The Supreme Court of South Carolina

In the Matter of Catherine Leigh Hunter, Deceased.

Appellate Case No. 2012-212818

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), the Office of Disciplinary Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Susan C. Rosen, Esquire, is hereby appointed to assume responsibility for Ms. Hunter's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Hunter maintained. Ms. Rosen shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Ms. Hunter's clients. Ms. Rosen may make disbursements from Ms. Hunter's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Hunter maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Ms. Hunter shall serve as notice to the bank or other financial institution that Susan C. Rosen, Esquire, has been duly appointed by this Court.

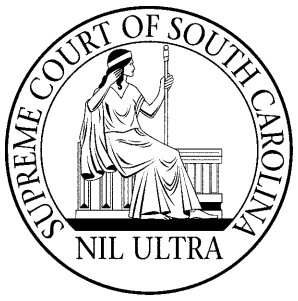
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Susan C. Rosen, Esquire, has been duly appointed by this Court and has the authority to receive Ms. Hunter's mail and the authority to direct that Ms. Hunter's mail be delivered to Ms. Rosen's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

August 29, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
September 5, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James D. Broach and Mark Loomis, Respondents,

v.

Eugene E. Carter, Advantage Real Estate, Inc., SilverDeer Management, LLC, Paradise Grande, LLC d/b/a The Horizon at 77th, and Howard Jacobson, Defendants,

Of whom Howard Jacobson is Appellant.

Appellate Case No. 2011-182306

Appeal From Horry County
Steven H. John, Circuit Court Judge

Published Opinion No. 5006
Heard April 25, 2012 – Filed July 25, 2012
Withdrawn, Substituted and Refiled September 5, 2012

REVERSED

Mark D. Neill, of The Neill Law Firm, of Murrells Inlet, for Appellant.

Lawrence S. Connor, IV, of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondents.

WILLIAMS, J.: On appeal, Howard Jacobson (Jacobson) contends there is no evidence in the record to support the jury's finding he was personally liable on behalf of Paradise Grande, LLC (Paradise Grande). Additionally, Jacobson argues

there is no evidence in the record to support a jury's finding that Jacobson tortiously interfered with James Broach's (Broach) and Mark Loomis's (Loomis) contracts with Advantage Real Estate, Inc. (Advantage). Finally, Jacobson argues the record does not support the jury's award of punitive damages. We reverse.

FACTS

This case concerns two real estate agents who sued to collect unpaid real estate commissions. Broach and Loomis worked as independent contractors for Advantage to obtain sales of various properties, including condominium units, known as Horizon 77th (Horizon), to be built by Paradise Grande.

Broach and Loomis separately entered into identical contracts with Advantage. The contracts' provisions, contained in the Independent Contractor and Broker Agreements (Independent Contractor Agreements), provided the general terms and conditions of Broach's and Loomis's working relationship with Advantage. The Independent Contractor Agreements also outlined the fee agreement, which provided that Broach's and Loomis's commissions would be paid after Advantage received payment from the buyer. Both Broach and Loomis acknowledged at trial their understanding was they would be paid their share of the commissions after Advantage received payment upon closing. Broach and Loomis worked for several years obtaining presales, sales, and closings of condominium units at Horizon. Accordingly, Broach and Loomis claim they are owed sales commissions arising from the sale of condominiums at Horizon. This case turns on the various agreements between the parties, which are discussed below.

A. The First Agreement

Paradise Grande entered into an Exclusive Sales and Marketing Agreement (First Agreement) with Advantage on February 24, 2006. Jacobson, the manager of SilverDeer Management, LLC (SilverDeer), which manages Paradise Grande, signed the First Agreement on behalf of Paradise Grande. Advantage's broker-in-charge, Eugene Carter (Carter), signed the First Agreement on behalf of Advantage. The First Agreement provided, "Paradise Grande could terminate the agreement for cause if Advantage failed to have *all units* presold by August 31, 2006." (emphasis added). Further, the First Agreement stated Paradise Grande would pay Advantage a sales commission of 6% of the closing price when the final sale was closed or after repayment of the construction loan, whichever event occurred first. Advantage failed to presell all units by August 31, 2006. As a result, Paradise Grande terminated the First Agreement.

B. Construction Loan

Paradise Grande entered into a Second Exclusive Sales and Marketing Agreement (Second Agreement) with Advantage based on negotiations between Paradise Grande and Wachovia Bank (Wachovia) concerning a construction loan. Pursuant to its agreement with Wachovia, Paradise Grande was required to have at least 80% of the condominium units at Horizon presold to obtain a construction loan. Because only 75% or 76% of the condominiums were presold, Paradise Grande renegotiated its construction loan agreement with Wachovia to provide additional security. As a part of this renegotiation, Paradise Grande agreed to provide a $500,000 letter of credit. Paradise Grande also agreed to pay furniture costs in excess of two million dollars instead of including those costs into the construction loan. In addition, Wachovia required deferment of real estate commissions that would be paid to Advantage until the construction loan was paid in full. Jacobson testified Paradise Grande pursued several other options to obtain a construction loan before finally agreeing to subordinate the real estate commissions. Further, Jacobson testified that had the letter of credit and the commission subordination not been made to Wachovia, Horizon would not have been built.

C. The Second Agreement

Because Advantage failed to comply with the First Agreement by failing to presell all the condominium units, Advantage entered into the Second Agreement with Paradise Grande. Carter, acting on behalf of Advantage, testified that entering into the Second Agreement was a "no-brainer" decision. He further testified:

> The second marketing agreement . . . there was essentially no discussion about this, I mean, none. There was no deliberation. Some decisions are so clear-cut there's just no deliberation. If the project doesn't get built everybody is out of two years of work, nobody gets paid, or you—they want you to subordinate your sale—I mean, subordinate your commission, and you already have enough sales to cover it. It's a no brainer. We were all trying to get the project built . . . . [T]his is one of the things we need to do to get the construction loan, and it

> doesn't matter anyway because we've got enough sales to cover it.

Carter recognized that if Advantage refused to agree to the subordination, Wachovia would not have executed the construction loan with Paradise Grande and the Horizon project would have been cancelled. Carter did not initially tell Broach and Loomis about the subordination provision in the Second Agreement because he stated that "at the time it did not appear significant." In fact, Carter testified that when Paradise Grande entered into the Second Agreement, no one imagined Broach and Loomis would not be paid their commissions. Carter also testified, the collapse of the real estate market was not anticipated at the time. He stated at trial, "[I]t was inconceivable that that many people would walk away from their money, and—but they did . . . . Nobody in our industry, in our area had seen anything like that happen. It just wasn't in the realm of—considered to be in the realm of possibility."

Paradise Grande lost in excess of six million dollars, it defaulted on its construction loan, and Wachovia foreclosed on the property. As a result of the Second Agreement, all sales commissions were subordinated to the construction loan, and Advantage was never paid any commissions. Additionally, Broach and Loomis never received commissions for the Horizon condominium units they successfully sold and closed. Broach received $73,000 as a result of a sales contest created by Paradise Grande to sell the Horizon units, but he testified he is owed an additional $135,741.39 in commissions. Loomis testified he is owed $21,917.98 in unpaid commissions.

PROCEDURAL HISTORY

On November 19, 2008, Broach and Loomis filed their original complaint against Carter, Advantage, and Paradise Grande seeking payment of their commissions.[1] Carter, Advantage, and Paradise Grande all filed Answers. Broach and Loomis subsequently filed an Amended Summons and Complaint on September 14, 2009, to include Jacobson.[2] Carter, Advantage, Paradise Grande, and Jacobson all filed an Answer to the Amended Complaint.

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[1] SilverDeer and Wachovia were originally named as parties in the lawsuit but were subsequently dismissed from the lawsuit.

[2] The Amended Summons and Complaint also included other defendants, but they were subsequently dismissed from the lawsuit.

A jury trial took place on November 29, 2010. The jury found Advantage and Carter breached the Independent Contractor Agreement with Broach and Loomis. In addition, the jury found Paradise Grande was not liable for tortious interference with a contract, but found Jacobson was individually liable for tortious interference with the Independent Contractor Agreements between Broach, Loomis, and Advantage. The jury awarded Broach and Loomis a total of $50,000 in actual damages and a total of $50,000 in punitive damages. Jacobson appeals.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Jacobson argues there is no evidence in the record to support the jury's finding that Jacobson tortiously interfered with Broach's and Loomis's Independent Contractor Agreements with Advantage. We agree.

The elements of a cause of action for tortious interference with a contract include the following: (1) a valid contract exists; (2) the defendant has knowledge of the contract; (3) the defendant intentionally procures its breach; (4) the defendant acted without justification; and (5) the plaintiff suffers prejudice. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).

a. Existence of a Contract

Here, there is no dispute that Broach and Loomis both had contracts with Advantage. Even if there was a dispute, the Independent Contractor Agreement between Advantage and Broach was presented at trial without objection. Although the Independent Contractor Agreement between Advantage and Loomis was not admitted as evidence at trial, there is testimony in the record supporting the existence of a contract between Advantage and Loomis. Therefore, we find there is evidence to support the existence of contracts between Advantage and Broach and Advantage and Loomis.

b. Knowledge of the Contracts

Jacobson argues no evidence shows Jacobson had knowledge of the contracts Advantage entered into with Broach and Loomis. We disagree and find there is at least some evidence in the record to support the jury's finding Jacobson had knowledge of these Independent Contractor Agreements.

An email sent by Jacobson indicated he knew Advantage's Independent Contractor Agreements with Broach and Loomis provided for payment of commissions upon closing and the Second Agreement would interfere with Broach's and Loomis's contracts with Advantage. The email from Jacobson to Carter discussing the decision to enter into the Second Agreement states, in pertinent part:

> Note that all commissions to [Advantage] must be subordinated to Bank loan, but this should not matter because we have nearly sold enough units to make the subordination of no risk to you. I must say that this [second] agreement does not address my biggest concern— that your team stops pushing Paradise Grande . . . . I need to know that your team (I don't really worry about you) will ensure not just they are compensated but that I and my investors get some profit out of this deal.

We find a reasonable juror could infer this email evinces Jacobson's concern that Advantage's agents, including Broach and Loomis, would stop selling Horizon units because the Second Agreement interfered with their understanding that they would receive payment of commissions upon closing. If Jacobson lacked knowledge that Broach and Loomis contracted with Advantage to be paid upon closing, he would have no reason to be concerned that they would discontinue their efforts to sell the Horizon units. Accordingly, we find there is evidence to support a jury's conclusion that Jacobson had knowledge of the contractual terms between Broach, Loomis, and Advantage.

c. Intentional Procurement of the Contract Breach

Additionally, we find there is evidence in the record showing Jacobson intended to procure the breach of the contracts between Broach, Loomis, and Advantage.

At trial, Jacobson testified he never had any intention of *injuring* Broach and Loomis by entering into the Second Agreement. However, intent to injure is not an element of tortious interference. In *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007), our supreme court held:

> None of the elements required for [tortious interference with a contract] . . . include "intent to harm." Although it is true that harm may result from an intentional inference with . . . contractual relations, it is not necessary that the interfering party intend such harm. Instead, it is only necessary that they intended to interfere with . . . an existing contract . . . .

While the issue of whether Jacobson intentionally procured the breach of contract is a close call, we find that based on our supreme court's decision in *Eldeco*, there is some evidence Jacobson intentionally interfered with Broach's and Loomis's contracts with Advantage. Even if the purpose of the subordination clause was to save the Horizon project, Jacobson directly interfered with Broach's and Loomis's Independent Contractor Agreements by negotiating the subordination clause with Wachovia while knowing the subordination would necessitate the alteration of Broach's and Loomis's rights to immediate payment at closing.

d. Absence of Justification

Jacobson argues that even if he intentionally procured the breach of the Independent Contractor Agreements, he was justified in executing the Second Agreement. We agree.

Here, the evidence in the record establishes only that Jacobson was justified in entering the Second Agreement. Advantage breached the First Agreement. As a result, Jacobson remained free to enter into a subsequent contract with Advantage on different terms. *See S.C. Dep't. of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 255, 547 S.E.2d 881, 883 (Ct. App. 2001) ("Generally, parties are free to contract for terms upon which they agree."); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."). Moreover, Jacobson testified the sole purpose for the Second Agreement was to save the Horizon project so that everyone, including Broach and Loomis, could get paid. Accordingly, there is no evidence to refute Jacobson acted in good faith when exercising his legal right to contract, and

we find Jacobson was justified in entering into the Second Agreement, which subordinated Broach's and Loomis's commissions.

