The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF J. M. LONG, III, PETITIONER

J. M. Long, III, who was definitely suspended from the practice of law for a period of nine (9) months, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, October 14, 2011, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 12, 2011

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
September 19, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eileen Frances Theresa Busto Theisen, Appellant,

v.

Clifford Richard Theisen, Respondent.

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 27041
Heard April 5, 2011 – Filed September 19, 2011

AFFIRMED

Robert M. Rosenfeld, of Porter & Rosenfeld, of Greenville, for Appellant.

Joseph M. Ramseur, Jr., of Greenville, and Steven E. Buckingham, of Gallivan, White & Boyd, of Greenville, for Respondent.

JUSTICE HEARN: This case presents the novel issue of whether an action for separate maintenance and support can be pursued when the parties are still living together. We hold that it cannot and affirm the family court's decision to dismiss this action. Due to our conclusion that this action fails a matter of law, we further hold that the family court did not err in cancelling the *lis pendens* and request for attorney's fees filed in conjunction with this suit.

FACTUAL/PROCEDURAL BACKGROUND

Eileen (Wife) and Clifford (Husband) Theisen were married in 1980. Aside from various forms of seasonal employment, Wife was a homemaker for the vast majority of the marriage. Husband currently receives dividend payments from his interest in his family's business as well as some compensation for serving as a director of the business, but the current economic crisis placed a strain on the parties' other financial resources. At the time of this action, the parties owned three properties: the marital home, which is in Wife's name, and two rental properties, both of which are in Husband's name.

Husband readily acknowledges that he and Wife have had their fair share of difficulties during the course of their thirty-year marriage. In fact, Wife has filed for divorce[1] on two previous occasions, at least one of which was premised on the fault ground of physical cruelty. Husband and Wife reconciled following the first petition, and the second was dismissed because the proceedings were not concluded within one year from the date of filing. In Husband's view, these actions were "nothing more than efforts to get [his] attention. . . . [They] stay living together, she calms down and life goes back to normal."

[1] Wife stated these proceedings were actions for divorce. Husband contends that they were for separate maintenance, not divorce. The record before us does not contain any copies of these filings, and Wife's attorney simply denominated these prior filings "actions" with no further indication of whether a divorce was sought.

Wife subsequently filed this action for separate maintenance alleging Husband "has engaged and continues to engage in a course of conduct making it unreasonable and unfair to require [Wife] to continue to live with him." In particular, Wife complained of Husband's unilateral control and disposal of marital assets, creation and non-payment of debts in Wife's name, and present emotional and verbal abuse. In her complaint, Wife asked the family court to award the following: (1) separate maintenance and support; (2) custody of the minor children;[2] (3) child support; (4) spousal support; (5) sole and exclusive use and possession of the marital home; (6) sole and exclusive use and possession of one of the parties' vehicles; (7) equitable division of marital assets and debts; and (8) attorney's fees. She also moved for temporary relief and filed a *lis pendens* on each of the rental properties in Husband's name. Despite alleging that Husband's conduct was so unreasonable and unfair that Wife should not have to live with him, Husband and Wife continued to live in the same house before and after she filed the instant action, albeit sleeping in different rooms.[3]

Husband counterclaimed for equitable distribution of the marital assets and debts as well as attorney's fees. He contended that the parties' difficulties were the result of their recent financial situation, not a course of conduct designed to denigrate Wife. Husband further made motions to dismiss Wife's complaint under Rule 12, SCRCP, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Both motions were premised on the fact that Husband and Wife were not living separate and apart. He also moved to cancel the *lis pendens* placed on his rental properties.

The family court held a combined hearing on Wife's motion for temporary relief and Husband's motions to dismiss and cancel the *lis pendens*. The court found it "has the jurisdiction to order separate support and maintenance, [but it] does not have the authority to do so when the

[2] All of their children have now attained the age of majority.

[3] The night before the hearing in the family court, Husband, Wife, and their children "all celebrated a very nice Easter dinner as a family at [their] home."

parties are living together." Accordingly, the court concluded "Wife has failed to state facts sufficient to constitute a cause of action" and dismissed her complaint. Based on that finding, the court cancelled each *lis pendens*, denied Wife temporary relief, and denied each party attorney's fees. This appeal followed.

ISSUES PRESENTED

Wife raises four issues on appeal:

I. Does the family court have subject matter jurisdiction to hear a claim for separate maintenance when the parties are still living together?

II. Did the family court err in dismissing Wife's complaint because it failed to allege the parties are no longer living together?

III. Did the family court err in cancelling Wife's *lis pendens* on Husband's rental properties?

IV. Did the family court err in not awarding Wife attorney's fees?

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

Wife first argues the family court erred in not exercising jurisdiction over this matter. However, Wife's argument misconstrues the court's finding that it lacks "authority" to hear the claim as a finding that it lacks subject matter jurisdiction.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). Because the family

court is a creature of statute, it is a court of limited jurisdiction. *State v. Graham*, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000). Accordingly, "[i]ts jurisdiction is limited to that expressly or by necessary implication conferred by statute." *Id.* Section 63-3-530(A)(2) of the South Carolina Code (2010) provides that "[t]he family court has exclusive jurisdiction . . . to hear and determine actions for divorce *a vinculo matrimonii*, separate support and maintenance, legal separation, and in other marital litigation between the parties."

Section 63-3-530(A)(2) therefore expressly confers upon the family court the power to hear all actions for separate maintenance. Indeed, the family court expressly found it had jurisdiction over this matter. Wife, however, interprets the word "authority" as meaning the court found its jurisdiction to be limited, and she accordingly engages in a discussion of the differences between "jurisdiction," "exercise of jurisdiction," and "authority." This argument misapprehends the nature of the family court's ruling, and it confuses and conflates the concepts of subject matter jurisdiction and the statutory elements to receive the relief sought. The court's order merely found that it lacked authority to award separate maintenance because Wife failed to plead its essential elements, not because the court lacked subject matter jurisdiction. Therefore, her arguments are more properly directed towards the court's dismissal of her claim under Rule 12(b)(6), SCRCP.

II. FAILURE TO STATE A CLAIM

Wife next argues the family court erred in dismissing her complaint because she failed to allege she was living separate and apart from Husband. We disagree.

Section 20-3-130(B)(5) of the South Carolina Code (Supp. 2010) contains the following provisions regarding separate maintenance:

> Alimony and separate maintenance and support awards may be granted *pendente lite* and permanently in such amounts and for

> periods of time subject to conditions as the court considers just including, but not limited to:
>
> . . . .
>
> (5) Separate maintenance and support to be paid periodically, but terminating upon the continued cohabitation of the supported spouse, upon divorce of the parties, or upon the death of either spouse . . . and terminable and modifiable based upon changed circumstances in the future. The purpose of this form of support may include, but is not limited to, circumstances where a divorce is not sought, but it is necessary to provide for support of the supported spouse by way of separate maintenance and support when the parties are living separate and apart.

Initially, we note that section 20-3-130(B)(5) does not specifically state whether the parties must live separate and apart prior to petitioning the court for separate maintenance. However, the very name *separate* maintenance and support connotes separation between the parties. "Separate" means "to set or keep apart" or "become divided or detached." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/separate. Thus, the purpose of separate maintenance is to provide support for a spouse when he or she is living apart from the other spouse. The statute also specifically states that it applies when the parties are living separate and apart but a divorce is not sought. The fact that separate maintenance terminates upon the continuous cohabitation of the supported spouse with another is more evidence of the same; the supported spouse cannot cohabitate with another unless he has already separated from the payor spouse. Furthermore, Wife's emphasis that she sleeps in a different room than Husband appears to be a tacit recognition on her part that at least some degree of separation is required.

We implicitly have recognized for years that living separate and apart is a requirement for separate maintenance. Under South Carolina law, a spouse does not need grounds that would merit a divorce in order to receive separate maintenance. *Machado v. Machado*, 220 S.C. 90, 103, 66 S.E.2d 629, 635

(1951). We have thus refused to define any specific grounds and instead have left this decision to the discretion of the family court.[4] *Id.* However, we have often searched for whether there was justification—whatever that justification may be—for the supported spouse to *leave* the marital home. *See, e.g., Welch v. Welch*, 250 S.C. 264, 268, 157 S.E.2d 249, 251 (1967) (holding a wife was entitled to separate maintenance and support where "[s]o far as man may judge, the alienation of the parties is complete, and a resumption of cohabitation would be intolerable"); *Inabinet v. Inabinet*, 236 S.C. 52, 56, 113 S.E.2d 66, 68 (1960) (stating in the context of separate maintenance that "[i]t is the duty of a husband to provide for his wife, in accordance with his means, a home wherein she may live as the object of his care and affection without interference from members of the household; and if he fails or refuses to provide such a home she will be justified in leaving and will not be guilty of desertion if she does so"); *Owens v. Owens*, 221 S.C. 84, 89, 69 S.E.2d 74, 76 (1952) (discussing question specifically raised on appeal regarding an award of separate maintenance of whether facts showed wife was justified in leaving the home); *Machado*, 220 S.C. at 103, 66 S.E.2d at 635 ("We think under our decisions that the conduct of appellant was sufficient to justify the respondent in leaving the home and that she is entitled to separate maintenance and support.").

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[4] The dissent extrapolates from *Machado* and the eighteenth century case *Brown v. Brown*, 1 S.C. Eq. (1 Des.) 196 (1789), that the family court's authority to grant this relief arises from its equitable powers and not any statutory requirements. South Carolina's family court system was created by statute in 1976, and this statutory framework now controls. As courts of limited jurisdiction, it is well-settled that family courts possess only such powers as are granted to them by statute. *Graham*, 340 S.C. at 355, 532 S.E.2d at 263. Accordingly, contrary to the dissent's view, the family court's authority emanates from section 20-3-130(B)(5), not from any equitable authority vesting the family courts with broad discretion. While we have refused to define specific grounds for a party to receive separate maintenance, those decisions are still valid only because the statute itself contains no grounds, not because of the family court's equitable jurisdiction.

While we have never specifically addressed the precise question presented here, we have addressed whether a spouse must leave the marital home when seeking a divorce, despite no statutory language directly on point. If the parties are seeking a no-fault divorce based on one year's continuous separation, they must live in separate domiciles during that time. *Barnes v. Barnes*, 276 S.C. 519, 520, 280 S.E.2d 538, 539 (1981). Our rationale was that otherwise, evidence of the actual separation, which is the gravamen of a no-fault divorce, would exist only "behind the closed doors of the matrimonial domicile," thus encouraging collusion between the parties. *Id.* The same rule applies if the parties seek a divorce on the fault ground of desertion. *Watson v. Watson*, 319 S.C. 92, 94, 460 S.E.2d 394, 395 (1995).

On the other hand, citing public policy concerns and the diminished threat of collusion or condonation, we refused to extend that rule to parties seeking a fault-based divorce on any other ground. *Id.* at 94, 460 S.E.2d at 395-96. As we stated in *Watson*, in those fault-based situations it is better to permit the separating spouse to remain in the home at the time of filing, and have custody and other living arrangements dealt with at a temporary hearing, than to require that spouse to vacate the home and potentially cause more disruption in the family's life at the time of filing. *Id.* at 94, 460 S.E.2d at 395.

The public policy concerns that drove our decision in *Watson* are not present here. Therefore, in order to state a claim for separate maintenance, the complaint must allege that the parties are living separate and apart. To hold otherwise would permit spouses to inundate the family court with claims following relatively minor disputes and quarrels. Because there are no defined grounds for this relief, parties could bring an action in the family court for almost any reason absent some threshold requirement. Requiring spouses to separate stems this tide by helping guarantee that court intervention into the marital relationship actually is truly necessary because the grounds underlying the complaint will at least be enough to warrant leaving the marital home.

Furthermore, living separate and apart must involve more than the cessation of the parties' romantic relationship. "The overwhelming weight of authority as to what is meant by living 'separate and apart' . . . implies something more than a discontinuance of sexual relations . . . . It implies the living apart . . . in such a manner that those in the neighborhood may see that the husband and wife are not living together." *Boozer v. Boozer*, 242 S.C. 292, 296-97, 130 S.E.2d 903, 905 (1963) (internal citations and quotations omitted); *accord Whitman v. Whitman*, 137 So. 666, 666 (Ala. 1931) ("The bill does not make out such a case when it shows that there has been an abandonment or separation and that the complainant and respondent were living together as man and wife when the bill or petition was filed."); *Hemphill v. Hemphill*, 324 P.2d 225, 228 (Ariz. 1958) ("A wife's action for separate maintenance generally presupposes a separation . . . ."); *Kesterson v. Kesterson*, 731 S.W.2d 786, 788 (Ark. Ct. App. 1987) ("All that must be established are a separation and an absence of fault."); *Baumgartner v. Baumgartner*, 148 N.E.2d 327, 330 (Ill. App. Ct. 1958) ("A complaint lacking an allegation that the parties are living separate and apart without fault on the part of the plaintiff fails to state a cause of action."); *Lynch v. Lynch*, 616 So. 2d 294, 296 (Miss. 1993) ("It is well-established that '[a] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they be reconciled to each other.'" (citations omitted)). Thus, prior to petitioning the court for separate maintenance, the parties must live in separate domiciles.

The dissent relies, in part, on *Murray v. Murray*, 271 S.C. 62, 246 S.E.2d 538 (1978) and *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009) in support of its position that living separate and apart is not a prerequisite for instituting an action for separate maintenance. However, neither of those cases is dispositive of the issue before us today. In *Murray*, the parties were still living together at the time they received separate maintenance.[5] 271 S.C. at 63-64, 244 S.E.2d at 539. However, the issue

[5] The opinion states that the parties were granted a legal separation. *Murray*, 271 S.C. at 63, 244 S.E.2d at 539. Although legal separations are not available under South Carolina law, this term is often inadvertently used

before the Court was whether the husband condoned the wife's misconduct by remaining in the house, not whether he failed to plead the elements of separate maintenance. *Id.* Therefore, as we stated at the outset of this opinion, the issue before us is one of first impression for the Court. It is well-settled that even though an appellate court has decided a case containing a certain issue, unless that issue was actually raised on appeal those cases are not dispositive. *Cf. Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000) ("The fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised."); *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 569, 144 S.E.2d 813, 816 (1965) (holding that even though the court previously heard interlocutory appeals, issue of whether such orders were actually appealable had not been raised). Indeed, the dissent's author has himself recognized this principle. *See Lewis v. Lewis*, 392 S.C. 381, 400 n.14, 709 S.E.2d 650, 660 n.14 (2011) (Pleicones, J., dissenting); *Bursey v. S.C. Dep't of Health and Envt'l Control*, 369 S.C. 176, 190, 631 S.E.2d 899, 907 (2006) (Pleicones, J., dissenting) ("[T]he fact that we have applied the APA standard in a previous Mining Council appeal where the parties did not contest the standard of review does not bind us in this case where the matter is properly preserved and presented for our review.").

As to *Gainey*, the court of appeals merely held that the issue of the family court's authority to approve an agreement for separate maintenance when the parties still lived together was not preserved for review. 382 S.C. at 424-25, 675 S.E.2d at 797. Contrary to the dissent's view of *Gainey*, it did not hold that Rule 60(b), SCRCP, is inapplicable to separate maintenance decrees even though the parties are residing together; it held that because the wife knew they were living together at the time of the hearing, she could have raised that issue at the hearing and was therefore barred from raising it afterwards pursuant to Rule 60(b). *Id.*

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interchangeably with separate maintenance. *Brewer v. Brewer*, 242 S.C. 9, 20, 129 S.E.2d 736, 741 (1963) (Bussey, J., concurring). Because this was not challenged in *Murray*, we assume this is what occurred.

We are also perplexed by the dissent's belief that our holding somehow discourages reconciliation between spouses. It is beyond question that the public policy of this State favors the institution of marriage, and it is our belief that acrimonious litigation does far less to preserve the marital bond than the requirements we impose today. Thus our concern goes beyond the fact that parties may institute litigation and then withdraw should they reconcile; it extends to the relative ease with which parties might otherwise bring their minor disputes into the spotlight of the family court, thereby working irreparable damage to the family unit. The potential for unnecessary litigation will work more harm to a marriage than the requirement that a spouse's discontent with the marriage ordinarily must be sufficient for him or her to leave the marital home prior to receiving separate maintenance.

