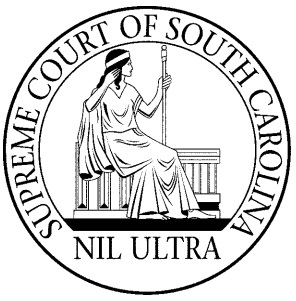

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
August 28, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Billy Wayne Cope, Petitioner.

Appellate Case No. 2009-143966

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 27303
Heard November 13, 2012 – Filed August 28, 2013

AFFIRMED AS MODIFIED

James M. Morton and Michael B. Smith, both of Morton & Gettys, LLC, of Rock Hill; David I. Bruck, of Washington & Lee School of Law, of Lexington, VA; Steven A. Drizin, of Northwestern University School of Law, of Chicago, IL; and Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of

Columbia, Solicitor Kevin S. Brackett, of York, for Respondent.

JUSTICE HEARN: This case presents us with the brutal sexual assault and murder of twelve-year-old Child. Based on those events, Child's father, Billy Wayne Cope, was convicted of murder, two counts of first degree criminal sexual conduct (CSC), criminal conspiracy, and unlawful conduct towards a child.[1] The court of appeals affirmed Cope's convictions in *State v. Cope*, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009). We granted certiorari to review the court of appeals' opinion and now affirm.

FACTUAL/PROCEDURAL BACKGROUND

The facts surrounding the sexual assault and murder of Child are graphic and profoundly disturbing. Shortly after 6:00 a.m. on the morning of November 29, 2001, Cope called 911 and reported finding Child dead in her bed, apparently from being choked by a piece of her blanket which was wrapped around her neck. When asked if she was breathing or if he had attempted CPR, Cope twice replied that she was "cold as a cucumber."

The response team arrived and Cope informed them his daughter was dead. When the medical technician asked how long she had been that way, he responded "four hours."[2] Cope also informed him that Child had a history of rolling in her sleep and she choked herself on her blanket.

Police examined the windows and doors and found no signs of forced entry. The house itself was in "extreme disarray," with clothes and boxes everywhere and roaches and cat feces throughout the house. Additionally, several responders noted

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[1] Cope's co-defendant, James Sanders, was also convicted of murder, first degree criminal sexual conduct, and criminal conspiracy and was sentenced to life imprisonment plus thirty years. His convictions were affirmed on appeal. *State v. Sanders*, 388 S.C. 292, 696 S.E.2d 592 (Ct. App. 2009). He is not a party to this appeal.

[2] Cope contends he said, and meant, "for hours," not "four hours."

that Cope acted strangely and was on his computer when they arrived while his two other daughters were huddled on the couch.

Cope was interviewed several times that day. In his first interview, Cope told police that Child's Youngest Sister went to bed around 9:30 p.m., but he allowed Child and her Middle Sister to stay up later so Child could help Middle Sister with math homework, and they went to bed around 12:30 a.m. Cope said he woke up around 6:00 a.m. and called Child's name several times, but she did not answer. He went to her room and found her lying on her back with a strip of her blanket wrapped around her neck. Youngest Sister and Middle Sister, who slept in a separate bedroom, came to the doorway, and he told them to go to the living room; then he called 911. Cope stated no one except the family had been in the home that day and he did not hear any noises that night because he sleeps with a CPAP machine for his sleep apnea as well as several fans. He agreed to accompany the police to the hospital so a rape kit could be performed and mentioned that his skin might be under Child's fingernails because she had scratched his back the night before.

When he was again interviewed around noon that day, he told police Child went to bed at 1:00 a.m. Cope also stated that when Child failed to answer him that morning, he initially thought "the rapture" had occurred and she had been taken to heaven. He said he had to kick Child's bedroom door open because it was jammed against her closet door. Cope again informed the police he thought her death was an accident because he did not hear any noise in the night.

Dr. James Maynard, the State's forensic pathologist who performed an autopsy on Child, placed her time of death between 2:00 a.m. and 4:00 a.m. He noted her clothing appeared as if it had been placed upon her by another person, with her bra unhooked and her pants not pulled up all the way. He noted she had injuries to her head consistent with being struck repeatedly, and she had been manually strangled. He further noted that the absence of ligature marks indicated she had not been strangled by the blanket. Although Dr. Maynard found Child on her back, he stated it appeared she was turned several times after her death. He noted she had injuries consistent with a 300-plus-pound man kneeling on top of her.[3]

[3] At the time of Child's death, Cope weighed approximately 385 pounds.

Dr. Maynard further found Child had been brutally sexually assaulted, both vaginally and anally. He observed the severity of the injuries indicated they could not have been inflicted by an erect penis, but must have been from a hard object, such as a dildo or broom handle. Additionally, he noted Child had a bite mark on one of her breasts. It also appeared she had been cleaned up after the assault.

Dr. Maynard observed that her hymen was absent, as were any remnants to indicate it had been torn during this incident. He stated she had vaginal irritation consistent with past penetration. He further noted evidence of past anal penetration.

The police brought Cope back in for another interview that evening following receipt of the autopsy results. Cope was apprised of some of the facts, including that Child had been sexually assaulted. This interview lasted over four hours and was recorded. This time, Cope stated he had gotten up at 3:00 a.m. to use the bathroom and did not check on Child because her door was closed, but checked on his other two daughters. Cope repeatedly denied any involvement in Child's death and requested that a polygraph test be performed. After the interview, he was arrested and charged with murder as well as three counts of unlawful neglect for the deplorable condition of his home. Police arranged for him to take a polygraph test the following morning.

He met with the polygraph examiner, Michael Baker, around 10:00 a.m. the next morning. During the exam, Baker asked: "did you choke [Child]"; "did you choke [Child] causing her to die"; and "were you in the room when [Child] died"? Cope answered each question in the negative. Baker scored the exam and determined Cope had not answered truthfully. According to Baker, Cope did not act surprised when he was informed he had failed the exam. Cope asked if he could have done it in his sleep, and Baker responded that he did not think that was possible. Cope then stated he "must have done it."

Cope then proceeded to confess to Baker. He stated he woke up around 3:00 a.m. and went to use the bathroom, after which "he still had an erection," so he walked into Child's room and began masturbating. Child woke up and said, "Gross, daddy." Cope, enraged by her comment, jumped on top of her and began swinging his fists, hitting her in the head with his hands and a video game that was in the bed with her. He then began choking her with both hands and the blanket. He stated that he used a broom to penetrate her both anally and vaginally.

Although he acknowledged there was a dildo in the house, he stated he had not used it on Child. Cope then said he deleted some temporary files off his computer, threw the dildo out the back door, and went to sleep. He could not remember what he did with the broom. Cope signed a written statement memorialized by Baker, indicating at the end that "these are the images that come into my mind." Cope shook hands with Baker after the interview, and Baker noted he seemed relieved to get the information off his chest.

Two days later, on December 2, Cope, who was in the county jail, requested to speak to the detectives again. He was transported to the sheriff's department the next morning and gave the following handwritten statement:

> I was asleep in my bed. I had a bad dream about an old girlfriend who had an abortion. The thought of her makes me cringe. In my dream she was telling me that I had an abortion with your child and I told her no. I became so enraged that I got out of bed. All I could hear was that laughing sound. I do not know what came over me, but I snapped and I jumped on the bed and straddled [Child]. I hit her in the head and started choking her. I did not know it was my own daughter until after I had shoved the broom stick in her privates. I fell back jarring me to my senses and I realized it was my daughter. I became so confused that I tried to rid the house of all the stuff that would make me look guilty. I grabbed the broom and I pulled it from her vagina. I pulled her panties and pants up. I did not know it was my own daughter until I fell backwards. The next morning at 6:03 when my alarm and phone rang out I was hoping it was a very bad dream.

Cope was asked if he would be willing to return to his home, walk the police through, and explain what happened. Police stated he was very willing to do so and he only had to be asked once. The visit to Cope's residence was videotaped. The video depicted the same version of the facts Cope had written in his second confession to the police and included not just Cope's description of the events, but also his reenactment. Cope also indicated in the video he had wrapped the blanket around her neck to make it seem like an accident. He was asked if his semen would be found anywhere on the scene, and he said it would not.

Later that afternoon, Cope was again interrogated and was presented with some of the facts police had discovered from Child's autopsy report, including the

presence of semen. Cope admitted to having masturbated into a cloth and informed the police where they could find it. The interrogation resulted in Cope signing the following statement, memorialized by one of the detectives:

> I woke up about three a.m. I went to the bathroom and I went into [Child's] room. I had a hard on. I jacked off in the floor and used a blue towel to clean it up. I started going into [Child's] room about the end of October through the first part of November playing with her and rubbing her and fingering her while she was asleep. [Child] was asleep on her stomach. I think the dildo inside her is what woke her up. When she woke up I jumped on top of her to keep her from turning and looking at me, then I heard her say, "Daddy, help me." I started strangling her with my hands. [Child] was pulling at my hands and I let go and started hitting her in the head and I went back to strangling her and she went limp. I got up, I saw the green string on the blanket and I was thinking to myself this would look like she strangled herself. I took the green strip and I wrapped it around her neck. I went straight with the wrap from off the floor and I wrapped it around her throat. I pulled both ends tight. I pulled both ends so it would be good and tight. Her hands were already at her neck so I left them. I jumped up off the bed and went and put the dildo up. I wiped it off first with the blue towel and then put it under the bed in the floor in the bedroom. Normally I put it between the mattress at the head of the bed but it had fallen so I put it at the head of the bed on the floor where it was. Then I fixed the doors of [Child's] bedroom so that they would lock. I pulled the closet and the door together, that's how I locked it. I did this so the kids would not wake up and see her before morning. I got back into my bed, I put my mask on, and went to sleep. And I woke up at 6:02 according to the clock in my bedroom. I sat up and called [Child] twice since now I knew that she was not going to answer. It was like a dream. I thought it was a dream. I did not hear from [Child] those two times I called her, sir or yes, sir. I thought, I thought the rapture had just taken place because I had just finished reading the *Left Behind* series about one month ago. I had hoped the rapture had taken place. I was praying it had. I got up and looked in on [Youngest Sister] and [Middle Sister] and they were still asleep. I went to [Child's] door and I forgot I had set the doors so I pushed on the doors and they would not open. I kicked the door open

> and saw [Child] laying there purple. I walked over to her and I tried to wake her and she was cold. I screamed and unwrapped the cord that I put on her neck. [Youngest Sister] and [Middle Sister] walked into the room and [Youngest Sister] started screaming. [Middle Sister] said Daddy is she dead and I said yes go get on the couch and pray as hard as you can and remember one thing she is with Jesus. I ran to the telephone which is exactly in front of the computer and I called 911. I said my daughter is dead and she is cold as a cucumber. Reality had not set in. . . . . Not until today 12/03/01 have I realized what I have done. Up until talking with you and the other [officer] I blocked stuff out. I am telling the truth this time. Everything I said before now is not true. When I put my fingers inside [Child] I pulled her panties, pants and panties down and used my two fingers. I could have jammed my hand down inside her. I remember I had watered down jelly on my fingers. Around the first of October was when I first started messing with [Child] at night while she was asleep and I would go into her bedroom and finger her and use a dildo on her. I did this many times.

The investigation against Cope proceeded; however, by the end of December, the police were aware that the DNA evidence obtained from Child's body was not Cope's. At some point, the State determined the semen on Child's pants and the saliva from the bite mark on her breast belonged to James Sanders. Sanders was eventually also indicted in connection with Child's rape and murder on January 22, 2004, and the State then charged both Cope and Sanders with conspiracy.

The case proceeded to a joint trial, the State's theory of the case being that Cope "served up his daughter for his and [] Sanders' own perverse pleasures and took her life. They did it together. There is no other reasonable explanation."

In addition to presenting the confessions and autopsy report, the State called Cope's other children to testify. Youngest Sister testified she heard someone scream and gasp for air in the middle of the night, but she thought it was a dream and went back to sleep. Middle Sister testified she and Child worked on her math homework until around 1:00 a.m., when they went to bed. She claimed that, before going to bed, she and Child went around the house, turned off all the lights, and locked the front door, including the chain latch.

The State also called Amy Simmons to testify. Simmons was a friend of the family who began exchanging letters with Cope while he was incarcerated. During the course of these exchanges, Simmons testified she received a letter in May of 2004 in which Cope wrote:

> God told me to tell you that I killed [Child]. I have secretly questioned God and I caught myself praising the Lord over the ending. I got my feelings hurt when I talked to my attorneys the story was not going to end on a happy note. [Child] is in the Lord [sic] Streets. Standing over her I saw her scream. My girl was returned to the spot where she belong [sic] and my enemies follow me scoffing. I don't know which way that I should turn. I didn't realize what I did until after Pastor Powell told me that she was dead. I just want to know if God was trying to share with me before it happened. Please forgive me. God is going to remove it soon. I wish that he had creeped [sic] into my head and killed me instead.
>
> How is [sic] Brian and Jaime? I don't know whether they remember me or not. I hope you don't mind the drawing on the envelopes. I hope that you are not mad or angry. I just thought you should know. Please don't stop writing. I have to get on with my life I need to tell you that a certain police woman as always came out victorious. May God bless you with comfort today.

The State also called a handwriting expert to testify as to the authenticity of the letters.

In his defense, Cope presented expert testimony that the letters were forgeries as well as evidence that the paper the letters had been written on were not available to inmates at the prison. Simmons was also impeached with evidence she had criminal forgery charges pending against her and that she had consented to discipline by a nursing board for forging documents. Cope additionally called Dr. Charles Honts to testify as an expert in psychology, particularly in the polygraph. Dr. Honts stated he disagreed with Baker's scoring of Cope's polygraph and opined his scoring of the examination indicated Cope had been truthful.