As we find Jacobson justified in interfering with Broach's and Loomis's contracts, we find the requisite elements to establish tortious interference with a contract are not present. *See Eldeco*, 372 S.C. at 480, 642 S.E.2d at 731 (holding a plaintiff *must show* absence of justification to establish a cause of action for tortious interference with a contract). As a result, we conclude the jury's finding that Jacobson is liable for tortious interference with a contract is unsupported by the evidence, and we reverse on this ground.[3]

B. Punitive Damages

Jacobson argues the record does not support the jury's award of punitive damages. We agree.

Based on our decision to reverse the jury's finding that Jacobson was liable for tortious interference with a contract, we must also reverse the jury's award of punitive damages. Punitive damages are predicated on the existence of actual damages, and Broach and Loomis have no other causes of action on which an actual damages award could be based. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 497, 309 S.E.2d 776, 780 (Ct. App. 1983) ("Punitive damages may be recovered only if the plaintiff proves his entitlement to actual damages.").

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[3] Because we find Jacobson's conduct was justified, we decline to address the remaining elements of tortious interference with a contract and decline to address Jacobson's argument that he cannot be held personally liable for the tort. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); *S. Contracting, Inc. v. H.C. Brown Const. Co., Inc.*, 317 S.C. 95, 98, 450 S.E.2d 602, 604 (Ct. App. 1994) (holding to establish a cause of action for tortious interference with contractual relations, the plaintiff must prove the absence of justification).

CONCLUSION

Accordingly, the jury's verdict is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Barbara B. Danley Williams, Sylvia H. Durant Cotton, Janie Durant Ancrum, Tricia Durant Middleton and Carolyn Durant White, Respondents,

v.

Elgie M. Moore, Larry M. Moore, W.F. Moore, Howard Danley Daniels, Jr., Earl Daniels, Cynthia Daniels, if they or any of them be alive; John Doe and Jane Doe, whose true names are Unknown and Fictitious names designating the unknown heirs, devisees, distributees, issue, executors, administrators, successors, or assigns of the above named Defendants, if they or any of them be dead, and William E. Danley, Elizabeth Danley, Elie Danley, Joe Danley, Rosetta Danley Simmons, Harriet Danley Durant, Elizabeth Danley Stigers, Howard Danley Daniels, William E. Danely, Jr., Harold Daniels, Melvin Durant, John A. Durant, all deceased; and Mary Roe and Richard Roe, whose true names are unknown and fictitious names designating infants, persons under disability, incompetents, imprisoned, or those persons in the military, if any; and also all other persons, known or whose true names are unknown, claiming any right, title interest in, or lien upon the real estate described in the Complaint herein,

Of whom Elgie M. Moore, Larry M. Moore, and W.F. Moore are the Appellants.

Appellate Case No. 2010-151961

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5029
Heard June 5, 2012 – Filed September 5, 2012

AFFIRMED

Donna K. Taylor, of Taylor Bowley & Byrd, LLC, of Charleston, for Appellants.

James K. Holmes, of The Steinberg Law Firm, LLP, Richard E. Fields, and Barry I. Baker, all of Charleston, for Respondents.

LOCKEMY, J.: In this property dispute, Elgie and Larry Moore appeal the trial court's decision to grant relief to Barbara B. Danley Williams, Sylvia H. Durant Cotton, Janie Durant Ancrum, Tricia Durant Middleton, and Carolyn Durant White (collectively known as Respondents). Specifically, the Moores argue the trial court erred in: (1) basing its decision on the incorrect survey; (2) denying the Moores' motion for directed verdict based upon standing; (3) allowing inadmissible, unreliable hearsay testimony into the record; (4) basing its order upon findings of fact not reflected in the record; and (5) revealing bias in favor of the Respondents. We affirm the trial court.

FACTS

In 1905, William E. Danley purchased approximately eight and one-half acres near the town of Lincolnville.[1] A plat of that property was prepared by J. Hamilton Knight (Knight plat) at the time of the conveyance and depicted an "old wagon road" running across the northern portion of the property before turning north across railroad tracks to the town of Ladson. Railroad tracks also ran along the northern boundary of the property.

[1] The Danley tract and Lot No. 13, which will be discussed below, were formerly situated in Berkeley County but are now located in Charleston County.

Danley subsequently conveyed two and one-half acres of his property to William M. Richardson in 1910. He also conveyed a strip of land measuring 29 feet by 232 feet (the "boot") to Central Realty Company (Central) in 1912. Everyone agreed the original purpose of the boot was to connect a planned subdivision to the old wagon road shown on the Knight plat to provide ingress and egress to Ladson. Title to the remaining acreage (Danley property) remained in the Danley family until the property was sold for non-payment of taxes to Charles Ross in 1959, who reconveyed the property to Harriet Durrant and Elizabeth Staggers by deed in 1960.[2] Since that time, Durrant and Staggers have paid the taxes on the Danley property still shown as containing eight and one-half acres.

The two and one-half acre parcel and boot that Danley sold to Richardson and Central, respectively, were conveyed to Union Corporation (Union) in April of 1913. The deed for that conveyance referenced a plat prepared by James O'Hear dated February 1912 (O'Hear Plat). In preparation of the planned subdivision (Ladson Farms), Union had McCrady Brothers and Cheves, Inc. do a tracing (McCrady Tracing), dated September 20, 1917. The tracing was prepared using the O'Hear Plat. Lot No. 13 of Ladson Farms was sold to Patrick Hanley in 1917, and that conveyance references the McCrady Tracing.

Elgie Moore (Elgie), originally purchased fifty-seven acres to the south of the disputed property from Elaine Harrell Finklea in 1976. Thereafter, Elgie filed a plat prepared by James O'Hear Sanders (Sanders Plat) purporting to show the purchase of sixty-nine acres instead of fifty-seven acres. The additional acreage consisted of a large portion of Lot No. 13, then owned by the heirs of Hanley. The heirs of Hanley filed a boundary dispute action against Elgie. The boundary dispute between the heirs of Hanley and Elgie was settled with Elgie purchasing Lot No. 13 by quitclaim and special warranty deeds in 1999.[3] A plat prepared by George A.Z. Johnson (Johnson Plat) depicted Lot No. 13 as it was conveyed in the quitclaim deed. All parties concede the Johnson Plat is incorrect.

Respondents initially commenced this action on July 30, 2007, to quiet title to and determine the boundary of their property. Respondents also moved to refer the

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[2] Durant and Staggers were the daughters of Danley.

[3] The resulting piece of property from this settlement will be referred to as the Moore property.

action to the Master in Equity, but the Moores objected and requested a trial by jury for the boundary dispute. The trial court ruled the boundary dispute would be tried by a jury, but the presiding trial court would determine how to handle the equitable issues. Upon the call of the case, all parties agreed to a bench trial.

The granddaughters of Danley, Sylvia H. Durant Cotton and Janie Durant Ancrum, testified at the trial. Cotton was 79 years old and Ancrum was 69 years old. Cotton lived on the Danley property at some point during her childhood and both women visited the Danley property as children. They testified that they would take a train to the Lincolnville Station and walk the mile to the Danley property along what was then a dirt road known as the old Lincolnville Road. Both remembered crossing over a small wooden bridge Danley built over a ditch on the side of old Lincolnville Road to get to his property. Cotton recalled that in the 1930's there was an old wagon road on the other side of the wooden bridge that connected to the adjoining subdivision.[4] Cotton also testified that in the early 1960's, Lincolnville Road was widened and paved. In order to widen the road, Cotton stated that a certain amount of land was taken from all the property along it, including the Danley property. Furthermore, she stated the Highway Department paved over the old wagon road as part of the widening of the highway. Cotton continued to visit the Danley property even after the family home collapsed. She stated that Elgie stopped her a few times while she was visiting the Danley property to ask her who she was and what she was doing there.

Ancrum was born after her grandfather passed away in 1939 and did not remember an old wagon road. She did remember a sandy path that led from the wooden bridge to her grandmother's fenced front yard. Ancrum testified that the Highway Department paved and widened Lincolnville Road to make it a highway. The widening included creating shoulders on the side of the highway and a ditch on at least one side. Due to the widening, Ancrum stated the sandy path she used to walk along had to be paved.

[4] After a review of the plats and testimony, it appears this portion of the old wagon road ran parallel to Lincolnville Road.

Respondents also offered the testimony of Ben Coker. Coker had been a land surveyor for 36 years.[5] He started his own business with a partner and performed land surveying for South Carolina Electric and Gas, Mead Westvaco, and Dupont, as well as others. He had been appointed as a land surveyor by the Master in Equity in Dorchester County and qualified as an expert witness in other cases. Here, Coker was qualified as an expert land surveyor by the trial court.

Coker began by discussing the Knight Plat and testified it was not drawn to scale, contained only limited measurements, and did not show where the old wagon road was located on the property, how wide it was, or how far it was from the railroad tracks. Coker explained a Mead Westvaco plat, which depicted the boundary of an adjacent property, showed that an oak tree marked the northwestern corner of its property, which was also the southwestern corner of the Moore property. Coker was able to locate an oak tree that matched the description given in the Mead Westvaco plat. The oak tree was also referenced on the O'Hear Plat. He testified that while the actual tree had blown over, the stump was still standing and a rebar was found in it. After plotting the southern boundary from the oak tree to a square iron at the southeastern corner of the Danley property, Coker testified that his plat (Coker Plat), the Sanders Plat, and the Knight Plat all agreed on at least the southern boundary line. Coker continued to describe his procedure for surveying the disputed property. Coker stated that after looking at the Highway Department's condemnation plans, it was apparent the Highway Department was attempting to lay the new highway as best they could right on top of the existing old Lincolnville Road. Furthermore, he stated the boot is now located within the confines of the Department of Transportation (DOT) right-of-way as well as the railroad right-of-way.

The Moores cross-examined Coker on his use or non-use of the railroad right-of-way as a boundary, but the full record of that line of questioning was not provided. After being given a hypothetical where the northern boundary is assumed to be the railroad right-of-way, Coker agreed six feet would be left in the boot property after subtracting the land taken by the DOT right-of-way.

[5] Coker is an unlicensed surveyor. However, he stated the only difference between an unlicensed and a licensed surveyor is that an unlicensed surveyor cannot sign a plat.

The Moores' expert surveyor, Ronnie L. Tyler, explained his method for preparing his plat (Tyler Plat). Tyler testified the oak tree Coker used as a boundary marker did not exist any longer because the tree was laying on its side with the root system attached to the end of the trunk. He stated the iron pin that was found in the oak tree's place was set by a surveying company in 2002, but was not accurate because there was a possible six and one-half foot variance due to the tree's uprooted position. Further, he testified he would have started with the railroad right-of-way as the constant and not the oak tree in order to line the property. Tyler stated he had not had an opportunity to finish his survey work, including the measuring of the remaining boot. The trial court granted the Moores forty-five days to allow Tyler to complete his survey and agreed to hold the case in abeyance until that time.

When the trial court reconvened, a settlement offer was placed on the record, which the Moores had refused. Thereafter, Respondents offered rebuttal expert testimony from Frank McAuley to confirm Coker's testimony and survey. McAuley testified he became involved through an attorney in Columbia that inquired about information concerning a title claim against Old Republic Title Company. He was asked to go with Coker and review all the work that had been done to prepare the Coker Plat. McAuley confirmed that the oak tree used in the Coker Plat would have been an accurate point to use. He also stated the boot would have existed underneath the pavement of what was a highway. When questioned about the differing placement of the boot on the older plats, he answered that

> [s]ome of [the old plats] had it on the north side of the railroad right of way. Some had it on the north side of the highway right of way and so forth and they just couldn't agree. I don't think they actually knew where it was or worried about it because they were trying to get connection to the crossing road.

McAuley concluded after reviewing all the documents and measurements that the Coker Plat was an accurate representation.

