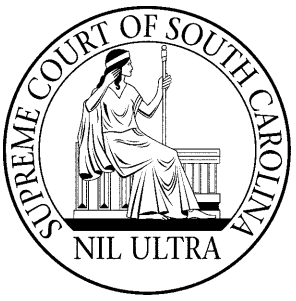

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 3, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5391-Peggy D. Conits v. Spiro E. Conits	Pending
5393-S.C. Ins. Reserve Fund v. East Richland Public Service Dist.	Pending
5398-Claude W. Graham v. Town of Latta	Pending
5403-Virginia Marshall v. Kenneth Dodds	Pending
5406-Charles Gary v. Hattie M. Askew	Pending
5407-One Belle Hall v. Trammell Crow (TAMKO)	Pending
5408-Martina R. Putnam v. State	Pending
5410-Protection and Advocacy v. Beverly Buscemi	Pending
5411-John Doe v. City of Duncan	Pending
5415-Timothy McMahan v. S.C. Department of Education	Pending
5416-Allen Patterson v. Herb Witter	Pending
5417-Meredith Huffman v. Sunshine Recycling	Pending
5418-Gary G. Harris v. Tietex International, Ltd.	Pending
5419-Arkay, LLC, v. City of Charleston	Pending
5420-Darryl Frierson v. State	Pending
5421-Coastal Federal Credit v. Angel Latoria Brown	Pending
5423-Ashley Noojin v. Frank Noojin, III	Pending
5424-Janette Buchanan v. S.C. Property and Casualty Ins.	Pending
2016-UP-028-Arthur Washington v. Resort Services	Pending
2016-UP-084-Esvin Perez v. Gino's The King of Pizza	Pending
2016-UP-099-Carrie Steele v. William Steele	Pending

2016-UP-139-Hector Fragosa v. Kade Construction	Pending
2016-UP-158-Raymond Carter v. Donnie Myers	Pending
2016-UP-163-James Tinsley v. SCDPPPS	Pending
2016-UP-182-State v. James Simmons, Jr.	Pending
2016-UP-184-D&C Builders v. Richard Buckley	Pending
2016-UP-204-Thomas Lowery v. SCDPPPS	Pending
2016-UP-206-State v. Devatee Tymar Clinton	Pending
2016-UP-210-Bernard Bagley v. SCDPPPS	Pending
2016-UP-239-State v. Kurtino Weathersbee	Pending
2016-UP-245-State v. Rodney Lee Rogers, Sr.	Pending
2016-UP-247-Pankaj Patel v. Krish Patel	Pending
2016-UP-248-Bruce R. Hoffman v. Seneca Specialty	Pending
2016-UP-253-Melissa Lackey v. 4 K&D Corporation	Pending
2016-UP-257-State v. James S. Cross	Pending
2016-UP-261-Samuel T. Brick v. Richland County	Pending
2016-UP-263-Wells Fargo Bank v. Ronald Pappas	Pending
2016-UP-264-Deutsche Bank v. Dora S. Morrow	Pending
2016-UP-266-Townes at Pelham v. Donna Boyd	Pending
2016-UP-268-SCDSS v. David and Kimberly Wicker	Pending
2016-UP-271-Lori Partin v. Jason Harbin	Pending
2016-UP-274-Bayview Loan Servicing v. Scott Schledwitz	Pending

2016-UP-275-City of North Charleston v. John Barra	Pending
2016-UP-276-Hubert Bethune v. Waffle House	Pending
2016-UP-280-Juan Ramirez v. Progressive Northern	Pending
2016-UP-281-James A. Sellers v. SCDC	Pending
2016-UP-299-State v. Donna Boyd	Pending
2016-UP-303-Lydia Miller v. Willie Fields	Pending
2016-UP-305-Phil Vasey v. Colton Builders, LLC	Pending
2016-UP-306-State v. Shawndell Q. McClenton	Pending
2016-UP-314-State v. Frank Muns	Pending
2016-UP-315-State v. Marco S. Sanders	Pending
2016-UP-316-Helen Marie Douglas v. State	Pending
2016-UP-318-SunTrust Mortgage v. Mark Ostendorff	Pending
2016-UP-320-State v. Emmanual M. Rodriguez	Pending
2016-UP-325-NBSC v. Thaddeus F. Segars	Pending
2016-UP-327-John McDaniel v. Career Employment	Pending
2016-UP-328-SCDSS v. Holly M. Smith and Steven L. Smith	Pending
2016-UP-330-State v. William T. Calvert	Pending
2016-UP-331-Claude Graham v. Town of Latta (2)	Pending
2016-UP-336-Dickie Shults v. Angela G. Miller	Pending
2016-UP-338-HHH Ltd. of Greenville v. Randall S. Hiller	Pending
2016-UP-340-State v. James R. Bartee, Jr.	Pending
2016-UP-344-State v. William Anthony Wallace	Pending

2016-UP-348-Basil Akbar v. SCDC Pending

2016-UP-350-TD Bank v. Sunil Lalla Pending

2016-UP-351-Tipperary Sales v. S.C. Dep't of Transportation Pending

2016-UP-352-State v. Daniel W. Spade Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5253-Sierra Club v. Chem-Nuclear Pending

5254-State v. Leslie Parvin Pending

5301-State v. Andrew T. Looper Pending

5322-State v. Daniel D. Griffin Pending

5326-Denise Wright v. PRG Pending

5328-Matthew McAlhaney v. Richard McElveen Pending

5329-State v. Stephen Douglas Berry Pending

5333-Yancey Roof v. Kenneth A. Steele Pending

5336-Phillip Flexon v. PHC-Jasper, Inc. Pending

5338-Bobby Lee Tucker v. John Doe Pending

5342-John Goodwin v. Landquest Pending

5344-Stoneledge v. IMK Development (Southern Concrete) Pending

5345-Jacklyn Donevant v. Town of Surfside Beach Pending

5346-State v. Lamont A. Samuel Pending

5348-Gretchen A. Rogers v. Kenneth E. Lee Pending

5355-State v. Lamar Sequan Brown Pending

5359-Bobby Joe Reeves v. State	Pending
5360-Claude McAlhany v. Kenneth A. Carter	Pending
5365-Thomas Lyons v. Fidelity National	Pending
5366-David Gooldy v. The Storage Center	Pending
5368-SCDOT v. David Powell	Pending
5369-Boisha Wofford v. City of Spartanburg	Pending
5371-Betty Fisher v. Bessie Huckabee	Pending
5373-Robert S. Jones v. Builders Investment Group	Pending
5374-David M. Repko v. County of Georgetown	Pending
5375-Mark Kelley v. David Wren	Pending
5378-Stephen Smalls v. State	Pending
5379-Fred Gatewood v. SCDC (2)	Pending
5382-State v. Marc A. Palmer	Pending
5384-Mae Ruth Thompson v. Pruitt Corporation	Pending
5388-Vivian Atkins v. James R. Wilson, Jr.	Pending
5389-Fred Gatewood v. SCDC (2)	Pending
5390-State v. Tyrone King	Pending
5392-State v. Johnie Allen Devore, Jr.	Pending
5395-State v. Gerald Barrett, Jr.	Pending
5399-State v. Anthony Bailey	Pending
5402-Palmetto Mortuary Transport v. Knight Systems	Pending

2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v. Harley)	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-303-Charleston County Assessor v. LMP Properties	Pending
2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-353-Wilmington Savings Fund v. Furmanchik	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)	Pending
2015-UP-378-State v. James Allen Johnson	Pending

2015-UP-382-State v. Nathaniel B. Beeks	Pending
2015-UP-388-Joann Wright v. William Enos	Pending
2015-UP-391-Cambridge Lakes v. Johnson Koola	Pending
2015-UP-395-Brandon Hodge v. Sumter County	Pending
2015-UP-402-Fritz Timmons v. Browns AS RV and Campers	Pending
2015-UP-403-Angela Parsons v. Jane Smith	Pending
2015-UP-414-Christopher A. Wellborn v. City of Rock Hill	Pending
2015-UP-423-North Pleasant, LLC v. SC Coastal Conservation	Pending
2015-UP-432-Barbara Gaines v. Joyce Ann Campbell	Pending
2015-UP-446-State v. Tiphani Marie Parkhurst	Pending
2015-UP-455-State v. Michael L. Cardwell	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-477-State v. William D. Bolt	Pending
2015-UP-478-State v. Michael Camp	Pending
2015-UP-485-State v. Alfonzo Alexander	Pending
2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr.	Pending
2015-UP-501-State v. Don-Survi Chisolm	Pending
2015-UP-505-Charles Carter v. S.C. Dep't of Corr. (3)	Pending
2015-UP-513-State v. Wayne A. Scott, Jr.	Pending
2015-UP-524-State v. Gary R. Thompson	Pending
2015-UP-540-State v. Michael McCraw	Pending

2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2015-UP-556-State v. Nathaniel Witherspoon	Pending
2015-UP-557-State v. Andrew A. Clemmons	Pending
2015-UP-564-State v. Tonya Mcalhaney	Pending
2015-UP-568-State v. Damian D. Anderson	Pending
2015-UP-574-State v. Brett D. Parker	Pending
2016-UP-010-State v. James Clyde Dill, Jr.	Pending
2016-UP-012-Whelthy McKune v. State	Pending
2016-UP-013-Ex parte State of South Carolina In re: Cathy J. Swicegood v. Polly A. Thompson	Pending
2016-UP-015-Onrae Williams v. State	Pending
2016-UP-021-State v. Darius Ranson-Williams	Pending
2016-UP-023-Frankie Lee Bryant, III, v. State	Pending
2016-UP-039-State v. Fritz Allen Timmons	Pending
2016-UP-040-State v. Jonathan Xavier Miller	Pending
2016-UP-052-Randall Green v. Wayne Bauerle	Pending
2016-UP-054-Ex Parte: S.C. Coastal Conservation League v. Duke Energy	Pending
2016-UP-055-State v. Ryan P. Deleston	Pending
2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr.	Pending
2016-UP-061-Charleston Harbor v. Paul Davis	Pending
2016-UP-067-National Security Fire v. Rosemary Jenrette	Pending

2016-UP-068-State v. Marcus Bailey	Pending
2016-UP-069-John Frick v. Keith Fulmer	Pending
2016-UP-070-State v. Deangelo Mitchell (AA Ace Bail)	Pending
2016-UP-073-State v. Mandy L. Smith	Pending
2016-UP-074-State v. Sammy Lee Scarborough	Pending
2016-UP-089-William Breland v. SCDOT	Pending
2016-UP-091-Kyle Pertuis v. Front Roe Restaurants, Inc.	Pending
2016-UP-097-State v. Ricky E. Passmore	Pending
2016-UP-109-Brook Waddle v. SCDHHS	Pending
2016-UP-118-State v. Lywone S. Capers	Pending
2016-UP-119-State v. Bilal Sincere Haynesworth	Pending
2016-UP-127-James Neff v. Lear's Welding	Pending
2016-UP-132-Willis Weary v. State	Pending
2016-UP-134-SCDSS v. Stephanie N. Aiken	Pending
2016-UP-137-Glenda R. Couram v. Christopher Hooker	Pending
2016-UP-138-McGuinn Construction v. Saul Espino	Pending
2016-UP-141-Plantation Federal v. J. Charles Gray	Pending
2016-UP-153-Andreas Ganotakis v. City of Columbia Board	Pending
2016-UP-160-Mariam R. Noorai v. School Dist. of Pickens Cty.	Pending
2016-UP-162-State v. Shawn L. Wyatt	Pending
2016-UP-168-Nationwide Mutual v. Eagle Windows	Pending

2016-UP-171-Nakia Jones v. State	Pending
2016-UP-187-Nationstar Mortgage, LLC v. Rhonda L. Meisner	Pending
2016-UP-189-Jennifer Middleton v. Orangeburg Consolidated	Pending
2016-UP-193-State v. Jeffrey Davis	Pending
2016-UP-198-In the matter of Kenneth Campbell	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel B. Dorn, in his capacity as the Parent and Natural guardian of E.D., R.D., and Y.D., Appellant,

v.

Paul S. Cohen and Susan Cohen, Individually and in their capacity as the Co-Conservators of the person of Abbie Ilene Dorn, a protected person and ward, and in their capacity as Co-Trustees of the Abbie Dorn Special Needs Trust, Respondents.

Paul S. Cohen, M.D. and Susan Cohen, Respondents,

v.

E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn, and the South Carolina Department of Health and Human Services, Respondents below,

Of whom E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn are the Appellants,

and

the South Carolina Department of Health and Human Services is a Respondent.

In Re: The Abbie Dorn Special Needs Trust

Appellate Case No. 2015-000659

Appeal From Horry County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5432
Heard May 11, 2016 – Filed August 3, 2016

AFFIRMED

John A. Massalon and Christy Ford Allen, both of Wills Massalon & Allen LLC, of Charleston, for Appellants Daniel B. Dorn, E.D., R.D., and Y.D.

Daniel Scott Slotchiver, of Slotchiver & Slotchiver, LLP, of Charleston, for Appellant Daniel B. Dorn.

John Kachmarsky, of Law Office of John Kachmarsky, of Charleston, as Court Appointed Attorney and Guardian ad Litem for Appellants E.D., R.D., and Y.D.

Reese Rodman Boyd, III and Bret Harlan Davis, of Davis & Boyd, LLC, of Myrtle Beach, for Respondents Paul S. Cohen and Susan Cohen.

Lynette Rogers Hedgepath, of the Hedgepath Law Firm, PA, of Conway, as Court Appointed Attorney for Abbie Ilene Dorn.

Virginia Lee Moore, of Moore Johnson & Saraniti Law Firm, PA, of Surfside Beach, as Court Appointed Guardian ad Litem for Abbie Ilene Dorn.

Shealy Boland Reibold, of the South Carolina Department of Health and Human Services, of Columbia, for Respondent South Carolina Department of Health and Human Services.

KONDUROS, J.: Daniel Bernard Dorn and E.D., R.D., and Y.D. (collectively, Appellants) appeal the circuit court's order dismissing as not immediately appealable their appeal of the probate court's order adding a party after the conclusion of Dorn's case-in-chief. Appellants contend the probate court's order, which added Abbie Ilene Dorn (Abbie) as a party to Dorn's petition to remove Abbie's parents, Paul S. Cohen, M.D. and Susan Cohen (collectively, the Cohens), as the coconservators and cotrustees of the Abbie Dorn Special Needs Trust (the Trust), was immediately appealable because it affected Dorn's substantial right to name his own defendant and to control the presentation of evidence at trial. We affirm the circuit court's order.

FACTS/PROCEDURAL HISTORY

Dorn and Abbie began trying to conceive a child after marrying in 2002. Despite difficulty, Abbie conceived triplets and delivered E.D., R.D., and Y.D. (collectively, Children) at Cedars-Sinai Medical Center (Cedars-Sinai) in Los Angeles, California on June 21, 2006. During delivery, Abbie suffered catastrophic injuries that left her incapacitated.

Abbie, through Dorn and her guardian ad litem, brought and settled a medical malpractice claim against Cedars-Sinai for $6,730,000. The settlement funded the Trust through a one-time contribution of $910,275.20. The balance of the settlement funded the purchase of a $4,333,105 annuity, which was to provide periodic payments of $31,000 per month to the Trust over the remainder of Abbie's life. The amount of the annuity payments to the Trust was set to increase annually at a rate of 3.5%.

The Trust named Abbie as its sole primary beneficiary and Children as remainder beneficiaries after Abbie's death.[1] The Trust named the Cohens as cotrustees. [2]

---

[1] Children's interest as remainder beneficiaries of the Trust was subject to the Trust's repayment of the South Carolina Department of Health and Human Services (DHHS) for expenditures made by South Carolina on Abbie's behalf.

