS offered the testimony of Jameka Hemming of the Nurturing Center, which is summarized above. The DSS caseworker testified Briggs completed all the services she was ordered to complete but asserted Briggs did not demonstrate behavioral changes. In reaching this conclusion, she relied primarily on reports from the Nurturing Center. The caseworker observed a visit

between Briggs and two of her children, and she believed Briggs was appropriate during the visit. She acknowledged Briggs's oldest child had discipline problems, had been in multiple placements, and was in a therapeutic placement at the time of the permanency planning hearing.

Briggs testified in her defense. Briggs submitted the report from the drug and alcohol treatment center and the letters from the counselor she saw through April 2014 and the counselor she saw at the Department of Mental Health. However, she did not call any of the counselors to testify at the hearing.

The guardian ad litem also testified. He stated he did not believe Briggs demonstrated a behavior change because she argued with staff and other people and did not control her emotions. The guardian ad litem recommended TPR and adoption concurrent with relative custody, but he stated he would not oppose DSS if it wanted to offer Briggs additional services.

At the conclusion of the second permanency planning hearing, DSS noted it had a pending merits hearing for Briggs's youngest child's case that was not before the court and stated the evidence it would offer in support of the removal would be the same evidence the court already heard. Briggs contested the removal but conceded the underlying facts for that case were the same and "it wouldn't make sense to have another" hearing.

The family court issued two orders. Regarding Briggs's three older children, the court found Briggs had not remedied the conditions that caused the removal and changed the permanent plan for the children to relative custody concurrent with TPR and adoption. Additionally, the court found it would be in the children's best interests for DSS to forego reasonable efforts at reunification.

Regarding Briggs's youngest child, the family court first found a preponderance of the evidence showed she was an abused or neglected child pursuant to subsection 63-7-20(4)(f) of the South Carolina Code (2010) and returning her to the home would place her at an unreasonable risk of harm or neglect. The court determined DSS could forego reasonable efforts to reunify Briggs with her youngest child pursuant to subsection 63-7-1640(C)(8) of the South Carolina Code (Supp. 2014) and ordered the child's permanent plan to be relative custody concurrent with TPR and adoption.

II. Standard of Review

On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011).

III. Forego Reasonable Efforts at Reunification

Briggs argues the family court erred in allowing DSS to forego reasonable efforts at reunification. Because we find the family court did not make adequate findings supporting its decision, we reverse and remand.

"It is the policy of this State to reunite the child with his family in a timely manner . . . ." S.C. Code Ann. § 63-1-20(D) (2010). The children's code "shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible as secure units." S.C. Code Ann. § 63-1-30 (2010). At the initial permanency planning hearing, DSS recommended—and the family court approved—a permanent plan of reunification. Subsection 63-7-1640(F) of the South Carolina Code (Supp. 2014) sets forth the standard family courts must follow when determining whether to allow DSS to forego reasonable efforts at reunification. The subsection provides that, in making such a determination, "the court must consider whether . . . continuation of reasonable efforts to preserve or reunify the family is in the best interests of the child." Before the court may authorize DSS to forego reunification, "the court must make specific written findings in support of its conclusion that one or more of the conditions set forth in subsection [63-7-1640](C)(1) through (8) [(Supp. 2014)] are shown to exist, and why continuation of reasonable efforts is not in the best interest of the child." § 63-7-1640(F).

As to the three older children, the family court stated, "Briggs has not remedied the conditions that caused the removal," and "[i]t is in the minors' best interests to terminate reasonable efforts to reunite the minors" with Briggs. However, the court did not make the findings required by section 63-7-1640. In particular, the court made no finding regarding the conditions listed in subsection 63-7-1640(C) or as to "why continuation of reasonable efforts [was] not in the best interest of the child[ren]." § 63-7-1640(F). The family court determined only, "DSS is no longer obligated to provide or arrange treatment services to . . . Briggs. The permanent plan for the minors at this time is no longer reunification . . . ." The family court

did find subsection 63-7-1640(C)(8) applied to Briggs's youngest child's case, but it did not make any specific findings to support the conclusion. Subsection 63-7-1640(C)(8) requires the family court to find "other circumstances exist" that make continuation of reasonable efforts at reunification inconsistent with the child's permanent plan. However, the family court did not make any finding as to what the "other circumstances" were.

Accordingly, we reverse and remand for a new permanency planning hearing and for the family court to make specific written findings to support its decision as required by subsection 63-7-1640(F). On remand, the family court should also consider the continuation of treatment services for Briggs.

IV. Permanent Plan

Briggs also contends the family court erred in finding the permanent plan should be relative custody concurrent with TPR and adoption. Based on the specific facts presented, we remand this issue for the family court to consider whether the permanent plan should be an extension for reunification.