The trial court found "[t]here was no separate conveyance of the two and a half (2 ½) acres or the boot into the [Respondents'] predecessor in title." Further, the trial court stated "[b]oth parcels were included in the conveyance of the larger five

hundred and thirty-six (536) acres to Central Realty which was later conveyed to the Union Corporation." It found the Coker Plat was prepared in accordance with the O'Hear plat and the McCrady Tracing of Ladson Farms which was "specifically referenced in the conveyance of Lot No. 13 to Hanley from whom the [Moores] took title." The trial court stated "[t]he [Moores'] claim of ownership to Lot No. 13 [was] limited as to what was conveyed to Mr. Hanley, their predecessor in title, and they are entitled to nothing more and to nothing less." Furthermore, it found the boot was taken by the Highway Department during the construction of the clay surfaced Old Ladson Road in the early 1940's and "when the Highway Department widened, paved [the highway] in 1951 and 1964." The trial court proceeded to explain that its finding was based on: (1) measurements shown of the property line "between the Danley property and Lot No. 13 being four hundred and forty-four (444) feet to the point where it connected to the boot as shown on the O'Hear plat and the tracing of Ladson Farms"; (2) "the testimony of [Cotton] and [Ancrum] that no wagon road existed on the northern boundary of their grandfather's property after the Old Ladson Road was constructed in the early 1940's" and (3) "the Highway Department drawing for the improvement of Van Oshen Road in 1951 and further improvements in 1964, neither of which showed any road existing on the south side of Old Ladson Road or Lincolnville Road."

The trial court enjoined the Moores from entering Appellants' property or interfering with their use or enjoyment of it. Further, the trial court authorized Coker to enter the Moores' and the Appellants' property for the sole purpose of placing survey stakes or markers on each of the corners of the properties.

Also, on January 8, 2010, the trial court ordered the equitable issues be tried by a Master in Equity. The Moores' motion to reconsider was denied, and this appeal was filed on February 8, 2010. Elgie passed away on March 21, 2010, but Larry Moore (Larry), Elgie's son and heir to the property in dispute, remains a party.

ISSUES ON APPEAL

1. Did the trial court err in its decision to rely upon the Coker Plat over the Tyler Plat?

2. Did the trial court err in denying the Moores' motion for a directed verdict on the issue of Respondents' standing?

3. Did the trial court err in allowing impermissible hearsay testimony on several occasions?

4. Did the trial court err by basing its decision on findings of fact that were not supported by the testimony in the record?

5. Did the trial court err by showing bias in favor of Respondents?

STANDARD OF REVIEW

"A boundary dispute is an action at law, and the location of a disputed boundary line is a question of fact." *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citing *Clements v. Young*, 310 S.C. 73, 74, 425 S.E.2d 63, 64 (Ct. App. 1992); *Saluda Land & Lumber Co. v. Fortner*, 162 S.C. 246, 247-50, 160 S.E. 594, 594-95 (1931)). "On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law." *Madren v. Bradford*, 378 S.C. 187, 191, 661 S.E.2d 390, 393 (Ct. App. 2008) (citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005)). "The judge's findings are equivalent to a jury's findings in a law action." *Id.* (citing *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995)). "Questions regarding credibility and weight of evidence are exclusively for the trial judge." *Id.* at 191-92, 661 S.E.2d at 393 (citing *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)). "The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence." *Id.* at 192, 661 S.E.2d at 393 (citing *Epworth*, 365 S.C. at 164, 616 S.E.2d at 714).

LAW/ANALYSIS

I. Surveys

The Moores contend the trial court was presented with conflicting expert testimony and surveys, and its choice to rely on Coker and the Coker Plat was unreasonable and warrants a reversal by this court. We disagree.

The Moores seem to imply Coker's status as an unlicensed surveyor undermines his credibility, although they do not specifically raise an issue regarding the trial court's qualification of Coker as an expert. While Coker was not a licensed land

surveyor, the trial court found his training and experience qualified him as an expert as to the boundary line in this case, and we do not see any reason to doubt that qualification. *See Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 423-24, 717 S.E.2d 765, 775 (Ct. App. 2011) ("The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice. . . . As a gatekeeper, the trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." (internal citations and quotations omitted)).

Reaching the issues that were specifically raised regarding the trial court's reliance on the Coker Plat, the Moores contend: (1) the trial court failed to recognize and follow established law that natural boundaries and monuments, when present, establish the intent of earlier surveys and grantors rather than artificial monuments; (2) the trial court failed to recognize and follow the metes and bounds of the deed by which the two and one-half acre parcel was conveyed by Danley to Richardson; (3) the trial court erred in ruling that Coker's work, even though it was certified by Paul Lawson, was accurate; (4) the trial court failed to consider a deed and plat from Emerson and Richardson conveying property to the south of the two and one-half acre parcel; (5) the trial court erred in relying upon deeds and plats to determine the boundaries of the boot, the two and one-half acre parcel, and what remains of the Danley property, which were subsequent to the Respondents' predecessor in title's conveyance out of their ownership and which are inconsistent with those senior deeds and plats; (6) the trial court erred in finding the boot was in the railroad right-of-way; (7) the trial court erred in finding Coker correctly identified the location of the oak tree believed to mark the southwest corner; (8) the trial court failed to hold the Respondents to the existing property law requiring them to have constructive notice of all deeds and plats in their own chain of title; (9) the trial court erred in finding that the two and one-half acres and the boot were conveyed at the same time; (10) the trial court erred in accepting the Coker Plat as accurate when it was inconsistent with prior plats drawn by Coker as well as Respondents' pleadings; and (11) the trial court erred in finding that any part of the Danley property conveyed by the 1905 plat could have been within the railroad right-of-way. We disagree.

"The rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case." *Bodiford*, 317 S.C.

at 543 n.1, 455 S.E.2d at 197 n.1 (citing *Garrett v. Locke*, 309 S.C. 94, 98, 419 S.E.2d 842, 845 (Ct. App. 1992)). "When determining boundaries, resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances." *Id.* (citing *Garrett*, 309 S.C. at 98, 419 S.E.2d at 845). "This rule, however, merely indicates the weight generally given to each type of evidence of location." *Id.* (citing *Southern Realty & Investment Co. v. Keenan*, 99 S.C. 200, 207-09, 83 S.E. 39, 41-42 (1914)). "The rule does not provide an order of admissibility, such that evidence of artificial boundaries is admissible only if there is no evidence of natural boundaries." *Id.* "The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location." *Id.*

The rule does not provide an order of admissibility; thus, the fact that Coker used artificial monuments to challenge the accuracy of the Tyler Plat does not render his testimony incompetent or inadmissible. We reject the Moores' challenges to Coker and McAuley's testimony and the Coker Plat. *See Madden v. Cox*, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (Ct. App. 1985) (appellate court cannot judge the weight or credibility of expert testimony on appeal); *Hibernian Soc'y v. Thomas*, 282 S.C. 465, 470, 319 S.E.2d 339, 342 (Ct. App. 1984) (appellate court has no power to weigh conflicting evidence in a law case). We believe there is evidence in the record to support the trial court's decision.

While the Moores raise many other evidentiary arguments, these arguments relate to the weight the trial court assigned to the Respondents' witnesses and exhibits. We believe it's clear the trial court weighed the conflicting expert testimony and found the Coker and McAuley's testimony as well as the Coker Plat to be more credible. There is ample evidence in the record regarding both experts' methods of surveying the properties and determining the boundaries. Further, the parties were able to present all the relevant plats for the properties at issue. Again, while the Moores may disagree with the weight the trial court accorded the Respondents' exhibits and witnesses' testimony, we find there is reasonable evidence to support the trial court's findings. Accordingly, we affirm the trial court.

II. Directed Verdict

The Moores maintain the trial court erred in denying their motion for a directed verdict on the issue of Respondents' standing. We find this issue unpreserved.

Despite the Moores' assertions, neither a motion for a directed verdict or judgment notwithstanding the verdict (JNOV) on the basis of the Respondents' standing is in the record on appeal. *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (finding that an issue must be raised to and ruled upon by the lower court to be preserved for appellate review); *see also In re McCracken*, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (only issues raised in a directed verdict motion can properly be raised in a JNOV motion). "The record must show that the issue was raised in the trial court." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012) (citing *Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991); *Reid v. Kelly*, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980)). "[T]he appellant has the burden of providing an adequate record on appeal." *Id.* at 214, 723 S.E.2d at 608 (citing *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000)); *see also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

There is no motion for a directed verdict or JNOV in the record on appeal. Moreover, there is no objection to Cotton or Ancrum's testimony. Because the Moores did not meet their burden of providing an adequate record on appeal, we find this issue unpreserved.

III. Hearsay

The Moores contend the court allowed impermissible hearsay testimony during Johnson's testimony regarding: (1) the Moores purportedly moving a survey stake and ejecting people from the property and (2) the contents of another attorney's file, which included a letter. We find that even if this testimony was hearsay, the Moores failed to prove any prejudice stemming from its admission.

There was testimony from Johnson, Cotton, and Coker regarding the Moores questioning their presence on the property and then removing them from the property, all without contemporaneous objections. *See Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 87 (Ct. App. 2011) (finding a contemporaneous objection is typically required to preserve issues for appellate review). Johnson also spoke of the removal of survey markers by Moore without a contemporaneous objection. The Moores only objection occurred when Johnson was questioned

about Francis Cantwell's file and letters contained within that file. Respondents asked, "In this Francis Cantwell file there were letters to Mr. Hanley that said that when he tried to go out on his property he had been chased off by guns?" Johnson responded that the letters indicated Hanley had been chased off the property by Moore with guns. The Moores objected on the basis of hearsay but were overruled by the trial court. We do not believe the Moores suffered any prejudice from the admission of the testimony. *See Starkey v. Bell*, 281 S.C. 308, 315-16, 315 S.E.2d 153, 157 (Ct. App. 1984) (though testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence admitted in the case).

Further undermining the Moores' claim of prejudice is the fact that the court did not rely on the alleged hearsay to determine the pertinent issue at trial, the boundary dispute. We find the trial court thoroughly explained its basis for determining the boundary, and there is reasonable evidence in the record consisting of numerous plats and expert testimony to support its decision. Additionally, the Moores fail to establish prejudice stemming from the trial court's injunction. The Moores were determined to have no ownership rights in the Danley property, and therefore, they are not prejudiced by the trial court enjoining them from entering or interfering with the property. Thus, even if the trial court erred in admitting the alleged hearsay, we find it was harmless error. *See Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 85-86, 504 S.E.2d 311, 316 (1998) (finding the admission and rejection of testimony is largely within the trial court's discretion, "the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of a legal error that results in prejudice for appellant") (citing *Baber v. Greenville Cnty.*, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997)). Accordingly, we affirm the trial court.

IV. Findings of Fact Not Supported by the Evidence

The Moores contend the following findings of fact were not supported by testimony in the record: (1) no remnant of the old wagon road exists today; (2) the two and one-half acre parcel sale to Richardson and the sale of the boot occurred at the same time; (3) Cotton was born and raised on the Danley property and remained on the property until a young adult; (4) no wagon road existed on their grandfather's property during Cotton's and Ancrum's lifetime; and (5) there was no separate conveyance of the two and one-half acre parcel or the boot into Moore's

predecessor in title. We find that even if any of these statements were in error, the error was harmless.

1. Old Wagon Road

The trial court stated "[n]o remnant of the road exists today," in reference to the old wagon road. The Moores introduced the Tyler Plat that showed the old wagon road drawn in a location that would place it under the power line maintenance road. On the Tyler Plat, there is a road titled "old public road to Ladson," and then it states, "remnants under power lines." Tyler testified he knew where parts of the old wagon road remain, "because portions of it, the remnants of it are underneath the power lines that are along the northern boundary of the Danley property and still being used today as a service road by South Carolina Electric and Gas to service their poles on that side." Tyler stated he used the Knight Plat as a reference in preparing the Tyler Plat.

In contrast to Tyler's testimony, Respondents introduced testimony stating the old wagon road was taken when the Highway Department widened and paved Old Ladson Road in 1951. Furthermore, it was stated that the location of the old wagon road at the point it crossed the railroad tracks did not correspond to the location of the old wagon road depicted in the Tyler Plat.

