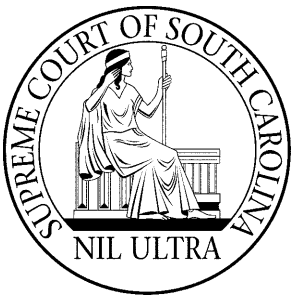

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 1, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Bradford Alexander Rawlinson,
Respondent.

Appellate Case No. 2018-001341

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service,

shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
July 24, 2018

The Supreme Court of South Carolina

In the Matter of Douglas Andrew Gaines, Respondent.

Appellate Case No. 2018-001342

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office. Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
July 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nathaniel Wright, Appellant.

Appellate Case No. 2016-000272

Appeal From Jasper County
Michael G. Nettles, Circuit Court Judge

Opinion No. Op. 5579
Heard April 18, 2018 – Filed August 1, 2018

AFFIRMED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, Assistant Attorney General Joshua Abraham Edwards, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

LOCKEMY, C.J.: In this criminal action, Nathaniel Wright appeals his convictions for voluntary manslaughter, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light. Wright asserts

the trial court erred in finding the public defender's office did not have an actual conflict of interest and denying Wright's request for a continuance. We affirm.

FACTS

On October 1, 2014, Wright fatally shot his brother, Maurice Wright, at their mother's home. That afternoon the two began arguing about money each accused the other of owing. The afternoon ended with Maurice dead–shot eight times. After a short police chase, Deputy Leonard Brown arrested Wright, who told him, "I'm not going to let [anyone] disrespect me." The State charged Wright with murder, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light.

Prior to trial, Wright's appointed counsel filed a motion for a continuance as well as a motion to be relieved as counsel. Wright's motion for a continuance centered on evidence that had been produced by the State in the week prior to trial. Specifically, Wright's counsel asserted she had not been given enough time to review medical records, jail house phone calls, or speak with a confidential informant the State indicated it intended to use as a witness. Wright's counsel admitted she intended to listen to the phone calls that evening and the State conceded it did not intend to use the recordings in its case in chief. Wright's counsel also admitted she had the medical records, but had not had an opportunity to review them thoroughly.

With regard to the motion to be relieved, Wright's counsel requested the court relieve her because there was a conflict of interest in the public defender's office. Wright's counsel argued her direct supervisor represented one of the witnesses against her client in obtaining a deal for his testimony against Wright. The conflict did not manifest itself until the State disclosed the witness the week prior to trial. Wright's counsel argued she should not be forced to continue representing Wright against his wishes based on the conflict.

The trial court then took sworn testimony from the Chief Public Defender and Wright's counsel's supervisor. The trial court asked both attorneys whether they discussed the case with Wright's counsel and whether any confidential information was disclosed regarding the two cases. They each testified no confidential information was discussed.

The trial court found, based on Rule 1.10(e) of the South Carolina Rules of Professional Conduct, that no actual conflict of interest was present in this case. The trial court found there had been no confidential information discussed or disclosed between the lawyers representing Wright or the witness. The trial court noted the rules allow for a "Chinese Wall" to screen lawyers in the public defender's office representing competing sides and since the lawyers in this office had not discussed the case, no actual conflict of interest existed.

After the trial court's ruling on the conflict of interest issue, Jared Newman, a private attorney, indicated a family member had retained him to represent Wright. Newman stated he did not believe he had time to review the evidence in this "complex" murder case. The trial court indicated his question to Newman was "what's your role in the case here today? We're going forward. What's your role?" Newman indicated he could serve as co-counsel, but did not believe he could accept the role of lead counsel. The trial court indicated he would allow Newman to act as co-counsel.

During the trial, Newman performed the cross-examination of each of the State's witnesses and performed the direct examination of each of Wright's witnesses. He also presented the closing statement. Wright's appointed counsel only presented the opening statement.

After deliberations, the jury returned guilty verdicts for voluntary manslaughter and the weapons charge. The trial court imposed a sentence of twenty-three years' imprisonment for voluntary manslaughter, five years' imprisonment for the weapons charge, and three years' imprisonment for the failure to stop for a blue light, all to run concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Hewins*, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

CONFLICT OF INTEREST

Subject to certain exceptions, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7, RPC, Rule 407 SCACR. "A concurrent conflict of interest exists if: (1) the representation of one client will be adverse to another client . . . ." Rule 1.7, RPC, Rule 407 SCACR. Generally, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" based on a conflict of interest. Rule 1.10(a), RPC, Rule 407 SCACR.

> A lawyer representing a client of a public defender office, legal service association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or substantially related matter if: (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Rule 1.10(e), RPC, Rule 407, SCACR.

Wright asserts the trial court erred by not relieving the public defender's office from representing him because the office had an actual conflict of interest. Wright argues his attorney's supervisor represented a witness against him in his trial, and no screening mechanism protected him as required by Rule 1.10(e) of the Rules of Professional Conduct. Wright asserts Rule 1.10(e) therefore imputes a conflict of interest upon his appointed attorney such that she should have been relieved. We disagree.

The situation presented in this case is exactly the circumstances Rule 1.10(e) seeks to avoid. In fact, the Chief Public Defender for the Fourteenth Circuit testified "I have contract attorneys that could have taken this case and everything else had we known some time ago." However, the State did not disclose the witness' identity until the week prior to trial. As a result of this late notice, the public defender's office could not contract with outside counsel or create an adequate screening

mechanism to ensure against a possible conflict of interest. While we agree with Wright that an explicit screening mechanism or addition of outside counsel would be the best remedy for this situation, we do not agree that the absence of an explicit screening mechanism creates an incurable conflict of interest such that the public defender's office should have been removed from handling his case.

We read Rule 1.10(e) as providing a way to ensure the public defender's office is not conflicted out, but we do not read it as requiring any specific procedures to ensure the absence of a conflict. The trial court took sworn testimony from both the Chief Public Defender as well as the attorney supervising Wright's counsel. They each testified they did not discuss any particulars of Wright's case with his attorney and they did not discuss anything that would give Wright's attorney any advantage or disadvantage in this case. While we are troubled by the situation, we are confident in the trial court's attempt to ensure no actual conflict existed. Rule 1.10(e) provides a public defender may continue representing a client, even with an imputed conflict of interest, if there is proper screening to prevent the exchange of confidential information. We find the trial court adequately determined no confidential information was disseminated or received by Wright's attorney. Thus, while no member of the office explicitly communicated the need to create a screening mechanism, the testimony indicates such a wall existed in this case. Accordingly, the public defender's office accomplished the purpose of the rule and Wright's attorney did not have to be relieved.

REQUEST FOR CONTINUANCE

"The trial court's denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Morris*, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008).

Wright asserts the trial court erred in failing to grant him a continuance based on his argument the public defender's office should have been conflicted out. As we have already discussed, the trial court properly declined to release the public defender's office, and no continuance was necessary because Wright's attorney had been given adequate time to prepare his defense. Therefore, we can discern no clear abuse of discretion by the trial court to warrant reversal.

CONCLUSION

Accordingly, the orders of the circuit court are

AFFIRMED.

KONDUROS, J., concurs. WILLIAMS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christ Central Ministries, Respondent,

v.

City of Columbia Board of Zoning Appeals, Appellant.

Appellate Case No. 2015-002532

Appeal From Richland County
Tanya A. Gee, Circuit Court Judge

Opinion No. 5580
Heard March 14, 2018 – Filed August 1, 2018

DISMISSED

Patrick L. Wright and Dana M. Thye, of Columbia, for Appellant.

Jerry Jay Bender, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent.

LOCKEMY, C.J.: We review a decision by the circuit court reversing on appeal a decision of the City of Columbia Board of Zoning Appeals (the City) denying Christ Central Ministries (CCM) a permit to replace a billboard on its property. We dismiss this case because it is moot.

FACTS

CCM owns property on the corner of Main Street and Elmwood Avenue in Columbia. Previously, CCM leased a portion of the property to Lamar Companies (Lamar) for the purpose of erecting and maintaining a fixed display billboard. In 2014, Lamar sought a permit to replace the existing billboard with a changeable copy billboard. The City issued the permit on March 13, 2014, and that permit, by its terms, lasted six months. On June 16, 2014, Lamar requested an extension of its permit. The City granted the extension until December 31, 2014.