[2] The Trust was established to provide a discretionary, spendthrift trust to supplement public resources and benefits, at the Cohens' discretion, when public resources and benefits were unavailable or insufficient to provide for Abbie's health, safety, and welfare.

The Trust empowered the Cohens to employ professionals, including attorneys, for estate administration purposes and to represent Abbie in legal matters. The Trust made compensation of the attorneys hired on Abbie's behalf contingent on court approval.

The Cohens moved to California to care for Abbie so she could remain close to Children; however, after learning Abbie was unlikely to secure daily visitation with Children, the Cohens returned with Abbie to their home in Horry County. On April 1, 2008, the Horry County Probate Court transferred jurisdiction over the Trust from Kern County, California to Horry County.

Dorn informed the Cohens he wanted a divorce, and they brought a marital dissolution action on Abbie's behalf in California in 2008. The California family court bifurcated the action and entered an order dissolving Dorn and Abbie's marriage on September 11, 2008. The California family court decided the custody, visitation, and child support portions of Dorn and Abbie's divorce nearly three years later in April 2011.

In November 2010, Dorn filed an emergency petition on Children's behalf to remove the Cohens as the Trust's cotrustees and sought a temporary restraining order (TRO) to prevent the Cohens from spending Trust money on anything other than Abbie's medical needs. Dorn alleged the Cohens abused their fiduciary responsibilities, violated the Trust's terms, and spent a substantial portion of the Trust's corpus on litigating the visitation portion of Dorn and Abbie's divorce. Dorn also sought repayment of all Trust funds associated with litigating the California visitation action.

Two days later, the Cohens filed a petition to affirm $495,326.75 in legal fees paid by the Trust and to reform the Trust's terms. The Cohens alleged the Trust's terms created a logistical impracticability by requiring them to obtain court approval before paying attorney's fees. The Cohens maintained the Trust empowered them to incur and pay legal fees on Abbie's behalf; further, the Cohens sought permission to pay future legal fees with Trust funds.

The probate court held a TRO hearing on December 15, 2010, and denied Dorn's request for a TRO. The probate court believed there was some question as to

whether the Cohens were authorized to pay legal fees with Trust funds and thought Dorn's and the Cohens' petitions should be heard together in a single trial. Dorn stated he had no objection to the cases being heard together, and he believed the questions of fact were common to both petitions.

The probate court found Dorn should be served with the Cohens' petition and it should be amended to name both Children and DHHS as parties. The probate court recognized a potential conflict of interest existed if Dorn were to represent Children with respect to the Cohens' petition because of the ongoing visitation dispute between Dorn and the Cohens. To resolve any conflict of interest, the probate court announced it would appoint a guardian ad litem to independently represent Children. The probate court appointed John Kachmarsky (Children's GAL) as attorney and guardian ad litem for Children on February 21, 2011. Contemporaneously, the probate court appointed Virginia Lee Moore as guardian ad litem (Abbie's GAL) and Lynette Rodgers Hedgepath (Appointed Attorney) as the appointed attorney for Abbie.

The Cohens amended their petition and named DHHS and Children as parties. Abbie and Children filed separate answers to the amended petition. Children asserted a counterclaim for breach of fiduciary duty against the Cohens, alleging the Cohens failed to exercise prudence or discretion in their pursuit of visitation with Children and dissipated the Trust's corpus without court approval. The Cohens answered Children's counterclaim and denied breaching their duties as cotrustees; further, the Cohens maintained Children failed to state a claim on which relief could be granted.

Trial commenced before the probate court on February 25, 2013. Dorn sought clarification regarding whether the probate court intended to hear three separate claims in a single trial, including Dorn's petition, the Cohens' petition, and Children's counterclaim. The Cohens believed trying multiple cases simultaneously was impractical and suggested Dorn's petition be heard and rebutted first, followed by the Cohens' petition. The Cohens argued any duplicative testimony from the first trial could be incorporated into the second trial as needed. Children preferred the petitions be heard simultaneously. Neither Abbie's GAL nor Appointed Attorney expressed a preference as to how the case should proceed.

The probate court believed the petitions were intertwined and trying the petitions together would be most effective. The probate court indicated if the petitions were heard separately, it was extremely unlikely the probate court would issue a decision at the end of the trial on Dorn's petition. The probate court explained Dorn would present his case first and the Cohens, Children, Appointed Attorney, and Abbie's GAL would be given an opportunity to cross-examine Dorn's witnesses. The probate court provided the parties would need to take that opportunity to question witnesses with respect to their own cases. The probate court stated the parties could recall witnesses later and call rebuttal witnesses to Dorn's case when presenting their own cases.

Appointed Attorney requested Dorn provide the parties with the order in which Dorn intended to call his witnesses. Dorn explained he would do whatever the probate court asked of him but noted the Cohens, Appointed Attorney, and Abbie's GAL had not requested Dorn's witness list during discovery. Dorn believed asking him to provide a witness list at that point circumvented the discovery process and sought information he was not required to provide. The probate court required only that Dorn inform the parties of the witnesses he intended to call before each day of trial. Finally, the probate court clarified Appointed Attorney was appointed to represent Abbie and not to represent Abbie's GAL.

Dorn, the Cohens, Children, and Appointed Attorney all presented opening statements. Dorn objected during Appointed Attorney's opening statement to statements regarding the potential repayment of legal fees to the Trust. The probate court told Dorn it would consider his objections to Appointed Attorney's anticipated evidence when Appointed Attorney presented that evidence during trial. Dorn called six witnesses in support of his petition. Appointed Attorney and Abbie's GAL cross-examined five and six of Dorn's witnesses, respectively. On the last day of trial, Dorn sought to clarify Abbie's status regarding the two petitions before the probate court. Dorn acknowledged the probate court appointed Abbie's GAL and Appointed Attorney but maintained Abbie was not a named party to his petition. The probate court interjected:

> She may not be named as a party, but let's be clear, in my opinion, she is a party in your action to remove the trustees of her trust. I didn't go back to look at the order, and I'm happy to, but my position is I appointed [Appointed Attorney] and [Abbie's GAL] to represent

> Abbie in the action you brought and in the action the Cohens brought.

Dorn argued Abbie was not a party because she was not listed on the pleadings. Dorn acknowledged Appointed Attorney and Abbie's GAL could cross-examine witnesses but argued they could not call their own witnesses during trial on Dorn's petition. The probate court responded Abbie was an indispensable party and if Dorn took the position Abbie was not a party earlier in the proceedings, it would have directed him to amend his pleadings. Dorn maintained he was unaware of any point in the proceedings when the probate court announced Abbie was a party to the petitions. Dorn contended Abbie was not a true party. Dorn argued Abbie did not answer the pleadings, serve or accept service of discovery, or file a petition seeking to be named a party to the petitions. Dorn argued he was never advised he needed to serve Abbie and Abbie never requested service. Children agreed with Dorn and argued Abbie was not a named party, whereas Children and DHHS were.

The Cohens argued Dorn's objections to Abbie's party status were untimely. They averred the probate court specifically stated all parties would be given an opportunity to cross-examine witnesses but whether Appointed Attorney and Abbie's GAL would not be allowed to call their own witnesses was not discussed. Abbie's GAL argued guardians ad litem in family court routinely called their own witnesses. Abbie's GAL also contended Abbie was a necessary party and Abbie's GAL and Appointed Attorney should be able to present any witnesses deemed necessary to protect Abbie's interests. Dorn argued his objection to Abbie's party status was not waived because he was not required to raise it until Abbie acted as a party, which had not occurred until that point in the case.

Appointed Attorney argued she and Abbie's GAL actively participated in the proceedings after they were appointed to represent Abbie on both petitions. Appointed Attorney argued she and Abbie's GAL attended depositions, participated in motions hearings and trials, and presented the probate court with fee affidavits. Appointed Attorney acknowledged she did not answer Dorn's petition but stated she would have answered if Abbie had been served. Appointed Attorney argued Dorn was on notice of Abbie's party status at the time the probate court appointed Appointed Attorney and Abbie's GAL. Appointed Attorney contended it was incumbent on Dorn to formally serve Abbie at that time.

Dorn argued Appointed Attorney and Abbie's GAL's involvement in the case rendered Abbie a participant, not a party. Dorn believed Abbie, as a participant, could cross-examine witnesses and submit fee petitions; however, Dorn argued a distinction arose because Abbie could not be served with discovery or call witnesses.

The probate court denied Dorn's motion to exclude Appointed Attorney and Abbie's GAL from calling witnesses based on Dorn's argument that Abbie was not a party. The probate court reiterated Dorn's underlying petition sought to remove the trustees of Abbie's trust, which made her an interested party. The probate court stated it must consider Abbie's best interests and was unaware of any rule preventing a court appointed guardian ad litem from calling his or her own witnesses in an action involving a protected person.

The parties did not complete the trial within the time allotted by the probate court. At the conclusion of the time scheduled for trial, the probate court requested Appointed Attorney and Abbie's GAL provide it with a list of potential witnesses. The probate court also requested the parties submit briefs on any outstanding motions, including adding Abbie as a party.

The parties submitted briefs at the end of March. In her brief, Abbie requested an amendment to the pleadings to allow her to present evidence and testimony regarding the Cohens' reliance on experts in performing their fiduciary duties. Abbie argued Dorn had ample opportunity to conduct discovery and would suffer no prejudice by amending the pleadings. The Cohens argued they should be allowed to amend the pleadings to conform to the evidence they presented at trial to assert the defense of advice of counsel. The Cohens argued Dorn had the opportunity to refute any evidence presented showing the Cohens relied on counsel's advice. Dorn argued it would be unduly prejudicial to allow the Cohens and Abbie to amend the pleadings to conform to the evidence and allow the Cohens to assert an affirmative defense two weeks into trial because Dorn would be required to submit additional discovery, conduct further depositions, and potentially recall every witness who previously testified.

The probate court held a telephone status conference with the parties on November 25, 2013. Thereafter, on December 3, 2013, the probate court issued an order continuing the incomplete trial and another order adding Abbie as a party to both petitions pursuant to Rule 19, SCRCP.

Appellants appealed to the circuit court the probate court's order adding Abbie as a party. On March 10, 2014, the probate court issued an order granting Abbie and the Cohens' motions to amend the pleadings to conform to the evidence and found Dorn would not suffer any prejudice and would be afforded a full opportunity to address the issues raised in the amended pleadings.

On June 26, 2014, the Cohens moved before the probate court for a mistrial on the basis the probate court judge who heard the first part of the trial on Dorn's and the Cohens' petitions was not reelected and would not likely be able to resume the proceedings before leaving office. The probate court judge recused herself from the matter on September 3, 2014. On October 14, 2014, the Cohens moved to stay the appeals filed by Appellants until a new judge was appointed and the proceedings were tried to conclusion or until a mistrial was declared.

The circuit court held a hearing on the Cohens' motion to stay on February 9, 2015. At the hearing, the circuit court stated it was unlikely a mistrial would be granted. The circuit court found Appellants' appeals were not immediately appealable because no final decision had been rendered in the case. The circuit court dismissed the appeals as not immediately appealable and did not rule on the Cohens' motion to stay the appeal at that time.[3] This appeal followed.

---

[3] The Form 4 orders contained in the record appear to state that the circuit court had already ruled Appellants' appeals were not immediately appealable and because of that the circuit court found the Cohens' motion for a stay moot. Specifically, the orders stated,

> This case came before the Court during the February 9, 2015 common pleas non-jury term for a hearing on Defendant Paul S. Cohen's Motion to Stay, filed October 15, 2014. Because this Court denied Plaintiff Daniel B. Dorn's [p]robate [a]ppeal, filed December 23, 2013 as interlocutory, Defendant Paul S. Cohen's Motion to Stay, filed October 15, 2014 is resolved as moot.

The Form 4 orders were sufficient for this court to consider whether the probate court's order was immediately appealable. *See Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("As both

LAW/ANALYSIS

Appellants argue the probate court's order adding Abbie as a party to Dorn's petition to remove the Cohens as cotrustees of the Trust is immediately appealable because it affects Dorn's substantial right to name his own defendants and control the presentation of evidence at trial. Appellants contend the probate court's order affected Dorn's substantial right because he could have received complete relief without Abbie's addition as a party. Appellants also argue allowing Appointed Attorney and Abbie's GAL to call undisclosed witnesses for whom Dorn had not prepared prevented Dorn from being able to identify, depose, or receive discovery from those witnesses, which left Dorn unable to effectively litigate the case, needlessly delayed proceedings, and burdened the Trust with extra costs. We disagree.

"The determination of whether a trial court's order is immediately appealable is governed by statute." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Section 14-3-330 of the South Carolina Code (1977 & Supp. 2015) states,

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

---

court rule and this Court's precedent provide, a judgment is effective only when reduced to writing and entered into the record.").

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Our supreme court has held an order depriving a plaintiff of his or her ability to determine the defendant against whom he or she brings a cause of action can affect a substantial right, making the order immediately appealable. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 146 ("The effect of this order is to prevent the [plaintiffs] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing."); *Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose [his] defendant is a substantial right within the meaning of this subsection.").

However, the fact that the probate court's order, on its face, added Abbie as a party to Dorn's petition is not inherently dispositive of whether the probate court's order was immediately appealable. Rather, "the question of whether an order is immediately appealable is determined on a case-by-case basis." *See Morrow*, 412 S.C. at 538, 773 S.E.2d at 146. To determine whether an order is immediately appealable, we look to the probate court's order's effect on the proceedings. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c).").

In *Neeltec*, our supreme court held an order requiring a plaintiff to substitute two corporations as defendants in lieu of the individual the plaintiff originally named in

the complaint was immediately appealable. 397 S.C. at 564, 725 S.E.2d at 927. In that case, the plaintiff originally filed an action against Willard Long, in his individual capacity, for blocking the plaintiff's advertisements for a fireworks store off Interstate 95 with advertisements for Long's own store, Fireworks Superstore. *Id.* at 565, 725 S.E.2d at 927. In defending the action, Long filed a "Motion for Summary Judgment or, in the Alternative, for Substitution of Parties," alleging Long did not own Fireworks Superstore but that it was owned by Hobo Joes, Inc. and subsequently, by Foxy's Fireworks Superstore, Inc. *Id.* at 565, 725 S.E.2d at 927-28. The special referee granted Long's motion, finding Long was not the proper defendant and ordered the plaintiff to substitute the two corporations as defendants. *Id.* In finding the order immediately appealable, our supreme court stated the order "effectively discontinue[d] [the plaintiff's] suit against Long, thus bringing the order under 2(a)." *Id.* at 566, 725 S.E.2d at 928.

Similarly, in *Morrow*, our supreme court held an order bifurcating proceedings that had the effect of depriving the plaintiffs of their substantial right to bring a case against the defendant of their choosing was immediately appealable. 412 S.C. at 539, 773 S.E.2d at 146. In that case, the plaintiffs filed a negligence action against a nursing home for injuries sustained by a resident who was assisted in the shower by a nursing home employee. *Id.* at 535-36, 773 S.E.2d at 144-45. In addition, the plaintiffs filed suit against the nursing home's corporate parents, alleging they were vicariously liable for the nursing home's negligence and directly liable for underfunding the nursing home, which led to staffing and training deficiencies. *Id.* at 536, 773 S.E.2d at 145. The nursing home's corporate parents filed a motion to bifurcate the trial, arguing the issues of the nursing home's negligence and corporate negligence were distinct. *Id.* Thereafter, the trial court issued an order stating the action against the nursing home could go forward but only if the plaintiffs were successful would the second action on corporate negligence proceed before a jury at trial. *Id.* In finding the circuit court's order immediately appealable, our supreme court stated the effect of the trial court's order was to grant the nursing home's corporate parents potential summary judgment on the issue of direct corporate liability because the plaintiffs would not be able to litigate that claim against the corporate parents if they were unsuccessful in their direct action against the nursing home. *Id.* at 539, 773 S.E.2d at 146. Our supreme court further determined the effect of the circuit court's order "deprive[d] [the plaintiffs] of bringing their case against the defendant of their own choosing." *Id.*

We find the probate court's order in this case did not affect Dorn's substantial right to choose his own defendant. Unlike the orders in *Neeltec* and *Morrow*, the probate court's order in this case neither substituted Abbie for the Cohens nor deprived Dorn of the ability to maintain his petition to remove the Cohens as the Trust's cotrustees. Rather, the probate court's order had the effect of an order granting a motion to intervene because it allowed for Abbie's full participation as a party in the action seeking to remove the trustees of the trust created for her benefit. *See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory, did not affect a substantial right, and was therefore not immediately appealable).