Living separate and apart therefore is a prerequisite to petitioning for an award of separate maintenance. Because Wife never alleged she was living separate and apart from Husband, the family court did not err in dismissing her complaint under Rule 12(b)(6), SCRCP.

III. *LIS PENDENS* AND ATTORNEY'S FEES

Finally, Wife argues the family court erred in cancelling the *lis pendens* she filed on Husband's rental properties and not awarding her attorney's fees. In light of our conclusion that she has failed to state a claim, we disagree.

A *lis pendens* essentially is another form of a pleading in a case. *Pond Place Partners, Inc. v. Poole,* 351 S.C. 1, 30, 567 S.E.2d 881, 896 (Ct. App. 2002). "It is premised upon and must be filed in time [and] in conjunction with an underlying complaint involving an issue of property." *Id.* A *lis pendens* must be filed "not more than twenty days before the filing of the complaint or at any time afterwards." S.C. Code Ann. § 15-11-10 (2005). It is therefore a derivative right, and its validity depends not only on the timeliness of its filing in relation to the underlying complaint, but on the validity of the complaint as well. Because we find Wife's complaint fails to state a claim, there is no valid complaint on which Wife's *lis pendens* can be premised. Accordingly, the family court did not err in cancelling it.

In considering whether to award a party attorney's fees, the court must consider the party's ability to pay his own fees, the beneficial results obtained by the party's attorney, each party's respective financial conditions, and the effect of the fee on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). Given our affirmance of the family court's dismissal of Wife's complaint, she did not achieve any beneficial results. We therefore affirm the court's denial of attorney's fees to Wife.

CONCLUSION

We affirm the order of the family court dismissing Wife's complaint for separate maintenance because she failed to allege that she and Husband were living separate and apart at the time of filing. Furthermore, because Wife's *lis pendens* and claim for attorney's fees hinge on the validity of her complaint, we find no error in the family court's denial of that relief to Wife.

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

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority that the family court did not find a jurisdictional defect in wife's complaint. See Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009). I disagree, however, that either as a matter of pleading or of policy a married couple must be living separate and apart in order to bring an action for separate maintenance and support. I would therefore reverse the family court order to the extent it dismissed the complaint and cancelled the *lis pendens*.

Although South Carolina did not permit divorce until 1949,[6] the equity courts "without any Legislative act, or other authority, began to exercise jurisdiction in case for alimony, *Brown* vs. *Brown*, 1 Eq. R. 196. A.D. 1785,[7] not as in England, as incident to suits for divorce, (for no divorce has ever been allowed in this State,) but as a separate and distinct ground for equitable relief. *Julineau* vs. *Julineau*, 2 Des. 45 A.D. 1787."[8] Hair v. Hair, 31 S.C. Eq. (10 Rich. Eq.) 163 (S.C. App. Eq. 1858). Although originally this equitable relief was available only to those who could establish fault that would be grounds for divorce in England, Rhame v. Rhame, 6 S.C. Eq. (1 McCord Eq.) 197 (S.C. App. 1826), this requirement was relaxed overtime, leaving the question whether to grant a decree of separate maintenance and support to the court's broad discretion. Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951). The equitable authority to grant this relief has devolved upon the family court, but remains a matter of discretion, not bound by statutory requirements.

This State's long established public policy favors preservation of marriage, and encourages and promotes reconciliation between spouses. Towles v. Towles, 256 S.C. 307, 182 S.E.2d 53 (1971). It is "the sundering of the marriage ties" which our public policy seeks to avoid by its strict construction of the grounds for divorce. E.g. Mincey v. Mincey, 224 S.C.

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[6] Except for the period 1872 to 1878, when divorce on the ground of adultery or willful desertion was permitted by statute. See Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949).

[7] Reported as Brown v. Brown, 1 S.C. Eq. (1 Des.) 196 (1789).

[8] Reported as Jelineau v. Jelineau, 2 S.C. Eq. (2 Des.) 45 (1801).

520, 80 S.E.2d 123 (1954) (constructive desertion is ground for divorce only where leaving spouse left because of other spouse's conduct which amounted to a fault ground for divorce); Nolletti v. Nolletti, 243 S.C. 20, 132 S.E.2d 11 (1963) (spouse must have been deserted for at least a year prior to commencement of divorce action on this ground); Shaw v. Shaw, 256 S.C. 453, 182 S.E.2d 865 (1971) (separation caused by one spouse's insanity cannot be basis for divorce). Because our public policy requires that courts strictly construe the grounds for divorce, our decisions have been especially concerned with preventing collusive divorces. E.g., Brown v. Brown, *supra*. Collusiveness is not an issue in a separate maintenance and support action, which does not require a fault ground or a physical separation for at least a year preceding commencement of a divorce action.

The majority takes the State's public policy strongly favoring marriage over divorce, and applies it to impose new obstacles to those seeking only separate maintenance and support, a non-terminal type of marital litigation which carries with it a greater hope of reconciliation. Moreover, because our public policy encourages reconciliation, I do not understand the majority's concern with those who commence but then withdraw marital litigation.[9]

The majority relies in part upon the statutory provision that terminates separate maintenance and support awards upon "continual cohabitation." S.C. Code Ann. § 20-3-130(B)(5) (Supp. 2010). Continual cohabitation is defined as "the supported spouse resides with another person in a **romantic relationship** for a period of ninety consecutive days." S.C. Code Ann. § 20-3-130(B) (Supp. 2010) (emphasis supplied). It is not merely living in the same residence which is required, but also a romantic relationship, ordinarily with a third person (though the resumption of cohabitation with a spouse would have the same effect) which provides the statutory basis for ending support. Unlike the majority, as I read § 20-3-130(B)(5), the purpose of

[9] One need only look at this couples' history, which includes two prior domestic filings by Wife before she initiated this suit. I do not perceive any empirical support for the majority's belief that requiring physical separation before the filing of a separate and maintenance action will reduce the number of "minor disputes" inundating the family courts.

separate maintenance and support is to provide the financial means necessary for the parties to be able to live separate and apart, not to require them to already be living in separate residences as a prerequisite to such an action.

I also disagree with the majority's decision to "borrow" the requirement that parties seeking a divorce based on either desertion or one year's separation must be separated when the action is commenced, and import it into a separate maintenance and support action as a pleading requirement. I see nothing in our precedents or in our rules[10] which require a person plead separation in her separate maintenance and support complaint. If anything, precedent and legislation suggest[11] that no such separation is required. Murray v. Murray, 271 S.C. 62, 246 S.E.2d 538 (1978) (no condonation in separate maintenance and support suit where husband stayed in home with wife); S.C. Code Ann. § 20-3-130(G) (Family Court may approve alimony or separate maintenance and support agreements "in actions for divorce…separate maintenance and support actions, or in actions to approve agreement where the parties are living separate and apart"); see also Gainey, *supra* (separate maintenance and support decree not subject to Rule 60(b), SCRCP relief even though parties resided in same home until day of merits hearing).

In my opinion, public policy does not require parties live in separate residences in order to bring a separate maintenance and support suit. Instead, I would allow such a suit where the parties no longer have a "romantic" relationship. We allow a divorce action to be brought where the parties share a residence, Watson, *supra*, and have allowed a separate maintenance and support suit under the same circumstances. Murray, *supra*. Both Watson and Murray recognize the hardship placed on a parent in a custody situation if the parent must leave the home in order to commence marital litigation. In a similar vein, public policy should recognize that financial impossibility may prevent a spouse from establishing a separate residence prior to receiving

[10] See Rule 9, SCRCP, "Pleading Special Matters."

[11] I agree with the majority that this case presents a novel question, and find "suggestions," not binding authority, in our precedents.

court-ordered support. We should not deny access to the family court to a party who must, of financial necessity, remain in the marital abode.

I would hold that living separate and apart is not a prerequisite to the bringing of a separate maintenance and support action. I therefore concur in part and dissent in part.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sandlands C&D, LLC, and Express Disposal Service, LLC, Plaintiffs,

v.

County of Horry, a Political Subdivision of the State of South Carolina, acting by and through its duly elected County Council, and Horry County Solid Waste Authority, Inc., Defendants.

CERTIFIED QUESTION

Opinion No. 27042
Heard May 24, 2011 – Filed September 19, 2011

CERTIFIED QUESTION ANSWERED

Robert Joseph Sheheen, of Savage, Royall & Sheheen, of Camden, William Thomas Lavender Jr., and Joan Wash Hartley, both of Nexsen Pruet, of Columbia, for Plaintiffs.

Emma Ruth Brittain, of Thompson & Henry, of Myrtle Beach, Stanley Eugene Barnett, of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, and Victoria Thomas Vaught, of

Battle, Vaught & Howe, of Conway, for Defendants.

Robert E. Lyon Jr. and M. Clifton Scott, both of Columbia, for Amicus Curiae South Carolina Association of Counties.

Karen Aldridge Crawford, of Nelson Mullins Riley & Scarborough, of Columbia, for Amici Curiae National Solid Wastes Management Association and Homebuilders Association of South Carolina.

CHIEF JUSTICE TOAL: Pursuant to Rule 244(a), SCACR,[1] we accepted the certified question from the Honorable Terry L. Wooten, United States District Court for the District of South Carolina, of whether the South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. §§ 44-96-10, *et. seq.* (2002) (SWPMA), preempts Horry County Ordinance 02-09 (2009), entitled "An Ordinance Regulating the County-Wide Collection and Disposal of Solid Waste Generated within Horry County and for the Prohibition of the Disposal of Solid Waste Materials in any Manner Except as Set Forth Herein; and Providing Penalties for Violation Thereof." We answer this question in the negative.

FACTUAL/PROCEDURAL BACKGROUND

In 1976, Congress enacted the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* (1976, as amended) (RCRA), to create a long-term solution for managing the increasing levels of solid waste across the

[1] Rule 244(a), SCACR, permits the Court to "answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court."

United States and to address contiguous environmental problems created by harmful disposal methods, inadequate landfill capacity, and substandard facilities. *Id.* § 6901(a), (b). The RCRA also mandated the promulgation of corresponding guidelines by the Environmental Protection Agency. *See, e.g.*, *id.* § 6907 (authorizing the promulgation of regulations governing solid waste management); *id.* § 6942(b) (authorizing the promulgation of regulations to oversee the creation of state solid waste management plans); 40 C.F.R. §§ 255.1, *et seq.* (regulations applicable to solid waste management); *id.* 256.01, *et seq.* (regulations applicable to state solid waste management plans).

In 1991, as a corollary to the federal guidelines, the General Assembly enacted the SWPMA after determining a "coordinated statewide management program [was] needed to protect public health and safety, protect and preserve the quality of the environment, and conserve and recycle natural resources." S.C. Code Ann. § 44-96-20(A)(13) (2002). Not only did the General Assembly seek to ensure the environmentally sound disposal of certain types of nonhazardous waste in South Carolina, but through the SWPMA, the General Assembly also sought to handle the practical problems associated with solid waste management by ensuring adequate landfill capacity to meet the state's future disposal needs and provide for the efficient and economical disposal of waste in the state. *See generally* S.C. Code Ann. § 44-96-20(A)(1)–(14) (listing the General Assembly's policy findings necessitating the passage of the SWPMA) *and* (B)(1)–(14) (listing the objectives of the SWPMA from a policy standpoint); 44-96-240(A)(1)–(6) (listing the General Assembly's findings necessitating the statewide management of solid waste) *and* (B)(1)–(2) (listing the objectives of the statewide management system). The SWPMA mandates the formation of a state solid waste management plan by DHEC and requires counties to prepare individual solid waste management plans or participate in regional solid waste management plans.[2] *Id.* §§ 44-96-20(A)(14) (stating that a purpose of

[2] To summarize, the SWPMA requires a county or regional solid waste management plan to include, in relevant part: an estimate of the rate of solid waste disposal at facilities within the county or region at the effective date of the SWPMA and during the subsequent twenty-year period, an estimate of the existing capacity and remaining lifespan of the existing landfills in the

the SWPMA is to require the creation of solid waste management plans), -60 (requiring creation of a state solid waste management plan), -80(A) (requiring counties to participate in single county or regional solid waste management plans). The SWPMA charged DHEC with the task of promulgating regulations, which would create new standards governing non-hazardous waste disposal practices in the state. *Id.* § 44-96-260 (authorizing DHEC to enact regulations); S.C. Code Ann. Regs. § 61-107, *et seq*. (solid waste regulations). DHEC has since promulgated regulations which govern, *inter alia*, the "minimum standards for the site selection, design, operation, and closure of all solid waste landfills and structural fill areas." S.C. Code Ann. Regs. § 61-107.19.I.A.1. Furthermore, the SWPMA authorized DHEC to establish a statewide permitting scheme. S.C. Code Ann. § 44-96-260(2) (authorizing DHEC to permit solid waste facilities); *id.* § 44-96-290 (outlining permitting parameters). As part of the permitting process, the SWPMA provides that "[n]o permit to construct a new solid waste management facility or to expand an existing solid waste facility may be issued until a demonstration of need is approved by [DHEC]," S.C. Code Ann. § 44-96-290(E), and authorizes DHEC to promulgate regulations governing permitting and demonstration of need decisions. *Id.* § 44-96-290(D), (E); *see also* S.C. Code Ann. Regs. § 61-107.17 (Supp. 2010) (DON Regulation). The DON Regulation creates geographic planning areas that DHEC must contemplate when deciding whether the projection of solid waste in the area warrants the construction of a new landfill at a proposed landfill site or the proposed expansion of an existing landfill. S.C. Code Ann. Regs. § 61-107.17.B.10 (defining "planning area"); *id.* § 61-107.17.D.2 (criteria for determining need). However, planning areas also affect the determination of yearly allowable disposal rates at permitted solid waste

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county or region, an estimate of the number of facilities needed to dispose of waste generated within the county or region within the projected twenty-year period, the estimated cost of executing the proposed solid waste plan, the revenue needed to fund the waste management plan in the future and the monies available for that purpose, and the estimated cost of constructing new solid waste management facilities as they become necessary during the twenty-year period and revenues that can be made available to fund those projects. S.C. Code Ann. § 44-96-80(A)(1)–(7).

facilities. S.C. Code Ann. Regs. §§ 61-107.17.D.3.a–b. This calculation is partially based on the estimates contained in the county or regional solid waste management plans. The SWPMA also requires DHEC to render a consistency determination, of whether or not the proposed solid waste facility is consistent with state and county or regional solid waste management plans, local zoning and land-use ordinances and regulations, any other applicable local ordinances, and the buffer requirements contained in other DHEC regulations. S.C. Code Ann. § 44-96-290(F); S.C. Code Ann. Regs. § 61-107.17.B.5 (defining "consistency determination"); *id.* 61-107.17.C.1 (providing that a permit will not be granted until the consistency determination is approved).

Plaintiffs Sandlands C&D, LLC (Sandlands) and Express Disposal Service, LLC (EDS) are related, privately-owned South Carolina companies. Sandlands owns and operates a landfill in Marion County, approximately two miles across the Horry County border, and EDS hauls waste originating in South Carolina and North Carolina to Sandlands' landfill.[3] DHEC granted Sandlands a permit to accept construction and demolition (C & D) waste[4] at the Marion County site. Prior to the passage of Horry County Ordinance 02-09 (the Ordinance), Sandlands received C & D waste originating in Horry County and hauled by EDS, accounting for a large portion of the waste processed at its landfill.

Horry County Council created Defendant Horry County Solid Waste Authority, Inc. (HCSWA) in 1990 to manage Horry County's solid waste needs. Horry County Code 60-90 (1990). The HCSWA, a non-profit

[3] The close relationship between Sandlands and EDS is customary in the industry, ensuring reduced tipping fees for the hauler and a steady stream of waste flow and income for the solid waste facility.

[4] DHEC classifies landfills that accept C & D waste as Class Two landfills. *See* S.C. Code Ann. Regs. § 61-107.19.IV (outlining requirements for this classification).

corporation, owns and operates a municipal solid waste landfill[5] and a C & D landfill, permitted by DHEC, at the same site on Highway 90 in Horry County.