The trial court stated that while the Knight Plat depicted the old wagon road running "across the northern boundary of [the] Danley property before turning north across the railroad tracks and continuing on to the town of Ladson," that plat did not contain "measurements showing the location or width" of the road. The trial court based its decision that no wagon road existed today on Cotton's and Ancrum's testimony that no road existed on the northern boundary of their grandfather's property after the Old Ladson Road was constructed in the early 1940's, and on Highway Department drawings. Ultimately, the trial court chose to give more weight to the Respondents' experts and testimony, and we find there is reasonable evidence to support the trial court's decision.

2. Two and one-half acres and the boot

The trial court found Danley conveyed the two and one-half acre parcel to Richardson at the same time he conveyed the boot to Central, on February 29, 1912. After reviewing the exhibits in the record, it appears that on May 2, 1910,

Danley executed the deed to Richardson. However, the deed was not recorded until February 24, 1912. On February 29, 1912, Danley executed the deed to Central. While it is not clearly legible, the deed regarding Central appears to have been recorded on March 6, 2012.

We find that despite these discrepancies, the date of the two deeds' conveyances did not affect the trial court's decision. The trial court noted Central conveyed the two and one-half acre Richardson property and the boot as part of the five hundred and thirty-six acre conveyance to Union which the O'Hear Plat depicts. The trial court agrees that eventually, Elgie was conveyed both the boot and the two and one-half acres as part of Lot No. 13. Any mistaken dates by the trial court regarding the deed conveyances did not affect the substantive outcome. Thus, we affirm the trial court.

3. Cotton and Ancrum

Respondents concede Cotton did not testify she was born on the Danley property, but point out she did live on the property at times during her childhood. Under these facts, we believe whether Cotton was born on the Danley property is insignificant, and any mistake by the trial court was harmless. As to Cotton and Ancrum's memory of the old wagon road, they did testify regarding their knowledge of its existence. The Moores merely disagree with the weight the trial court gave their testimony. *See Madden v. Cox*, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (Ct. App. 1985) (appellate court cannot judge the weight or credibility of testimony on appeal). Accordingly, we affirm the trial court.

4. Confrontation Involving Larry Moore

Respondents concede the use of "confrontation" may be too strong in its implication. However, there is testimony that one of the Moores approached Johnson and Cotton on separate occasions questioning who they were and asking them to leave the property. Despite the word usage, we find the trial court did not base its decision on whether there was a confrontation or merely a conversation between the parties. We find there was reasonable evidence in the record to

support the trial court's finding of interaction between the parties. Thus, we affirm the trial court.

V. Abuse of Discretion and Bias in Favor of Respondents

While the Moores list many of their appellate arguments as the basis for this court to find that the trial court was biased in favor of Respondents, we find this issue is not preserved for our review.

The record is devoid of any motion by the Moores for recusal; if they felt the trial court was exhibiting bias, a motion would have been the proper procedure by which to preserve this argument on appeal. *See Butler v. Sea Pines Plantation Co.*, 282 S.C. 113, 122-123, 317 S.E.2d 464, 470 (Ct. App. 1984) (stating that "[g]enerally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision"); *see also Burke*, 393 S.C. at 55, 710 S.E.2d at 87 (finding a contemporaneous objection is typically required to preserve issues for appellate review).

While this rule is flexible in a situation where "the tone and tenor of the trial judge's remarks are such that any objection would have been futile," we do not believe the record supports such a conclusion here. *State v. Thomason*, 355 S.C. 278, 288-89, 584 S.E.2d 143, 148 (Ct. App. 2003). After reading through the record on appeal, it appears both sides were allowed to present their arguments and the trial court's determination of the boundary lines was based on reasonable evidence presented at the trial. Thus, we find the Moores did not preserve this issue for our review.

CONCLUSION

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

WILLIAMS AND THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wyndham Enterprises, LLC and Rodney Wyndham, Individually, Appellants,

v.

The City of North Augusta and The City of North Augusta Board of Zoning Appeals, Respondents.

Appellate Case No. 2010-167368

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5030
Heard June 6, 2012 – Filed September 5, 2012

REVERSED

Stephen Peterson Groves, Sr., of Nexsen Pruet, LLC, of Charleston, and Stevens Bultman Elliott, of Columbia, for Appellants.

Carmen V. Ganjehsani and Charles E. Carpenter, Jr., of Carpenter Appeals & Trial Support, LLC, of Columbia; and Kelly F. Zier, of Zier Law Firm, LLC, of North Augusta, for Respondents.

LOCKEMY, J.: Wyndham Enterprises, LLC and Rodney Wyndham (Appellants) appeal the circuit court's affirmation of The City of North Augusta Board of Zoning Appeals' (the BZA) denial of Appellants' special exception request to sell fireworks. Appellants argue the BZA acted outside the scope of its authority, and

its decision was arbitrary, capricious, and violated Appellants' right to equal protection. We reverse.

FACTS/PROCEDURAL BACKGROUND

On September 1, 2009, Appellants purchased a 0.91 acre parcel of land (the property) in the City of North Augusta (the City). The property is located in Aiken County (the County) off Exit 1 of I-20 near the Georgia and South Carolina border. Appellants intended to build a 5,000 square foot structure on the property to house a Halloween Express retail store which would sell costumes, decorations, and novelty items. The property was zoned General Commercial under the North Augusta Development Code (the Code). Pursuant to the Code, the sale of fireworks is designated as a special exception use in General Commercial zoning districts.

On September 23, 2009, Appellants submitted an application to the BZA requesting a special exception to sell fireworks on the property. In an October 30, 2009 memorandum, Skip Grkovic, the City's Director of the Department of Economic and Community Development (DECD), recommended the BZA approve the special exception request subject to certain conditions which Appellant agreed to meet. In its minor site plan, the DECD stated Appellants' application met the development and zoning standards of the Code for a retail sales use in a General Commercial District. However, the DECD noted the sale of fireworks must be approved as a special exception by the BZA.

On November 5, 2009, the BZA held a public hearing on Appellants' request for a special exception. At the hearing, Mr. Wyndham testified the business would operate as the Halloween Express store for approximately twelve weeks per year and a fireworks retail store from Memorial Day to Labor Day. Mr. Wyndham indicated the fireworks store would not necessarily be open every day during the period of time the business was not operating as the Halloween Express. Also at the hearing, fourteen residents of nearby residential neighborhoods testified against the special exception. Residents' concerns included increased traffic, decreased property values, and a negative image of the community due to multiple fireworks retailers in the same area.[1]

[1] An existing fireworks store is located adjacent to the property. While this existing store is located within City limits, it was permitted and approved for development before the land was annexed by the City from the County. A second

At the conclusion of the hearing, the BZA unanimously voted to deny Appellants' special exception request. Pursuant to section 18.4.5.4.3(b) of the Code, the BZA must evaluate permits for special exceptions on the basis of the following criteria:

1. That the special exception complies with all applicable development standards contained elsewhere in this Chapter and with the policies contained in the Comprehensive Plan. (Rev. 12-1-08; Ord. 2008-18)

2. That the special exception will be in substantial harmony with the area in which it is to be located.

3. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

Pursuant to the minutes of the November 5, 2009 BZA meeting, the BZA determined the special exception did not comply with the second and third criteria. The BZA found the special exception was "not in harmony with nearby residential developments" and would have "a detrimental impact on existing and proposed residential development in the area."

Subsequently, Appellants appealed the BZA's decision to the circuit court, arguing the BZA's decision was arbitrary and capricious, a violation of the Equal Protection Clause, and a contravention of statutory law. A hearing was held before the circuit court on May 26, 2010. In a July 1, 2010 order, the circuit court affirmed the BZA's denial of Appellants' special exception request. This appeal followed.

STANDARD OF REVIEW

On appeal, the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A) (Supp. 2011). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516

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fireworks store is located nearby, but is located in the County and not within the City limits.

S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*

LAW/ANALYSIS

Arbitrary and Capricious

Appellants argue the circuit court erred in affirming the BZA's decision to deny Appellants' special exception request because the BZA's decision was arbitrary and capricious. We agree.

Pursuant to section 18.4.5.4.3(b) of the Code, the BZA must evaluate permits for special exceptions on the basis of the following criteria:

1. That the special exception complies with all applicable development standards contained elsewhere in this Chapter and with the policies contained in the Comprehensive Plan. (Rev. 12-1-08; Ord. 2008-18)

2. That the special exception will be in substantial harmony with the area in which it is to be located.

3. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

Furthermore, the BZA, "[i]n making quasi-judicial decisions, . . . must ascertain the existence of facts, investigate the facts, hold hearings, weigh evidence and draw conclusions from them, as a basis for official action, and exercise discretion of judicial nature." *North Augusta Development Code* § 5.1.4.5(a). Decisions of the BZA must be supported by "competent, substantial, and material evidence." *Id.*

Here, the BZA determined the special exception did not comply with the second and third criteria. Although the hearing transcript indicates the BZA voted to deny the special exception request based on the third criterion, the minutes of the meeting state the BZA found both the second and third criteria were not satisfied. The minutes normally constitute the BZA's final findings. S.C. Code Ann. § 6-29-800(F) ("All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail."). But the

transcript can constitute the final findings if the minutes are found invalid. *See Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 493-94, 536 S.E.2d 892, 899 (Ct. App. 2000). Here, the circuit court considered the minutes to constitute the BZA's findings, and those findings included a denial based upon the second and third criteria.

Appellants contend the BZA's decision to deny their special exception was based solely on opinion and conjecture. Appellants point out the memorandum prepared by the DECD, which recommended the BZA grant the special exception, explained that DECD staff discussed the proposed fireworks use with the City's traffic consultant and determined the proposed use would not generate a significant amount of traffic. Respondents contend the BZA's decision was supported by the evidence, complied with the Code's requirements for granting a special exception, and was neither arbitrary nor capricious. Respondents argue the residents' sworn testimony regarding the detrimental change in character to the neighborhood by the proliferation of fireworks stores, the decreased property values of the residential homes in the area, and the negative impact on future residential growth was ample evidence to the support the BZA's decision.

We find the BZA's decision was arbitrary and capricious. Regarding the third criterion, the BZA determined the special exception would not discourage or negate the use of the commercially zoned property immediately surrounding the property, but would have a detrimental impact on existing and proposed residential development. At the hearing, residents testified as to their concerns regarding the proposed fireworks business. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the character of the surrounding area. The testimony proffered was based on speculation and opinion. Although property owners can generally testify as to the value of and damage to their own property, here only one of numerous witnesses addressed the special exception's effect on property value. Moreover, the property owner did not testify about his specific parcel but rather testified broadly about the undesired fireworks store's possible effect on the neighborhood's home values as a whole. This testimony was not competent to support the denial of the special exception. *Compare Olson v. South Carolina Dept. of Health & Entl. Control*, 379 S.C. 57, 67, 663 S.E.2d 497, 502-03 (Ct. App. 2008) (affirming an administrative law court's finding that the effect on the value of adjacent landowners' property warranted the denial of a dock permit because *those adjacent landowners* testified the desired permit would diminish the value of their respective properties); *Myrtle Beach Farms Co. v. Hirsch*, 304 S.C. 94, 96-97, 401 S.E.2d 196, 198 (Ct. App. 1991) (reversing the denial of an injunction based upon a restrictive covenant and

stating "Myrtle Beach Farms based its decision to withhold approval mainly on its opinion, which it was competent to make *as the owner of the surrounding property*, that the use of the subject property as a site for a helicopter ride service would have an adverse impact on the future marketability or desirability of the surrounding property" (emphasis added)).

Additionally, none of the residents properly explained why Appellants' business would cause a decrease in property values when one fireworks store is located across the street from the property and another store is located nearby. The residents' testimony also failed to relate how their concerns about a fireworks business would be different from their concerns regarding commercial enterprises which would be allowed as a matter of right without the need to seek a special exception. No competent testimony was presented differentiating the effect of a fireworks store on property values from the effect of a fast food restaurant or convenience store on property values. Both of these types of business would be entitled to open in the same commercial location as a matter of right.

