Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

August 11, 2010

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (T-Th).

The Commission will not accept applications after 12:00 Noon on Monday, September 13, 2010.

A vacancy will exist in the office held by the Honorable J. Michelle Childs, Judge of the Circuit Court, At Large, Seat 9, upon her resignation effective on or before August 19, 2010, in order to serve as a Judge for the United States District Court, District of South Carolina. The successor will fill the unexpired term of that office, which will expire June 30, 2015.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/html-pages/judmerit.html

Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

August 12, 2010
M E D I A R E L E A S E

Public Hearings have been scheduled to begin Tuesday, November 16, 2010, commencing at 9 a.m. regarding the qualifications of the following candidates for judicial positions:

Court of Appeals

Seat 1	**The Honorable Paul E. Short, Jr.,** Chester, S.C.
Seat 2	**The Honorable H. Bruce Williams,** Columbia, S.C.

Circuit Court

5th Circuit, Seat 1	**The Honorable DeAndrea Gist Benjamin,** Columbia, S.C.
5th Circuit, Seat 1	**Lisa C. Glover,** Columbia, S.C.
5th Circuit, Seat 1	**Robert E. Hood,** Columbia, S.C.
5th Circuit, Seat 1	**John P. Meadors,** Columbia, S.C.
5th Circuit, Seat 1	**Andrea Culler Roche,** Columbia, S.C.
5th Circuit, Seat 1	**James Shadd, III,** Columbia, S.C.
5th Circuit, Seat 1	**Larry C. Smith,** Columbia, S.C.
5th Circuit, Seat 1	**The Honorable Jeffrey M. Tzerman,** Camden, S.C.
13th Circuit, Seat 2	**Eric K. Englebardt,** Greenville, S.C.
13th Circuit, Seat 2	**J. Anthony Mabry,** Simpsonville, S.C.
13th Circuit, Seat 2	**Andrew R. Mackenzie,** Greenville, S.C.
13th Circuit, Seat 2	**The Honorable Letita H. Verdin,** Greenville, S.C.

Family Court

9th Circuit, Seat 1	**Amanda Lee Callander,** Charleston, S.C.
9th Circuit, Seat 1	**Emily G. Johnston,** Mt. Pleasant, S.C.
9th Circuit, Seat 1	**Ben F. Mack,** Charleston, S.C.
9th Circuit, Seat 1	**Daniel E. Martin, Jr.,** Charleston, S.C.
9th Circuit, Seat 1	**Rita J. Roache,** Mt. Pleasant, S.C.
9th Circuit, Seat 1	**The Honorable James A. Turner,** Charleston, S.C.
9th Circuit, Seat 1	**Alexandra DeJarnette Varner,** Sullivan's Island, S.C.

Master-in-Equity

Dorchester County	**The Honorable Frederick James Newton,** Summerville, S.C.
Dorchester County	**The Honorable Patrick R. Watts,** Summerville, S.C.

Retired

Court of Appeals	**The Honorable Jasper Marshall Cureton,** Columbia, S.C.
Family Court	**The Honorable Stephen S. Bartlett,** Greenville, S.C.

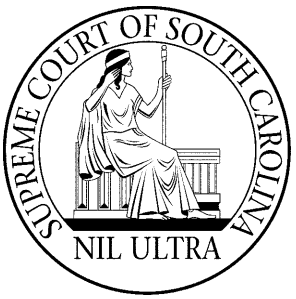
Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony. These statements must be received by **Noon, Tuesday, November 2, 2010**. The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel, 104 Gressette Building, Post Office Box 142, Columbia, South Carolina, 29202.

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.gov/html-pages/judmerit.html.

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6623.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 16, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

2009-OR-00529 – Renee Holland v. Wells Holland	Pending
2009-OR-00841 – J. Doe v. Richard Duncan	Pending
2009-OR-00866 – Don Boyd v. City of Columbia	Pending
2010-OR-00232 – William McKennedy v. State	Pending

EXTENSION TO FILE PETITION FOR REHEARING UNITED STATES SUPREME COURT

2010-OR-00215 – Don Boyd v. Wal-Mart Stores	Granted until 9/3/2010

PETITIONS FOR REHEARING

26786 – Sonya Watson v. Ford Motor Company	Pending
26833 – Carolyn Chester v. SC DPS	Pending
26834 – Fowler v. Hunter	Pending
26836 – Jon Hartfield v. The Getaway Lounge	Pending
26843 – The State v. Ron Finklea	Pending
26844 – Martha Lewis Argoe v. Three Rivers Behavioral Center	Pending
2010-MO-017 – State v. James Nichols Padgett	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2010-UP-381-Same Wayne Vetro, M.D. v. S.C. Department of Labor Licensing and Regulation
(Richland, Administrative Law Judge John McLeod)

2010-UP-382-Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC
(Berkeley, Judge Thomas L. Hughston, Jr.)

2010-UP-383-The State v. Jacques Gibson
(Richland, Judge Steven H. John)

PETITIONS FOR REHEARING

4674-Brown v. James	Denied 07/21/10
4680-State v. Garner	Pending
4685-Wachovia Bank v. Coffey	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4694-Sherlock (London I v. Enterprise)	Pending
4697-State v. D. Brown	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending

4702-Peterson, Frank v. Porter, Charles	Pending
4705-Hudson v. Lancaster Conv.	Pending
4706-Pitts, Patricia v. Fink, Chad	Pending
4707-Richitelli v. Motiva Enterprises	Pending
4708-State v. Webb, Thomas	Pending
4711-Jennings v. Jennings	Pending
4714-State v. Strickland	Pending
4716-Johnson v. Horry County	Pending
2010-UP-276-Ford v. S.Carolina	Pending
2010-UP-298-Graham v. Babb	Pending
2010-UP-300-Motsinger v. Williams	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-314-Clems v. SCDPPPS	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket #2	Pending
2010-UP-343-Birket v. Blackwell	Pending
2010-UP-351-Musick v. Dicks	Pending

2010-UP-352-State v. McKown Pending

2010-UP-355-Nash v. Tara Plantation Pending

2010-UP-356-State v. D. Robinson Pending

2010-UP-362-State v. R. Sanders Pending

2010-UP-369-Island Preservation v. The State Pending

2010-UP-370-State v. J. Black Pending

2010-UP-371-F. Freeman v. SCDC (3) Pending

2010-UP-372-State v. Z. Fowler Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page Pending

4370-Spence v. Wingate Pending

4451-State of South Carolina v. James Dickey Pending

4474-Stringer v. State Farm Pending

4476-Bartley, Sandra v. Allendale County Pending

4480-Christal Moore v. The Barony House Pending

4491-Payen v. Payne Pending

4493-Mazloom v. Mazloom Pending

4510-State v. Hicks, Hoss Pending

4518-Loe #1 and #2 v. Mother Pending

4526-State v. B. Cope Pending

4529-State v. J. Tapp	Pending
4545-State v. Tennant	Pending
4548-Jones v. Enterprise	Pending
4553-Barron v. Labor Finders	Pending
4554-State v. C. Jackson	Pending
4560-State v. C. Commander	Pending
4561-Trotter v. Trane Coil Facility	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Pending
4605-Auto-Owners v. Rhodes	Pending
4606-Foster v. Foster	Pending
4607-Duncan v. Ford Motor	Pending

4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4630-Leggett (Smith v. New York Mutual)	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4653-Ward v. Ward	Pending
4654-Sierra Club v. SCDHEC	Pending

4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending
4666-Southeast Toyota v. Werner	Pending
4670-SCDC v. B. Cartrette	Pending
4671-SCDC v. Tomlin	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things Possible	Pending
4687-State v. D. Syllester	Pending
2008-UP-126-Massey v. Werner	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-668-State v. S. Terry	Dismissed 08/02/10
2009-UP-148-State v. J. Taylor	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-204-State v. R. Johnson	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-276-State v. Byers	Granted 08/05/10
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Baby Spires	Pending

2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-359-State v. P. Cleveland	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-585-Duncan v. SCDC	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending
2009-UP-594-Hammond v. Gerald	Pending

2009-UP-596-M. Todd v. SCDPPPS	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-111-Smith v. Metts	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-162-State v. T. Washington	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-178-SCDSS v. Doss	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending

2010-UP-225-Novak v. Joye, Locklair & Powers	Pending
2010-UP-227-SCDSS v. Faith M.	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-234-In Re: Mortgage (DLJ v. Jones, Boyd	Pending
2010-UP-238-Nexsen, David v. Driggers Marion	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-269-Adam C. v. Margaret B.	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-278-Jones, Dyshum v. SCDC	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Louis Michael Winkler, Jr., Appellant.

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26857
Heard June 24, 2010 – Filed August 16, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender Elizabeth A. Franklin-Best, both of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia, and Solicitor J. Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.[1]

FACTS/PROCEDURAL HISTORY

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.[2] That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

Phyllis Richardson (Richardson) arrived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an

---

[1] This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

[2] Victim was Appellant's estranged wife.

upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at $150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, Jonathan G. (Jonathan), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at Jonathan. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant,[3] they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder

[3] Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, Mary Elizabeth C. (Mary), Jonathan's friend, testified that on the evening of the murder she was on the phone with Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Mary then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched Appellant's blood profile. Cooper testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley

while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

ISSUES

I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?

II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?

III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?

IV. Did the trial court err in not conducting a full *Faretta* inquiry?

V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?

VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are 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) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d

240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

LAW/ANALYSIS

I. Rule 801(d)(1)(B), SCRE

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of Jonathan's interview with police on the evening of the murder. We disagree.

> Prior consistent statements are not hearsay if:
>
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

> (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

Saltz, 346 S.C. at 121-22, 551 S.E.2d at 244.

Jonathan testified that he saw Appellant shoot and kill his mother. During cross examination, Jonathan testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. Jonathan denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. Jonathan also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and Jonathan, "He said he's gone, and I asked him. I said who. . . . He said my dad . . . ." Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with Jonathan on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, Jonathan identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that Jonathan's statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, Jonathan testified at trial and was subject to cross-examination. Second, Appellant accused Jonathan of recently fabricating the statement. Appellant was accusing Jonathan of lying when Jonathan testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, Jonathan's statement to Pitts was consistent with his testimony at trial. Fourth, the

statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence Jonathan's statement to Pitts.

II. 911 Tape

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the jurors were listening to the tape during deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the

evidence was presented at trial.[4] This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.[5]

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); *see also U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a

[4] Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

[5] Issue three condenses Appellant's third and fourth issues on appeal into one issue.

separate trial. *See* S.C. Code Ann. § 16-3-20(B) (2003); *see also State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

IV. *Faretta* Warnings

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*,

the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170. However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.[6]

V. Mitigating Social History

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

[6] Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.

VI. S.C. Code Ann. § 16-3-20(C)(a)(11)

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann. § 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping at the time Victim was murdered. Victim, as the victim in the 2005 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. Jonathan testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. Mary testified she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11),

and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See*, *e.g.*, *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard T. Ray a/k/a Richard Todd Rae, Appellant,

v.

Jonathan H. Austin a/k/a Jonathan Austin Henry, Respondent.

Richard T. Ray a/k/a Richard Todd Rae, Appellant,

v.

Lumbermens Mutual Casualty Company, d/b/a Kemper Insurance Company, Respondent.

Appeal From Anderson and Pickens County
Ellis B. Drew, Jr., Master in Equity Judge

Opinion No. 26858
Heard April 8, 2010 – Filed August 16, 2010

AFFIRMED AS MODIFIED

Samuel Darryl Harms, Harms Law Firm, PA, of Greenville, for Appellant.

M. Todd Loftis, of Howser, Newman & Besley, LLC, Mason A. Summers and David A. Anderson, both of Richardson, Plowden, and Robinson, all of Columbia, for Respondent.

JUSTICE HEARN: In this case, we decide whether Lumbermens Mutual Casualty Company, doing business as Kemper Insurance Company ("Lumbermens"), made a meaningful offer of underinsured motorist coverage ("UIM") to Cintas Corporation ("Cintas"). We find a meaningful offer was made and affirm the circuit court's order granting summary judgment in favor of Lumbermens.

FACTUAL/PROCEDURAL BACKGROUND

Cintas began purchasing automobile insurance from Lumbermens through the insurance brokerage firm of Aon Risk Services Incorporated ("Aon") in 1989. In 1991, Cintas designated Kevin Ryan as its agent to purchase automobile insurance on its behalf. From that point forward, Ryan met and consulted with Tom Purtell, Senior Vice President of Aon, on an annual basis to discuss the insurance options available to Cintas and to renew Cintas's policy. That same year, Cintas adopted the risk management strategy of declining uninsured motorist coverage (UM) and UIM in states where such coverage was not required. For states mandating coverage, Cintas purchased the minimum amount required by law. According to Ryan, Cintas implemented this strategy because it obtained other insurance, namely workers' compensation, to cover injuries sustained by employees while driving vehicles owned by Cintas.

On June 25, 2002, Ryan and Purtell met to renew Cintas's insurance policy with Lumbermens for the upcoming year. At the meeting, Purtell presented Ryan with the insurance policy provided by Lumbermens along with state specific forms offering UM and UIM coverage. Purtell explained

to Ryan that Cintas had the option to purchase UM and UIM coverage in states where coverage was not required. Purtell also gave Ryan the opportunity to review the state specific forms offering UM and UIM coverage and answered Ryan's questions. Thereafter, Ryan signed the insurance policy and accompanying state forms on behalf of Cintas. Consistent with Cintas's risk management strategy, Ryan rejected UM and UIM coverage in states where coverage was not required and purchased the minimum amount required by law in states mandating coverage. Additionally, Cintas's risk management strategy was inserted into the language of the policy as an endorsement. The endorsement read: "For all states, where permitted to do so, the Insured has elected to reject Uninsured and/or Underinsured Motorists coverage. In those states, where the rejection of coverage is not permitted, the lowest permissible coverage limit applies."

The state specific form provided by Lumbermens for South Carolina was entitled "Offer of Optional Additional Uninsured Motorist and Optional Underinsured Motorist Coverage" ("the form"). The form, itself, was four pages long. On pages one and two of the form, it explained the nature of UM and UIM coverage. With regard to UIM coverage, the form stated:

> [Y]ou have the right to buy UIM coverage in limits up to the limits of liability coverage which you will carry under your automobile insurance policy. Some of the more commonly sold limits of underinsured motorist coverage, together with the additional premiums which you will be charged have been printed by your insurance company upon this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits in the blanks provided. If your insurance company is allowed to market those limits within this State, then your insurance agent will fill in the amounts of the increased premium.

On page three, the form contained blank lines for the insurance company to fill in commonly sold limits of UIM coverage along with increases in premium for the selection of such coverage. In the form issued to Ryan, Lumbermens failed to fill in the blanks. Also, on page three, the form asked, "[d]o you wish to purchase underinsured motorist coverage?" During Ryan's deposition, he offered conflicting testimony as to whether he personally checked the "no" box next to this question. Ryan also failed to sign under the "no" box as required by the form. However, Ryan signed the very last page of the form. By signing, Ryan acknowledged he had read the offers of UM and UIM coverage and indicated whether he wished to receive such coverage in the space provided.

Shortly after the policy became effective, Richard Ray, a Cintas employee, was severely injured in an automobile accident when Jonathan Austin failed to stop at a red light and collided with the vehicle driven by Ray. At the time of the accident, Ray was driving a vehicle owned by Cintas.[1] Following the accident, Ray filed a negligence action against Austin. Austin, through his insurance carrier, Safe Auto Insurance Company, agreed to tender the limits of his automobile policy in exchange for Ray entering into a Covenant Not to Execute.[2] Ray then filed a declaratory judgment action against Lumbermens, contending Lumbermens failed to make a meaningful offer of UIM coverage to Cintas.[3] Accordingly, Ray asked the circuit court to reform the policy to provide UIM coverage in an amount equal to the five million dollar liability limits of the policy issued by Lumbermens.

Thereafter, Ray and Lumbermens filed cross-motions for summary judgment. The circuit court denied Ray's motion for summary judgment and granted Lumbermens' motion for summary judgment, finding Lumbermens made a meaningful offer of UIM coverage to Cintas. Specifically, the circuit

---

[1] To date, Ray has received workers' compensation benefits in the amount of $574,823.48.

[2] Austin maintained $15,000 in liability coverage, the minimum required under South Carolina law at the time of the accident.

[3] After the filing of the declaratory judgment action against Lumbermens, Ray's lawsuits against Austin and Lumbermens were consolidated.

court found the form complied with the requirements of section 38-77-350(A)-(B) of the South Carolina Code (Supp. 2009), entitling Lumbermens to the statutory presumption that a meaningful offer was made. In the alternative, the circuit court found Lumbermens made a meaningful offer of UIM coverage under *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987). This appeal followed.

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

LAW/ANALYSIS

Initially, we must determine whether the form complied with the requirements set forth in section 38-77-350(A), entitling Lumbermens to the statutory presumption that a meaningful offer was made. We hold it did not.

Automobile insurance carriers are required to offer UIM coverage up to the limits of the insured's liability coverage. S.C. Code Ann. § 38-77-160 (2002). The insurer bears the burden of establishing that it made a meaningful offer of UIM coverage. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). "[A] noncomplying offer has the legal effect of no offer at all." *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). If the insurer fails to comply with its duty to make a meaningful offer, the policy will be reformed by operation

of law to include UIM coverage up to the limits of liability insurance carried by the insured. *Butler*, 323 S.C. at 405, 475 S.E.2d at 760.

The insurer enjoys a presumption that a meaningful offer of UIM coverage has been made when a form offering UIM coverage complies with the requirements set forth in section 38-77-350(A) and is signed by the named insured. S.C. Code Ann. § 38-77-350(A)-(B). Section 38-77-350(A) provides:

> The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:
>
> (1) a brief and concise explanation of the coverage;
>
> (2) a list of available limits and the range of premiums for the limits;
>
> (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
>
> (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
>
> (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

The circuit court erred in finding the form offering UIM coverage to Cintas complied with the statutory requirements of section 38-77-350(A). Page three of the form contained three blanks for Lumbermens to fill in the commonly sold limits of UIM coverage along with corresponding increases in premium for selecting such coverage. Lumbermens failed to fill in the blanks. Accordingly, the form failed to comply with the requirements of section 38-77-350(A)(2). As such, Lumbermens was not entitled to the statutory presumption that a meaningful offer of UIM coverage was made.

Next, we must determine whether Lumbermens made a meaningful offer of UIM coverage to Cintas under *Wannamaker*.

Even where the insurer is not entitled to the statutory presumption that a meaningful offer of UIM coverage was made, the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under *Wannamaker*. *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005). In *Wannamaker*, this Court established a four part test to determine whether a meaningful offer of UIM coverage has been made. 291 S.C. at 521, 354 S.E.2d at 556. In order for an insurer to make a meaningful offer of UIM coverage:

> (1) the insurer's notification process must be commercially reasonable, whether oral or in writing;
>
> (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
>
> (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and
>
> (4) the insured must be told that optional coverages are available for an additional premium.

Id.

"The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Floyd*, 367 S.C. at 262-63, 626 S.E.2d at 12 (citing *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)). The insurer is required to make a meaningful offer of UIM coverage to commercial insureds even if the insured has expressed a desire not to purchase such coverage. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005). "One who is ignorant and unwary might require more explanation than a sophisticated applicant." *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 376, 415 S.E.2d 406, 409 (Ct. App. 1992). "[E]vidence of the insured's knowledge or level of sophistication is relevant and admissible when analyzing, under *Wannamaker*, whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM coverage." *Croft*, 365 S.C. at 420, 618 S.E.2d at 918.

We find Lumbermens met three of the four *Wannamaker* factors. Initially, Lumbermens notified Cintas of the availability of UIM coverage in a commercially reasonable manner. Consistent with their ten-year course of dealings, Purtell, on behalf of Lumbermens, met with Ryan, Cintas's insurance purchasing agent, to discuss the insurance options available to Cintas. At the meeting, Purtell explained to Ryan that Cintas had the option to purchase UIM coverage. Additionally, Purtell presented Ryan with the form offering UIM coverage. The form itself intelligibly advised Cintas of the nature of UIM coverage. The form explained that UIM coverage is triggered when liability coverage is insufficient to cover the damages of the insured. Finally, the form stated that UIM coverage was available for an additional premium.

The only remaining element to analyze under *Wannamaker* is whether Lumbermens specified the limits of UIM coverage and did not merely offer such coverage in general terms. Lumbermens contends it satisfied this prong of the *Wannamaker* test by advising Cintas of its option to purchase UIM coverage "up to the limits of liability coverage." If we were to find that such

a general statement satisfied this prong of the *Wannamaker* test, we would essentially do away with this element altogether. On the other hand, if we were to find Lumbermens failed to make a meaningful offer of UIM coverage because it failed to offer coverage in more specific terms, we would reach the absurd result of reforming the insurance policy to give Cintas coverage it understood, did not want, and clearly rejected. Moreover, in reaching this absurd result, we would turn the policy objective behind the meaningful offer requirement in *Wannamaker* on its head.