During 2014, CCM began negotiations to enter into a new lease agreement for the sign location. CCM, through its agent, requested a permit from the City to replace the existing billboard with a changeable copy billboard on September 23, 2014. The City denied CCM's request because "Currently, there is an active zoning/building permit . . . issued to Lamar Advertising, to convert said sign to a changeable copy." The letter notified CCM "[s]hould that permit not be renewed or the proposed work completed, and/or should Lamar retain no property interest, it is my understanding that you immediately intend to obtain a permit for the conversion to changeable copy per 17-404(e)(4)."

CCM decided to sign a lease with a different sign company, and Lamar removed its billboard in August 2014. CCM again sought a permit to place a changeable copy billboard on the property in January, 2015, after the expiration of Lamar's permit. The City denied CCM's request noting "[i]t is my understanding that the non-conforming sign at the above referenced location was removed by the sign owner on or about August 2, 2014. As such, this office would not be able to issue a permit, per § 17-404(e)(4), to replace a sign that is no longer existing." CCM appealed the City's decision to the Board of Zoning Appeals, which affirmed the City's denial. CCM appealed the Board's decision to the circuit court.

The circuit court reversed the Board's decision. The circuit court found, according to the plain language of the City's ordinance, "no language in the relevant provision of the ordinance imposes a time period in which one must act to seek a permit, and strict construction of the ordinance does not grant this court authority to impose such a limitation." The City filed a notice of appeal on December 7, 2015.

STANDARD OF REVIEW

"The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)). "This court will not reverse a zoning board's decision unless the board's findings of fact have no evidentiary support or the board commits an error of law." *Id*. at 91-92, 791 S.E.2d at 308. "Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Id*. at 92, 791 S.E.2d at 308 (quoting *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)). "The determination of legislative intent is a matter of law." *Id*. (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

ANALYSIS

The City asserts the circuit court erred in its interpretation of the city ordinance. The City claims that, as a legal non-conforming sign, it could not be replaced once it was removed. It was on this basis, the City argues, CCM's permit request was denied, and the circuit court erred by reversing the zoning board's determination. We decline to address the issues the City raises because its actions have caused this case to become moot.

The City initially requested the circuit court stay its order requiring the City to issue CCM the zoning permit. The circuit court denied that request. The City did not request this court stay the order pending the outcome of the appeal. Instead, the City issued CCM a permit to construct the billboard in question. CCM has constructed the billboard at significant cost, and has collected rents from a third-party pursuant to a new lease. The City's decision to grant the permit pending appeal has made "any grant of effectual relief impossible for the reviewing court." *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006).

In *Seabrook*, our supreme court found a similar zoning appeal mooted by a municipality's actions pending appeal. The City of Folly Beach denied a property owner's request to rezone a parcel of land for residential development. *Id*. at 194-95, 631 S.E.2d at 909. The property owner then sued the City of Folly Beach alleging, "deprivations of procedural and substantive due process, a violation of

equal protection, gross negligence, and a temporary taking." *Id*. at 195-96, 631 S.E.2d at 910. The circuit court found the City of Folly Beach liable on the due process and equal protection claims, and the City of Folly Beach appealed. *Id*. at 196, 631 S.E.2d at 910.

After the circuit court's decision, the City of Folly Beach rezoned the property owner's land to residential. The *Seabrook* Court found, "because the Seabrook property was rezoned . . . Respondents have already received the appropriate procedural relief." *Id*. at 197, 631 S.E.2d at 911. Accordingly, the court found the zoning issue was moot. *Id*.

Similarly, we find any decision this court makes regarding the interpretation of the zoning ordinance would "have no practical legal effect upon an existing controversy." *Id*. at 197, 631 S.E.2d at 910. The City's decision to grant CCM's request for a permit has resolved this dispute. There is nothing more for this court to do.

CONCLUSION

Accordingly, the appeal is

DISMISSED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius and Karen Albenesius, Appellants,

v.

Town of Sullivan's Island and Sullivan's Island Town Council, Respondents.

Appellate Case No. 2015-002550

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5581
Heard April 10, 2018 – Filed August 1, 2018

AFFIRMED

Robert Holmes Hood, Jr and James Bernard Hood, both of Hood Law Firm, LLC, of Charleston; A. Walker Barnes, of Hood Law Firm, LLC, of Spartanburg; and Deborah Harrison Sheffield, of Columbia, for Appellants.

J. Brady Hair and Derk Van Raalte, IV, both of Law Office of J. Brady Hair, N. Charleston, for Respondents.

LOCKEMY, C.J.: In this appeal from the Charleston County Master-in-Equity, Appellants assert the master erred in granting the Town of Sullivan's Island's

(Town's) motion for summary judgment on numerous claims regarding the Town's decision not to cut a maritime forest on the island. We affirm.

FACTS

Appellants in this case own front row property on Sullivan's Island. However, Appellants do not own the property closest to the beach–rather, the Town owns those lots, which continue to grow each year, through a process known as sediment transport. *See* Josh Eagle, Coastal Law 6 (2011). Professor Eagle explains, "sand grains do not magically vanish from or appear on a beach; rather they are going to, or coming from somewhere else along the coast." *Id*. While most land use cases along our coast involve erosion, or the loss of beachfront sediment, this case involves accretion, or the addition of sediment to the beach front.

The question here is whether the Town must maintain the land exactly as it was in 1991, including cutting any vegetation to a height of three feet, as Appellants assert. The land owned by the Town is subject to certain restrictions resulting from a deed conveying the land to the Town from the Low Country Open Land Trust (the Trust). In order to protect the Town's ocean adjacent property from development, the Town's council enacted an ordinance on January 15, 1991, which authorized the Town to convey the land between the ocean and the front row properties to the Trust. The Trust subsequently conveyed the land back to the Town on February 12, 1991.

The conveyance from the Trust included the deed restrictions at issue here. The deed explained the purposes behind the conveyance.

> Whereas the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and
>
> WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property") which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

> WHEREAS, the parties desire to place restrictions upon the Property for the purposes of, *inter alia*, retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife; and
>
> WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:
>
> A) The appropriate survey maps from the United States Geological survey, showing the property line and other contiguous or nearby protected areas;
>
> B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and
>
> C) On-site photographs taken at appropriate locations on the property . . . .

To further those purposes, the deed provided certain restrictions. Specifically,

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and

> emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens. . . .
>
> 6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of the law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

The deed also gave all property owners the right to challenge any action on the property by the Town in violation of the agreement. The deed also provided the restrictions were self-renewing unless repealed by a 75% vote of the town's electorate.

When the deeds were executed in 1991, the Town had an ordinance, passed in 1981, restricting the use of the ocean adjacent property. The ordinance indicated

> There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section) and no man-made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the . . . area as follows . . . (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.

§ 21-39A. In 1995, that ordinance was amended. The 1995 Ordinance was, in most material ways, identical to the 1981 Ordinance. However, the 1995 Ordinance noted, "vegetation may be trimmed and pruned so as to have a

maximum height of no less than seven feet (7') above the ground." § 21-39.1G. Finally, the Town amended the ordinance again in 2005. The 2005 Ordinance indicated which plants could be trimmed and pruned and noted "[t]his vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3).

When the 1991 deeds were executed, the ocean adjacent land was covered in sea oats and wildflowers and the Appellants' homes had unobstructed ocean views and access to ocean breezes. Because of the Town's trimming and pruning ordinances, however, the vegetation on the ocean adjacent land has grown into a maritime forest.

In the summer of 2010, Appellants applied to the Town for a permit to trim and prune the ocean adjacent property, as allowed by the deed. Appellants wished to cut the vegetation to a height of no less than three feet, as indicated in the 1981 Ordinance. The Town denied the permit.

Appellants then filed this action. In their complaint against the Town, Appellants asserted claims for breach of contract, breach of contract accompanied by a fraudulent act, a violation of the South Carolina Unfair Trade Practices Act (SCUTPA)[1], nuisance, and inverse condemnation.[2] Appellants demanded injunctive relief, a writ of mandamus, a declaratory judgment, attorney's fees and costs, and compensatory damages. Appellants also requested the court invalidate the 1995 and 2005 Town ordinances.

According to the Appellants, the unchecked growth of vegetation on the ocean adjacent land has resulted in public and private harms. Appellants claim they and the public have been deprived of their ocean views and breezes. Furthermore, the overgrowth has allegedly caused other dangers and nuisances including fire hazards, mosquitos, raccoons, snakes, and coyotes. Appellants' also claim the value of their properties has been diminished by $1,000,000 because of the maritime forest.

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[1] S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2017).

[2] Appellants' inverse condemnation and SCUTPA claims are not at issue in this appeal.