Cope also presented expert testimony from Dr. Saul Kassin regarding false

confessions. Dr. Kassin discussed different indicia of innocence, such as waiving the right to a lawyer, consenting to a physical exam, and volunteering to take a polygraph. He noted that false confessions appear remarkably like real confessions, often including details and motive. Dr. Kassin testified that Cope had likely lost all hope after having been interrogated for hours and repeatedly professing his innocence; once he learned he failed the polygraph test, it would have shaken him. Dr. Kassin stated that when presented with false evidence indicating their guilt, people sometimes begin to doubt themselves and construct new memories based on a belief in their own guilt. He mentioned there were cases where alleged murder victims turned up alive, cases where another perpetrator was found who knew all the details of the crime, and cases where DNA evidence was discovered exonerating people who had confessed to committing those crimes.

Additionally, Cope called forensic pathologist Clay Nichols to testify. Dr. Nichols opined the sexual injuries sustained by Child could have been inflicted with an erect penis and that a 400-pound man thrusting a broom into Child's body would have resulted in much more catastrophic injuries. Dr. Nichols further noted that it was unlikely the dildo found on the scene had been used because it was less than six inches long and Child's injuries indicated she had been penetrated by an object between six to eight inches. In discussing Child's strangulation, he noted that although it was unlikely the blanket had been used, he thought only one hand had been used and that she was attacked from the front. He further opined that he found no evidence to indicate chronic sexual abuse. Dr. Nichols also stated he did not think her injuries were consistent with a 400-pound man jumping on her back.

Cope also presented the expert testimony of a locksmith that the front door could have been opened with a credit card without leaving any marks. The locksmith explained this was because the locking mechanism was a spring latch and not a dead latch.

Finally, Cope testified in his own defense. He stated that on the evening of Child's death, Youngest Sister had gone to bed at 9:30 p.m. and he had let Child and Middle Sister stay up until 1:00 a.m. working on Middle Sister's long division homework. He said he awoke around 3:00 a.m. to go to the bathroom and then tried to play a game on the computer. When he woke the next morning and Child did not answer when he called to her, he thought the rapture had taken her.

He stated that when he found her, she was not unclothed, just uncovered. He

further testified they never put on the chain lock because his wife would sometimes come home from work while everyone was asleep and she would not be able to get in the house. He also testified there was a flashlight found in Child's room that he had never seen before.

Cope testified that during his police interview, the detectives continually insinuated he knew more about the crime. He eventually began to insist on taking a polygraph because he had taken two or three previously for work and he trusted them. He then testified that once he was told he had failed the polygraph, he began to doubt himself. He stated he asked if he could have done it and not known about it because he had no memory, but he had been informed that the pathologist concluded the rape was not done by a human penis, so he started putting images in his head. He then described the images that came to him.

Cope further testified that once he was in jail, he realized he had falsely confessed and the police would never believe him, so he tried to invent a second story hoping they would just think he was crazy. He then concocted the confession where he purported to kill Child while dreaming about his ex-girlfriend. During his subsequent interview, the detectives continued to point out the inconsistencies in his statements and threatened him with the death penalty if he did not finally tell them the truth. Cope testified that by then, he did not care what happened anymore; he would have said anything and he willingly signed any statements he was given. Cope also discussed the incriminating letters to Amy Simmons and denied having ever written them.

The jury convicted Cope of murder, two counts of first degree CSC, criminal conspiracy to commit CSC, and unlawful conduct towards a child. He was subsequently sentenced to life imprisonment for murder, thirty years' imprisonment for one of the CSC charges, to be served consecutively, and thirty years' imprisonment for the other count of CSC, ten years for unlawful neglect, and five years for conspiracy, to be served concurrently.

ISSUES PRESENTED

I. Did the court of appeals err in upholding the trial court's refusal to admit evidence of Sanders' other crimes and failure to sever the trials?

II. Did the court of appeals err in affirming the trial court's exclusion of

testimony offered to show Sanders had bragged to fellow inmates about how he was going to get away with the murder and rape of "a little girl in Rock Hill"?

III. Did the court of appeals err in affirming the trial court's refusal to allow Cope's false-confessions expert to specifically discuss factually similar cases?

IV. Did the court of appeals err in affirming the trial court's denial of Cope's motion for a directed verdict on the charge of criminal conspiracy?

LAW/ANALYSIS

I. EVIDENCE OF OTHER CRIMES

Cope argues the court of appeals erred in affirming the trial court's refusal to allow admission of evidence of Sanders' other crimes. We disagree.

In criminal cases, the appellate court sits solely to review errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. Washington*, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Cope's defense relied in part on the theory that Sanders acted alone. In support of this contention, Cope sought to establish Sanders was capable of entering the home without signs of forced entry by introducing evidence that Sanders had committed similar crimes in Cope's neighborhood around the time of Child's assault. Prior to trial, Cope proffered the testimony of four other victims, which is summarized below.

First Incident: The victim testified that on December 12, 2001, at approximately 11:00 p.m., Sanders knocked on her door and asked to use her phone because he had car trouble. When she went to the door, Sanders pushed the door in and attacked her. Sanders carried her to the bedroom and laid her on the bed. He kissed her on the mouth and breasts and raped her. Sanders then asked

her for money and the victim gave him twenty dollars from her pocketbook. The victim was sixty years old.

Second Incident: The victim testified that on December 16, 2001, she had fallen asleep on the couch and woke up around 1:00 a.m. with Sanders standing over her. She screamed and Sanders put his hand over her mouth and trapped her under a rocking chair. At the time, she was living in a second story apartment with her husband and three daughters, but her husband was out. She continued screaming and her dog began to bark so one of her daughters ran in to see what was wrong and Sanders then fled, jumping off her balcony. He had apparently entered through her unlocked patio door.

Third Incident: The victim testified she returned to her apartment, near Cope's home, around 7:30 or 8:00 p.m. on December 19, 2001, and she immediately went to the bathroom. After exiting the bathroom, the victim noticed her front door was cracked, and she walked towards the door to close it. A man, who she later identified as Sanders in a photographic lineup, came through the door. The victim began fighting Sanders, and he tried to put a plastic bag over her head, which she was able to claw through and remove. Sanders then tried to wrap a rug around her head, and he turned her over on her stomach, pulled up her shirt, and attempted to unbuckle her belt. The victim grabbed a pen from her back pocket and stabbed Sanders with it several times in his leg. Sanders shoved her into a bedroom and fled. The victim stated she was twenty years old when the attack occurred. She testified he did not choke her. She also identified Sanders as the perpetrator in court.

Fourth Incident: The victim testified she was renting a room in a house within a few blocks of Cope's home. Her bedroom connected to a bathroom that also had a door that went into the kitchen. She testified she was watching a movie in her bed around midnight on January 12, 2002, when she heard a knock at her bathroom door. The victim asked who was there, and no one answered. She heard another knock, again asked who was there, got out of bed, and walked toward the bathroom door, assuming it was one of her roommates. When she got to the door, Sanders pushed it open, hitting the victim's head with the door. The two began fighting and moved to the kitchen, where Sanders pushed her to the ground and kicked and stomped on her back. Sanders put her in a choke hold and pulled her off the ground. She tried to punch Sanders, and he let her go briefly and threw her to the ground, kicking her again. While the victim was on the ground, Sanders

went back into the bedroom and grabbed her purse. She then grabbed a baking pan and hit Sanders in the head with it. The contents of her purse spilled out and the victim grabbed her Mace; however, Sanders pushed her back down to the ground, and she sprayed most of the Mace on herself. The victim then grabbed a screwdriver off the floor and began stabbing at Sanders, piercing his left shoulder and causing him to flee. She further testified there were no signs of forced entry, and neither she nor the police were able to determine how Sanders gained access to her house. The victim was nineteen when the attack occurred. She had identified Sanders from a photograph and also identified him in court.

Although the trial court found Cope had presented clear and convincing evidence that Sanders committed these other crimes, it declined to allow in the testimony, holding the other crimes were not sufficiently similar to be admitted under Rule 404(b), SCRE. The court of appeals affirmed, noting that although other jurisdictions have adopted a lesser standard of similarity in evaluating this type of reverse 404(b) evidence—where evidence of other crimes has been offered in exculpation by the defendant—here the crimes were too dissimilar to pass even a lesser threshold.

A. Rule 404(b) Analysis

Cope argues the trial court erred in refusing to admit evidence of Sanders' other crimes under Rule 404(b). We disagree.

"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; *see State v. Lyle*, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. *Clasby*, 385 S.C at 154, 682 S.E.2d at 895. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b). *Id.*

Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan. *Id*. at 155, 682 S.E.2d at 896. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *Id.* The evidence is admissible if the similarities outweigh the dissimilarities. *Id.* "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Clasby,* 385 S.C. at 155, 682 S.E.2d at 896.

We find no abuse of discretion in the exclusion of this evidence. Although there are some similarities between the crime charged and the other acts, there are also many distinctions. Those crimes all occurred subsequent to Child's murder and none of them involved children. Only one of those victims was raped and that rape did not include anal penetration, the use of a foreign object, nor was the victim cleaned up afterward. Additionally, none of the attacks involved manual strangulation or resulted in the victim's death. Furthermore, although those crimes arguably demonstrate that Sanders could enter a house without signs of forced entry, his method varied wildly, ranging from a ruse to entering through an unlocked door. Given these differences, we cannot conclude the trial judge abused his discretion in finding the evidence was inadmissible under a Rule 404(b)/*Lyle* analysis.[4]

[4] The dissent criticizes our analysis of the similarities as ineffectual given the evidence that Sanders committed the other crimes as well as the charged crimes. We disagree that identity alone precludes consideration of the other particulars of the crimes. If the purpose of the evidence is to show that Sanders acted pursuant to a common scheme, we fail to see how we can decline to look at the commonality of the entire crimes when determining admissibility. We cannot look only to the fact that Sanders committed all the subsequent assaults alone simply because that is the detail Cope wants the jury to draw inferences from. The jury would be presented with all the specifics of these crimes and we therefore cannot ignore the

Alternatively, Cope argues the trial court should have analyzed the evidence under a more permissive standard because the testimony was not being offered by the State. He cites to several jurisdictions that have adopted a less stringent standard for admission of "other crimes" evidence when it is offered by a defendant in exculpation. While his assertion has some appeal, Cope failed to present this argument before the trial judge, and the issue is thus unpreserved. "It is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). Prohibiting an appellant from raising an issue for the first time on appeal ensures that the trial court is able "to rule properly after it has considered all relevant facts, law, and arguments." *Id.* We therefore find it would be inappropriate to find error on an issue never properly raised below.

B. Due Process

Relying on the United States Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006), Cope also argues that by excluding this evidence, he was denied his constitutional right to present a defense.[5] There, Holmes sought to introduce evidence that another man, White, had actually perpetrated the crimes for which he was charged. *Id.* at 323. He proffered several witnesses who testified White had been in the neighborhood where the crime occurred on the morning it was committed. *Id.* He also presented testimony of witnesses who claimed White had admitted committing the crimes. *Id.* The trial court refused to admit the evidence, noting the substantial incriminating evidence presented by the State and concluding that Holmes "could not overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *Id.* at 324 (internal quotations omitted). On appeal, this Court affirmed the trial court in *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004), and the United States Supreme Court reversed. Specifically, the Supreme Court held the trial court violated Holmes' right to a "meaningful opportunity to present a complete defense" by excluding evidence of third-party guilt on the grounds that the State had introduced forensic evidence that, if believed, strongly supports a guilty verdict. *Holmes v. South Carolina*, 547

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differences that militate against a conclusion Sanders employed *any* common scheme.

[5] *Holmes* was issued after Cope's trial, but three years prior to the court of appeals' opinion.

U.S. at 330–31 (internal quotation omitted).

The facts here are distinguishable from *Holmes*. It was not the strength of the State's case that led to exclusion of evidence of Sanders' other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible. *Holmes* plainly acknowledges that excluding evidence because its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury is not violative of the Constitution. *Id.* at 326. Because we find the exclusion of this testimony was appropriate for those exact reasons, we hold Cope's federal due process rights were not violated. We accordingly affirm the court of appeals' affirmance of the trial court's exclusion of this testimony.

C. Severance

Cope then argues the evidence of other crimes would have been admissible as evidence of third-party guilt in a separate trial and the court of appeals erred in upholding the denial of his motion for a severance. We disagree.

In South Carolina, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). Motions for a severance are addressed to the discretion of the trial court. *Id.* at 74, 502 S.E.2d at 75. A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. *State v. Dennis*, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (citing *Zafiro v. United States*, 506 U.S. 534 (1993)). Furthermore, "[a]n appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." *State v. Stuckey*, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct. App. 2001).

After the trial court refused the admission of testimony regarding Sanders' other crimes, Cope moved to sever the trials, arguing severance would prevent any prejudice against Sanders. The trial court declined, clarifying that prejudice was not the basis for its ruling and further stating the evidence would not have been admitted even if Cope was tried alone because the crimes were so dissimilar. The court of appeals, noting evidence of Sanders' guilt would not be inconsistent with

Cope's guilt, affirmed the trial court. It thus concluded that evidence of Sanders' other crimes would be inadmissible in a separate trial as evidence of third-party guilt because it did not raise an inference of Cope's innocence.

The admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). In *Gregory*, we held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." *Id* at 104, 16 S.E.2d at 534 (internal quotations omitted). Pursuant to this standard, we find the proffered testimony in this case would only produce speculation as to whether Sanders acted alone in Child's rape and murder and would therefore have been excluded in a separate trial. Evidence of Sanders' guilt is not inconsistent with Cope's guilt, nor does it raise a "reasonable inference"—and certainly not a presumption—of Cope's innocence. We therefore affirm the court of appeals in finding that the trial court did not err in refusing to grant a severance to allow Cope to admit this evidence.

II. TESTIMONY OF JAMES HILL

Cope contends the court of appeals erred in affirming the trial court's exclusion of testimony from an inmate, James Hill, who allegedly heard Sanders telling other inmates how he raped and killed "a little girl in Rock Hill." We find no reversible error.

During a proffer, Hill testified he was jailed with Sanders in a segregation unit in late 2002, when he overheard Sanders talking with another inmate. Sanders joked about how police were not doing their jobs, and he bragged that it was easy to "delude them." According to Hill, Sanders "made the comment that he was going to get away with what he did to that little girl in Rock Hill." Hill testified Sanders indicated he had committed oral and anal sodomy on the child, and Sanders claimed he had smothered her. Hill stated Sanders was explicit about the liberties he took with the child and Sanders claimed he entered and exited though a window before proceeding to another house. Hill testified he met Cope in another part of the jail a few months later, and he realized Sanders' statement was important when he overheard Cope talking about his case with another inmate.

In objecting to the admission of the testimony, Sanders argued that it was "not relevant to this case because there [have] been no identifying characteristics," noting that there are many criminal allegations against him, so nothing makes this relevant. The trial court sustained the objection, stating "there has been no testimony as to time, place, other circumstances." The court of appeals affirmed, concluding the trial court did not abuse its discretion in finding the testimony was irrelevant.

Cope contends the court of appeals erred in concluding Hill's testimony was irrelevant. Additionally, he argues it was admissible as an out-of-court statement by an unavailable declarant and the exclusion amounted to a violation of his constitutional rights. Although we agree the testimony passes the threshold of relevance under Rule 401, we nevertheless find it inadmissible as hearsay which would not fall within the proposed exception.[6]

Rule 804(b)(3), SCRE, provides as exception to the hearsay rule for the admissibility of out-of-court statements against penal interest made by an unavailable declarant. "However, if offered to exculpate the accused in a criminal trial, they are admissible only if corroborating evidence **clearly** indicates the trustworthiness of the statements." *State v. Kinloch*, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000). "The rule does not require *that the information within the statement* be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made." *Id.* at 389, 526 S.E.2d at 707. However, we have noted that "[i]n many instances, it is not possible to separate

[6] We therefore agree with the dissent that the testimony was relevant under Rule 401. However, we disagree with the dissent's conclusion that Sanders' challenge to the admissibility of Hill's testimony went to the weight of the evidence and not to admissibility. Certainly, the factual discrepancies would go to the weight of the evidence, but prior to examining the veracity of the statement, the court must address whether the proponent has put forth sufficient evidence to demonstrate the statement was actually *made* so as to be admissible. *See Kinloch*, 338 S.C. at 389, 526 S.E.2d at 707 ("The corroboration requirement is a preliminary determination as to the statement's admissibility, not an ultimate determination about the statement's truth.").

these two considerations in analyzing the matter of corroboration." *State v. McDonald*, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000). "Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made." *State v. Wannamaker*, 346 S.C. 495, 501, 552 S.E.2d 284, 287 (2001) (internal quotations omitted).

Accordingly, to fall within this hearsay exception, the statement must be clearly corroborated so as to establish that the statement was made. We find here that it was not. As the trial court noted, there was no testimony on "time, place, [or] other circumstances" to verify this statement was ever made by Sanders. Hill is unsure to whom Sanders allegedly made the statements, which frustrates any ability to confirm Sanders actually said this to anyone. Furthermore, the statement does not detail specifics of the crimes, and even gets some salient facts wrong. There was no evidence oral sex was performed on Child and she was not smothered. Moreover, there is absolutely no mention of Cope, a detail doubtful to be omitted whether Sanders conspired with him, or was only aware he had been arrested for Sanders' crimes. We accordingly find that although Hill's testimony may have been relevant, it was nevertheless inadmissible as hearsay because it was not clearly corroborated so as to indicate its trustworthiness.

III. EXCLUSION OF SPECIFICS FOR FALSE-CONFESSION EXPERT

Cope also alleges the trial court erred in refusing to allow Dr. Saul Kassin—Cope's false-confession expert—to testify about specific cases involving false confessions.

"Generally, the admission of expert testimony is a matter within the sound discretion of the trial court." *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991). Thus, we will not reverse the trial court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion. *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003).

Cope called Dr. Kassin and sought to qualify him as an expert in social psychology for the purpose of testifying on the phenomenon of false confessions.

The State conducted a voir dire of Dr. Kassin and thereafter objected to his qualification, and Cope proffered his testimony outside the presence of the jury. The State objected to Dr. Kassin referencing with specificity any cases where somebody confessed and was later exonerated. Cope asserted the case of *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004), stands for the proposition that other cases of false confession are admissible if they have a "factual nexus" to the case before the court. However, when asked by the court whether Dr. Kassin would be testifying about any particular case, Cope responded that it was "certainly not [his] plan . . . to call any reference to any specific other case" but that Dr. Kassin would "talk about generally the science that is recognized." The court then stated it would allow him to testify but noted "the witness cannot testify about particular cases unless they are on all fours with this particular case, and you've told me that, pretty much indicated that you don't know of any." Cope responded that he had not and did not intend to ask him about those, but noted there may be cases where certain factors would match the circumstances in Cope's case. The court stated its concern that this would result in a "parade of horribles" before the jury that would be prejudicial and would not serve its function of assisting the jury in its determination of the facts. However, the trial court nevertheless qualified Dr. Kassin as an expert in social psychology with a focus on interrogation and interviews.

Dr. Kassin proceeded to testify before the jury, and began describing types of false confessions, including "coerced compliant" false confessions, where an innocent person might confess in the hope of terminating a bad situation, avoiding some threatened or implied harm, or obtaining leniency or some reward. In attempting to explain how this could occur, Dr. Kassin mentioned the Central Park jogger case.[7] The State immediately objected and the court sustained the objection based on its previous ruling. The jury was removed and Cope then argued specific examples of other false confessions should be admissible because the field of study was relatively recent and is highly dependent on case studies to properly describe the factors used to show whether a confession is false. The trial court disagreed,

[7] The Central Park jogger case involved the brutal rape and assault of a young woman when she was jogging through New York City's Central Park. Five juveniles were arrested and later confessed as well as implicated one another. The convictions were later vacated in *People v. Wise*, 752 N.Y.S.2d 837, 850 (Sup. Ct. 2002), when another man confessed to perpetrating the crime alone and DNA evidence corroborated his confession.

noting that it found the prejudice outweighed any probative value, but allowed Dr. Kassin to make another proffer for the record.

In his proffered testimony, Dr. Kassin specifically discussed two cases. One involved Peter Reilly, who found his mother dead and confessed to killing her after being informed he had failed a polygraph test. He was eventually released from prison after exculpatory evidence was found.

The second case involved Gary Gauger, who found his parents slaughtered at home and was extensively interrogated. The police then informed him he failed his polygraph test and he confessed, in some detail, to committing the murders. Later, he was exonerated when a member of a motorcycle gang was caught on tape bragging about the crime. The State objected to specific mention of these cases, and the court held Dr. Kassin should omit discussion of them.

The court of appeals affirmed, noting that "the trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony." *Cope*, 385 S.C. at 289, 684 S.E.2d at 185. The court found Dr. Kassin had been allowed to present exhaustive testimony on the theories underlying the study of coerced internalized false confessions, explain the techniques used by interrogators that can lead to false confessions, and inform the jury that there were "innumerable actual cases" of coerced internalized false confessions. *Id.* at 290, 684 S.E.2d at 185.

Cope contends the trial court should have allowed Dr. Kassin to discuss the specifics of these two cases because they were "nearly identical in many critical respects" to Cope's case. Specifically, Cope notes that the cases involved the same type of "coerced internalized" false confessions that were part of the theory of his defense; Gauger and Reilly were similarly grief-stricken and vulnerable after losing a close relative; both men were also presented with powerful evidence of their guilt; they confessed after being informed they failed a polygraph test; and all three eventually recanted their confessions. He also seeks to distinguish the *Myers* case, which the court of appeals relied upon in its analysis.

In affirming the trial court, the court of appeals relied on *Myers*, which also involved false confession testimony by Dr. Kassin. There, this Court held the trial judge did not err in excluding specific testimony about false confessions in cases from Connecticut and Indiana. *Myers*, 359 S.C. at 50, 596 S.E.2d at 493. The

Court noted Dr. Kassin was actually allowed to testify about specific instances of false confessions, including cases where people had confessed in shaken baby cases, and the deaths were later proved to have been caused by some problem other than abuse. *Id.* at 494, 596 S.E.2d at 51. He also discussed cases where defendants confessed to murder, but the victims later turned up alive. *Id.* The Court further noted that "Dr. Kassin did testify about specific cases, he just did not use names or say in which state the crime happened." *Id.* Although the Court acknowledged the Connecticut case was similar to Myers' case, it found the trial court did not abuse its discretion in excluding information about it, noting Dr. Kassin was able to testify at length about false confessions and touch briefly on the Connecticut case. *Id.* Moreover, the Court found that even assuming error by the trial court, Myers could not show prejudice in light of Dr. Kassin's other testimony. *Id.*

Cope argues that *Myers* is distinguishable because the Gauger and Reilly convictions were not merely similar, but were nearly identical in many critical respects. He further argues that Dr. Kassin was not permitted to testify about the Gauger or Reilly cases at all, and therefore the court of appeals erred in affirming the exclusion of the testimony and in failing to recognize the crucial differences between Cope's case and *Myers*.

Although Cope argues this issue in terms of the similarity of the cases, the trial court's ruling was based primarily on a Rule 403 analysis, noting twice that it found the prejudice outweighed the probative value and expressing some concern about sensationalism. Therefore, even assuming testimony about the Reilly and Gauger cases should have come in because of their similarities, the specifics of those cases were properly excluded as more prejudicial than probative. Presenting the jury with explicit details of historical cases of people who were imprisoned based on false confessions would distract the jury's attention from the facts of this case and potentially confuse the issues. Moreover, *Myers* does not stand for the proposition that testimony regarding substantially similar cases should be allowed in; instead, the Court simply found Myers could not show he was prejudiced by the exclusion of the explicit discussion of similar cases.

Similarly, although Cope argues his defense was crippled by the exclusion of these specifics, we find no prejudice. The extensive and thorough testimony offered by Dr. Kassin informed the jury of the nature of coerced internalized false

confessions and the factors that often accompany such false confessions—such as fatigue, stress, recent trauma, and aggressive police methodology. Furthermore, he noted that this *does* in fact occur and indicated generally that there were a number of cases where people gave detailed confessions which later turned out to be completely false. Although Cope contends the exclusion of these examples hindered his ability to overcome the jury's likely predilection to doubt false confessions happen, his expert was permitted to testify fully that there are a large number of cases where false confessions occurred. We therefore affirm the court of appeals in holding the trial court did not err in excluding the case specifics from Dr. Kassin's testimony.

IV. DIRECTED VERDICT ON CONSPIRACY

Lastly, Cope argues the trial court erred in failing to grant his motion for a directed verdict on the conspiracy charge because the evidence presented by the State allowed only for speculation as to Cope's guilt. We disagree.

In reviewing a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not with its weight. *State v. Curtis*, 356 S.C. 622, 633 591 S.E.2d 600, 605 (2004). In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State. *Id.* (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *Id.* "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Arnold*, 361 S.C. 386, 389, 605 S.E.2d 529, 531 (2004).

Criminal conspiracy is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means. S.C. Code Ann. § 16-17-410 (2003). The gravamen of conspiracy is an agreement or combination. *State v. Gunn*, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993). "To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). The Court must exercise caution in its analysis, however, to ensure the proof is not

obtained "by piling inference upon inference." *Gunn*, 313 S.C. at 134, 437 S.E.2d at 81.

After the State rested, Cope moved for a directed verdict on the conspiracy charge. He argued there was no evidence in the record indicating any conspiracy existed between himself and Sanders, and specifically, no evidence of a meeting of the minds or any agreement between the two men. Cope noted a conspiracy charge cannot be supported by suspicion or conjecture, and the fact there was no evidence of forced entry, combined with the fact Sanders' DNA was found on Child, did not rise to the level of proof of a conspiracy. The trial judge found all the evidence indicated that Cope had been home all night and Sanders was there at some point. He further noted there was evidence the chain on the front door was latched and that the windows had not been disturbed. He then held there was "some direct and substantial circumstantial evidence" that Sanders and Cope conspired, and therefore denied the motion.

The court of appeals affirmed. It acknowledged the State's case was entirely circumstantial, but stated:

> Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally strangled herself, notwithstanding compelling forensic evidence that Sanders was present and actively participating during the same time period in which her death was determined to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of "acts, declarations, or specific conduct" by the alleged conspirators to withstand a directed verdict motion on this charge. *See State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (reversing

> a conviction for trafficking and noting "the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference" that the petitioners had knowledge that drugs were being transported).

Cope, 385 S.C. at 295–96, 684 S.E.2d at 188.

Cope argues the court of appeals erred because the evidence presented by the State of Cope's confessions and suspicious behavior may tend to support the conclusion that Cope was guilty of criminal sexual conduct, but not that he had conspired with Sanders. Cope further points out that to find a conspiracy, the jury must conclude there was an agreement to commit the crime and commission of the underlying crime is insufficient.