We refuse to apply the *Wannamaker* factors in a manner that contravenes the very purpose behind the meaningful offer requirement. The clear purpose of the meaningful offer requirement is to protect insureds—to give them the opportunity "to know their options and to make an informed decision as to which amount of coverage will best suit their needs." *Floyd*, 367 S.C. at 262-63, 626 S.E.2d at 12 (internal quotation omitted). In this case, there can be no doubt that Lumbermens informed Cintas of its option to purchase UIM coverage. Lumbermens explained to Cintas the nature of UIM coverage through oral discussions and in writing. During Ryan's deposition, he confirmed that Purtell informed him of the availability of UIM coverage. Ryan stated, "[w]e [he and Purtell] would talk about whether we wanted to buy any additional coverage. Of course, our stance was no. We knew that additional coverage had additional cost associated with it." The facts of this case reveal that Cintas made a business decision to refuse UIM coverage. Cintas made this decision with full awareness of the nature of the coverage it was rejecting. Accordingly, we find Lumbermens made a meaningful offer of UIM coverage to Cintas.

For the foregoing reasons, the ruling of the circuit court is

AFFIRMED AS MODIFIED.

TOAL, CJ., BEATTY, KITTREDGE, JJ., concur. PLEICONES, J., concurring separately.

JUSTICE PLEICONES: I concur in the majority's decision to affirm the circuit court order granting summary judgment to Lumbermens. I write separately because I conclude that we need not reach the Wannamaker[4]/statutory presumption[5] "meaningful offer" issues where, as here, the insured's agent does not contend he lacked all the information necessary to make an intelligent decision whether and in what amount to purchase underinsured and uninsured coverage. See S.C. Code Ann. § 38-77-160 (2002).

The typical "meaningful offer" case arises when an insured or third party to the insurance contract seeks to reform that contract to include underinsured or uninsured coverage, alleging that the insurer failed to meet its obligation to make a sufficient offer under § 38-77-160. In essence, the insurer can rely on the Wannamaker factors or a statutorily acceptable form as an affirmative defense in such a suit, relying on this evidence to show it in fact conveyed the requisite information to the insured. In my opinion, however, where the insured itself does not dispute it had all the information necessary to make an informed, intelligent choice, there is no need to discuss whether the form was acceptable under § 38-77-350 or whether Wannamaker has been satisfied.

I concur in the decision to uphold the grant of summary judgment here.

---

[4] State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987).

[5] S.C. Code Ann. § 38-77-350(2002 and Supp. 2009).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Matrix Financial Services Corporation, Respondent,

v.

Louis M. Frazer, Linda S. Frazer, Matthew Kundinger, and Parks Grove Homeowners Association, Inc., Defendants,

of whom Matthew Kundinger is the Appellant.

Appeal from Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 26859
Heard April 21, 2009 – Filed August 16, 2010

REVERSED

David Alan Wilson, of Horton Drawdy Ward & Jenkins, PA, and Edward Scott Sanders, both of Greenville, for Appellant.

Earle G. Prevost, and Michael J. Giese, both of Leatherwood, Walker, Todd & Mann, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, Matthew Kundinger (Appellant) enrolled a default judgment against Louis and Linda Frazer (the Frazers) before the Frazers closed a refinance mortgage with Matrix Financial Services Corporation (Matrix). In Matrix's foreclosure action, the master-in-equity granted Matrix equitable subrogation, giving the refinance mortgage priority over Appellant's judgment lien. We certified this case pursuant to Rule 204(b), SCACR. We reverse.

FACTS/PROCEDURAL BACKGROUND

In 1998, Appellant brought suit against the Frazers in California. In 2000, the Frazers moved to South Carolina, and defaulted in Appellant's California lawsuit.

In January 2001, the Frazers purchased a home in Greenville County. The original mortgage was assigned to Matrix in June 2001. In September 2001, Matrix and the Frazers entered into a loan commitment for a refinance mortgage. A title search was conducted on September 18, 2001. The refinance loan was closed on November 26, 2001, but was not recorded until April 3, 2002.

Meanwhile, on September 4, 2001, Appellant obtained a default judgment against the Frazers in California, and enrolled that judgment in Greenville County on October 31, 2001.

The Frazers filed bankruptcy, and Matrix sought to foreclose its November 2001 mortgage. Appellant counterclaimed, alleging his judgment had priority over Matrix's mortgage because it had been recorded first. Matrix then sought to be equitably subrogated over Appellant's judgment lien. The master-in-equity granted Matrix's request, and Appellant appeals that order.

ISSUES

I. Did the master-in-equity err in equitably subrogating Matrix's refinance mortgage to the primary priority position of the original mortgage over Appellant's judgment lien?

II. Does the doctrine of unclean hands prevent Matrix from receiving the remedy of equitable subrogation?

ANALYSIS

Equitable Subrogation

Appellant argues the master-in-equity erred in holding Matrix was entitled to equitable subrogation. We agree.

In *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992), this Court listed the requirements a mortgagee must meet to qualify for equitable subrogation: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage.

In *Dedes*, a bank refinanced its initial mortgage and sought to be equitably subrogated over the rights of an intervening mortgagee. This Court held that the bank could not meet the elements of equitable subrogation merely by paying "itself [the] outstanding debt by refinancing the balance owed" because the bank had no "direct interest necessitating discharge of the debt . . . ." *Dedes*, 307 S.C. at 159, 414 S.E.2d at 136. To meet the criteria for equitable subrogation, a party must have liability for the debt other than a voluntary agreement to refinance its own earlier mortgage. Otherwise, a lender can simply refinance the debt at any time to prevail over an

intervening lien holder, rendering the requirement of secondary liability meaningless.

Here, we are faced with the same situation presented to the court in *Dedes*. Matrix seeks to be equitably subrogated over Appellant's judgment lien based solely on its voluntary refinancing of its own debt. Matrix had no liability for the original mortgage before it voluntarily refinanced the balance owed. Thus, Matrix had no obligation to pay off its existing mortgage. Matrix admits that it would not have obligated itself unless it could obtain a first lien, and that if it knew about Appellant's lien it would not have authorized disbursement. Because Matrix cannot prove that it was secondarily liable on the initial mortgage, Matrix was a mere volunteer when it disbursed the funds and is not entitled to equitable subrogation.

Unclean Hands

Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We agree.

Real estate and mortgage loan closings, including refinance loans, must be supervised by an attorney. *See Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Id.* The court grants equity at its discretion and can refuse to provide a remedy when the party has failed to act equitably in the transaction at issue. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (2000).

In *Wachovia Bank v. Coffey*, Op. No. 4685, 2010 WL 1904876 (S.C. Ct. App. May 6, 2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. The court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the

court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:

> The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:
>
> > The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, at * 3 (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

Similarly, in this case Matrix comes to the court with unclean hands, and is thus barred from seeking equitable relief. Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan–all admittedly without the supervision of a licensed attorney. Thus, Matrix has committed the unauthorized practice of law in closing the refinance mortgage, clearly violating South Carolina law. The dissent's protestations aside, a party cannot violate the law and expect not to bear the consequences of its actions. This Court will not grant a discretionary, equitable remedy to a party who refused to follow the laws of this state. Therefore, even if Matrix were able to satisfy the requirements for equitable subrogation, Matrix would not be entitled to that equitable remedy because it has unclean hands.

CONCLUSION

For the above reasons, we hold Matrix is not entitled to equitable subrogation, and also has unclean hands barring it from receiving an equitable remedy. The master-in-equity's order is reversed.

WALLER, and BEATTY, JJ., concur. KITTREDGE, J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I concur in result. I would reverse on the issue of unclean hands and not reach the merits of the equitable subrogation issue. Concerning the matter of unclean hands, I would reverse the judgment of the trial court only because Matrix, as a result of its unlawful conduct, is not entitled to the benefit of having its lien equitably subrogated over Appellant's judgment lien. To resolve this appeal, I see no need to reach the broader question of the underlying efficacy of a real estate mortgage secured through the unauthorized practice of law and the general availability of foreclosure relief in such circumstances. I would go no further than to hold that the benefit of equitable subrogation is not available where, as here, the mortgage was secured through the unauthorized practice of law.

JUSTICE PLEICONES: I respectfully dissent. First, I believe the majority misapprehends the requirement in equitable subrogation that the party asserting the doctrine be "secondarily liable." Second, in dicta, the majority creates a new rule that equity will not aid a party that violated South Carolina law in closing a mortgage because that party has unclean hands, a rule I believe may have chaotic unintended consequences.

A. Equitable Subrogation

Equitable subrogation is a remedy favored by the courts, and it is to be liberally and expansively applied. So. Bank and Trust Co. v. Harrison Sales Co., Inc., 285 S.C. 50, 328 S.E.2d 60 (1985). The doctrine:

> is founded on the fictional premise that an obligation extinguished by a payment made by a third person is to be treated as still subsisting for the benefit of such third person, whereby he is substituted to the rights of the creditor when he has made such payment.
>
> St. Paul – Mercury Indem. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954) citing Aetna Life Ins. Co. of Hartford v. Town of Middleport, 124 U.S. 534 (1888).

"The purpose of subrogation is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." U.S. v. Baron, 996 F.2d. 25 (2nd Cir. 1993) (internal citation omitted). Thus, the proper focus is whether equity should elevate appellant's judgment lien over Matrix's mortgage, not whether Matrix should be punished for its participation in an unlawful closing.

A mortgagee seeking to be equitably subrogated to an earlier mortgage must establish:

1) that the mortgagee has paid the earlier debt;

2) that the mortgagee was not a volunteer but had a direct interest in the discharge of the earlier mortgage;

3) that the mortgagee was secondarily liable for the debt or for the discharge of the mortgage;

4) that no injustice will be done to another creditor if subrogation is permitted; and

5) the mortgagee asserting the doctrine did not have actual knowledge of the other lien.

Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992).

The majority holds Matrix is not entitled to equitable subrogation because it cannot satisfy the second and third requirements in that it voluntarily paid off the original mortgage, upon which it was not secondarily liable. In making this argument the majority relies on Dedes, while the master and Matrix rely upon Dodge City of Spartanburg, Inc. v. Jones, 317 S.C. 491, 454 S.E.2d 918 (Ct. App. 1995) *cert. denied* Feb. 8, 1996. I believe that the majority misreads Dedes, but if they are correct, I would overrule that case to the extent it holds a lender refinancing its own mortgage can never invoke equitable subrogation.

In Dedes, as here, the mortgagee (Bank) of the original mortgage entered a new agreement with the debtors, who executed a new note and mortgage. When Dedes, an intervening mortgagee, sought to foreclose its mortgage, the Bank pled equitable subrogation seeking to have its new mortgage assume the priority its original mortgage held over Dedes' intervening mortgage. In upholding the master's order finding the Bank was not entitled to invoke the doctrine, this Court held:

> [Bank] paid itself [Debtor's] outstanding debt by refinancing the balance owed. **There is no showing of any direct interest necessitating discharge of the [first mortgage]. The record is silent as to what secondary liability [Bank] could have for [Debtor's] debt secured by its own first mortgage lien.**
>
> Dedes, 307 S.C. at 159, 414 S.E.2d at 136 (emphasis supplied).

I read Dedes as a failure of proof case, not as the majority does, as a decision holding that one who satisfies a preexisting mortgage as a condition of giving a new mortgage is never entitled to equitable subrogation. In 1927, this Court held that a lender who pays the original mortgage itself, or furnishes money to the mortgager to pay off an existing mortgage, pursuant to an agreement by which the lender will give a new mortgage, has the equitable right to be subrogated to the paid-off mortgage. Enterprise Bank v. Fed. Land Bank, 139 S.C. 397, 138 S.E. 146 (1927). In this situation, the lender furnishing the money is not a volunteer, and becomes secondarily liable for the discharge of the first mortgage under the instruments creating the new mortgage which require the satisfaction of the first mortgage as a condition of the giving of the second. Id.; see also James v. Martin, 150 S.C. 75, 147 S.E. 752 (1929) (applying Enterprise Bank and quoting: "One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder"). In Dedes, it appears the Bank failed to present evidence that its second loan was conditioned on the satisfaction of its first loan. I do not view Dedes as overruling Enterprise Bank or James.

Matrix was not a volunteer[1] but was directly interested in the discharge of the original mortgage, and was secondarily liable for its discharge by

[1] The majority holds that Matrix was a 'volunteer' for purposes of equitable subrogation because it voluntarily refinanced the original mortgage. A rule

virtue of its agreement to make a new loan to the Frazers conditioned on the payoff of the first mortgage. See Enterprise Bank, *supra*; James, *supra*; Dodge City, *supra*. Matrix has established its entitlement to equitable subrogation under existing South Carolina law. Moreover, as explained below, the majority's decision to deny a refinancer equitable subrogation does not comport with the current Restatement of Property.

Under the Restatement (Third) of Property § 7.3 (1996), a refinanced mortgage retains the same priority as the mortgage it replaces, except to the extent this priority would materially prejudice a junior lienholder. Material prejudice may exist where the principal amount is increased, or where the intervening lien is acquired after the release of record of the first mortgage and before the recordation of the replacement mortgage. In general, under the Restatement (Third), whether the refinancer is the original mortgagee or not, and regardless whether the refinancer has actual or constructive knowledge of any junior lienholder, it is entitled to be equitably subrogated to the first mortgage. As the Washington Supreme Court explained, the theory underlying the doctrine and the following policy considerations support a rule that, absent material prejudice to a junior lienholder, equitable subrogation should be automatically available to a mortgage refinancer who can show it expected to have first priority:

1) Equitable subrogation preserves priorities by keeping mortgages and other liens in their proper recordation order;

2) Equitable subrogation accomplishes substantial justice and rests on the maxim that no one (here, the junior lienholder) should be enriched by another's loss;

3) Facilitating refinancing helps prevent foreclosures; and

---

that only lenders forced to refinance an existing mortgage are not volunteers would effectively eliminate the availability of the equitable subrogation remedy.

4) A liberal equitable subrogation policy reduces title insurance premiums.[2]

Bank of America v. Prestance Corp., 160 Wash.2d 560, 160 P.3d 17 (2007).

Of course, we need not adopt the Restatement (Third) in order to affirm the master's ruling that Matrix is entitled to equitable subrogation here. Enterprise Bank, *supra*; James, *supra*; Dodge City, *supra*.

B. Unclean Hands

The majority also holds that appellant may assert that Matrix has "unclean hands" because it "unlawfully" closed the refinancing mortgage, and thereby defeat Matrix's right to equitable subrogation. It is unclear to me how appellant, a stranger to the mortgage transaction, is in a position to assert "unclean hands" with respect to the closing. See Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943) ("'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others"). The majority does not explain why appellant may assert "unclean hands" with respect to the mortgage between Matrix and the Frazers, leaving the reader to assume the Court is altering the requirement that only a party to the transaction may assert the bar. I am not comfortable altering the principles of equity in the absence of a persuasive policy reason.

Perhaps more disturbingly, the impact of a decision holding that equity will not aid a mortgagee when the closing was unlawful will be devastating, undermining lender confidence in an already unstable market, and making title insurance virtually unavailable in South Carolina.[3] Even if we were to

[2] Citing Nelson & Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305.

[3] One need only review this Court's attorney disciplinary cases to see that many closings are conducted unlawfully, often without the knowledge of the

adopt such a harsh rule, the Court should acknowledge in fairness and equity, that the law has been evolving in the area of residential real estate closings, and thus many mortgagees may hold mortgages that were closed "unlawfully." See State v. Buyers Serv. Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987); Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006). In fact, it was not until McMaster, decided twenty-one months after the Matrix loan was closed, that we rejected the contention that refinance closings were subject to a different set of rules than original loans. To suggest that a mortgage given in an unlawful closing will not be protected in equity leads to uncertainty and increased costs.[4]

While I strongly disapprove of Matrix's failure to abide by South Carolina law in the processing of this mortgage, appellant's "unclean hands" claim is insufficient to defeat Matrix's entitlement to equitable subrogation of its November 2001 mortgage.

CONCLUSION

I would affirm the master's order.

---

lender. To hold that equity will not aid the lender in such a situation, will deny it the right to foreclosure. See Wachovia Bank, N.A. v. Coffrey, 2010 WL 19048786 (S.C.Ct. App. May 6, 2010).

[4] For example, will a financial institution be willing to purchase a mortgage without ensuring that the loan was closed lawfully?

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jesse Branham, Jr., as Guardian ad Litem for Jesse Branham, III, and Jesse Branham, Jr., Respondent,

v.

Ford Motor Company and Cheryl Jane Hale, Defendants,

Of Whom Ford Motor Company is the Appellant.

Appeal From Hampton County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26860
Heard April 9, 2009 – Filed August 16, 2010

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

C. Mitchell Brown, William C. Wood, Jr., Beth Burke Richardson, and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, Elbert S. Dorn and Nicholas W. Gladd, both of Turner, Padgett, Graham & Laney, PA, of Columbia, for Appellant.

John R. Hetrick and Robert J. Bonds, both of Hetrick, Harvin & Bonds, of Walterboro, Ronnie L. Crosby, John E. Parker,

Grahame E. Holmes, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal in a product liability case tried to a jury in Hampton County. The jury awarded the plaintiff $16,000,000 in actual damages and $15,000,000 in punitive damages. We affirm in part, reverse in part and remand for a new trial.

I.

This product liability action involves a 1987 Ford Bronco II 4x2, manufactured in 1986. Cheryl Hale (or her husband) purchased the 1987 Ford Bronco in June of 1999 for a nominal sum.[1] At the time of sale, the Bronco had 137,500 miles on it.

On June 17, 2001, Hale was driving her Bronco along Cromwell Road in Colleton County. Hale was driving several children to her house. Hale's daughter was seated in the front passenger seat. Plaintiff Jesse Branham, III, was riding in the backseat. Hale recalled that the children were "all excited." No one was wearing a seatbelt.

The weather was clear and, according to Hale, she was not speeding. Hale admittedly took her eyes off the road and turned to the backseat to ask the children to quiet down. When she took her eyes off the road, the Bronco veered towards the shoulder of the road, and the rear right wheel left the roadway. When Hale realized that her inattention resulted in the vehicle leaving the roadway, she responded by overcorrecting to the left. Hale's overcorrection led to the vehicle "shaking." The vehicle rolled over. Branham was thrown from the vehicle and was injured.

---

[1] A document referenced during Hale's testimony indicates a purchase price of $150.

Branham filed this lawsuit against Ford Motor Company and Hale in Hampton County. At trial,[2] Branham did not seriously pursue the claim against Hale. The case against Ford was based on two product liability claims, one a defective seatbelt sleeve claim and the other, a "handling and stability" design defect claim related to the vehicle's tendency to rollover. Both of these claims were pursued in negligence and strict liability.[3] Ford denied liability and, among other things, asserted Hale's negligence caused the accident. The jury, in a general verdict,[4] found both Ford and Hale responsible and awarded Branham $16,000,000 in actual damages and $15,000,000 in punitive damages. Only Ford appeals. The direct appeal is before us pursuant to Rule 204(b), SCACR, certification.

II.

A.
The Seatbelt Sleeve Negligence Claim

Branham alleged Ford was negligent "[i]n selling the Bronco II with a defective rear occupant restraint system." The amended complaint contains no specifications of Ford's purported negligence. At trial, Branham claimed Ford was negligent in failing to adequately test the seatbelt sleeve, but he did not challenge the seatbelt sleeve design. Branham filed a companion strict liability claim concerning the seatbelt sleeve. Ford successfully moved for a directed verdict on the strict liability seatbelt sleeve claim.

---

[2] This was the second trial of this case. The first trial ended in a mistrial when it was discovered that one or more jurors had been represented by the law firm representing one of the parties.

[3] Branham also alleged warranty claims in his complaint but did not pursue these claims at trial, and the jury was not asked to consider these claims.

[4] The unusual verdict form is discussed in detail in Part III.D, *infra*. Ford's request that the jury answer specific interrogatories related to the multiple claims was denied.

The trial court dismissed the strict liability claim on the ground that the seatbelt sleeve was not as a matter of law in a defective condition unreasonably dangerous to the user at the time of manufacture. Based on this premise, Ford contends the companion negligence claim must fail, for all products liability actions, regardless of the stated theory, have common elements. *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985) ("In a products liability action the plaintiff must establish three things, regardless of the theory on which he seeks recovery: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user."). Ford, therefore, concludes that the negligence claim (which required Branham to prove that the seatbelt sleeve was in a defective condition unreasonably dangerous to the user) should have been dismissed. We agree. When an element common to multiple claims is not established, all related claims must fail.

A negligence theory imposes the additional burden on a plaintiff "of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). The fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user.

In addition, Ford asserts there is no separate "failure to test claim" apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous. We agree, for if a product is not in a defective condition unreasonably dangerous to the user, an alleged failure to test cannot be the proximate cause of an injury. The failure to establish that the seatbelt sleeve was in a defective condition unreasonably dangerous to the user for purposes of the strict liability claim requires the dismissal of the companion negligence claim.