Appellants' contention that Dorn could have received complete relief without Abbie's addition as a party in unavailing. Appellants' argument overlooks Abbie's interest as the primary beneficiary of the Trust. *See* S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2015) (stating a beneficiary is "a person [who] . . . has a present or future beneficial interest in a trust, vested or contingent"). "[A]ccording to the former decisions of this court, it is indispensable that the beneficiaries be made parties to any proceeding brought for the purpose of adjudicating their interest." *Hood v. Cannon*, 178 S.C. 94, 99-100, 182 S.E.2d 306, 308 (1935). In this case, determination of the issues before the probate court had serious consequences for Abbie, whose welfare and care depended directly on the prudent use of the Trust's funds. Therefore, the probate court's joinder of Abbie under Rule 19, SCRCP, was proper and enabled Abbie, through Appointed Attorney and Abbie's GAL, to protect her interests as the Trust's primary beneficiary. *See* Rule 19(a), SCRCP ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall* be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest . . . ." (emphasis added)).

To the extent Appellants argue Abbie's interests were adequately represented by the Cohens, we disagree. This argument fails to recognize the distinction between guardians and guardians ad litem, as well as the position in which Dorn's petition placed the Cohens by forcing them to defend their expenditures from the Trust. "The terms 'guardian' and 'guardian ad litem' have separate and distinct legal meanings; thus, persons appointed to serve in those capacities are charged with

separate and distinct duties and obligations." *Wilson v. Ball*, 337 S.C. 493, 496, 523 S.E.2d 804, 806 (Ct. App. 1999).

> A "guardian" is one given the power and charged with the duty of taking care of a person who is considered incapable of administering his or her own affairs and of managing his or her property rights. A "guardian ad litem," on the other hand, is one authorized to prosecute on behalf of or defend an incapacitated person in any suit to which the incapacitated person may be a party and to protect his or her interests in the particular litigation.

Id. at 496-97, 523 S.E.2d at 806 (footnote omitted). Further, "[a] guardian ad litem is a representative of the court[,] appointed to assist it in properly protecting the interests of an incompetent person." *Shainwald v. Shainwald*, 302 S.C. 453, 457, 395 S.E.2d 441, 444 (Ct. App. 1990).

The record makes abundantly clear the Cohens are excellent caregivers and provide Abbie with outstanding care. However, given that Dorn's petition places the Cohens in the unenviable position of defending their expenditures from the Trust, a potential conflict of interest exists between whether Trust funds were used to satisfy Abbie's special needs versus the Cohens' perception of Abbie's needs. Thus, while Appellants are correct the Cohens are Abbie's guardians and can protect her interests under many circumstances, the independent representation the probate court afforded Abbie by appointing Abbie's GAL and Appointed Attorney was needed here.

Further, despite Appellants' arguments to the contrary, Dorn suffered no undue prejudice as a result of the probate court's order adding Abbie as a party to the proceedings. Appellants argue the probate court's order left Dorn unable to effectively litigate his case; however, the record gives no indication Dorn would not be given sufficient time to prepare to cross-examine any witnesses Appointed Attorney and Abbie's GAL may call to testify at trial. The probate court indicated from the outset that because both petitions were based on the same questions of fact, it would be flexible with the parties' presentation of their cases and allow the parties to recall witnesses and call rebuttal witnesses if necessary. Appellants never objected to this procedural arrangement; instead, both Dorn and Children were early proponents of trying the petitions simultaneously.

The record demonstrates Abbie, through Appointed Attorney and Abbie's GAL, fully participated in the proceedings through depositions, presented an opening statement, and participated in cross-examination of the other parties' witnesses before she was officially named a party to the petitions. The probate court's comments demonstrated it intended to allow Appointed Attorney and Abbie's GAL to fully participate at trial. Further, Appointed Attorney's willingness to answer Dorn's petition if Abbie had been served with Dorn's petition demonstrated a common understanding amongst the parties Abbie was to be afforded the rights of a full party to both petitions from the beginning of trial. Therefore, we find Appellants were not unduly prejudiced by Abbie's addition as a party in this case and the circuit court properly determined the probate court's order was not immediately appealable because Abbie's addition as a party did not affect Dorn's substantial right to choose his own defendant.

CONCLUSION

We find the circuit court did not err in dismissing as not immediately appealable Appellants' appeals of the probate court's order adding Abbie as a party. Consequently, the circuit court's order is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Winthrop University Trustees for the State of South Carolina, Respondent,

v.

Pickens Roofing and Sheet Metals, Inc., Appellant.

Appellate Case No. 2014-000821

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 5433
Heard December 8, 2015 – Filed August 3, 2016

AFFIRMED

Lyndey Ritz Zwingelberg and Kirby Darr Shealy, III, both of Adams and Reese LLP, of Columbia, for Appellant.

Zachary Mason Jett and Peter W. Vogt, both of Butler Weihmuller Katz Craig, LLP, of Charlotte, for Respondent.

MCDONALD, J.: In this case arising from an extensive roof fire, a jury awarded the Winthrop University Trustees for the State of South Carolina (Winthrop) $7,223,343.14 in damages against Pickens Roofing and Sheet Metals, Inc. (Pickens). On appeal, Pickens argues the circuit court erred in (1) denying its

motion for a new trial absolute based on the court's refusal to strike a juror for cause; (2) denying its directed verdict motion as to liability; (3) failing to properly recharge the jury on proximate cause; (4) bifurcating the liability and damages phases of trial; (5) denying its directed verdict motion as to damages; and (6) failing to adjust the jury's damages verdict to reflect Winthrop's comparative negligence. We affirm.

FACTS & PROCEDURAL HISTORY

On March 6, 2009, a fire erupted on the roofs of Bancroft Hall and Owens Hall, two buildings on the campus of Winthrop University. Bancroft Hall, a U-shaped building, was originally constructed in 1909; Winthrop built Owens Hall adjacent to Bancroft Hall in 2007. Connecting Bancroft Hall and Owens Hall is a flat roof (the flat roof), which is situated lower than the pitched roofs of the two adjoining buildings.[1]

In 2009, Winthrop sought bids for the Bancroft Hall reroofing project, which involved removing asbestos-containing shingles and updating the roof's appearance to be consistent with that of newly constructed Owens Hall. Winthrop hired Stafford Consulting Engineers (Stafford) to design and prepare specifications for the project. After Winthrop awarded the construction bid to Pickens, Stafford prepared a construction contract, incorporating the specifications into the contract terms. One specification required Pickens to maintain worksite safety precautions and "[c]omply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss."[2] Additionally, the following specification applied to storage areas for work materials: "Prior to starting work, obtain approval from Owner [Winthrop] for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved

---

[1] The flat roof measures approximately twenty to twenty-five feet long by twelve feet wide on one side and three to four feet wide on the other side.

[2] The International Fire Code, which includes standards of the National Fire Protection Association (NFPA), is incorporated by reference in South Carolina municipal and county building codes. *See* S.C. Code Ann. § 6-9-50(A) (Supp. 2015). Of importance in this appeal, section 8.3.3 of NFPA 241 prohibits the "yard storage" of combustible materials within thirty feet of a structure during construction.

locations." Pursuant to the agreement, Winthrop approved storage of materials in (1) a "lay down" area on the ground in front of Bancroft Hall and (2) a nearby parking lot.

During the week of March 1–5, 2009, a three-man Pickens metal crew installed copper on the dormer windows of the Bancroft Hall roof. No other construction crews worked on Bancroft Hall or Owens Hall that week. The Pickens crew stored some roofing materials on the flat roof and did not remove them when they finished work around 4:00 p.m. on Friday, March 5. The following afternoon, a student noticed smoke emerging from the Owens Hall roof; campus police and the fire department responded to the scene. The fire burned for over twenty-four hours into the early evening of March 7. Despite using a stream of approximately 300 gallons of water per minute, the fire department had difficulty extinguishing the fire within the insulation layer of the Owens Hall roof.

On August 31, 2012, Winthrop filed a complaint against Pickens for (1) breach of contract, (2) breach of implied warranty of workmanship, and (3) negligence. Winthrop alleged that Pickens's storage of combustible construction materials on the flat roof—negligently and in violation of the contract terms—caused its fire-related damages. The case was tried by jury from March 17–21, 2014.

Before trial, the circuit court conducted voir dire of the potential jurors. During the jury selection process, the circuit court asked if any jurors or their family members had worked for or had a business relationship with Winthrop. Juror 25 stated, "I am a student researcher at Winthrop and I do know about this. . . . I was there during the fire, the incident, so I know people who were affected by it." When asked if she could remain impartial despite her experience and relationships, Juror 25 responded, "I could do that. I could do that. That's not a problem. It's just I wanted to say that I knew things that occurred." When asked what specific knowledge she had, Juror 25 responded, "The fire, the incident, things that were said about how it occurred, and so forth." Juror 25 asserted that she could be impartial despite her knowledge of the fire.

The circuit court also asked if any jurors or their family members were Winthrop graduates. Juror 25 stated she was a "recent graduate" but could remain impartial. Additionally, the circuit court asked if any member of the jury pool had heard about the case through media coverage. Juror 25 again responded, noting, "I watched it on the news. I am friends with students who were affected by the fire. They discussed some things that they knew and the school website and then some

[of] the professors talked about it, but I don't live on campus so I don't know any specifics, but I have watched it." The circuit court then stated:

> This is very important. . . . Could you put aside anything you may have heard about the case before coming here to court today or anything about it that happened, and render your decision solely on the sworn testimony and evidence that comes in during the trial and the court's instruction on the law that applies and [render] a decision which is fair and impartial to both sides based solely on that evidence that applies. Could you do that or not do that?

Juror 25 responded affirmatively.

The court selected a twenty-person strike panel, which included Juror 25. During a recess before the parties exercised their peremptory strikes, Pickens apparently requested in chambers to strike Juror 25 for cause. Subsequently, Pickens exercised a peremptory strike on Juror 25. After the jury was sworn, Pickens placed its motion to strike Juror 25 for cause on the record, arguing the circuit court should strike Juror 25 because she "is a student at Winthrop University" who indicated she had watched the fire on the news and discussed it with students and faculty. Pickens argued, "I felt that that gave her a perspective on this case that other jurors would not have."

The circuit court denied Pickens's motion, finding that even though Juror 25 was a Winthrop graduate, she did not know any more specifics about the case than other jurors who knew about it had learned through news coverage. The circuit court also emphasized that Juror 25 responded affirmatively that she could be impartial when asked if she could put aside any prior knowledge and decide the case based on the evidence presented at trial. The circuit court noted that this decision differed from its decision to strike another juror who had a connection as a current employee, stating, "You demonstrated no cause to strike her solely [based] on whatever connection she might have known about the case before. . . . In any event, you struck her. You are not prejudiced by that. She is not on the jury obviously."

Before trial, Winthrop filed a motion in limine requesting bifurcation of the trial into liability and damages phases pursuant to Rule 42(b), SCRCP. Winthrop

asserted the damages testimony could add several days to the trial and argued there were no genuine issues as to the extent of its damages. Pickens opposed the motion for bifurcation, and the parties discussed bifurcation in chambers. Pickens did not put its arguments in opposition to bifurcation on the record, but stated, "I understand that we had a conversation in chambers with Your Honor. Your Honor[] has reached a decision on that. I just wanted to state that we did oppose that for the record."

The circuit court granted the motion to bifurcate, explaining, "I questioned [Winthrop] very closely about that because I was not inclined to bifurcate if . . . the same witnesses [would] testify in the second trial with regard to damages . . . ." Determining most of the damages witnesses would not be called to testify during the liability phase, the circuit court reasoned,

> It makes sense to me to bifurcate because if the jury were to return a verdict for [Pickens] we wouldn't have to spend all that time with all those witnesses on damages.
>
> On the other hand, if they return a verdict against [Pickens] then with regard to damages the witnesses pretty much are different witnesses. . . . So we won't lose any time or have to put witnesses up to testify basically to the same things twice.

During the liability phase of trial, Otis Driggers, a certified fire investigator, was qualified as an expert in the field of fire investigation and cause and origin investigation. He testified he could not locate the source of ignition during his investigation, but determined that the fire originated on the flat roof. The parties also stipulated that the fire originated on the flat roof. In his investigation, Driggers interviewed Randall Pruitt (Randall), Matthew Pruitt (Matthew), and Brandon Lusk (Lusk), three Pickens employees who worked on the Bancroft Hall roof project the week before the fire. According to Driggers, the crew reported leaving materials such as rolls of felt paper, metal louvers, and copper flashing on the flat roof when they left work at 4:00 p.m. on Friday, March 5.

Randall, the sheet metal foreman for the project, supervised Matthew and Lusk. Randall worked under his boss, Bobby Pickens (Bobby), and the project manager, Clint Robinson (Robinson). Randall, Matthew, and Lusk used the flat roof for breaks and for storing materials; Lusk and Matthew recalled going back and forth

to the flat roof several times on March 5 to get materials for installing copper on the dormers. Randall testified he only stored copper flashing and other metal materials on the flat roof, and he recalled transporting roofing paper to his truck when he left work. However, in a deposition and interview with Driggers, Randall acknowledged that he left rolls of roofing paper on the flat roof. Lusk recalled storing copper panels, louvers, metal screws, and metal clips on the flat roof, but denied storing felt paper or wooden pallets on the flat roof. When Winthrop impeached Lusk with his post-fire interview with Driggers in which he stated they stored felt paper on the flat roof, Lusk asserted Driggers misunderstood him about paper storage. Matthew testified they stored shingles, copper, metal pieces, and felt paper on the flat roof. All three Pickens metal workers testified they did not smoke or use any soldering materials the week before the fire.

Robinson testified no contract provision allowed for roof storage of materials and that Pickens did not receive permission from Winthrop to store materials on the flat roof. Robinson recalled Pickens stored sheet metal, metal fasteners, and rolls of felt paper on wooden pallets on the flat roof during his project inspections, but he did not go on the roof the day before the fire. Robinson admitted he did not know about the requirements of NFPA 241 addressing storage of materials and was not familiar with the regulations, even though he acknowledged the contract required Pickens to comply with all applicable codes.

Similarly, Bobby testified that the specifications allowed for storage of materials in only two locations on the ground and that Pickens did not have specific permission from Winthrop for roof storage. Bobby also acknowledged that the South Carolina Fire Code applied to the project, stating he was familiar with material storage rules, although he did not know the particular NFPA standard prohibiting yard storage of materials within thirty feet of a structure. He testified Randall and Robinson should have known the applicable laws for the storage of combustible materials.

Additionally, Stafford engineer Vu Nguyen testified Stafford was not aware that Pickens stored materials on the flat roof and that Pickens did not get approval for this storage space at the pre-construction meeting. Wesley Love, Winthrop's project manager for the Bancroft Hall reroof, testified Pickens did not ask to store material on the flat roof, Winthrop did not provide permission, and Winthrop did not know about the overnight storage of materials. Love also testified he did not monitor Pickens's work for safety, and he did not consider himself a fire prevention program superintendent for the Bancroft Hall roof project, nor did he designate any

other Winthrop employee with the title.[3] Walter Hardin, Winthrop's vice president of facilities management, testified that no Winthrop employee was designated with the title of fire prevention program superintendent. Hardin explained, "That was handled through our specifications through Stafford which puts that responsibility on [Pickens]." Hardin stated Winthrop relied on Pickens to comply with applicable roofing laws.