Regarding the residents' traffic concerns, we note that although there was testimony that residents felt the fireworks business would increase traffic, they failed to offer any competent evidence to support their opinions. *See Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation). Multiple neighborhood residents provided accounts of problems exiting and entering the neighborhood at the location of the proposed fireworks business. However, this testimony failed to establish how adding the fireworks store would increase traffic problems in any way but a conjectural manner. Additionally, the City's own traffic consultant determined the proposed fireworks business would not generate a significant amount of traffic.

As to the second criterion, the BZA determined the special exception was not in substantial harmony with the surrounding area. The record reflects the property is located within a commercial district near another fireworks business, a Circle K convenience store, and a Waffle House. Although the BZA determined the proposed fireworks business was in substantial harmony with these commercial uses, the BZA found the fireworks business was not in substantial harmony with nearby residential developments. We find the BZA's decision to give deference to residential neighborhoods outside the commercial zoning district in which the business would be located was arbitrary and capricious. Furthermore, as stated

above, the record is void of any factual evidence to support the testimony that this particular fireworks business would have a detrimental impact on the character of the surrounding area.

Thus, because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony, we reverse the circuit court's decision to affirm the BZA.

Remaining Issues

Appellants also argue the circuit court erred in affirming the BZA because the BZA acted outside the scope of its authority and its decision violated Appellants' right to equal protection. Based upon our decision to reverse the circuit court as to Appellants' first issue on appeal, we need not address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, the circuit court's decision is

REVERSED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Demetrius Price, Appellant.

Appellate Case No. 2009-147286

Appeal From Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 5031
Heard June 19, 2012 – Filed September 5, 2012

AFFIRMED

Appellate Defender Kathrine H. Hudgins for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Respondent.

FEW, C.J.: Demetrius Price appeals his conviction for assault and battery with intent to kill (ABWIK). He argues the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon. We affirm.

I. Facts and Procedural History

Deon Cannick was shot in the neck at close range. The bullet exited through his back, leaving his spinal cord exposed. He was instantly paralyzed, but survived. There was no evidence the shooting was unintentional.

On the day of the shooting, Price and Lucius Simuel went to the apartment Deon shared with his brother, Deverol. The men asked Deon if he wanted to buy some drugs. When Deon declined, they asked him to go get Deverol so they could see if he wanted to make a purchase. Deon went upstairs and told Deverol the men wanted to see him. Deverol walked downstairs and outside to speak with Price and Simuel. Price offered to sell him pills and cocaine. When Deverol said "no," the men forced him back into the apartment and pulled out guns. They asked him, "where is the iron at?", which Deverol understood to mean, "where are the guns?"[1]

Meanwhile, Deon was upstairs playing a video game. His dog got out of the room, and he chased after her. When he caught the dog on the stairs, he looked up and saw Price pointing a gun at him from below. He also saw that Simuel had a gun aimed at Deverol's chest. Deon put his hands up and said, "please don't shoot me. You can have anything you want." Price and Simuel instructed Deon to come to them. With his hands still up, Deon began walking towards them. Price ran up the stairs, moved his gun to the left side of Deon's neck, and shot him. Deon tumbled down the stairs. As Deon lay bleeding at the foot of the staircase, Price and Simuel

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[1] Urban Dictionary defines "iron" as "[a] gat, peice, heat, or any kind of handgun." *See Iron*, Urban Dictionary (Apr. 13, 2004), http://www.urbandictionary.com/define.php?term=iron. Time Magazine rated Urban Dictionary as one of its "50 Best Websites" in 2008, the year Price shot Deon, and described it as follows: "To stay hip, visit Urban Dictionary, which has millions of user-submitted words and definitions. Visitors can vote on the best entries . . . ." Anita Hamilton, *Urban Dictionary - 50 Best Websites 2008*, Time (Jun. 17, 2008), http://www.time.com/time/specials/2007/article/0,28804,1809858_1809955_1811527,00.html. On the date of publication of this opinion, the cited definition had 164 "up" votes and 48 "down" votes. "Peice," according to Urban Dictionary, is not a misspelling. However, that entry has more down votes than up.

again asked, "where's the iron at?" and then ran away. Deverol went outside to look for Price and Simuel's car, and he was shot in his hand and abdomen.

Price was indicted and tried for ABWIK, first degree burglary, possession of a firearm during the commission of a violent crime, and unlawful possession of a firearm under section 16-23-30(B) of the South Carolina Code (Supp. 2011). In its jury charge, the trial court instructed the jury that malice was an element of ABWIK and that "malice may be inferred from the conduct of a person if that conduct shows a total disregard for human life. Inferred malice may arise when the deed is done with a deadly weapon." The court also charged ABHAN as a lesser-included offense. During deliberations, the jury asked the court for a "summary of the conditions for ABWIK." The trial court recharged the jury on ABWIK and ABHAN, including the instruction that malice may be inferred from the use of a deadly weapon. The jury found Price guilty of all charges, and the court sentenced him to life without the possibility of parole on both the ABWIK and burglary convictions.[2] Price appeals only the conviction for ABWIK.

II. Charge on Inferring Malice from Use of a Deadly Weapon

Price argues the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

A. Issue Preservation

The State claims this issue is not preserved because Price did not object to the instruction in the charge conference or when the court initially charged the jury, but only after the court recharged the jury. The State argues Price was required to object before the jury began deliberating, and by failing to do so, he waived any objection to the charge. *See* Rule 20(b), SCRCrimP ("[T]he parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. . . . Failure to object in accordance

[2] The trial court sentenced Price to life for ABWIK pursuant to section 17-25-45 of the South Carolina Code (Supp. 2011) because Price had prior convictions from Georgia for armed robbery and burglary in the first degree.

with this rule shall constitute a waiver of objection.").[3] Price argues, however, that the jury's question on the "conditions of ABWIK" demonstrates its deliberations were controlled by the recharge, not the initial charge. By objecting to the instruction that actually affected the jury's decision, Price argues, he preserved the issue. We recognize there is a substantial question as to whether Price preserved this issue for appeal. However, we choose to address the merits of the issue. *Cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, Op. No. 27044 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 15, 21) (stating "we . . . resolve the issue on preservation grounds when it clearly is unpreserved").

B. The Inferred Malice Charge

Whether a trial court will be reversed for instructing the jury that malice may be inferred from the use of a deadly weapon depends on whether the jury was presented with evidence that, if the jury believed it, would reduce, mitigate, excuse, or justify the offense. *Belcher*, 385 S.C. at 610, 685 S.E.2d at 809 (holding "the 'use of a deadly weapon' implied malice instruction has no place in a[n] . . . assault and battery with intent to kill[] prosecution where evidence is presented that would reduce, mitigate, excuse or justify the . . . assault and battery with intent to kill"). We agree with the trial court that there was no evidence of self-defense or anything else which could excuse or justify ABWIK. We disagree, however, with the court's conclusion that there was evidence of an absence of malice, which would reduce or mitigate the offense. In deciding to give the ABHAN charge, the court stated:

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[3] The State makes the interesting argument that it is not possible for a trial court to correct an erroneously given charge that malice may be inferred from the use of a deadly weapon. The State points out that even under *Belcher*, malice may be inferred from the use of a deadly weapon. *See Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 ("[W]e [do not] restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon . . . . 'Do jurors need the court's permission to infer something? The answer is, of course not.'" (citation omitted)). *Belcher* simply prohibits the trial court from telling that to the jury under the circumstances described in the opinion. Because the inference is permitted, the trial court has no way of correcting itself when it improperly gives the charge, as a corrective statement about the charge may give the jury the incorrect impression it is not allowed to draw the inference.

> [S]ome of the testimony has indicated, indirectly though it might be, that this was something perhaps other than just a knocking down the door and going in there and shooting up everybody. And so there may be something there that is sufficient to indicate the absence of malice in this particular case.

We find no such evidence in the record. Our review of the record reveals no evidence that could reduce, mitigate, excuse, or justify this crime.

On appeal, Price points to testimony indicating that Deon and Deverol were drug-dealing gang members and that Deon's shooting may have been part of a drug deal gone wrong. We disagree that these facts would reduce, mitigate, excuse, or justify the crime. It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK. *See State v. Coleman*, 342 S.C. 172, 177, 536 S.E.2d 387, 389-90 (Ct. App. 2000) (affirming trial court's decision to not charge ABHAN as lesser-included offense of ABWIK, where "Coleman's manner in using the weapon—pointing the gun at Victim and then deliberately raising the gun to aim at Victim's head just before he fired—could have only been reasonably calculated to kill or cause great bodily harm to Victim. Moreover, the resulting wound was near-fatal." (footnote omitted)).

Belcher does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed ABWIK. *See Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 (stating "the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed . . . assault and battery with intent to kill"). On the facts of this case, we find no error.

Price's ABWIK conviction is **AFFIRMED.**

SHORT, J., concurs in result only.

HUFF, J., dissents.

HUFF, J., dissenting:

Because I believe the issue raised on appeal is properly preserved and the trial court committed reversible error in charging the jury that malice could be inferred from the use of a deadly weapon under the facts of this case, I respectfully dissent. I disagree with the majority's conclusion that the only jury question created by the evidence is whether the defendant is the person who committed assault and battery with intent to kill (ABWIK). Rather, I would find there is evidence that would reduce or mitigate the alleged ABWIK, such that the charge on inferred malice from the use of a deadly weapon was reversible error.

Demetrius Price was convicted of first degree burglary, ABWIK, possession of a weapon during the commission of a violent crime, and possession of a handgun by a prohibited person. The trial court sentenced Price to life without the possibility of parole on both the burglary and ABWIK charges, and five years each on the weapon charges. Price appeals only his conviction and sentence for ABWIK, asserting the trial court committed reversible error in charging the jury that malice could be inferred when the deed was done with a deadly weapon, because evidence was presented that would reduce the ABWIK charge to assault and battery of a high and aggravated nature (ABHAN). I would reverse Price's ABWIK conviction, and remand for a new trial on this charge.[4]

FACTUAL/PROCEDURAL BACKGROUND

Price was tried for and convicted of the above charges along with his co-defendant, Lucius Simuel. The charges stem from an incident which resulted in severe injuries to two brothers, the younger being left paralyzed. The State's theory was

[4] It should be noted that our legislature has abolished the common-law offense of ABWIK for offenses occurring on or after June 2, 2010. S.C. Code Ann. § 16-3-620 (Supp. 2011).

that Price and Simuel intended to rob the drug-dealing brothers, but shot them instead. The record reveals the following:

During the day on July 28, 2008, eighteen year old Deon Cannick and his older brother, Deverol Cannick,[5] were shot at the apartment the brothers shared with their two brothers, Malik Campbell and Marcus Campbell, and with Deverol's girlfriend, Sharita Willingham. According to Deon, he was in his upstairs apartment when he received a phone call from his friend, Martin Guzman. He went downstairs to talk to Martin and Jesse Reese, who wanted a $5 bag of marijuana. After Deon returned with the marijuana, Martin and Jesse informed Deon that two men were looking for him. Deon noticed two men walking up to him, recognizing one of the men as Lucius Simuel, who was the uncle of his ex-girlfriend, Tiah Frazier. The men asked Deon if he wanted some drugs, and when he replied he did not, they asked him to go get his brother, Deverol. Deon went upstairs and told Deverol that Tiah's uncle was down there looking for him, and Deverol then went downstairs. Deon remained upstairs playing video games until Sharita opened a door, letting one of their pit bulls out of a room. When the dog started running downstairs, Deon ran after her and grabbed her harness. As Deon looked up, he saw two men with guns, one of the men pointing his gun at Deon. Deon did not know the person pointing the gun at him, but recognized him as the same man who had accompanied Simuel that day. The men instructed Deon to come to them. Deon put his hands in the air and started walking toward them, and the man then waived the gun to the left of Deon's neck and shot Deon. Deon rolled to the bottom of the stairs, where he saw Simuel and Price, along with his brother. Deverol exclaimed, "you shot my brother," at which point Simuel and Price asked, "where's the iron at?" Deon understood this to mean they were asking about guns. Deon thought the men wanted to go upstairs, but they turned and ran outside instead because the dog was still on the steps. Deverol ran outside, after which Deon heard the sounds of gunshots, and Deverol then ran back inside bleeding. Deon stated he never gave any money or marijuana to the people who came in his home, and to his knowledge, they did not take anything.