Relying on *Bragg*, the trial court determined it appropriate to grant a directed verdict on the strict liability claim, while at the same time allowing the negligence claim to go forward. We find the trial court's reliance on *Bragg* misplaced.

In *Bragg*, the trial court directed a verdict in favor of the manufacturer with respect to the strict liability claim, but refused to grant a directed verdict on the negligence claims. 319 S.C. at 538, 462 S.E.2d at 325. Bragg alleged two negligence claims: negligence "in failing to place appropriate warnings" on the product and another negligence claim "in supplying [a product] that was defective[ly] [designed]." *Id.* at 537-38, 462 S.E.2d at 325. The jury returned a verdict against Bragg on the negligence claims.

Bragg appealed the dismissal of the strict liability claim, "contend[ing] the court's decision to grant the motion for directed verdict on strict liability, while denying the motion for directed verdict on negligence, was logically inconsistent and reversible error because those claims are virtually identical and require the same proof." *Id.* at 538, 462 S.E.2d at 325. The court of appeals in *Bragg* affirmed the trial court and noted that "[s]trict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established either under principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other." *Id.* at 539, 462 S.E.2d at 326.

While we agree that strict liability and negligence are not mutually exclusive theories of recovery, we caution against a broad reading of *Bragg* in this regard. An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. As noted, the negligence claim must have a fault-based element, which is not required for a strict liability claim. Where one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to ascertain the basis for the dismissal. If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed.

In the present case, because the strict liability claim was dismissed due to the absence of an element shared by the companion negligence claim, the negligence claim should have been dismissed as well.

The trial court determined as a matter of law that the seatbelt sleeve was not in a defective condition unreasonably dangerous to the user. Consequently, the absence of this common, shared element required the dismissal of the strict liability claim *and* the companion negligence claim.[5] The trial court erred in failing to direct a verdict as to the negligence seatbelt sleeve claim.[6]

B.

The "Handling and Stability" Design Defect Claim

The "handling and stability" design defect claim (strict liability and negligence) is the gravamen of Branham's case. Branham alleged a design defect related to the rollover propensity of the Bronco. Ford appeals from the denial of its motions to dismiss the strict liability and negligence design defect claims. Viewing the evidence in a light most favorable to Branham, we find no error in the submission of these design defect claims to the jury. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (stating that on appeal from the denial of a directed verdict motion, the evidence must be viewed in a light most favorable to the nonmovant).

---

[5] The converse of the situation before us is more easily understood, that is, where the negligence claim is dismissed and the strict liability survives, as questions of fact are presented as to elements common to both claims yet the plaintiff fails to present evidence of the absence of due care.

[6] On appeal, Branham seeks to challenge the trial court's dismissal of the strict liability seatbelt claim. Issue preservation rules aside, we have reviewed the evidence concerning the seatbelt claim and conclude the trial court properly directed a verdict.

We begin with an overview of the technical information involved in the design defect claims. Ford uses the term "stability index" to describe the overall stability of a vehicle. The stability index is a comparison of the height and width of the vehicle, expressed in a numerical term. A closely connected term is the center of gravity. A vehicle's center of gravity relates to what one usually thinks of as "top heavy" or "stable." The lower the center of gravity in a vehicle, the more stable it is. Conversely, the higher the center of gravity (top heavy), the less stable the vehicle is.

The stability of a vehicle is related in part to its suspension. According to Branham's expert, Dr. Melvin Richardson, a vehicle with a stable suspension is able to make a turn in the road, and "as the vehicle goes around the curve, it leans over some and . . . the tires stay the same distance apart where they touch the ground." A vehicle with an unstable suspension will cause the tires to "scrub" the ground during a turn, which "cuts down friction, [and] increases tire wear," causing the vehicle to handle poorly. When a vehicle is turning and the tires begin to scrub, "you lose some of [the tire's] capabilities to keep the vehicle going in the right direction and lose some of the ability to control the vehicle."

Ford primarily employed two engineering tests as a means of determining whether the Bronco II was ready for manufacturing. The first test is called a "J" turn. In this test, as described by Dr. Richardson, the vehicle is driven down a roadway, and "as quickly as possible the driver turns [the wheel to a] predetermined angle and just holds it there" for the remainder of the turn.

The second test is called an accident avoidance maneuver test. This is where the vehicle is turned in an abrupt fashion one way, like in the "J" turn, but with the added maneuver of an immediate turn back in the opposite direction. With these engineering concepts in mind, we turn to the design defect evidence presented.

Thomas Feaheny, a former vice president at Ford, testified for Branham. Feaheny described the marketing forces and engineering insights

that led to the development of the Bronco II. The genesis of the Bronco II spawned from the YUMA Program, which came into being in the late 1970s. YUMA was Ford's code name for the study of small trucks, which eventually resulted in the Ford Ranger, and later the Bronco II. The YUMA prototypes initially had a MacPherson front suspension, which, according to Feaheny, is a "type of independent front suspension that is used on a lot of small cars and trucks." Ford's engineers requested the MacPherson front suspension for the Bronco II when communicating with management on how best to address the Bronco II's handling and stability concerns raised during the prototype stage.

Feaheny opined that the MacPherson strut was the "best, most feasible suspension from a functional standpoint and also from a cost and weight standpoint." However, there was a divergence in viewpoints between corporate executives and engineers, as Ford's engineers advocated the use of the MacPherson strut for the small truck program. Since the mid-1960s Ford had employed a Twin I-Beam suspension on its bigger trucks. Feaheny testified that "there was a belief that [Ford] should adapt [the] Twin I-Beam suspension to the new small trucks."

The engineers at Ford believed the MacPherson suspension the better choice and "opposed [the Twin I-Beam suspension] because it was directionally wrong from the standpoint of steering, handling and rollover propensity and other characteristics." Because the Twin I-Beam suspension was physically larger than the MacPherson suspension, using it required the entire vehicle to be lifted higher. This had a cascading effect on the composite makeup of the vehicle, which detrimentally moved the center of gravity higher off the ground. To make room for the Twin I-Beam suspension, the engine had to be raised "two to three" inches. With the engine raised a few inches, the transmission had to be raised, which caused the hood to be raised, which then caused the seating to be raised. The net effect of this was a higher center of gravity, "which add[ed] a rollover propensity."

Feaheny also noted that the Twin I-Beam had a tendency for "jacking." Feaheny stated that jacking is a term used to describe an occurrence when the

"vehicle will slide out in a severe handling maneuver. The outboard wheel would tend to dig into . . . the suspension arm, which was strong and stiff, [and it] would have to move with that wheel and the inner pivot would go up in the air." When a vehicle jacks, there is an instantaneous raising of the center of gravity, which further "increase[s] the propensity for rollover."

Use of the Twin I-Beam and its attendant safety concerns came to a head in the late 1970s. A group of engineers approached Feaheny and recommended that Ford use either the MacPherson suspension or the SLA (short long arm) suspension for the YUMA prototypes. The engineers made it clear that they were "very concerned" with the Twin I-Beam. Feaheny directed the engineers to one of his colleagues, Jim Capalongo, and Feaheny later met with Capalongo to discuss the engineers' concerns. After this meeting, alternative suspension designs were discussed and tested for "about a year" but the Twin I-Beam was still selected.

The reason the Twin I-Beam was selected in the face of engineering concerns was that it served a "major marketing advantage," as Ford had promoted this form of suspension on its full size trucks since the mid-1960s. In the minds of the marketing executives, the Twin I-Beam was part and parcel of a tough truck, and it made business sense to carry that suspension into the smaller trucks.

The testimony of Dr. Richardson buttressed the evidence supplied by Feaheny and Ford's internal documents. Dr. Richardson opined that the use of the Twin I-Beam suspension led to the Bronco II being unreasonably dangerous. Dr. Richardson described three common suspension systems referenced above: (1) the SLA; (2) the MacPherson; and (3) the Twin I-Beam. It was through Dr. Richardson that Branham introduced many of Ford's internal documents showing the competing concerns and interests of the engineers and management over the proper suspension.

The Bronco II was designed from the existing "bones" of the Ford Ranger. Dr. Richardson opined that using the Ranger as the design platform

was an appropriate engineering decision, and that it gave Ford the advantage of using components that had already been made.

Dr. Richardson testified to a Ford document dated February 5, 1981, and titled "Revised Stability Index for Utility." The stated objective of the document was to "review alternatives to increase stability index." Reading from the document, he stated that, "a study of methods to improve the stability index for the Bronco II has resulted in several design alternatives to achieve an improvement . . . from 1.85 to maximum achievable of 2.25 without a totally new concept vehicle."

The document made a general assessment about improving the stability index. "In order to improve stability index substantially, the following are required: widen track width, and lower center of gravity achieved by raising the wheel center lines with respect to body with trade-offs in ground clearance and vehicle package." The document also made five proposals to achieve a higher stability index. The first two proposals did not jeopardize the target release date for the Bronco II, but the latter three did. Only one of the proposals would have achieved a stability index of 2.25 for the Bronco II, but it was not selected.

Ford selected what is referred to as "proposal two," and it had a target stability index of 2.02. Dr. Richardson pointed out that proposal two saved Ford money. None of the proposals on this document argued for a change in the suspension system. But Dr. Richardson opined that had Ford opted to use an SLA or a MacPherson suspension system, then it could have achieved a stability index of 2.25. At that point, however, Ford had already decided to employ the Twin I-Beam suspension notwithstanding its engineers' criticisms.

Dr. Richardson testified to Plaintiff's exhibit 31, dated March 17, 1982, which discussed "J" turn testing for the Bronco II. In relevant part, the document stated the following:

> Engineering sign-off for the Bronco II is scheduled for 7/9/82. Minimal development DVP&R[7] testing has been completed because the suspension and steering system designs have not been finalized for improved roll characteristics during the "J" turn maneuver.
>
> A decision is required to solidify the steering and suspension designs. Development recommends pursuing items 1, 2, and 3 below if a small improvement in roll characteristics during a "J" turn maneuver is deemed acceptable, or pursuing item 4 below if a major improvement is required. Incorporation of item 4 would most likely cause a delay in Job #1 [the release date of the Bronco II].

(emphasis in original). Dr. Richardson testified that to his knowledge none of the recommendations set out in the document were adopted.

Dr. Richardson testified to a Ford document dated May 4, 1982. The document identified the current stability index of the Bronco II at 2.03. Dr. Richardson noted that any change to the Bronco II after the date of this document "had to be very small if [Ford] w[as] going to still put [the Bronco II] on the market in the beginning of [1983]." He went on to testify that in the state the Bronco II was then in, with a stability index of 2.03 the vehicle would be "dangerously unstable."

Branham introduced a Ford document from September 14, 1982, with the following stated purpose: "To identify advanced engineering projects that will be undertaken to provide for continued improvement, Bronco II handling, during its cycle life." Dr. Richardson responded to the document as follows:

> The vehicle should have been made reasonably safe when it was first designed and built. There was time to do that, the

[7] This acronym stands for Design Verification Plan and Report. In general terms, it is a type of testing to verify the product works as designed.

> discussions in the engineering documents, to me as an engineer, show me that the engineers knew how to do that, could have done it, and that should have been done. To release it without it being reasonably safe then subjects those people who buy it to risk. Now, if it is released in that configuration, it certainly should be improved as time goes along because it shouldn't be left that way.

Following up on his expert's opinion, Branham asked whether improvements were ever made to correct the problems in the Bronco II when it was released. Dr. Richardson responded, "there were no improvements made that would correct this defect."

The rollover propensity in the Bronco II 4x4, as reflected in the stability index and elevated center of gravity, was increased in the Bronco II 4x2. The two-wheel drive Bronco was lighter than its four-wheel version, resulting in reduced stability and an even higher center of gravity. The Bronco II involved in this litigation is a 4x2.

The foregoing is not an exhaustive review of the evidence presented by Branham, but it serves to support the able trial judge's determination that Branham presented sufficient evidence of a design defect known to Ford at or prior to the date of manufacture to withstand a directed verdict motion. We make this determination without having to rely on the further body of evidence of the Bronco II's rollover tendencies found in the substantial post-distribution evidence which the trial court allowed.[8]

C.

We next address Ford's two-fold argument that: (1) Branham failed to prove a reasonable alternative design pursuant to the risk-utility test; and (2) South Carolina law requires a risk-utility test in design defect cases to the exclusion of the consumer expectations test.

---

[8] We discuss this issue in detail in Part III.A, *infra*.

For a plaintiff to successfully advance a design defect claim, he must show that the design of the product caused it to be "unreasonably dangerous." *Madden v. Cox*, 284 S.C. 574, 579-80, 328 S.E.2d 108, 112 (Ct. App. 1985). In South Carolina, we have traditionally employed two tests to determine whether a product was unreasonably dangerous as a result of a design defect: (1) the consumer expectations test and (2) the risk-utility test.

In *Claytor v. General Motors Corp.*, this Court phrased the consumer expectations test as follows: "The test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product." 277 S.C. 259, 262, 286 S.E.2d 129, 131 (1982).

The *Claytor* Court articulated the risk-utility test in the following manner: "[N]umerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Id.* at 265, 286 S.E.2d at 132.

Later, in *Bragg v. Hi-Ranger, Inc.*, our court of appeals phrased the risk-utility test as follows: "[A] product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995). The *Bragg* court went on to list the above factors set forth in *Claytor* as the relevant inquiry when weighing the danger of the product versus its utility. *Id.* at 543-44, 462 S.E.2d at 328.

Ford contends Branham failed to present evidence of a feasible alternative design. Implicit in Ford's argument is the contention that a product may only be shown to be defective and unreasonably dangerous by way of a risk-utility test, for by its very nature, the risk-utility test requires a showing of a reasonable alternative design.[9] Branham counters, arguing that

[9] One commentator has noted that, "one simply cannot talk meaningfully about a risk-[utility] defect in a product design until and unless one has

under *Claytor* he may prove a design defect by resort to the consumer expectations test or the risk-utility test. Branham also argues that regardless of which test is required, he has met both, including evidence of a feasible alternative design. We agree with Branham's contention that he produced evidence of a feasible alternative design. Branham additionally points out that the jury was charged on the consumer expectations test *and* the risk-utility test.

As discussed above, Branham challenged the design of the Ford Bronco II by pointing to the MacPherson suspension as a reasonable alternative design. A former Ford vice president, Thomas Feaheny, testified that the MacPherson suspension system would have significantly increased the handling and stability of the Bronco II, making it less prone to rollovers. Branham's expert, Dr. Richardson, also noted that the MacPherson suspension system would have enhanced vehicle stability by lowering the vehicle center of gravity. There was further evidence that the desired sport utility features of the Bronco II would not have been compromised by using the MacPherson suspension. Moreover, there is evidence that use of the MacPherson suspension would not have increased costs. Whether this evidence satisfies the risk-utility test is ultimately a jury question. But it is evidence of a feasible alternative design, sufficient to survive a directed verdict motion.

While the consumer expectations test fits well in manufacturing defect cases, we do agree with Ford that the test is ill-suited in design defect cases. We hold today that the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design. In doing so, we recognize our Legislature's presence in the area of strict liability for products liability.

In 1974, our Legislature adopted the *Restatement (Second) of Torts* § 402A (1965), and identified its comments as legislative intent. S.C. Code

---

identified some design alternative (including any design omission) that can serve as the basis for a risk-[utility] analysis." Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 468 (1979).

Ann. §§ 15-73-10–30 (2005). The comments in section 402A are pointed to as the basis for the consumer expectations test.[10] Since the adoption of section 402A, the American Law Institute published the *Restatement (Third) of Torts: Products Liability* (1998). The third edition effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test. We believe the Legislature's foresight in looking to the American Law Institute for guidance in this area is instructive.

The Legislature has expressed no intention to foreclose court consideration of developments in products liability law. For example, this Court's approval of the risk-utility test in *Claytor* yielded no legislative response. We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature's presence in this area.

Some form of a risk-utility test is employed by an overwhelming majority of the jurisdictions in this country.[11] Some of these jurisdictions

---

[10] *E.g.*, *Young v. Tide Craft, Inc.*, 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978) (quoting from comment i. to express the consumer expectations test); *see also* Jerry J. Philips, *Consumer Expectations*, 53 S.C. L. REV. 1047, 1047 (2002) (noting that comments g. & i. form the consumer expectations test).

[11] By our count 35 of the 46 states that recognize strict products liability utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed. Four states do not recognize strict liability claims at all. Those four states are Delaware, Massachusetts, North Carolina, and Virginia. *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 980 (Del. 1980); *Back v. Wickes Corp.*, 378 N.E.2d 964, 968-69 (Mass. 1978); *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 509-10 (N.C. 1980); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 57 n.4 (Va. 1988). Another state, Missouri, rejects altogether any test in the form of a jury charge to determine whether a product is unreasonably dangerous, leaving that determination instead to the "collective intelligence and experience" of the jury. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 64-65 (Mo. 1999) (quoting *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. 1998)).

exclusively employ a risk-utility test,[12] while others do so with a hybrid of the risk-utility and the consumer expectations test, or an explicit either-or option.[13] States that exclusively employ the consumer expectations test are a decided minority.[14]

---

[12] *Gen. Motors Corp. v. Jernigan*, 883 So.2d 646, 662-63 (Ala. 2003); *Armentrout v. FMC Corp.*, 842 P.2d 175, 183-84 (Colo. 1992); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674-75 (Ga. 1994); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004); *Jenkins v. Int'l Paper Co.*, 945 So.2d 144, 150-51 (La. Ct. App. 2006); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285-86 (Me. 1988); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 329-30 (Mich. 1995); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96-97 (Minn. 1987); *Williams v. Bennett*, 921 So.2d 1269, 1273-75 (Miss. 2006); *Rix v. Gen. Motors Corp.*, 723 P.2d 195, 201-02 (Mont. 1986); *Cavanaugh v. Skil Corp.*, 751 A.2d 518, 522 (N.J. 2000); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 61-62 (N.M. 1995); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 735-36 (N.Y. 1995); *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1026-27 (Pa. 1978); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex. 1998); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682-84 (W. Va. 1979).

[13] *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220 (Alaska 1998); *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 879-80 (Ariz. 1985); *Lee v. Martin*, 45 S.W.3d 860, 864 (Ark. Ct. App. 2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1333-34 (Conn. 1997); *Liggett Group, Inc. v. Davis*, 973 So.2d 467, 475-76 (Fla. Dist. Ct. App. 2007); *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1311 (Haw. 1997); *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 352 (Ill. 2008); *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1152-54 (Md. 2002); *Kelleher v. Marvin Lumber & Cedar Co.*, 891 A.2d 477, 492 (N.H. 2005); *Endresen v. Scheels Hardware & Sports Shop, Inc.*, 560 N.W.2d 225, 233-34 (N.D. 1997); *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1248-49 (Ohio 1998); *McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 331-32 (Or. 2001); *First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 444-45 (S.D. 2004), *superseded by rule change on unrelated grounds* 2006 S.D. Sess. Laws Ch. 341 *as recognized in In re Estate of Duebendorfer*, 721

We believe that in design defect cases the risk-utility test provides the best means for analyzing whether a product is designed defectively. Unlike the consumer expectations test, the focus of a risk-utility test centers upon the alleged defectively designed product. The risk-utility test provides objective factors for a trier of fact to analyze when presented with a challenge to a manufacturer's design. Conversely, we find the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous.[15]

We believe the rule we announce today in design defect cases adheres to the approach the trial and appellate courts in this state have been following. In reported design defect cases, our trial and appellate courts have

---

N.W.2d 438, 444 (S.D. 2006); *Ray ex rel. Holman v. BIC Corp.*, 925 S.W.2d 527, 533 (Tenn. 1996); *Dimick v. OHC Liquidation Trust*, 157 P.3d 347, 349-50 (Utah Ct. App. 2007); *Soproni v. Polygon Apartment Partners*, 971 P.2d 500, 505 (Wash. 1999).

[14] *Rojas v. Lindsay Mfg. Co.*, 701 P.2d 210, 211-12 (Idaho 1985) *but see Pucket v. Oakfabco, Inc.*, 979 P.2d 1174, 1181 (Idaho 1999) (noting absence of reasonable alternative design as a basis for affirming summary judgment); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003); *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 81-82 (Neb. 1987); *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 686 P.2d 925, 928 (Nev. 1984) *but see McCourt v. J.C. Penney Co., Inc.*, 734 P.2d 696, 697-98 (Nev. 1987) (recognizing alternative design is a factor for determining whether a product is unreasonably dangerous); *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988) but *see Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 718 (R.I. 1999) (discussing relevancy of alternative design in context of whether a product is defectively designed); *Farnham v. Bombardier, Inc.*, 640 A.2d 47, 48 (Vt. 1994); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 739-41 (Wis. 2001); *Sims v. Gen. Motors Corp.*, 751 P.2d 357, 364-65 (Wyo. 1988).