On April 7, 2009,[6] Horry County Council enacted the first ordinance in South Carolina regulating the flow[7] of solid waste

> to protect the health, safety and general well-being of the citizens of Horry County, enhance and maintain the quality of the environment, conserve natural resources and to prevent water and air pollution by providing for a comprehensive, rational and effective means of regulating the collection and disposal of solid waste generated in Horry County and for the prohibition of the disposal of any waste materials in any manner except as set forth in this Ordinance.

Horry County Code 02-09, Art. I, § 1.1. To this end, the Ordinance requires all acceptable solid waste[8] generated within Horry County to be deposited at

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[5] DHEC classifies landfills that accept municipal solid waste as Class Three landfills. *See* S.C. Code Ann. Regs. § 61-107.19.V (outlining requirements for this classification).

[6] The Ordinance became effective on June 1, 2009.

[7] The concept of "flow control" refers to the requirement that waste generated and collected within a particular area be deposited at a specific location for disposal.

[8] "Acceptable waste" includes C & D and municipal solid waste. *Id.* Art. I, § 1.2.1. The Ordinance excludes "unacceptable waste," which it defines as "sewage and its derivatives, agricultural waste, biomedical waste, special nuclear or by-product materials . . . and hazardous waste." *Id.* Art. I, § 1.2.14. Under the Ordinance, "solid waste" is defined as "garbage, refuse, litter, rubbish or other waste resulting from industrial, commercial, agricultural or household activities not disposable by means of sewage

the HCSWA's landfill or a "designated facility." *Id.* Art. II, § 2.1.1 (designation); *id.* Art. VIII, § 8.1.1 (restricting disposal to designated facilities). A "designated facility" is defined as "any solid waste facility(ies) owned and/or operated by the [HC]SWA and/or public owned facilities designated by the [HC]SWA for the acceptance or disposal of solid waste and [C & D] debris, including but not limited to, landfills and transfer stations." *Id.* Art. I, § 1.2.9. Any person or hauler violating the Ordinance by depositing waste at a non-designated facility is subject to penalties. *Id.* Art. VIII, § 8.1.4 (persons); *id.* Art. IX, § 9.1.2 (haulers); *id.* Art. XI, §§ 11.1–11.3 (penalties).

QUESTION PRESENTED

Does the SWPMA preempt the Horry County Ordinance?

ANALYSIS

An ordinance "is a legislative enactment and is presumed to be constitutional." *Aakjer v. City of North Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) (*citing Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985)). The party challenging a local ordinance bears the burden of proving its invalidity. *Id.* It is mandated in "[t]his State's constitution . . . that the powers of local governments should be liberally construed." *Id.* (*citing* S.C. Const. art. VIII § 17).

We have employed a two-step analysis to determine the validity of a local ordinance. *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 394–95, 629 S.E.2d 624, 627 (2006) (*citing Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000)). First, a court must determine "whether the county had the power to enact the ordinance." *Id.* at 395, 629

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system operated in accordance with state and federal regulations," *id.* Art. I, § 1.2.13, and "waste" is defined as "solid waste, C & D waste, biomedical waste, hazardous waste, agricultural waste and septic tank sludge, and includes both acceptable and unacceptable wastes," *id.* Art. I, § 1.2.15.

S.E.2d at 627. "If the state has preempted a particular area of legislation, then the ordinance is invalid," and "[i]f no such power existed, the ordinance is invalid and the inquiry ends." *Id.* Where a court finds the county did "ha[ve] the power to enact the ordinance," then it must "ascertain[] whether the ordinance is inconsistent with the Constitution or general law of this state." *Id.* (citations omitted).

I. Authority to Enact the Ordinance

Despite Plaintiffs' extensive arguments concerning the question of whether Horry County had the authority to enact the Ordinance, the issue is not squarely before us, as the single question certified to this Court concerns preemption. However, for the sake of providing context to the preemption discussion, and because the two questions are inextricably linked in this case, we conclude Horry County validly enacted the Ordinance in furtherance of its police powers.

Recognizing that "[t]he management of solid waste is the inherent responsibility of local government, whose authority in this area is derived from its police powers," the Ordinance purports "to protect the health, safety, and general well-being of the citizens of Horry County, enhance and maintain the quality of the environment, conserve natural resources and to prevent water and air pollution by providing for a comprehensive, rational and effective means of regulating the collection and disposal of waste . . . ." Horry County Code 02-09, Art. I, § 1.1. We note that the mere mention of police power rhetoric as part of the preamble to an ordinance does not guarantee that a local governmental action is a valid exercise of such powers. *See, e.g.*, *Henderson v. City of Greenwood*, 172 S.C. 16, 24, 172 S.E. 689, 691 (S.C. 1934) ("The mere statement in the preamble of an ordinance that is passed under the police power does not give a municipality *carte blanche* to pass an unreasonable ordinance or one opposed to the Constitution or laws of the state.") (citations omitted). However, in view of the counties' longstanding involvement in the field of solid waste management, we find

that the Ordinance represents a valid exercise of Horry County's police powers, as articulated in section 4-9-25 of the South Carolina Code.[9]

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[9] Trash collection and disposal historically has been a regular duty of local governments. In 1956, the General Assembly first statutorily authorized regulation of the field by the counties through the issuance of licenses and franchises for the collection and disposal of solid waste. *See* Act No. 809, 1956 S.C. Acts 1837 (*codified at* S.C. Code Ann. §§ 44-55-1010 to -1060 (Supp. 2010)). In 1974, the General Assembly further authorized the counties to participate in collecting and disposing of solid waste through the employment of county employees or by contract with municipalities or private entities, to levy charges for any services provided, and to again promulgate any necessary regulations. *See* Act No. 886, 1974 S.C. Acts 1941 (*codified at* S.C. Code Ann. §§ 44-55-1210–1230 (Supp. 2010)).

With the advent of "home rule" legislation in this state, the General Assembly in 1989 enacted section 4-9-25 of the South Carolina Code, which states:

> All counties of the State, in addition to the powers conferred to their specific form of government [under section 4-9-30], have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (Supp. 2010). The broad delegation of power under this section "is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State." *Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219,

II. Preemption

We now turn to the thrust of the certified question—whether the SWPMA preempts the Ordinance. As stated previously, an ordinance is invalid if we find that state law preempts the area of legislation. *Ports Auth.*, 368 S.C. at 395, 629 S.E.2d at 627. "To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." *Id.* (*citing Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990)). In *South Carolina Ports Authority v. Jasper County*, we discussed federal preemption concepts and premised our finding of no preemption on the basis that the petitioner failed to establish express preemption, implied field preemption, and implied conflict preemption. 368 S.C. at 395–96, 629 S.E.2d at 627–28 (explaining that in federal court, preemption may be had on grounds of express preemption, implied field preemption, and implied conflict preemption). Likewise, we discuss these federal preemption categories here because Plaintiffs contend these same categories are substantiated in the present case.

A. Express Preemption

Plaintiffs argue that the SWPMA expressly subordinates county regulation of solid waste management to DHEC, creates a coordinated statewide solid waste management system, and mandates regional planning. Therefore, the SWPMA and accompanying regulations expressly preempt a county from regulating the flow of solid waste within the counties, as required by the Ordinance.

"Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 (citations omitted).

At the outset, we recognize that the SWPMA imposes a coordinated, statewide regulatory scheme overseen at the state level by DHEC. *See, e.g.*,

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226, 464 S.E.2d 113, 118 (1995).

S.C. Code Ann. § 44-96-20(A)(13) ("A coordinated statewide solid waste management program is needed to protect public health and safety, protect and preserve the quality of the environment, and conserve and recycle natural resources."). However, we disagree with Plaintiffs concerning the purported scope of the counties' regulatory authority as part of this statewide scheme.

The SWPMA does not prohibit county regulation of solid waste management. Plaintiffs urge this Court to adopt a rule whereby DHEC has the exclusive authority to regulate the entire field of solid waste management, arguing this case is analogous to *Southeast Resource Recovery, Inc. v. South Carolina Department of Health and Environmental Control*, 358 S.C. 402, 595 S.E.2d 468 (2004). In that case, this Court held that DHEC possessed the exclusive authority under the SWPMA to make consistency determinations as part of the permitting process, and consequently, DHEC could not relinquish this decision to the counties. *Id.* at 408, 595 S.E.2d at 471. Although there is no doubt the express language of the SWPMA provides for DHEC's exclusive authority in the area of *permitting*, *see* S.C. Code Ann. § 44-96-290(E) ("No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department."); *id.* § 44-96-260(2) (DHEC may "issue, deny, revoke, or modify permits, registrations, or orders under such conditions as the department may prescribe . . . ."), we glean no similar express language in the statute concerning the *flow* of solid waste within the counties. Therefore, *Southeastern Resource Recovery* is inapposite.

Furthermore, Plaintiffs have not identified any specific provisions of the SWPMA that prohibit Horry County's passage of the Ordinance. To the contrary, the SWPMA is laden with references to the counties' involvement in the management and regulation of solid waste. *See, e.g.*, 44-96-80(A), (J), (K). Likewise, the DON Regulation itself contains no express language prohibiting county regulation of the flow of waste.[10] *But see* S.C. Code Ann.

[10] Because the DON Regulation contains no express language prohibiting the Ordinance, we discuss Plaintiffs' arguments concerning the operation of the DON Regulation in the context of implied conflict preemption, *infra*.

§ 44-96-290(F) (Supp. 2010) ("[N]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and *other applicable local ordinances, if any*[.]") (emphasis added); S.C. Code Ann. Regs. § 61-107.B.5.c (requiring consistency determinations account for any local ordinances); *id.* § 61-107.C.1 (providing DHEC must approve the consistency determination prior to granting a permit). Accordingly, we do not find section 44-96-80(K) expressly prohibits Horry County from enacting the Ordinance.[11]

Next, Plaintiffs cite a multitude of provisions to support their contention that the Ordinance conflicts with the SWPMA's requirement that counties adopt a regional approach to solid waste management.[12] There is no

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[11] Section 44-96-80(K) provides:

> The governing body of a county is authorized to enact such ordinances as may be necessary to carry out its responsibilities under this chapter; provided, however, that the governing body of a county may not enact an ordinance inconsistent with the state solid waste management plan, with any provision of this chapter, with any other applicable provision of state law, or with any regulation promulgated by the department providing for the protection of public health and safety or for protection of the environment.

S.C. Code Ann. § 44-96-80(K) (2002).

[12] *See* S.C. Code Ann. § 44-96-20(B)(14) (stating that a goal of the SWPMA is to "encourage local governments to pursue a regional approach to solid waste management"); *id.* § 44-96-50(C) (similarly providing that "[i]t is the policy of this State to encourage a regional approach to solid waste management[]"); *id.* § 44-96-60(A)(12) (requiring the state solid waste management plan to outline "procedures for encouraging and ensuring

doubt the SWPMA favors regionalism. *See* S.C. Code Ann. § 44-96-80(G) ("Counties are strongly encouraged to pursue a regional approach to solid waste management."). However, the SWPMA unequivocally tempers the operation of all of the provisions advocating for a regional approach with the proviso, found in section 44-96-80(G), that "[n]othing in this chapter . . . shall be construed to require a county to participate in a regional plan . . . ." *Id.* The only interpretation supported by the plain language of section 44-96-80(G), together with all other provisions on the subject, is that the legislature intended the SWPMA to "*strongly encourage*" participation in a regional plan, but not to "*require*" it. *Id.* (emphasis added). This interpretation effectuates the stated objectives of the SWPMA of imposing a statewide, coordinated solid waste management system and advancing a regional approach to solid waste management, yet simultaneously allows for regulation at the local level. The express language of the SWPMA and DHEC regulations support this interpretation. Therefore, because Plaintiffs have not cited any express language in the SWPMA demonstrating the legislature's intent to preclude local regulation of the flow of solid waste within the counties, there can be no express preemption.

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cooperative efforts in solid waste management by the State, local governments, and private industry, including a description of the means by which the State may encourage local governments to pursue a regional approach to solid waste management"); *id.* § 44-96-240(6) (2002) ("A regional approach to the establishment of solid waste management facilities should be strongly encouraged in order to provide solid waste management services in the most efficient and cost-effective manner and to minimize any threat to human health and safety or to the environment."); *id.* § 44-96-260(10) (authorizing DHEC to "encourage counties and municipalities to pursue a regional approach to solid waste management within a common geographical area"); *id.* § 44-96-270 (providing that "[t]he department shall conduct a study and shall submit a report to the Governor and to the General Assembly not later than eighteen months after this chapter is effective on ways to encourage counties and municipalities to pursue a regional approach to solid waste management, including incentives to encourage the siting, construction, and operation of regional solid waste management facilities").

B. Implied Field Preemption

Plaintiffs advance a similar argument with respect to implied field preemption. Plaintiffs contend that the SWPMA establishes a comprehensive statutory scheme for the permitting and siting of landfills that grants DHEC exclusive regulatory authority and responsibility for overseeing the field of solid waste management, and therefore, the SWPMA impliedly preempts the Ordinance. We disagree.

Implied field preemption occurs "when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." *Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 (citations omitted).

Plaintiffs primarily point to section 44-96-80(E) to support their contention the SWPMA provides for a statewide coordinated system in the field of solid waste management that occupies the entire field, and as a result, Horry County's passage of the Ordinance hinders statewide planning and policy. Section 44-96-80(E) provides:

> Each [county or regional] solid waste management plan submitted pursuant to this section shall be consistent with the state solid waste management plan, with the provisions of this chapter, with all other applicable provisions of state law, and with any regulation promulgated by the department for the protection of public health and safety or for protection of the environment.

S.C. Code Ann. § 44-96-290(E) (2002).

While this section requires counties to comply with state law, DHEC regulations, and the state solid waste management plan when submitting their own county plans, we do not agree that this section demonstrates the General Assembly's intent to grant DHEC exclusive regulatory authority over the entire field of solid waste management. Where the General Assembly specifically recognizes a local government's authority to enact local laws in

the same field, the statutory scheme does not evidence legislative intent to occupy the entire field of regulation. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 213, 574 S.E.2d 196, 199 (2002) (stating "[i]t would have been unnecessary for the legislature to refer to municipalities' authority to regulate the hours of operation of retail sales of beer and wine if the General Assembly intended to occupy the entire field."); *American Vets Post 100 v. Richland County Council*, 280 S.C. 317, 313 S.E.2d 293 (1984) (where the language of the statute contemplated additional regulation of the game of bingo at the local level, there was not preemption). The SWPMA is silent with respect to control over the flow of local waste generated in the counties and, instead, expressly invites county regulation, planning, authority, and responsibility in the field of solid waste management. *See, e.g.*, S.C. Code Ann. § 44-96-80(A), (J), (K). Therefore, we find the legislature did not intend for DHEC to occupy the entire field of solid waste management.

Likewise, we find that the field of solid waste management does not require statewide uniformity. While the SWPMA implements a statewide regulatory framework overseen by DHEC, it still provides for flexibility so that the counties can address their individualized solid waste needs. The concerns about compliance with local regulations and the passage of conflicting local ordinances that were present in *Aakjer v. City of Myrtle Beach* are not present in this case. *See Aakjer*, 388 S.C. at 134, 694 S.E.2d at 215 (finding statewide uniformity was necessary after Myrtle Beach enacted a municipal ordinance requiring all motorcycle riders to wear helmets and eyewear within city limits (where such requirements were not mandated by state law) because inconsistent and conflicting local regulations would burden individuals seeking to conform to these requirements when riding their motorcycles across the state). To the contrary, in the solid waste field, statewide uniformity is not necessarily beneficial, given the various solid waste needs specific to each county, which differ in size, geography, and population.

Accordingly, we find Plaintiffs have not satisfied their burden with respect to implied field preemption.

C. Implied Conflict Preemption

Plaintiffs contend that the Ordinance clearly hinders the purpose of the SWPMA because it obstructs the SWPMA's policy of mandating a regional approach to solid waste management and interferes with the DON Regulation's planning formula for adequate landfill capacity in the state. We disagree.