Section 63-7-1700 of the South Carolina Code (Supp. 2014) sets forth several options for a family court at a permanency planning hearing. The family court must return the child to the parent's home if it determines "the child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal." § 63-7-1700(D). The family court may order an extension for reunification if the court determines the child cannot be returned home at the time of the hearing "but that the child may be returned to the parent within a specified reasonable time." § 63-7-1700(F). To grant an extension, the family court must make specific findings as set forth in subsection 63-7-1700(F). The family court may award custody or legal guardianship to a suitable, fit, and willing relative or nonrelative "[i]f after assessing the viability of adoption, [DSS] demonstrates that [TPR] is not in the child's best interests." § 63-7-1700(G). The family court may approve a plan that is not reunification, relative custody, or TPR if it finds compelling reasons to select another plan and that the plan is in the child's best interests. § 63-7-1700(C). Finally, the family court must order DSS to file a petition for TPR if the child cannot be returned home and the court determines subsections (C), (F), or (G) do not apply. § 63-7-1700(E).

Here, the family court properly determined the children could not be safely returned home at the time of the permanency planning hearing. Although Briggs was making progress in the placement plan, she had not completed important components of the plan. Having determined the children could not be returned home, the family court next determined the permanent plan would be relative custody concurrent with TPR and adoption. Based on the order, it appears the family court based its decision primarily on the fact Briggs was discharged from the Nurturing Center, which DSS submitted as proof that Briggs was not making the required behavior changes. However, we find Briggs's discharge does not constitute sufficient proof that she was not making behavior changes. Hemming, who testified about Briggs's discharge, was not present for Briggs's conversation with her supervisor and had no personal knowledge of the discussion that took place or Briggs's reasons for leaving the Nurturing Center that day. When asked why Briggs was discharged, Hemming first stated the Nurturing Center temporarily closed based on a change in insurance, and when it reopened, Briggs refused to sign the new consent forms without first seeking her attorney's advice. Briggs's request to review the forms with an attorney was reasonable. By not signing them, however, she set off a chain of events that ultimately resulted in her discharge from the Nurturing Center. We find the evidence presented regarding Briggs's discharge from the Nurturing Center does not constitute sufficient proof that Briggs was not making the required behavior changes.

Additionally, we are impressed by the positive reports Briggs submitted from other service providers, including the Department of Mental Health, where Briggs attended ongoing family therapy with her oldest child. According to the letter from the Department of Mental Health—which was written after Briggs's discharge from the Nurturing Center and entered into the record without objection—Briggs showed insight into her oldest child's behavior and "expressed a desire to continue therapy." In the letter, the counselor recommended continued family therapy and stated Briggs's oldest child could be "successfully returned home" if Briggs obtained "external support, continued family therapy, and continued practic[ing] parenting techniques learned in therapy." Although Briggs successfully completed several aspects of her treatment plan and was continuing family counseling through the Department of Mental Health, the order does not indicate the family court considered this and other positive reports or Briggs's ongoing therapy when determining the permanent plan. Because the children had been in foster care for less than one year at the time of the permanency planning hearing and Briggs was regularly attending counseling designed to help her remedy

the conditions causing removal, an extension for reunification would have been a viable option for the permanent plan. Accordingly, on remand, the family court shall consider whether the permanent plan should be an extension for reunification, as set forth in subsection 63-7-1700(F).

V. Removal

Briggs argues the family court erred in removing her youngest child from the home based on its previous finding she abused or neglected the three older children. We disagree.

The removal statute provides:

> The [family] court shall not order that a child be removed from the custody of the parent or guardian unless the court finds that the allegations of the [removal] petition are supported by a preponderance of evidence including a finding that the child is an abused or neglected child as defined in Section 63-7-20 and that retention of the child in or return of the child to the home would place the child at unreasonable risk of harm . . . .

S.C. Code Ann. § 63-7-1660(E) (2010).

> "Child abuse or neglect" or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare:
>
> (a) inflicts or allows to be inflicted upon the child physical or mental injury . . . ; [or]
>
> . . . .
>
> (f) has committed abuse or neglect as described in subsections (a) through (e) such that a child who subsequently becomes part of the person's household is at substantial risk of one of those forms of abuse or neglect.

S.C. Code Ann. § 63-7-20(4) (2010).

In the merits order for the removal of Briggs's three older children, the family court found by a preponderance of the evidence that Briggs physically abused them, as defined by section 63-7-20(4)(a). Briggs's youngest child was born after the family court made that determination. Thus, a preponderance of the evidence supports a finding of abuse under 63-7-20(4)(f) and qualifies the youngest child as an abused child. A preponderance of the evidence also supports the family court's determination that returning the children home at that time would place them at an unreasonable risk of harm. Thus, the family court did not err in removing Briggs's youngest child.

VI. Conclusion

Based on the foregoing, we affirm the family court's removal of Briggs's youngest child. We reverse the family court's permanent plan and its decision to allow DSS to forego reasonable efforts at reunification, and remand for a new permanency planning hearing consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.