Finally, Daniel Arnold, who was qualified as an expert in fire safety and fire spread analysis, testified he visited Winthrop three or four days after the fire and interacted with origin investigator Driggers. Arnold found the evidence from the fire was consistent with the conclusion that the fire started on the flat roof between Bancroft Hall and Owens Hall. Arnold testified about pictures depicting the height the flames reached, opining that the flame height demonstrated that the fire spread from the flat roof to the pitched roofs. According to Arnold, the flames could not have reached the height of the pitched roofs without the presence of combustible materials on the flat roof. Arnold maintained it was possible to analyze how the fire spread without knowing the ignition source of the fire. He explained that a fire would have self-extinguished on the flat roof and would not have spread if other combustible materials were not stored on the roof because the roof by itself was designed to withstand the spread of fire. Arnold opined to a reasonable degree of engineering certainty that the fire would not have spread from the flat roof to the adjoining pitched roofs but for the presence of combustible materials. Arnold also testified that the International Fire Code and NFPA 241 were adopted in the South Carolina Code; the NFPA provided guidelines for minimizing fire damage during construction or renovation projects and contained a specific provision restricting the storage of combustible materials within thirty feet of a construction project. He confirmed that roofing paper and wooden pallets were combustible materials, and that any materials stored on the flat roof would have been less than thirty feet from the Bancroft Hall construction project.

After Winthrop closed its case, Pickens moved for a directed verdict on the issue of liability, arguing Winthrop failed to prove causation. Specifically, Pickens argued Winthrop introduced no evidence of how the fire began. Pickens claimed that

---

[3] Section 7.2 of NFPA 241 provides for the responsibilities of an owner—here, Winthrop—in ensuring fire safety: "The owner shall designate a person who shall be responsible for the fire prevention program and who shall insure that it is carried out to completion."

Winthrop relied on a "spread theory" of liability to prove its case, which is not recognized in South Carolina. Because Winthrop failed to provide evidence that the fire would not have occurred but for Pickens's actions, Pickens argued that Winthrop failed to meet its burden of proof as a matter of law. Pickens further contended that it was unforeseeable that the storage of materials that would be installed on the roof would cause a fire because they were no more combustible than the roof itself or other building components.

The circuit court denied the directed verdict motion, reasoning that there was evidence from which the jury could find Pickens's negligence or breach of contract proximately caused Winthrop's damages. The circuit court further held there was evidence from which the jury could find the fire would not have caused such extensive damages but for the presence of combustibles. Initially, the circuit court stated this was "an issue of novel impression probably in South Carolina," and the case was not a "spread theory" liability case because it involved a contract for a worksite and a statutory duty, not the common law duty of a landowner to prevent the foreseeable spread of fire to neighboring landowners. The circuit court further found the ignition source insignificant because the fire started on the flat roof, the statutes were designed to prevent the spread of fire by prohibiting the storage of combustible materials in certain areas near construction sites, and there was evidence from which a jury could find the combustible materials caused most of the damage because the expert testified the fire would not have spread from the flat roof but for the presence of combustible materials.

After closing arguments as to liability, the circuit court charged the jury on the applicable law. As part of its charge, the circuit court instructed the jury on the definition of proximate cause, foreseeability, and direct cause:

> Proximate cause requires proof of both causation [in] fact and legal cause. Causation [in] fact is proved by establishing the plaintiff's damages would not have occurred but for the defendant's negligence. Legal cause is proved by establishing foreseeability. The touchstone of proximate cause in South Carolina is foreseeability. That is the foreseeability of some damage from a negligent act or omission is a prerequisite to it being a proximate cause of the damage for which recovery is sought. The test for foreseeability is whether some damage to another is the natural and probable

> consequence of the complained of act. A defendant may be held for anything which appears to have been a natural and probable consequence of its negligence. For an act to be [a] proximate cause of damages[,] the damages must be a foreseeable consequence of the act. Foreseeability is not determined from hindsight, but rather from the defendant's [perspective] at the time of the complained of act. The law requires only reasonable foresight. When the damages complained of are not reasonably foreseeable in the exercise of due care[,] there is no liability.

After some deliberation, the jury sent the circuit court a note requesting to be recharged on the "definition of proximate cause." The circuit court gave the following recharge on proximate cause, which repeated a portion of its earlier charge:

> Now, as to proximate cause, I charged you previously that even if you find that the plaintiff has proved the defendant to have been negligent they would not be entitled to a verdict unless you further found that the defendant's negligence was the proximate cause of the plaintiff's injuries. Proximate cause does not mean the soul [sic] cause. The defendant's conduct can be a proximate cause if it was at least one of the direct concurring causes of the injury. The law defines proximate cause to be something that produces a natural chain of events which in the end brings about the injury . . . or damage. In other words proximate cause is a direct cause without which the damage would not have occurred. Okay. Anything else that you need while we are out?

The foreperson replied, "No, that answers it."

Pickens objected, arguing the circuit court erred in failing to include a discussion of foreseeability in the recharge on proximate cause. The circuit court responded the jury "didn't ask for that" and explained that because the jury asked for a definition of proximate cause, it did not complicate the definition by including

foreseeability. The circuit court also stated, "They heard it all the first time. They asked me to [define] proximate cause and when I finished reading the forelady was shaking her head yes, so I figured that is all they want. I asked do you want any more than that."

The jury found against Pickens on both the breach of contract and negligence causes of action. The jury also determined that Winthrop was forty percent comparatively negligent. Pickens moved for judgment notwithstanding the verdict (JNOV), arguing again that the case should not have been submitted to the jury because Winthrop did not present any evidence on the issue of causation. The circuit denied the motion.

The trial continued into the damages phase. Six witnesses testified about the fire and water damages resulting from the fire as well as the payments to contractors completing the repairs.[4] Pickens did not present any evidence as to damages but again moved for a directed verdict, arguing Winthrop failed to prove how its breach of duty made the damages worse. Pickens argued the evidence showed only that Pickens caused the fire to spread, and Winthrop failed to connect Pickens's actions to the damages. The circuit court denied the directed verdict motion, ruling that evidence existed from which the jury could determine that Pickens's actions caused all of the damages. The court based its reasoning on the testimony that the fire would have been contained in the flat roof area but for the improper combustible material storage and the testimony that substantial damages resulted from the firefighters' inability to extinguish the fire after it spread.

The jury returned a damages verdict in the amount of $7,223,343.14. Pickens raised several post-trial motions. Pickens again moved for JNOV, asserting Winthrop failed to provide adequate proof of the cause of the fire during the liability phase. Pickens also renewed its directed verdict motion as to damages, arguing Winthrop failed to prove which damages were caused by the spread of the fire. Additionally, Pickens moved for a new trial absolute based on the circuit court's error in bifurcating the trial, arguing it was inappropriate for the jury to consider proximate cause and damages separately. Pickens also moved for a new trial absolute based on the denial of its motion to strike Juror 25 for cause. In the alternative, Pickens requested that the circuit court enter a judgment governed by the jury's comparative negligence determination, advancing the theory that the

[4] Winthrop also admitted into evidence a binder documenting its specific damages by category.

breach of duty supporting the negligence verdict was the same as that existing in the contract. Thus, it was proper for the court to apportion comparative negligence under both the negligence and breach of contract causes of action.

The circuit court denied the motion for a new trial absolute on the juror issue, explaining that the juror did not have a close connection that required it to strike her for cause and that Pickens failed to show prejudice because it struck the juror with a peremptory strike. The circuit court found the bifurcation proper, denied Pickens's JNOV motions, and determined Winthrop had a right to elect its remedy. Winthrop elected to recover for breach of contract, and the circuit court entered judgment in the amount of $7,223,343.14.

ISSUES ON APPEAL

I. Did the circuit court err in denying Pickens's motion for a new trial based on the court's refusal to strike Juror 25 for cause?

II. Did the circuit court err in denying Pickens's directed verdict motion as to liability because Winthrop failed to present evidence of causation?

III. Did the circuit court err in failing to repeat a jury charge on foreseeability following the jury's request for additional instruction on proximate cause?

IV. Did the circuit court err in bifurcating the liability and damages phases of the trial?

V. Did the circuit court err in denying Pickens's directed verdict motion as to damages because Winthrop failed to present evidence establishing Pickens's conduct worsened the damages resulting from the fire?

VI. Did the circuit court err in failing to adjust the jury's damages verdict according to its comparative negligence finding?

ANALYSIS

I. Juror Strike

Pickens argues the circuit court erred in denying its motion for a new trial based on the court's refusal to strike Juror 25 for cause. Specifically, Pickens asserts the

circuit court should have struck Juror 25 for cause—despite her statement that she could remain impartial—because she was a "student researcher" and a "recent graduate" of Winthrop who knew about the fire and knew people affected by the fire. Pickens argues the failure to strike Juror 25 mandated a new trial because Pickens did not have a panel of impartial jurors and was forced to use a peremptory strike on a biased juror. We disagree.

"A litigant's right to an impartial jury is a fundamental principle of our legal system." *Burke v. AnMed Health*, 393 S.C. 48, 52, 710 S.E.2d 84, 86 (Ct. App. 2011). "[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury." S.C. Code Ann. § 14-7-1050 (Supp. 2015). "To safeguard this right, prospective jurors must be excused for cause when . . . the [circuit] court determines that the juror cannot be fair and impartial." *Burke*, 393 S.C. at 53, 710 S.E.2d at 86. A court should disqualify a juror "[i]f it appears to the court that the juror is not indifferent in the cause." S.C. Code Ann. § 14-7-1020 (Supp. 2015). "The decision [to disqualify a juror] is within the sound discretion of the [circuit court]." *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986).

In *Abofreka*, our supreme court found that a prior business relationship between a juror and a party does not disqualify the juror as a matter of law. *Id.* at 125, 341 S.E.2d at 624. Thus, the circuit court did not abuse its discretion in failing to disqualify challenged jurors who had been patients of Abofreka because the jurors stated they could be fair to both sides. *Id.*

In *Hollins v. Wal-Mart Stores, Inc.*, the circuit court denied Hollins's request to strike for cause a juror whose brother worked at the Wal-Mart where the incident occurred. 381 S.C. 245, 248–49, 672 S.E.2d 805, 806 (Ct. App. 2008). This court held that the circuit court did not abuse its discretion in refusing to strike the juror because Hollins had the opportunity to fully question the juror, who responded that she had no knowledge of the matter, had not discussed it with her brother, and could be fair and impartial. *Id.* at 252, 672 S.E.2d at 808.

We hold that the circuit court did not abuse its discretion in failing to strike Juror 25 for cause. Initially, we find that Pickens's argument that the trial court erred in refusing to strike Juror 25 for cause because she was a "student researcher" is unpreserved because it was not specifically raised to and ruled on by the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the [circuit] court of the point

being urged by the objector."). As to Pickens's preserved objections to Juror 25, we do not find that Juror 25's status as a Winthrop graduate required her removal because she stated the relationship would not interfere with her ability to remain impartial. *See Abofreka*, 288 S.C. at 125, 341 S.E.2d at 624. Although Juror 25 had been on campus when the fire occurred and knew people affected by it, she did not appear to have any special knowledge about the fire, and she affirmed that she could decide the case impartially based upon the evidence presented at trial. Based on her responses to the voir dire questions, we cannot say the circuit court abused its discretion in refusing to strike this juror for cause. *See Burke*, 393 S.C. at 53, 710 S.E.2d at 86 ("[P]rospective jurors must be excused for cause when . . . the [circuit] court determines that the juror cannot be fair and impartial.").

Moreover, as Juror 25 was not empaneled, Pickens did not suffer prejudice from any error in failing to strike the juror. *See Wilson v. Childs*, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) ("There is no reversible error in the impaneling of a jury unless it appears that the objecting party was prejudiced."); *Moore v. Jenkins*, 304 S.C. 544, 547, 405 S.E.2d 833, 835 (1991) ("[W]ith regard to errors in the empaneling of juries, this Court has previously stated in reviewing such errors that, 'irregularities in the empaneling of the jury will not constitute reversible error unless it affirmatively appears that the objecting party was prejudiced thereby.'" (quoting *S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct. App. 1985))).

II. Directed Verdict—Liability

Pickens next argues that the circuit court erred in denying its directed verdict motion during the trial's liability phase because Winthrop failed to present evidence of causation. Specifically, Pickens asserts Winthrop's causes of action fail as a matter of law because it could not prove, even with circumstantial evidence, that Pickens caused the fire to ignite. Pickens claims Winthrop relied on a "spread theory" of liability to support causation because it had no evidence of an ignition source, noting South Carolina has never recognized liability under a "spread theory." Further, Pickens asserts Winthrop failed to prove causation because "its storage of the very materials that would shortly be installed on the roof of Bancroft Hall does not create a foreseeable risk of fire ignition that is any greater than that borne by the building generally." Pickens contends that the absence of foreseeability is fatal to Winthrop's causes of action because foreseeability is crucial in fire cases in which the ignition source is unknown.

"A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)). "On appeal from a circuit court's denial of a motion for a directed verdict or a JNOV, we apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "We will not reverse the circuit court's ruling on a JNOV motion unless there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Id.* (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)).

To recover in breach of contract and negligence actions, a plaintiff must show the defendant's actions caused its damages. *See Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010) (providing that to establish a breach of contract, the plaintiff must prove the contract, its breach, and the damages that "follow as a natural consequence and a proximate result of such breach") (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 146, 638 S.E.2d 650, 662 (2006) ("Negligence is not actionable unless it is a proximate cause of the injury."); *Dropkin v. Beachwalk Villas Condo. Ass'n, Inc.*, 373 S.C. 360, 363, 644 S.E.2d 808, 810 (Ct. App. 2007) (providing a plaintiff must prove a causal connection between the defendant's violation of a statute and its injury to be entitled to damages for negligence per se).

"Proximate cause requires proof of both causation in fact and legal cause." *Madison*, 371 S.C. at 146, 638 S.E.2d at 662. "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability." *Id.* at 147, 638 S.E.2d at 662. "The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause*, 403 S.C. at 150, 742 S.E.2d at 649. "Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." *Id.* (quoting *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972)).

"Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." *McQuillen v. Dobbs*, 262 S.C. 386, 392, 204 S.E.2d

732, 735 (1974) (quoting *Chaney v. Burgess*, 246 S.C. 161, 143 S.E.2d 521 (1965)). In *McQuillen*, after a fire destroyed his personal possessions, a mobile home tenant sued the owner for negligence in failing to properly inspect and maintain a fuel oil furnace. *Id.* at 388, 204 S.E.2d at 735. The owner moved for a directed verdict, arguing the plaintiff provided no evidence that his negligence proximately caused the fire or resulting damages. *Id.* The supreme court affirmed the denial of the directed verdict motion, holding that although no direct evidence showed what caused the fire, the plaintiff provided evidence of facts and circumstances from which a jury could reasonably infer the fire would not have occurred but for the defendant's negligence. *Id.* at 391–93, 204 S.E.2d at 735–36.

In *Thorburn v. Spartanburg Theatres, Inc.*, the plaintiff sued for negligent maintenance of an electrical system, and the defendant argued the circuit court erred in submitting the issue to the jury because there was no direct testimony as to the cause of a fire and the jury's conclusion that it was an electrical fire was speculative and unsupported by the evidence. 263 S.C. 165, 168–69, 208 S.E.2d 919, 920 (1974). Our supreme court was "convinced that the evidence warranted a reasonable inference that the fire was caused by defendant's failure to properly maintain the electrical system, which required submission of the case to the jury, even though the evidence did not exclude all possibility of some other cause of plaintiff's injury." *Id.* at 169, 208 S.E.2d at 920.