"[Implied] [c]onflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." *Ports Auth.*, 368 S.C. at 400, 629 S.E.2d at 630 (citations omitted). Generally, additional regulation that merely supplements state law does not result in a conflict. *Denene*, 352 S.C. at 214, 574 S.E.2d at 199 (citations omitted).

> In order for there to be a conflict between a state statute and a municipal ordinance "both must contain either express or implied conditions which are inconsistent or irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand."

Id. (*quoting Town of Hilton Head*, 302 S.C. at 553, 397 S.E.2d at 664).

> The General Assembly enacted the SWPMA, in relevant part, to:
>
> (1) protect the public health and safety, protect and preserve the environment of this State, and recover resources which have the potential for further usefulness by providing for, in the most environmentally safe, economically feasible and cost-effective manner, the storage, collection, transport, separation, treatment, processing, recycling, and disposal of solid waste;

(2) establish and maintain a cooperative state program for providing planning assistance, technical assistance, and financial assistance to local governments for solid waste management;

(3) require local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management services and programs;

(4) promote the establishment of resource recovery systems that preserve and enhance the quality of air, water, and land resources;

(5) ensure that solid waste is transported, stored, treated, processed, and disposed of in a manner adequate to protect human health, safety, and welfare and the environment;

….

(7) encourage local governments to utilize all means reasonably available to promote efficient and proper methods of managing solid waste, which may include contracting with private entities to provide management services or operate management facilities on behalf of the local government, when it is cost effective to do so;

….

(13) require local governments and state agencies to determine the full cost of providing storage, collection, transport, separation, treatment, recycling, and disposal of solid waste in an environmentally safe manner; and

(14) encourage local governments to pursue a regional approach to solid waste management,

S.C. Code Ann. § 44-96-20(B)(1)–(5), (7), (13), (14), and to:

> (1) regulate solid waste management facilities other than hazardous waste management facilities . . . ; and
>
> (2) ensure that all solid waste management facilities in this State are sited, designed, constructed, operated, and closed in a manner that protects human health and safety and the environment,

id. § 44-96-240(B)(1)–(2). The Ordinance does not conflict with any of these enumerated purposes, either directly or impliedly.

Plaintiffs primarily argue that the Ordinance conflicts with statewide planning by inhibiting the implementation of the DON Regulation, which Plaintiffs argue mandates a regional approach to solid waste management in the State. As evidence of the conflict between the Ordinance and the General Assembly's intent to advance a regional approach to solid waste management, Plaintiffs point to the 75-mile wide planning radius for Class Three Landfills (which includes municipal solid waste facilities), and the increase in the planning area for Class Two Landfills (which includes C & D landfills) from the previously authorized 10-mile radius to a 20-mile planning radius.[13] *See* S.C. Code Ann. § 61-107.17.C.3 (listing the planning areas for the landfill

[13] In 2009, DHEC promulgated the current DON Regulation, which made various changes to the previous DON Regulation, namely modifying the size of planning areas, augmenting the criteria for gaging the disposal rate cap for certain classes of landfills, and resolving when rate increases could be requested. *See* S.C. Code Ann. Regs. § 61-107.19.A.1 (Supp. 2010) (preamble). These changes were meant to "reduce the number of potential locations for new solid waste facilities and help to reduce and install a cap on the over-all allowable disposal rate in the State while ensuring an adequate number of facilities throughout the State to meet disposal needs." *Id.*; *see also* S.C. Code Ann. Regs. § 61-107.17 (Supp. 2008) (2000 DON Regulation); *id.* § 61-100 (DHEC's prior mechanism for determining need, deemed unconstitutional in *Northeast Sanitary Landfill, Inc. v. South Carolina Department of Health and Environmental Control*, 843 F. Supp. 100 (D.S.C. 1992)).

classes). Specifically, Plaintiffs claim that because these planning areas extend beyond county borders across the state, especially in the case of the municipal solid waste facilities, the Ordinance conflicts with the legislature's intent to require regional planning. For example, Plaintiffs argue, some counties are prohibited from hosting municipal solid waste facilities due to the restrictions of the DON Regulation. Plaintiffs also contend that the increase in size of planning areas for Class Two landfills further demonstrates the legislature's intent to promote regional planning in the field of solid waste management.

We reiterate that the SWPMA merely *encourages* a regional approach to solid waste management while at the same time explicitly allowing single-county planning. *See* S.C. Code Ann. § 44-96-80(G). Therefore, we disagree with Plaintiffs to the extent they argue that the requirements of the DON Regulation mandate regionalism and foreclose county regulation of the flow of solid waste. There is no correlation between demonstration of need decisions and the ultimate destination of collected waste within a planning area. The planning radius merely serves to pinpoint the permissible location of a new facility. S.C. Code Ann. Regs. § 61-107.17.D.2.a (requiring that no more than two landfills overlap in their respective planning areas). On the other hand, the rate of waste generated within a particular planning area is used to calculate the maximum allowable waste that may be disposed of at a particular facility per year, subject to increases as allowed under the DON Regulation. *Id.* § 61-107.17.D.3.a–b (calculating facilities' maximum capacity); *id.* 61-107.17.D.3.c–d (outlining how to obtain increases). This number is based in part on the overall disposal rates within a particular county or region, as compiled in the various county or regional solid waste management plans. However, there is no nexus between the location where collected waste is deposited and these calculations. We note further that the SWPMA allows (and encourages) counties not able to host a certain type of landfill to join with other counties to form regional solid waste plans. Moreover, solid waste facilities do not receive waste exclusively from their own planning areas, so even when facilities cannot host a certain type of landfill, that waste may still be transported to landfills across the state.[14] In

[14] Both Sandlands and the HCSWA accept waste from outside their planning

our view, the DON Regulation serves as a planning tool to ensure the state is prepared to meet the waste disposal needs of the population by providing adequate landfill capacity and to assist the counties in that endeavor. *See* 44-96-20(B)(2) (stating the purpose of the SWPMA is to "establish and maintain a cooperative state program for providing planning assistance, technical assistance, and financial assistance to local governments for solid waste management"). Accordingly, the Ordinance does not inhibit the operation of the DON regulation or encroach on DHEC's permitting authority.

While the SWPMA provides for a statewide management system, it also places the onus on the counties to plan and provide for solid waste collection and disposal at the local level. Horry County's passage of an ordinance regulating the flow of waste neither frustrates the purpose of the SWPMA, nor interferes with need determination for landfill permitting pursuant to the DON Regulation. Compliance with both the Ordinance and the SWPMA is undoubtedly possible. Therefore, we find that the Ordinance is not preempted under the implied conflict analysis.

III. Inconsistency with the Constitution or General Law

Finally, we turn to whether the Ordinance is "inconsistent with the Constitution or general law of this state." *Ports Auth.*, 368 S.C. at 394–95, 629 S.E.2d at 627 (*citing Hospitality Ass'n*, 320 S.C. at 224, 464 S.E.2d at 117). Plaintiffs contend that the Ordinance directly conflicts with section 44-55-1020 of the South Carolina Code because that section allows individual generators of waste and municipalities to dispose of waste in any manner allowed by the county health departments, and the Ordinance requires disposal of solid waste at a facility designated by Horry County Council.

Plaintiffs' reliance on this section is specious. The Ordinance was not enacted with section 44-55-1020 in mind,[15] and because the Ordinance does

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areas.

[15] Horry County Council enacted the Ordinance pursuant to section 44-55-1210 of the South Carolina Code, *see* Horry County Code 02-09, Art. II, which provides:

not pertain to Horry County's authority to issue licenses and franchises for the collection and disposal of waste under sections 44-55-1010 to -60, section 44-55-1020 has no bearing on the question of the Ordinance's validity in this case.[16]

Having determined that the Ordinance does not conflict with the SWPMA or DHEC regulations, which allow for county regulation of solid waste, we find the Ordinance is not inconsistent with section 44-55-1020.

> The governing body of any county may by ordinance or resolution provide that the county shall engage in the collection and disposal of solid waste. Such collection and disposal may be accomplished either by use of county employees and equipment or by contract with private agencies or municipalities of the county. Service charges may be levied against persons for whom collection services are provided whether such services are performed by the county, a municipality or a private agency.

S.C. Code Ann. § 44-55-1210 (Supp. 2010). The Ordinance is obviously not prohibited by the plain language of this section.

[16] We also note that the individual county health departments have since fallen under the regulatory authority of DHEC. Since DHEC began regulating solid waste management pursuant to the SWPMA, the agency has limited the operation of section 44-55-1020 through, for example, prohibiting individuals or municipalities to engage in "open dumping," defined as "any unpermitted or unregistered solid waste disposal or land filling activity," S.C. Code Ann. Regs. §§ 61-107.I.A.8 and 61-107.I.B.53, and requiring collectors of municipal solid waste to "ultimately dispose of solid waste at facilities and/or sites permitted or registered by [DHEC] for processing or disposal of that waste stream," S.C. Code Ann. Regs. § 61-107.5.D.3. To be clear, the SWPMA did not invalidate section 44-55-1020. However, we agree with Defendants that reliance on these antiquated statutes to invalidate the Ordinance is unavailing in light of the passage of the SWPMA and resulting regulations.

Plaintiffs have not directed us to any other inconsistent statutory or constitutional provisions. Therefore, the Ordinance is a valid exercise of Horry County's authority.

CONCLUSION

Based on the foregoing, we find that the Solid Waste Policy and Management Act does not preempt Horry County Ordinance 02-09.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Thomas Edward Jennings, Appellant.

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27043
Heard April 5, 2011 – Filed September 19, 2011

REVERSED

Blake A. Hewitt and John S. Nichols, both of Bluestein, Nichols Thompson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor W. Walter Wilkins, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of two counts of committing a lewd act upon a minor and was sentenced to fifty-five months' imprisonment for the first charge and fifteen years, suspended upon the service of fifty months and three years' probation for the second charge, with the sentences to run consecutively. Appellant appeals his convictions, arguing the trial court erred in allowing the State to introduce the written reports of a forensic interviewer. We reverse.

FACTS

Appellant was a neighbor of the three minor alleged victims ("oldest child," "middle child," and "youngest child"), aged eleven, nine, and six, respectively. Although the children described appellant as a friend and grandfather figure, all claimed he inappropriately touched them on numerous occasions. According to the children, appellant would typically start out by rubbing their backs underneath their shirts, and would eventually put his hand down their pants, underneath their underwear.

Middle child first reported appellant's actions to her parents after she returned from a bike ride with appellant. According to middle child, she became upset when appellant asked her if she liked it when he rubbed her back. She claimed she returned to her house and told her mother what appellant had been doing to her. Following middle child's revelation, the other two children claimed appellant had also touched them inappropriately.

Appellant admitted he developed a friendly relationship with the children and that he had engaged in incidental physical contact with them from time to time. He vehemently denied, however, touching any of them inappropriately.

Forensic interviewer Shauna Galloway-Williams interviewed each of the children. The State called her as its first witness and asked her to briefly summarize what each of the victims told her during the interviews. Appellant objected, and the trial court sustained the objection. The State then moved to

admit the forensic interviewer's written reports into evidence. Over appellant's objection, the trial court allowed the written reports into evidence.

The written reports contain several sections of information. Each report contains a "Background Information" section, including identical descriptions of when the family moved to South Carolina and how they began to interact with appellant. This section also contains the mother's account of her conversation with middle child during which middle child revealed appellant had been abusing her. For instance, the reports state that mother told the forensic interviewer that middle child told mother that appellant touched middle child inappropriately, and that middle child did not like it when appellant touched her. The reports also state that mother told the forensic interviewer that the other children told mother that appellant had also touched them inappropriately. Each report also contains a section entitled "Regarding Allegations of Abuse" in which the forensic interviewer outlines the children's accounts of the alleged abuse by appellant provided in the interviews.

Finally, each report contains a section entitled "Conclusion of interview," where the forensic interviewer states that the children "provide[d] a compelling disclosure of abuse by [appellant]." The reports further conclude that each of the children provided details consistent with the background information received from their mother, the police report, and the other two children.

Later in the forensic interviewer's testimony, the Court allowed the State to play videos of each of the three interviews. After the videos were played, all three children testified that appellant abused them in the manner described in the forensic interviews.

ISSUES

I. Did the trial court err in allowing the State to introduce written reports from the children's interviews?

II. Did the trial court err in allowing the State to introduce videos of the children's interviews before the children had testified?

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citation omitted).

LAW/ANALYSIS

I. Admissibility of written reports

Appellant argues the trial court erred in allowing the State to introduce the forensic interviewer's written reports from her interviews with the children. Specifically, appellant argues the reports contained inadmissible hearsay that improperly bolstered the children's testimony, that they impermissibly allowed the forensic interviewer to vouch for the credibility of the children, and that their admission was not harmless beyond a reasonable doubt. We agree.

A. Written reports as inadmissible hearsay

Appellant first argues the trial court erred in allowing the State to introduce the reports because they constituted impermissible hearsay, which improperly bolstered the children's testimony.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE.

"Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010). Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id.

Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis in original); see also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (forensic interviewer's hearsay testimony impermissibly corroborated the victim's testimony because the outcome of the case hinged on the victim's credibility regarding the identification of the perpetrator); Dawkins v. State, 346 S.C. 151, 154, 551 S.E.2d 260, 261 (2001) (defendant was entitled to post-conviction relief where four witnesses testified without objection regarding the victim's out-of-court conversations with them concerning the alleged abuse).

Appellant specifically challenges the portions of the report where the mother related to Williams that the middle child told her appellant molested her and specific things the victims told the forensic interviewer during the interviews. We find these portions of the written reports constitute inadmissible hearsay as they were out-of-court statements offered to prove that appellant did in fact inappropriately touch the girls in the way that they claimed.

We also find the trial court's error in allowing the State to introduce this evidence was not harmless. This trial hinged on the children's credibility, and the written reports were cumulative to the children's testimony. As this Court has held before, where credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is

not harmless. Jolly, supra; Dawkins, supra; Smith, supra. Because the children's credibility was the ultimate determination for the jury to make in deciding appellant's guilt, the trial court's error in admitting the reports could not have been harmless. Id.

B. Improper vouching

Appellant also argues the trial court erred in allowing the State to introduce the written reports because they improperly vouched for the victims' credibility. Specifically, appellant challenges the conclusion section of the reports where the forensic interviewer states the children provided a "compelling disclosure of abuse" and provided details consistent with the background information received from mother, the police report, and the other two children.

For an expert to comment on the veracity of a child's accusations of sexual abuse is improper. See State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); but see State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (forensic interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity).

We find the trial court abused its discretion in allowing the State to introduce the reports because they allowed the forensic interviewer to improperly vouch for the children's veracity. In each report, the forensic interviewer stated that during the interviews, each child had "provide[d] a compelling disclosure of abuse by [appellant]." The forensic interviewer further concluded that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were

being truthful. We therefore find the trial court erred in allowing the State to introduce the reports. Dawkins, supra; Dempsey, supra.

We further find the trial court's admission of the reports did not amount to harmless error. There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless.").

II. Timing of videos' introduction

Appellant argues the trial court erred in allowing the State to introduce the videos of the interviews before the children had testified. Specifically, appellant argues allowing the videos to be introduced at that time violated his constitutional rights to due process and confrontation. We disagree.

An out-of-court statement of a child under the age of 12 may be admissible under certain circumstances. See S.C. Code Ann. § 17-23-175 (Supp. 2010). Section 17-23-175 provides, in pertinent part:

> (A) In a general sessions court proceeding . . . an out-of-court statement of a child is admissible if:
>
> > (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> >
> > (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);

> (3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

Prior to trial, the State requested a ruling on the introduction of the videos of the victims' interviews with Williams, pursuant to S.C. Code Ann. § 17-23-175 (Supp. 2010). While appellant did not challenge the admissibility of the videos, he did argue that, under the statute, the videos could not be introduced *before* the victims testified. Specifically, appellant argued the statute "contemplates [the victims] be subject to cross-examination before the [videos] come in." Appellant did not, however, make any constitutional arguments in support of his objection. After reviewing the statute, the trial court allowed the State to introduce the video prior to the victims' testimony, with the understanding that the victims would in fact be called upon to testify.