We acknowledge there is no direct evidence that the two men agreed to commit this crime or that they even knew each other. However, conspiracy can be proven by circumstantial evidence and the conduct of the parties. Although Cope criticizes the State's conspiracy charge as unsubstantiated and a desperate attempt to reconcile Cope's confessions with the presence of Sanders' DNA, we fail to find the argument so completely implausible given the State's evidence. There were no signs of forced entry on any of the windows and evidence was presented that the chain on the door had been latched. The house was in such disarray it would have been almost impossible for Sanders to navigate the house in the dark without someone guiding him. Cope confessed to sexually assaulting his daughter on three separate occasions. Furthermore, the bite mark which contained Sanders' saliva was determined to have been inflicted contemporaneously with her other injuries. There was also evidence Child had been cleaned up and dressed after the sexual assault and murder, which Sanders would have been unlikely to do if he risked being caught by someone in the home at any moment. Although the evidence of the existence of an agreement between Sanders and Cope may not be overwhelming, it need not be to survive a directed verdict motion. Viewing the evidence in the light most favorable to the State, we find the evidence would allow a jury to conclude the men conspired to commit these crimes. Competent evidence was admitted which tended to show both men were present with Child around the time of her death and each played some role in the acts that were perpetrated upon her. We find sufficient circumstantial evidence to survive a directed verdict and allow a jury to determine whether an agreement to perpetrate the sexual assault existed between Cope and Sanders. Accordingly, we affirm the court of appeals'

affirmance of the trial court's denial of a directed verdict.[8]

CONCLUSION

We find no reversible error by the trial court and we therefore affirm Cope's convictions.

TOAL, C.J., and BEATTY, J., concur. KITTREDGE, J., concurring in part and dissenting in part in which PLIECONES, J., concurs.

[8] We note that even if we reversed the conspiracy conviction, because Cope is serving that five-year sentence concurrently with his sentence of life plus thirty years' imprisonment, his time incarcerated would not change. Furthermore, while Cope argues that reversal on this ground would necessitate a new trial on all grounds, his confessions alone would be sufficient to support the CSC and murder convictions.

JUSTICE KITTREDGE: I fully recognize that, as the majority states, the "facts surrounding the sexual assault and murder of Child are graphic and profoundly disturbing." Notwithstanding my agreement with the majority's characterization of the horrific nature of this tragic crime, I respectfully concur in part and dissent in part. I join the majority in affirming the court of appeals with respect to the conspiracy charge. However, I dissent with respect to two trial court evidentiary errors, which in my judgment require reversal of the court of appeals and remand for a new trial.

I.

In the early morning hours of November 29, 2001, James Sanders, a serial rapist, entered the home of Petitioner Billy Wayne Cope and brutally raped and murdered Cope's twelve-year-old daughter. Sanders' identity was not known at the time, as the analysis of DNA[9] crime scene evidence, specifically saliva from a bite mark on Child's breast and semen on Child's pants, was not completed for approximately one month.

Initially, and understandably, law enforcement focused on Cope as the sole suspect. Law enforcement assumed the saliva and semen from the crime scene belonged to Cope. Most certainly, Cope's bizarre behavior plausibly supported what turned out to be a false assumption. Although Cope at first denied any involvement with Child's sexual assault and murder, his behavior was reasonably viewed as suspicious by investigators. Moreover, investigators were unable to find evidence of forced entry into the home. Cope also agreed to take a polygraph examination, which he apparently passed. The examiner, however, informed Cope that he had failed, whereupon Cope's strange series of confessions began. Cope even agreed to return to his home so police could videotape his confession while he purported to reenact the crime.

Cope, for example, stated he "strangl[ed] her with my hands" and believed Child had been "raptured," because he "had just finished reading the *Left Behind* series . . . ." Another confession attributed the attack to "a bad dream about an old girlfriend who had an abortion." According to Cope:

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[9] Deoxyribonucleic acid, more commonly known as DNA, is the double-helix structure in cell nuclei that carries the genetic information of living organisms. *Black's Law Dictionary* 550 (9th ed. 2009).

> In my dream she was telling me that I had an abortion with your child and I told her no. I became so enraged that I got out of bed. All I could hear was that laughing sound. I do not know what came over me, but I snapped and I jumped on the bed and straddled [Child]. I hit her in the head and started choking her. I did not know it was my own daughter until after I had shoved the broom stick in her privates. I fell back jarring me to my senses and I realized it was my daughter.

Confident the DNA evidence from the saliva and the semen would point to Cope, police charged Cope with the sexual assault and murder. In short, the police 'had their man.' This preliminary view of Cope as the sole perpetrator was, to be sure, understandable under the circumstances, and it is not my intent to criticize law enforcement for its concentrated focus on Cope. Sometime later, however, the police became aware the DNA evidence obtained from Child was Sanders', not Cope's. This DNA analysis confirming Sanders' guilt unhinged the investigators' reasonable theory that Cope was the sole perpetrator of the horrific crime.

Sanders was then charged in connection with the rape and murder. The State moved forward with the charges against Cope as well, and both men were charged with conspiracy. The State's theory was that "they did it together" with Cope "serv[ing] up his daughter for his and [] Sanders' own perverse pleasures." Cope and Sanders were tried jointly, and both were convicted and sentenced to life imprisonment.[10]

On direct appeal, the court of appeals initially held the trial court erred in denying Cope's directed verdict motion concerning conspiracy. In its first opinion, the court of appeals found:

> We agree with Cope that the absence of actual proof of an agreement and of some connection between him and Sanders warranted a directed verdict on the conspiracy charge. Here, there was no direct evidence of any association between Cope and Sanders. The State's

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[10] Cope was convicted of murder, two counts of first degree criminal sexual conduct (CSC), criminal conspiracy to commit CSC, and unlawful conduct towards a child. Sanders was convicted of murder, first degree CSC, and criminal conspiracy. The joint trial allowed the State to take, in large part, a bystander role in terms of the critical evidentiary issues, as Sanders carried the State's water in objecting to much of Cope's evidence.

> evidence of a conspiracy was entirely circumstantial, consisting of (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting, (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry, and (3) the fact that the house was full of debris and passage inside, particularly at night, would have been difficult. These factors, whether considered individually or collectively, raise at most a suspicion that Cope and Sanders intended to act together for their shared mutual benefit. Any inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best. Therefore, because the State failed to prove the element of agreement for the crime of conspiracy, the trial court should have granted a directed verdict as to that charge.

In a substituted opinion, the court of appeals reversed course and found sufficient evidence of a conspiracy to submit the charge to the jury. The court of appeals also rejected Cope's remaining assignments of error.

II.

Although a close question is presented, I join the majority in upholding the denial of the directed verdict motion related to the conspiracy charge. I would, however, reverse Cope's convictions on two evidentiary grounds, not reach the additional challenges, and remand for a new trial.

A.

I believe it was unfairly prejudicial to Cope, and thus reversible error, to exclude under Rule 404(b), SCRE, evidence of Sanders' multiple assaults against women, which were committed in the vicinity of Cope's home shortly after the murder of Child. On four occasions between December 12, 2001, and January 12, 2002, Sanders gained entry into residences and either raped or attempted to sexually assault victims ranging in age from nineteen years old to sixty years old. I find the exclusion of this evidence was an abuse of discretion.

Certainly, the admission or exclusion of evidence is committed to the sound discretion of the trial court. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). However, "the determination of whether the facts surrounding [a

sexual] assault sufficiently evidence a common scheme or plan is a question of law." *State v. Tutton*, 354 S.C. 319, 326-27, 580 S.E.2d 186, 190 (Ct. App. 2003). In examining the issue, a trial court must exercise its evidentiary discretion in the context of the situation presented, not in a formulaic manner. Similarly, on appeal, a reviewing court must also consider the evidentiary ruling in context. Here, the context that must be considered is a criminal defendant's attempt to present evidence that a co-defendant committed these offenses alone, which was entirely consistent with the co-defendant's practice of committing similar offenses alone. Respectfully, it strikes me that the academic considerations of the majority ignore the reality of the unique facts presented. *See United States v. Rodriguez*, 215 F.3d 110, 120-21 (1st Cir. 2000) (noting the similarity of the prior bad act is a factor tending to support admissibility but cautioning that there is no per se rule to determine admissibility; rather admissibility is determined by evaluating the particular facts and legal issues in each case).

More to the point, a myopic approach to matters such as the similarities or lack of similarities between the charged crime and the other crimes serves little purpose in this case. Any suggested dissimilarities are of no moment, for it is not seriously challenged that Sanders raped and murdered Child and, by clear and convincing evidence, committed the four other crimes. Because it is beyond serious dispute that Sanders committed *all* of the offenses, I see no reason to determine whether the similarities provide a suitable nexus between the other crimes and the charged offense. The relevance of this evidence is unmistakable—Sanders, as a serial rapist, always acted alone.[11]

Even assuming such comparative analysis were required under the circumstances presented, I would find reversible error in any event, for I disagree that there are meaningful dissimilarities between the crime charged and the other crimes. I am unpersuaded by the suggestion that Sanders' other sexual attacks were not sufficiently similar to the rape and murder of the twelve-year-old child. I do not

[11] With great respect, it appears the majority has permitted the State's "theory" of the case to dictate the admissibility or inadmissibility of a defendant's alleged exculpatory evidence. In my view, by considering only *the State's* theory in the 404(b) analysis, the majority has essentially all but assured Cope, or any other defendant, would be unable to present evidence in his defense when prosecutors cast wide theories of guilt and conspiracy.

understand why it is so remarkable for a rapist who assaults women ranging from age nineteen to sixty to also assault a twelve-year-old female child. The notion that these acts are "dissimilar" is especially troubling here, where it is clearly established Sanders committed *all* the assaults, including the rape and murder of Child.

And finally, the Court notes the comparative lack of brutality in the other sexual attacks. I disagree, for any differences in the level of brutality were not for lack of trying. Sanders forcibly raped a victim on December 12. On December 16, Sanders physically overpowered another victim, but the victim's screams, a dog barking, and a daughter appearing to see what was wrong led to Sanders fleeing the scene. On December 19, Sanders attempted to overpower a victim by putting a plastic bag over the victim's head and wrapping the victim in a rug; the victim resisted mightily, ultimately grabbing a pen and stabbing Sanders in the leg, causing him to flee. Several weeks later on January 12, Sanders entered another victim's residence, shoved the front door against the victim's head and then pushed the victim down, stomping her; the victim resisted and Sanders responded by putting her in a chokehold, from which the victim broke free, only to be thrown down and kicked again; the victim used mace and grabbed a screwdriver from the floor and stabbed Sanders in his left shoulder, causing him to flee. I would not diminish the brutality of these crimes.

I find there is a striking similarity between the facts of this case and the proffered evidence of Sanders' other sexual assaults. All five incidents occurred within a six-week period, and each of the four other incidents occurred within five miles of Cope's home. Moreover, in all five cases, Sanders was a stranger to the victim, yet there were no signs of forced entry to any victim's home. In light of the testimony that the assailant is acquainted with the victim in the vast majority of sexual assault cases,[12] the presence of these two common features is significant. In my view, the other four incidents present a compelling pattern in terms of time, geography and commonality of features—a pattern which is entirely consistent with the facts of

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[12] During the hearing, Gregg McCrary testified as an expert in crime scene analysis. McCrary testified that rape accounts for only 0.8% of all crimes committed and less than 20% of rapes are stranger-based rapes where the assailant is unknown to the victim. McCrary testified that, because stranger-based rapes are "very rare," it would be "very, very unusual" to have "more than one offender committing similar type crimes in a similar area at a similar time."

this case and material to Cope's theory that Sanders acted alone. *See Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477, 480, 445 S.E.2d 468, 470 (1994) (noting that evidence is material if the proffered fact is logically or rationally connected to a disputed fact).

Under the circumstances presented, I would find the exclusion of the evidence of Sanders' other crimes was reversible error, particularly in light of the importance of the proffered evidence to Cope's theory of the case. *See State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (finding an error is harmless only where "the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"). I would additionally find the exclusion of Sanders' other crimes violated Cope's due process guarantee of "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

B.

I would further hold that the court of appeals erred by affirming the trial court's exclusion of the testimony of James Hill, a fellow inmate of Sanders. Hill purportedly heard Sanders telling another inmate of his rape and murder of "a little girl in Rock Hill." During a proffer, Hill testified he was incarcerated with Sanders in late 2002, when he overheard Sanders talking with another inmate. Sanders joked about how the police were not doing their jobs, and he bragged that it was easy to "delude them." According to Hill, Sanders "made the comment that he was going to get away with what he did to that little girl in Rock Hill." Hill testified that Sanders indicated he had committed oral and anal sodomy on Child, and Sanders claimed he had smothered her. Hill stated Sanders specifically said he "fucked her. He fucked her good[,]" and Sanders claimed he entered and exited the residence though a window.

In objecting to the admission of the testimony, Sanders successfully argued that it was "not relevant to this case because there has been no identifying characteristics," noting that there are many allegations against him. Procedurally, I note that the State did not object to Hill's testimony. Beyond that, Sanders' objection to Hill's testimony was limited to relevance. The majority agrees with me that the trial court's ruling on the relevancy objection was error, for Hill's testimony manifestly meets the threshold of relevancy under Rule 401, SCRE. Clearly, the testimony has some "tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Undaunted, and apparently relying on the rule that allows affirmance on any ground appearing in the record, the majority finds an alternative basis to *exclude* Hill's testimony. The majority states that "we nevertheless find it inadmissible as hearsay which would not fall within the proposed exception[,]" specifically Rule 804(b)(3), SCRE. I strongly disagree, and I would not strain to such lengths to sustain the exclusion of this evidence. There is no plausible deniability as to Sanders' guilt, as he left a bite mark on Child's breast and his semen was found on Child's pants. *See State v. Kinloch*, 338 S.C. 385, 389, 526 S.E.2d 705, 707 (2000) ("The rule does not require that *the information within the statement* be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made."). The supposed lack of specificity in Hill's testimony is unavailing, for there is no evidence of another young girl in Rock Hill who was raped and murdered during the same time frame.