We are likewise convinced that the circuit court properly submitted this issue to the jury. To establish proximate cause, Winthrop needed to provide evidence that Pickens's breach of duty—here, the storage of combustible materials on the flat roof—was a cause in fact of the damages and was a legal cause.

Here, there was evidence that the fire would not have occurred but for Pickens's negligence. The parties stipulated that the fire began on the flat roof. Arnold provided expert testimony that the flames on the flat roof would not have reached the height they reached and consequently spread to the pitched roofs but for the presence of combustibles. Arnold also testified that the fire would have self-extinguished on the flat roof without the presence of combustibles. Viewing the evidence in the light most favorable to Winthrop, this constitutes evidence warranting a reasonable inference that the presence of improperly placed combustible materials was a direct cause of the fire damages, as the fire would not have spread to either of the pitched roofs nor caused significant damages but for Pickens's acts.

Moreover, we find there was evidence to submit to the jury that the damages were foreseeable. Like the circuit court, we find unpersuasive Pickens's argument that the damages were unforeseeable because the work crew left the exact materials that would eventually compose the Bancroft Hall roof on the flat roof. The fire code specifically prohibits the storage of combustible materials near a construction site, and one of the stated purposes of the fire code is to prevent the spread of fire. Because a reasonable inference could be drawn that the storage of prohibited combustible materials near a construction project could cause the quick spread of a fire, the question of foreseeability was properly submitted to the jury. *See id.* ("Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." (quoting *Player*, 259 S.C. at 606, 193 S.E.2d at 533)).

Pickens argues that Winthrop's claims failed as a matter of law because Winthrop could not identify the specific ignition source for the roof fire. However, here, as in *Thorburn*, "the circumstances under which the fire originated and its destructive effect precluded direct proof of its cause." 263 S.C. at 168, 208 S.E.2d 920; *see also Scavens v. Macks Stores, Inc*, 577 F.2d 870, 872 (4th Cir. 1978) (stating direct testimony of fire chief, expert testimony, and "circumstantial evidence tending to indicate a gas fire had occurred" provided sufficient factual basis from which jury "could have reasonably concluded that the fire resulted from the ignition of a combustible mixture of air and natural gas. The jury could also have reasonably concluded that any one of the identified potential sources of ignition could have ignited the fire and that, since the store contained no other source of natural gas, a leak in the gas heater line provided the natural gas."). Accordingly, we do not view the question of the specific ignition source fatal to Winthrop's claims; we find Winthrop provided the necessary direct and circumstantial evidence to establish causation of the fire damages and support the submission of this issue to the jury.

III. Jury Charge

Pickens argues the circuit court erred in failing to give the jury a complete charge on proximate cause following the jury's request for a recharge. Pickens complains the circuit court prejudiced it by omitting the "touchstone" of the definition of proximate cause—foreseeability. Pickens asserts that the charge was particularly important because the cause of the fire was the primary issue in the case, and the circuit court's failure to give a complete instruction on both elements of proximate cause misguided the jury, led to potential juror confusion, and prejudiced Pickens. We disagree.

"In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court's decision absent an abuse of discretion." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 414, 717 S.E.2d 765, 770 (Ct. App. 2011). "In order to warrant reversal for refusal of the [circuit court] to give requested jury instructions, such refusal must have been both erroneous and prejudicial." *Horry Cty. v. Laychur*, 315 S.C. 364, 368, 434 S.E.2d 259, 262 (1993). "When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* "Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial." *Id.*

Here, the circuit court's original charge contained a lengthy explanation of proximate cause, which included an explanation of foreseeability. When the jury requested additional instruction on the definition of proximate cause, the circuit court gave a more succinct definition, defining proximate cause as "something that produces a natural chain of events which in the end brings about the injury" and "a direct cause without which the damage would not have occurred." This is an accurate statement of the law. *See McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998) ("Proximate cause is the efficient or direct cause of an injury."). The portion charged was responsive to the jury's recharge request. *See Rauch*, 284 S.C. at 597, 327 S.E.2d at 378 ("When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request."). Accordingly, we find no error in the circuit court's recharge.

IV. Bifurcation

Pickens contends the circuit court erred in bifurcating the trial because causation and damages were inextricably intertwined. Pickens asserts considerations of judicial economy and convenience should not have outweighed its right to a fair trial in which the jury could have considered causation and damages together.

"This court must review a trial judge's decision to bifurcate the issues of liability and damages under an 'abuse of discretion' standard." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Rule 42(b), SCRCP, provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

Rule 42(b), SCRCP. "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." *Creighton*, 334 S.C. at 108, 512 S.E.2d at 516. "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." *Id.*

We find the circuit court properly exercised its discretion in bifurcating the trial. Because most of the damages witnesses would not be called during the liability phase, the circuit court reasoned it would save time and resources by trying the liability phase separately. We find the bases for the circuit court's ruling—convenience and judicial economy—are legitimate reasons for bifurcation. *See* Rule 42(b), SCRCP.

Moreover, we do not find bifurcation resulted in injustice to Pickens because the liability and damages evidence did not overlap. Indeed, the evidence presented during the damages phase was limited to topics such as the documentation of Winthrop's damages; cleanup, reconstruction, and electronics restoration; and the invoices from and payments to those performing such work after the fire. Thus, bifurcation was appropriate.

V. Directed Verdict—Damages

Pickens argues the circuit court erred in denying its directed verdict motion in the damages phase because Winthrop failed to provide evidence for the jury to determine with reasonable certainty the damages caused by Pickens. Specifically, Pickens asserts that the jury did not have any evidence of the cost of repairs for Winthrop absent Pickens's breach of duty and erroneously held Pickens liable for all of Winthrop's losses in the fire even though under Winthrop's theory, Pickens's actions merely aggravated the fire damages. We disagree.

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation." *Pope*, 395 S.C. at 434, 717 S.E.2d at 781. "Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant." *Mellen v. Lane*, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008). "An owner can recover for property destroyed or damaged by fire such damages as will restore him to the same property status that he occupied before his property was burned." *Nelson v. Coleman Co.*, 249 S.C. 652, 659, 155 S.E.2d 917, 921 (1967).

Viewing the evidence in the light most favorable to Winthrop, we find the circuit court did not err in submitting the damages issue to the jury. *See Pope*, 395 S.C. at 434, 717 S.E.2d at 781. Pickens does not challenge the evidence of the amount of damages Winthrop suffered from the fire. Rather, Pickens complains about a lack of evidence of causation of the damages, asserting Winthrop's evidence did not enable the jury to determine with reasonable certainty the amount of damages attributable to Pickens's actions. Although Pickens suggests it could have caused only a portion of the damages due to its role in the spread or exacerbation of the fire, Winthrop's expert testified that the fire would not have spread and would have completely extinguished, except on the flat roof area, but for the presence of the improperly placed combustibles. This testimony alone provides sufficient evidence to support the circuit court's submission of the damages question to the jury. Winthrop produced the testimony of six witnesses as well as a binder of invoices encompassing the repair and reconstruction costs, from which the jury was able to determine damages with reasonable certainty. Accordingly, we find the circuit court properly denied Pickens's directed verdict motion as to damages.

VI. Comparative Negligence and Breach of Contract

Finally, Pickens argues the circuit court erred in failing to adjust the jury's damages verdict for breach of contract in accordance with its comparative negligence determination. Pickens asserts the breach of contract claim is coextensive with the negligence claim because the contract merely acknowledged certain duties imposed by statute rather than imposing new obligations on Pickens. Pickens contends it would violate public policy for "a contracting party to essentially incorporate by reference the duties to which the opposing party is otherwise bound

by law into a contract and thereby escape an apportionment of liability for his own contributions to a particular loss." We disagree.

"Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts." *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990). "It is a fundamental rule of law in this state that there can be no double recovery for a single wrong." *Id.* "Plaintiffs may only recover once for their actual damages." *Id.* "If multiple causes of action are raised on the same set of facts, the plaintiff may be required to elect his remedy to prevent a double recovery for a single wrong." *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 429, 450 S.E.2d 112, 115 (Ct. App. 1994).

In *Ritter & Associates, Inc. v. Buchanan Volkswagen, Inc.*, Ritter sued BVW for breach of contract, negligence, and negligent supervision for damages it caused in a check kiting scheme. 405 S.C. 643, 648, 748 S.E.2d 801, 804 (Ct. App. 2013). The special referee found in favor of Ritter on its breach of contract claim and awarded $434,000 in damages, but granted judgment in favor of BVW on the negligence causes of action because the "allegations of negligence and negligent supervision were merely examples of the nonperformance of the contractual obligations between the parties." *Id.* On appeal, BVW argued the special referee erred in failing to apportion liability to Ritter based on its own negligent business practices, asserting "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." *Id.* at 651, 748 S.E.2d at 805. However, this court held the apportionment theory inapplicable because comparative negligence applies only to a plaintiff in a negligence action, and Ritter recovered under a breach of contract theory. *Id.*

Pickens argues comparative negligence should govern the damages award "because there [was] truly no legal distinction in the breach of the duty that [was] occasioned in the breach of contract cause of action and the negligence cause of action in this particular case." Pickens asserts *Ritter* is distinguishable because only contract liability existed in that case; thus, it did not involve an election of damages, whereas the jury here found Pickens liable in contract and tort. We agree that the situation is distinguishable; however, we nonetheless find Winthrop could properly elect to recover the non-apportioned damages awarded for breach of contract. *See Ritter*, 405 S.C. at 651, 748 S.E.2d at 805 ("[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging

negligence as a cause of action."). South Carolina's precedent that comparative negligence is inapplicable to a breach of contract theory governs this situation. Although Pickens argues this case presents a unique factual situation requiring an exception to the rule, it cites no persuasive authority to support its public policy argument. Accordingly, we affirm the ruling of the circuit court.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis, Appellants.

Appellate Case No. 2014-001524

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

Opinion No. 5434
Heard April 5, 2016 – Filed August 3, 2016

REVERSED AND REMANDED

Ian S. Ford and Neil Davis Thomson, both of Ford Wallace Thomson LLC, of Charleston, for Appellants.

M. Dawes Cooke, Jr., John William Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Stephen P. Hughes and James Andrew Yoho, both of Howell Gibson & Hughes, PA, of Beaufort, for Respondent.

LOCKEMY, C.J.: Ronnie D. Dennis and Jeanette Dennis (Appellants) appeal the circuit court's grant of the Callawassie Island Members Club, Inc.'s motion for summary judgment. We reverse and remand to the circuit court.

FACTS/PROCEDURAL BACKGROUND

In 1999, Appellants purchased property on Callawassie Island, a private island located between Beaufort and Hilton Head Island. They also purchased a membership in the Callawassie Island Club (CIC). The provisions governing membership in CIC were memorialized in the Plan for Offering of Memberships in the Callawassie Island Club (CIC Plan). In 2001, CIC members purchased the club's assets and took over operation of the club under a new name, the Callawassie Island Members Club (CIMC). In conjunction with the purchase, CIMC issued an amended plan for offering of membership (CIMC Plan) and established its own general club rules (GCR) and bylaws.

In November 2010, Appellants stopped paying dues to CIMC, asserting their tender of a letter of resignation to CIMC relieved them of any further obligation to CIMC. Thereafter, in August 2011, CIMC filed a breach of contract action against Appellants for the collection of unpaid dues, fees, assessments, and other charges. CIMC asserted the CIMC Plan, like the CIC Plan before it, required resigned members remain in good standing with CIMC until their memberships were reissued by CIMC. CIMC maintained Appellants were CIMC members and were bound by the CIMC Plan. According to CIMC, Appellants paid a $4,000 assessment required of members at the time of the transfer of assets from CIC to CIMC, were issued a membership certificate to CIMC, and continued to enjoy membership privileges for a number of years.

Appellants answered the complaint, alleging they were informed by CIMC management that club members who joined prior to 2001 would not be required to maintain a membership but could resign their membership at the member's discretion. Appellants further asserted the GCRs provide that members not paying dues will be suspended for four months, and members whose accounts are not settled within those four months shall be expelled from CIMC. Appellants asserted the GCRs provide that dues and fees do not accumulate as a result of an expulsion. Appellants also claimed CIMC did not maintain a fair and reasonable process for the termination of memberships, failed to allow members to approve fundamental changes to members' rights, failed to act in good faith, and made material misrepresentations to Appellants. Additionally, Appellants asserted counterclaims for breach of fiduciary duty and negligent misrepresentation.

On September 30, 2013, CIMC filed a motion for summary judgment. CIMC argued its contracts with Appellants (including the CIMC Plan, the GCRs, and the bylaws) were unambiguous in their collective requirement that a member must

remain in good standing with CIMC until his membership is reissued. CIMC further argued the South Carolina Nonprofit Corporation Act[1] (the Act) provides that a member is not relieved from any obligations which were incurred, or commitments which were made, while he was still a member.

Following a hearing in November 2013, the circuit court granted CIMC's motion for summary judgment on January 15, 2014. The court found CIMC's governing documents were unambiguous and clearly required a resigned member to pay dues until his membership is reissued. The court further found there was no evidence of fraud or bad faith on the part of the CIMC Board of Directors (CIMC Board), and the Act clearly provides that a member cannot void a contractual undertaking simply by leaving a club. The court also found CIMC was entitled to summary judgment on Appellants' breach of fiduciary duty and negligent misrepresentation claims. The court awarded CIMC $51,131.76 in unpaid dues and attorney's fees.

Thereafter, Appellants filed a motion for reconsideration, objecting to the form of the summary judgment order and the legal standard employed by the court in reaching its determination. They alleged there were questions of fact for the jury to decide, including what documents apply and bind the parties; what documents constitute a contract between the parties; the amount of damages owed; whether CIMC is bound by statements of its agents that Appellants would accumulate no more than four months of dues and fees before being expelled; whether it violates state law for Appellants to be treated differently than other similarly situated members; and whether it violates state law to not allow Appellants to resign.

Following a hearing in May 2014, the circuit court issued an amended order, once again granting CIMC summary judgment and denying Appellants' motion to reconsider. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to

[1] S.C. Code Ann. §§ 33-31-101 to -1708 (Supp. 2015).

the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Issues of Fact

Appellants argue the circuit court erred in failing to apply the "mere scintilla" standard and disregarding evidence of genuine issues of material fact.

A. Contractual Relationship

First, Appellants contend a genuine issue of fact exists as to whether they have a contractual relationship with CIMC. Appellants argue there is no evidence their CIC membership was transferred to CIMC. They maintain they signed a purchase agreement with CIC in 1999 and never entered into any membership agreement with CIMC. Conversely, CIMC argues Appellants' CIMC membership is evidenced by their payment of a $4,000 assessment associated with the transfer of CIC to CIMC and the issuance of a membership certificate to Appellants.[2] CIMC also argues Appellants' CIMC membership is evidenced by their admission of their continued use of CIMC amenities and their admission that they had a duty to pay dues to CIMC until their membership was resigned, transferred back to CIMC, or as otherwise terminated as allowed by the governing documents.

We hold a question of fact does not exist as to whether Appellants were members of CIMC. The evidence in the record supports the circuit court's finding that Appellants' membership in CIC transferred to CIMC upon the sale of the club. We note the 1994 CIC Plan expressly contemplated the transfer of CIC assets to the membership, which occurred in 2001 when CIMC assumed control. Appellants also admitted in their answer that they received benefits from their membership until their resignation.

[2] Appellants do not address this assertion in their brief, and we were unable to find any evidence of this claim in the record.

B. Governing Documents

Appellants assert there are genuine disputes as to (1) which governing documents are controlling, and (2) the interpretation and application of the governing documents as they relate to Appellants' obligations to pay dues.