An objection must be made on a specific ground. State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (citing State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997)). For an issue to be properly preserved it has to be raised to and ruled on by the trial court. Id. This rule also applies to constitutional arguments. See State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008) (confrontation clause and due process arguments not preserved for review). Accordingly, the argument now made on appeal, that appellant's constitutional rights were violated, is not preserved for this Court's review.

CONCLUSION

The trial court erred in allowing the State to introduce the forensic interviewer's written reports because they contained impermissible hearsay,

vouched for the children's credibility, and their admission was not harmless. Accordingly, appellant's convictions are

REVERSED.

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

JUSTICE KITTREDGE: I concur in result, but agree with Chief Justice Toal that the apparent categorical rule emanating from Jolly v. State and its progeny precluding a finding of harmless error goes too far. 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (stating that "[i]mproper corroboration testimony that is *merely cumulative to the victim's testimony* . . . cannot be harmless . . . .") (emphasis in original). In my judgment, it may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances. But these determinations are necessarily context dependent, and a categorical rule is at odds with longstanding harmless error jurisprudence. Cf. Huggler v. State, 360 S.C. 627, 634-36, 602 S.E.2d 753, 757-58 (2004) (holding in a post-conviction relief matter arising from a criminal sexual conduct conviction that defense counsel's failure to object to the admission of written witness statements that went beyond time and place of the alleged sexual assault fell below an objective standard of reasonableness, but counsel's failure to object had not prejudiced the defendant's case "[i]n light of the overwhelming evidence presented by the State" and "[t]he evidence of abuse was overwhelming even without the content in the [improperly admitted] written statements.").

I have reviewed the evidence, including the video interviews of the children. While a close question may be presented, I cannot say the improper vouching and admission of the forensic interviewer's written reports were harmless beyond a reasonable doubt. There is a lack of overwhelming evidence of guilt apart from the State's regrettable desire to admit patently inadmissible evidence. Accordingly, I join the majority in voting to reverse.

HEARN, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. While I agree with the majority's disposition of Appellant's argument regarding the timing of the introduction of the videos, I disagree with the majority regarding the prejudicial nature of the forensic interviewer's written reports. I would hold that the admission of the written reports was harmless error and that the reports did not vouch for the children's veracity.

The majority points to a string of cases to support the assertion that improperly admitted hearsay testimony that is merely cumulative to the victim's testimony can never be harmless error. *See Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994). I do not dispute that our cases say as much, but I do disagree with those holdings. Although I concurred in the *Jolly* opinion, I have come to believe that the *Jolly* case and its progeny go too far, and consequently, I believe we should take this opportunity to overrule *Jolly*. In my opinion, these cases create a rule of per se prejudice when testimony is cumulative to the victim's testimony. Such a rule is contrary to the traditional analysis of improperly admitted hearsay testimony, which requires a finding of prejudice. *See State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice.").

In my view, the admission of the written reports was harmless error. The video of the forensic interview was shown at trial, as allowed by statute, the victims testified, and Appellant testified. The jury heard both sides of the story and nonetheless convicted Appellant. Appellant has not shown that the introduction of the reports so tainted the verdict that he was prejudiced. As stated previously, I disagree with the per se rule created by *Jolly* and its progeny. In my opinion, a defendant should always be required to prove he suffered prejudice from the improper introduction of cumulative hearsay testimony.

I do not believe the forensic interviewer's report vouched for the credibility of the victims. The interviewer did not state she believed the victims. In fact, she testified that her role as a forensic interviewer was "to

interview children and to report the information that they share," and that "[i]t's not [her] job to prove guilt or innocence or to prove whether someone is telling the truth or not." Therefore, in my view, the reports did not vouch for the victims.

Thus, Appellant suffered no prejudice from the introduction of the reports, and I would hold their admission to be harmless error.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tony L. Pope and Lynn S. Pope, Individually and Representing as a Class all Unit Owners for Riverwalk at Arrowhead Country Club Horizontal Property Regime, Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc., and Buildstar Corporation, Appellants,

Riverwalk at Arrowhead Country Club Property Owner's Association, Inc., Respondent,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc., and Buildstar Corporation, Appellants.

Appeal From Horry County
Clifton Newman, Circuit Court Judge

Opinion No. 4888
Heard June 15, 2011 – Filed September 14, 2011

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, and Michael J. Anzelmo, all of Columbia; and William L. Howard, Stephen L. Brown, and Russell G. Hines, all of Charleston, for Appellants.

John P. Henry and Philip C. Thompson, both of Conway, for Respondents.

SHORT, J.: Heritage Communities, Inc. (HCI), Heritage Riverwalk, Inc. (HRI), and BuildStar Corporation (collectively, Appellants) appeal the jury's verdicts in these consolidated construction defect actions. We affirm.

FACTS

Construction on Riverwalk Development (Riverwalk), a condominium complex in Horry County, began in June 1997 and was completed in December 1999. Riverwalk included 228 units in 19 buildings. HCI was the parent corporation of both HRI (the developer and seller), and BuildStar (the general contractor supervising all construction). Prior to and simultaneously with the construction, Appellants developed numerous other properties in Horry County, South Carolina.[1] HCI turned management of Riverwalk over to the Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. (the POA) in September 2002.

The POA filed an action against Appellants alleging defects in the construction of Riverwalk. Condominium owners Tony and Lynn Pope (the Popes) also filed an action against Appellants, on their own behalf and on behalf of the owners of Riverwalk, seeking to recover damages for the loss of use of their property during the estimated repair period. By order filed September 3, 2008, the Honorable Benjamin Culbertson certified the Popes and all other unit owners as a class (the Class). The Class and POA actions were consolidated for trial.

[1] Appellants also developed a property in Charlotte, North Carolina.

The POA and the Class (collectively, Respondents) alleged numerous causes of action including (1) negligence against HCI, HRI, and BuildStar; (2) breach of express warranty against HCI; (3) breach of the warranty of habitability against HRI; (4) breach of the warranty of workmanlike service against BuildStar; and (5) breach of fiduciary duty against HCI and HRI.

The case went to trial on January 5, 2009, before the Honorable Clifton Newman. After the close of Respondents' evidence, the trial court directed a verdict for HCI on the express warranty cause of action and for BuildStar on the warranty of workmanlike service cause of action. At the close of all evidence, the trial court granted Respondents' motions for directed verdicts on the negligence claims. The jury returned a verdict in favor of the POA for $4.25 million in actual damages and $250,000 in punitive damages. The jury awarded the Class $250,000 in actual damages and $750,000 in punitive damages. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in its instructions to the jury?

II. Did the trial court err by ruling Appellants were amalgamated in interests?

III. Did the trial court err by failing to decertify the Class?

IV. Did the trial court err by admitting expert testimony as to loss of use damages?

V. Did the trial court err by admitting evidence of subsequent remedial measures?

VI. Did the trial court err by admitting evidence of construction defects at other HCI developments?

VII. Did the trial court err by granting Respondents' motions for directed verdict on the negligence claims?

VIII. Did the trial court err by denying Appellants' motions for directed verdict and judgment notwithstanding the verdict (JNOV)?

IX. Did the trial court err by permitting the punitive damages awards?

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

LAW/ANALYSIS

I. Jury Instructions

Appellants argue the trial court erred in its instructions to the jury. We find no reversible error.

a. Willfulness, Wantonness, and Recklessness in Defining Negligence

Appellants maintain the trial court erred in charging the jury by including the standard of willful, wanton, and reckless conduct in the definition of simple negligence, which effectively required the jury to find the recklessness necessary to award punitive damages.

In instructing the jury, the court charged:

> Now, [Respondents] allege that [Appellants] negligently constructed the Riverwalk Condominiums. Negligence is the failure to exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the same or similar circumstances as exist[] in this case. Carelessness and negligence mean[] the same thing.
>
> To establish negligent construction[,] [Respondents] must prove four essential elements. One, that there was an undertaking to construct a

> building by [Appellants; two] that [Appellants] **were negligent or careless or reckless, willful and wanton** in the performance of that construction work, or stated another way, that they did not perform the work in a good and workman[-]like manner.
>
> Three, **that the negligence or carelessness or recklessness, willfulness and wantonness** of [Appellants] in performing that construction work was a proximate cause of any damages sustained by [Respondents].
>
> And four, the resulting damages must be shown.
>
> Negligence is not actionable unless it proximately causes [Respondents'] damages. . . .

(emphasis added).

Later in the charge, the court addressed punitive damages:

> Punitive damages can only be awarded where [Respondents] prove by clear and convincing evidence that [Appellants'] actions were willful, wanton, malicious and in reckless disregard of [Respondents'] rights or where [Appellants'] actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness. . . .
>
> . . . .
>
> [Respondents] cannot recover punitive damages based on negligent conduct. Negligence is the doing of some act which a person of ordinary prudence would not have done under similar

> circumstances . . . . Mere negligence will not support a punitive damages award. To recover punitive damages [Respondents] must prove by clear and convincing evidence that [Appellants'] actions were willful, wanton or reckless or so grossly negligent as to imply a willfulness or wantonness.
>
> The word[s] recklessness, willfulness[,] and wantonness are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care. Recklessness is distinguished from negligence. Negligence is the failure to use due care. Negligence is carelessness, as mentioned earlier. Negligence is a failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances. **Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of [Respondents] or a reckless disregard of the rights of [Respondents]. Recklessness is an awareness of wrongful conduct and continuation to act regardless of consequences.**
>
> Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise even the slightest care. . . .

(emphasis added).

Appellants argue the instruction, combined with the grant of directed verdicts to Respondents on negligence, suggested to the jury the court had

already determined that Appellants were willful, wanton, and reckless. We find no reversible error.

In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). Furthermore, an appellate court will review the charge as a whole. See Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). Here, although the trial court's initial language in instructing the jury on negligence may have been a misstatement of law, the court then extensively defined willful, wanton, and reckless conduct and instructed the jury on the difference between mere negligence and willful, wanton, and reckless conduct. In reading the charge in its entirety, we find no prejudice to Appellants. See Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (finding an alleged error in a jury charge must be prejudicial to warrant a new trial).

b. Mandatory Award of Damages

Appellants also argue the trial court's jury charge was erroneous because it required the jury to award actual damages on the negligence claims. Appellants argue the charge inappropriately conveyed to the jury that the directed verdicts on negligence extended to proximate cause and should only have conveyed the court's determination of duty and breach.[2] We find no reversible error.

[2] "To establish a negligence cause of action under South Carolina law, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369-70, 635 S.E.2d 97, 101 (2006).

During opening arguments, Appellants conceded that construction defects existed at Riverwalk, and repairs needed to be made. Appellants' counsel stated: "[W]e ask you [the jury] to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert . . . the true cost of the repairs in this case, which will be around 2.3, 2.391 million dollars."

At the close of evidence, the court directed verdicts on the negligence claim. As to the POA's claim, the trial court instructed the jury:

> I charge you that as a matter of law I have determined that [Appellants] were negligent in the construction of these condominiums. As a result **you must award** [the POA] damages for the cost of repairs and other costs . . . **to the extent these damages have been proven** by a preponderance of the evidence.

(emphasis added).

The trial court is required to charge only the current and correct law of South Carolina. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton, 334 S.C. at 497-98, 514 S.E.2d at 575. A jury charge that is substantially correct and covers the law does not require reversal. Id. at 496, 514 S.E.2d at 574.

In reading the charge in its entirety, we find no error based on the evidence at trial and the court's directed verdict on the POA's negligence claim. Ordinarily, proximate cause is a question for the jury, and the trial court's jury charge in a negligence action should include instruction on this element of negligence. See McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (stating proximate cause is ordinarily a question for the jury); see also Clark, 339 S.C. at 390, 529 S.E.2d

at 539 (finding a trial court must charge the current and correct law). However, when the evidence is susceptible to only one inference, proximate cause is a matter of law for the court. McKnight, 385 S.C. at 387, 684 S.E.2d at 569.

In this case, the trial court granted a directed verdict in the POA action on duty, breach, and proximate cause. The dispute at trial was the amount of the damages. Therefore, the court correctly charged the jury it must award damages to the extent they were proven. See Hinds v. Elms, 358 S.C. 581, 584-86, 595 S.E.2d 855, 857-58 (Ct. App. 2004) (suggesting when liability is established in a negligence action, including proximate cause, the plaintiff is entitled to an award of damages unless proof completely fails); Baker v. Weaver, 279 S.C. 479, 482, 309 S.C. 770, 771 (Ct. App. 1983) (stating instructions to the jury should be confined to the issues at trial). We find no reversible error in these jury instructions.

Finally, as to Appellants' argument that the trial court erred in instructing the jury as to damages on the Class's negligence claim, we find no error. During the jury charge conference, Appellants argued the directed verdict on the proximate cause element of negligence applied only to the POA's construction defect claim, and it did not apply to the Class's loss of use claim. Agreeing with Appellants, the trial court stated: "I'm clearly not going to tell them they must award damages on the loss of use. They may find there were no damages, no loss of use . . . ." The court charged: "As to the class action lawsuit . . . you must determine the nature and extent of any damages suffered by the unit owners for the loss of use of the condominiums during any repairs." We find these instructions do not require the jury to award damages, as Appellants argued. See Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (stating a jury charge that is substantially correct does not require reversal).

II. Amalgamation of Interests

Appellants argue the trial court erred in finding the separate corporate entities, HCI, HRI, and BuildStar, were amalgamated. We disagree.

Gwyn Hardister,[3] the chief operating officer and president of HCI, testified about the management of and interplay between the corporate entities. Hardister testified HCI was the parent corporation of HRI and BuildStar. HRI provided off-site management of Riverwalk, sold the condominium units, and owned title to the property. BuildStar was the general contractor acting as an oversight management group, and it supervised the construction of Riverwalk. Hardister testified Roger Van Wie was his boss, a corporate officer, and a board member. Although HCI, HRI, and BuildStar were separate corporations, they had the same board members, and all were managed and controlled by Van Wie. According to Hardister, Riverwalk did not have any employees; all employees of HCI, HRI, and BuildStar reported to Van Wie; the delineation of employees between the separate corporations was vague; and the three companies shared offices. Hardister acknowledged construction problems to the homeowners and represented that HCI would repair the problems. Furthermore, the warranty manual distributed to the homeowners upon purchase was entitled: "Heritage Communities, Inc. Limited Warranty Manual" and identified HCI as the corporation extending the warranty.

Lynn Anderson, an HCI employee, testified she was the vice president of finance and accounting for HCI and eventually became the president of BuildStar. Anderson paid the bills for all three corporations. She testified the three corporations shared the same officers, directors, office, and telephone number.

The trial court found the corporate entities were amalgamated, stating: "[T]he legal distinction[s] between the entities are blurred, . . . they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others . . . because they are in effect one and the same . . . ."

[3] Mr. Hardister is identified in the record as Quinn Hardester, but identified by Respondents as Gwyn Hardister.

Appellants first argue the trial court erred by not employing a "piercing the corporate veil" analysis.[4] We find this issue is not preserved for appellate review.

At trial, Appellants' argument regarding piercing the corporate veil was as to Van Wie, not as to the separate corporations. Counsel for Appellants stated: "I raised earlier on this afternoon [Respondents] want to basically try Roger Van Wie and when they do that, what they are essentially asking the Court to do is to pierce a corporate vail [sic] without ever having any elements and without ever actually bringing any testimony to try to say it is all Roger Van Wie."

We find the issue raised on appeal, that the trial court erred in neglecting to find the elements necessary to pierce the corporate veil, is not preserved. See Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 65 (2nd ed. 2002) ("The objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."). In this case, the earlier discussion referred to by Appellants' counsel related to objections to testimony that impugned Van Wie's character. In our view, the objection was not sufficiently specific to inform the trial court that Appellants wanted it to consider the theory of piercing the corporate veil, rather than the amalgamation of interests theory, as between the three corporate entities.