[15] The consumer expectations test is best suited for a manufacturing defect claim.

placed their imprimatur on the importance of showing a feasible alternative design. *See Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) (adopting the risk-utility test); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) (affirming verdict in favor of plaintiff by noting that plaintiff presented evidence of a design alternative); *Mickle v. Blackmon*, 252 S.C. 202, 234-35, 166 S.E.2d 173, 187-88 (1969) (discussing a manufacturer's decision to use one type of inferior material as a component part one year, but a superior material the following year—that is, a design alternative); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995) (affirming defense verdict and noting that plaintiff failed to present evidence of a feasible alternative design); *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct. App. 1990) (affirming a defense directed verdict and noting that plaintiff's expert failed to discuss design alternatives); *Gasque v. Heublein, Inc.*, 281 S.C. 278, 283, 315 S.E.2d 556, 559 (Ct. App. 1984) (affirming a plaintiff's verdict and noting in detail existence of alternative design evidence).

In *Kennedy v. Custom Ice Equipment Co.*, this Court specifically pointed to evidence that the challenged industrial ice machine would have been safer had the manufacturer installed a protective cover. 271 S.C. at 176, 246 S.E.2d at 178. In *Gasque v. Heublein, Inc.*, our court of appeals acknowledged the importance of a reasonable alternative design in a product liability design defect case wherein it noted evidence of alternative designs in an opinion affirming an award for the plaintiff. 281 S.C. at 283, 315 S.E.2d at 559. In like manner is the case of *Sunvillas Homeowners Ass'n v. Square D Co.*, where the court of appeals upheld a directed verdict in favor of a manufacturer, noting that plaintiffs did not produce any evidence of design alternatives. 301 S.C. at 334, 391 S.E.2d at 870. And more recently, in *Bragg*, our court of appeals again noted the absence of alternative design evidence in affirming a defense verdict. 319 S.C. at 546, 391 S.E.2d at 330. The very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design over another. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test.

This approach is in accord with the current edition of the Restatement of Torts:

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998). Concerning the framework for the risk-utility test, we agree with Professor David G. Owen, who observed:

> [T]he basic liability test should be congruent with the basic issue that in most cases must be proved. In design defect litigation, that basic issue involves the following fundamental . . . question: whether the manufacturer's failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong. A congruence between this central issue and the liability test requires that the test focus squarely on the issue of what, in particular, allegedly was wrong with the manufacturer's design decision. More specifically, this inquiry asks whether the increased costs (lost dollars, lost utility, and lost safety) of altering the design—in the particular manner the plaintiff claims was reasonably necessary to the product's safety—would have been worth the resulting safety benefits.

David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1687 (1997).

In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is the

core of the risk-utility balancing test in design defect cases, yet we do not suggest a jury question is created merely because a product can be made safer. We adhere to our longstanding approval of the principle that a product is not in a defective condition unreasonably dangerous merely because it "can be made more safe." As we observed in *Marchant v. Mitchell Distributing Co.*:

> Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous.
>
> . . . .
>
> There is, of course, some danger incident to the use of any product.

270 S.C. 29, 35-36, 36, 240 S.E.2d 511, 513, 514 (1977).

In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.[16] On retrial, Branham's design defect claim will proceed pursuant to the risk-utility test and not the consumer expectations test.

---

[16] The analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are worth the benefits that will inhere in the proposed alternative design.

III.

Notwithstanding the existence of ample evidence to withstand a directed verdict motion on the handling and stability design defect claim, we reverse and remand for a new trial. There are three reasons we reverse and remand the finding of liability and award of actual damages. First, this case implicates two evidentiary rules related to products liability cases. The first rule provides that whether a product is defective must be measured against information known at the time the product was placed into the stream of commerce. When a claim is asserted against a manufacturer, post-manufacture evidence is generally not admissible. The second rule provides that evidence of similar incidents is admissible where there is a substantial similarity between the other incidents and the accident in dispute tending to prove or disprove some fact in controversy. Evidence was introduced that violated both of these rules. Third, Branham's closing argument was a direct appeal to the passion and prejudice of the jury. And although not a standalone ground for reversal, we find that because Ford and Hale were joint tortfeasors, it was error to require the jury to apportion responsibility between the defendants.

A.
Post-distribution evidence

In order for a plaintiff to prove his case in a product liability action, he must show that the "product was in a defective condition at the time that it left the hands of the particular seller . . . and unless evidence can be produced which will support the conclusion that it was *then* defective, the burden is not sustained." *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 131-32 (1982) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g. (1965) adopted as legislative intent via S.C. Code

---

Claytor, 277 S.C. at 265, 286 S.E.2d at 132 (recognizing that any product "can be made more safe" and that "numerous factors must be considered, including the usefulness and desirability of the product [and] the cost involved for added safety").

Ann. § 15-73-30 (2005)); *see also Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 548-49, 462 S.E.2d 321, 331 (Ct. App. 1995) (recognizing that the "product must be 'measured against a standard existing at the time of sale'" and that "'hindsight opinions by [. . .] experts suggesting that more should have been done . . . are insufficient to discredit the conclusion that the manufacturer met the standard of care'") (quoting *Sexton ex rel. Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991) and *Doe v. Miles Labs., Inc., Cutter Labs. Div.*, 927 F.2d 187, 193 (4th Cir. 1991))); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a. (1998) ("[F]or the liability system to be fair and efficient, the balancing of risks and benefits in judging product design . . . must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution."). Because the claim here is against the manufacturer, the "time of distribution" is the time of manufacture.

While we find Branham presented sufficient evidence to create a jury question on his design defect claim, we further find Ford was prejudiced by Branham's unrelenting pursuit of post-distribution evidence on the issue of liability. Given the extent of the improper post-distribution evidence introduced, the error cannot be considered harmless.

We first clarify what is post-distribution evidence. Simply defined, post-distribution evidence is evidence of facts neither known nor available at the time of distribution. When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or "reasonably attainable" at the time of manufacture.[17] *See* RESTATEMENT (THIRD) OF

[17] The dissent asserts that our opinion "may be read as barring any evidence created after the date of manufacture." We do not intend our holding to reach that far. As defined above, post-distribution evidence is "evidence of facts neither known *nor available* at the time of distribution." The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a speaks in terms of "reasonably attainable" knowledge at the time of distribution. If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture.

TORTS: PRODUCTS LIABILITY § 2, cmt. a. (1998). The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper. *See Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 326 (Mich. 1995) ("Evidence of conduct after the date of manufacture improperly shifts the focus from the premanufacturing decision and has the potential to taint any finding of liability.").

Hale's Ford Bronco II 4x2 was manufactured in 1986. The following is a sampling of the post-manufacture (or post-distribution) evidence.

Branham introduced a memorandum dated April 14, 1989, dealing with a meeting that three Ford engineers had with "six people from Consumers Report." The memorandum stated that:

> Our objective was to "give it our best shot" at diffusing a very negative story on the Bronco II in the June issue . . . . The magazine has done a comparative test of the Chevy S-10 Blazer, Geo Tracker, Dodge Raider and Bronco II. As the result of several calls from a Consumer Report writer, we were led to believe that the story could be nearly as negative as last summer's Suzuki Samurai story. Plus, NHTSA is currently conducting an engineering analysis of the Bronco II which creates a negative cloud. And, FARS [Fatal Analysis Reporting System] data shows Bronco II to have a higher fatal rollover rate relative to certain competitors.

The memorandum went on to note the following: "Our data are not terribly favorable. Our rollover rate is three times higher than the Chevy S-10 Blazer." This evidence of the Bronco II's rollover rate is post-manufacture evidence.

The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Later in the same 1989 memorandum, as the engineers discuss how they thought they did, this comment is made: "We think, however, that we have clouded their minds, loosened some conclusions they may have reached prior to our meeting and sent them off to search for additional information that could work to our advantage." The "clouded their mind" comment became a mantra for Branham on the issue of liability and otherwise.

Through Branham's expert, Dr. Richardson, a 1989 film was introduced. Counsel emphasized this film, taped in 1989, comparing the S-10 Blazer and the Bronco II. As reflected in Plaintiff's exhibit 54A, which is the corresponding report to the videotape, Ford requested "additional 'J' turn tests" on May 17, 1989 for various vehicles, including a 1989 Bronco II 4x4. The tape (post-manufacture evidence) revealed that the 1989 Bronco II did not handle as well as the S-10 Blazer.

Dr. Richardson also testified to a document, Plaintiff's exhibit 168, referencing post-manufacture evidence that compared a 1989 Bronco II (referred to in the document as BII) to the UN46 prototype, now known as the Ford Explorer. This exhibit shows the additional evidence of the rollover tendency of the Bronco II that came to light after 1986:

> Current "strategies" for development of utility vehicle stability have changed over the past few years due (sic) the increased availability of rollover accident data and analyses. Previous strategies were partially driven by the Insurance Institute tests of the Jeep CJ7 in the early 80's which emphasized risk from rollovers caused by extreme (rate and magnitude) steering inputs in emergency maneuvers. Independent DOT, GM and Ford studies have confirmed that rollovers directly induced by extreme steering inputs are rare for any Utility vehicle (including the CJ7). The following quote from GM's recent SAE Paper (Reconstruction of Rollover Collisions, SAE 890857) summarizes current wisdom. "A common pre-rollover maneuver is an off-road path by the car, followed by heavy steer correction back towards the road leading to a side slide, and, ultimately, a

trip followed by the rollover." Based on this new information, the UN46 was developed using a handling philosophy notably different from the BII.[18]

This post-distribution exhibit concludes:

> Based on an analysis of FARS accident summaries and BII & Competitive handling characteristics, it is impossible to identify any type of vehicle "defect" that could explain the BII FARS performance. It is most likely that the handling strategy used during the development of the BII, which fully exploited the vehicles (sic) inherent quickness (due to its short wheelbase), encourages aggressive driving and makes the vehicle more sensitive to the large steering wheel "over-corrections" that seem to be part of most rollover scenarios. This sensitivity is aggravated by the fact the (sic) most operators in rollover accidents are either inexperienced drivers, under the influence of alcohol or both. The UN46, designed with the benefit of the FARS experience for all utility vehicles, has been intentionally developed to resolve these issues.

Yet another example of post-distribution evidence is found in a March 3, 1989 memorandum addressing an accident caused while testing a prototype anti-lock braking system (ABS) at the Dearborn Proving Grounds (DPG). The memorandum revealed that on February 28, 1989, a "demonstration was conducted on an ice pad located on the DPG East-West runway" and that the "accident involved a Kelly-Wayes Company owned 1989 Bronco II with prototype ABS." The goal was to test the efficacy of the ABS system when running partially on ice and partially on dry ground. During the test procedure the Bronco II rolled over. The rollover occurred on ice.

---

[18] Plaintiff's exhibit 168 refers to General Motors' "recent" Society of Automotive Engineers (SAE) paper concerning rollovers. The GM SAE paper was published in February of 1989.

There are other examples of post-manufacture evidence, but the few examples cited illustrate the inherent prejudice that flows from post-distribution evidence. It is good when a manufacturer continues to test and evaluate its product after initial manufacture. As additional information is learned, changes may be made that improve product safety and function. As a matter of policy, the law should encourage the design and manufacture of safe, functional products. In holding manufacturers accountable for unreasonably dangerous products pursuant to a fair system, products liability law serves that goal. Moreover, the law should encourage manufacturers to continue to improve their products in terms of utility and safety free from prior design decisions judged through the lens of hindsight.

Whether the 1987 Ford Bronco II was defectively designed and in a defective condition unreasonably dangerous must be determined as of the 1986 manufacture date of the vehicle. Ford's 1986 design and manufacture decision should be assessed on the evidence available at that time, not the increased evidence of additional rollover data that came to light after 1986.

B.

Other Similar Incidents

In *Whaley v. CSX Transportation Inc.*, this Court recognized that similar accidents are admissible if they "tend[] to prove or disprove some fact in dispute." 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). The Court also recognized that this type of evidence has the potential to be "highly prejudicial."[19] *Id.* at 483, 609 S.E.2d at 300. Accordingly, it set forth a stringent standard for admissibility: "'[A] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.'" *Id.* at 483, 609 S.E.2d at 300 (quoting *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995)); *see also Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604

[19] In *Nissan Motors Co. v. Armstrong*, the Texas Supreme Court made a similar observation, noting that: "[P]rolonged proof of what happened in other accidents cannot be used to distract a jury's attention from what happened in the case at hand." 145 S.W.3d 131, 138 (Tex. 2004).

S.E.2d 385 (2004) (recognizing that "unless Orkin's past conduct is 'similar' to the conduct directed at the [plaintiffs], it is inadmissible").

Before addressing the "substantially similar" test, we resolve Ford's twin challenge to the post-manufacture evidence of supposed similar incidents. Even assuming a plaintiff satisfies the *Whaley* "substantially similar" test, such evidence must not run afoul of the rule in products liability cases that prohibits post-distribution evidence to establish liability. *Whaley* is instructive in this regard.

Whaley was employed by CSX Transportation. Whaley became ill, allegedly due to work conditions, with heat-related symptoms first reported on May 24, 2000. Whaley introduced evidence that "between 1984 and 2000, CSX had received ninety-seven employee complaints about heat. In addition, the trial judge permitted Whaley to introduce evidence that, between 1993 and 2000, eighteen CSX employees had suffered heat stroke." *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300. Because "Whaley did not establish that the reported complaints and injuries stemmed from the same or similar circumstances as his injuries[,]" it was error to admit the evidence. *Id.* at 483-84, 609 S.E.2d at 300. Yet Whaley never attempted to introduce evidence of other incidents that occurred after the 2000 injury date.

On the issue of liability, Branham presented voluminous evidence of post-manufacture rollover data. The post-manufacture evidence of purported similar incidents was error, even if the "substantially similar" threshold was met.[20] Post-manufacture evidence of similar incidents is not admissible to prove liability.

---

[20] Branham's evidence concerning the February 28, 1989 rollover, discussed above in Part III.A., is an example of evidence that violates both rules. First, it is post-manufacture evidence. Second, the purpose was to test a prototype braking system (the anti-lock braking system) on ice. According to Plaintiff's exhibit 275, "[s]everal brake application maneuvers were performed on the ice surface." The 1989 Bronco rolled over during the testing. A rollover under these circumstances is so patently dissimilar to the

This Court recently revisited *Whaley* in a products liability setting, *Watson v. Ford Motor Co.*, Op. No. 26786 (S.C. Sup. Ct. filed March 15, 2010) (Shearouse Adv. Sh. No. 10 at 37). In *Watson*, we repeated that "[e]vidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Id.* at 50. In imposing a burden on plaintiffs to demonstrate "that the other accidents were substantially similar to the accident at issue[,]" the Court "set forth factors to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other accidents." *Id.* at 51 (citing *Buckman v. Bombardier*, 893 F. Supp. at 552).

We turn now to the evidence of pre-manufacture rollover data. Branham introduced evidence of rollover accidents involving the Bronco II and other vehicles in the same class that was known at or prior to the 1986 manufacture of Hale's Bronco II. Ford claims the pre-manufacture comparative evidence of rollover accidents violates the *Whaley–Watson* "substantially similar" test because there was no showing that the cause of the other accidents was similar to the cause of the rollover accident at issue.

In commenting on this evidentiary dispute, we must be careful not to foreclose the discretion of the trial court in ruling on objections during the course of the retrial. This is especially true with "other similar incidents" evidence because of its potential to be "highly prejudicial," thereby implicating Rule 403, SCRE. Our discussion, therefore, is intended as a general guideline, as we recognize a host of factors can arise during the course of a trial that impact a trial court's decision to admit or exclude evidence.

---

circumstances of Hale's June 17, 2001 accident that no discussion is warranted.

With that caveat, on the record before us, we disagree with Ford. Admittedly, a showing of comparative rollover accident rates does not establish the manner in which any particular accident occurred. But Ford misconstrues the essence of Branham's design defect claim. To the extent Branham is able to establish (at or prior to the manufacture date of the subject vehicle) the rate or number of rollover accidents of the Bronco II was greater as compared to other vehicles in its class, such evidence may well be relevant on whether the Bronco II was unreasonably dangerous.

We do agree with Ford that if the cause of an accident is known and the cause is not substantially similar to the accident at issue, evidence of the other accident should be excluded. Yet, where the precise cause of an accident is not known, Bronco II rollover accident data has relevance when compared to rollover accident data of other vehicles in class. This relevance is linked directly to Branham's claim that the design of the Bronco II caused it to have an unreasonably dangerous tendency to rollover.

Like the trial court, we are persuaded by neither Ford's general argument that many accidents may be attributable to inexperienced or impaired drivers, nor its specific reference to Hale's inattention as the cause of the June 17, 2001 accident.

First, as referenced in a Ford document (Plaintiff's exhibit 168), Ford recognized the tendency of the Bronco II to roll over, describing it as driving "sensitivity" which is "aggravated by the fact [that] most operators in rollover accidents are either inexperienced drivers, under the influence of alcohol or both." Assuming a number of rollover accidents are caused by inexperienced or impaired drivers, there is no suggestion in this record that inexperienced or impaired drivers disproportionately favored the Bronco II, thus skewing the comparative rollover accident data. It is inferable that rollover accidents caused by inexperienced or impaired drivers are shared by all vehicles in the class, not just the Bronco II. While Ford's position may have appeal as a jury argument, it is of little moment on the admissibility question in the record before us.

Second, there may be little or no doubt as to Hale's negligence, but that misses the point in terms of the admissibility of comparative rollover accident data. A car manufacturer must design and produce vehicles that are not in a defective condition unreasonably dangerous to the user. Cars are designed with utility and safety in mind, and careless driving is a foreseeable reality. The general nature of the alleged negligent driving on the part of Hale was (or should have been) part of the evaluative process that culminated in the ultimate decision of Ford to design, manufacture and market the Bronco II to the driving public. Ford had a duty to design and manufacture the Bronco II as a reasonably safe vehicle.

We believe our consideration of the admissibility of the pre-manufacture rollover accident data necessarily flows from the risk-utility test for products liability design defect cases.

C.

Closing Argument

It is improper for counsel to make a "closing argument to the jury . . . calculated to arouse passion or prejudice." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Ct. App. 1984). The closing argument of Branham's counsel was designed to inflame and prejudice the jury. Closing argument excerpts include:

1. "This is how Ford looks at this. That little bit of thirty people being killed every year didn't matter. Those thirty people, those thirty extra people getting killed in a year didn't matter to them because it was just a little bitty number."

2. "It does matter about those people getting killed. Those thirty people do count. Those thirty people--that's thirty more people that got killed that year. If you expect these vehicles to last about twenty years, that's six hundred more people getting killed using this vehicle as opposed to a Chevy S-10 Blazer. That's serious."

3. "And that doesn't count the paralyzed people, the quadriplegics, the people with serious injuries, the thousands of people that have been in these events because of this rollover propensity of this vehicle that they knew about, and they knew it since day one but they chose profit over safety every time because they looked at it as numbers. They didn't look at it as lives, as people."

4. "I submit to you that the evidence is that they did it because they thought it was a little, small number. . . . [T]hey did not look at it as thirty lives a year[], they didn't look at it as six hundred lives. That's how they should have looked at it, but that was not how they did it."

5. "They got together at the highest levels of Ford Motor Company and they made a judgment that rather than delaying and improving the Bronco II, they were going to sell the vehicle as it was and that they were going to risk people's lives and they were going to risk serious injuries like we have here today. They were going to risk people's brains."

6. "Jesse Branham is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and numerous others have brain injuries or are paralyzed, quadriplegic, have extremely serious injuries. We believe that you should tell Ford Motor Company what you think about this kind of thing."

It is unmistakable that the closing argument relied heavily on inadmissible evidence. In addition, as will be discussed below, much of the prejudice resulting from the improper evidence was merged in closing argument with Branham's pursuit of punitive damages in requesting that the jury punish Ford for harm to Branham **and others**. The closing argument invited the jury to base its verdict on passion rather than reason. The closing

argument denied Ford a fair trial. *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct. App. 1996) ("The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial.").

D.

The Verdict Form

Over Ford's objection, the trial court required the jury to apportion liability between Ford and Hale. This was error. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 303, 641 S.E.2d 903, 907-08 (2007) ("[A] special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error."). Whether Ford was prejudiced by the improper verdict form is speculation, but we address the issue in light of the remand for a new trial.

Ford and Hale were alleged joint tortfeasors. The accident occurred in 2001. In 2001, multiple tortfeasors were jointly and severally responsible for all damages. Concerning a plaintiff's ability to collect on a judgment, there could be no apportionment of fault among joint tortfeasors.[21] The trial court used a verdict form that is standard in comparative negligence cases where a defendant alleges the plaintiff's own negligence caused the accident and resulting injuries. Question five of the verdict form asked the following:

---

[21] The cross-claim between Ford and Hale was severed from the underlying trial. The current version of the Contribution Among Tortfeasors Act became effective for cases arising after July 1, 2005. The 2005 amendment to the Act provides that a "less than fifty percent" at-fault defendant "shall only be liable for that percentage of the indivisible damages determined by the jury." S.C. Code Ann. § 15-38-15(A) (Supp. 2008). A provision applicable in 2001 provided that "[i]n determining the pro rata shares of tortfeasors in the entire liability . . . [,] their relative degrees of fault shall not be considered." S.C. Code Ann. § 15-38-30 (2005).