After briefing and argument, the master granted the Town summary judgment in several orders throughout the litigation. First, the master granted the Town summary judgment as to the breach of contract accompanied by a fraudulent act claim. The master found the Town was immune from suit for breach of contract accompanied by a fraudulent act because the Tort Claims Act provides a governmental entity cannot be sued for legislative action or inaction or for employee conduct outside the scope of his official duties.

Subsequently, the master granted summary judgment on Appellants' request for injunctive relief because the deed's language did not obligate the Town to only trim and prune bushes and trees in the ocean adjacent property to three feet. The master found "[t]he 1995 and 2005 Deed Restrictions allow less cutting than did the 1981 Ordinance. As such, these ordinances are 'more restrictive.'" The master also found the 1981 Ordinance did not provide Appellants a right to cut all vegetation, but rather any decision to allow pruning would issue, "[w]hen the Zoning Administrator finds as a fact that bushes and trees create a hazard to health, safety, and welfare of the Town in a particular area." Additionally, the master granted summary judgment on the inverse condemnation claim as no legal right had been taken.

On July 29, 2015, the master submitted an order containing more grounds for its decision. The master found Appellants failed to secure a cutting permit from the South Carolina Department of Health and Environmental Control (SCDHEC), and could not, therefore, prove any damages resulting from the Town's denial of their permit to trim vegetation on the ocean adjacent property.

Finally, the master issued an order purporting to grant the Town's motion for summary judgment on the nuisance, breach of contract, and mandamus causes of action. The master found the Town could not be held responsible for acts of nature which occurred after the Town stopped trimming the vegetation on the land. The master also noted "[Appellants'] claims of a public nuisance cannot stand against the Town because their argument alleges a duly enacted law constitutes a nuisance." The master held these legislative acts cannot be the basis for a nuisance claim.[3] This appeal followed.

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[3] This was the final order in the record. Appellants filed a motion for reconsideration and clarification asking the master to indicate which causes of

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Penza v. Pendleton Station*, 404 S.C. 198, 203, 743 S.E.2d 850,852 (Ct. App. 2013).

> When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; 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.

Id. "In determining whether a genuine issue of [material] fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." *Id*. at 203, 743 S.E.2d at 852-53. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Id*. at 203-04, 743 S.E.2d at 853 (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)).

INTERPRETATION OF THE DEED

Appellants assert the master erred by granting the Town summary judgment on its various contract claims because the deed's language requires the Town to preserve the ocean adjacent property exactly as it existed in 1991. We disagree.

"[T]he interpretation of a deed is an equitable matter." *Id*. at 204, 743 S.E.2d at 853 (quoting *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998) (alteration in original)). "The construction of a clear and unambiguous deed is a question of law for the court." *Id*. (quoting *Hunt v. Forestry Comm'n,* 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004)). "[T]he determination of whether language in a deed is ambiguous is a question of law.

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action survived for trial. The order denying the motion for reconsideration does not indicate which, if any, causes of action the master did not dismiss. Based on the record before us, we cannot determine what causes of action remain.

The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Id*. (quoting *Proctor v. Steedley,* 398 S.C. 561, 573 n. 8, 730 S.E.2d 357, 363 n. 8 (Ct. App. 2012) (alteration in original)).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." *Id*. (quoting *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 590, 635 S.E.2d 649, 655 (Ct. App. 2006)). "[O]nce a contract or agreement is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Id*. (quoting *Williams v. Teran, Inc.,* 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976) (alteration in original)). "Moreover, in ascertaining [the grantor's] intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law." *Id*. (quoting *Bennett,* 370 S.C. at 590, 635 S.E.2d at 655 (alteration in original)). "When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper." *Id*. Only "[w]hen the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." *Id*. at 205, 743 S.E.2d at 853 (quoting *Williams,* 266 S.C. at 59, 221 S.E.2d at 528 (alteration in original)).

The deed indicates the parties intended for the land to stay in the "condition of the Property at the time of this grant" as shown in multiple photographs taken in 1991. But that language cannot be taken in isolation, and must be read with the remainder of the document. *See Bennett*, 370 S.C. at 590, 635 S.E.2d at 655 (noting, to determine the intention of a grantor, "the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with [the] law"). The deed's language evidences an intent that the town maintain the land's natural character. Appellants' interpretation of the deed would require the town to continuously remove all vegetation from the beach that was not present in 1991 to preserve this character. We do not read the deed as requiring such drastic management.

The deed's initial language was "made subject to" the Town's "unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens" and the Town's ability to "enact ordinances and regulations affecting the Property which are more

restrictive than these Restrictions or which are not inconsistent with these restrictions." Appellants asserted during argument before this court these phrases mean the Town can only trim the vegetation lower than it was in 1991 to comply with the deed. It is illogical that an organization "whose purpose is to preserve and conserve natural areas" would transfer property to the Town and require more land management as a less restrictive regulation. Instead, the master found, and we agree, the Town's ordinances, which permit less trimming of vegetation on the accreted land, are more restrictive than those indicated in the deed, and were specifically contemplated by the deed's unambiguous language.

While the deed's language is unambiguous, it is noteworthy that both the Town and the grantor of the deed agree the Town's ordinances are appropriate under the language of the deed. Elizabeth Hagood, the executive director of the Lowcountry Open Land Trust stated in an affidavit the Trust "periodically and regularly visited the [ocean adjacent land] each year since 2001, reviewed the existing field conditions, compared the field conditions to the deed restrictions, and found nothing that violated the deed restrictions." Although that affidavit alone does not determine whether the Town's actions comply with the deed's plain language, it provides additional evidence that the only two parties to the contract agree the Town's ordinances are in keeping with the intentions of the parties in 1991.

Accordingly, based upon the plain language of the deed in its entirety, we affirm the master's order granting summary judgment on each of the breach of contract causes of action.

NUISANCE

Appellants assert the master erred by granting the Town summary judgment on the nuisance cause of action. Appellants argue the master received affidavits indicating the overgrown nature of the ocean adjacent property has created a breeding ground for an enormous and highly undesirable increase in the populations of bugs, raccoons, snakes, rats, spiders and other unwanted varmints and dangerous animals. Finally, Appellants state the overgrowth poses dangers from fires and criminal activity. Based on Appellants' complaint and the arguments presented in their briefs to this court, we affirm.

"[A] nuisance is 'anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property.'" *Ravan v.*

Greenville Cty., 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993) (quoting *Neal v. Darby*, 282 S.C. 277, 285, 318 S.E.2d 18, 23 (Ct. App. 1984)). "However, the interference or inconvenience must be unreasonable to be actionable." *Id*. "Nothing is a public nuisance which the law itself authorizes." *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (Ct. App. 1989). A governmental entity is not liable for a loss resulting from a nuisance. S.C. Code Ann. § 15-78-60(7) (2005).

We note nothing in the Tort Claims Act prohibits Appellants from pursuing a nuisance theory in order to seek an injunction to abate the nuisance. *See* S.C. Code Ann. § 15-78-50(c) (2005). However, as framed in Appellant's complaint and the briefs, the basis of Appellants' nuisance claims is "[b]y breaching the Deed Restrictions, the Town has allowed the overgrowth of the vegetation on the accreted land into a maritime forest that serves as breeding grown[d] for pests and varmint, poses a fire hazard, and provides cover for criminal behavior." Appellants assert, "[e]quity demands that the Town Government abate these dangers and honor its contractual obligations to the citizens of Sullivan's Island." Appellants' arguments sound in contract, not in tort. Indeed, Appellants acknowledged as much during oral argument. Because we find the contract does not require the Town to clear the land, we also affirm the master's order granting summary judgment on Appellants' nuisance cause of action.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.[4]

WILLIAMS and KONDUROS, JJ., concur.

[4]Appellants also assert the master erred by: (1) finding Appellants could not prove an injury because they had not requested a permit from SCDHEC to allow them to cut on the property; and (2) finding the Tort Claims Act provides the Town with immunity from a claim for breach of contract accompanied by a fraudulent act. Because we find the town has not breached a contract, we decline to reach these additional sustaining grounds. *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 the disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norwest Properties, LLC, Appellant,

v.

Michael T. Strebler, Lisa W. Strebler, and Paul J. Mitchell, Defendants,

Of whom Michael T. Strebler and Lisa W. Strebler are the Respondents.

Appellate Case No. 2016-000636

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 5582
Submitted May 1, 2018 – Filed August 1, 2018

REVERSED

Kathleen Chewning Barnes, of Barnes Law Firm, LLC, of Hampton; Phillip Anthony Curiale, of Auburn, WA; and Brian L. Boger, of Columbia; all for Appellant.