Appellants argue the circuit court referenced several CIMC documents (including the 2007, 2008, and 2009 amended GCRs, as well as the 2001, 2007, 2008, and 2012 amended CIMC Plans and the 2001 Bylaws) but failed to identify which documents were controlling. Appellants contend that in granting summary judgment, the circuit court relied upon language from various amended documents but applied its analysis with no uniformity or consistency. They further assert that although the court found the governing documents were unambiguous, it failed to specify which documents were unambiguous.

CIMC maintains the following documents were provided to the circuit court at the November 2013 hearing: the 1994 CIC Plan; the 2001, 2007, and 2008 CIMC Plans; and the 1994 GCRs and bylaws. CIMC further contends it provided all of the amended versions of these documents to the court at the May 2014 hearing.

We find the circuit court erred in granting summary judgment because there is some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation. *See Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the Court; but where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

Specifically, the 1994 GCRs provide:

> Any member may terminate membership in the Club by delivering to the Club's Secretary written notice of termination in accordance with the By-laws. Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums).

However, unlike the 1994 GCRs, the 1994 CIC Plan and Bylaws provide resigned members are obligated to continue to pay dues *until their memberships are*

reissued. Further ambiguity is found is in the 2009 GCRs, which provide that members who have terminated their club memberships remain liable for *unpaid* dues until their membership is sold. The term "unpaid" is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation.

Thus, we find the evidence relating to the issue of whether Appellants were obligated to pay dues post-resignation, viewed in the light most favorable to Appellants, leaves a genuine issue of material fact for trial and, thus, precludes judgment for Callawassie as a matter of law.

Appellants further argue the circuit court failed to address language in the governing documents which provides that the liability for unpaid dues ends after four months of delinquency by the mandatory process of expulsion. Appellants contend they had the right to be expelled from CIMC once their dues were delinquent for the four month period. The 2001 GCRs provide:

> **13.3.1.** Any member whose account is delinquent for sixty (60) days from the statement date may be suspended by the Board of Directors. . . . Any member whose account is not settled within the four (4) months' period following suspension shall be expelled from the Club.

Appellants presented evidence that prior to joining CIC they were assured by CIC employee Ellen Padgett[3] that they would never be obligated to pay for more than four months of past dues. Ronnie Dennis testified Padgett informed him his "maximum liability was for four months," and Jeanette Dennis testified Padgett told her if Appellants wanted to leave the club they would only be responsible for four months of dues. Padgett testified in her deposition that she understood section 13.3.1 to mean that after four months of delinquency, a member would lose his or her membership.

We acknowledge that section 13.3.1 provides club members *may* be suspended; however, in light of the subsequent mandatory expulsion language and the

[3] Padgett remained on staff with CIC after it became CIMC. She is referred to as the membership administrator, membership secretary, and membership coordinator throughout the record.

conflicting evidence presented as to the club's actual suspension and expulsion practices, we agree with Appellants that the language of the GCRs presented an ambiguity as to whether Appellants were entitled to expulsion and thus exposed to a maximum liability of four months' of unpaid dues (plus any accrued expenses). Where there is some ambiguity in the governing documents as to whether expelled members are still liable for dues accruing after expulsion, summary judgment is inappropriate. *See Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the Court; but where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

II. The Nonprofit Corporations Act

Appellants argue the circuit court erred in failing to properly apply the Act. Specifically, Appellants contend the circuit court erred in finding that assigning liability for continuing obligations post resignation is not statutorily prohibited under section 33-31-620 of the South Carolina Code (2006).

Section 33-31-620 provides "(a) [a] member may resign at any time. (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation."

Section 33-31-620 obligates resigned members to pay any dues incurred *before* resignation. This section does not require resigned members to continue to pay any dues that accrue *after* resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations. In essence, Appellants would be trapped like the proverbial guests in the Eagles' hit *Hotel California*, who are told "you can check-out anytime you like, but you can never leave."[4]

Appellants state in their brief it is undisputed that CIMC membership is no longer available to non-Callawassie property holders. With only 85 lots remaining for development and every fourth purchase coming off the resale list, it is possible only 21 names will ever come off the list. Appellants are 72nd on the resale list. Therefore, it appears unlikely Appellants will ever be able to sell their

[4] Eagles, *Hotel California*, *on* Hotel California (Asylum 1977).

membership. We find section 33-31-620 protects club members from such continuing liability after resignation.

CONCLUSION

We **REVERSE** the circuit court's order granting summary judgment and **REMAND** this case for trial.[5]

WILLIAMS and MCDONALD, JJ., concur.

[5] Based upon our reversal of the grant of summary judgment, the court need not address Appellants' remaining issues on appeal. *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 prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joshua William Porch, Appellant.

Appellate Case No. 2013-002531

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5435
Heard May 3, 2016 – Filed August 3, 2016

AFFIRMED

Michael J. Anzelmo and Matthew A. Abee, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

HUFF, J.: Joshua William Porch appeals his conviction for murder, arguing the trial court erred in failing to void the State's arrest warrant pursuant to *Franks v.*

Delaware.[1] Porch also argues the trial court erred by limiting Porch's testimony in violation of the Confrontation Clause. We affirm.

FACTUAL/PROCEDURAL HISTORY

In the early morning hours of May 13, 2006, Justin Mallory (Mallory) found his wife, Nikea Mallory (Victim), dead in the family's apartment in Richland County. Victim suffered blunt force trauma to the head, a bruise on her neck, a stab wound on the right side of her neck, and a stab wound on her right eyebrow. The stab wound to Victim's neck was the fatal injury. Hours after discovering Victim's body, Mallory was charged with Victim's murder.

During the murder investigation, Mallory told officers they should talk to Joshua Porch, who lived near Mallory. Investigator Randy Strange interviewed Porch and his wife. Porch told Investigator Strange he was not in the Victim's apartment the night of the murder.

Police interviewed Porch again on June 27, 2007, after they discovered unidentified male DNA at the crime scene. Porch agreed to provide officers with a DNA sample and told them that he was in the Victim's apartment the day before the murder. Porch stated he cut himself while he was peeling or cutting an apple for his child and he attempted to clean up the blood with paper towels in the kitchen. Porch then signed a written statement of his version of events. In that statement, Porch also indicated he told this version of events to the investigators that interviewed him after the murder.

Following the second interview, Major James Smith contacted Investigator Strange to confirm Porch's story. Investigator Strange told Major Smith he could not recall Porch telling him he cut himself in the Victim's apartment the day before the murder. Major Smith returned to Porch's home that same day and asked Porch about his story. Porch told Major Smith he could not recall whether he told Investigator Strange about the cut. Porch stated he was scared to tell the police about the cut because he did not want to be considered a suspect.

---

[1] 438 U.S. 154 (1978) (allowing defendants to challenge a probable cause determination after the issuance of a search warrant in limited circumstances).

On July 2, 2007, Captain James White and Major Smith interviewed Porch again. Porch told the officers he was present at Victim's apartment during the early morning hours of May 13, 2006. Porch stated he and Victim were drinking together that night and started kissing and fondling one another. According to Porch, Mallory arrived at the apartment and became angry. Mallory and Victim started arguing in front of Porch but later went to the kitchen to continue arguing. Porch stated he saw Victim push Mallory and Mallory "swung at her" with an unidentified item in his hand. Porch told the officers he stepped in between Mallory and the Victim to stop them from fighting and Mallory cut him. Porch then went to the kitchen to wrap his hand with paper towels and clean up the blood. According to Porch, Victim was "slouched" on the couch when he left, but he did not think she was badly injured. Porch explained he made inconsistent statements to police because he "was afraid [he] would be charged as an accomplice, or accused of actually doing it. [He] was also afraid [his] wife would find out about [him] and [Victim] getting involved that morning." During the interview, Captain White noticed Porch was left handed.

Mallory was tried twice for Victim's murder. Porch testified consistent with his July 2, 2007 statement in each of those proceedings. The first trial ended in a hung jury. Mallory then elected to proceed to a bench trial and was acquitted. Following his acquittal, Mallory contacted the Richland County Sheriff's Department (RCSD) and requested they reopen the investigation into his wife's murder. Deputy Chief David Wilson was assigned to investigate the case. Chief Wilson reviewed the investigation file and noticed several inconsistencies. Chief Wilson was bothered by Porch's shifting statements to police. Chief Wilson noted the stab wounds were to the Victim's right side, which led him to suspect the assailant was left-handed. Chief Wilson learned Porch was left-handed. Finally, Chief Wilson reviewed DNA evidence from the crime scene, which revealed further inconsistencies relating to Porch's version of events. Specifically, investigators found Porch's blood not only in the kitchen, but also on Victim's shirt.

Chief Wilson interviewed several other witnesses and secured a warrant for Porch's arrest. Officers learned Porch had moved from South Carolina back to his home town in California. On July 8, 2009, RCSD officers arrested Porch in a store in California and transported him to the Long Beach Police Department for questioning. Investigators Shawn McDaniel and Brian Godfrey notified Porch of his Miranda rights around 1:00 a.m. on July 9, 2009. That morning, Porch admitted he stabbed Victim but claimed it was an accident.

Investigators McDaniel and Godfrey reviewed the case file to determine if the evidence supported Porch's accident claim. The investigators then interviewed Porch again on July 10, 2009. At that time, Porch told the investigators he initiated intimate contact with Victim and she attacked him with the knife. Porch told officers he hit Victim in the head with his palms and once on the right side of her head with his left elbow.

Investigators McDaniel and Godfrey then took Porch to the Los Angeles County Sheriff's Department for a third interview, which was recorded. Initially, Investigator Cohen from the Los Angeles County Sheriff's Office interviewed Porch for six and a half hours. Investigators McDaniel and Godfrey then interviewed Porch. Subsequently, investigators brought Porch back to South Carolina for trial.

Prior to trial, Porch challenged the sufficiency of the evidence to support probable cause for his arrest warrant. Porch argued Chief Wilson intentionally or recklessly omitted information from his arrest warrant affidavit and any evidence gathered as a result of his arrest should be suppressed. The trial court granted Porch a pretrial hearing to determine if the arrest warrant was valid but declined to suppress the evidence gathered as a result of Porch's arrest.

Porch also made a motion in limine to exclude the entire recorded interrogation from California because Investigator Cohen was unavailable to testify. Porch argued he would not be able to cross-examine her because the California state court declined to enforce the South Carolina subpoena sent by the State. The trial court found Porch had an opportunity to cross-examine Investigator Cohen regarding the video at a pretrial *Jackson v. Denno*[2] hearing. The trial court believed that opportunity to cross-examine was all that is necessary under *Crawford v. Washington*[3] but took the matter under advisement. The next morning, prior to trial, the court ruled the portion of the interview conducted by Investigator Cohen was inadmissible but the portion of the interview conducted by Investigators McDaniel and Godfrey was admissible.

---

[2] 378 U.S. 368 (1964).
[3] 541 U.S. 36 (2004).

During the trial, Porch testified on his own behalf. Prior to his testimony, Porch inquired whether he would be allowed to discuss what he was told in the six-and-a-half-hour interview the court determined was not admissible because of Investigator Cohen's absence. The State argued, "[I]f Mr. Porch testifies about specific occurrences within that six and a half hour interview with Investigator Cohen, . . . it opens the door for the possibility of us playing portions of that video as well." The trial court indicated it was troubled by Investigator Cohen's absence but agreed that Porch's testifying about Investigator Cohen's interview could potentially open the door for the video of the interview to be admitted into evidence. Porch decided not to testify about any statements from the recorded interview in order to ensure the State would not have an opportunity to rebut his testimony with the video.

The jury found Porch guilty of Victim's murder. The trial court sentenced Porch to fifty years' imprisonment. This appeal followed.

LAW/ANALYSIS

I. *Franks v. Delaware*

Porch argues the RCSD omitted critical exculpatory information from the arrest warrant. Porch asserts in light of the omitted information, no probable cause existed to support his arrest warrant. Therefore, Porch requests this court void the arrest warrant and suppress any evidence resulting from Porch's arrest.

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). Entitlement to a *Franks* hearing is a matter of law subject to de novo review. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008). The *Franks* test applies in cases when officers include false information in a warrant affidavit and cases when officers omit potentially exculpatory information. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. While we commend the trial court in this case for holding a *Franks* hearing out of an abundance of caution, we find Porch failed to overcome his heavy burden to establish he was entitled to such a hearing. Furthermore, we take this opportunity to clarify the proper standard trial courts should apply in

cases in which the defendant challenges the *omission* of evidence from the arrest affidavit.

"To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *Id.* "There will be no *Franks* violation if the affidavit, *including the omitted data*, still contains sufficient information to establish probable cause." *Id.* (emphasis added).

The defendant has the burden of proving the officer acted with the requisite intent. *State v. Gore*, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014). "A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof." *State v. Lynch*, 412 S.C. 156, 179, 771 S.E.2d 346, 358 (Ct. App. 2015). "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that *its inclusion* in the affidavit would defeat probable cause." *Id.* at 180, 771 S.E.2d at 358-59 (emphasis added) (quoting *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003)). "Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence." *Id.* at 180, 771 S.E.2d at 359 (quoting *Shorter*, 328 F.3d at 170). "If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)).

"The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *Colkley*, 899 F.2d at 301 (quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987)). "'[M]ere[] neligen[ce] in . . . recording the facts relevant to a probable cause determination' is not enough." *Id.* (alterations in original) (quoting *Franks*, 438 U.S. at 170). An omission does not per se invalidate the arrest warrant. *Gore*, 408 S.C. at 245, 758 S.E.2d at 721. The Fourth Circuit has expressed "doubts about the validity of inferring bad motive under *Franks* from the fact of omission alone, for such an inference collapses into a single inquiry the two elements–'intentionality' and 'materiality'–which *Franks* states are independently necessary." *Colkley*, 899 F.2d at 301.

"Probable cause is a 'commonsense, nontechnical conception [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

Porch asserted *Franks* requires the trial court excise any offending information from an arrest warrant affidavit, then analyze the affidavit to determine if probable cause still exists to support the warrant. However, Porch conflates the test for the inclusion of false information in a warrant affidavit with the test for omission of potentially exculpatory information. If a defendant carries his heavy burden of demonstrating information was intentionally or recklessly omitted from the affidavit, the trial court must then include the potentially exculpatory information and determine if probable cause exists.

We find Porch failed to overcome his burden to show Chief Wilson intentionally or recklessly omitted potentially exculpatory information from his warrant affidavit. In the affidavit, Chief Wilson stated:

> That on 05/14/2006 while at 1103 Pinelane Rd. Apt. 331C in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he did with malice and aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder.

Chief Wilson stated he faxed the warrant to Judge Phil Newsom and personally appeared before the magistrate to discuss the case. Neither Chief Wilson nor Judge Newsom remembered the specific details they discussed prior to Judge Newsom signing the warrant. Judge Newsom agreed with Chief Wilson probable cause existed to believe Porch committed the murder and authorized the arrest warrant.

Judge Newsom also testified he never signs a warrant before the officer requesting the warrant physically appears before him. Judge Newsom was "sure" Chief Wilson told him some background on this case, but he could not recall anything in particular and he stated warrant proceedings are not recorded. Finally, Judge Newsom stated he did not remember Chief Wilson telling him Porch admitted being at the crime scene because Porch witnessed the Victim's husband stab her.

During the pretrial hearing, Chief Wilson testified he did not include some information in the affidavit. Specifically, Wilson admitted he did not include (1) information from an eye witness from the first two trials who testified she heard a "domestic argument" coming from the apartment and saw a black male running toward a white van; (2) information from a security guard at the hospital Mallory took Victim to who testified he heard Mallory say, "Bitch bled all over my van, my walls, my Playstation" and saw Mallory remove something from his van while it was at the hospital; (3) Mallory had "plenty of time" to commit this murder; (4) Porch's statements regarding how his blood came to be at the scene of the crime; (5) information that Mallory had been tried twice for this crime and Porch testified for the State in both instances; and (6) information that the situation during the argument was "fluid" and the blood could have gotten on Victim's shirt during her fight with Mallory. However, Chief Wilson testified none of the information he included in the affidavit was false, and he believed the totality of the circumstances established probable cause to arrest Porch for Victim's murder.