> Taking the combined negligence that proximately caused the parties' injuries as one hundred percent (100%), what percentage of that negligence is attributable to Defendant Ford Motor Company and what percentage is attributable to the Defendant Cheryl Jane Hale?

The jury apportioned fault 55% Ford and 45% Hale. Allocating fault between Ford and Hale served no legitimate purpose. Our comparative system for allocating liability between a plaintiff and a defendant is in no manner implicated where fault lies, if at all, among multiple defendants. Since the *Nelson v. Concrete Supply*[22] decision adopting comparative negligence (between a plaintiff and a defendant), this Court has reaffirmed the applicability of joint and several liability among joint tortfeasors. *Summer v. Carpenter*, 328 S.C. 36, 48, 492 S.E.2d 55, 61 (1997); *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 175-76, 467 S.E.2d 439, 443 (1996); *see also Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 478, 499 S.E.2d 509, 513 (Ct. App. 1998).

The trial court justified the apportionment question on the basis of a need to ensure that any punitive damage award was supported by a negligence cause of action, and not the strict liability claim. The trial court's reasoning is not persuasive. If there were genuine concern regarding the basis of a plaintiff's verdict, the easy solution was a verdict form tailored to that concern, just as Ford requested.

A detailed verdict form would have specified whether a finding of negligence against Ford was based on the seatbelt sleeve claim or the design defect claim, or both. A proper verdict form would have avoided the confusion caused by having the jury apportion blame between jointly and severally liable defendants. More to the point, Ford's requested special verdict form would have avoided the very real risk that the jury (unaware of joint and several liability principles) would take the cue from the apportionment question and inflate the actual damage award to ensure Branham received a full recovery from the one deep-pocket defendant. The

---

[22] *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

actual damage award causes genuine concern as to the effect on the jury of the improper verdict form.

IV.

Ford challenges the jury's award of $16,000,000 actual damages and $15,000,000 punitive damages. Because of our directive for a new trial, we decline to address Ford's contentions that these awards are excessive.

A.
Actual Damages

Ford contends the $16,000,000 actual damage award is grossly excessive. "When a verdict is 'grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.'" *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (quoting *Small v. Springs Indus., Inc.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)). In light of the remand for a new trial, it is unnecessary to resolve Ford's claim that the actual damage award is grossly excessive.

B.
Punitive damages

The issue of punitive damages was properly submitted to the jury. Ford, however, contends that the $15,000,000 punitive damage award cannot withstand constitutional scrutiny. We agree. Because of the necessity of a new trial, we address two issues: Branham's reliance on "harm to others" and the evidence of compensation of Ford's executives.

The pervasive prejudice resulting from the improper post-manufacture evidence on the issue of liability was compounded in Branham's pursuit of punitive damages. Perhaps the manifestation of this error is most easily seen

in counsel's request that the jury punish Ford for harming others beyond Branham. *See Durham v. Vinson*, 360 S.C. 639, 653, 602 S.E.2d 760, 767 (2004) (reversing an award of punitive damages because the trial court allowed the jury to "punish" the defendant for a "bad act unrelated" to the defendant's action toward the plaintiff); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 350, 353 (2007) (reversing a punitive damages award where plaintiff's counsel asked the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been," and holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation").

As outlined above, punishing Ford in this case for harming all Bronco II rollover victims was a central theme in counsel's closing argument.[23] The trial court charged the jury not to punish Ford for other "conduct." The charge violated the "harm to others" prohibition set forth in *Durham v. Vinson* and *Philip Morris USA v. Williams*. By focusing on conduct, as opposed to harm to Branham, the charge invited the jury to punish Ford for

---

[23] For example, "If you expect these vehicles to last about twenty years, that's six hundred more people getting killed using this vehicle as opposed to a Chevy S-10 Blazer. That's serious. . . . And that doesn't count the paralyzed people, the quadriplegics, the people with serious injuries, the thousands of people that have been in these events . . . . Jesse Branham is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and numerous others have brain injuries or are paralyzed, quadriplegic, have extremely serious injuries. We believe you should tell Ford Motor Company what you think about this kind of thing." (Excerpts from Plaintiff's counsel's closing argument.) Ford has been told in other litigation that the Bronco II was defectively designed. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999); *Ford Motor Co. v. Cammack*, 999 S.W.2d 1 (Tex. App. 1998). Due process forbids punishing a tortfeasor multiple times for the same injury.

all Bronco rollover deaths and injuries—the very harm *Durham* and *Philip Morris* forbid.

We next examine the admission of financial data regarding Ford. Unless the United States Supreme Court holds otherwise under the Due Process Clause, we adhere to South Carolina law that "the wealth of a defendant is a relevant factor in assessing punitive damages." *Welch v. Epstein*, 342 S.C. 279, 307, 536 S.E.2d 408, 423 (Ct. App. 2000). This is frequently described as the "ability to pay" factor. But this factor is not without boundaries. "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("[R]eference to [the defendant's] assets . . . ha[s] little to do with the actual harm sustained by the [plaintiff]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

Branham presented evidence of Ford's net worth, income, revenues and cash flow. In 2005, Ford's net worth was $12,597,000,000. Also in 2005, Ford had $1,986,000,000 in income, $177,000,000,000 in revenue and $21,000,000,000 in cash flow. Branham extrapolated these figures to "per week," "per day," and "per hour." For example, concerning Ford's cash flow, "[t]hat's $416 Billion per week,[24] $59 Million per day, [and] $2.474 Million per hour."

This Court has approved the use of a defendant's net worth as a proper guide in assessing the "ability to pay" factor. *Hicks v. Herring*, 246 S.C. 429, 437, 144 S.E.2d 151, 154 (1965) (noting that "the wealth of a defendant is a relevant factor in assessing punitive damages"). This Court has not, however, addressed the propriety of extrapolating financial data in the manner

[24] The $416 Billion per week figure is in the record, though the figure is clearly a miscalculation given annual cash flow of $21 Billion.

introduced at trial. Our court of appeals has directly addressed this issue and found no abuse of discretion in the admission of per day earnings of a defendant, *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 344, 450 S.E.2d 66, 73-74 (Ct. App. 1994), nor has it found an abuse of discretion in admitting the per day operating revenue or per day net income. *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 169-70, 536 S.E.2d 380, 385-86 (Ct. App. 2000). These court of appeals decisions have not been tested since the 2003 Supreme Court opinion of *State Farm v. Campbell*.

Because the United States Supreme Court has discovered that a state court's punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages. Evidence concerning net worth appears the safest harbor. *Honda Motor* speaks directly to "net worth." 512 U.S. at 432. Consideration of a defendant's net worth is well-rooted in the common law of punitive damages. *State Farm v. Campbell*'s cautionary observation that "reference to [the defendant's] assets . . . ha[s] little to do with the actual harm sustained by the [plaintiff]" militates against venturing beyond net worth and extrapolations from net worth. *State Farm*, 538 U.S. at 427. The retrial shall be confined to such evidence.

While the United States Supreme Court's foray into punitive damages law is, to be sure, confusing, there can be no serious doubt concerning financial evidence of the salaries and compensation of a defendant corporation's officers. Such evidence introduces an arbitrary factor in a jury's consideration and assessment of punitive damages.

Branham went far beyond the pale in submitting evidence of Ford's senior management compensation, including the following: In 2005, the Ford Chairman and Chief Executive Officer was compensated by stock options worth $5,300,000; the Ford President and Chief Operating Officer received a salary $1,458,000 in 2005; the Ford Executive Vice President received a salary of $972,000 in 2005; the Ford Chief Financial Officer received a salary of $916,000 in 2005; a former Ford chairman received $880,000 in 2005. Additional testimony revealed that "[i]n 2005, they didn't pay bonuses. In

2004, they did pay bonuses: $2 Million, $1 Million, $1 Million and $1 Million plus stock and other compensation. This gives you a picture of Ford Motor Company's financial condition." The admission of this evidence was error and highly prejudicial.

V.
Alignment of Parties

We reach Ford's final challenge assigning error to the trial court's failure to realign defendant Hale as a plaintiff. Ford requested realignment of Hale as a plaintiff so that Ford would not have to share its allotment of preemptory jury strikes[25] with Hale.[26] We find the issue not preserved for review, but we address this issue in the hope that our speaking to the matter will aid the bench and bar. This is a novel issue in our modern jurisprudence.

Hale and her counsel sat on the plaintiff's side throughout the trial, beginning with jury selection. We recognize that Hale filed a cross-claim against Ford, but that claim was severed from this trial. Hale's counsel declined to cross-examine any witness called by Branham but one. The one witness Hale cross-examined was Branham's economic expert. The question: "[H]ow many millions are in a billion?"

The only *bona fide* defendant in this case was Ford. The following is the totality of Branham's closing argument concerning Hale:

---

[25] In South Carolina, in a civil action, each side receives four peremptory strikes and the strikes are made on a side-to-side basis until 12 jurors are seated. *See* S.C. Code Ann. § 14-7-1050 (1976). Therefore, Branham had four strikes and Ford and Hale each had two.

[26] It appears Ford's motion to realign Hale was filed prior to jury selection and initially handled off the record. During jury selection, Ford's counsel referred to his earlier motion concerning the "alignment of the parties . . . [and] the issue of the number of strikes." Ford's counsel reiterated his concern by noting that Hale's counsel "is sitting over there with the plaintiff."

> I want to first talk with you just a minute about what occurred in the wreck. . . . Ms. Hale was going down Cromwell Road at a relatively slow speed, 35 miles an hour, she looked in the back, went to the edge of the road, she made--went to the right, made a steer to the left.
>
> Nobody knows what that steering was because nobody has a picture of it. We could argue about that from now to eternity and nobody would know, because nobody can know. But she was driving ordinary, she wasn't doing anything--she wasn't out there doing any reckless driving out there that day.
>
> . . . .
>
> Here, Ms. Hale looked in the backseat; there's no question about that, she took her eyes off the road. But did she do something that was wrong. She did what all reasonable drivers would do, which was she tried to get back on the road. She made the turn to do it and the vehicle rolled over, at 35 miles an hour, under those circumstances.

Trial judges in South Carolina have the authority to realign parties. Beyond a court's inherent authority to manage and conduct a trial, our Rule 21, SCRCP, regarding joinder of parties is identical to the federal rule, Rule 21, FRCP.

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 21, SCRCP.

Federal courts rely on Rule 21 as authority to realign parties. *See In-Tech Mktg. Inc. v. Hasbro, Inc.*, 685 F.Supp. 436, 442 n.19 (D.N.J. 1988) (noting that Rule 21 "permits [the District] Court, *sua sponte* to re-align *any* party at *any* time"); *First Nat'l Bank of Shawnee Mission v. Roeland Park*

State Bank & Trust Co., 357 F. Supp. 708, 711 (D. Kan. 1973) (noting that the District Court "may order a realignment of the parties 'on such terms as are just'" pursuant to Rule 21). Our sister state of Georgia relies on Rule 21 in recognizing that "a trial court does have the discretion, 'at any stage of the action and on such terms as are just,' . . . to realign the parties." *Cawthon v. Waco Fire & Cas. Ins. Co.*, 386 S.E.2d 32, 33 (Ga. 1989) (citing its codified version of Rule 21).

The *Cawthon* decision is instructive. At trial, the Cawthons made a motion to have a co-defendant realigned as a plaintiff. The "Cawthons were concerned that they would be forced to share jury strikes with the [co-defendant whose interests were aligned with the plaintiffs]." *Id.* at 33. The trial court recognized the unfairness of the present alignment, "but [stated] that it had no authority to realign the parties." *Id.* Relying on its own version of Rule 21, the Georgia Supreme Court found the trial court erred in "concluding it did not have discretion to realign the parties," and affirmatively held that trial courts have the right to realign parties in the interests of justice. *Id.*

We adopt the reasoning of *Cawthon*, including the authority of a trial court to realign parties "at any stage of the action." *Id.* The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice.

VI.

The judgment of the trial court is affirmed in part, reversed in part and the case is remanded for a new trial.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

TOAL, C.J., and BEATTY, J., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion, in which WALLER, J., concurs.

JUSTICE PLEICONES: I concur in part and dissent in part. While I agree that the risk-utility test is the appropriate test for design defect cases, I do not believe this Court has the power to simply discard the consumer expectations test, expressly adopted by the General Assembly in S.C. Code Ann. §§ 15-73-10 through 30. Furthermore, in my opinion, much of the evidence the majority views as improper "post-manufacture" evidence was properly admissible to prove (1) the foreseeable risk of harm posed by the Bronco II as produced, (2) that the proposed alternative designs could have reduced or avoided the foreseeable risk, and (3) that the Bronco II, absent the alternative designs, was not reasonably safe.

I. Risk-Utility Test

As the majority notes, the General Assembly adopted the Restatement (Second) of Torts § 402A in 1974. See S.C. Code Ann. §§ 15-73-10 through 30. The comments to § 402A, which form the basis for the consumer expectations test, were expressly adopted as legislative intent. S.C. Code Ann. § 15-73-30. The majority then notes that the American Law Institute has, in the Restatement (Third) of Torts, moved away from the consumer expectations test for design defects in favor of the risk-utility test and proposes that this Court do the same. While I agree with the majority that the risk-utility test is the appropriate test for design defect cases, I do not believe that this Court has the authority to simply reject the General Assembly's chosen test, even if we believe that body would approve of the change. See Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 333 S.E.2d 57 (Ct. App. 1985) ("It is the duty of this court to interpret the law. We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance.").

However, I believe that this Court may effect the same result under the existing statute by interpreting the consumer expectations test in the specific context of design defect cases. S.C. Code Ann. § 15-73-10 provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability . . . ." Comments to § 402A explain that a product is in a "defective condition unreasonably dangerous to the user or consumer or to his property" when the

product is in "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A cmt. g. A product is unreasonably dangerous when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." Restatement (Second) of Torts § 402A cmt. i. These comments form the basis for the consumer expectations test.

In my view, given the complexity of many modern products, a consumer's expectations are not directed to any specific characteristic of the design, but rather to the manufacturer's design decision. The ordinary consumer expects that the manufacturer will weigh the foreseeable risks against the benefits and only offer a product for sale to the general public if the latter outweighs the former. See 60 S.C. L. Rev. 1101.

Accordingly, I concur in the majority's decision to apply risk-utility principles to design defect claims. However, in my view, such change must be achieved within the framework of existing statutory provisions.

II. Post-Manufacture Evidence

I respectfully disagree with the majority's stance on "post-manufacture" evidence. The majority reverses the jury verdict based, in part, on its finding that "Ford was prejudiced by Branham's unrelenting pursuit of post-manufacture evidence on the issue of liability." The opinion defines "post-manufacture evidence" as "evidence of facts neither known nor available at the time of manufacture." Such evidence is, in the majority's view, inadmissible because "[w]hen assessing liability in a design defect claim, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known at the time of manufacture." I believe the majority's rule sweeps too broadly and absorbs within its ambit evidence which is properly admissible in a design defect case.

I note at the outset that the majority opinion may be read as barring any evidence *created* after the date of manufacture. If this is the majority's view, I strongly disagree. In my view, such a rule would deprive the fact finder of

relevant evidence regarding what the manufacturer knew or should have known, design alternatives, and the risk inherent in the manufacturer's design.

In a products liability action, the plaintiff must prove (1) that he was injured by the product; (2) that the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. See Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). Under the risk-utility test for design defect cases, a plaintiff must prove the second element, product defect, by showing that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b) (1998).

In seeking to meet his burden, the plaintiff introduced the following evidence which the majority finds objectionable:

(1) A memo dated April 14, 1989, dealing with a meeting that three Ford engineers had with representatives from Consumer Reports, discussing a comparative test of the Bronco II and other similar cars, showing the Bronco II to have a higher fatal rollover rate than the other cars.

(2) A film, taped in 1989, showing "J-tests" comparing the Chevy Blazer and Bronco II, and demonstrating that the Bronco II did not handle as well as the Blazer.

(3) A document that compared a 1989 Bronco II to a prototype of the Ford Explorer, showing that the handling strategy of the Bronco II makes the vehicle more sensitive to steering over-corrections that seem to be part of most rollover scenarios.

In finding the above evidence improper and inadmissible, the majority notes that:

> Whether the 1987 Ford Bronco II was defectively designed and in a defective condition unreasonably dangerous must be determined as of the 1986 manufacture date of the vehicle. Ford's 1986 design and manufacture decision should be assessed on the evidence available at that time, not the increased evidence of additional rollover data that came to light after 1986.

While I agree in general with the majority's proposition, I note that *when* the reports were generated or tests conducted is of little consequence, since testimony established that the vehicles tested were substantially the same as the model involved in the accident, the testing methods were available to Ford prior to the date of manufacture, and the rollover risk was known to Ford prior to the date of manufacture. In short, the date on which the evidence was created is of little utility in determining the relevance of the evidence and a broad rule barring evidence created "post manufacture" actually serves to defeat the goals of the risk-utility test.

First, I believe the evidence was admissible to show foreseeable risk. The risk-utility test, as set forth in the Restatement (Third) of Torts, speaks not in terms of evidence of risk of which the manufacturer was *actually* aware, but in terms of *foreseeable* risk. No party disputes that Ford had the ability to test the 1987 Bronco II in the same way as was done in the disputed evidence mentioned above. In fact, Ford conducted such tests, the results of which led some Ford engineers to conclude that the wheel base design was flawed.[27] Consequently, in my view, the memo, film, and document were properly admissible to show foreseeable risk, an essential element of the plaintiff's burden of proof in a design defect case.[28]

---

[27]Even if the risk-utility test considered only the manufacturer's *actual* knowledge of the risk, introduction of the memo, film, and document would not be prejudicial to Ford as this testimony demonstrates that Ford was aware of the stability problems demonstrated in the "post-manufacture" evidence.

[28] I note that a rule barring any evidence created after the date of manufacture would bar nearly all evidence created by a party other than the defendant manufacturer, as it is the only party with access to the vehicle prior to the date of manufacture.

Second, I believe the video was admissible to show the viability of the proposed reasonable alternative design. To satisfy the risk-utility test, the plaintiff must prove, in most instances, that the foreseeable risk could have been avoided by the adoption of a reasonable alternative design. Restatement (Third) of Torts: Products Liability, § 2 cmt. d. The alternative design must be one that could have been practically adopted at the time of the sale. Id.

The plaintiff proposed reasonable alternative designs that were available at the time of manufacture, i.e. the McPherson Strut suspension system and SLA suspension system, and he was entitled to an opportunity to show that the alternative designs could have reduced or avoided the foreseeable risk. Testimony at trial established that the Blazer used the SLA suspension system and the video demonstrated that the SLA system remedied the alleged rollover propensity of vehicles using the Twin I-Beam suspension system. The video was therefore, in my view, properly admitted.

Finally, I believe the memo, film, and document were properly admissible to aid the plaintiff in proving the final element of the risk-utility test: that "the omission of the alternative design renders the product not reasonably safe." Though the "post-manufacture" evidence dealt with Bronco II vehicles manufactured between 1987 and 1989, testimony at trial established that there were no major changes to the Bronco II after 1987. The vehicles' rollover propensities are therefore relevant to the issue of the reasonableness of Ford's choice of the Twin I-Beam suspension system over the SLA or McPherson system.

For the reasons stated above, I concur in part and dissent in part.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Terry T. Tindall, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 26861
Heard November 4, 2009 – Filed August 16, 2010

REVERSED

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Christina Theos Adams, of Anderson, for Respondent.

JUSTICE PLEICONES: Terry T. Tindall was convicted of trafficking cocaine in excess of four hundred grams, sentenced to twenty-five years imprisonment, and assessed a $250,000 fine. On certiorari, he challenges the Court of Appeals rulings affirming the trial court's denial of his motions to suppress the cocaine and his statement to police. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008). We reverse.

FACTS

One morning in 2004, an officer stopped Tindall's vehicle for speeding, following another vehicle too closely, and failure to maintain his lane. The officer asked Tindall to exit the vehicle and to have a seat in the patrol car. The officer questioned Tindall and, approximately fifteen to twenty minutes into the stop, asked Tindall if he could search his car, to which he replied "I don't care" or "I don't mind." The officer searched the vehicle and discovered a large quantity of cocaine hidden beneath the rear bumper.[1]

Tindall was placed in custody and given Miranda warnings, after which he gave a statement to the officer admitting that he was being paid $1,500 to drive the Jeep from Atlanta to Durham. Tindall never admitted knowing that the cocaine was in the vehicle. At trial, Tindall moved to suppress the cocaine and his statement to police. The trial court denied the motions and Tindall was convicted and sentenced. The Court of Appeals affirmed on direct appeal. This Court granted certiorari to review the decision of the Court of Appeals.

DISCUSSION

On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002). However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. Id.

[1] The entire encounter was captured on the officer's dash camera and there is no genuine dispute as to the facts, only their interpretation.