Robert L. Widener and Andrew Gordon Melling, both of McNair Law Firm, PA, of Columbia, for Respondents.

HILL, J.: This is an appeal from a damages award arising from the failed sale of a residential lot. The Master awarded the Seller, Respondents Michael T. Strebler and

Lisa W. Strebler (collectively "Seller"), $40,388 in damages for breach of contract. The Buyer, Appellant Norwest Properties, LLC, appeals claiming the award (except $350 in costs) constitutes special damages that Seller failed to plead. We agree, and reverse.

I.

Shortly after listing the lot for sale in 2005, Seller accepted Buyer's offer for the $175,000 asking price. The parties signed a contract and set a closing date. Buyer commissioned a survey of the lot, which revealed numerous encroachments on the property by an adjoining landowner, Paul J. Mitchell. It transpired Seller had previously granted Mitchell permission for the encroachments, which were never recorded or otherwise memorialized.

After reviewing the survey, Buyer requested Seller remove the encroachments before closing. The closing date passed without resolution.

On November 18, 2005, Buyer sued Seller for specific performance and breach of contract. Seller appeared *pro se*, filing an Answer denying Buyer's allegations and asserting Buyer breached the contract. The only reference to any claim for damages appears in Seller's prayer for relief, which asks for "costs and damages."

The Master held a bench trial on November 9, 2009. The only testimony at this hearing related to Seller's breach of contract damages occurs amidst the following brief exchange while Mr. Strebler is on the stand:

Mr. Strebler:	[I]s it appropriate in my testimony to ask for damages, as I sit here?
THE COURT:	Well - - in your Pleadings did you ask for damages?
Mr. Strebler:	Yes, I did, Your Honor.
THE COURT:	Okay, you can go ahead and talk about it.
Mr. Strebler:	[Seller] would like - - in the Pleadings has asked for damages. [Seller] has been damaged to the extent that he has costs of ownership beyond August 31, 2005, the contractual closing date. Those costs are financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs of administration. And further, [Seller] requests damages for resources expended in defending this action. Thank you, Your Honor.

On May 20, 2010, the Master ruled Buyer did not prove Seller breached the contract. Instead, the Master found Buyer breached the contract, the contract was invalid, and Mitchell had an easement on the property. The Master ordered that "[Seller] be awarded his costs and damages in this case in accordance with Paragraph 20 of the Contract. [Seller] shall submit those actual amounts with supporting documentation to the Court for final determination of the amount of this award."

On May 16, 2011, Seller filed a "motion to approve" the amount of damages, and attached a spreadsheet detailing its damages, which totaled $48,713.00 and included: (1) $6,842.00 in real estate taxes from 2005-2011; (2) $2,2560.00 in homeowners' association fees; (3) $8,325.00 in Seller's "professional time" defending the action *pro se*; (4) $350.00 in litigation costs; and (5) $30,637.00 in "carrying costs" based on the interest accrued on the line of credit used to finance ownership of the lot. It appears Seller sold the property to Mitchell in 2011 for $175,000.

In response, Buyer promptly filed a memorandum opposing Seller's damages request. At the July 29, 2011 damages hearing, Buyer presented numerous grounds for denying Seller's motion, including repeated attacks on Seller's failure to plead special damages.

On October 23, 2015, Seller asked the court for "an order approving" their motion. On March 1, 2016[1], the Master issued an order granting the motion and awarded Seller $40,388.00, which represented all of Seller's requested damages except the claimed "professional time." Buyer appeals from that order, which we now reverse.

II.

We first address Seller's error preservation claims, which we can quickly jettison. Because Buyer did not appeal the May 2010 Order or the January 2011 Order denying Buyer's Rule 59(e), SCRCP, motion, Seller reasons those orders have become the law of the case. However, neither of those orders was a final ruling on the damages amount, given the Master expressly left the damages issue open for later determination. There was no final damages order to appeal until the 2016 Order was issued. *See Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final."); *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942) ("A

[1] The remarkable delays between the hearings and orders have not been explained.

judgement, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause . . . as to all the parties, reserving no further questions or directions for future determination. It must . . . leav[e] nothing to be done but to enforce by execution what has been determined." (quoting 2 Am. Jur. 860, § 22)).

Seller also insists the special damages issue is unpreserved because Buyer did not file a 59(e) motion regarding its special damages argument. As we shall see, Buyer raised their objections and arguments against special damages to the Master before and during the damages hearing. Buyer's argument—that special damages were improper because unpled—was rejected when the Master awarded Seller special damages. *See Spence v. Wingate*, 381 S.C. 487, 489–90, 674 S.E.2d 169, 170 (2009) (where trial judge's order granted respondents' motion for summary judgment on precisely the grounds argued by respondents at summary judgment hearing, but did not restate the ground on which appellant opposed the motion, the ruling was sufficient to preserve appellant's argument, and appellant was not required to file a Rule 59(e) motion to preserve the issue for appeal). Accordingly, we find Buyer preserved its issues for appeal and turn our attention to the merits.

III.

Review of the trial court's damages award is limited to correcting errors of law. *McNaughton v. Charleston Charter Sch. For Math & Sci., Inc.*, 411 S.C. 249, 262, 768 S.E.2d 389, 396 (2015). Buyer argues the Master erred in awarding damages to Seller, except the $350 in litigation costs, because they are special damages, which Seller failed to plead. We agree.

General damages are those the law infers because they are the proximate and necessary result of the wrong. Special damages do not necessarily arise from the wrong, but from facts unique to the case. "Damages for losses that are the natural and proximate, but not the *necessary,* result of the injury may be recovered only when such special damages are sufficiently stated and claimed." *Sheek v. Lee*, 289 S.C. 327, 328–29, 345 S.E.2d 496, 497 (1986) (quoting *Hobbs v. Carolina Coca-Cola Bottling Co.*, 194 S.C. 543, 10 S.E.2d 25, 28 (1940)). Unlike general contract damages—those every contracting party knows are likely to ensue in the event of a breach—special damages are recoverable only if, when the contract was formed, the breaching party had reason to foresee (or was clearly warned of) their probable consequence. *See Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992) (noting although "the defendant need not foresee the exact dollar

amount of the injury, the defendant must know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result . . . . "); *see also McNaughton*, 411 S.C. at 261–62, 768 S.E.2d at 396. Because foreseeability is the key condition of their recovery, special damages must be specifically pled to alert the breaching party that something more than generic breach of contract damages are in play. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("Special damages must . . . be specifically alleged in the complaint to avoid surprise to the other party.").

Seller's claim for property taxes, homeowners' association fees, and carrying costs are special damages in an action for breach of a real estate contract. The Master's order awarding special damages incorrectly states that "[Seller], in their Answer, requested costs and damages, including reimbursement of property taxes on the property at issue for the years 2006, 2007, 2008 and 2009, as well as the holding costs of the property." Even construing Seller's scant Answer as a counterclaim for breach of contract, *see* Rule 8(c), SCRCP, it does not request special damages and does not mention property taxes, carrying costs, or homeowners' association fees. Thus, we find no evidence Seller specifically pled special damages. *See* Rule 9(g), SCRCP ("When items of special damage are claimed, they shall be specifically stated."); Terry E. Richardson & Daniel S. Haltiwanger, *South Carolina Damages*, § 4-2 (2004) ("Proper pleading and proof are critical in supporting a case for special damages.").

Seller nevertheless claims the parties tried the special damages by implied consent. Rule 15(b), SCRCP, covers two situations involving amendments to conform to the evidence:

> First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary . . . Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial.

Sunvillas Homeowners Ass'n, Inc. v. Square D Co., 301 S.C. 330, 334–35, 391 S.E.2d 868, 871 (Ct. App. 1990).

An issue cannot be tried by implied consent when one party expressly objects. Seller, however, contends Mr. Strebler's brief testimony at the 2009 hearing was enough to inject the issue of special damages into the case, and Buyer's failure to object before the Master's 2010 order now bars Buyer from disputing it consented to trying the issue of special damages.

We find several problems with Seller's argument. First, for an issue to have been tried by implicit consent, it "must have been discussed extensively at trial." *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002). Mr. Strebler's comments at the 2009 hearing were more of an aside than an extensive discussion, and no concrete evidence of the methodology or amount of his special damages accompanied his short monologue.

The second and more glaring problem is that no specific final judgment amount was sought or included in the 2010 order. Instead, that order notes damages would be finally determined at a later hearing, a reality Seller acknowledged by filing its "motion to approve damages." We hold Buyer's memorandum opposing the motion, as well as its arguments at the damages hearing pointing to Seller's failure to plead special damages, constituted timely and proper objections to the Master's consideration of special damages. These objections triggered the following provision of Rule 15(b):

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits . . . . Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.