Moreover, the majority finds it significant that "there is absolutely no mention of Cope" in Hill's proffered testimony.[13] It seems to me, however, that the *absence* of any reference to Cope in Sanders' alleged jailhouse confession serves to *enhance*, rather than diminish, the statement's relevance and corresponding prejudice to Cope by its exclusion. This is especially evident where Cope expressly sought to refute the claim of a conspiracy with Sanders. Sanders' objection to Hill's testimony was in essence a challenge to the weight of the evidence, not its admissibility. I would find the trial court erred in excluding the testimony of Hill.

Finally, I observe that this is the kind of typical jailhouse confession evidence that is routinely allowed in evidence, with two glaring differences. First, it is almost always the State seeking admission of such evidence. Second, the testifying inmate expects to gain from his assistance to the prosecution. Here, Hill agreed to testify in a situation that he well understood was contrary to the prosecution and thus contrary to his best interest.

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[13] Again, I believe it improper for the State's theory of a case alone to control the admissibility or inadmissibility of a co-defendant's exculpatory evidence.

III.

In concurring in part and dissenting in part, I would reverse Cope's convictions and remand for a new trial.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch, Petitioner,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation, are Respondents.

_____

Kevin Key and Sandra Key, Petitioners,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation, are Respondents.

_____

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch and Julius Poch, Petitioner,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater

Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,
of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation, are Respondents.

Appellate Case No. 2010-149288

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 27304
Heard January 23, 2013 – Filed August 28, 2013

AFFIRMED AS MODIFIED

John R. Kuhn, of Kuhn & Kuhn, LLC of Charleston, Robert Bratton Varnado, of Brown & Varnado, LLC of Mt. Pleasant, Christine Companion Varnado and Jason Scott Luck, both of The Seibels Law Firm, P.A. of Charleston, for Petitioners.

Barrett Ray Brewer of Clawson & Staubes, LLC of Charleston, for Respondents.

JUSTICE BEATTY: Kenneth Poch ("Poch") and Kevin Key ("Key") were temporary workers contracted through Personnel Resources of Georgia, Inc. ("Personnel Resources") and Carolina Staffing, Inc. d/b/a Job Place of Conway ("Job Place"), to work for Bayshore Concrete Products/South Carolina, Inc.

("Bayshore SC") to clean up a concrete casting worksite and dismantle equipment used to produce concrete forms. As a result of a tragic, work-related accident, Poch was killed and Key was injured. Poch's estate and Key received workers' compensation benefits through Job Place.

Subsequently, Key and his wife and the estate of Poch ("Petitioners") filed suit against Bayshore SC and its parent company, Bayshore Concrete Products Corporation ("Bayshore Corp.").[1] The circuit court granted Respondents' motion to dismiss the actions on the ground that workers' compensation was Petitioners' exclusive remedy and, therefore, Respondents were immune from liability in a tort action. The Court of Appeals affirmed the circuit court's order. *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). This Court granted a writ of certiorari to review the decision of the Court of Appeals. Although we agree with the result reached by the Court of Appeals, we find the court incorrectly analyzed Petitioners' arguments. Accordingly, we affirm as modified.

I. Factual/Procedural History

Bayshore Corp. is a Virginia corporation that is in the business of manufacturing pre-cast concrete products for use in construction projects. On April 21, 2000, the Board of Directors for Bayshore Corp. held a meeting to discuss a bid it secured to supply pre-cast concrete forms for use in the Carolina Bays Parkway project (the "project") in Horry County, South Carolina. On that same day, Bayshore Corp. formed Bayshore SC as its wholly owned subsidiary for the purpose of acting as a remote casting yard to fulfill the bid locally for the project. Bayshore Corp. then executed a lease for the South Carolina factory site and purchased casting equipment from the previous tenant, Traylor Brothers, to be used by Bayshore SC. Bayshore SC paid the rent for the leased property and used the equipment to produce the concrete forms. As a term of the lease, Bayshore SC was required to return the worksite to its original condition.

As the project reached its final stages, Bayshore SC began the cleanup of the worksite by dismantling the equipment and casting beds that were used to create the pre-stressed concrete forms. Because many of the Bayshore SC payroll employees left to seek other employment as the project drew to a close, Bayshore SC sought to hire temporary laborers to assist in the site cleanup and equipment

[1] Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., related entities that performed engineering and construction services, were dismissed as defendants.

dismantling. Bayshore SC contracted with Job Place to hire workers to help with the project, including Poch and Key.

On June 6, 2002, Poch and Key were directed by Larry Lenart, Bayshore SC's supervisor, to enter a trench dug by Lenart in order to dig around buried steel girders to extract the concrete abutments. When the trench collapsed, Key was injured and Poch was killed. After the accident, Poch's estate and Key received workers' compensation benefits through Job Place.

Subsequently, Petitioners sued Bayshore Corp. and Bayshore SC in tort. In their Answer, Bayshore Corp. and Bayshore SC claimed Poch and Key were statutory employees of both the parent and the subsidiary. Based on this claim, Bayshore Corp. and Bayshore SC moved for summary judgment or, alternatively, for a dismissal due to the lack of subject matter jurisdiction because workers' compensation was the exclusive remedy for Poch and Key.

After a hearing, during which the parties submitted affidavits[2] and deposition testimony, the circuit court ruled that Bayshore Corp. and Bayshore SC were immune from civil suit as Petitioners' claims fell within the exclusive jurisdiction of the Workers' Compensation Act (the "Act"). In so ruling, the court found: (1) Poch and Key were leased employees who performed the work of Bayshore SC and, in turn, that of Bayshore Corp. at the time of the accident; (2) both corporations were entitled to immunity pursuant to the workers' compensation exclusivity provision because Bayshore SC, the special employer of Poch and Key, was performing the work of Bayshore Corp.; (3) Bayshore SC and Bayshore Corp. were statutory employers of Poch and Key because the employees were performing the work of both corporations; (4) both Bayshore Corp. and Bayshore SC were entitled to workers' compensation exclusivity under the contractor/subcontractor analysis; and (5) both corporations were entitled to tort immunity as they secured workers' compensation coverage for Poch and Key.

Following the denial of their motions for reconsideration, Petitioners appealed the circuit court's order to the Court of Appeals. The Court of Appeals

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[2] The court denied Petitioners' motions to exclude the affidavits of (1) S. Keith Colonna, the president of Bayshore Corp. and Bayshore SC; (2) Vernon Dunbar, an attorney who attested to the statutory employer status of the corporations; and (3) Larry Lenart, the supervisor at the Bayshore SC site.

affirmed the decision of the circuit court. *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). In finding that Petitioners' exclusive remedy was workers' compensation benefits, the court ruled: (1) Bayshore SC was Poch's and Key's statutory employer;[3] (2) Petitioners failed to present evidence as to any exception or statutory provision that would eliminate Bayshore SC's immunity;[4] (3) Poch and Key were statutory employees of Bayshore Corp. under a contractor/subcontractor analysis and, thus, Bayshore Corp. could invoke the workers' compensation exclusivity provision; and (4) the admission of certain affidavits did not warrant reversal. *Id.* at 23-32, 686 S.E.2d at 694-99.

This Court granted a writ of certiorari to consider whether the Court of Appeals erred in holding that: (1) Bayshore Corp. was entitled to tort immunity as an upstream, statutory employer of Poch and Key; and (2) Bayshore Corp. and Bayshore SC complied with the statutory requirements of securing workers' compensation coverage for Poch and Key. We denied the petition as to Petitioners' challenge regarding the admission of the affidavits.

II. Discussion

A. Jurisdictional Implications of Exclusive-Remedy Doctrine

"The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury." *Edens v. Bellini*, 359

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[3] Having found that Bayshore SC was Poch's and Key's statutory employer, the court declined to address any argument regarding the borrowed-employee doctrine. *Id.* at 26, 686 S.E.2d at 696.

[4] *See Cason v. Duke Energy Corp.*, 348 S.C. 544, 547 n.2, 560 S.E.2d 891, 893 n.2 (2002) ("The only exceptions to the exclusivity provisions are: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations" (citations omitted)). Recently, this Court adopted the "dual persona" doctrine as a narrow exception to the exclusivity provision. *Mendenall v. Anderson Hardwood Floors*, L.L.C., 401 S.C. 558, 738 S.E.2d 251 (2013). Our decision in *Mendenall*, however, does not affect the disposition of the instant case as the facts do not warrant an application of the "dual persona" doctrine.

S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Id.* at 441-42, 597 S.E.2d 867. This exclusivity provision states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> *Provided, however,* this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S.C. Code Ann. § 42-1-540 (1985). "The exclusivity provision of the Act applies both to 'direct' employees and to those termed 'statutory employees' under § 42-1-400."[5] *Edens*, 359 S.C. at 445, 597 S.E.2d at 869.

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[5] Section 42-1-400 provides:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985).

"South Carolina courts have repeatedly held that determination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Consequently, this Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). "Any doubts as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008).

B. Status of Bayshore SC

Petitioners assert the Court of Appeals erred in determining that Bayshore Corp.[6] was entitled to workers' compensation exclusivity as a statutory employer of Poch and Key. In support of this assertion, Petitioners claim that Bayshore Corp. was a "co-subcontractor" with Bayshore SC. Citing section 42-1-540 of the South Carolina Code, Petitioners contend this status negates workers' compensation exclusivity as it does "not apply to injuries resulting from acts of a subcontractor of the employer or his employees." Petitioners explain that "Poch, Key, and Lenart were co-subcontractors hired by a common employer on the Carolina Bays Parkway project." In turn, "Lenart's employer, Bayshore Corp. (VA) is not entitled to immunity" from tort liability.

"In determining whether an employee is engaged in activity that is 'part of [the owner's] trade, business, or occupation' as required under section 42-1-400, this Court has applied three tests." *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). "The activity is considered 'part of [the owner's] trade, business, or occupation' for purposes of the statute if it (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; ***or*** (3) has previously been performed by the owner's employees." *Id.* "If the activity at issue meets even *one* of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.' " *Id.*

We find Bayshore SC qualifies as a statutory employer under one, if not all three, of these tests. First, the work being performed by Poch and Key was an

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[6] Based on our review of Petitioners' briefs, it appears they concede that Bayshore SC was a statutory employer as they primarily challenge Bayshore Corp.'s status. However, for the purposes of analytical progression, we have analyzed Bayshore SC's status.

important part of Bayshore SC's business activities as Colonna, the president of both Bayshore SC and Bayshore Corp., testified the collapsed trench was dug in order to dismantle a concrete casting bed by removing concrete abutments from steel piles driven into the ground. He confirmed that dismantling casting beds was performed regularly by Bayshore employees as Bayshore "couldn't be in the business of precast concrete for long if [it] didn't have the capacity to change [] form size and be able to meet customer needs."

Second, Colonna testified that dismantling casting beds was a necessary and integral part of Bayshore's business, which was routinely completed by regular, payroll employees at every Bayshore facility. He also noted that the concrete bed being dismantled by Poch and Key had been constructed by regular Bayshore SC employees. Furthermore, Lenart stated that he dug the trench around the abutments and then instructed Poch and Key to enter the trench and dig around the pile caps and steel beams so that Bayshore SC welders could cut the steel beams.

As to the third test, there is evidence that the dismantling of the concrete forms and the worksite cleanup had previously been performed by Bayshore SC employees for several months prior to leasing Poch and Key. Colonna and Lenart testified that Bayshore SC leased Poch and Key to assist the remaining regular Bayshore SC employees in restoring the site to its original condition. Lenart, the Bayshore SC supervisor who dug the trench, testified that both leased and regular employees all worked together to disassemble the facilities, dig trenches, separate steel, burn wood, load equipment, and dispose of trash.

Because Bayshore SC qualified as Poch's and Key's statutory employer, it was immune from liability in tort under the Act's exclusivity provision.

C. Extension of Tort Immunity to Bayshore Corp. as Parent of Subsidiary

Even if Bayshore SC qualified as a statutory employer, Petitioners contend the Court of Appeals erred in extending tort immunity to Bayshore Corp. based on a contractor/subcontractor analysis. Petitioners assert the appropriate analysis is governed by *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962) and *Monroe v. Monsanto Co.*, 531 F. Supp. 426 (D.S.C. 1982), as these cases assess the identity between a parent corporation and its subsidiary for workers' compensation and tort immunity purposes.

Applying this legal standard, Petitioners assert Bayshore Corp. cannot claim immunity based on its relationship to its subsidiary because Bayshore SC was a separate and distinct corporate entity at the time of the accident. In support of this claim, Petitioners characterize the parent-subsidiary relationship as follows: (1) Bayshore SC, rather than Bayshore Corp., was the "owner" of the project; (2) Bayshore Corp. set up Bayshore SC as a "separate entity to independently perform work in South Carolina"; (3) Bayshore Corp. and Bayshore SC were "formally recorded as being separate corporate entities at the time of the accident"; (4) the Board of Directors of both companies were not "identical"; (5) the Bayshore "entities kept separate corporate minutes"; (6) the corporations were headquartered and transacted business in separate locations; (7) the corporations hired and paid their own employees separately; (8) the corporations "strictly maintained separate books, account records, and bank accounts"; and (9) the corporations maintained separate federal tax identification numbers and were required to file separate tax reports.