The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure. U.S. Const. amend. IV. Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed. 89 (1996). In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. Id.

Tindall concedes that the initial traffic stop was legal but contends that the officer exceeded the scope of the stop without reasonable suspicion that a serious crime was afoot. We agree.[2]

The officer stopped Tindall for speeding, following too closely behind another vehicle, and failing to maintain his lane. He obtained Tindall's driver's license, registration, proof of insurance, and a copy of the car rental agreement and asked him to have a seat in the front passenger seat of his patrol car. The officer testified that as Tindall exited the vehicle, he did a "felony stretch," raising his hands in a stress relief action which officers are taught to look for in criminal patrol classes. He then patted-down Tindall and Tindall took a seat in the patrol car. A police dog was in the back of the vehicle.

The officer asked Tindall about his destination and he responded that he was driving to Durham to meet with his brother. The officer then called in the driver's license and vehicle information. Approximately three minutes later, the dispatcher reported back that there were no problems with either the license or vehicle and the officer informed Tindall that he would write him a warning ticket.

---

[2] We find, as did the Court of Appeals, that Tindall's arguments are properly preserved for review.

At this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket. However, rather than issue the ticket, the officer continued to question Tindall for an additional six to seven minutes, inquiring as to where he was going, the purpose for the trip, what exit he would take to get to Durham, whether he had ever been charged with any drug crimes, what type of business he was in, and various questions about his business.[3] During this questioning, two other officers called in for back-up stood outside of the patrol car door.

We find the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. A reasonable person in Tindall's position – seated in the front seat of the patrol car with two officers standing at his door, another officer to his left, and a police dog in the back seat – would not have felt free to terminate the encounter. See Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991) (seizure for purposes of Fourth Amendment where reasonable person would not feel free to disregard the police and go about his business).

The question therefore becomes whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning. See Sullivan, 138 F.3d at 131. At that point, the officer had ascertained the following information: (1) Tindall was driving to Durham[4] to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous. We find these facts did not provide

[3] Tindall stated that he had recently been laid off by Northwest Airlines and that he and his wife were opening a day care center. The officer then asked Tindall questions about day care regulations, including the ratio of staff to children and the amount of square footage provided per child.

[4] The officer testified that Durham is a "drug hub." He also stated that Greenville, Charlotte, Jacksonville, Raleigh, Spartanburg, and Oconee are "drug hubs."

the officer with a "reasonable suspicion" that a serious crime was afoot. Consequently, the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.[5]

The fact that Tindall "consented" to the search of the vehicle does not alter our conclusion as the consent was the product of the unlawful detention. "Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008), citing State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). Having found the seizure violated the Constitution, we find nothing in the record to rebut this presumption of invalidity.

As we find that the cocaine was discovered after an unlawful detention and invalid consent, we conclude that Tindall's statement should have been suppressed. See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.").

[5] We disagree with the dissent's contention that we fail to appropriately apply the standard of review. While we acknowledge that we review under the deferential "any evidence" standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. See Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459. In short, we must ask first, whether the record supports the trial court's assumed findings, set forth above, and second, whether these facts support a finding that that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall. On the facts before us, we must answer the latter question in the negative.

CONCLUSION

We find the officer's actions after completion of the license and registration computer check exceeded the scope of the initial traffic stop. The continued stop beyond this point, without reasonable suspicion, constituted an illegal detention and the evidence and statement should have been suppressed. The decision of the Court of Appeals, which upheld the trial court's denial of Tindall's motions to suppress, is therefore

REVERSED.

BEATTY, J., and Acting Justice John H. Waller, Jr., concur. KITTREDGE, J., dissenting in a separate opinion, in which Acting Justice James E. Moore, concurs.

JUSTICE KITTREDGE: I respectfully dissent. Two guiding principles shape our State's Fourth Amendment jurisprudence. First, in a Fourth Amendment fact-based challenge, we are constrained by the "any evidence" standard of review. A trial court's ruling in Fourth Amendment search and seizure cases must be upheld if there is any evidence to support the ruling. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). Second, the touchstone of the Fourth Amendment is "reasonableness." *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) ("'[T]he ultimate touchstone of the Fourth Amendment,' we have often said, is 'reasonableness.'") (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)). Today's decision ignores these principles. The Court simply substitutes its preferred findings and construes the Fourth Amendment in a manner that places unnecessary and unreasonable constraints on law enforcement.

I.

Terry T. Tindall was paid $1,500 to transport a large quantity of cocaine from Atlanta, Georgia, to Durham, North Carolina. Tindall was apprehended in Oconee County, South Carolina. He was convicted and sentenced for trafficking cocaine in excess of 400 grams. The trial court denied Tindall's motions to suppress the drugs and his statement to police. The court of appeals properly applied the "any evidence" standard of review and affirmed. *State v. Tindall*, 379 S.C. 304, 309, 665 S.E.2d 188, 191 (Ct. App. 2008) (recognizing that a trial court's factual rulings are reviewed under the "clear error" standard and the appellate court will affirm if any evidence supports the ruling) (citing *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666).

II.

Sergeant Dale Colegrove of the Oconee County Sheriff's Office was patrolling Interstate 85 the morning of April 15, 2004. At 7:05 a.m., Colegrove conducted a traffic stop on a Jeep Cherokee traveling northbound

on the interstate after the vehicle crossed from Georgia into South Carolina, near mile-marker three. The vehicle was speeding and following another vehicle too closely. The vehicle was driven by Tindall.

As a result of Tindall's nervousness and delay in following initial instructions, Colegrove, an experienced officer, "sense[d] that something wasn't right with what [Tindall] was thinking." Colegrove's suspicions grew when he learned Tindall was driving a rental car from Atlanta. The car had been rented by another individual, Lee Braggs, the day before and had to be returned to Atlanta that day, April 15. Tindall was named as a permissive user in the rental agreement.

Colegrove promptly began the process of checking Tindall's driver's license and vehicle registration, while engaging Tindall in conversation. According to Colegrove, "while waiting on the check to come back, I really started just observing behavior changes." Colegrove requested backup. When Colegrove received information from dispatch that Tindall's driver's license was valid at approximately 7:15 a.m., he informed Tindall that he would receive a warning ticket.

Colegrove began to write the warning ticket while continuing to talk with Tindall. When the warning ticket was completed at 7:20 a.m. and the ticket was issued to Tindall, Colegrove asked for, and received, Tindall's consent to search the vehicle. Fifteen minutes elapsed from the initial stop to the issuance of the ticket to the search of the vehicle. At 7:29 a.m., 2,380 grams of cocaine were found hidden in three packages in the rear undercarriage of the vehicle.

Tindall was placed in custody and given *Miranda* warnings at 7:34 a.m., after which he gave a statement to Colegrove. Sergeant Colegrove testified:

> [Tindall] stated that he was traveling to Durham, leaving Atlanta going to Durham for Lee Braggs. He stated again that he was being paid $1,500 – once his *Miranda* and everything else was read, he stated to me he was being paid $1,500 to take that Jeep from Atlanta to Durham where Mr. Braggs was flying to

> meet him in Durham to pick that vehicle up and that his brother was going to return him back to Atlanta and that he was getting $1,500 for driving that vehicle from Atlanta to Durham. That's exactly what he said.

Tindall was indicted for trafficking cocaine in excess of 400 grams. He moved to suppress the cocaine and his statement to police. The trial court denied the motions, and Tindall was convicted and sentenced. The court of appeals applied the proper standard of review and affirmed in a thorough and well-reasoned opinion.

III.

There is evidence to support a finding that the officer had objectively reasonable and articulable suspicion that Tindall was engaged in criminal activity. This is the basis of the court of appeals' affirmation. Viewing the "whole picture," I join the court of appeals and would hold the standard of review requires an affirmance. More to the point, I cannot say that under the totality of the circumstances there is no evidence to support the ruling of the trial court.

In addition, contrary to the majority's implication, the Constitution does not foreclose further conversation between a motorist and law enforcement during the process of writing a traffic summons. *See Muehler v. Mena*, 544 U.S. 93 (2005) (holding mere police questioning while individual was detained did not constitute an independent Fourth Amendment violation and such questioning was not additional seizure within the meaning of the Fourth Amendment). There is ample evidence to affirm the denial of Tindall's Fourth Amendment challenge, as the court of appeals recognized.

The Fourth Amendment is measured through a lens of reasonableness. *See Fisher***,** 130 S. Ct. at 548; *Brigham City, Utah***,** 547 U.S. at 403. Fourth Amendment challenges are typically fact-intensive. As observed in *State v. Pichardo*, "[r]easonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." 367 S.C. 84, 101, 623 S.E.2d 840, 849 (Ct. App. 2005) (citations omitted). The fact-specific nature of the inquiry

explains why this Court determined the deferential "any evidence" standard of review is appropriate in Fourth Amendment cases in *Brockman*.

The court of appeals cited to what, prior to today, was a sound rule – "Under the 'clear error' standard, an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *Tindall*, 379 S.C. at 309, 665 S.E.2d at 191 (citing *Pichardo*, 367 S.C. at 95-96, 623 S.E.2d at 846). I vote to affirm the court of appeals.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett, and Lawrence Redmond, Petitioners,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, as Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company,

LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod, and all other persons unknown claiming any right, title, estate, interest or lien upon the real estate tracts described in the Complaint therein, Defendants,

of whom Debbie S. Dinovo is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26862
Heard May 26, 2010 – Filed August 16, 2010

AFFIRMED

Donald Higgins Howe, of Howe & Wyndham, LLP, and Walter Bilbro, Jr., both of Charleston, for Petitioners.

William C. Cleveland, III, and John C. Hawk, IV, both of Buist, Moore, Smythe & McGee, of Charleston, for Respondent.

Charles M. Feeley, of Summerville, for Guardian Ad Litem.

JUSTICE BEATTY: In this heirs' property dispute, the Court granted the petition of Sara Mae Robinson and others ("Petitioners") for a writ of certiorari to review the decision of the Court of Appeals in Robinson v. Estate of Harris, Op. No. 2008-UP-647 (S.C. Ct. App. filed Nov. 24, 2008). In this opinion, the Court of Appeals affirmed a circuit court order that granted summary judgment in favor of Debbie S. Dinovo on the grounds Petitioners' action to set aside a 1966 quiet title action was barred by the three-year statute of limitations as established by section 15-67-90 of the South Carolina Code,[1] Dinovo is

[1] Section 15-67-90 provides:

> No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced or application for leave to defend be made within three years from the time of filing for record a certified copy of such judgment or decree in the

a bona fide purchaser for value without notice pursuant to the recording statute as established by section 30-7-10 of the South Carolina Code,[2] and Petitioners' action was barred by the doctrine of laches. We affirm.

I. Factual/Procedural History

This action involves a portion of a 20-acre tract of land located on Fort Johnson Road, in James Island, South Carolina. The tract was formerly owned by Simeon B. Pinckney, who died intestate in 1921 and allegedly left a wife, Laura Pinckney, and two sons, Ellis and Herbert Pinckney, as his heirs.

The land held by Simeon B. Pinckney originated from a conveyance to him by deed executed in 1874 (and recorded in 1875) from Thomas Moore. The property was described as being 20 acres, more or less. In 1888, Simeon B. Pinckney conveyed 5 acres of this property to his wife, Isabella Pinckney, leaving approximately 15 acres. A survey conducted in 1923, however, found that exactly 14.3 acres remained.

> office of the clerk of court of the county in which the lands affected by such judgment or decree are situated or, in case of minors, within three years after coming of age.

S.C. Code Ann. § 15-67-90 (2005).

[2] Section 30-7-10 provides in relevant part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded . . . are valid so as to affect the rights of subsequent . . . purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10 (2007).

In 1946, Laura Pinckney, Ellis Pinckney, and Herbert Pinckney executed two cross-deeds that divided the 14.3-acre parcel among themselves, creating a 4.3-acre tract and a 10-acre tract.[3] One of the 1946 cross-deeds conveyed the 4.3-acre tract to Herbert Pinckney and the other deed conveyed the 10-acre tract to Ellis Pinckney. In 1966, after Herbert Pinckney died intestate, Laura Pinckney Heyward brought a successful action to quiet title to the 4.3-acre tract held by Herbert.[4] None of the Petitioners or their predecessors-in-interest filed responsive pleadings in the 1966 proceeding.

As the result of subsequent conveyances, the 4.3-acre tract was ultimately divided into four lots. The owners of these lots are as follows: (1) The Converse Company (Lot #1); (2) Martine A. Hutton (Lot #2); (3) David Savage and Lisa M. Shogry-Savage (Lot #3); and (4) Debbie (Shogry) Dinovo (Lot #4). The instant case involves the interests of Dinovo ("Respondent").

---

[3] Petitioners gave a detailed account of their family's lineage dating back to the death of Simeon B. Pinckney. Essentially, Petitioners alleged they were the true heirs and subsequent-interest holders of Simeon B. Pinckney, descended through his true heirs, Samuel James Pinckney and Mary Pinckney. Petitioners claimed Laura Pinckney (who later assumed the married name of Heyward) was Samuel James Pinckney's sister-in-law. Based on this allegation, Petitioners asserted Laura Pinckney Heyward obtained the 1946 deeds by falsely claiming to be the wife of Simeon B. Pinckney (instead of Isabella Pinckney, Simeon B. Pinckney's "true spouse") and claiming that Simeon B. Pinckney's sole heirs were herself and her sons Herbert and Ellis Pinckney. According to Petitioners, Samuel James Pinckney was alive in 1946 and may have been living on a portion of the original 20-acre tract with his wife and children. However, Petitioners claimed that neither Samuel James Pinckney nor any of the other legitimate heirs could read or write and, thus, did not have notice of the 1946 deeds.

[4] By way of publication, Laura Pinckney Heyward served the 1966 quiet title action to "unknown persons." See S.C. Code Ann. § 10-2404 (1962) (precursor to S.C. Code Ann. § 15-67-40 (2005), which provides for service by publication for "unknown persons defendant" in an action to determine adverse claims to real property within this state); S.C. Code Ann. § 15-67-40 (2005) ("Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against nonresident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action to try adverse claims within this State.").

On February 1, 2005, Petitioners filed an action to quiet title to several tracts of land located on James Island, including the 4.3-acre tract at issue in the instant case. In their Complaint, Petitioners sought "to establish their legitimate relationship as lineal descendants and heirs" of Simeon B. Pinckney. The first twenty-five named Petitioners claimed they were heirs of Simeon B. Pinckney, and the remaining Petitioners claimed they purchased interests in the property and were the legitimate owners of those interests.

In support of these claims, Petitioners alleged the 1946 deeds and 1966 action to quiet title were fraudulent and were undertaken without consideration for the rights or interests of Petitioners and other heirs. Specifically, Petitioners asserted the 4.3-acre tract was fraudulently conveyed to Herbert Pinckney in 1946 and, thereafter, wrongly passed by inheritance to his mother Laura Pinckney Heyward at Herbert's death. Additionally, Petitioners claimed Laura Pinckney Heyward fraudulently procured the 1966 quiet title action to the 4.3-acre tract when neither she nor Herbert Pinckney owned any interest in the tract. Finally, Petitioners alleged they did not become aware of the 1946 deeds, of the 1966 quiet title action, or of any other action affecting their title to the property until 2004.

Based on these allegations, Petitioners sought "(a) a determination of all owners of the four (4) tracts of property, . . . a determination of each owner's respective rights and interests in said tracts, and the quieting of the titles to these four (4) tracts and (b) the sale of the respective owners' interests in these four (4) tracts."

Respondent answered and filed a motion for summary judgment. In her answer, Respondent raised a number of affirmative defenses, including the doctrines of laches, estoppel, waiver, bona fide purchaser for value, *res judicata*, collateral estoppel, and the applicable statute of limitations.

In response to the motion for summary judgment, Petitioners argued their claim was not barred by section 15-67-90 given the 1966

quiet title action was the result of extrinsic fraud. Because they offered affidavits supporting their claim that the 1966 quiet title action was procured through fraud and forgery, Petitioners contended their action was distinguishable from the case of Yarbrough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990).[5]

After a hearing, the circuit court granted summary judgment in favor of Respondent. In doing so, the court found Petitioners' claims were barred by: (1) the three-year statute of limitations, codified in section 15-67-90, which prohibits setting aside "for any reason" a judgment quieting title to land; (2) Respondent is a bona fide purchaser for value without notice pursuant to section 30-7-10, the recording statute; and (3) the doctrine of laches. Because Petitioners were not parties to the 1966 quiet title action, the circuit court judge found the doctrines of collateral estoppel and *res judicata* were not applicable.

Petitioners appealed the circuit court's order to the Court of Appeals.

In a summary opinion, the Court of Appeals affirmed the decision of the circuit court. See Robinson v. Estate of Harris, Op. No. 2008-UP-647 (S.C. Ct. App. filed Nov. 24, 2008). In support of its decision, the court cited: (1) the three-year statute of limitations as codified in section 15-67-90; (2) Yarbrough as interpreting section 15-67-90; (3) Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), cert. granted (Apr. 10, 2009); and (4) Burnett v. Holiday Brothers, Inc., 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983),

[5] In Yarbrough, the property claimant filed an action to vacate a seven-year-old judgment quieting title to approximately ten acres of land. Yarbrough claimed the judgment was procured through extrinsic fraud. Id. at 341, 391 S.E.2d at 874. The trial court granted summary judgment to the defendants on the ground the action was time-barred by section 15-67-90. Id. at 341, 391 S.E.2d at 875. On appeal, the Court of Appeals affirmed the trial court's decision. In so ruling, the court found that "[n]othing in this record demonstrates Yarbrough's knowledge regarding her claim of extrinsic fraud was any different in 1981 than it was in 1988." Id. at 342, 391 S.E.2d at 875.

to reference the purpose of the recording statute as codified in section 30-7-10.

This Court granted Petitioners' request for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A.

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP; Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

B.

In essence, Petitioners contend summary judgment was improperly granted given that significant and material questions of fact exist relating to extrinsic fraud and forgery in the underlying 1966 quiet title action and the 1946 cross-deeds upon which the action was based.

In support of this contention, Petitioners argue the circuit court and the Court of Appeals erred in determining that section 15-67-90 constitutes an "absolute bar" to setting aside judgments quieting title to

land. Because they submitted affidavits in support of their claims of extrinsic fraud and forgery, Petitioners assert their cause of action is distinguishable from Yarbrough and should not have been procedurally barred by the applicable statute of limitations.

C.

In analyzing Petitioners' arguments, we must determine whether section 15-67-90 constitutes an "absolute bar" to Petitioners' action or whether Petitioners' claim of extrinsic fraud supersedes the application of this statute of limitations.

This determination requires us to revisit our decision in Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In Hagy, the biological parents brought an action in 1994 to set aside the 1992 adoption of their daughter on the ground that their consent to the adoption was induced by fraudulent statements made by the adoptive parents, who were also the biological mother's father and stepmother. Id. at 428-29, 529 S.E.2d at 716. In response, the adoptive parents defended on the merits and asserted the action was time-barred by section 20-7-1800 of the South Carolina Code, which at the time provided: "No final decree of adoption is subject to collateral attack for any reason after a period of one year following its issuance." Id. at 429, 529 S.E.2d at 716. The family court concluded the time bar did not apply to actions to set aside an adoption for fraud. The Court of Appeals reversed the family court's decision, finding section 20-7-1800 barred the action because it was commenced more than one year after the final adoption decree was commenced. Id.

On appeal, this Court affirmed as modified the decision of the Court of Appeals. In so ruling, this Court considered the novel question of "whether a facially applicable statute of limitation will bar an action to set aside a judgment procured by extrinsic fraud." Id. at 430, 529 S.E.2d at 717.[6] The Court determined that a statute of

[6] The Court referenced Yarbrough but noted that there was no comparable challenge to the statute of limitations in that case. Hagy, 339 S.C. at 430 n.5, 529 S.E.2d at 717 n.5.

limitations purporting to bar all actions to set aside a judgment would not limit "a court's inherent authority to set aside a judgment for extrinsic fraud." Id. at 431, 529 S.E.2d at 717. However, because Hagy failed to prove her consent was obtained by fraud, the Court affirmed the decision of the Court of Appeals. Id. at 433-34, 529 S.E.2d at 719.

We find Hagy supports Petitioners' contention that this Court, the Court of Appeals, and the circuit court have the inherent authority to set aside the 1966 quiet title action and the underlying 1946 cross-deeds if in fact they were procured as the result of extrinsic fraud. Moreover, a broad reading of Yarbrough indicates that a court could consider the ground of extrinsic fraud, if sufficiently proven, as affecting the application of section 15-67-90. See Yarbrough, 301 S.C. at 341-42, 391 S.E.2d at 875 (concluding property claimant's action to quiet title brought seven years after title clearance action was barred by section 15-67-90 but implicitly recognizing that extrinsic fraud, if proven, could operate to preclude application of the three-year statute of limitations).[7]

In view of our conclusion, the question becomes whether Petitioners' submission of the affidavits is sufficient to withstand Respondent's motion for summary judgment based on Petitioners' claim of extrinsic fraud.