Rule 15(b), SCRCP.

Absent an objection, Rule 15(b) allows a court to amend the pleadings to conform to the evidence, but "when there is no consent to try an unpleaded issue, as manifested by a trial objection to evidence only relevant to the unpleaded issue, a court may not amend without a formal motion." 3 James Wm. Moore et al., Moore's Federal Practice §15.18[3] (3d ed. 2018). Although the spirit of the modern procedural rules is to promote pleading flexibility to ensure disputes are decided on their merits rather than the whims of formalism, Rule 15(b) reminds us that pleading is not altogether formless, and issues cannot enter a trial by stealth.

Because Buyer objected to the special damages and Seller did not move to amend, the Master was powerless to amend the pleadings on his own or consider the issue of special damages. One federal court of appeals has outlined the procedure federal rule 15(b) demands in this scenario, which we adopt:

> Th[e] mechanism for implying an amendment is not available if the opposing party objects to evidence pertaining to a new claim. Instead, upon objection by the opposing party, . . . the pleadings may be amended if the party files a motion to amend the complaint and the objecting party fails to satisfy the court that it will be prejudiced by the amendment. The party must expressly move under Rule 15(b) for such an amendment. *Moncrief,* 174 F.3d at 1163 n. 7 ("A court may not *sua sponte* invoke the second portion of Rule 15(b)."). Accordingly, when proper objections have been made but no Rule 15(b) motion has been filed, the lack of prejudice to a party does not provide a basis for an amendment.

Green Country Food Mkt., Inc. v. Bottling Grp., LLC, 371 F.3d 1275, 1280–81 (10th Cir. 2004). Rule 15(b), SCRCP, is similar to its federal counterpart, but even more exacting when it comes to amendments granted over objection, as it requires the trial court to document justification for the amendment on the record.

Because Buyer objected to the unpled special damages, and Seller never moved to amend its pleadings, Seller's pleadings were never amended to claim special damages, and that issue was not tried by consent. We therefore reverse the damages award, except the $350 in unappealed costs.

REVERSED.[2]

SHORT and THOMAS, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leisel Paradis, Appellant,

v.

Charleston County School District, James Island Charter High School, Robert Bohnstengel and Stephanie Spann, in their individual capacities, Respondents.

Appellate Case No. 2016-001337

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

Opinion No. 5583
Heard June 5, 2018 – Filed August 1, 2018

AFFIRMED

J. Lewis Cromer and James Paul Porter, of Cromer Babb Porter & Hicks, LLC, of Columbia, for Appellant.

Bob J. Conley and Emmanuel Joseph Ferguson, of Cleveland & Conley, LLC, of Charleston, for Respondents Charleston County School District and Robert Bohnstengel.

Rene Stuhr Dukes, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondents James Charter High School and Stephanie Spann.

LOCKEMY, C.J.: In this civil case, Leisel Paradis appeals the circuit court's order granting Charleston County School District's, James Island Charter High School's, Robert Bohnstengel's, and Stephanie Spann's (collectively, Respondents) motions to dismiss her lawsuit asserting claims for defamation and civil conspiracy. We affirm.

FACTS

Paradis was employed as a teacher at James Island Charter High School (JICHS), which is located within the Charleston County School District. Bohnstengel was the principal at JICHS during part of the 2013-14 school year and Spann was the assistant principal at JICHS during the 2013-14 and 2014-15 school years.

At the close of the 2012-13 school year, Paradis received notice she would be placed on an evaluation protocol to correct deficiencies identified by school administrators. After two years of evaluations, Respondents determined Paradis did not correct the identified deficiencies and terminated her. Thereafter, Paradis filed this action alleging claims for defamation and civil conspiracy. Respondents moved to dismiss her complaint. The circuit court granted the motions. This appeal followed.

STANDARD OF REVIEW

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). "A 12(b)(6)[, SCRCP] motion should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'" *Id.* (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.*

DEFAMATION

"The tort of defamation permits a plaintiff to recover for injury to her reputation as the result of the defendant's communications to others of a false message about the plaintiff." *McBride v. School Dist. of Greenville Cty.*, 389 S.C. 546, 559, 698 S.E.2d 845, 852 (Ct. App. 2010). The plaintiff in a defamation action must prove "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id*. at 559-60, 698 S.E.2d at 852 (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id*. at 560, 698 S.E.2d at 852 (quoting *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860).

"A statement is classified as defamatory *per se* when the meaning or message is obvious on its face, and defamatory *per quod* when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement." *Id*. "Even '[a] mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain.'" *Id*. (quoting *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001)). "However, when the statement is defamatory *per quod,* 'the plaintiff must introduce extrinsic facts to prove the defamatory meaning.'" *Id*. (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

"Additionally, a statement may be actionable *per se* or not actionable *per se*." *Id.* "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." *Id.* (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664). "When the statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages." *Id.* "When the statement is not actionable *per se*, 'the plaintiff must plead and prove both common law malice and special damages.'" *Id.* (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664). "Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights." *Id.* (quoting *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665). "Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in

one's business or profession." *Id*. at 560-61, 698 S.E.2d at 852 (quoting *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001)).

The circuit court granted Respondents' motions for a directed verdict, finding Paradis's defamation claim was barred by sovereign immunity. The circuit court found the South Carolina Tort Claims Act (SCTCA) did not waive Respondents' sovereign immunity for performing their statutory duty to assess each teacher's competence. The circuit court also found Paradis's claim was barred by the two-year statute of limitations applicable to defamation. Finally, the circuit court found Paradis failed to state facts sufficient to constitute a cause of action for defamation.

"The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." *Proctor v. Dep't of Health & Envtl. Ctrl.*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005)). "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained" within the SCTCA. S.C. Code Ann. § 15-78-40 (2005). However, the General Assembly did not intend to waive all its sovereign immunity. "The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter." S.C. Code Ann. § 15-78-20(b) (2005). Specifically, the SCTCA provides a "governmental entity is not liable for a loss resulting from: . . . the exercise of discretion or judgment by the governmental entity or employee." S.C. Code Ann. § 15-78-60(5) (2005).

We find the circuit court properly dismissed Paradis's defamation claim against Respondents because the actions Paradis alleges were defamatory were discretionary acts by governmental employees. Paradis's complaint alleges she was assaulted by a student in her classroom and told Bohnstengel she planned to file a police report documenting the incident. Paradis claimed Bohnstengel became angry with her and discouraged her from filing a report, as it would harm the school's reputation. Subsequently, Spann recommended Paradis be placed on the SAFE-T/ADEPT evaluation for the 2013-2014 school year based on the

number of disciplinary referrals she made. Paradis claimed she was shocked because she had recently passed a separate goals based evaluation.

Spann and another administrator, Maureen Jessup[1], evaluated Paradis during the 2013-14 school year. Based on their observations, the administrators decided Paradis failed her evaluation. In order to continue working, Paradis was required to undergo the same evaluation during the 2014-15 school year. Spann, Richard Gordon, the new principal at JICHS, and Susan Watson-Bell served as Paradis's evaluators. Paradis claimed the evaluation team periodically changed her requirements and she subsequently failed another evaluation. Paradis was then terminated.[2]

Paradis's complaint states she "was slandered by oral and written statements as well as by actions of the Defendant District and Defendant JICHS." She further claimed, "These statements and actions, including false accusations that Plaintiff could not effectively teach her students and manage her classroom, injured Plaintiff in her trade business and profession." Furthermore, "By virtue of placing and holding Plaintiff on the evaluation process for two years – which was widely known at JICHS – Plaintiff's credibility as a teacher was diminished greatly."

During the motion hearing Paradis attempted to provide context for her claims. Paradis told the circuit court "there are several things that were defamatory in this case, not only the evaluation itself, but also the act of termination due to the results of the evaluation." Paradis claimed she never should have been placed on the evaluation plan as she passed the previous goals based evaluation.

In essence, Paradis asserts the act of improperly placing her on the SAFE-T/ADEPT evaluation was itself defamation, without requiring any other actions by school employees. Paradis does not indicate any of the administrators improperly discussed her case with other employees or outside individuals. Furthermore, in Paradis's motion to reconsider following the circuit court's order, she continued to focus her argument on her placement on the evaluation plan, not on statements made to other individuals. It is the responsibility of education administrators to continually evaluate faculty members they supervise. S.C. Code Ann.