Chief Wilson admitted he omitted some information from the warrant affidavit, but we find the content of the omissions alone is insufficient evidence to demonstrate Chief Wilson acted intentionally or with reckless disregard of whether the omissions would make the affidavit misleading. There is no evidence Chief Wilson intentionally omitted the statements regarding Mallory's involvement in his wife's death. Furthermore, including the statements from all four versions of Porch's story was unnecessary because those statements were not credible. Accordingly, we find Porch failed to make a sufficient showing to entitle him to a *Franks* hearing.

While we find Porch failed to demonstrate Chief Wilson intentionally or recklessly omitted potentially exculpatory information, we also find, even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch. Porch admitted he

was present at the murder scene and his blood was found in the same area where Victim's body was found.

Although Porch testified for the State in Mallory's murder trial, his story continued to change throughout the investigation. If all of this information were included in the affidavit presented to the magistrate, we find probable cause would have supported an arrest warrant for Porch. Accordingly, we affirm the trial court's decision not to suppress the evidence discovered as a result of Porch's arrest.

II. Confrontation Clause

Porch argues the trial court erred by "threatening Porch with the introduction of a videotape displaying [Porch's] interrogation" in violation of the Confrontation Clause. Porch also asserts the trial court's decision to allow the State to rebut his testimony using the video limited his ability to present a full and complete defense.[4]

"As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006). "[A] proffer of testimony is required to preserve the issue of whether the testimony was properly excluded by the trial [court], and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." *Id.* at 163, 634 S.E.2d at 29.

We find this issue is not preserved for this court's review. The trial court indicated the State may have been able to rebut Porch's testimony by introducing the video if Porch opened the door by testifying about the California interrogation. However, Porch failed to proffer what his testimony would have been if he were allowed to testify about the interrogation without opening the door. Therefore, we decline to address Porch's Confrontation Clause argument.

---

[4] Porch also argues the trial court erred in finding he had an opportunity to cross-examine Investigator Cohen during the *Jackson v. Denno* hearing. However, Porch admits the State only submitted that portion of the interview conducted by Investigators McDaniels and Godfrey. Because the State did not seek to admit any portion of the interview conducted by Investigator Cohen, we find this argument is without merit.

CONCLUSION

Based on the foregoing, Porch's conviction is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League, Respondents,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Appellant.

Appellate Case No. 2014-002118

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5436
Heard February 11, 2016 – Filed August 3, 2016

REVERSED

Newman Jackson Smith, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellant.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP, of Charleston; and James B. Holman, IV and Christopher K. DeScherer, both of Southern Environmental Law Center, of Charleston; all for Respondents.

LOCKEMY, C.J.: The Town of Awendaw (the Town) appeals the circuit court's final order, arguing the court erred in finding (1) Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League had standing; (2) the Town never

received a proper petition requesting the 2004 annexation; (3) the Town falsely claimed it had a proper petition to annex the United States Forest Service (the Forest Service) property; (4) the Town was estopped from asserting a statute of limitations defense; and (5) the statutory time period for challenging the 2004 annexation was tolled. We reverse.

FACTS/PROCEDURAL BACKGROUND

Beginning in 2004, the Town made a series of three land annexations, starting with the annexation of a strip of the Francis Marion National Forest (the National Forest) and culminating in October 2009 with the annexation of a 359.51-acre tract (the Nebo Tract). The Nebo Tract is encircled by the National Forest and is owned by EBC, LLC.

The Town attempted to create the required contiguity between its own border and the Nebo Tract by annexing the ten-foot wide and 1.25 mile long strip of the National Forest (the Ten-Foot Strip). The Ten-Foot Strip is contiguous with the Nebo Church Tract[1], which connects the Nebo Tract to the Ten-Foot Strip.

The Town annexed the three tracts (Nebo Tract, Nebo Church Tract, and Ten-Foot Strip) purportedly using the 100% petition method outlined in section 5-3-150(3) of the South Carolina Code (2004).[2] In early 2004, the Town requested the Forest Service enable the Town to annex the Ten-Foot Strip in order for the Town to also annex the Nebo Church Tract. Despite the Town's admission that the Forest Service did not provide them anything in writing expressing their desire that the Ten-Foot Strip be annexed, the Town used a 1994 letter it received from a Forest Service representative stating the agency had "no objection" to the annexation of several strips of property described therein. According to land surveyor Robert Frank, none of the strips described in the 1994 letter were the Ten-Foot Strip at issue in this case.

---

[1] The Nebo Church Tract is owned by Mount Nebo AME Church.

[2] Pursuant to section 5-3-150(3), "any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation."

On May 10, 2004, the Town passed an ordinance stating a "proper petition h[ad] been filed" for annexation of the Ten-Foot Strip and accepting the petition. The Town also passed an ordinance that same day annexing the Nebo Church Tract.

In 2009, EBC requested the Town annex the Nebo Tract under the 100% petition method. On October 1, 2009, the Town passed an ordinance accepting the petition and annexing the Nebo Tract. The Town also enacted ordinances (1) rezoning the Nebo Tract as "planned development," (2) declaring its Comprehensive Plan amended to allow the Nebo Tract as planned development, and (3) approving a development agreement with EBC.

On April 23, 2010, Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League (collectively, Respondents)[3] filed a second amended complaint against the Town and EBC. Respondents alleged that by unlawfully annexing the Nebo Tract and allowing for intensive residential and commercial development of the property, the Town has harmed and "will continue to harm one of the most important ecological areas on the Atlantic coast, including the [National Forest], a sensitive resource of national significance that is owned and managed for the benefit of the public." Respondents asserted the Town's 2004 annexation of the Ten-Foot Strip was void because the Town never received a petition requesting annexation from the Forest Service, and therefore, the subsequent annexations of the Nebo Tract and the Nebo Church Tract failed because those tracts lacked contiguity with the Town. Respondents requested the court declare the Nebo Tract annexation ordinance void and issue a declaratory judgment "adjudicating the invalidity of the annexation and all accompanying ordinances regarding the Nebo Tract, including the ordinance approving the Development Agreement, the amendment of the Comprehensive Plan, and the purported rezoning, and a permanent injunction enjoining acts in furtherance of any of the illegally enacted ordinances and requiring that the Nebo Tract be returned to the *status quo* prior to the illegal annexation and rezoning . . . ."

On December 22, 2010, the Town and EBC filed a motion for partial summary judgment arguing Respondents lacked standing and their challenge was barred by the statute of limitations. The circuit court subsequently denied the motion. On September 6, 2012, Respondents and EBC entered into a settlement agreement wherein EBC dismissed its counterclaims against Respondents and Respondents dismissed their claims against EBC.

---

[3] Vicary and Prause are residents of the Town. The League has members who are residents of the Town.

The case proceeded to trial on April 16, 2014. Following trial, the circuit court issued an order declaring (1) Respondents had standing; (2) the action was timely filed; and (3) the Town's annexation of the Ten-Foot Strip was void because the Town never received a petition of annexation from the Forest Service. The court declared "[b]ecause the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the Town's subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town." The court further held

> because the Nebo Tract did not occur as a matter of law, it follows that the other ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract are each *ultra vires* and *void ab initio*.

Thereafter, the Town filed a Rule 59(e), SCRCP, motion to reconsider. The circuit court denied the Town's motion on September 22, 2014. The Town appealed.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.*

The present case is an action in equity. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 544, 590 S.E.2d 338, 345-46 (Ct. App. 2003) (finding a declaratory judgment action brought by a taxpayer citizen requesting declaratory relief is an action in equity). In an appeal from an action in equity tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976). "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

LAW/ANALYSIS

The Town argues the circuit court erred in finding Respondents had standing to challenge the 2004 annexation ordinance. We agree.

"To have standing, one must have a personal stake in the subject matter of the lawsuit." *Sloan v. Greenville Cty.*, 356 S.C. at 547, 590 S.E.2d at 347 (quoting *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001)). "Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

The circuit court determined Respondents had standing under the public importance exception and as taxpayers challenging government action under the South Carolina Uniform Declaratory Judgment Act[4]. On appeal, the Town argues Respondents did not have statutory standing. Citing to *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Ex parte State ex rel. Wilson v Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011), the Town asserts the only non-statutory party which may challenge a municipal annexation is the State of South Carolina acting in the public interest to challenge an absolutely void annexation ordinance. The Town further contends Respondents lacked constitutional standing and the public importance exception is not applicable.

On appeal, Respondents argue they had standing under the public importance exception and as taxpayers challenging government action under the Declaratory Judgment Act. *See* S.C. Code Ann. § 15-53-30 (2005) ("Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."); *see also Sloan v. Greenville Cty.*, 356 S.C. at 551, 590 S.E.2d at 349 (holding taxpaying citizen of Greenville County had a direct interest in the County abiding by procurement procedures set out in the County code); *Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (finding taxpayer in Greenville County had standing to sue as an individual taxpayer who had interest in the proper use and allocation of tax receipts by the school district and holding "[a] taxpayer's

[4] S.C. Code Ann. §§ 15-53-10 to -140 (2005).

standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina" and taxpayers in the past have been held to "constitute a class specially damaged" by illegal, ultra vires acts). Respondents argue *St. Andrews* and *Yemassee* are distinguishable from the present case because they involved annexations municipalities attempted to carry out in good faith, not through deceitful conduct.

We agree with the Town that Respondents lacked standing. Our case law provides that "to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights," and the State of South Carolina is the only non-statutory party which may challenge a municipal annexation. *See St. Andrews*, 349 S.C. at 604-05, 564 S.E.2d at 648.

In *St. Andrews*, the supreme court granted certiorari to consider whether municipal annexations using roadways to achieve contiguity are authorized by statute. 349 S.C. at 603, 564 S.E.2d at 647. In deciding this issue, the court articulated the general rule of standing for annexation challenges. *Id.* at 604, 564 S.E.2d at 648; *see also* S.C. Code Ann §§ 5-3-150(1), (3) (2004). The court explained the rules for standing vary depending on whether the method of annexation is carried out via the 75% or 100% method. *St. Andrews*, 349 S.C. at 604, 564 S.E.2d at 648. Under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area; while under the 100% method, the challenger must assert an infringement of its own proprietary interests or statutory rights. *Id.* In addition, the supreme court held, "the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action." *Id.* at 605, 564 S.E.2d at 648 (emphasis omitted). The court found "the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'" *Id.*

In *Yemassee*, the supreme court applied the general standing rule for 100% annexations as articulated in *St. Andrews*. 391 S.C. at 572, 707 S.E.2d at 406. The *Yemassee* case involved tracts of land annexed via the 100% petition method in which the plaintiffs argued the municipality failed to comply with the signature requirements of the 100% method. 391 S.C. at 573, 707 S.E.2d at 406. Specifically, the plaintiffs asserted the annexation should have been treated as made by the 75% method, as opposed to the 100% method, since the annexed lands included state-owned marshlands in addition to privately-held properties. *Id.* In denying standing to the plaintiffs, the supreme court reaffirmed its ruling from *St. Andrews* that to challenge a 100% annexation, the challenger must assert an

infringement of its own proprietary interests or statutory rights. *Id.* at 572-74, 707 S.E.2d at 406-07.

Here, Respondents have failed to show any infringement of their own proprietary interests or statutory rights. In addition, because none of Respondents are the State of South Carolina, they are prohibited from challenging the Town's annexations pursuant to *St. Andrews* and *Yemassee*. Respondents contend *St. Andrews* and *Yemassee* are distinguishable from the present case because those cases involved annexations carried out in good faith, not through deception. We disagree and note Respondents failed to cite any case law to support this argument. Additionally, although Respondents contend they met the standard for the public importance exception for standing, *St. Andrews* clearly provides the State, *acting in the public interest*, is the only non-statutory party which may challenge a municipal annexation.

CONCLUSION

We reverse the circuit court's determination that Respondents had standing. In light of our disposition of the case, it is not necessary to address the Town's remaining 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 prior issue is dispositive).

REVERSED.

WILLIAMS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

First South Bank, Respondent,

v.

John E. Rosenberg and Philip J. Brust, Defendants,

Of whom the Estate of Philip J. Brust is the Appellant.

Appellate Case No. 2015-000035

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 5437
Heard May 9, 2016 – Filed August 3, 2016

AFFIRMED AS MODIFIED

Robert Ernest Sumner, IV and E. Brandon Gaskins, both of Moore & Van Allen, PLLC, of Charleston, for Appellant.

Jeffrey L. Silver and Taylor Anthony Peace, both of Tyler Jackson Peace & Silver, LLC, of Columbia, for Respondent.

WILLIAMS, J.: The estate of Philip J. Brust[1] appeals the circuit court's grant of summary judgment in favor of First South Bank (First South) as well as its denial of Brust's motion to amend his answer and counterclaim. Brust argues the court erred in (1) granting First South's motion for summary judgment because it ignored questions of fact regarding the scope of authority granted under a specific limited power of attorney (the POA), Brust's knowledge of a guaranty's scope, the effect of subsequent loan modifications, and Brust's proposed counterclaims against First South; and (2) denying Brust's motion to amend because it incorrectly relied upon the doctrine of res judicata rather than deciding the motion under Rule 15, SCRCP. We affirm as modified.

FACTS/PROCEDURAL HISTORY

This appeal arises from a loan (the Loan) between First South and Ecological Investments, LLC (Ecological), for which First South obtained separate personal guaranties from Brust (the Guaranty) and John Rosenberg. Brust and Rosenberg were both members of Ecological. In 2005, Ecological owned 82.68 acres in Jasper County (the Property), an area that Ecological intended to convert into a "Butterfly Kingdom" for the conservation of butterflies. Prior to becoming involved with First South, Ecological obtained a loan from a separate bank in 2001.[2] First South offered to refinance Ecological's existing loan in 2005, providing a $2.6 million interest-only loan with a two-year term.

On January 9, 2006, First South issued a letter (the Commitment Letter) to Rosenberg and Brust, explaining First South was "pleased to commit to Ecological . . . a loan commitment." The Commitment Letter set forth pertinent information related to liabilities and the Loan, including that "[p]ayment of the Loan shall be unconditionally guaranteed, jointly and severally by [Rosenberg and Brust]." The Commitment Letter further stated that, upon its acceptance, it "shall

---

[1] Philip J. Brust died during the pendency of the underlying action, and his estate was substituted as a party to the action. For the purposes of this opinion, we refer to Brust and his estate simply as "Brust."

[2] According to Terry Finger, Brust's attorney, Brust executed a power of attorney in 2001, granting Finger the authority to act as Brust's attorney-in-fact and authorizing Finger to execute a guaranty.

become an integral part of the Loan documents." Rosenberg and Brust signed the Commitment Letter in their individual capacities.
Brust executed the POA on January 25, 2006, appointing Finger or Rosenberg as his true and lawful attorney and granting Finger and Rosenberg the authority

> to execute any and all documents, and to perform any lawful act or to execute or amend any document, instrument, or thing, which may be involved in the financing of [the Property], including, but not necessarily limited to, the power to execute . . . any document, instrument, contract, [n]ote, [m]ortgage, agreement, assignment, affidavit, disclosure, etc[etera] . . . or to execute any such other documents as may be necessary to close the [L]oan with First South Bank in the original principal sum of $2,600,000.00.

First South and Ecological closed the Loan on February 2, 2006. At the closing, Rosenberg executed his personal guaranty as well as the Guaranty, signing as Brust's attorney-in-fact.[3] The Guaranty, executed to induce First South to make loans to Ecological, stated the following:

> [Brust] absolutely and unconditionally guarantees [First South] the full and prompt payment when due . . . of the debts, liabilities[,] and obligations as follows:
>
> . . . .
>
> [Brust] guarantees to [First South] the payment and performance of each and every debt, liability[,] and obligation of every type and description [that Ecological] may now or at any time hereafter owe to [First South] (whether . . . now exist[ing] or . . . hereafter created or incurred . . .).