On cross-examination, Deon admitted that he was a marijuana dealer at the time of the incident, he and Deverol were both members of a gang, and that Deverol was also a drug dealer who sold drugs besides marijuana, including cocaine, hydrocone

[5] Deverol also uses the name Devin Cannick, and goes by the nickname "Reese" as well.

and ecstasy pills. Deon further acknowledged that he had a conversation with Simuel previously concerning the purchase of ecstasy pills involving his brother, that Deverol had asked about buying the pills from Simuel, and Deon had asked Simuel for the pills on behalf of Deverol. When Simuel came to his door that day, Simuel asked Deon if he wanted to buy marijuana, ecstasy pills, and cocaine. Deon reiterated that the men had said "where the iron at," and denied they asked, "any more iron, any more iron up there?" He initially acknowledged that he told one of the detectives the men said, "any more iron, any more iron up there," but testified they actually asked "where's the iron at?" He later testified the detective might have made a mistake in writing up the interview.

Deverol testified that on the day of the incident, there was a knock at the door and his brother then told him that Tiah's uncle was at the door. Deverol went downstairs and opened the door and shut it behind him. He saw Tiah's uncle, Simuel, and another man. Simuel pointed to Price and told Deverol that this was the guy Simuel had told him about, but Deverol did not know what Simuel was talking about. Price asked Deverol if he wanted to buy any pills, and Deverol said he did not. The man then pulled out a bag of what appeared to be cocaine and asked Deverol if he wanted some of that, which Deverol again declined. Deverol saw two bags being pulled out, and he was then pushed back toward the door inside his apartment. Both men had guns, but Deverol denied that he had a gun on him at that time. Once they had pushed Deverol back into the house, the men said "'where is the iron at,' meaning, where are the guns." Deon had run downstairs once he heard the commotion, and grabbed the dog by her collar as she ran past him. Before Deverol knew it, Price reached up and shot Deon. Deon fell down the stairs, and Deverol ran around inside the home a little while, going up the stairs, before going outside to try to look for the men's car. Once outside, he saw the men arguing, at which point he dropped to the ground. Both men had a gun. Deverol was shot in the hand and, after that, the men shot him in his side. Deverol admitted he was selling drugs while living at the apartment, including cocaine, marijuana and pills, and these drugs were in his apartment at the time of the incident. He also admitted to owning guns, but denied having them on his person at the time he went to answer the door.

Sharita Willingham testified she was in the apartment living room on the day in question when there was a knock at the door, and Deverol and Deon went downstairs to see who was there. She let her dog out of a room, and the dog ended up running downstairs. Sharita stated she looked over the bannister to where Deon

and Deverol stood, observed Simuel holding a long gun and trying to force open the door, and saw Deverol attempting to close the door. Simuel pushed the door open and entered the apartment. When Sharita ran to find her phone, she heard a gunshot, and then heard two more shots. Sharita testified there were two people at the door other than Deverol. Sharita agreed that in her statement to law enforcement she indicated that "the guy outpowered Deverol and they began to argue."

Investigation of the matter lead authorities to Price and Simuel. Simuel eventually turned himself in to the authorities and gave statements to them. The State introduced Simuel's redacted statements into evidence. In the first statement, Simuel told authorities he went to Deon and Deverol's house and he was not expecting anyone to get shot. He stated he was "being greedy and wanted money," and that he had set the whole thing up and would have to deal with the consequences. Simuel stated he had been to Deon's home before, smoking a joint and having a conversation with Deon's brother. Deon's brother asked Simuel about getting some pills. On the morning of the shooting, Simuel received a call from his nephew advising Simuel that "he was looking for some pills." Simuel went to Deon's house, where he saw "a white kid and a Mexican standing outside of Deon's house and thought this was strange as no one ever is just hanging out in front of their house." Simuel saw Deon outside with them, and Deon was acting strangely. Deon went inside to get his brother. Deon's brother then came out, and a few minutes later **Deon came out with a gun, "stating where is it at."** Simuel said "the Mexican" then pulled a gun. Simuel heard a shot and saw Deon go down. Simuel started running and heard another three gunshots. Simuel stated he was afraid because of the large amount of pills in the car. Thereafter, Simuel called his niece, Tiah, and told her that her boyfriend tried to set him up. Simuel denied shooting anyone. On another occasion, Simuel told authorities that he was involved in the incident, but denied having a gun or shooting anyone. He stated he told the authorities eighty percent of the truth in the first interview, and after leading them that far, they would have to do the rest of the work. Finally, Simuel met with authorities one more time and gave another statement. He denied breaking into anyone's residence or having a weapon while at Deon's, but indicated he originally lied about the incident. When asked how he became involved, Simuel stated he received a call from his niece, Tiah Frazier, and his nephew, Chris Battle, concerning pills for Tiah's boyfriend, Deon.

The investigator who interviewed Deon acknowledged that Deon, in describing the incident, stated he heard the two men ask, "any more iron, any more iron up there." Deon also told the investigator that he talked about getting some pills so he could make some extra money weeks before the shooting, and when referring to the incident, Deon stated he "was overcome with a crazy feeling" as the two men approached. The investigator agreed he found no evidence of forced entry to the door, such as a dent or the door being broken. The same investigator interviewed Malik on the day of the shooting, at which time Malik stated that he went to the top of the stairs during the incident to see what was wrong, and observed two subjects at the bottom of the stairs fighting with his brothers. Malik also testified, admitting he talked to the investigator, but denied telling him he saw his brothers fighting with the suspects, explaining he must have been misunderstood on that point. A search of the victims' apartment led to the discovery of four guns in the bedrooms. Also found throughout the apartment were various suspected drugs, including cocaine and marijuana, as well as marijuana plants and two bundles of hydrocodone tablets.

Tiah Frazier testified that on July 28, 2008, Deon called her and asked to talk to her uncle, but Simuel was not there, so Tiah gave Deon a contact number for Simuel. Deon indicated to Tiah in the call that he wanted to buy some pills. Later in the day, on the afternoon of the shooting, Simuel called Tiah and told her that Deon had tried to rob him and that Deon had been shot. Chris Battle, Tiah's brother and Simuel's nephew, also testified to events he recalled from July 28. Chris stated that Deon called Tiah that day and asked if Simuel was home and asked for a number, which Tiah gave Deon. Deon asked for the number because he wanted some pills. They called Simuel and told him Deon was asking for some pills. Hours went by before they heard from their uncle, and when he finally called, he told them that "the deal went bad" and Deon and his brother were shot.

After both the State and Defenses rested, the trial court noted it was inclined to charge ABHAN to the jury, noting there was "some evidence in the record from which some of the testimony has indicated, indirectly though it may be, that this was something perhaps other than just a knocking down the door and going in there and shooting up everybody," such that there may be evidence "sufficient to indicate the absence of malice in this particular case." Counsel for both Price and Simuel requested the court give an ABHAN charge, and the solicitor stated he had no objection, because the jury could find there was an absence of malice from the evidence. The two defense attorneys also requested a self-defense charge, arguing

there was evidence from Simuel's statement that Deon pulled a gun out and asked "where is it at," and there was evidence concerning the deal having "gone bad," and the victims were trying to rob the defendants. The trial court declined, however, to charge self-defense.

The court thereafter charged ABWIK and ABHAN to the jury. During the court's charge on ABWIK, it instructed the jury that malice could be inferred from the use of a deadly weapon. Neither counsel for the defendants objected to the court's inference charge at that time. After deliberations began, however, the jury requested a written summary "of the conditions of ABWIK." In response, the trial court instructed the jury on virtually the same law it had previously charged on both ABWIK and ABHAN, including a charge on malice and that malice could be inferred from the use of a deadly weapon. In particular, the trial court recharged the jury as follows:

> Malice can be inferred from conduct which shows a total disregard for human life. Inferred malice can arise when the deed is done with a deadly weapon. A deadly weapon obviously is any article or instrument which is likely to cause death or bodily harm.
>
> And so if facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, that's an inference that is simply an evidentiary fact. And you can consider that, along with all of the other evidence in the case, and give it the weight that you think it should receive.

This time, trial counsel for Price excepted to the court's charge based upon the court's inclusion of language that was excluded by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The trial court noted its instruction did include the language excluded by *Belcher*. It concluded, however, that *Belcher* was inapplicable, because *Belcher* was limited to situations involving self-defense and "things of that nature," and the court had found self-defense did not lie in this case. Price was thereafter convicted as charged.

ISSUE

Whether the trial court committed reversible error, based on *Belcher*, by instructing the jury during its charge on the law of ABWIK that "inferred malice may arise when the deed is done with a deadly weapon," where evidence was presented that would reduce the ABWIK to ABHAN, and the court instructed the jury on ABHAN.

LAW/ANALYSIS

Price contends the trial court committed reversible error by instructing the jury that malice could be inferred from the use of a deadly weapon, as there was evidence presented that would reduce the ABWIK charge to ABHAN, and the inferred malice charge was thus erroneous pursuant to *Belcher*. Price further argues the trial court erred in finding *Belcher* is limited to cases in which a defendant is entitled to a self-defense instruction. I agree.

First, I disagree with the State's contention that the issue is not properly preserved, or that Price somehow waived it because he failed to object to the inferred malice instruction when initially charged by the trial court. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). As recently noted by our supreme court, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, Op. No 27044 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 15) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). Here, Price specifically excepted to the inferred malice charge immediately after the trial judge recharged the jury the allegedly offending language. The trial judge proceeded to address Price's concerns pursuant to *Belcher*, ultimately finding *Belcher* inapplicable. Thus, the matter was clearly raised to the trial judge, and the trial judge clearly ruled upon the matter. Additionally, I find Price did not waive any objection to the charge by failing to object when the matter was initially charged by the court. This matter involves two separate charges. While Price may very well have waived his objection to the *initial* inferred malice charge by failing to contemporaneously object, he specifically objected to the recharge and did not

waive his subsequent objection to this allegedly erroneous instruction. Hence, a contemporaneous objection was made to the second charge that malice could be inferred from the use of a deadly weapon, and this issue is therefore preserved as to the second charge. Neither do I find Price's failure to object after the initial charge and prior to the jury initially retiring for deliberations constitutes waiver of his right to subsequently challenge the recharge pursuant to Rule 20(b), SCRCrimP. This rule provides in part as follows: "Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires. . . . Failure to object in accordance with this rule shall constitute a waiver of objection." Rule 20(b), SCRCrimP. Our supreme court has specifically declined to give a strident interpretation to Rule 20(b), instead finding an objection to a jury charge preserved under the rule where an on-the-record ruling was made after an opportunity for discussion, in spite of the fact that the objection to the charge was not renewed after the conclusion of the charge. *See State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) (holding, where appellant's request to charge was denied on-the-record after an opportunity for discussion, Rule 20(b), SCRCrimP did not require appellant to renew his request at the conclusion of the charge in order to preserve the issue on appeal). Further, I disagree with the State's assertion that Price could have suffered no prejudice from the alleged error because the charge had previously been presented to the jury without objection. Once Price objected to the recharge, it was incumbent upon the trial judge to correct any error in his charge. Thus, assuming the charge was erroneous pursuant to *Belcher* and required correction, it cannot be said Price suffered no prejudice when the trial judge failed to give a corrected charge.[6]

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[6] I disagree with the State's contention that it is not possible for a trial court to correct an erroneously given charge that malice may be inferred from the use of a deadly weapon because a corrective statement about the charge may give the jury the incorrect impression it is not allowed to draw the inference. This would be true even in situations where an initial objection is made to the charge, and *Belcher* makes clear that such an erroneous charge will not be tolerated. The court could have instructed the jury to disregard its previous charge concerning inferred malice and the use of a deadly weapon and then properly charged the jury, or perhaps fashioned some other instruction to correct the matter. Because the trial court overruled the objection to the charge, no corrective charge possibilities were ever broached. At any rate, regardless of whether the objection was raised at the initial charge or the subsequent charge, I do not believe that an erroneous jury charge

On the merits, I believe the trial court erred in charging the jury that malice could be inferred from the use of a deadly weapon under the facts of this case. The trial court is required to charge *only* the current and correct law of South Carolina, and the law to be charged must be determined from the evidence presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "An instruction should not be given unless justified by the evidence." *State v. Cooney*, 320 S.C. 107, 110, 463 S.E.2d 597, 599 (1995).