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[1] Initially, Bohnstengel served as one of Paradis's evaluators. However, before the evaluation finished, Bohnstengel was terminated. Jessup completed the evaluation.
[2] Paradis exhausted her administrative remedies following her termination.

§ 59-26-40(J) (Supp. 2017) ("Teachers employed under a continuing contract must be evaluated on a continuous basis. At the discretion of the local district and based on an individual teacher's needs and past performance, the evaluation may be formal or informal."). Ordinarily, acts can constitute defamation; however, in this case, Paradis is claiming Respondents defamed her by utilizing the discretion given them by state law to place her on an evaluation plan. The SCTCA specifically excludes liability for this type of exercise of discretion. S.C. Code Ann. § 15-78-60(5) (stating a "governmental entity is not liable for a loss resulting from: . . . the exercise of discretion or judgment by the governmental entity or employee"). Accordingly, we affirm the circuit court's dismissal of Paradis's defamation claim because the General Assembly has not waived its right to sovereign immunity with regard to the evaluation process for teachers.

We recognize the circuit court did not address Paradis's assertions she "was slandered by oral and written statements as well as by actions of the Defendant District and Defendant JICHS" because Paradis's argument during the hearing on the motion to dismiss focused solely on the evaluation process. In her brief, however, Paradis asserts her defamation claim "involves the words and conduct associated with her being maintained on the SAFE-T plan throughout the 2013-2014 school year, her continuation on that plan for 2014-2015, her termination, and publications to non-privileged co-workers." Therefore, we must also determine whether her claims that school administrators made false statements about her ability to teach are sufficient to overcome a motion to dismiss. We find they are not.

In deciding whether a claim should be dismissed pursuant to Rule 12(b)(6), SCRCP, this court should consider whether Paradis has "state[d] facts sufficient to constitute a cause of action." "Rule 12(b)(6), SCRCP, 'retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.'" *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 93 (2nd ed. 1996)). When a plaintiff states nothing more than legal conclusions, a claim should fail. *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889). Paradis failed to provide any *facts* to support her claims. She states she "was slandered by oral and written statements as well as by actions of the Defendant District and Defendant JICHS" and "[t]hese statements and actions, including false accusations that Plaintiff could not effectively teach her students and manage her classroom, injured Plaintiff in her

trade business and profession." She never indicates who made defamatory statements about her, what they said, or to whom those statements were published. We recognize the pleadings must be liberally construed. *Gaskins*, 343 S.C. at 671, 541 S.E.2d at 271. Rule 12(b)(6) requires the plaintiff to allege facts. Paradis failed to do so. Accordingly, we affirm the circuit court's order dismissing her defamation claim.

CIVIL CONSPIRACY

"The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing special damage." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas, in civil conspiracy, the gravamen of the tort is the damage resulting from an overt act done pursuant to a common design." *Id*.

"A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Id*. "Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id*.

Paradis asserted Bohnstengel and Spann "met, conspired, schemed and planned with others to rebuke [her] and cause her special damages in an evil and personal agenda motivated from a personal dislike of Plaintiff and her valid complaints about discipline issues." Paradis claimed Bohnstengel and Spann "were able to specially [sic] inflict their evil agenda upon the Plaintiff and did so outside the scope of their own employment . . . [by] targeting the Plaintiff for an unwanted and invasive evaluation." According to Paradis, "[s]uch actions taken by the Defendants and others amount to an unlawful civil conspiracy and approximately cause [sic] special damages to the Plaintiff for being blacklisted and ostracized from the profession of education." As a remedy, Paradis requested actual and punitive damages, along with attorney's fees and costs associated with the civil conspiracy cause of action.

The circuit court dismissed Paradis's civil conspiracy claim, finding she failed to state with specificity the special damages she sustained as a result of Bohnstengel

and Spann's alleged conspiracy and the actions she alleges constituted the conspiracy were done in the scope of Bohnstengel's and Spann's employment.

"Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct." *Hackworth*, 385 S.C. at 116, 682 S.E.2d at 875. "General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of." *Id*. at 116-17, 682 S.E.2d at 875. "Special damages, on the other hand, are not implied at law because they do not necessarily result from the wrong." *Id*. at 117, 682 S.E.2d at 875. "Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party." *Id*. "If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Id*.

The circuit court found "[t]he only mention of special damages in Plaintiff's complaint, beyond the conclusory statement that she sustained them generally, is that she has been ostracized or blacklisted from the profession of education and that she incurred legal fees to pursue the claims set forth in her [c]omplaint." However, the circuit court found "Plaintiff fails to plead any specific facts to support such an assertion, such as an inability to obtain other employment in the education profession." The circuit court further noted Paradis's "alleged damages of being blacklisted and ostracized are simply a re-wording of the 'injury to her professional reputation' that are the claimed damages under her defamation cause of action." Finally, the circuit court found Paradis could not rely on the costs she bore for prosecuting her civil conspiracy claim as special damages.

We note Paradis has on appeal alleged the damages she claims for civil conspiracy and defamation are for different parties and are thus different damages. We decline to address this issue as it was never raised to the circuit court. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Additionally, Paradis asserts the circuit court erred because she sufficiently alleged special damages. She claims the reputational damages she asserts in her defamation claim are separate and distinct from the "alleged damages of being blacklisted and ostracized." However, those reputational damages are precisely the damages one would expect from defamatory statements. Furthermore, in her brief,

Paradis fails to address the circuit court's decision that her attorney's fees would not constitute special damages. Accordingly, we affirm the circuit court's decision that Paradis has failed to plead any damages other than the general damages which arise from alleged defamatory acts. *See Hackworth*, 385 S.C. at 116, 682 S.E.2d at 875 ("General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of.").

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.[3]

WILLIAMS and KONDUROS, JJ., concur.

[3] Paradis also requests this court allow her to amend her complaint if it were to find her defamation and civil conspiracy claim lacking. *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) ("When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice."). We decline to do so. Paradis's request in essence asks this court to reverse the circuit court's decision to not allow her to amend her complaint. However, Paradis did not present the circuit court or this court with any proposed changes she would make to the complaint to cure the deficiencies identified. Accordingly, this court is unable to determine whether the circuit court abused its discretion in denying her request to amend. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) ("A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tashon Hurell, Appellant.

Appellate Case No. 2016-000275

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5584
Heard May 22, 2018 – Filed August 1, 2018

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General J. Benjamin Aplin, and Assistant Attorney General Jennifer Ellis Roberts, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Summerville, all for Respondent.

SHORT, J.: Tashon Earl Hurell appeals his convictions of attempted murder, armed robbery, and kidnapping, arguing the trial court erred by 1) refusing to direct verdicts, 2) admitting irrelevant testimony regarding his brother, 3)

admitting irrelevant evidence regarding shoes, 4) admitting evidence of his laughter when shown a photograph, and 5) refusing to declare a mistrial. We affirm.

BACKGROUND FACTS

Mary Pecorora (the victim) testified she was working the night shift at the Kangaroo convenience store in Summerville on April 23, 2014. While in the bathroom to get supplies, she heard the store buzzer, indicating someone had entered the store. As she approached the front door, someone came around a corner, yelled at her, and hit her in the head with a bat. The perpetrator wore a mask, told her, "You gonna get it[,] *itch," and threatened to cut her throat. The victim testified the perpetrator grabbed her by the neck, dragged her to the cash register, and forced her to open it. He grabbed the money, jumped over the counter, and left. The victim described the perpetrator as approximately 5' 10" or 5' 11", "kind of slender," and African American. She testified he was wearing a ski mask, a bandana, a hooded jacket, gloves, and red shoes. The victim called 911, and officers responded. The victim's injuries required facial and sinus surgeries.

Bernard Nelson of the Summerville Police Department testified he responded to the 911 call. Nelson took numerous photographs of the scene, including photos of a footprint on the counter. Nelson also viewed the store's video surveillance tape. Based on the victim's description and the videotape, Nelson passed a description to other police units of a "black male subject wearing a light hoodie with . . . multi-colored graphic designs on the front. Bright lime green hoodie, black pants, red shoes, black gloves, dark colored bandanna over his face." Nelson also testified the suspect was of medium build, had a husky voice, and was carrying a baseball bat.

Hobie Williams, then of the Summerville Police Department, testified he was a K-9 handler on the night of the robbery. He arrived at the scene and deployed his dog near the rear of the store to track the freshest human odor to be found. The canine tracked to apartments near the store. There is a footpath between the locations, and it takes between thirty and ninety seconds to walk the path. Williams and another officer walked around the first building of the apartment complex and spoke to a male, who was outside on his upper level balcony. The male reported seeing a black male running from around the building carrying a baseball bat and wearing a

dark tee shirt, baseball cap, and dark shorts. He also reported the man jumped the balcony beneath his, drove away in a white Mustang, returned, jumped the balcony again, and left a second time in the Mustang. The witness had never before seen the car at the apartment complex.