1. Alter Ego Theory

We agree with Petitioners that the Court of Appeals applied an incorrect legal standard; however, as will be discussed, we conclude the Court of Appeals reached the correct result despite this error.

In assessing whether the employees could maintain a tort action against Bayshore Corp., we consider the following general rule:

> A parent corporation is generally not immune from an action in tort by an injured employee of its subsidiary by virtue of the employee's entitlement to workers' compensation. Where an employee of a subsidiary is injured while working on property owned by the parent corporation and receives workers' compensation benefits from the subsidiary, the employee may maintain an action in tort against the parent corporation even though parent and subsidiary are covered by same policy of workers' compensation insurance.
>
> However, a parent corporation's immunity has been recognized in some instances on the theory that the parent is or may be found to be the alter ego of the employer-subsidiary corporation.

82 Am. Jur. 2d *Workers' Compensation* § 90 (2003) (footnotes omitted); *see* Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R.4th 948, § 2 (1984 & Supp. 2013) (discussing alter ego theory by which a parent corporation may seek tort immunity via its interest in the employer-corporation; noting that immunity does not extend where: (1) parent and subsidiary are separate and distinct entities; or (2) there is evidence of fraud, abuse of corporate privilege, or an attempt to circumvent the law to avoid liability).

Initially, we note that Bayshore Corp., in seeking immunity, did not rely solely on the parent-subsidiary designation. Instead, Bayshore Corp. presented evidence through affidavits and deposition testimony to establish that the two corporations could be viewed as only one economic entity.

In examining the relationship between the two corporations, we recognize the correct approach is the one found in *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982).[7] *See* John D. DeDoncker, Note, *Adopting an Economic Reality Test When Determining Parent Corporations' Status for Workers' Compensation Purposes*, 12 J. Corp. L. 569, 577 (1987) (analyzing different theories to assess parent-subsidiary relationship for workers' compensation purposes; discussing *Monroe* and stating, "[t]he alter ego theory functions on the premise that when two corporations operate essentially as one, they should be considered as one for workers' compensation purposes").

In *Monroe*, the plaintiff sustained injuries while employed at the Fovil Manufacturing Company. *Monroe*, 531 F. Supp. at 427. The plaintiff lost his arm in a machine called the Gamble Cutter, which was designed, built, and placed in the Fovil plant by the Hale Manufacturing Company and the Monsanto Company. *Id.* After receiving workers' compensation benefits from Fovil, the plaintiff filed suit against Monsanto and Hale. *Id.* at 428. Monsanto owned all outstanding capital stock of Fovil and Hale. *Id.* at 431. The defendants moved for summary judgment on the ground the action was barred by the exclusivity provision of the

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[7] Although the Court of Appeals referenced *Monroe*, it declined to apply it as the court believed the contractor/subcontractor analysis was more appropriate. *Poch*, 386 S.C. at 27 n.3, 686 S.E.2d at 697 n.3 ("Though we believe *Monroe* is persuasive, we do not believe it is controlling, and we rely upon other case law from South Carolina.").

Workers' Compensation Act. *Id.* at 427. The basis for the motion was their claim that both Fovil and Hale were wholly owned corporate subsidiaries of Monsanto and that all three corporations were in essence a single entity. *Id.* The plaintiff only opposed the motion as to Hale. *Id.* Ultimately, the United States District Court of South Carolina denied the motion, finding Hale was a separate and distinct corporate entity from that of the plaintiff's employer, Fovil. As a result, the court found that Hale could not escape tort liability. *Id.* at 434-35.

In reaching this conclusion, the court analyzed South Carolina law[8] and gleaned eight factors that courts should consider in determining whether two related businesses are separate and distinct corporations for workers' compensation purposes. *Id.* at 432-34. These factors may be assessed by answering the following questions:

(1) Did the two businesses maintain separate corporate identities?

(2) Did the two businesses maintain separate Boards of Directors?

(3) Did the two businesses transact business from different locations under different managers?

(4) Did the two businesses hire and pay their own employees?

(5) Did the two corporations hold themselves out to their employees as two separate identities?

(6) Did the two corporations engage in different business activities?

(7) Did the two corporations maintain separate books, bank accounts, and payroll records?

(8) Did the two corporations file separate tax returns?

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[8] Specifically, the court considered the following cases: (1) *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E.2d 718 (1948); (2) *Brown v. Moorhead Oil Co.*, 239 S.C. 604,124 S.E.2d 47 (1962); and (3) *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.S.C. 1977).

Id. at 434. Although the court enumerated these eight factors, it emphasized that these factors were not the only relevant factors and that none of the factors alone provided immunity. *Id.*

2. Application of *Monroe* Factors

Keeping in mind that no one factor is controlling, the weight of the evidence supports a finding that Bayshore SC was the alter ego of Bayshore Corp.

First, the two businesses did not clearly maintain separate identities as Colonna, the president of both corporations, testified that "Bayshore" was used "interchangeably" in signing documents, including the lease agreement for the project and the Job Place contract. Furthermore, documents such as letterhead, employment applications, benefits packages, and safety manuals used at the South Carolina site displayed a standard Bayshore Corp. designation. In terms of workers' compensation coverage, Colonna testified that one policy covered all corporations but that separate, self-insured reserve funds were set up for each corporation.

Second, with the exception of two people, the corporations shared the same officers and directors. In fact, Bayshore SC's Board of Directors was comprised entirely of members of the Bayshore Corp.'s Board of Directors. All officers received their salaries from Bayshore Corp. Notably, the same legal counsel, safety director, and engineers were used for both corporations and paid by Bayshore Corp.

As to the third factor, Bayshore Corp. was headquartered in Virginia whereas Bayshore SC operated exclusively in South Carolina. However, Bayshore Corp. entered into the lease agreement in South Carolina, purchased the equipment to be used on the jobsite, and periodically sent several Bayshore Corp. employees to oversee the completion of the project. Significantly, all of the billing invoices and normal correspondence for Bayshore SC were sent to Bayshore Corp. in Cape Charles, Virginia. Bayshore Corp. also retained all of Bayshore SC's corporate and personnel files.

In terms of the fourth factor, Colonna testified that the hiring and firing of salaried employees at the South Carolina site was done by a Bayshore Corp. employee. He further testified that salaried employees, who worked on the South Carolina site, received a paycheck from Bayshore Corp. and were provided 401(k)

plans and healthcare coverage through Bayshore Corp. These salaried employees included: (1) Lenart, the production supervisor; (2) Brandon Rowe, the plant manager; and (3) Randy Maccoon, the quality control supervisor. Hourly employees were paid through Bayshore SC. Bayshore SC also hired the temporary workers, including Poch and Key, to assist on the site. Toward the conclusion of the project, the invoices for these workers were paid through the accounts payable department at Bayshore Corp.

Regarding the fifth factor, the two corporations did not hold themselves out to their employees as separate entities as Bayshore SC employees were provided with employment documents that were standard for Bayshore Corp.

As to the sixth factor, both corporations engaged in the same business activity of providing concrete forms for construction sites. Both corporations also used the same process and equipment in performing this work.

In terms of the seventh factor, the two corporations maintained separate books, accounting records, and bank accounts for purposes of financial accountability. However, Bayshore SC contributed to Bayshore Corp.'s gross revenues. More importantly, Bayshore Corp. was entirely responsible for the financial operation of Bayshore SC.

Finally, as to the eighth factor, the two corporations maintained separate tax identification numbers and filed separate tax returns. Admittedly, the separate tax return filings militate against the Respondents; however, this one factor, though weighty, is not dispositive in the workers' compensation context. Considering the preponderance of the evidence, we conclude that Bayshore Corp. and Bayshore SC operated as one economic entity.

Based on the foregoing, we find the circuit court and the Court of Appeals correctly determined that Bayshore Corp. was immune from the employees' tort actions as the two corporations could be viewed as only one economic entity.[9] *See*

[9] In applying the eight-factor *Monroe* test, the dissent reaches the opposite conclusion. The dissent's position, which is contrary to our view, the decision of the Court of Appeals, and the circuit court's holding, is based on no specific evidence. Rather, the dissent offers a cursory review of the few factors that favor its position. Although the *Monroe* test is not mathematically precise and no single

1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43.80 (Supp. 2012) ("A holding company and its wholly owned subsidiary will be considered a single employer for workers' compensation purposes if the two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity.").[10]

D. Bayshore Corp.'s Status with Respect to Procurement of Workers' Compensation Insurance

If Bayshore Corp. and Bayshore SC were immune from tort liability due to their employment/corporate status, Petitioners claim the Court of Appeals erred in finding the corporations could benefit from this immunity as they failed to offer proof of or secure workers' compensation coverage for Poch and Key in violation of the provisions of the Act.

Citing section 42-5-40[11] of the South Carolina Code and this Court's decision in *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766

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factor is determinative, we believe the dissent may have overlooked the preponderance of the evidence to reach a desired result.

[10] In view of this conclusion, we reject Petitioners' "co-subcontractor" contention as neither corporation comes within the definition of a "subcontractor." *See Black's Law Dictionary* 1437 (7th ed. 1999) (defining "subcontractor" as "One who is awarded a portion of an existing contract by a contractor, esp. a general contractor").

[11] Section 42-5-40 provides:

> Any employer required to secure the payment of compensation under this Title who refuses or neglects to secure such compensation . . . shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Title or at law in an action instituted by the employee or his personal representative against such employer to recover damages for personal injury or death by accident and in any such action such employer shall not be permitted to defend upon any of the grounds mentioned in Section 42-1-510.

(1999), Petitioners assert that "each entity who seeks to take advantage of Workers' Compensation immunity must demonstrate that it secured Workers' Compensation benefits for the statutory employee, even if the statutory employee's immediate employer has already secured those benefits."

Petitioners further assert that "neither Bayshore Corp. (VA) nor Bayshore SC secured compensation directly or indirectly for Poch and Key, nor did they meet the requirements of section 42-1-415(B)" of the South Carolina Code,[12] which provides a method by which a corporation can demonstrate that their statutory employees are covered by workers' compensation insurance at the time of hiring even though the corporation is not directly liable as a statutory employer.

Essentially, Petitioners challenge the following findings of the Court of Appeals: (1) section 42-5-40 concerns only the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state Uninsured Employer's Fund and cannot be applied to prevent an employer from benefitting from the exclusivity provision; and (2) section 42-1-415(B) applies only to situations when a person seeks to qualify for reimbursement from the Uninsured Employer's Fund.

S.C. Code Ann. § 42-5-40 (1985). This code section was amended effective July 1, 2007. However, because the work-related accident occurred on June 6, 2002, we cite to the earlier version of the statute.

[12] Section 42-1-415 provides in relevant part:

> To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

S.C. Code Ann. § 42-1-415(B) (Supp. 2012).

1. Insurance Requirements as Interpreted in *Harrell*

We find the Court of Appeals' interpretation of section 42-5-40 is erroneous as it is in direct conflict with this Court's decision in *Harrell*. In that case, Harrell, an employee of Folk Land Management, Inc., filed a negligence action against Pineland Plantation, Ltd., the partnership that owned and operated a plantation maintained as a vacation resort where Harrell sustained an injury for which he received workers' compensation benefits from Folk. *Harrell*, 337 S.C. at 317-19, 523 S.E.2d at 768-69. After settling his workers' compensation claim against Folk, Harrell brought a tort action against Pineland for negligence. *Id.* at 319, 523 S.E.2d at 769. The circuit court dismissed Harrell's complaint on the ground his exclusive remedy was under the Workers' Compensation Act. *Id.*

On appeal, the Court of Appeals reversed the circuit court's order, finding Harrell could sue Pineland in an action at law. *Id.* This Court granted a writ of certiorari to consider whether Pineland was Harrell's statutory employer under the Act and whether Pineland was immune from tort pursuant to the Act's exclusive remedy provision even though it did not purchase its own workers' compensation coverage or otherwise qualify as self-insured under the Act. *Id.* at 320, 523 S.E.2d at 769.

Having found Pineland was Harrell's statutory employer, we analyzed whether Pineland could claim immunity under the Act even though it did not provide any form of workers' compensation insurance. *Id.* at 325, 523 S.E.2d at 772. Because Pineland failed to secure the payment of compensation as prescribed by sections 42-5-10 and -20 of the Act, we held that Pineland could not avail itself of tort immunity under the Act's exclusive remedy provision. *Id.* at 331, 523 S.E.2d at 775. In reaching this conclusion, we explained that "an employer who fails to secure the payment of compensation as prescribed in section 42-5-20 loses its immunity under the Act's exclusive remedy provision" and becomes liable either under the Act or in an action at law pursuant to section 42-5-40. *Id*. at 327, 523 S.E.2d at 773 (emphasis added).

In *Glover v. United States*, 337 S.C. 307, 523 S.E.2d 763 (1999), we reaffirmed our decision in *Harrell*, explaining that:

> Under the Act, the basic duty of any employer, whether it be the direct employer or statutory employer, is the obligation to secure the payment of compensation as prescribed by section 42-5-20.

> Compliance with this obligation is the *quid pro quo* exacted from the employer in exchange for immunity. Thus, a statutory employer who fails to secure the payment of compensation as prescribed by section 42-5-20 may not claim immunity under the Act.

Id. at 310-11, 523 S.E.2d at 764.

2. Procurement of Insurance

Based on *Harrell* and its progeny, Petitioners are correct that Bayshore Corp. and Bayshore SC could have lost their tort immunity had they failed to procure workers' compensation coverage for Poch and Key at the time of hiring. However, we hold the corporations preserved their immunity as there is evidence to support the circuit court's finding that "both retained worker's compensation insurance that would have covered [Petitioners] had Job Place/Personnel Resources failed to secure coverage."