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" Hagy, 339 S.C. at 431, 529 S.E.2d at 717. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. at 431, 529 S.E.2d at 717-18 (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

---

[7] Based on our finding that section 15-67-90 is not an "absolute bar," we need not address Petitioners' issue as to whether this statute violates the due process clauses of our state and federal constitutions. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (stating no person shall be deprived of life, liberty, or property without due process of law).

"[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment. Center v. Center, 269 S.C. 367, 373, 237 S.E.2d 491, 494 (1977).

Intrinsic fraud is fraud which was presented and considered at trial. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id.

Considering the facts of the instant case in the procedural posture of a motion for summary judgment, Petitioners offered evidence that arguably created a material question of fact regarding whether the 1946 cross-deeds and 1966 quiet title action were procured by extrinsic fraud.

Although Petitioners' affidavits are very detailed, they essentially outlined Petitioners' ancestry as direct descendants of Simeon B. Pinckney and his son Samuel James Pinckney. The affidavits indicate Laura Pinckney was not married to Simeon B. Pinckney and that Herbert and Ellis Pinckney were of no relation to Simeon B. Pinckney. The affidavits also provide that several of Petitioners' relatives had lived on the subject property prior to the institution of the 2005 quiet title action. Additionally, the affidavits state Petitioners were unaware of the 1966 quiet title action and did not realize until late 2003 that portions of the 4.3-acre tract were under construction because the property was heavily wooded and the construction was "off the road."

D.

However, even assuming Petitioners offered sufficient evidence of extrinsic fraud to withstand Respondent's motion for summary judgment, this alone is not dispositive of Petitioners' appeal. Instead,

this case presents a unique set of circumstances that operate to preclude Petitioners' action.

As evidenced by our decision in Hagy, this Court recognized that the doctrine of laches would be applicable in determining whether an action is time-barred even if extrinsic fraud is established. Hagy, 339 S.C. at 431 n.7, 529 S.E.2d at 717 n.7 (discussing the one-year statute of limitations for a collateral attack on an adoption decree and stating "[a]lthough not an issue in this case, the doctrine of laches will apply in determining whether such an action is barred"). We believe the instant case presents such a scenario.[8]

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Jones v. Leagan, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009). The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise

[8] The Court of Appeals affirmed the circuit court's order based on section 15-67-90 and Respondent's status as a bona fide purchaser for value without notice. Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (recognizing that where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); see also Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). However, because this case presents us with an opportunity to address the applicability of the doctrine of laches to section 15-67-90, we have chosen to analyze the merits of this doctrine rather than merely rely on procedural rules to reach our ultimate disposition.

detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums, 296 S.C. at 199, 371 S.E.2d at 528.

Applying the foregoing to the facts of the instant case, we find Respondent established the requisite factors to bar Petitioners' action based on the doctrine of laches.

Here, Petitioners waited thirty-nine years to challenge the 1966 quiet title action. Although Petitioners claim they did not have notice of the 1966 quiet title action until 2004, their own affidavits appear to discount this claim. In the affidavits, Petitioners assert that one of their heirs paid the county property taxes on the Fort Johnson Road properties until at least 1988. If this was in fact the case, Petitioners would have received county tax documents that corresponded to the respective properties. After the property was sold, the subsequent purchasers would have then received these tax documents. In turn, Petitioners' failure to receive tax documents should have served as notice regarding a problem with their title to the property. Thus, given that the deeds and the quiet title action were publicly-recorded and documented, it was an unreasonable length of time for Petitioners to delay in instituting the 2005 quiet title action.

Additionally, Respondent would be undoubtedly prejudiced if Petitioners' claim is not barred by laches given she purchased her lot for significant consideration and has been in possession of it since 1997 and built a family residence in 2002.

In reaching our decision, we have thoroughly considered and are empathetic to Petitioners' plight. However, given the specific facts of the instant case, we are compelled to hold the doctrine of laches precludes Petitioners from pursuing their claim. Here, Petitioners waited thirty-nine years to assert their rights regarding the 1966 quiet title action. We find such a flagrant and egregious delay represents the

quintessential situation that the doctrine of laches was intended to protect. For this Court to hold otherwise, we would have to affirmatively reject this well-established equitable doctrine.

Our decision should not be construed as establishing a general rule. Instead, we believe under the proper facts a claim of extrinsic fraud could be utilized to successfully circumvent the three-year statute of limitations as established by section 15-67-90.[9]

E.

Finally, Petitioners contend the Court of Appeals erred in relying on Robinson v. Estate of Harris (Duggan), 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), cert. granted (Apr. 10, 2009), a case involving a .5-acre tract that was part of Simeon B. Pinckney's original parcel. Specifically, Petitioners assert the Court of Appeals erred in applying section 15-39-870,[10] as the .5-acre tract at issue in the above-cited Duggan case was obtained by defendant Daniel Duggan via a different chain of title than Respondents' property. Thus, Petitioners contend the Duggan case involved a tract of land that was not the subject of the 1966 quiet title action, but rather was foreclosed upon and sold to Duggan at a judicial sale pursuant to section 15-39-870. Because the 4.3-acre tract at issue in the instant case was not sold at a judicial sale, Petitioners assert the Court of Appeals erred in applying section 15-39-870 to Respondents' case.

---

[9] To conclude otherwise, we believe, would require property owners to check the title to their property every three years.

[10] Section 15-39-870 provides:

> Upon execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2005).

We hold Petitioners' argument to be without merit as the Court of Appeals cited Robinson, the Duggan case, merely to establish the general prerequisites to institute the protection of Respondent as bona fide purchaser for value. Because the requirements of a bona fide purchaser are the same in relation to section 30-7-10 or section 15-39-870, it is inconsequential that the Court of Appeals cited Robinson which applied section 15-39-870. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) (outlining well-established requirements to invoke protection as a bona fide purchaser for value and discussing limitations of the status of a bona fide purchaser in situations involving deeds that are void *ab initio*). Moreover, a determination as to the propriety of the Robinson citation is unnecessary given our decision to affirm the grant of summary judgment to Respondent based on the doctrine of laches.

III. Conclusion

Based on the foregoing, we find the circuit court properly granted Respondent's motion for summary judgment. Even assuming Petitioners sufficiently established their extrinsic fraud claim to avoid the three-year statute of limitations provided for in section 15-67-90, we hold the doctrine of laches operates to bar their claim. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

TOAL, C.J., KITTREDGE, J, Acting Justices James E. Moore and E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett, and Lawrence Redmond, Petitioners,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, as Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company,

LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod, and all other persons unknown claiming any right, title, estate, interest or lien upon the real estate tracts described in the Complaint therein, Defendants,

of whom David L. Savage and Lisa M. Shogry-Savage are, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26863
Heard May 26, 2010 – Filed August 16, 2010

AFFIRMED

Donald Higgins Howe, of Howe & Wyndham, LLP, and Walter Bilbro, Jr., both of Charleston, for Petitioners.

Robert E. Stepp, Amy L. B. Hill, and Tina Cundari, all of Sowell, Gray, Stepp & Laffitte, LLC, of Columbia, for Respondents.

Charles M. Feeley, of Summerville, for Guardian Ad Litem.

JUSTICE BEATTY: In this heirs' property dispute, the Court granted the petition of Sara Mae Robinson and others ("Petitioners") for a writ of certiorari to review the decision of the Court of Appeals in Robinson v. Estate of Harris, Op. No. 2008-UP-649 (S.C. Ct. App. filed Nov. 24, 2008). In this opinion, the Court of Appeals affirmed a circuit court order that granted summary judgment in favor of David L. Savage and Lisa M. Shogry-Savage on the grounds Petitioners' action to set aside a 1966 quiet title action was barred by the three-year statute of limitations as established by section 15-67-90 of the South Carolina Code,[1] David L. Savage and Lisa M. Shogry-Savage are bona fide

[1] Section 15-67-90 provides:

> No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set

purchasers for value without notice pursuant to the recording statute as established by section 30-7-10 of the South Carolina Code,[2] and Petitioners' action was barred by the doctrine of laches. We affirm.

I. Factual/Procedural History

This action involves a portion of a 20-acre tract of land located on Fort Johnson Road, in James Island, South Carolina. The tract was formerly owned by Simeon B. Pinckney, who died intestate in 1921 and allegedly left a wife, Laura Pinckney, and two sons, Ellis and Herbert Pinckney, as his heirs.

The land held by Simeon B. Pinckney originated from a conveyance to him by deed executed in 1874 (and recorded in 1875) from Thomas Moore. The property was described as being 20 acres, more or less. In 1888, Simeon B. Pinckney conveyed 5 acres of this property to his wife, Isabella Pinckney, leaving approximately 15 acres.

> aside such judgment or decree shall be commenced or application for leave to defend be made within three years from the time of filing for record a certified copy of such judgment or decree in the office of the clerk of court of the county in which the lands affected by such judgment or decree are situated or, in case of minors, within three years after coming of age.

S.C. Code Ann. § 15-67-90 (2005).

[2] Section 30-7-10 provides in relevant part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded . . . are valid so as to affect the rights of subsequent . . . purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10 (2007).

A survey conducted in 1923, however, found that exactly 14.3 acres remained.

In 1946, Laura Pinckney, Ellis Pinckney, and Herbert Pinckney executed two cross-deeds that divided the 14.3-acre parcel among themselves, creating a 4.3-acre tract and a 10-acre tract.[3] One of the 1946 cross-deeds conveyed the 4.3-acre tract to Herbert Pinckney and the other deed conveyed the 10-acre tract to Ellis Pinckney. In 1966, after Herbert Pinckney died intestate, Laura Pinckney Heyward brought a successful action to quiet title to the 4.3-acre tract held by Herbert.[4] None of the Petitioners or their predecessors-in-interest filed responsive pleadings in the 1966 proceeding.

As the result of subsequent conveyances, the 4.3-acre tract was ultimately divided into four lots. The owners of these lots are as follows: (1) The Converse Company (Lot #1); (2) Martine A. Hutton

---

[3] Petitioners gave a detailed account of their family's lineage dating back to the death of Simeon B. Pinckney. Essentially, Petitioners alleged they were the true heirs and subsequent-interest holders of Simeon B. Pinckney, descended through his true heirs, Samuel James Pinckney and Mary Pinckney. Petitioners claimed Laura Pinckney (who later assumed the married name of Heyward) was Samuel James Pinckney's sister-in-law. Based on this allegation, Petitioners asserted Laura Pinckney Heyward obtained the 1946 deeds by falsely claiming to be the wife of Simeon B. Pinckney (instead of Isabella Pinckney, Simeon B. Pinckney's "true spouse") and claiming that Simeon B. Pinckney's sole heirs were herself and her sons Herbert and Ellis Pinckney. According to Petitioners, Samuel James Pinckney was alive in 1946 and may have been living on a portion of the original 20-acre tract with his wife and children. However, Petitioners claimed that neither Samuel James Pinckney nor any of the other legitimate heirs could read or write and, thus, did not have notice of the 1946 deeds.

[4] By way of publication, Laura Pinckney Heyward served the 1966 quiet title action to "unknown persons." See S.C. Code Ann. § 10-2404 (1962) (precursor to S.C. Code Ann. § 15-67-40 (2005), which provides for service by publication for "unknown persons defendant" in an action to determine adverse claims to real property within this state); S.C. Code Ann. § 15-67-40 (2005) ("Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against nonresident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action to try adverse claims within this State.").

(Lot #2); (3) David Savage and Lisa M. Shogry-Savage (Lot #3); and (4) Debbie (Shogry) Dinovo (Lot #4). The instant case involves the interests of David L. Savage and Lisa M. Shogry-Savage ("Respondents").

On February 1, 2005, Petitioners filed an action to quiet title to several tracts of land located on James Island, including the 4.3-acre tract at issue in the instant case. In their Complaint, Petitioners sought "to establish their legitimate relationship as lineal descendants and heirs" of Simeon B. Pinckney. The first twenty-five named Petitioners claimed they were heirs of Simeon B. Pinckney, and the remaining Petitioners claimed they purchased interests in the property and were the legitimate owners of those interests.

In support of these claims, Petitioners alleged the 1946 deeds and 1966 action to quiet title were fraudulent and were undertaken without consideration for the rights or interests of Petitioners and other heirs. Specifically, Petitioners asserted the 4.3-acre tract was fraudulently conveyed to Herbert Pinckney in 1946 and, thereafter, wrongly passed by inheritance to his mother Laura Pinckney Heyward at Herbert's death. Additionally, Petitioners claimed Laura Pinckney Heyward fraudulently procured the 1966 quiet title action to the 4.3-acre tract when neither she nor Herbert Pinckney owned any interest in the tract. Finally, Petitioners alleged they did not become aware of the 1946 deeds, of the 1966 quiet title action, or of any other action affecting their title to the property until 2004.

Based on these allegations, Petitioners sought "(a) a determination of all owners of the four (4) tracts of property, . . . a determination of each owner's respective rights and interests in said tracts, and the quieting of the titles to these four (4) tracts and (b) the sale of the respective owners' interests in these four (4) tracts."

Respondents answered and filed a motion for summary judgment. In their answer and motion, Respondents raised a number of affirmative defenses, including the doctrines of laches, estoppel, waiver, bona fide

purchaser for value, *res judicata*, collateral estoppel, and the applicable statute of limitations.

In response to the motion for summary judgment, Petitioners argued their claim was not barred by section 15-67-90 given the 1966 quiet title action was the result of extrinsic fraud. Because they offered affidavits supporting their claim that the 1966 quiet title action was procured through fraud and forgery, Petitioners contended their action was distinguishable from the case of Yarbrough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990).[5]

After a hearing, the circuit court granted summary judgment in favor of Respondents. In doing so, the court found Petitioners' claims were barred by: (1) the three-year statute of limitations, codified in section 15-67-90, which prohibits setting aside "for any reason" a judgment quieting title to land; (2) Respondents are bona fide purchasers for value without notice pursuant to section 30-7-10, the recording statute; and (3) the doctrine of laches. Because Petitioners were not parties to the 1966 quiet title action, the circuit court judge found the doctrines of collateral estoppel and *res judicata* were not applicable.

Petitioners appealed the circuit court's order to the Court of Appeals.

In a summary opinion, the Court of Appeals affirmed the decision of the circuit court. See Robinson v. Estate of Harris, Op. No. 2008-UP-649 (S.C. Ct. App. filed Nov. 24, 2008). In support of its

[5] In Yarbrough, the property claimant filed an action to vacate a seven-year-old judgment quieting title to approximately ten acres of land. Yarbrough claimed the judgment was procured through extrinsic fraud. Id. at 341, 391 S.E.2d at 874. The trial court granted summary judgment to the defendants on the ground the action was time-barred by section 15-67-90. Id. at 341, 391 S.E.2d at 875. On appeal, the Court of Appeals affirmed the trial court's decision. In so ruling, the court found that "[n]othing in this record demonstrates Yarbrough's knowledge regarding her claim of extrinsic fraud was any different in 1981 than it was in 1988." Id. at 342, 391 S.E.2d at 875.

decision, the court cited: (1) the three-year statute of limitations as codified in section 15-67-90; (2) Yarbrough as interpreting section 15-67-90; (3) Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), cert. granted (Apr. 10, 2009); and (4) Burnett v. Holiday Brothers, Inc., 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983), to reference the purpose of the recording statute as codified in section 30-7-10.

This Court granted Petitioners' request for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A.

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP; Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

B.

In essence, Petitioners contend summary judgment was improperly granted given that significant and material questions of fact

exist relating to extrinsic fraud and forgery in the underlying 1966 quiet title action and the 1946 cross-deeds upon which the action was based.

In support of this contention, Petitioners argue the circuit court and the Court of Appeals erred in determining that section 15-67-90 constitutes an "absolute bar" to setting aside judgments quieting title to land. Because they submitted affidavits in support of their claims of extrinsic fraud and forgery, Petitioners assert their cause of action is distinguishable from Yarbrough and should not have been procedurally barred by the applicable statute of limitations.

C.

In analyzing Petitioners' arguments, we must determine whether section 15-67-90 constitutes an "absolute bar" to Petitioners' action or whether Petitioners' claim of extrinsic fraud supersedes the application of this statute of limitations.

This determination requires us to revisit our decision in Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In Hagy, the biological parents brought an action in 1994 to set aside the 1992 adoption of their daughter on the ground that their consent to the adoption was induced by fraudulent statements made by the adoptive parents, who were also the biological mother's father and stepmother. Id. at 428-29, 529 S.E.2d at 716. In response, the adoptive parents defended on the merits and asserted the action was time-barred by section 20-7-1800 of the South Carolina Code, which at the time provided: "No final decree of adoption is subject to collateral attack for any reason after a period of one year following its issuance." Id. at 429, 529 S.E.2d at 716. The family court concluded the time bar did not apply to actions to set aside an adoption for fraud. The Court of Appeals reversed the family court's decision, finding section 20-7-1800 barred the action because it was commenced more than one year after the final adoption decree was commenced. Id.

On appeal, this Court affirmed as modified the decision of the Court of Appeals. In so ruling, this Court considered the novel

question of "whether a facially applicable statute of limitation will bar an action to set aside a judgment procured by extrinsic fraud." Id. at 430, 529 S.E.2d at 717.[6] The Court determined that a statute of limitations purporting to bar all actions to set aside a judgment would not limit "a court's inherent authority to set aside a judgment for extrinsic fraud." Id. at 431, 529 S.E.2d at 717. However, because Hagy failed to prove her consent was obtained by fraud, the Court affirmed the decision of the Court of Appeals. Id. at 433-34, 529 S.E.2d at 719.

We find Hagy supports Petitioners' contention that this Court, the Court of Appeals, and the circuit court have the inherent authority to set aside the 1966 quiet title action and the underlying 1946 cross-deeds if in fact they were procured as the result of extrinsic fraud. Moreover, a broad reading of Yarbrough indicates that a court could consider the ground of extrinsic fraud, if sufficiently proven, as affecting the application of section 15-67-90. See Yarbrough, 301 S.C. at 341-42, 391 S.E.2d at 875 (concluding property claimant's action to quiet title brought seven years after title clearance action was barred by section 15-67-90 but implicitly recognizing that extrinsic fraud, if proven, could operate to preclude application of the three-year statute of limitations).[7]

In view of our conclusion, the question becomes whether Petitioners' submission of the affidavits is sufficient to withstand Respondents' motion for summary judgment based on Petitioners' claim of extrinsic fraud.

---

[6] The Court referenced Yarbrough but noted that there was no comparable challenge to the statute of limitations in that case. Hagy, 339 S.C. at 430 n.5, 529 S.E.2d at 717 n.5.

[7] Based on our finding that section 15-67-90 is not an "absolute bar," we need not address Petitioners' issue as to whether this statute violates the due process clauses of our state and federal constitutions. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (stating no person shall be deprived of life, liberty, or property without due process of law).

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" Hagy, 339 S.C. at 431, 529 S.E.2d at 717. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. at 431, 529 S.E.2d at 717-18 (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment. Center v. Center, 269 S.C. 367, 373, 237 S.E.2d 491, 494 (1977).

Intrinsic fraud is fraud which was presented and considered at trial. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id.

Considering the facts of the instant case in the procedural posture of a motion for summary judgment, Petitioners offered evidence that arguably created a material question of fact regarding whether the 1946 cross-deeds and 1966 quiet title action were procured by extrinsic fraud.

Although Petitioners' affidavits are very detailed, they essentially outlined Petitioners' ancestry as direct descendants of Simeon B. Pinckney and his son Samuel James Pinckney. The affidavits indicate Laura Pinckney was not married to Simeon B. Pinckney and that Herbert and Ellis Pinckney were of no relation to Simeon B. Pinckney. The affidavits also provide that several of Petitioners' relatives had lived on the subject property prior to the institution of the 2005 quiet title action. Additionally, the affidavits state Petitioners were unaware of the 1966 quiet title action and did not realize until late 2003 that portions of the 4.3-acre tract were under construction because the property was heavily wooded and the construction was "off the road."

D.

However, even assuming Petitioners offered sufficient evidence of extrinsic fraud to withstand Respondents' motion for summary judgment, this alone is not dispositive of Petitioners' appeal. Instead, this case presents a unique set of circumstances that operate to preclude Petitioners' action.

As evidenced by our decision in Hagy, this Court recognized that the doctrine of laches would be applicable in determining whether an action is time-barred even if extrinsic fraud is established. Hagy, 339 S.C. at 431 n.7, 529 S.E.2d at 717 n.7 (discussing the one-year statute of limitations for a collateral attack on an adoption decree and stating "[a]lthough not an issue in this case, the doctrine of laches will apply in determining whether such an action is barred"). We believe the instant case presents such a scenario.[8]

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Jones v. Leagan, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009). The equitable doctrine of laches is defined as "neglect for an

[8] The Court of Appeals affirmed the circuit court's order based on section 15-67-90 and Respondents' status as bona fide purchasers for value without notice. Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (recognizing that where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); see also Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). However, because this case presents us with an opportunity to address the applicability of the doctrine of laches to section 15-67-90, we have chosen to analyze the merits of this doctrine rather than merely rely on procedural rules to reach our ultimate disposition.

unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums, 296 S.C. at 199, 371 S.E.2d at 528.