[3] Although Brust did not attend the closing, First South was unaware of his absence until after receipt of the closing documents. Additionally, no First South representative attended the closing.

> . . . .
>
> The liability of [Brust] shall not be affected or impaired by . . . any one or more extensions or renewals of [i]ndebtedness (whether . . . for longer than the original period) or any modification of the interest rates, maturities[,] or other contractual terms applicable to any [i]ndebtedness . . . .

Ecological defaulted under the Loan on November 30, 2012. On March 8, 2013, First South filed a summons and complaint against Rosenberg and Brust, claiming the guaranties induced it into making the Loan, and Rosenberg and Brust were in default under their respective guaranties. First South requested judgment against Brust and Rosenberg for the remaining amount due under the terms of the Loan.[4]

Brust filed an answer to the complaint and asserted, in pertinent part, the following affirmative defenses:

> 20. [First South's] claim is barred, in whole or in part, because [its] alleged losses are the result of [its] failure to follow its own policies and procedures and negligence in the underwriting, approval[,] and administration of the [L]oan . . . .
>
> . . . .
>
> 23. [Defendant] Brust should be released from any obligations under the Guaranty . . . to the extent [First South] breached its duty of good faith and fair dealing to . . . Brust and to the extent [First South] had knowledge or should have known that . . . Brust was being deceived by . . . Rosenberg regarding the [L]oan and collateral or that . . . Brust had been induced to enter into the

[4] Rosenberg consented to summary judgment against him on October 2, 2013. Accordingly, Rosenberg was not involved in the matter after this date and is not a party to this appeal.

> Guaranty in ignorance of facts that materially increased his risks under the Guaranty.

Thereafter, First South filed a motion for summary judgment as to Brust on all claims. Brust filed a memorandum in opposition to First South's motion, claiming (1) no apparent or implied authority existed because First South did not rely upon the POA, and (2) no ratification occurred because Brust had no knowledge of the Guaranty's terms and never affirmatively acted to accept the Guaranty.

Brust later deposed Finger and Patrick Wright, First South's vice president, who stated it was unnecessary for the Guaranty to cover "continuing" and "unlimited" debts, liabilities, and obligations. Additionally, Wright stated he did not attend the closing or review the Guaranty prior to the closing.

Subsequently, Brust filed a motion to amend his answer pursuant to Rule 15(a), SCRCP, claiming the amendments neither raised novel legal issues nor prejudiced First South. With the motion, Brust attached his proposed amended answer, in which he sought to assert the following counterclaims against First South:

> 90. First South breached [its duty to act reasonably and comply with standard banking practices] by failing to adhere to its own policies and procedures, and failing to comply with the standard banking practices for the underwriting, closing[,] and administration of the loans in question.
>
> . . . .
>
> 95. First South has breach[ed] any contractual obligations that exist pursuant to the Guaranty or otherwise by failing to adhere to the specific contractual obligations set forth in the Guaranty and for breaching the covenant of good faith and fair dealing . . . .

Four days after Brust filed his motion to amend, the circuit court held a hearing on First South's motion for summary judgment.[5] At the hearing, First South contended the POA was unambiguous, Rosenberg had the authority to bind Brust under the Guaranty, and Brust was responsible for the debt. Brust asserted the following arguments in response: Rosenberg did not have actual authority to bind Brust under the Guaranty because the Guaranty's terms exceeded the scope permitted by the POA, and the POA was required to specifically grant authority to execute a Guaranty; no apparent authority existed because First South did not rely upon the POA; the Guaranty unconditionally guaranteed any future debts, which was not permitted by the POA; First South did not know of the POA's existence or that Rosenberg signed the Guaranty on behalf of Brust until after the closing, showing it did not rely upon the POA; any reliance by First South was unreasonable because it failed to follow standard banking procedures in determining Rosenberg's authority; and material modifications and "changes" to the Loan released Brust from liability under the Guaranty.

According to Brust, most of these issues involved questions of fact that should not be determined at the summary judgment stage. Brust also stated, "[W]e did raise affirmative defenses . . . [a]nd so we decided to re-style it as a counterclaim . . . . So all of those allegations were pled . . . [, and w]e intend to re-style them as counterclaims as soon as the court can hear us on th[e motion to amend]." The circuit court took the matter under advisement.

The circuit court subsequently issued an order granting First South's motion for summary judgment. The court found, *inter alia*, Brust's proposed counterclaims were identical to two of his original defenses, the POA vested in Rosenberg the authority to sign the Guaranty on Brust's behalf, and Ecological defaulted under the Loan. The court concluded (1) the POA was clear and unambiguous and granted Rosenberg actual authority to sign the Guaranty on Brust's behalf, (2) Rosenberg had apparent authority to bind Brust under the Guaranty, (3) First South relied upon Brust's representations when it closed the loan, (4) Brust ratified the Guaranty by enjoying the Loan's benefits and not repudiating the Guaranty, (5) First South

---

[5] Brust did not object to the circuit court ruling upon the motion for summary judgment prior to hearing arguments on the motion to amend. Instead, Brust agreed that the summary judgment motion was the only matter before the court at this hearing.

breached no duty, (6) no renewal or modification released Brust from liability under the Guaranty, and (7) the proposed counterclaims "contain[ed] the same material allegations as the defenses set forth in the [original answer] . . . and shall be treated as the defenses contained in the [original a]nswer and disposed of."

Thereafter, the circuit court held a hearing on Brust's motion to amend. Brust then filed a motion to alter or amend the order granting summary judgment, alleging a multitude of errors in the court's order. The court issued an order denying the motion to amend, ruling the counterclaims "would prejudice [First South] and force [it] to re-litigate matters barred by res judicata." One week later, the court denied Brust's motion to alter or amend the grant of summary judgment in favor of First South. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in granting summary judgment in favor of First South?

II. Did the circuit court err in designating Brust's proposed counterclaims as defenses?

III. Did the circuit court err in denying Brust's motion to amend?

LAW/ANALYSIS

I. Grant of Summary Judgment

First, Brust argues the circuit court erred in finding no genuine issue of material fact existed as to the scope of the POA and Brust's liability under the Guaranty. We disagree.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). Rule 56(c), SCRCP, provides summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In ruling on a

motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." *Harrington v. Mikell*, 321 S.C. 518, 521, 469 S.E.2d 627, 629 (Ct. App. 1996). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). Once the moving party meets this burden, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings," but rather "must come forward with specific facts showing . . . a genuine issue for trial." *Id.* at 197–98, 659 S.E.2d at 203.

A. Rosenberg's Actual Authority

Brust argues the circuit court misinterpreted the POA by refusing to recognize it was susceptible to more than one interpretation. According to Brust, other jurisdictions have been "especially cautious" in recognizing an agent's ability to bind a principal under a guaranty, and this court should adopt the position that the authority to bind under a guaranty must be expressly granted in the power of attorney. Brust further insists the POA's language was ambiguous as to whether Rosenberg had actual authority to bind Brust to the Guaranty.[6] We disagree.

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)). This court has previously concluded that "an action to interpret a power of attorney is similar to an action to interpret a contract" and, thus, "is an action at law." *Id.*

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *Id.* at 454–55, 756 S.E.2d at 161 (quoting *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993)). Although the construction of an ambiguous contract is a question of fact, the

[6] In arguing the POA was ambiguous, Brust analyzes facts beyond the POA's four corners, explaining the 2001 power of attorney specifically stated "guaranty," but the POA did not; the same attorney drafted both powers of attorney; and according to Wright's deposition, the Guaranty was not necessary to the closing of the Loan.

interpretation of an unambiguous contract is a question of law. *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). This court is "without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

Moreover, "[i]f a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." *Bates v. Lewis*, 311 S.C. 158, 161 n.1, 427 S.E.2d 907, 909 n.1 (Ct. App. 1993). "Whe[n] the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. This court's duty is to enforce the contract made by the parties regardless of the parties' failure to carefully guard their rights. *Watson*, 407 S.C. at 455, 756 S.E.2d at 162.

In the instant case, the circuit court found the POA was unambiguous and permitted Rosenberg to execute the Guaranty on behalf of Brust. We hold Brust failed to demonstrate a genuine issue of material fact as to the POA's ambiguity and, therefore, reject Brust's argument that Rosenberg had no actual authority. In determining Brust and Rosenberg's intent, we find the POA's language unambiguously granted Rosenberg the authority "to execute any and all documents . . . or to execute or amend any document, instrument, or thing, which may be involved in the financing of [the Property]." *See Watson*, 407 S.C. at 454–55, 765 S.E.2d at 161 ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." (quoting *Sphere Drake Ins. Co.*, 313 S.C. at 473, 438 S.E.2d at 277)).

Although Brust contends the POA was ambiguous, we note the only possible ambiguity in it was the language "as may be necessary to close the [L]oan." However, even if we construed the term "necessary"—or the entire phrase—as ambiguous, this single term or phrase did not render the POA ambiguous. Other language in the POA clearly permitted Rosenberg "to execute any . . . documents . . . involved in [the Property's] financing." *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one

may not create an ambiguity by pointing out a single sentence or clause."). Further, the POA did not limit Rosenberg's authority to execute documents necessary to close the Loan. Instead, the POA permitted the execution of any documents related to the Property's financing. Thus, we do not look beyond the POA to determine the parties' intent. *See Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 ("Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574)).

Given our finding that the POA was unambiguous, we reject Brust's invitation to go beyond the four corners of the POA in construing the document. *See Bates*, 311 S.C. at 161 n.1, 427 S.E.2d at 909 n.1 (noting extrinsic evidence cannot be used to give an unambiguous contract a meaning different from the meaning indicated by its plain terms). Moreover, we reject Brust's contention that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law. Accordingly, we affirm the circuit court's grant of summary judgment as to this issue because Rosenberg possessed actual authority to bind Brust to the Guaranty's terms.[7]

B. Modifications Resulting in Release from Liability

Brust further contends the circuit court erred in finding subsequent modifications did not release him from liability under the Guaranty. According to Brust, material changes to the Loan and First South's failure to communicate these changes—in violation of its banking policies—released Brust from liability under the Guaranty. We disagree.

"A guaranty is a contract." *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (quoting *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996)). As

[7] Because our holding on the issue of actual authority is dispositive, we need not reach the issues of apparent authority and ratification. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive).

noted above, "[t]he cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *Watson*, 407 S.C. at 454–55, 756 S.E.2d at 161 (quoting *Sphere Drake Ins. Co.*, 313 S.C. at 473, 438 S.E.2d at 277). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* at 455, 756 S.E.2d at 161 (quoting *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)).

We find no genuine issue of material fact exists as to whether subsequent modifications of the Loan released Brust from the Guaranty's liability. Under the Guaranty, Brust guaranteed payment of the indebtedness, and his liability was not "affected by . . . any one or more extensions or renewals of [i]ndebtedness or any modification of the . . . contractual terms." Accordingly, a review of the Guaranty reveals no modification or renewal of the Loan released Brust from liability. *See id.* at 455, 756 S.E.2d at 161 (noting that clear and unambiguous language in a contract determines the contract's force and effect).[8] Therefore, we affirm the circuit court as to this issue.

II. Designation of Counterclaims as Defenses

Additionally, Brust argues the circuit court erred in employing Rule 8(c), SCRCP, to classify his proposed counterclaims as defenses. Brust reasons (1) the seventh and tenth defenses were not counterclaims, and (2) the court should have ruled upon his motion to amend to add counterclaims before classifying the two

[8] To the extent Brust argues First South was liable for violating its own banking policies by not obtaining a new guaranty for each modification of the Loan, we find Brust abandoned this argument at trial by specifically stating First South owed Brust no duty to comply with its own policies. We further note our court has squarely rejected the argument that, in a normal creditor–debtor relationship, a bank owes a fiduciary duty to a debtor. *See Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (providing that our courts have held "the normal relationship between a bank and its customer is one of creditor–debtor and not fiduciary in nature").

counterclaims as defenses.[9] Although we agree the court erred in classifying the counterclaims as defenses, we find no error in its application of Rule 8(c).

> A pleading which sets forth a . . . counterclaim . . . shall contain (1) a short and plain statement of the grounds . . . upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.

Rule 8(a), SCRCP. "A party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted . . . ." SCRCP 8(b), SCRCP. Rule 8(c), SCRCP, sets forth a nonexclusive list of affirmative defenses a party must plead, but it does not include negligence or breach of contract. "An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established." *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983) (internal citation omitted). "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." Rule 8(c), SCRCP.

At the outset, we find the circuit court incorrectly determined Brust's proposed counterclaims constituted defenses. In our view, the court should have classified Brust's defenses as counterclaims. The seventh defense and the first proposed counterclaim contained almost identical language, each setting forth a claim for negligence. Similarly, the tenth defense and second proposed counterclaim contained almost identical language, each setting forth a breach of contract counterclaim. Moreover, the seventh and tenth defenses included demands for the court to bar First South's claims "in whole or in part" based upon facts pled in the answer.

---

[9] Although First South argues the defenses were correctly classified as counterclaims, the circuit court's ruling stated the proposed counterclaims "are and shall be treated as the defenses contained in the answer."

Given the similar language, as well as the fact that the circuit court already had jurisdiction over the matter, we find categorizing the defenses as counterclaims pursuant to Rule 8(c) was the correct action. *See* Rule 8(a) (requiring a counterclaim include a "statement of the facts showing that the pleader is entitled to relief" and "a demand for judgment for the relief"); *id.* (requiring a counterclaim state the court's jurisdictional grounds unless the court already has jurisdiction); Rule 8(c) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation."). Accordingly, we affirm as modified the court's ruling because its application of Rule 8(c) was proper. *See* Rule 220(c), SCACR (noting this court may affirm any ruling upon any ground appearing in the record).[10]

III. Motion to Amend

Finally, Brust contends the circuit court erred in denying his motion to amend the answer to include two counterclaims against First South. According to Brust, the court mistakenly applied the doctrine of res judicata and, instead, should have analyzed his motion under Rule 15, SCRCP. We find no reversible error.

Given that Brust's proposed counterclaims raised the same assertions as his answer, we find any error in the circuit court's denial of his motion to amend harmless because the court disposed of these issues in its order granting summary judgment in favor of First South. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize . . . an overriding rule of civil procedure [that] says[] whatever doesn't make any difference, doesn't matter."). In other words, even if the court had granted Brust's motion to amend, it would have had no practical effect on the outcome of the case. We further note that, instead of arguing in favor of the motion to amend or requesting a continuance at the June 3,

[10] To the extent Brust argues the circuit court erred in not ruling upon his motion to amend prior to ruling upon First South's motion for summary judgment, we find this issue is not preserved for appellate review. At the summary judgment hearing, Brust failed to object to any issue regarding the procedure of the court's hearings on the motions. In fact, Brust conceded that the motion for summary judgment was the only issue before the court at the June 2014 hearing. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review.").

2014 hearing for the court to first rule upon his motion to amend, Brust agreed that the only issue before the court was the motion for summary judgment. If Brust believed, as he now argues on appeal, that the additional counterclaims in his amended answer would have bearing on the court's summary judgment ruling, then we find it was incumbent upon him to object accordingly at that time. Thus, under these facts, we are unable to conclude the circuit court abused its discretion in denying Brust's motion to amend his answer. *See City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232–33, 599 S.E.2d 462, 465 (Ct. App. 2004) (stating "a motion to amend is addressed to the sound discretion of the [circuit court]," and its "finding will not be overturned on appeal without an abuse of discretion" (quoting *Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999))).

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED AS MODIFIED.

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