Williams testified he saw a dollar bill laying on the ground in the balcony area[1] of the lower unit. Although the ground was wet, the bill was dry and appeared to have blood on it. Williams testified he went into the building and made contact with the occupant of the unit in question. Hurell's sister, Tashima Jones, answered the door. Jones permitted Williams to retrieve the dollar bill from her balcony. Hurell's brother, Traquan, was also in the apartment. Williams identified the dollar bill during the trial.

Lucas Hartman testified he was the man interviewed by Williams. Hartman testified he was on his balcony at approximately 1:30 a.m. when he saw a man wearing black shorts and carrying a baseball bat and backpack approaching from behind the building across from Hartman's building. The men nodded at each other. Hartman next witnessed the man jump over the balcony beneath his balcony. Hartman heard the door open and close before the man came back out, drove away in a white Mustang, returned, and did the "same exact thing." According to Hartman, he assumed the man entered the apartment for a few minutes on each return. Hartman testified that although he was unequivocal about the make of the vehicle in his initial statement, he was not an expert on vehicles and the vehicle may not have been a Mustang. During cross-examination, he admitted he first learned the vehicle could have been a Pontiac Grand Am from Officer Williams. On re-direct examination, Hartman insisted he was never positive the vehicle was a Ford Mustang.

Michael Weaver, a detective with the Summerville Police Department, testified he was the on-call detective on April 23, 2014. Later that day, Weaver obtained a search warrant for Jones's apartment. Because no one was home when he attempted to search, Weaver obtained a key to the apartment from the apartment manager. His search resulted in a bat, a bandanna, and two pairs of red shoes, all

[1] The balcony is also described in the record as a breezeway. The photographic exhibit depicts a porch area on the ground level apartment, enclosed with a waist-high railing.

of which were found to be irrelevant and returned to Jones. After his search and visit to the manager's office to return the key, Weaver noticed a white Pontiac Grand Am in front of the apartment. Because one of the reports had listed a white vehicle rather than a white Mustang, Weaver went back to the apartment because he believed the two vehicle makes were similar. Hurell and his mother, Jana Hurell, were there. The white vehicle was a Pontiac owned by Mrs. Hurell.

Hurell objected to any testimony of his interactions with Weaver, arguing he attempted to end the conversation with law enforcement because Hurell told Weaver, "I'm not giving you anything." During a proffer of the evidence, Weaver's report indicated Hurell walked away from him, then came back and laughed when shown a photograph of the lime green sweatshirt, saying, "[W]hy would someone wear something like this?" The trial court admitted the evidence, and Weaver testified Hurell laughed when shown the photo of the suspect wearing the sweatshirt during the robbery. Weaver claimed Hurell then asked why anyone would wear a sweatshirt like that during something like this.

Travis Holdorf testified he knew Hurell at the time of the robbery and knew Hurell's cell phone number at the time as ***-2320. Marilyn Dilly, of Sprint as a reseller for TracFone,[2] testified as a records custodian of Hurell's cell phone records for the period April 22-24, 2014. George Floyd of Verizon Wireless also testified as a records custodian, and the records for Hurell's cell phone were introduced. Floyd testified there were cell towers at 10870 Dorchester Road and at 132 Trailing Alley, both in Summerville. According to Floyd, towers in rural areas such as the Summerville towers are between three and five miles apart.

Detective Weaver testified he obtained Traquan's phone records. At the time of the robbery, Traquan was on the phone from 12:21 a.m. until 2:11 a.m. He then hung up for a few moments and got back on the phone at 2:12 a.m. As to Hurell's phone, there was no activity during the time the robbery was commenced between 12:55 a.m. and 1:10 a.m. His phone was used beginning at 1:10 a.m. and pinged off the cell tower on Dorchester Road near the store. It switched to the cell tower near Hurell's mother's house, then back to the tower on Dorchester Road over an eighteen minute period. The phone was used again at 7:08 a.m. at the tower near

[2] Dilly testified TracFone is a reseller of Sprint, sells prepaid phones, and keeps its own records.

the store. The phone then repeatedly called the telephone number for the Greyhound Bus Lines at 8:41 a.m.

The State called Shelby Bradt, the former girlfriend of Hurell's brother, Tremaine. Hurell objected, arguing her testimony would be to claim the perpetrator on the store videotape was not Tramaine, the evidence was inadmissible as lay opinion testimony, and it was irrelevant. The court overruled the objection, and Bradt testified she viewed the store videotape and the perpetrator did not look or sound like Tramaine. Bradt also testified she had never seen Tramaine wearing the green sweatshirt.

Weaver retrieved the South Carolina Department of Motor Vehicle (DMV) records for Jones's address, which indicated the residents were Jones, Hurell, and Traquan. Weaver created three six-pack photo lineups, each of which included one of the three Hurell brothers: Hurell, Traquan, and Tramaine. The victim identified Tramaine, whom she recognized as a regular customer, as having been outside the store when her shift began the night of the robbery, but she could not identify the perpetrator. Weaver also testified he reviewed the video of the robbery with the victim and neither he nor the victim thought the perpetrator sounded like Tramaine.

Tashima Jones, Hurell's sister, testified she lived in the apartment with Traquan and her son at the time of the robbery. According to Jones, Hurell alternately lived with their mother and his girlfriend. She testified she did not recognize the green sweatshirt. During direct testimony, Jones was asked about Hurell listing her address as his own with the DMV. She replied, "Prior to him getting out from serving some time, . . ." Hurell moved for a mistrial. After conferring with Hurell, his attorney withdrew the motion. Outside of the presence of the jury, the court questioned Hurell about the withdrawal of the motion and cautioned Jones, Tramaine, and Traquan about referring to Hurell's prior criminal activities while testifying.

Detectives Weaver and Nick Santana interviewed Hurell's brother, Traquan, at Bi-Lo, where Traquan worked. Traquan testified he was shown the video of the robbery, he did not recognize the perpetrator, and the green sweatshirt was not his. Detective Weaver was recalled and testified Traquan told him during an initial interview that the character on the sweatshirt was a Tasmanian Devil and the

sweatshirt had been given to him by a friend. Santana testified he assisted during the investigation and was present when Traquan recognized the sweatshirt.

Weaver reviewed Hurell's Facebook page and saw photographs of shoes similar to those worn by the perpetrator. Derek Cheek, then of the Dorchester County Sheriff's Office, testified he reviewed the Facebook photographs in the investigatory file and noted Hurell wearing red and black shoes similar to those worn by the perpetrator in the surveillance videotape. Cheek also testified he reviewed websites of shoes, and a tread pattern in blood found at the site of the robbery was consistent with the tread pattern of red and black Nike shoes similar to those seen on the videotape. Hurell objected to the shoe evidence as irrelevant.

Samuel Stewart, a DNA analyst with the South Carolina Law Enforcement Division (SLED), testified as an expert that the blood on the dollar bill found outside Jones's apartment matched the victim's blood.

The State rested. Hurell moved for directed verdicts on all charges, which the court denied. Hurell moved for a mistrial when the jury requested to review his sister's testimony again, and asked, "Did she say when he got out he sometimes stayed with her?" The jury subsequently sent a note to disregard the previous note. The court denied the motion for a mistrial. After more than four hours of deliberation, the court gave an *Allen*[3] charge. After the jury rendered its verdicts of guilty on all three charges, Hurell renewed his motion for a mistrial and moved to set aside the verdicts. The trial court denied the motions and sentenced Hurell to three concurrent thirty year terms of imprisonment.

STANDARD OF REVIEW

The appellate court sits to review criminal cases for errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law."

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[3] *Allen v. United States*, 164 U.S. 492, 501 (1896) (discussing the jury charge given by a trial judge to encourage a deadlocked jury to reach a verdict).

State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (quoting *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2011)).

LAW/ANALYSIS

I. ADMISSION OF EVIDENCE

Hurell argues the trial court committed three errors in the admission of evidence. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

A. Bradt's Testimony

Hurell first argues the trial court erred by allowing Shelby Bradt, the former girlfriend of Hurell's brother Tramaine, to testify the man on the videotape was not Tramaine. Hurell argues the evidence was confusing to the jury. The State argues the evidence was relevant to eliminate alternative suspects because the evidence showed the suspect went into the apartment where Hurell's sister lived and anyone who also had a connection to Hurell's sister could have been a suspect.

Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

In *State v. Fripp*, 396 S.C. 434, 437-38, 721 S.E.2d 465, 466 (Ct. App. 2012), the State elicited the testimony of a store manager and store employee who witnessed a robbery at their store. Although the perpetrator was wearing a jacket pulled over his head, the manager identified Fripp as the perpetrator depicted on the store videotape. *Id.* The store employee also testified Fripp was the man on the videotape. *Id.* at 438, 721 S.E.2d at 466. On appeal, Fripp argued the trial court erred in permitting the witnesses to identify him as the perpetrator depicted on the videotape. *Id.* at 438, 721 S.E.2d at 467.

This court affirmed, finding the "the criteria set forth in Rule 701 [were] met." *Id.* at 439, 721 S.E.2d at 467. The court first noted the testimony of the employees was based on their perceptions of Fripp "not only on the videotape, but during the time they had known and observed him in the [s]tore." *Id*. The manager testified she knew Fripp from seeing him in the store as often as twice a day. *Id.* The employee testified "she had worked at the [s]tore for several years and also knew Fripp through his family." *Id.* The court found the testimony was "helpful in determining a key fact in issue—whether Fripp was the person depicted on the videotape." *Id.*

We likewise find Bradt's testimony was properly admitted. Bradt testified she had known Hurell's brother as a boyfriend; thus, her perceptions of the videotape and opinion that the perpetrator was not the brother were rationally based. In addition, her testimony was helpful in determining a key fact in issue—the identity of the perpetrator.

B. The Red and Black Shoes

Hurell next argues the trial court erred in admitting evidence regarding red and black shoes without a proper foundation and because the evidence was irrelevant. We disagree.

The perpetrator was initially described by the victims and portrayed in the videotape as wearing red shoes. Responding officer Nelson also took photographs

of a footprint on the counter. Cheek testified he reviewed the case file and found a photograph from Facebook depicting Hurell wearing red and black shoes with a white mark, possibly a Nike swoosh. Because the videotape from the robbery also showed the perpetrator wearing red and black shoes, Cheek searched the internet in an attempt to match the tread pattern of the shoes allegedly worn by Hurell in the Facebook page with the tread pattern of the footprint left on the store's counter. Cheek testified the tread pattern from a red and black Nike sold on the Champs Sports website was similar to the tread pattern in the bloody footprint left at the scene. When the State attempted to introduce photographs from the website, Hurell objected, arguing no foundation had been laid and the shoes were not relevant because no shoes had been recovered. The trial court overruled the objections.

We find no error in the trial court's admission of the evidence. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

First, we find the State laid a proper foundation for the photographic evidence.

> Whenever counsel intends to admit photographic evidence into the record, it is necessary to lay proper foundation testimony as to authentication, identification, and verification. The extent of foundation testimony required in each case is largely a function of the purpose for which the photograph is offered.
>
> Normally, it is sufficient for the admission of photographs that a person familiar with the subject, such as a scene, testify that the photographs truly represent what they purport to depict.

Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers* § 19:12 (Sept. 2017). Here, Cheek testified he searched the internet for photographs of shoes matching those seen in the Facebook page. He also testified he made screenshots of the photographs he obtained from the Champs Sports website. We find the State laid an adequate foundation for the admissibility of the photographs.

Second, we find the evidence was relevant. "Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003); *see* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008).

We find the photographs were relevant to identifying Hurell as the perpetrator. The surveillance video portrayed red and black shoes, and Hurell was portrayed wearing similar red and black shoes in a Facebook photograph. Accordingly, the trial court did not err in permitting the State to attempt to match tread marks from similar looking shoes to those found in the bloody footprint at the scene using photographs.

C. Hurell's Laughter

Hurell argues the trial court erred by allowing Detective Weaver to testify Hurell laughed when shown a photograph of the bright green sweatshirt worn by the perpetrator during the robbery because it was irrelevant and any probative value was substantially outweighed by its unduly prejudicial effect. We disagree.

Hurell argued during the proffer of the evidence that Hurell's laughter was not relevant and was extremely prejudicial because it "attempt[ed] to paint him as cold-hearted or villainous." The court stated, "Hurell made apparently, I thought, a humorous comment . . . . Who would wear something like that to do something like that . . . or something to that inclination." In ruling the testimony was admissible, the court found, "My take on that is not the same take that you're taking out from it. . . . [T]o me, it seems to me someone who doesn't have to worry about it. Not someone who's being callously indifferent."

Hurell argues the evidence was "gratuitous bad character evidence" that was not relevant and indicated he was the type of person who would commit such a crime. Propensity evidence is not admissible to prove a defendant has the inclination or propensity to commit the crime with which he is charged. *State v. Nelson,* 331 S.C. 1, 6, 501 S.E.2d 716, 719 (1998). We agree with the trial court that this evidence did not unfairly suggest Hurell had the propensity to commit the crimes charged. Thus, we find no error in its admission. *See State v. Oglesby,* 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("The admission of evidence is within the sound discretion of the trial court.").

II. DIRECTED VERDICTS

Hurell argues the trial court erred by refusing to direct verdicts on all three counts where the State's circumstantial evidence raised only a suspicion of guilt, and the trial court incorrectly reasoned the directed verdict standard had changed. We disagree.

In deliberating on Hurell's motions for directed verdicts, the trial court stated it "must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." The court went on to review the circumstantial evidence of guilt and concluded, "a reasonable juror could believe ever[y] step in the chain." Thus, it denied the motions.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010). "[A] court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). "On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

We find no error by the trial court in reviewing the motion for a directed verdict or in its application of the directed verdict standard. First, there was circumstantial evidence the perpetrator went from the store to the apartment and was the same person seen carrying a baseball bat and entering Hurell's sister's apartment. There was also evidence the perpetrator was known to Hurell's sister because the bloody dollar bill matching the victim's DNA was found on her porch. In addition, there was evidence Hurell's brother owned a sweatshirt similar to the distinctive one worn by the perpetrator. There was also circumstantial evidence the perpetrator used Hurell's mother's vehicle. Next, there was evidence Hurell's cell phone was used in the area near the time of the incident and was used to call the Greyhound Bus Lines numerous times later that morning. Finally, there was a Facebook photograph indicating Hurell owned shoes similar to those seen being worn by the perpetrator in the video. We find substantial circumstantial evidence existed.

We also find the trial court applied the correct standard in reviewing the motions. It is not the trial court's function to weigh the evidence; rather, it must view the evidence in the light most favorable to the State and submit the case to the jury if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused. *Bennett*, 415 S.C. at 236-37, 781 S.E.2d at 354. We find the evidence presented was sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. *See id*. at 237, 781 S.E.2d at 354 ("[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.").

III. MISTRIAL

Hurell argues the trial court erred by refusing to declare a mistrial after Hurell's sister inadvertently told the jury he had been in prison as the result of a prior conviction. We disagree.

At the time of the reference to Hurell's prior prison time, Hurell's counsel moved for a mistrial. After consultation with Hurell, the motion was withdrawn. Outside of the presence of the jury, the court cautioned all of Hurell's relatives not to comment on whether Hurell had ever served time in jail or been charged with any type of criminal offense.

During jury deliberations, the jury sent two notes to the trial court. The first note requested to review the sister's testimony, asking, "Did she say when he got out he sometimes stayed with her?" The second note stated, "[P]lease disregard the last request." Hurell's counsel argued, "I think it's telling, that's the part they want to know about. Because they've got when he got out in parenthes[e]s. . . . Clearly, this is a topic of conversation within the jury room." Hurell moved for a mistrial.

The trial court found the first note "was a concern to the [c]ourt and had that been a question the [c]ourt was going to have to resolve, I would have reconsidered your motion for a mistrial. But since [the jury] immediately came back and said, please disregard it, I am taking the position that [it was] disregarding that question as well . . . . Based upon that interpretation of the questions by the jury, I am going to deny your motion for [a] mistrial."

"The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "A mistrial should not be granted unless absolutely necessary." *Id.* at 13, 515 S.E.2d at 514. "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Id.* We find no abuse of discretion by the trial court. Further, we find Hurell has not shown prejudice. *See State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."); *State v. Manning*, 400 S.C. 257, 270, 734 S.E.2d 314, 320 (Ct. App. 2012) (holding a single reference to a severed charge did not constitute sufficient prejudice to warrant a mistrial).

AFFIRMED.

THOMAS and HILL, JJ., concur.