Applying the foregoing to the facts of the instant case, we find Respondents established the requisite factors to bar Petitioners' action based on the doctrine of laches.

Here, Petitioners waited thirty-nine years to challenge the 1966 quiet title action. Although Petitioners claim they did not have notice of the 1966 quiet title action until 2004, their own affidavits appear to discount this claim. In the affidavits, Petitioners assert that one of their heirs paid the county property taxes on the Fort Johnson Road properties until at least 1988. If this was in fact the case, Petitioners would have received county tax documents that corresponded to the respective properties. After the property was sold, the subsequent purchasers would have then received these tax documents. In turn, Petitioners' failure to receive tax documents should have served as notice regarding a problem with their title to the property. Thus, given that the deeds and the quiet title action were publicly-recorded and documented, it was an unreasonable length of time for Petitioners to delay in instituting the 2005 quiet title action.

Additionally, Respondents would be undoubtedly prejudiced if Petitioners' claim is not barred by laches given they purchased their lot for significant consideration and have been in possession of it since 1996 and built a family residence in 2002.

In reaching our decision, we have thoroughly considered and are empathetic to Petitioners' plight. However, given the specific facts of the instant case, we are compelled to hold the doctrine of laches precludes Petitioners from pursuing their claim. Here, Petitioners waited thirty-nine years to assert their rights regarding the 1966 quiet title action. We find such a flagrant and egregious delay represents the quintessential situation that the doctrine of laches was intended to protect. For this Court to hold otherwise, we would have to affirmatively reject this well-established equitable doctrine.

Our decision should not be construed as establishing a general rule. Instead, we believe under the proper facts a claim of extrinsic fraud could be utilized to successfully circumvent the three-year statute of limitations as established by section 15-67-90.[9]

E.

Finally, Petitioners contend the Court of Appeals erred in relying on Robinson v. Estate of Harris (Duggan), 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), cert. granted (Apr. 10, 2009), a case involving a .5-acre tract that was part of Simeon B. Pinckney's original parcel. Specifically, Petitioners assert the Court of Appeals erred in applying section 15-39-870,[10] as the .5-acre tract at issue in the above-cited Duggan case was obtained by defendant Daniel Duggan via a different chain of title than Respondents' property. Thus, Petitioners contend the

---

[9] To conclude otherwise, we believe, would require property owners to check the title to their property every three years.

[10] Section 15-39-870 provides:

> Upon execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2005).

Duggan case involved a tract of land that was not the subject of the 1966 quiet title action, but rather was foreclosed upon and sold to Duggan at a judicial sale pursuant to section 15-39-870. Because the 4.3-acre tract at issue in the instant case was not sold at a judicial sale, Petitioners assert the Court of Appeals erred in applying section 15-39-870 to Respondents' case.

We hold Petitioners' argument to be without merit as the Court of Appeals cited Robinson, the Duggan case, merely to establish the general prerequisites to institute the protection of Respondents as bona fide purchasers for value. Because the requirements of a bona fide purchaser are the same in relation to section 30-7-10 or section 15-39-870, it is inconsequential that the Court of Appeals cited Robinson which applied section 15-39-870. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) (outlining well-established requirements to invoke protection as a bona fide purchaser for value and discussing limitations of the status of a bona fide purchaser in situations involving deeds that are void *ab initio*). Moreover, a determination as to the propriety of the Robinson citation is unnecessary given our decision to affirm the grant of summary judgment to Respondents based on the doctrine of laches.

III. Conclusion

Based on the foregoing, we find the circuit court properly granted Respondents' motion for summary judgment. Even assuming Petitioners sufficiently established their extrinsic fraud claim to avoid the three-year statute of limitations provided for in section 15-67-90, we hold the doctrine of laches operates to bar their claim. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

TOAL, C.J., KITTREDGE, J, Acting Justices James E. Moore and E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett, and Lawrence Redmond, Petitioners,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, as Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse

Company, LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod, and all other persons unknown claiming any right, title, estate, interest or lien upon the real estate tracts described in the Complaint therein, Defendants,

of whom The Converse Company, LLC is, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26864
Heard May 26, 2010 – Filed August 16, 2010

AFFIRMED

Donald Higgins Howe, of Howe & Wyndham, LLP, and Walter Bilbro, Jr., both of Charleston, for Petitioners.

John J. Hearn, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent.

Charles M. Feeley, of Summerville, for Guardian Ad Litem.

JUSTICE BEATTY: In this heirs' property dispute, the Court granted the petition of Sara Mae Robinson and others ("Petitioners") for a writ of certiorari to review the decision of the Court of Appeals in Robinson v. Estate of Harris, Op. No. 2008-UP-648 (S.C. Ct. App. filed Nov. 24, 2008). In this opinion, the Court of Appeals affirmed a circuit court order that granted summary judgment in favor of The Converse Company, LLC ("Converse") on the grounds Petitioners' action to set aside a 1966 quiet title action was barred by the three-year statute of limitations as established by section 15-67-90 of the South Carolina Code,[1] Converse is a bona fide purchaser for value without

[1] Section 15-67-90 provides:

> No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced or application

notice pursuant to the recording statute as established by section 30-7-10 of the South Carolina Code,[2] and Petitioners' action was barred by the doctrine of laches. We affirm.

I. Factual/Procedural History

This action involves a portion of a 20-acre tract of land located on Fort Johnson Road, in James Island, South Carolina. The tract was formerly owned by Simeon B. Pinckney, who died intestate in 1921 and allegedly left a wife, Laura Pinckney, and two sons, Ellis and Herbert Pinckney, as his heirs.

The land held by Simeon B. Pinckney originated from a conveyance to him by deed executed in 1874 (and recorded in 1875) from Thomas Moore. The property was described as being 20 acres, more or less. In 1888, Simeon B. Pinckney conveyed 5 acres of this property to his wife, Isabella Pinckney, leaving approximately 15 acres.

> for leave to defend be made within three years from the time of filing for record a certified copy of such judgment or decree in the office of the clerk of court of the county in which the lands affected by such judgment or decree are situated or, in case of minors, within three years after coming of age.

S.C. Code Ann. § 15-67-90 (2005).

[2] Section 30-7-10 provides in relevant part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded . . . are valid so as to affect the rights of subsequent . . . purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10 (2007).

A survey conducted in 1923, however, found that exactly 14.3 acres remained.

In 1946, Laura Pinckney, Ellis Pinckney, and Herbert Pinckney executed two cross-deeds that divided the 14.3-acre parcel among themselves, creating a 4.3-acre tract and a 10-acre tract.[3] One of the 1946 cross-deeds conveyed the 4.3-acre tract to Herbert Pinckney and the other deed conveyed the 10-acre tract to Ellis Pinckney. In 1966, after Herbert Pinckney died intestate, Laura Pinckney Heyward brought a successful action to quiet title to the 4.3-acre tract held by Herbert.[4] None of the Petitioners or their predecessors-in-interest filed responsive pleadings in the 1966 proceeding.

As the result of subsequent conveyances, the 4.3-acre tract was ultimately divided into four lots. The owners of these lots are as

---

[3] Petitioners gave a detailed account of their family's lineage dating back to the death of Simeon B. Pinckney. Essentially, Petitioners alleged they were the true heirs and subsequent-interest holders of Simeon B. Pinckney, descended through his true heirs, Samuel James Pinckney and Mary Pinckney. Petitioners claimed Laura Pinckney (who later assumed the married name of Heyward) was Samuel James Pinckney's sister-in-law. Based on this allegation, Petitioners asserted Laura Pinckney Heyward obtained the 1946 deeds by falsely claiming to be the wife of Simeon B. Pinckney (instead of Isabella Pinckney, Simeon B. Pinckney's "true spouse") and claiming that Simeon B. Pinckney's sole heirs were herself and her sons Herbert and Ellis Pinckney. According to Petitioners, Samuel James Pinckney was alive in 1946 and may have been living on a portion of the original 20-acre tract with his wife and children. However, Petitioners claimed that neither Samuel James Pinckney nor any of the other legitimate heirs could read or write and, thus, did not have notice of the 1946 deeds.

[4] By way of publication, Laura Pinckney Heyward served the 1966 quiet title action to "unknown persons." See S.C. Code Ann. § 10-2404 (1962) (precursor to S.C. Code Ann. § 15-67-40 (2005), which provides for service by publication for "unknown persons defendant" in an action to determine adverse claims to real property within this state); S.C. Code Ann. § 15-67-40 (2005) ("Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against nonresident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action to try adverse claims within this State.").

follows: (1) The Converse Company, LLC (Lot #1); (2) Martine A. Hutton (Lot #2); (3) David Savage and Lisa M. Shogry-Savage (Lot #3); and (4) Debbie (Shogry) Dinovo (Lot #4). The instant case involves the interests of Converse ("Respondent").

On February 1, 2005, Petitioners filed an action to quiet title to several tracts of land located on James Island, including the 4.3-acre tract at issue in the instant case. In their Complaint, Petitioners sought "to establish their legitimate relationship as lineal descendants and heirs" of Simeon B. Pinckney. The first twenty-five named Petitioners claimed they were heirs of Simeon B. Pinckney, and the remaining Petitioners claimed they purchased interests in the property and were the legitimate owners of those interests.

In support of these claims, Petitioners alleged the 1946 deeds and 1966 action to quiet title were fraudulent and were undertaken without consideration for the rights or interests of Petitioners and other heirs. Specifically, Petitioners asserted the 4.3-acre tract was fraudulently conveyed to Herbert Pinckney in 1946 and, thereafter, wrongly passed by inheritance to his mother Laura Pinckney Heyward at Herbert's death. Additionally, Petitioners claimed Laura Pinckney Heyward fraudulently procured the 1966 quiet title action to the 4.3-acre tract when neither she nor Herbert Pinckney owned any interest in the tract. Finally, Petitioners alleged they did not become aware of the 1946 deeds, of the 1966 quiet title action, or of any other action affecting their title to the property until 2004.

Based on these allegations, Petitioners sought "(a) a determination of all owners of the four (4) tracts of property, . . . a determination of each owner's respective rights and interests in said tracts, and the quieting of the titles to these four (4) tracts and (b) the sale of the respective owners' interests in these four (4) tracts."

Respondent answered and filed a motion for summary judgment. In its answer, Respondent raised a number of affirmative defenses and counterclaims, including laches, stale demand, equitable estoppel, waiver, bona fide purchaser for value, betterment, acquiescence,

adverse possession, presumption of grant, slander of title, and the applicable statute of limitations.

In response to the motion for summary judgment, Petitioners argued their claim was not barred by section 15-67-90 given the 1966 quiet title action was the result of extrinsic fraud. Because they offered affidavits supporting their claim that the 1966 quiet title action was procured through fraud and forgery, Petitioners contended their action was distinguishable from the case of Yarbrough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990).[5]

After a hearing, the circuit court granted summary judgment in favor of Respondent. In so ruling, the circuit court relied on its previously-issued order granting summary judgment in favor of Respondent's predecessor-in-interest Shogry-Savage.[6] Therefore, the circuit court found Petitioners' action was barred by the operation of section 15-67-90, the fact that Respondent is a bona fide purchaser for value without notice pursuant to section 30-7-10, and the doctrine of laches.

---

[5] In Yarbrough, the property claimant filed an action to vacate a seven-year-old judgment quieting title to approximately ten acres of land. Yarbrough claimed the judgment was procured through extrinsic fraud. Id. at 341, 391 S.E.2d at 874. The trial court granted summary judgment to the defendants on the ground the action was time-barred by section 15-67-90. Id. at 341, 391 S.E.2d at 875. On appeal, the Court of Appeals affirmed the trial court's decision. In so ruling, the court found that "[n]othing in this record demonstrates Yarbrough's knowledge regarding her claim of extrinsic fraud was any different in 1981 than it was in 1988." Id. at 342, 391 S.E.2d at 875.

[6] On June 2, 2006, the circuit court judge granted summary judgment in favor of David L. Savage and Lisa M. Shogry-Savage on the grounds that: (1) Petitioners' claims were barred by section 15-67-90, a three-year statute of limitations that prohibits setting aside a judgment quieting title to land "for any reason"; (2) Savage and Shogry-Savage are bona fide purchasers for value without notice pursuant to the recording statute as established by section 30-7-10; and (3) Petitioners' action was barred by the doctrine of laches. Because Petitioners were not parties to the 1966 quiet title action, the circuit court judge found the doctrines of collateral estoppel and *res judicata* were not applicable. This circuit court judge was the presiding judge on all four cases involving the 4.3-acre tract.

Petitioners appealed the circuit court's order to the Court of Appeals.

In a summary opinion, the Court of Appeals affirmed the decision of the circuit court. See Robinson v. Estate of Harris, Op. No. 2008-UP-648 (S.C. Ct. App. filed Nov. 24, 2008). In support of its decision, the court cited: (1) the three-year statute of limitations as codified in section 15-67-90; and (2) Yarbrough as interpreting section 15-67-90.

This Court granted Petitioners' request for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A.

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP; Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

B.

In essence, Petitioners contend summary judgment was improperly granted given that significant and material questions of fact exist relating to extrinsic fraud and forgery in the underlying 1966 quiet title action and the 1946 cross-deeds upon which the action was based.

In support of this contention, Petitioners argue the circuit court and the Court of Appeals erred in determining that section 15-67-90 constitutes an "absolute bar" to setting aside judgments quieting title to land. Because they submitted affidavits in support of their claims of extrinsic fraud and forgery, Petitioners assert their cause of action is distinguishable from Yarbrough and should not have been procedurally barred by the applicable statute of limitations.

C.

In analyzing Petitioners' arguments, we must determine whether section 15-67-90 constitutes an "absolute bar" to Petitioners' action or whether Petitioners' claim of extrinsic fraud supersedes the application of this statute of limitations.

This determination requires us to revisit our decision in Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In Hagy, the biological parents brought an action in 1994 to set aside the 1992 adoption of their daughter on the ground that their consent to the adoption was induced by fraudulent statements made by the adoptive parents, who were also the biological mother's father and stepmother. Id. at 428-29, 529 S.E.2d at 716. In response, the adoptive parents defended on the merits and asserted the action was time-barred by section 20-7-1800 of the South Carolina Code, which at the time provided: "No final decree of adoption is subject to collateral attack for any reason after a period of one year following its issuance." Id. at 429, 529 S.E.2d at 716. The family court concluded the time bar did not apply to actions to set aside an adoption for fraud. The Court of Appeals reversed the family court's decision, finding section 20-7-1800 barred the action because it was

commenced more than one year after the final adoption decree was commenced. Id.

On appeal, this Court affirmed as modified the decision of the Court of Appeals. In so ruling, this Court considered the novel question of "whether a facially applicable statute of limitation will bar an action to set aside a judgment procured by extrinsic fraud." Id. at 430, 529 S.E.2d at 717.[7] The Court determined that a statute of limitations purporting to bar all actions to set aside a judgment would not limit "a court's inherent authority to set aside a judgment for extrinsic fraud." Id. at 431, 529 S.E.2d at 717. However, because Hagy failed to prove her consent was obtained by fraud, the Court affirmed the decision of the Court of Appeals. Id. at 433-34, 529 S.E.2d at 719.

We find Hagy supports Petitioners' contention that this Court, the Court of Appeals, and the circuit court have the inherent authority to set aside the 1966 quiet title action and the underlying 1946 cross-deeds if in fact they were procured as the result of extrinsic fraud. Moreover, a broad reading of Yarbrough indicates that a court could consider the ground of extrinsic fraud, if sufficiently proven, as affecting the application of section 15-67-90. See Yarbrough, 301 S.C. at 341-42, 391 S.E.2d at 875 (concluding property claimant's action to quiet title brought seven years after title clearance action was barred by section 15-67-90 but implicitly recognizing that extrinsic fraud, if proven, could operate to preclude application of the three-year statute of limitations).[8]

---

[7] The Court referenced Yarbrough but noted that there was no comparable challenge to the statute of limitations in that case. Hagy, 339 S.C. at 430 n.5, 529 S.E.2d at 717 n.5.

[8] Based on our finding that section 15-67-90 is not an "absolute bar," we need not address Petitioners' issue as to whether this statute violates the due process clauses of our state and federal constitutions. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (stating no person shall be deprived of life, liberty, or property without due process of law).

In view of our conclusion, the question becomes whether Petitioners' submission of the affidavits is sufficient to withstand Respondent's motion for summary judgment based on Petitioners' claim of extrinsic fraud.

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" Hagy, 339 S.C. at 431, 529 S.E.2d at 717. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. at 431, 529 S.E.2d at 717-18 (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment. Center v. Center, 269 S.C. 367, 373, 237 S.E.2d 491, 494 (1977).

Intrinsic fraud is fraud which was presented and considered at trial. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id.

Considering the facts of the instant case in the procedural posture of a motion for summary judgment, Petitioners offered evidence that arguably created a material question of fact regarding whether the 1946 cross-deeds and 1966 quiet title action were procured by extrinsic fraud.

Although Petitioners' affidavits are very detailed, they essentially outlined Petitioners' ancestry as direct descendants of Simeon B. Pinckney and his son Samuel James Pinckney. The affidavits indicate Laura Pinckney was not married to Simeon B. Pinckney and that Herbert and Ellis Pinckney were of no relation to Simeon B. Pinckney. The affidavits also provide that several of Petitioners' relatives had

lived on the subject property prior to the institution of the 2005 quiet title action. Additionally, the affidavits state Petitioners were unaware of the 1966 quiet title action and did not realize until late 2003 that portions of the 4.3-acre tract were under construction because the property was heavily wooded and the construction was "off the road."

D.

However, even assuming Petitioners offered sufficient evidence of extrinsic fraud to withstand Respondent's motion for summary judgment, this alone is not dispositive of Petitioners' appeal. Instead, this case presents a unique set of circumstances that operate to preclude Petitioners' action.

As evidenced by our decision in Hagy, this Court recognized that the doctrine of laches would be applicable in determining whether an action is time-barred even if extrinsic fraud is established. Hagy, 339 S.C. at 431 n.7, 529 S.E.2d at 717 n.7 (discussing the one-year statute of limitations for a collateral attack on an adoption decree and stating "[a]lthough not an issue in this case, the doctrine of laches will apply in determining whether such an action is barred"). We believe the instant case presents such a scenario.[9]

[9] The Court of Appeals affirmed the circuit court's order based on section 15-67-90. Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (recognizing that where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); see also Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). However, because this case presents us with an opportunity to address the applicability of the doctrine of laches to section 15-67-90, we have chosen to analyze the merits of this doctrine rather than merely rely on procedural rules to reach our ultimate disposition.

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Jones v. Leagan, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009). The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums, 296 S.C. at 199, 371 S.E.2d at 528.

Applying the foregoing to the facts of the instant case, we find Respondent established the requisite factors to bar Petitioners' action based on the doctrine of laches.

Here, Petitioners waited thirty-nine years to challenge the 1966 quiet title action. Although Petitioners claim they did not have notice of the 1966 quiet title action until 2004, their own affidavits appear to discount this claim. In the affidavits, Petitioners assert that one of their heirs paid the county property taxes on the Fort Johnson Road properties until at least 1988. If this was in fact the case, Petitioners would have received county tax documents that corresponded to the respective properties. After the property was sold, the subsequent purchasers would have then received these tax documents. In turn, Petitioners' failure to receive tax documents should have served as notice regarding a problem with their title to the property. Thus, given that the deeds and the quiet title action were publicly-recorded and documented, it was an unreasonable length of time for Petitioners to delay in instituting the 2005 quiet title action.

Additionally, Respondent would be undoubtedly prejudiced if Petitioners' claim is not barred by laches given it purchased the lot for significant consideration and has been in possession of it since 2003.

In reaching our decision, we have thoroughly considered and are empathetic to Petitioners' plight. However, given the specific facts of the instant case, we are compelled to hold the doctrine of laches precludes Petitioners from pursuing their claim. Here, Petitioners waited thirty-nine years to assert their rights regarding the 1966 quiet title action. We find such a flagrant and egregious delay represents the quintessential situation that the doctrine of laches was intended to protect. For this Court to hold otherwise, we would have to affirmatively reject this well-established equitable doctrine.

Our decision should not be construed as establishing a general rule. Instead, we believe under the proper facts a claim of extrinsic fraud could be utilized to successfully circumvent the three-year statute of limitations as established by section 15-67-90.[10]

III. Conclusion

Based on the foregoing, we find the circuit court properly granted Respondent's motion for summary judgment. Even assuming Petitioners sufficiently established their extrinsic fraud claim to avoid the three-year statute of limitations provided for in section 15-67-90, we hold the doctrine of laches operates to bar their claim. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

TOAL, C.J., KITTREDGE, J, Acting Justices James E. Moore and E. C. Burnett, III, concur.

[10] To conclude otherwise, we believe, would require property owners to check the title to their property every three years.