In *Belcher*, decided one month prior to the trial in the case at hand, our supreme court addressed and overruled a long line of cases pertaining to jury instructions regarding the permissive inference of malice from the use of a deadly weapon. There, the court noted, while it had long been the sanctioned practice for trial courts in South Carolina to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon, after "carefully scrutinize[ing] the historical antecedents to this permissive inference," from there forward, a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. 385 S.C. at 600, 685 S.E.2d at 803-04. Unable to harmonize more recent jurisprudence (which sanctioned an inference of malice based upon the use of a deadly weapon charge regardless of whether evidence was presented that would reduce, mitigate, excuse or justify a killing) with earlier writings of the court that placed a qualification on such a charge, our supreme court found that malice includes the absence of justification, excuse and mitigation such that, when viewing malice in light of these component parts, "inferring malice from the use of a deadly weapon is indeed only a 'half-truth.'" *Id.* at 609-10, 685 S.E.2d at 808. Thus, "[t]he absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone," and "[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts." *Id.* at 610, 685 S.E.2d at 808-09. Based upon this analysis, the court in Belcher stated:

> Under our policy-making role in the common law, we hold that the "use of a deadly weapon" implied malice

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under *Belcher* is excusable simply because the trial court would have had difficulty correcting the charge, or that such difficulty would result in a determination that a defendant in such a situation would not have been prejudiced.

> instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

Id. at 610, 685 S.E.2d at 809. The court further particularly noted in a footnote to this holding that, because the crime of assault and battery with intent to kill requires malice, its holding in this regard also applied to ABWIK. *Id.* at 610 n.6, 685 S.E.2d at 809 n.6.

Additionally, the court in *Belcher* recognized the trial court had charged the jury that the killing had to be unlawful and that there "ha[d] to be a deliberate and intentional design to use or employ or handle a deadly weapon so as to endanger the life of another without just cause or excuse." Nevertheless, it determined that "instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide," noting that "[a] jury charge is no place for purposeful ambiguity." *Id.* at 611, 685 S.E.2d at 809.

Finally, the *Belcher* court agreed that erroneous jury instructions are subject to a harmless error analysis, and acknowledged that in many murder prosecutions there may be overwhelming evidence of malice apart from the use of a deadly weapon. However, the court held the error in charging that malice could be inferred by the use of a deadly weapon could not be considered harmless beyond a reasonable doubt in that case, as evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. *Id.* at 611-12, 685 S.E.2d at 809-10.

The *Belcher* court therefore concluded, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." *Id.* at 612, 685 S.E.2d at 810.

Turning to the case at hand, I find the trial court committed reversible error in charging the jury that malice could be inferred from the use of a deadly weapon. First, contrary to the trial court's position, *Belcher* is not limited to situations involving self-defense such that the mandates of *Belcher* are not transgressed if self-defense does not lie. *Belcher* makes absolutely clear that where evidence is

presented that would reduce, mitigate, excuse or justify the killing or the alleged assault and battery with intent to kill, a jury charge that malice may be inferred from the use of a deadly weapon is improper. Here, evidence was presented from which the jury could conclude Price and his co-defendant did not simply shoot Deon and Deverol while carrying out their plan to rob the two brothers. Specifically, evidence was presented that Deon had previously discussed with Simuel obtaining ecstasy pills from Simuel on Deverol's behalf, and Simuel had appeared at Deon and Deverol's home that day with Price after Deon had attempted to contact Simuel that day for the purpose of obtaining the pills. Significantly, evidence was presented that Deon pulled a gun out as Price and Simuel attempted to conduct a drug transaction with Deverol and stated "where is it at," thereby showing Price and Simuel may have, in fact, been the target of an armed robbery. Additionally, there is evidence Deon, in describing the incident to an investigator, stated he heard the two men ask if there was "*any more* iron up there," referring to guns, and indicating the victims may have, in fact, previously pulled a gun on the defendants while in the downstairs area. The investigator testified he found no evidence of forced entry to the apartment door, and Malik told the investigator that he observed two subjects at the bottom of the stairs fighting with his brothers during the incident. Also, Simuel's niece, Tiah, testified that on the day of the shooting, Deon had called her and asked to talk to her uncle, indicating he wanted to talk to Simuel about buying some pills, and later that day Simuel called Tiah and told her that Deon had tried to rob him. Chris Battle, Simuel's nephew, corroborated that Deon called Tiah that day and asked for Simuel because he wanted some pills, Tiah and Chris called Simuel and told him Deon was asking for some pills, and hours later, Simuel called and told them that "the deal went bad."[7] Thus, evidence was presented that would reduce or mitigate the alleged ABWIK, making the charge on inferred malice from the use of a deadly weapon improper. I

[7] I do not agree with the majority's position that the only conflicting evidence was as to who shot Deon, and the only possible interpretation of the evidence was that the person who shot Deon committed ABWIK. Though Deon did testify the shooter pointed a gun at him and, while Deon's hands were in the air, the man waived the gun to the left of Deon's neck and shot him, there was evidence presented from which the jury could conclude that the defendants were actually targeted for a robbery by the victims, and the defendants managed to gain the upper hand in the situation. In other words, given the conflicting evidence on why the shooting came about, the jury was free to believe or disbelieve Deon's version of the events.

find very telling the fact that the trial court recognized the presence of such evidence, specifically noting the appropriateness of a charge on ABHAN based on evidence that the incident was something "other than just a knocking down the door and going in there and shooting up everybody" but, rather, was "sufficient to indicate the absence of malice in this particular case." As well, the State specifically conceded during the trial that the jury could find there was an absence of malice from the evidence.

The supreme court in *Belcher* made a thorough analysis in its well-reasoned opinion, clearly elucidating, based upon historical antecedents, that because malice includes the absence of justification, excuse and mitigation, an inference of malice based upon the use of a deadly weapon charge is no longer proper where evidence is presented that would reduce, mitigate, excuse or justify the killing or the alleged ABWIK. Because I believe there was evidence presented that would, at a minimum, reduce or mitigate the alleged ABWIK, thereby showing a possible absence of malice, I believe the trial court erred in charging that jury that malice could be inferred from the use of a deadly weapon.

Second, the fact that the trial court may have charged the jury that the unlawful act had to be an intentional one and had to be done without just cause or excuse did not cure the error in charging that malice could be inferred from the use of a deadly weapon in this instance. *See id.* at 611, 685 S.E.2d at 809 (holding, though the trial court had charged the jury that the killing had to be unlawful and that there had to be a deliberate and intentional design to use or employ or handle a deadly weapon so as to endanger the life of another without just cause or excuse, instructing the jury that malice could be inferred by the use of a deadly weapon was nonetheless confusing and prejudicial where evidence was presented that would reduce, mitigate, excuse or justify the homicide).

Lastly, I disagree with the State's contention that any error in charging the jury on inferred malice was harmless in light of overwhelming evidence of malice presented at trial. Here, as noted, evidence was presented that would reduce or mitigate the ABWIK charge. In fact, both the trial court and the State acknowledged at trial that there was evidence presented from which the jury could determine there was an absence of malice. I cannot conclude, beyond a reasonable doubt, that the trial court's error in charging that malice could be inferred from the use of a deadly weapon did not contribute to the jury's guilty verdict on the charge of ABWIK. Accordingly, I cannot find that the trial court's error in so charging the

jury was harmless beyond a reasonable doubt. *See id.* at 611-12, 685 S.E.2d at 809-10 (noting, though the court agreed that erroneous jury instructions are subject to a harmless error analysis and acknowledged that in many murder prosecutions there may be overwhelming evidence of malice apart from the use of a deadly weapon, the error in charging that malice could be inferred by the use of a deadly weapon could not be considered harmless beyond a reasonable doubt in that case, as evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge); s*ee also State v. Tapp*, Op. No. 27129 (S.C. Sup. Ct. filed June 6, 2012) (Shearouse Adv. Sh. No. 19 at 28) (holding error is considered harmless when it could not reasonably have affected the result of the trial, and noting our jurisprudence requires the appellate court, when engaging in a harmless error analysis, not to question whether the State proved its case beyond a reasonable doubt, but to question whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict).

CONCLUSION

I would find the issue was raised and ruled upon below such that it is preserved for our review, and Price did not waive consideration of the issue when he objected to only the recharge. Further, pursuant to *Belcher*, I would hold the trial court erred in charging the jury that malice could be inferred from the use of a deadly weapon under the facts of this case, and such error was not harmless. Accordingly, I would reverse and remand Price's ABWIK conviction.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

LeAndra Lewis, Appellant,

v.

L.B. Dynasty, Inc., d/b/a Boom Boom Room Studio 54 and the South Carolina Uninsured Employers' Fund, Defendants,

Of whom the South Carolina Uninsured Employers' Fund is Respondent.

Appellate Case No. 2010-165646

Appeal from the South Carolina
Workers' Compensation Commission

Opinion No. 5032
Heard March 27, 2012 – Filed September 5, 2012

AFFIRMED

Charles B. Burnette, III, Burnette & Payne, PA, of Rock Hill, Blake A. Hewitt and John S. Nichols, Bluestein, Nichols, Thompson, & Delgado, LLC, of Columbia, for Appellant.

Lisa C. Glover, the South Carolina Uninsured Employers' Fund, of Columbia, for Respondent.

FEW, C.J.: LeAndra Lewis worked as a dancer in various "exotic dance clubs" throughout North and South Carolina. On June 23, 2008, she was shot while dancing at the Boom Boom Room Studio 54 on Two Notch Road in Columbia, South Carolina. The workers' compensation commission held that she was not an employee of the club and therefore not entitled to benefits under the Workers' Compensation Act. We agree.

I. Facts and Procedural History

Lewis was nineteen years old and living in Charlotte, North Carolina at the time of her injury. She danced three or four nights a week at a place called Club Nikki's in Charlotte. On two or three other nights a week, Lewis travelled around the Carolinas to dance in other clubs. She typically earned between $250.00 and $350.00 a night in cash. When the single commissioner asked about her total income dancing "five to six nights a week, fifty weeks,"[1] Lewis responded, "the money is actually addictive honestly, so you want to strive to get more, you know, so you work even harder." Lewis worked several years in this business before she was shot, and she never filed a tax return.[2] The clubs where Lewis worked are commonly referred to as strip clubs. Lewis's role as a dancer in these clubs is what most people would call being a stripper.

The night Lewis was shot was the second or third night she danced at the Boom Boom Room. She had not danced there the night before, and she could not remember the previous time or times she was there. Lewis presented several fellow exotic dancers as witnesses to explain that dancers often choose a city and a club to dance in on a particular night and travel there uninvited and unannounced. In keeping with this practice, Lewis showed up at the Boom Boom Room on this particular night, showed her identification to prove she was at least eighteen years old, and paid the required "tip-out" fee in cash to the club. She did not fill out an employment application and did not sign an employment agreement. The club

[1] Using the numbers testified to by Lewis, which average five and a half nights a week for fifty weeks earning $300.00 per night, her annual taxable income would have been $82,500.00.

[2] In response to a follow-up question about filing tax returns, Lewis testified, "I don't have enough money. I want to talk to somebody, but they're just too expensive for me to afford."

gave her a "rules sheet," she went to the dressing room to put on her outfit, and she danced.

At some point during the night, an altercation broke out in the club. There was gunfire, and a stray bullet hit Lewis in the abdomen. She suffered serious injuries to her intestines, liver, pancreas, kidney, and uterus. Surgeons removed one kidney, and doctors informed her she may never be able to have children due to the injuries to her uterus. According to her testimony, extensive scarring from the gunshot wound left her unemployable as an exotic dancer.

Lewis filed a claim for benefits with the workers' compensation commission. Because the club had no insurance, the South Carolina Uninsured Employers' Fund was forced to defend. Both the single commissioner and the appellate panel denied Lewis's claim based on the finding that she was not an employee. Her appeal came directly to this court pursuant to section 42-17-60 of the South Carolina Code (Supp. 2011).

II. The Independent Contractor/Employee Analysis

"[T]he determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of [her] work." *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). The test requires us to "examine[] four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire." *Id.* The question is a jurisdictional one as to which the appellate court "may take its own view of the preponderance of the facts upon which jurisdiction is dependent." *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 317, 713 S.E.2d 267, 270 (2011). Applying the *Wilkinson* "control" test to the facts of this case, we find that Lewis was not an employee of the club.