Appellants also argue application of the amalgamation of interests theory, like piercing the corporate veil, requires a finding of fraud, wrong, or fundamental unfairness. At trial, Appellants argued the three corporations were separate entities and sharing office space was not sufficient for the court to find an amalgamation of interests. Appellants did not argue the trial court needed to find fraud, wrong, or fundamental unfairness. Thus, this issue is

[4] South Carolina employs a "two prong test for piercing the corporate veil. The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. The second prong requires the plaintiff to demonstrate that 'fundamental unfairness' would result from recognition of the corporate entity." Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 102, 668 S.E.2d 798, 800 (2008).

not preserved. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

Appellants finally argue the trial court erred in finding these corporations were amalgamated in interests. We disagree.

In Kincaid v. Landing Development Corp., 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company. Id. at 96, 344 S.E.2d at 874. In addition to sharing owners, the three companies shared a location. Id. Furthermore, the management company was the corporation called to remedy problems. Id. Finally, the company's letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company." Id. This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." Id. (quoting the trial court); see Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597-605, 649 S.E.2d 135, 140-44 (Ct. App. 2007) (discussing Kincaid as one of three theories raised for holding a parent corporation liable in place of a subsidiary: (1) piercing the corporate veil; (2) alter-ego or instrumentality theory; and (3) the amalgamation of interests or blurred identity theory).

In this case, we find similar indicia of an amalgamation of interests between HCI, HRI, and BuildStar. The corporations shared a location, telephone number, and board members. Also, the record contains evidence the delineation of employees between them was vague. In addition, HCI held itself out to the homeowners as the corporation responsible for construction defects in its warranty and through Hardister's representations to the homeowners. In our view, evidence supports the trial court's finding of an amalgamation of interests between HCI, HRI, and BuildStar.

III. Decertification of the Class

Appellants argue the trial court erred in denying their motion to decertify the Class because it failed to meet the requirements of commonality and typicality. We disagree.

Prior to the consolidation of these two actions, the Class was certified by order of Judge Culbertson. The Class sought damages for the loss of use of their condominiums for the period of time Respondents' expert testified all units would have to be vacated. Citing the five prerequisites of class certification found in Rule 23(a) of the South Carolina Rules of Civil Procedure, Judge Culbertson made these findings: (1) the Class consisted of 228 condominium owners and was so numerous that joinder of all members was impracticable; (2) there were questions of law or fact common to the Class because they all alleged they would suffer loss of use during the remediation period necessary to repair the construction defects; (3) the claims of the representative parties were identical to the claims of the other members of the Class; (4) the representative parties would fairly and adequately protect the interests of the Class; and (5) the amount in controversy exceeded $100 per member of the Class.

At trial, Appellants moved to decertify the Class. Appellants argued the class representatives, the Popes, were absentee homeowners who rarely utilized their unit; therefore, they did not represent the Class. Appellants also argued the Class was not common because members sustained differing amounts of damage to their units, and members utilized their units in different manners, including permanent residency, full or part-time rentals, and vacation homes. The trial court denied the motion, finding Appellants' primary argument, that the Class lacked the commonality required by Rule 23(a)(2) because the use of the units differed, was not an issue of commonality as much as an issue to be addressed by the parties' respective experts as to the amount of loss of use damages.

Tony Pope, a class representative, testified he owned a unit at Riverwalk and was the treasurer of the POA. Pope used his unit as a second home, did not rent it, and believed he was entitled to compensation for the period of time the unit would be unavailable to him while Riverwalk was

being restored. Albert Best, qualified as an expert in the field of estimating reconstruction and rehabilitation projects, testified he is a general contractor and owner of a construction company that specializes in restoration of houses in South Carolina with water intrusion damage. Best testified the reconstruction of Riverwalk would require the homeowners to move out of the development for four months.

Francis DeSantis,[5] qualified as an expert in loss of use damages, testified he estimated the damages for loss of use by the number of units, the size and number of bedrooms per unit, and comparable rental rates in the area. DeSantis testified all owners, regardless of how each utilized his or her unit, were uniformly affected. DeSantis explained he considered loss of use based on habitability, not on occupancy. Thus, according to DeSantis, an owner who was a permanent resident and had to move out suffered the same loss of use damages as an owner who used the unit as a second home and could not use it.

It is within a trial court's discretion whether a class should be certified. Tilley v. Pacesetter Corp., 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). The party seeking certification is required to prove the following five elements:

> 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class."

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) (alterations by court) (quoting Rule 23(a), SCRCP). The failure to satisfy any one of the prerequisites is fatal to class certification. Id. at 21,

[5] Mr. DeSantis is identified in the record as Francis DeSentes, but identified by Respondents as Francis DeSantis.

577 S.E.2d at 200. "The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation." Id.

To establish commonality, a party must show "questions of law or fact common to the class." Rule 23(a)(2), SCRCP. Commonality does not require every issue in the case to be common to all class members. Gardner, 353 S.C. at 21, 577 S.E.2d at 200-01. Rather, commonality is met when the class shares a determinative issue. Id. We find the Class shares the determinative issue of loss of use. We also find the fact that the Class members utilized their units in different manners does not defeat the commonality prerequisite. See McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) (discussing the commonality requirement of Rule 23 and stating it is not necessary that all questions of law and fact be common, only that common issues exist among the class).

To establish the typicality requirement, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Rule 23(a)(3). In King v. American General Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 325 (2009), our supreme court reversed the trial court's order decertifying the class. The trial court decertified the class, finding no typicality in a class action against a lender for failing to timely provide statutorily-mandated attorney preference disclosure forms. Id. at 87, 687 S.E.2d at 323. The trial court based its decision on the differing times of when the class members' loans attached to property. Id. The supreme court reversed, finding the common feature satisfying typicality was the lender's failure to timely provide the form. Id. at 91, 687 S.E.2d at 325. In this case, the representatives claimed damages arising from construction defects and loss of use. The record contains evidence that all unit owners, regardless of the manner of their use, would be excluded from the property for four months. We find the representatives' claims were typical of the claims of the other class members.

IV. Expert Evidence of Loss of Use Damages

Appellants argue the trial court erred in denying their motion to exclude the testimony of Respondents' expert on loss of use damages because the unit

owners were in different positions vis-à-vis the use of their units. Appellants argued the expert's theory, that a non-permanent resident was entitled to the same loss of use damages as a permanent resident, was flawed. Appellants also objected to qualifying the witness as an expert. We find no reversible error.

Francis DeSantis testified he has an undergraduate degree in mechanical engineering and did graduate work in engineering and business. For the last fifteen years, he has owned a real estate and rental broker's company in Horry County. DeSantis has been a licensed real estate broker in South Carolina for fourteen years. He testified that approximately ninety-eight percent of his company's revenue derives from the rental business.

Beginning in 2002, DeSantis began making loss of use and loss of profit calculations, performing studies to place a financial value on rental rates needed to replace a condominium for a period of time. DeSantis performs competitive analyses of rental rates, market trends, demand levels, occupancy rates, and rental prices in the area. His company focuses primarily on single-family homes and condominiums. DeSantis testified he has acted as a consultant for numerous clients, including a bank and many homeowners' associations. DeSantis was formerly qualified as an expert in loss of use damages in South Carolina in 2006. DeSantis admitted he had not published any studies and was not an economist or accountant. The trial court qualified DeSantis as an expert in loss of use damages.

The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice. Manning v. City of Columbia, 297 S.C. 451, 453-54, 377 S.E.2d 335, 337 (1989); McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 490, 626 S.E.2d 52, 55 (Ct. App. 2006).

Expert testimony is subject to the reliability requirements of Rule 702, SCRE. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Rule 702 applies to both scientific and nonscientific evidence. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). In White, the supreme court reiterated that whether an expert's testimony is scientific or nonscientific, the trial court has a gatekeeping role with respect to all evidence sought to be admitted under Rule 702. Id. As a gatekeeper, "[t]he trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." Watson, 389 S.C. at 449, 699 S.E.2d at 177.

Regarding Appellants' contention that the trial court abused its discretion in qualifying DeSantis as an expert, we find no error. DeSantis has significant background knowledge of the condominium rental market in the area, and he has performed other studies of loss of use based on rental and occupancy rates. Furthermore, he has been performing loss of use analyses for more than five years, including testifying as an expert in loss of use. We find no error by the trial court in qualifying DeSantis as an expert in loss of use damages.

Appellants also argue the trial court erred in admitting the expert testimony because the methodology was flawed by concluding homeowners that were not permanent residents suffered loss of use damages. DeSantis testified he estimated the damages for loss of use by the number of units, the size and number of bedrooms per unit, and comparable rental rates in the area. DeSantis included loss of use for all owners, regardless of how each owner utilized his or her unit, opining the owners were uniformly affected regardless of their use. Thus, according to DeSantis, an owner who was a permanent resident and had to move out suffered the same loss of use damages as an owner that used the unit as a second home and could not use it. DeSantis explained he applied the lowest monthly rate, rather than the seasonal weekly rate, to determine the total loss of use damages. DeSantis testified the total loss of damages suffered was $928,215.[6]

[6] Appellants' expert on loss of use damages, Jesse Teel, Jr., testified loss of use damages varied among condominium owners depending on use. Teel calculated total loss of use damages at $227,041.

We find no abuse of discretion by the trial court in admitting this testimony. In considering the evidence, the court recognized Appellants' argument to exclude the testimony was based on a belief that the damages suffered by each type of owner were different. The trial court found the basis of Appellants' attack on DeSantis was the believability, rather than the admissibility, of his testimony. The court noted the different methodologies used by the parties' experts. Appellants' expert analyzed loss of use by separating the owners into certain categories of homeowners. DeSantis analyzed loss of use as common among the different types of homeowners. The trial court found both methodologies to be appropriate measures of loss of use.

In sum, the trial court examined the matter pretrial, listened to extensive voir dire on DeSantis' qualifications and experience in calculating loss of use damages, and admitted the testimony. Based on our review of the record, we find the trial court adequately performed the gatekeeper function. See Watson, 389 S.C. at 449, 699 S.E.2d at 177 (stating the trial court, as the gatekeeper, must examine the substance of the testimony to determine if it is reliable).[7]

V. Evidence of Subsequent Remedial Measures

Appellants argue the trial court erred in admitting a letter from BuildStar to the manufacturer of the windows used in constructing Riverwalk, that asked the manufacturer to replace 192 defective windows. Appellants maintain the admission violated Rule 407, SCRE, regarding evidence of subsequent measures.[8] We find this issue is not preserved for appellate review.

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[7] To the extent Appellants argue the trial court failed to specifically state it found the evidence reliable, we find the issue is not preserved because it was not raised to or ruled upon by the trial court. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (noting that issues not raised to or ruled upon by the trial court are not preserved for appellate review).

[8] Rule 407 governs the admissibility of subsequent remedial measures and provides: "When, after an event, measures are taken which, if taken

Jim Graham testified he worked for a window manufacturer at the time Riverwalk was constructed. Graham was called in 1997 or 1998 by one of his company's distributors regarding water intrusion problems with the windows at HCI developments. During his testimony, Appellants objected to references regarding other HCI developments; Graham's ability to testify as to the cause of the water intrusion without qualifying as an expert; Graham's inability to authenticate the letter; Graham's bias due to settlement offers; and hearsay. Respondents introduced the letter from BuildStar during Graham's testimony. Appellants' counsel objected, "[s]ubject to the prior objection . . . ." Appellants never raised the issue of the inadmissibility of the exhibit based on a violation of the rule governing subsequent remedial measures. Because this issue was neither raised to nor ruled upon by the trial court, it is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (noting that issues not raised to or ruled upon by the trial court are not preserved for appellate review); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (noting the grounds for an objection must be specifically stated to preserve an issue for appellate review).

VI. Evidence of Defects at Other Developments

Appellants argue the trial court erred in admitting evidence of defects at other HCI developments. We disagree.

Numerous times throughout the trial, Appellants objected to or moved to exclude evidence of construction defects at other HCI developments. The trial court admitted the evidence.

Rule 404(b) of the South Carolina Rules of Evidence governs this issue: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. In Whaley v. CSX Transportation, Inc., 362 S.C. 456,

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previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence . . . ." Rule 407, SCRE.

483, 609 S.E.2d 286, 300 (2005), our supreme court recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute. See Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010) (discussing Whaley). Evidence of similar acts has the potential to be exceedingly prejudicial. Branham, 390 S.C. at 230, 701 S.E.2d at 19. Accordingly, a plaintiff must present facts showing the other acts were substantially similar to the event at issue. Whaley, 362 S.C. at 483, 609 S.E.2d at 300. Other acts may be admissible for purposes of establishing the facts necessary to prove entitlement to punitive damages. Judy v. Judy, 384 S.C. 634, 642-43, 682 S.E.2d 836, 840-41 (Ct. App. 2009), aff'd on other grounds, 393 S.C. 160, 712 S.E.2d 408 (2011) (affirming when the trial court admitted evidence of a similar prior lawsuit). The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. Whaley, 362 S.C. at 483, 609 S.E.2d at 300 (applying the abuse of discretion standard of review to the admissibility of evidence of similar accidents).

Jennifer Harmon, an employee of Noble Company, testified at trial. Noble Company specialized in property management of homeowners' associations and was hired in 1999 to manage the POA. At the time, Roger Van Wie, Gwyn Hardister, and Lynn Anderson were on the Board of Directors. Harmon testified the Board requested a building condition assessment report, which was prepared in October 1999. The report noted numerous construction defects at Riverwalk, including moisture intrusion around the windows, doors, and breezeway ceilings; gaps in the brick facade; and water damage on porches.

Harmon testified Noble Company managed four other HCI developments, and they had experienced similar construction defect problems. Harmon admitted HCI had been given copies of building assessment reports on the other developments, similar to the one prepared for Riverwalk, indicating comparable problems.

Thomas Pegram, an architect, was hired to develop plans for Riverwalk. Pegram testified he used the same basic plans at Riverwalk that were used at the other HCI developments. Graham, the window manufacturer, testified he was investigating problems with windows at

several HCI developments. Hardister, HCI's president, testified other HCI developments had problems with leaks at or near the windows, and were also involved in construction litigation. Anderson, HCI's vice president of finance and accounting and president of BuildStar, testified to involvement in litigation involving three of the other HCI developments. Franklin Drew Brown, qualified as Respondents' expert in contracting and building forensics, testified to numerous defects at Riverwalk. Brown testified he had been hired to investigate three other HCI developments and found similar deficiencies. Steve Watkins, qualified as Appellants' unlimited general contractor expert, testified he had been involved in "four or five" HCI development cases. Jesse Teel, Appellants' loss of use expert, testified he had performed a loss of use analysis on another HCI development. Alan Campbell, Appellants' engineering and construction defect expert, testified to the scope of work necessary to repair Riverwalk. Campbell testified he had prepared reports on the scope of work at other HCI developments.

After a review of the record, we find the construction defects at the other HCI developments were substantially similar to those experienced by Riverwalk. Many of the experts were involved in all of the HCI developments that were experiencing the same water intrusion problems and subsequent litigation. The HCI employees were likewise involved in the litigation of several of the developments. Brown testified the deficiencies at the various developments were the same, including the use of identical inappropriate trim. Graham testified he became involved when the issue with the windows was first reported in 1997 or 1998, prior to the completion of Riverwalk, and the same windows and installation occurred at Riverwalk. We find significant similarities between the construction defects alleged in this case and the defects testified about at the other developments.

We also find the evidence was admissible to prove several of the elements required for a punitive damages award, as argued by Respondents at trial. See Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (listing the factors to consider in conducting a review of punitive damages as (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) existence of similar past conduct; (5) likelihood of deterring the defendant or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors

deemed appropriate). The evidence was relevant to the elements of the duration of the conduct, Appellants' awareness, and similar past conduct. For instance, Graham's testimony of the discovery regarding moisture intrusion around the windows indicated knowledge as early as 1997 or 1998, and also indicated the duration of the conduct. Harmon testified HCI had received building assessment reports on other developments, indicating the duration of the conduct and similar past conduct. Viewing the testimony as a whole, we find no error by the trial court in admitting evidence of defects at the other developments.

VII. Directed Verdict on Respondents' Negligence Claims

Appellants argue the trial court erred in granting Respondents' motions for directed verdicts as to the negligence claims. We disagree.