Although a lack of coverage was not directly contested before the circuit court, the Respondents nevertheless offered the affidavit of Richard Stadler, the construction underwriter for St. Paul/Travelers Insurance Company. Stadler attested that Bayshore Corp. and Bayshore SC had workers' compensation coverage at the time of the accident as there was an "insurance policy [that] cover[ed] Bayshore Concrete Products Corporation and of South Carolina Inc."[13] Additionally, Colonna, who is the president of both corporations, testified that workers' compensation coverage was secured for the South Carolina site at the time of the accident. He further noted that "an excess or umbrella policy," which was above the self-insured reserved, covered "all the companies."[14] Thus, without

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[13] The dissent refuses to accept this affidavit as evidence of proof of workers' compensation insurance. The dissent, however, neither challenges the truthfulness of the affidavit nor offers supporting authority for its position. Accordingly, we discern no basis for which to reject the affidavit as it is by its very nature a sworn statement intended as documentary evidence in a legal proceeding. *See Marine Wharf & Storage Co. v. Parsons*, 49 S.C. 136, 139, 26 S.E. 956, 966 (1897) ("An 'affidavit' is defined in 1 Am. & Eng. Enc. Law, p. 307, to be 'a formal written (or printed) voluntary ex parte statement sworn (or affirmed) to before an officer authorized to take it, to be used in legal proceedings.' ").

[14] Despite Colonna's use of the term "self-insured," there was an insurance policy in existence that provided workers' compensation coverage.

evidence to the contrary, we find the corporate entities complied with the requirements of *Harrell*.

The dissenters reach a contrary result by placing form over substance as to the issue of procurement of insurance by Bayshore Corp. and Bayshore SC. Without dispute, evidence of compliance with section 42-5-20 is required of every employer subject to the provisions of the Workers' Compensation Act. Section 42-5-20, however, allows employers to provide proof of insurance or financial ability to pay through various sources, including self-insurance. Notably, the responsibility for filing proof of compliance with section 42-5-20 falls on the insurance carrier unless the employer is self-insured. Here, contrary to the dissenters' assumption, Bayshore's alleged umbrella insurance policy did not transform Bayshore into a self-insured employer. Thus, because Bayshore procured the requisite insurance policy and was not self-insured, the insurance carrier bore the responsibility of providing proof of insurance coverage. Should Bayshore be penalized for failing to do something that it was not required to do? We think not. We must also recognize there was no allegation or evidence in the record to suggest that proof of compliance with section 42-5-20 was not filed.

Furthermore, we emphasize that this case did not go to trial but, rather, was presented in the posture of Respondents' motion for summary judgment or alternative motion to dismiss. Undoubtedly, the parties were aware that the evidence presented at this hearing would include affidavits. The affidavit of the construction underwriter for St. Paul/Travelers Insurance Company specifically stated that the insurance policy covered Poch's and Key's workers' compensation claims. This affidavit was not challenged during the motion hearing. Yet, inexplicably, the dissenters find this unchallenged affidavit from the insurance carrier to be insufficient evidence at the summary judgment/motion to dismiss hearing.

Having concluded that Bayshore Corp. and Bayshore SC secured workers' compensation coverage, we find Petitioners' reliance on section 42-1-415(B) is misplaced as that provision applies only in cases involving reimbursement from the Uninsured Employer's Fund and neither corporation in the instant case sought to transfer liability to the Fund. *See Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 315, 680 S.E.2d 1, 3 (2009) (interpreting section 42-1-415 and stating, "Liability may only be transferred from the higher tier contractor to the Fund after the higher tier contractor has properly documented the lower tier contractor's claim that it retains workers' compensation insurance").

III. Conclusion

Based on the foregoing, we find the Court of Appeals correctly affirmed the decision of the circuit court as Bayshore SC and Bayshore Corp. proved they were entitled to immunity from tort under the Act's exclusivity provision. However, in reaching this decision, the Court of Appeals erred in its analysis as it should have utilized the alter ego theory rather than the contractor/subcontractor doctrine in determining whether tort immunity extended to Bayshore Corp. Furthermore, the Court of Appeals misinterpreted this Court's decision in *Harrell* as a statutory employer can lose its immunity under the Act's exclusive remedy provision if the employer fails to secure the payment of workers' compensation as prescribed by the Act. Because Bayshore SC and Bayshore Corp. secured such coverage, they retained their immunity. Accordingly, we affirm as modified the decision of the Court of Appeals.

AFFIRMED AS MODIFIED.

KITTREDGE, J., and Acting Justice James E. Moore, concur. TOAL, C.J., and PLEICONES, J., concur in part and dissent in part in separate opinions.

CHIEF JUSTICE TOAL: I respectfully concur in part, and dissent in part. First, I agree wholeheartedly with the majority's adoption of the *Monroe*[15] factors and its application of these factors in the instant case. In my opinion, the evidence supports a finding that Bayshore SC was the alter ego of Bayshore Corp. and both should be immune from liability in tort as statutory employers of Poch and Key.

As to Petitioners' next argument, that the court of appeals erred in finding that Bayshore Corp. and Bayshore SC could benefit from the immunity because they failed to offer proof of or secure workers' compensation coverage in violation of the Act and this Court's decision in *Harrell*,[16] the majority was correct in finding that the court of appeals misinterpreted *Harrell*. I agree with the majority's interpretation that, pursuant to *Harrell*, a statutory employer becomes liable under section 42-5-40 of the South Carolina Code[17] for failure to secure workers' compensation insurance for the statutory employee in accordance with the Act.

However, I join Justice Pleicones's dissenting opinion because it is my view that Bayshore Corp. and Bayshore SC did not submit adequate proof that they secured or filed evidence of workers' compensation coverage as required by the Act and *Harrell*. *See* S.C. Code Ann. § 42-5-20 (Supp. 1998) ("Every employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or mutual insurance association formed by a group of employers so authorized or shall furnish to the commission satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this title."); *id.* § 42-5-30 (Supp. 2012) ("Every employer accepting the compensation provisions of this title shall file with the Commission, in form prescribed by it, annually or as often as may be necessary evidence of his compliance with the provisions of § 42-5-20 and all others relating thereto."); *Harrell*, 337 S.C. at 328, 523 S.E.2d at 774 (refusing "to adopt an interpretation of the Act that would allow [an employer] to claim tort immunity without complying with the quintessential obligation imposed upon [the employer] by the Act—the duty to *secure* the payment of compensation." (emphasis in

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[15] *Monroe v. Monsanto*, 531 F. Supp. 426 (D.S.C. 1982).

[16] *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

[17] *See* S.C. Code Ann. § 42-5-40 (1985).

original) (alterations added)). With respect to Bayshore SC's coverage, the corporations submitted an affidavit of Richard Stadler, the construction underwriter for St. Paul/Travelers Insurance Company as proof of coverage.[18] In my view, the content of this affidavit is grossly insufficient to establish that either corporation procured workers' compensation insurance, filed evidence of workers' compensation insurance, or filed evidence of financial ability sufficient to qualify as self-insured. *See* S.C. Code Ann. §§ 42-5-10 (1985); 42-5-20; 42-5-30; 42-5-40. Stadler's affidavit does not contain the requisite specificity required under the statute, as it does not refer to the precise type of coverage or time period covered, and thus, we are unable to discern the kind and scope of coverage allegedly in effect at the time of the accident. Moreover, there is no evidence that the corporations filed proof of insurance with the Commission. The majority further relies on the testimony of Keith Colonna, the president of both corporations, who testified that the corporations secured workers' compensation insurance prior to the accident, noting that "an excess or umbrella policy" above the self-insured reserve, covered "all the companies." I agree with Justice Pleicones that "the only inference to be drawn from this record in light of Mr. Colonna's testimony is that both Bayshore entities viewed themselves as self-insured, and that the underwriter was referring to a liability umbrella policy." Thus, I join his dissent in part, as I, too, am unwilling to hold that a mere representation of coverage by an employer is sufficient to meet the statutory requirements, and I disagree with the majority's holding that the corporations retained tort immunity because they procured workers' compensation for the employees. The majority's conclusion is simply unsupported by this record.

Therefore, I would hold that because neither Bayshore SC nor Bayshore Corp. complied with the insuring requirement of the Act, they are liable in tort to under section 42-5-40. Accordingly, I would reverse the court of appeals.

[18] I note that Stadler's affidavit makes no mention of Bayshore Corp.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree that we should explicitly adopt the *Monroe*[19] test here, but reach the opposite result when I apply that test to these facts. Further, I find no evidence that either Bayshore entity purchased workers' compensation liability insurance within the meaning of our statutes and conclude that neither can invoke tort immunity.

In my opinion, there is no evidence in the record that either Bayshore SC or Bayshore Corp "insure[d] and ke[pt] insured his liability" as required by S.C. Code Ann. § 42-5-20 (Supp. 2012**)** and therefore both are subject to a suit in tort.

S.C. Code Ann. § 42-5-40 (Supp. 2012). An affidavit from an underwriter to the effect "[t]hat the insurance policy [covering both Bayshore entities] as written would have provided Workers' Compensation coverage" for petitioners is insufficient to support a finding that the policy to which he refers contains the provisions required by S.C. Code Ann. § 42-5-70 (1984) or that imposed by § 42-5-80(A) (Supp. 2012). In fact, the only inference to be drawn from this record in light of Mr. Colonna's testimony is that both Bayshore entities viewed themselves as self-insured, and that the underwriter was referring to a liability umbrella policy. There is neither evidence nor any representation that the Bayshore entities met the South Carolina statutory requirements for self-insurers. *See* S. C. Code Ann. § 42-5-20; § 42-5-50 (1984); § 42-5-10 (Supp. 2012). I am unwilling to hold that an employer's mere representation that it is self-insured is sufficient to satisfy the statutes, nor am I willing to agree that an umbrella policy is sufficient to meet the insuring requirements. I disagree with the majority's conclusion that there is evidence the Bayshore entities directly purchased workers' compensation liability coverage.

Based upon my view of the evidence, I conclude neither Bayshore SC nor Bayshore Corp. complied with the insuring requirement of § 42-5-20, and therefore may be liable in tort to petitioners pursuant to § 42-5-40. *Harrell V. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

I agree we should explicitly adopt the eight-factor *Monroe* test for determining the relationship between parent and subsidiary in the workers'

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[19] *Monroe v. Monsanto Co.*, 531 F.Supp. 426 (D.S.C. 1982).

compensation area. In light of this decision, we should remand the case in order to allow the parties to present any additional relevant evidence, and to allow the Commission to make a factual determination. If, however, we are to apply this new test in this appeal, then viewing these factors in light of the facts as recited by the majority, I would conclude that Bayshore SC and Bayshore Corp. are separate economic entities. The businesses maintained separate corporate identities, had separate Boards of Directors albeit with many common members, were located in two different locations, hired and paid at least some of their own employees, maintained separate books, bank accounts, and payroll records, and filed separate tax returns. I therefore disagree with the majority's conclusion that Bayshore Corp. shares Bayshore SC's status as petitioner's statutory employer. As explained above, I also disagree with the majority's finding that the Bayshore entities met the insuring requirement found in § 42-5-20. I therefore would find both Bayshore SC and Bayshore Corp. may be liable in tort to petitioners under § 42-5-40. Finally, I agree with the majority that we should explicitly adopt the *Monroe* test, and I also agree that § 42-1-415(B) is inapplicable here.

Because I find that both Bayshore SC and Bayshore Corp. failed to meet their statutory workers' compensation insuring obligations, I would reverse the decision of the Court of Appeals which upheld the circuit court finding that both Bayshore SC and Bayshore Corp. are immune from tort liability

THE STATE OF SOUTH CAROLINA
In The Supreme Court

16 Jade Street, LLC, Respondent/Appellant,

v.

R. Design Construction Co., LLC.; Carl R. Aten, Jr., Individually and in his capacity as principal and agent of R. Design Construction Co., LLC; Catterson & Sons Construction; Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction, Defendants,

Of whom, Carl R. Aten, Jr., is Appellant,

and Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction, is Respondent,

R. Design Construction Co., L.L.C., Third-Party Plaintiffs,

v.

Kintz Electric, Third-Party Defendant.

Appellate Case No. 2009-146786

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

Opinion No. 27305
Heard October 17, 2012 – Filed August 28, 2013

AFFIRMED IN PART AND REVERSED IN PART

Mary Bass Lohr, Thomas A. Bendle, and William T. Young, III, all of Howell, Gibson & Hughes, P.A., of Beaufort, for Appellant.

Jeffery A. Ross, of Clawson & Staubes, LLC, of Charleston, for Respondent.

E. Mitchell Griffith, Michael D. Freeman, and Matthew D. Cavender, of Griffith, Sadler, & Sharps, P.A., of Beaufort, for Respondent-Appellant.

JUSTICE HEARN: Carl Aten, Jr. appeals the circuit court's order finding him personally liable for torts he committed as a member of a limited liability company (LLC). Although this case poses the novel question of whether the Uniform Limited Liability Company Act (LLC Act) shields an LLC member from personal liability from his own torts, we save that discussion for another day and find Aten has committed no actionable tort. We therefore reverse the portion of the circuit court's order which imposes personal liability upon Aten.

FACTUAL/PROCEDURAL BACKGROUND

R. Design Construction Company, L.L.C. is engaged in the construction industry. Aten and his wife are the only members of R. Design, and Aten holds a residential home builder's license. R. Design selected a parcel in Beaufort, South Carolina, on which it planned to build a four-unit condominium project. When Aten could not secure the necessary financing, he approached Dennis Green, who formed 16 Jade Street, LLC to develop the property. R. Design then entered into a contract with Jade Street to construct the condominium. Aten signed the contract as a member of R. Design and not in his personal capacity.