Lewis claims that the club's managers "controlled" her by searching her when she arrived that night, requiring her to pay the "tip-out" fee, and directing her to the manager's office and then the dressing room. She argues in her brief the club's control over her is demonstrated by these facts:

> She danced when the club told her to dance; the club selected the music; the club set her hours; the club required her to perform on demand; the club required her to strive to get V.I.P. dances; the club set her tip-out and the floor rate for V.I.P. dances; and the club required her to bring drinks from the bar.

She argues that the club furnished equipment, such as the stage for dancing; poles to assist the dancers; private rooms for V.I.P. dances; tables, chairs, and couches for the customers; and even glasses in which the bartenders poured their drinks. In her brief, Lewis states, "The club provided the dancers with cleaning solution, towels, and a basket for collecting money while on stage, and the club provided the dancers with lockers for their belongings."

Lewis discounts the method of payment factor on these facts since the club paid her nothing, but simply took a cut of her tips. As to the right to fire factor, Lewis argues the club's right to "fine" her or refuse her readmission to dance at the club for violating club rules weighs in favor of an employment relationship.

We compliment Lewis's counsel for this creative presentation, framing questions to the witnesses and presenting evidence to the commission in such a fashion as to create the appearance that the facts of this case fit the words of the *Wilkinson* test. However, we find that none of this supports the argument that Lewis met the test for an employment relationship under *Wilkinson*. Rather, the facts of this case demonstrate that Lewis was not an employee, and therefore that she is not entitled to workers' compensation benefits.

We decide this appeal using the test articulated by the supreme court in *Wilkinson*. *See Pikaart*, 393 S.C. at 318-19, 713 S.E.2d at 270-71 (explaining that *Wilkinson* requires a court to "evaluate[] the four factors with equal force in both directions to provide an even-handed and balanced approach"); *Paschal v. Price*, 392 S.C. 128, 133-34, 708 S.E.2d 771, 773-74 (2011) (applying *Wilkinson* test). As Lewis's counsel candidly acknowledged at oral argument, however, this case presents an "unorthodox" situation. Given these unusual facts, we initially stand back from the *Wilkinson* analysis and note that Lewis was an itinerant artistic performer. Other than to perform within the physical limitations of the Boom Boom Room and to comply with its basic rules and procedures, most of which simply required her to obey the law, she did as she pleased. One of her witnesses testified, "Sometimes

you just jump up some days and say, 'let's go down here, I think.' Or a rapper might be here, you know, that's another reason that girls travel, is a rapper might be here or an actor or somebody and you just want to come down here for that." Lewis was asked at the hearing before the single commissioner, "You could go to ten different clubs in ten different days if you wanted to?" to which she responded, "Right." Lewis was never invited to dance at the Boom Boom Room. She showed up unannounced, paid the club for the right to dance and receive tips from its customers, and kept almost all the money she received without paying any employment taxes. This arrangement left her free to walk out of the club at a moment's notice without any employment-related consequences other than to lose income. As one of Lewis's witnesses testified, "You're not free to leave, but you can leave. You have to pay to leave." These circumstances and others we will discuss weigh heavily against finding an employment relationship.

Focusing back on the *Wilkinson* test, we find Lewis was not an employee.

1. The right or exercise of control

Despite all the circumstances cited by Lewis under which the club required her to work, the work she travelled from Charlotte to perform, and the performance the customers of the club paid to see, was that of an exotic dancer. As Lewis states in her brief, "The record does not indicate that the club told [her] *how* to dance."[3] As counsel conceded at oral argument, "There is not any evidence of the club telling [her] how specifically to dance" and, "While the dance is going on she has complete discretion." The extent to which an exotic dancer in the Boom Boom Room decides the manner in which she performs her dance to satisfy the club's customers, according to the record in this case, is not subject to any limitation or control by the club. The "right or exercise of control" factor weighs against finding an employment relationship.

[3] In fairness, Lewis continued the sentence with "but the record does reflect that the club exerted so much control over [her] that *if* the club had told [her] how to dance, she would have been required to follow the club's instructions." We find no evidentiary support for the portion of the sentence quoted in this footnote. Rather, the record indicates the club had nothing to say as to *how* Lewis should dance.

2. Furnishing of equipment

The "equipment" Lewis argues the club furnished her is insignificant to the *Wilkinson* analysis. With respect to furnishing equipment, the club did nothing more than allow her onto its premises. There is no practical possibility that an exotic dancer might bring her own stage, poles, chairs, couches, or bar glasses. From the standpoint of both the Boom Boom Room and its customers, Lewis brought her own "equipment" for her work. This factor weighs against finding an employment relationship.

3. Method of payment

As Lewis points out in her brief, "The club paid Ms. Lewis nothing—zero." She collected her payment in the form of cash tips from the club's customers. The club's only involvement in the customers paying money to the dancers was to keep a large quantity of one dollar bills on hand so that a customer could "make it rain." This procedure allowed a customer who was particularly happy with a dancer's performance or who wanted to encourage a more enthusiastic performance to pay the club $100.00 or more and get the same amount back in one dollar bills. When the customer threw the ones in the air, he was said to "make it rain." As Lewis testified, however, even in this instance the money comes from the customer. Therefore, the club did not pay Lewis. Rather, *she paid the club* for the right to perform. As she testified, "they . . . told me to pay my [$70.00] tip-out" as a condition of entering the club. She also paid the club a share of her V.I.P. fees and tipped the disk jockey and bartender. This factor weighs against finding an employment relationship.

4. Right to fire

Lewis argues the club had the right to fire her if she did not comply with its rules. We find, however, that the "rules" the club imposed on exotic dancers like Lewis do not indicate an employment relationship. Any business has a right to impose conditions on those to whom it pays money for work, regardless of whether the worker is an independent contractor or an employee. The business's right to terminate the relationship for a violation of its conditions does not make the worker an employee. *See Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704 (stating "a right of

termination, in some form, exists in an independent contractor arrangement"). In this case, the employment "relationship" Lewis claims existed was never contemplated to last more than one night in the club. Therefore, terminating the relationship would involve nothing more than kicking her out of the club and not allowing her back in on a subsequent night. Lewis was asked by her attorney, "In your own words, explain to the commissioner how their rules and controls dictate what you have to do when you get there and if you don't do what they say, what happens." She responded:

> Well, if you don't do what they say, then you get fined. If you don't pay the fine, then you are fired. Or if—it depends on to what extreme the—what you did, you know. . . . Like if you get caught having sex in the club, then you're automatically fired. Like fighting, you're automatically fired, can't work back at the club.

These restrictions do not distinguish Lewis's relationship with the Boom Boom Room from any independent contractor relationship. Any business that pays for work to be performed on its premises is free to terminate the relationship for the type of conduct Lewis described, even when the work is being performed by an independent contractor. The "rules" imposed on Lewis are not in the record, and Lewis has cited no significant restriction on her conduct from these rules or otherwise that is not simply a requirement that Lewis obey the law. *See* 382 S.C. at 302, 676 S.E.2d at 703 (stating "requiring a worker to comply with the law is not evidence of control by the putative employer"). The "right to fire" factor weighs against finding an employment relationship.

III. Conclusion

We agree with the workers' compensation commission's finding that Lewis is not an employee. Thus, the commission correctly concluded it had no jurisdiction to award benefits. This ruling makes it unnecessary to address the other issues raised on appeal. *See Price v. Peachtree Elec. Servs., Inc.*, 396 S.C. 403, 410, 721 S.E.2d 461, 464 (Ct. App. 2011) (declining to address other issues when "our determination as to the jurisdiction of the Commission is dispositive of the case").

AFFIRMED.

HUFF, J., concurs.

SHORT, J., dissents in a separate opinion.

SHORT, J., dissenting: The majority finds the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) was correct in finding Lewis was an independent contractor of the Boom Boom Room Studio 54 (the Club) in Columbia. However, I would find that Lewis was an employee of the Club; therefore, I respectfully dissent.[4]

"The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits and is reviewable under a preponderance of the evidence standard." *Shatto v. McLeod Reg'l Med. Ctr.*, 394 S.C. 552, 557, 716 S.E.2d 446, 449 (Ct. App. 2011). Because the issue of Lewis's employment status is jurisdictional, this court makes findings based on its view of the preponderance of the evidence. *See Brayboy v. WorkForce*, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009) (making its findings based on its view of the preponderance of the evidence because the issue of Brayboy's employment status was jurisdictional).

[4] The Club did not have workers' compensation insurance; therefore, the South Carolina Uninsured Employer's Fund (the Fund) became involved in the case. The Fund filed an initial brief on appeal; however, it did not file a final brief. Rule 208(a)(4), SCACR, provides that if a respondent does not file an initial brief, this court is permitted to take whatever action the court deems proper. Respondent's failure to file a brief alone can justify reversal. *See Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981) (noting that respondent did not file a brief with the court and her failure to do so allowed the court to take such action upon the appeal as it deemed proper, and stating this failure alone would justify reversal; however, it simply considered it as an additional ground). Despite the Fund's failure to file a final brief, this court permitted the Fund to appear and argue the case at oral argument.

"Under South Carolina law, the primary consideration in determining whether an employer/employee relationship exists is whether the alleged employer has the right to control the employee in the performance of the work and the manner in which it is done." *Paschal v. Price*, 392 S.C. 128, 132, 708 S.E.2d 771, 773 (2011). "The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work or undertaking." *Kilgore Group, Inc. v. S.C. Emp't Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993). "'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work.'" *Bates v. Legette*, 239 S.C. 25, 34-35, 121 S.E.2d 289, 293 (1961) (quoting 56 C.J.S. *Master and Servant* § 3(1)). "The four principal factors indicating the right of control are (1) direct evidence of the right to, or exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire." *Paschal*, 392 S.C. at 132, 708 S.E.2d at 773. This court evaluates the four factors with equal force in both directions. *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009).

Although I could not find any South Carolina appellate court cases that have addressed whether an exotic dancer is classified as an employee or independent contractor, other courts in various jurisdictions have analyzed the same or similar arrangements between exotic dancers and clubs and found an employment relationship existed. *See Club Paradise, Inc. v. Oklahoma Emp't Sec. Comm'n*, 213 P.3d 1157, 1161 (Okla. Civ. App. 2008) (finding the exotic dancers were employees of Club Paradise based on the club's control over its dancers' performance, and noting the workers performed on the club's premises, the club could dismiss its workers at any time, and either party could terminate their relationship without liability); *Yard Bird, Inc. v. Va. Emp't Comm'n*, 503 S.E.2d 246, 224-25 (Va. Ct. App. 1998) (finding exotic dancers were employees based on the amount of control the Yard Bird had over its dancers, and noting the club attempted to enforce its rule that dancers not leave the premises between sets, dancers could choose times they worked, but only in conformity with the club's schedule, and the club required dancers to comply with liquor control laws and regulations that governed its licensing status). While these jurisdictions do not apply an identical test to that utilized by the courts in South Carolina for determining whether an employment relationship exists, they are to some degree similar and consider the degree of control the alleged employer exerts over the worker.

In the case before us, Lewis presented evidence that the Club exercised the right to control her and the other exotic dancers in the performance of their work. When hired, Lewis was required to present her identification and sign a form agreeing to comply with the Club's rules. The Club provided virtually all of the necessary tools for the dancers to perform, including towels, lockers, alcohol, music, chairs, tables, a stage, poles, a "V.I.P." area, and customers. Although dancers could choose their own costumes, they could not remove the bottom portion of their costume or choose when they performed on stage. The Club set the fees for V.I.P. dances and required the dancers to remit a portion of the fees they collected to the Club. The Club fined or fired dancers if they missed their turn in the rotation or altered the V.I.P. dance price. Once the dancers reported to work, the Club fined or fired them if they left before a certain time. In addition, the Club fined or fired dancers for failure to comply with the Club's rules. Thus, under the totality of the circumstances, I find the Club exercised the sufficient amount of control over Lewis in the performance of her work to establish an employment relationship, and the Appellate Panel erred in finding Lewis was an independent contractor.