During opening arguments, counsel for Appellants stated:

> Ladies and gentlemen of the jury, the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny . . . is that the costs out at Riverwalk are going to cost over 8.6 million dollars . . . . We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk.
>
> You will hear us say repeatedly during this case we're not running from these issues, we acknowledge there are issues out there at Riverwalk. We acknowledge there are certain repairs that need to be made but they do not fall anywhere near the class of repairs that these plaintiffs are going to ask for in this case. . . .
>
> . . . .

> [W]e ask you to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert . . . the true cost of the repairs in this case, which will be around 2.3, 2.391 million dollars.

The trial court granted Appellants' motions for directed verdicts on the negligence claims, finding:

> [I]t [is] clear that [the] condominiums were negligently constructed, and that is based on the testimony as well as the representation of counsel. It would not be proper to allow counsel to represent to the jury that [Appellants are] responsible and intend[] to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction. . . .

Appellants argue they did not concede liability on the negligence claim, but merely acknowledged the existence of the defects. In response to Respondents' motion for directed verdicts on negligence, counsel for Appellants argued:

> As to the negligence issue, Your Honor, I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues out there at Riverwalk and laying out the damages in an opening statement how the case will progress . . . . [O]ur defect experts and our estimator have identified that there [are] $2,391,619 in deficiencies out there and that what I said to the jury was what are the real issues and what is it going to really cost to fix it, and I gave them that number.

> Now, to say that means you automatically have bought into that, I don't believe it is fair under the pleadings . . . . [W]e pled both affirmatively that there are third parties . . . responsibl[e] . . . .

We find no error by the trial court in granting a directed verdict on negligence based on Appellants' concession at trial. We find the concession of counsel in this case similar to that in Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). In Collins, the plaintiff was injured in a car accident, and while being transported to the hospital in an ambulance, was further injured when a truck collided with the ambulance. Id. at 292, 504 S.E.2d at 348. This court found the defendant's concessions during opening statements were concessions of liability and proximate cause. Id. at 303, 504 S.E.2d at 354-55 (concluding defendant's statements that the plaintiff's injuries were primarily caused by the first accident and the plaintiff would fail to prove the damages were primarily caused in the second accident, was a concession supporting a directed verdict of liability and proximate cause); see Hall v. Benefit Ass'n of Ry. Emps., 164 S.C. 80, 83, 161 S.E. 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial.").

Based on the evidence, we also affirm the trial court's grant of directed verdicts on the negligence claims. Appellants argue the case was about numerous distinctive defects, and even if Appellants' witnesses acknowledged the existence of defects, they did not acknowledge all defects alleged by Respondents. Viewing the trial in its entirety, the issue in this case was the extent of damages. The primary witnesses testified to conflicting estimates of the extent of the damages. The experts of both Appellants and Respondents testified to detailed defects in the construction of Riverwalk. The reports differed primarily in the scope of work necessary to repair the defects and the cost of the repairs.

Franklin Brown, Respondents' expert, testified to the construction defects at Riverwalk. Brown found numerous defects: (1) inadequate site drainage; (2) nonexistent or improperly installed sealant; (3) gaps in the cladding system, siding, and trim; (4) inadequate brick lintel support at the

windows; (5) improperly installed brick veneer; (6) missing flashing above windows; (7) deck membrane improperly terminated or compromised by the use of posts or screws on the balconies and decks; (8) no control joints installed in balcony ceilings; (9) inadequate attic access to one unit; (10) water damage to exterior trim; (11) water damage to interiors; and (12) water damage to wall sheathings. Brown testified that in his expert opinion, the industry standard of care in constructing Riverwalk was breached. Brown provided a report indicating the scope of work necessary to repair Riverwalk. Respondents' expert, Albert Best, estimated it would cost $8,662,147 to make the repairs described in Brown's scope of work report. He estimated the job would take three years to complete.

Alan Campbell, Appellants' expert, acknowledged many construction defects, code violations, and violations of industry standards. He provided his own scope of work report for the defects he determined needed to be corrected. Appellants' expert, Steve Watkins, testified it would cost $2,391,619 to repair the construction defects in Campbell's report.

Harmon, an employee of Riverwalk's property manager, also testified to the defects. Harmon testified about the building condition assessment report and Appellants' knowledge of the defects. Harmon also admitted HCI knowingly turned the homeowners' associations over to the homeowners with knowledge of the construction deficiencies and without the funds to make the necessary repairs. Harmon testified Hardister addressed the homeowners at a March 15, 2000 association meeting, admitted HCI was aware of construction problems, and assured the homeowners HCI intended to correct the problems.

Hardister also acknowledged the construction problems. He admitted he was aware of the construction deficiencies, HCI was still selling the condominiums with this knowledge, and the problems were not corrected at the time of the insolvency and closing of the corporations. Hardister admitted the POA was entitled to have repairs made.

In ruling on motions for directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions and deny the motions if the

evidence yields more than one inference or its inference is in doubt. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006).

As this court did in Collins, we find the trial court's grant of a directed verdict affirmable based either on the concessions made at trial or based on the evidence. 332 S.C. at 303, 504 S.E.2d at 354. As the trial court in this case determined, we find the issue for the jury regarding the extent of the defects was a question of damages rather than liability or proximate cause.

Appellants also argue the trial court erred in granting a directed verdict on the negligence claims because BuildStar, as the general contractor, was not responsible for the work performed by the subcontractors. Although a general contractor is not automatically responsible for the negligence of a subcontractor, a builder who undertakes to supervise the construction of a building is under the duty to exercise reasonable care. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008) (rejecting the argument that a general contractor is automatically responsible for the negligence of a subcontractor, but approving jury instructions that included the law imposing a duty to use due care on a general contractor who supervises a subcontractor). Here, Pegram testified that a part of an architect's job is construction administration. After plans are completed, an architect performing construction administration reviews the shop drawings of the contractors and subcontractors, checks the material to be used, and visits the job site on a daily or weekly basis to insure the construction follows the plans. Pegram testified Van Wie would not permit his firm to conduct the contract administration at Riverwalk. Pegram was not prohibited from contract administration on any previous or subsequent jobs. Pegram warned Van Wie of the serious nature of the lack of contract administration and insisted on including a notice on the plans that Pegram's company was not permitted to inspect construction, and therefore, it was to be held harmless for construction defects. Finally, Lynn Anderson testified

BuildStar was supervising the subcontractors at Riverwalk. We find no error in the trial court's grant of a directed verdict on Respondents' negligence claims.

VIII. Denial of Directed Verdict and JNOV

Appellants argue the trial court erred in denying their motions for directed verdict and JNOV. Appellants maintain damages were speculative. Appellants also argue they were entitled to directed verdicts because no individualized determinations were made as to the standards of care applicable respectively to HCI, HRI, and BuildStar, and clear and convincing proof of entitlement to punitive damages from each Appellant was not established. We affirm the trial court's denial of Appellants' motions for directed verdict and JNOV.

Respondents' expert, Albert Best, acknowledged there were hidden damages in water intrusion construction defect projects. Best testified he determined the amount of hidden damage by comparing it to other buildings his company had repaired with similar construction. He testified that hidden damage in condominium projects ranged from ten to thirty percent of the contract, and he included ten percent in his estimate to repair Riverwalk. Appellants' expert, Steve Watkins, also acknowledged his estimate of damages included numerous allowances and contingencies for hidden damage.

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation. Id. However, proof with mathematical certainty of the amount of loss or damage is not required. Id. The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is afforded, permitting a reasonably close estimate of the loss. Piggy Park Enters., Inc. v. Schofield, 251 S.C. 385, 391-92, 162 S.E.2d 705, 708 (1968).

We find a sufficiently reasonable basis of computation of damages in the record to support the trial court's submission of the issue of damages to the jury. See May v. Hopkinson, 289 S.C. 549, 559, 347 S.E.2d 508, 514 (Ct. App. 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems).

Appellants also argue Respondents failed to establish that each Appellant violated its respective standard of care, and that the jury's award of punitive damages was not based on individualized determinations that clear and convincing evidence supported such damages against each Appellant. Because we found the trial court did not err in finding Appellants amalgamated in interests, we decline to address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

IX. Punitive Damages

Appellants finally argue the punitive damages awards in both actions were improper because (1) the jury was permitted to award punitive damages to non-parties (other HCI developments) and (2) the punitive damages awards were inconsistent with the guidelines established in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). We find no error.

a. Non-parties

Appellants argue the trial court's erroneous admission of evidence of defects at other Heritage developments resulted in the jury's imposition of punitive damages to non-parties. Because we found the trial court did not err in admitting evidence of defects at other HCI developments, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

b. Gamble v. Stevenson

Appellants argue that several of the factors used to review a punitive damages award weigh in their favor. In particular, Appellants argue the award of punitive damages has no deterrent effect because Appellants went out of business prior to the commencement of this litigation, and Appellants have no ability to pay punitive damages.

In Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991), the supreme court listed the factors the trial court should consider in reviewing a punitive damages award: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood that the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) other factors deemed appropriate. Specific factual findings as to each factor are not required. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996) (finding although evidence of ability to pay is a factor in reviewing a punitive damages award, it is not a prerequisite).[9]

[9] Appellants do not argue the amount of the punitive damages award violates constitutional guidelines. See Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 582-83, 686 S.E.2d 176, 182 (2009) (changing the standard of review of the constitutionality of a punitive damages award to de novo and mandating a review of the constitutionality of a punitive damages award).

The trial court conducted a post-trial review of the punitive damages award using the factors outlined in Gamble and properly set forth its findings on the record. As to Appellants' degree of culpability, the trial court found relevant Appellants' experts' admission of code and industry standard violations. The trial court also noted the relevancy of Appellants' admissions of selling defective condominiums. As to the factors of the duration of the conduct and Appellants' awareness, the trial court noted the sales of defective condominiums continued for several years, and Appellants admitted they were aware of the construction deficiencies. The trial court noted the admission of similar conduct in other developments in reviewing the factor of similar past conduct. The court also found the award reasonably related to the costs and losses the POA and the Class will incur as a result of the defective condominiums. Finally, the court noted that although Appellants were no longer in business, the award would deter others from similar conduct, and the Appellants' inability to pay was not a requirement before the jury was justified in awarding punitive damages. We find no error by the trial court in the findings made under Gamble.

CONCLUSION

Based on the foregoing, the jury's verdicts are

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Team IA, Inc.,	Appellant,
v.	
Cicero Lucas, George Lawson, IV, and 5 Point Solutions, LLC,	Defendants,
Of whom Cicero Lucas is	Respondent,
Cicero Lucas and George Lawson, IV,	Third-Party Plaintiffs,
v.	
Brent Yarborough and Team IA, Inc.,	Third-Party Defendants.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4889
Submitted June 1, 2011 – Filed September 14, 2011

REVERSED AND REMANDED

Joel W. Collins, Jr., Robert F. Goings, and Christian Bosel, all of Columbia; and S. Clay Keim, Jeffrey A.

Lehrer, and Lucas J. Asper, all of Spartanburg, for Appellant.

Terry Richardson, Jr., Daniel S. Haltiwanger, and Christopher J. Moore, all of Barnwell, for Respondent.

GEATHERS, J.: This is an appeal from a circuit court order granting partial summary judgment to Respondent Cicero Lucas on the grounds that the non-competition and non-solicitation clauses in an employment agreement he signed were overly broad and unenforceable. Appellant Team IA, Inc. (Team IA) argues the circuit court erred in granting partial summary judgment to Lucas, when (1) material facts were in dispute as set forth in the Supplemental Affidavit of Brent Yarborough; (2) the circuit court applied Georgia law despite the presence of a choice of law provision in the agreement signed by the parties requiring the application of South Carolina law; (3) the circuit court arguably would have reached a different result had it applied South Carolina law to evaluate whether the non-solicitation clause was an unreasonable restraint on trade; (4) no evidence was presented that the non-competition provision would improperly curtail Lucas's efforts to earn a livelihood; and (5) the circuit court could have limited the nationwide geographic restriction in the non-competition clause to the less expansive restricted territory alternatively defined in the employment agreement as South Carolina, North Carolina, Georgia, and Alabama. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Team IA conducts business in the microfilm, data entry, software, hardware, consulting, and related services industries. Team IA markets its business on a nationwide basis through electronic and print media, including the internet, attendance at trade shows, submission of bids, direct sales, and other means. In April of 2001, Team IA hired Lucas as a sales representative for the company. The parties signed an employment agreement, which contained the following clauses:

A) Non-Solicitation Agreement

1) Employee agrees and acknowledges by signing below, that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly [n]or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services.

2) For the purposes of this Agreement, the term "CUSTOMER" shall mean any person, firm, or business entity who currently has a system or product which was designed or installed by or is being serviced by Employer; or who has purchased goods or services or who has contracted to purchase goods or services from Employer during the twelve (12) months prior to Employee's separation from employment; or who is an Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months.[1]

. . . .

B) Covenant Not to Compete

1) In order to prevent the improper disclosure or use of confidential and proprietary information and other trade secrets, and to protect the Employer from unfair competition, Employee agrees that, absent the prior express written consent of the

[1] We note that the non-solicitation clause in this agreement appears to prohibit contact with both former customers and former prospective customers of Team IA.

> Employer, while employed by Employer and for twelve (12) months immediately following the resignation or termination of his employment with the Employer, regardless of who initiates separation from employment, Employee shall not, directly or indirectly, by himself, or through or on behalf of any other person, firm, partnership, company, corporation, representative or agent, within the geographical territory (hereinafter, the "RESTRICTED TERRITORY") set forth below, solicit, attempt to solicit, sell, or attempt to sell, provide, or attempt to provide COMPETING SERVICES as defined below.
>
> Recognizing that Team IA competes on a nationwide basis, the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

(emphasis added) (footnote added).

The employment agreement also contained the following choice of law provision:

> This Agreement shall be governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina. Any dispute concerning or arising under this Agreement must be submitted to a court of competent jurisdiction, either state or federal, within the State of South Carolina,

> and the Parties hereby voluntarily submit to the jurisdiction of such court.

(emphasis added).

Lucas resigned from Team IA in February of 2009. Subsequent to his resignation, Lucas contacted all but one of the customers with whom he had worked while employed at Team IA. Phone records supplied by Lucas and attached as an exhibit to Team IA's memorandum in opposition to summary judgment indicate Lucas contacted at least eight Team IA customers with whom he worked extensively while he was employed. In a second supplemental response to Team IA's interrogatories, Lucas admitted he contacted "all of his personal customers" by telephone to inform them of his departure, and he listed eleven Team IA customers by name.

Within one week of his resignation, Lucas established and became part owner and operator of 5 Point Solutions, LLC, a company that performed services similar to those provided by Team IA. The Fulton County, Georgia, Clerk of Superior Court had previously reached an agreement with Team IA for a large microfilm creation project. The day after Lucas formed 5 Point Solutions, Fulton County pulled the project from Team IA and designated Lucas's new company as its microfilm vendor. The Fayette County, Georgia, Clerk of Superior Court also pulled a scanning project from Team IA and awarded the same project to 5 Point Solutions. Lucas had been actively involved in securing business from both of these customers while he worked for Team IA.

Team IA filed a lawsuit for breach of contract, breach of duty of loyalty, tortious interference with contractual relations, and nine other causes of action, alleging inter alia that Lucas breached the terms of his employment agreement. Lucas filed a motion for partial summary judgment on the breach of contract action with respect to the non-solicitation and non-competition provisions contained therein, and the circuit court held a hearing on the motion.

Two weeks after the hearing on the summary judgment motion, Team IA filed the Supplemental Affidavit of Brent Yarborough. In that document,

Yarborough listed numerous "customers/prospective customers" with whom Lucas had worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA. On October 5, 2009, Lucas filed a Motion to Strike the Supplemental Affidavit as untimely. On October 19, 2009, Team IA filed a Memorandum in Opposition to Lucas's Motion to Strike. The circuit court neglected to expressly rule on the motion to strike, and the November 19, 2009 order granting summary judgment did not mention the supplemental affidavit.

The circuit court granted partial summary judgment to Lucas on the grounds that (1) the restricted territory set forth in the non-competition clause was overly broad as Team IA did not have clients in three of the four states listed, and (2) the non-solicit provision was unenforceable as it prohibited Lucas from accepting business from unsolicited customers of Team IA. The circuit court applied Georgia law to evaluate the validity of the non-solicitation provision and South Carolina law to evaluate the validity of the non-competition clause. Team IA filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. In its motion, Team IA argued the circuit court erred in failing to consider the facts and evidence set forth in Yarborough's affidavit and supplemental affidavit.

The circuit court denied Team IA's motion to alter or amend, noting, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively." The order did not specifically mention Yarborough's supplemental affidavit. This appeal followed.

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "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(e), SCRCP, further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In ascertaining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Application of the Summary Judgment Standard

Team IA argues the trial court erred in accepting as true the facts set forth in Lucas's affidavit while disregarding the facts set forth in Yarborough's initial affidavit and supplemental affidavit. We agree.

A covenant not to compete will be upheld only if it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983).

"Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer." Id. at 675, 301 S.E.2d at 143. "A

restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App. 1995). Nonetheless, "agreements not to compete, while looked upon with disfavor, critically examined, and construed against any employer, will be upheld as enforceable if such agreement is reasonable as to territorial extent of the restraint and the period for which the said restraint is to be imposed." Almers v. S.C. Nat'l Bank of Charleston, 265 S.C. 48, 51, 217 S.E.2d 135, 136 (1975).

"A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." Dudley, 278 S.C. at 676, 301 S.E.2d at 143. South Carolina has enforced a non-solicitation agreement precluding a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative. Standard Register Co. v. Kerrigan, 238 S.C. 54, 59, 74, 119 S.E.2d 533, 535, 544 (1961) (emphasis added).

Recently, our supreme court held that "the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). The supreme court further noted "it would violate public policy to allow a court to insert a geographical limitation where none existed." Id. at 587-88, 694 S.E.2d at 17 (emphasis added).

In reaching its conclusion, the Poynter court analyzed this court's Faces Boutique opinion. Id. at 588, 694 S.E.2d at 18 (citing Faces Boutique, 318 S.C. at 43-44, 455 S.E.2d at 709). In Faces Boutique, this court concluded an employer's willingness to stipulate at trial to an interpretation of a non-competition provision that would render it proper in scope does not rectify the invalidity of the covenant as initially written. 318 S.C. at 43-44, 455 S.E.2d at 709. Therefore, we interpret the supreme court's holding in Poynter to mean that (1) a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable, and (2) the parties may not of their own accord convert an overly broad territorial restriction into an

enforceable one by entering into a subsequent agreement that artificially limits the actual terms used in the parties' original contract.

Here, we believe the nationwide territorial restriction contained in the non-competition provision at issue was overly broad on its face. However, we conclude the alternative territorial restriction contained in the parties' original agreement (South Carolina, North Carolina, Georgia, and Alabama) would remain valid and enforceable to the extent it is not overly broad after further development of the facts.

Yarborough's initial affidavit stated:

> Team IA both allowed and expected Mr. Lucas to solicit new business for Team IA on a nationwide scale. A review of a sample of Mr. Lucas's sales activities – based on expense reports he submitted to Team IA for reimbursement – demonstrates Mr. Lucas's nationwide sales activities on behalf of Team IA. (See Attachment 4 Attached Hereto.) This summary also shows examples of Mr. Lucas's attendance at and participation in tradeshows, on behalf of Team IA, which took place across the country and included attendees representing a nationwide prospective customer base.

The expense report attached to Yarborough's initial affidavit reflects Lucas conducted sales activity in South Carolina, North Carolina, Georgia, Alabama, Kansas, California, Illinois, Pennsylvania, and Florida. However, Lucas's own affidavit conflicts with Team IA's assessment. Lucas's affidavit averred, "I performed no work for customers in Alabama, South Carolina, or North Carolina." We hold further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Specifically, whether the "sales activity" Lucas conducted as documented in the expense report included contact with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama is unclear. See Standard

Register Co., 238 S.C. at 59, 119 S.E.2d at 535 (enforcing a non-solicitation agreement that precluded a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative) (emphasis added).

In his supplemental affidavit, Yarborough listed numerous "customers/prospective customers" with whom Lucas worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA.[2] However, the circuit court did not expressly rule on whether this supplemental affidavit was timely. The Record on Appeal is unclear as to whether the circuit court considered Yarborough's supplemental affidavit when ruling on Team IA's motion to reconsider; the order did not specifically mention the supplemental affidavit, nor any of the facts set forth within it. Nonetheless, the order denying Team IA's motion to reconsider noted, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively."

Under the circumstances, regardless of whether or not the circuit court considered the facts set forth in Yarborough's supplemental affidavit, we hold summary judgment was premature. See Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992) ("Accordingly, summary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful."). Our decision is based on a genuine issue of material fact potentially in dispute as to whether or not Lucas interacted with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama during the term of his employment. See Dudley, 278 S.C. at 676, 301 S.E.2d at 143 ("A geographic restriction is generally reasonable if [it] is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.").

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[2] We decline to rule on whether a non-solicitation agreement's prohibition on contact with former prospective customers of a former employer is overly broad and unenforceable on its face as that particular issue is not yet ripe for our review. Specifically, the Record on Appeal is unclear as to whether Lucas contacted former customers or former potential customers of Team IA.

Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. See Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) ("Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law."). We also direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough prior to entering an order on the Motion for Partial Summary Judgment.

II. Choice of Law

Team IA contends the circuit court erred in applying Georgia law to determine the validity of the non-solicitation clause at issue despite the presence of a choice of law provision in the employment agreement requiring the application of South Carolina law. We agree.

Choice of law clauses are generally honored in South Carolina. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 336 (2003) ("We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored."); see also Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.").

In Livingston v. Atlantic Coast Line Railroad, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935), our supreme court discussed traditional choice of law rules in the absence of a choice of law provision: "It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs." (emphasis added). "If the contract be silent thereabout, the presumption is that the law governing the enforcement is the law of the place where the contract is made." Id. (emphasis added). Therefore, traditional choice of law

rules apply only in the absence of an express provision regarding the applicable law to govern the contract.

In the present matter, the circuit court applied traditional choice of law rules despite the presence of a choice of law provision designating South Carolina law. Specifically, the circuit court relied upon Witt v. American Trucking Ass'ns, 860 F. Supp. 295, 300-01 (D.S.C. 1994) (applying South Carolina common law choice of law rules when determining what law should govern a contract that did not contain a choice of law provision), Livingston, 176 S.C. at 391, 180 S.E. at 345, and Lister v. NationsBank of Delaware, 329 S.C. 133, 144-45, 494 S.E.2d 449, 455-56 (Ct. App. 1997) (applying South Carolina law to a breach of contract accompanied by fraudulent act action when the contract did not contain a choice of law provision, when the contract was performed in South Carolina, and when the breach occurred in South Carolina). These cases regarding choice of law in the absence of a choice of law provision are not applicable to this contract because it contained a choice of law provision.

The only recognized exception to adhering to the parties' choice of law provision does not apply here because the contract designated South Carolina law, and it is being interpreted here in South Carolina. See Nucor Corp., 482 F. Supp. 2d at 728 ("However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy."). The application of South Carolina law does not violate South Carolina public policy. Finally, neither party disputes the validity of the choice of law provision. Therefore, notwithstanding whether or not some or all of this contract was performed in Georgia, the circuit court should have applied South Carolina law.

We need not reach the merits of the final two issues on appeal given our reversal on the previously stated grounds. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive).

CONCLUSION

We conclude further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. We direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough. Finally, we instruct the circuit court to apply South Carolina law in evaluating the non-solicitation provision contained in this employment agreement. Accordingly, the decision of the circuit court is

REVERSED AND REMANDED.[3]

SHORT and KONDUROS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Claude Potter, Employee, Appellant,

v.

Spartanburg School District 7, Employer, and S.C. School Board Self-Insurance Trust Fund, Carrier, Respondents.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4890
Submitted June 1, 2011 – Filed September 14, 2011

AFFIRMED

Andrew N. Poliakoff, of Spartanburg, for Appellant.

Michael Allen Farry, of Greenville, for Respondents.

KONDUROS, J.,: This is an appeal of a workers' compensation case arising from Claude Potter's compensable injuries, which originated from a slip and fall during his employment with Spartanburg School District 7 (School District). The Appellate Panel found that although Potter did suffer a psychological overlay from his injury, he did not sustain any permanent partial disability as a result of the psychological overlay, and the circuit court affirmed. Potter raises several issues on appeal, claiming the circuit court erred in affirming the following findings: (1) Potter did not suffer any "physical brain damage" causally related to the accident; (2) the only body part with resulting impairment from the accident is the right leg; (3) Potter has not suffered a psychological/mental injury; and (4) Potter has not suffered permanent and total disability. We affirm.

FACTS

On December 19, 2003, Potter was performing maintenance on a heating ventilation and air conditioning (HVAC) system located on the roof of a building for the School District. While securing a ladder, Potter fell approximately twelve to fourteen feet landing on asphalt and losing consciousness for a few minutes. He fractured his right femur with "minimal displacement" and sustained a small cut above his eye. Potter's right leg was surgically repaired and a few stitches were used to treat the cut above his eye. The computerized tomography (CT) scan of his head on the day of the fall showed a "small amount of supratentorial blood." A second CT scan, taken a few days later, revealed no new problems and the previous swelling and pressure had subsided. The School District began paying Potter weekly temporary total disability benefits and provided medical care.

On November 23, 2004, Potter underwent a neurological consultation. The neurologist, Dr. Thomas A. Collings, found Potter's reported problems with disequilibrium were probably not related to his fall, and the vertigo and mild head injury had resolved itself. His treating physician, Dr. Mark D. Visk, evaluated Potter on December 16, 2004, and assigned him a twenty percent permanent impairment to the right leg and discharged him from active care. Potter had an independent medical evaluation in May 2005. The evaluator provided no assessment of Potter's mental status, but found he had a twenty-four percent whole person impairment related to his shoulder, leg,

and lower back. In June 2005, Potter received a neuropsychological evaluation from Dr. Randolph Waid, a licensed clinical psychologist. Dr. Waid noted Potter's injuries included "cognitive disorder residuals of traumatic brain injury with interfering effects of pain, sleep disturbance, and fatigue." He recommended Potter receive psychiatric evaluation and treatment to manage Potter's "sleep disturbance, mood labiality, as well as depression," along with a course of psychological counseling to develop "affective compensatory strategies and antidepressants." Potter's attorney referred him to Dr. Collings for another evaluation in September 2005. After an examination and a review of previous medical reports, Dr. Collings opined: "I do not feel that Mr. Potter has any significant ongoing neurologic difficulty from the fall on 12/ 18/ 03."

On January 6, 2006, Potter filed a Form 50 alleging he sustained compensable injuries to his "brain, shoulder, back, hip, leg, and head" when he fell from the ladder. By consent order, the parties agreed for Potter to be referred to Dr. David Tollison for psychological evaluation and treatment, which began on June 20, 2006, and continued until March 14, 2007. During the course of treatment, the School District filed a Form 21 requesting a hearing to determine the amount of compensation to be paid to Potter. Potter was released by Dr. Tollison in March 2007 at psychological maximum medical improvement and told to return if needed. On August 30, 2007, the School District denied Potter sustained any compensable permanent brain damage or that Potter was permanently and totally disabled.

The single commissioner held an evidentiary hearing on December 4, 2007, and filed an order on January 8, 2008, holding: (1) Potter sustained a compensable injury by accident to his right leg; (2) Potter reached maximum medical improvement with a thirty percent partial disability to the right leg; (3) Potter was not disabled from his job because of his injuries; and (4) he did not suffer any physical brain damage causally related to the admitted accident. Citing McLeod v. Piggly Wiggly Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984), the order noted that Dr. Waid is a clinical psychologist, not a neurosurgeon or a medical doctor, and his opinion "concerning alleged brain damage is beyond [h]is area of expertise." Additionally, the order stated "greater weight is given to the opinion of the treating physician" with respect to Potter's "injuries and body parts involved."

Potter appealed, and a majority of the Appellate Panel affirmed the findings and conclusions of the single commissioner with some additional findings. The Appellate Panel further found that although Potter did suffer a psychological overlay from his injury, he did not sustain any permanent partial disability as a result of the psychological overlay. In his dissent, Commissioner J. Alan Bass disagreed with the findings that Dr. Waid was unqualified to render an opinion concerning brain damage and that Potter did not suffer any brain damage causally-related to the admitted accident. Potter appealed to the circuit court. The circuit court found substantial evidence in the record supported the specific findings of fact made by the Appellate Panel and the decision was not affected by an error of law; therefore, the circuit court affirmed the findings and conclusions of the Appellate Panel. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not "substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions." Brought v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. Shealy v. Aiken Cnty, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. Id.

LAW/ANALYSIS

I. Physical Brain Damages Causally Related to the Accident

Potter argues the circuit court erred in affirming the Appellate Panel's finding that he did not suffer any physical brain damage causally related to the accident, based on the Appellate Panel's misinterpretation of McLeod v. Piggly Wiggly Co., and ignoring Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). Potter suggests Tiller stands for the proposition that medical evidence is not required in workers' compensation claims, even in medically complex cases, thus he is entitled to a determination of physical brain damage based on the medical testimony presented to the Appellate Panel. We disagree.

The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 685 (1946); Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented. Id. Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) (citing Tiller, 334 S.C. at 340, 513 S.E.2d at 846). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

The Appellate Panel, as the ultimate fact finder, was within its discretion to rely on McLeod in determining the weight Dr. Waid's opinion should be afforded. McLeod provides the Appellate Panel with the ability to ascertain the proficiency of an expert and to decide whether a "higher degree of expertise" is needed regarding an award. 280 S.C. at 471, 313 S.E.2d at 41 (holding the award should be remanded for redetermination when an alleged defect and injury sustained by the claimant concerned a complicated area of the body requiring a higher degree of expertise than provided to the Appellate Panel). In this case, Dr. Waid's opinion, as a clinical psychologist, was

reviewed and given a lesser weight due to the Appellate Panel's evaluation of Waid's opinion concerning alleged brain damage based on his expertise presented to the Appellate Panel.

The Appellate Panel's reliance on McLeod does not disregard Tiller. Tiller allows Dr. Waid's opinion to be taken into consideration by the Appellate Panel as it weighs and considers all the evidence, both lay and expert, when determining whether causation has been established. While medical testimony is entitled to great respect, the Appellate Panel may disregard it if the record contains other competent evidence. Id. Nor is the Appellate Panel bound by the opinion of medical experts. Sanders v. MeadWestvaco Corp., 371 S.C. 284, 292, 638 S.E.2d 66, 71 (Ct. App. 2006). In this case, the Appellate Panel was presented with medical evidence from Potter's emergency room physician, Potter's primary physician, a neurologist, and a psychologist. The Appellate Panel committed no error of law by relying on McLeod in its assessment of Dr. Waid's credibility and the weight to afford his opinion, as it made its factual findings regarding physical brain damage. Furthermore, "'it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another.' That function belongs to the Appellate Panel alone." Id. (quoting Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)). We therefore affirm.

II. Remaining Issues

The remaining issues have been abandoned by Potter because he fails to cite any statute, rule, or legal authority for the three issues in his brief. An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. See In the Matter of the Care & Treatment of McCracken, 346 S.C. 87, 92-3, 551 S.E.2d 235, 238-39 (2001) (finding issues were abandoned because there was no specific legal ground upon which the court could rely); see also Pack v. S.C. Dep't of Transp., 381 S.C. 526, 532, 673 S.E.2d 461, 464 (Ct. App. 2009) (holding appellant abandoned issue when she cited no legal authority to support her argument). While Potter's brief suggests other facts that could have been considered by the Appellate Panel, he gives this court no substantive legal authority upon which to rely. Accordingly, these issues are abandoned.

CONCLUSION

The decision of the circuit court affirming the Appellate Panel's findings of fact and conclusions of law is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.