As part of the deal, R. Design was to be paid $150,000 to serve as the general contractor for the project, and it alone was in charge of choosing subcontractors. One of the subcontractors selected by R. Design was Catterson &

Sons Construction, Inc. Michael Catterson, the sole shareholder of Catterson & Sons, was a subcontractor with a special framing license in addition to a general contractor's license. Catterson & Sons' scope of work was focused primarily on framing and aerated autoclave concrete (AAC) block[1] installation.

As the general contractor, R. Design was to supervise the project. Thus, whenever Catterson had a question about the work he was to perform or any issues that arose, he would ask Aten. Furthermore, Catterson & Sons was to implement the design standards specified by Aten and R. Design. Catterson himself, however, did not actually perform any construction but served mainly as the liaison between the foreman and his own workers.

Several months after construction began, problems arose concerning the AAC block installation and the framing. Green called Kern-Coleman, the structural engineer, to perform an inspection. The initial inspection identified four defects, but Green pressed on, following Aten's assurances that these problems would be addressed. However, the problems did not abate. Following a progress payment dispute, Catterson & Sons left the job site and did not return. In the ensuing months, Aten's relationship with Green deteriorated as Aten tarried in fixing the defects, and the construction eventually ground to a halt. R. Design subsequently left the project, never replacing Catterson & Sons nor adequately addressing the defects.

The day after R. Design left the project, Kern-Coleman conducted another inspection of the property. This time, it identified thirty-four defects in addition to the original four, which had not yet been remedied, for a total of thirty-eight. Anchor Construction was retained as the new general contractor, and its own inspection revealed sixty defects in the original construction. After Anchor began working on the project, more defects surfaced.

Jade Street subsequently sued R. Design, Aten, Catterson & Sons, and Catterson for negligence and breach of implied warranties. Jade Street also filed a breach of contract claim against R. Design and Aten.[2] Following a bench trial, the

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[1]AAC blocks are preformed concrete blocks with cavities that, when stacked, permit rebar and grouting mortar to be inserted to provide structural support.

[2] R. Design brought cross-claims against Catterson and Catterson & Sons for equitable indemnity and breach of contract. Aten also filed a third-party complaint

circuit court found in favor of Jade Street as follows: (1) against R. Design for breach of contract, negligence, and breach of implied warranties; (2) against Catterson & Sons for negligence and breach of contract; and (3) against Aten personally for negligence in failing to supervise the subcontractors. In rejecting Aten's argument that the LLC Act shielded him from personal liability, the circuit court additionally pointed to the fact that Aten held a residential home builder license and was therefore more than a "mere member" of the LLC. It concluded the statutes pertaining to the license create civil liability for the licensee. The court imposed no liability against Catterson himself. Ultimately, the circuit court awarded Jade Street $925,556 in damages for its claims and awarded the same amount to R. Design for its breach of contract claim against Catterson & Sons. This appeal followed.

This Court affirmed the circuit court as modified in a decision published April 4, 2012. We subsequently granted Aten's petition for rehearing on May 4, 2012. We now withdraw our previous opinion and issue this opinion.

ISSUES PRESENTED

I. Did the circuit court err in finding Aten can be held personally liable for negligent acts he committed while working for an LLC of which he was a member?

II. Did the circuit court err in not finding Catterson personally liable for the tortious acts of Catterson & Sons?

LAW/ANALYSIS

I. ATEN'S PERSONAL LIABILITY

Aten argues the provisions of the LLC Act, as enacted in South Carolina, shield a member of an LLC from personal liability for ordinary negligence committed while working in furtherance of the LLC and therefore the circuit court erred in finding him individually liable. However, prior to addressing the statute's construction, we turn first to the threshold question of whether Aten owed a duty of

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against Kintz Electric, an electrical subcontractor. Issues relating to these claims were not raised on appeal.

care upon which to establish a negligence claim. The circuit court concluded the Residential Home Builders Act creates a legal duty for a residential builder license holder. We disagree.

The main factor in determining whether a statute imposes a legal duty is legislative intent. *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). Whether the legislature intended to create a private cause of action for the violation of a statute is determined primarily by the language of the statute. *Id*. Generally, if a statute does not expressly establish civil liability, a duty will not be implied absent evidence the legislature enacted the statute for the benefit of a private party. *Id.* at 397, 645 S.E.2d at 248.

Section 40-59-400 of the South Carolina Code (2005) codifies the definitions of terms used in the Residential Home Builders Act and provides the following relevant definitions:

> (5) "Resident licensee" means a licensed practitioner who spends a majority of each normal workday working out of a principal or branch office and who is in responsible charge of the office and the building services provided from that office including, but not limited to, responsibility for applying for permits for the firm.
>
> (6) "Responsible charge" means the direction of building services by a residential builder, residential specialty contractor, or home inspector to the extent that successful completion of the building services is dependent on the personal supervision, direct control, and final decisions by the qualified registrant to the extent that *the qualified registrant assumes professional responsibility* for the building services.

(emphasis added). Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility "is broad enough to include civil liability."

We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty, nor was this statute enacted for the benefit of a private party. The provisions in question concern the issuance of certificates of authorization for a company engaging in residential home-building, specialty contracting, or home inspection and serve essentially to

define terms used within a subsection the Residential Home Builders Act. Section 40-59-410 of the South Carolina Code (2005) requires the company to identify a resident licensee in "responsible charge" of each principal or branch office. § 40-59-410(B)(1), (D), & (H). The statute therefore requires at least one person in each office of the company to be licensed and assume professional responsibility for the project. However, we disagree with the court's conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court. *See* S.C. Code Ann. § 40-1-110(1) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he "lacks the professional or ethical competence to practice the profession"); § 40-59-110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned). Thus, we decline to construe these statutes so broadly as to create a duty in tort.

Accordingly, we find the circuit court erred in finding Aten personally liable because he owed no duty to Jade Street. We therefore find it unnecessary to reach the novel issue of whether the LLC Act absolves an LLC member of personal liability for negligence committed while acting in furtherance of the company business. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the Court need not address remaining issues when disposition of prior issue is dispositive).

II. CATTERSON'S PERSONAL LIABILITY

Jade Street also appeals the circuit court's conclusion that Catterson himself is not personally liable for the actions of Catterson & Sons. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 33-6-220(b) (2006) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."); *Aaron v. Mahl*, 381 S.C. 585, 591, 674 S.E.2d 482, 485 (2009) ("In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them.").

CONCLUSION

For the foregoing reasons, we reverse the circuit court's holding that Aten is personally liable and affirm the court's finding that Catterson is not personally liable for the acts of Catterson & Sons.

TOAL, C.J., PLEICONES and KITTREDGE, JJ., concur. BEATTY, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Justin B., a Juvenile Under the Age of Seventeen, Appellant

Appellate Case No. 2010-151466

Appeal From Horry County
Jan B. Bromell Holmes, Family Court Judge

Opinion No. 27306
Heard October 4, 2011 – Filed August 28, 2013

AFFIRMED AS MODIFIED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: Justin B. (Appellant), a minor under seventeen years of age, challenges the active electronic monitoring (electronic monitoring) requirements of section 23-3-540 of the South Carolina Code. Section 23-3-540 requires that individuals convicted of certain sex-related offenses, including

criminal sexual conduct with a minor in the first degree (CSC–First), submit to electronic monitoring for the duration of the time the individual is required to remain on the sex offender registry. S.C. Code Ann. § 23-3-540(A)–(H) (Supp. 2012). An individual found guilty of CSC–First is required to register as a sex offender bi-annually for life. *Id.* §§ 23-3-430, -460 (Supp. 2012). Section 23-3-540 also provides that ten years from the date electronic monitoring begins, an individual may petition the chief administrative judge of the general sessions court for the county in which the offender resides for an order of release from the monitoring requirements. *Id.* § 23-3-540(H). However, those persons convicted of CSC–First may not petition for this review. *Id.* Thus, these sex offenders must submit to monitoring for the duration of their lives. Appellant argues that, because he is a juvenile, this imposition constitutes cruel and unusual punishment in violation of the federal and state constitutions. We find electronic monitoring is not a punishment, and reject Appellant's claim. However, Appellant must be granted periodic judicial review to determine the necessity of continued electronic monitoring.

FACTUAL/PROCEDURAL BACKGROUND

On May 3, 2009, Appellant's adoptive mother witnessed him sexually molest his adoptive sister and notified police. In August 2009, Appellant was indicted for CSC–First in violation of section 16-3-655(A)(1) of the South Carolina Code. S.C. Code Ann. § 16-3-655(A) (Supp. 2012). Pursuant to a negotiated plea deal in which Appellant agreed to plead guilty if allowed to do so in family court, Appellant was brought before the family court on a juvenile petition in November 2009. Appellant admitted guilt and was subsequently adjudicated delinquent. The family court committed Appellant for an indeterminate period to the Department of Juvenile Justice, not to exceed Appellant's twenty-first birthday, and required Appellant to undergo counseling. The family court also ordered Appellant to register as a sex offender as required by section 23-3-460 of the South Carolina Code, and to comply with section 23-3-540's electronic monitoring requirements. *Id.* §§ 23-3-460, -540. Appellant appealed, and this Court certified the case pursuant to Rule 204(b), SCACR.

ISSUE PRESENTED

Whether lifetime electronic monitoring pursuant to sections 23-3-400 and -540 of the South Carolina Code is unconstitutional as a violation of the prohibition against cruel and unusual punishment under the Eight Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution when applied to a juvenile.

STANDARD OF REVIEW

All statutes are presumed constitutional, and if possible, will be construed to render them valid. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt. *In re Lasure*, 379 S.C. 144, 147, 666 S.E.2d 228, 229 (2008). The party challenging the statute's constitutionality bears the burden of proof. *In re Treatment of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).

LAW/ANALYSIS

The Eighth Amendment to the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII; *see also* S.C. Const. art. 1, § 15 ("Excessive bail shall not be required . . . nor shall cruel, nor corporal, nor unusual punishment be inflicted."). Appellant does not argue that electronic monitoring itself is cruel and unusual, but that "the duration of lifetime electronic monitoring for a juvenile offender is so severe as to constitute a violation of the prohibition against cruel and unusual punishment." Our determination of whether the electronic monitoring provisions of section 23-3-540 constitute cruel and unusual punishment rests primarily on whether electronic monitoring constitutes a punishment.

I. Civil Requirement or Criminal Punishment

We hold that Section 23-3-540's electronic monitoring requirement is a civil obligation similar to other restrictions the state may lawfully place upon sex

offenders. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 93 (2003) (holding that the imposition of restrictive measures on sex offenders adjudged to be potentially dangerous is a legitimate non-punitive governmental objective); *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding lifelong sex offender registration does not implicate a liberty interest because it is non-punitive); *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 526 (2001) (holding sex offender registration non-punitive in purpose or effect and determining that sex offender registration did not constitute a criminal penalty).

The United States Supreme Court's analysis in *Smith v. Doe* is instructive on this point.

In that case, the respondents pled *nolo contendere* to child molestation charges and completed rehabilitative programs for sex offenders following their release from prison in 1990. *Smith*, 538 U.S. at 91. In 1994, the Alaska State Legislature enacted the Alaska Sex Offender Registration Act (the Act). *Id.* at 89. The Act required all sex offenders to register with law enforcement authorities and provide periodic verification of the information submitted at the time of registration. *Id.* at 90–91. The Act applied to sex offenders convicted prior to the Act's passage. *Id.* The respondents challenged the Act as an ex post facto violation. *Id.* The United States District Court for the District of Alaska rejected the respondents' claim, granting summary judgment to the state. However, the United States Court of Appeals for the Ninth Circuit determined that although the legislature intended the Act "to be a non-punitive, civil regulatory scheme," the Act's actual effects were punitive. *Id.* at 91–92.

The Supreme Court disagreed, beginning its inquiry by determining the legislature's objective from the Act's text and structure. *Id.* at 92–93 ("Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction . . . . A conclusion that the legislature intended to punish would satisfy an ex post facto challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it.") (citations omitted).

The Supreme Court observed that the Alaska State Legislature expressed the Act's objective in the statutory test itself, finding that "sex offenders pose a high risk of offending," and identifying the public's protection as the Act's "primary

governmental interest." *Id.* at 93. Thus, the Supreme Court held, "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). Additionally, the Supreme Court noted that the Act did not require any procedural safeguards associated with the criminal process and contemplated "distinctly civil procedures." *Id.* at 96 (concluding that the Alaska State Legislature intended to create a civil, non-punitive regime).

The Supreme Court next focused its inquiry on the Act's actual effects, and relied principally on the factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963),[1] finding:

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.

Smith, 538 U.S. at 97.

The respondents argued that the Act's provisions resembled shaming punishments of the colonial period. *Id.* The Supreme Court disagreed, observing that

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[1] "The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. **Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned** are all relevant to the inquiry, and may often point in differing directions." *Mendoza-Martinez*, 372 U.S. at 168–69 (emphasis added).

> [p]unishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.

Id. at 98. However, the Court found that the Act's associated stigma resulted not from public display for ridicule, but instead from the dissemination of accurate information from a criminal, and generally public, record. *Id.* ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."). Moreover, the Act imposed no physical restraint, and thus did not resemble imprisonment. *Id.* at 99–100.

The Ninth Circuit concluded that the Act contained retributive registration obligations, thus promoting a traditional aim of punishment. *Id.* at 102. Additionally, the state conceded that the Act might deter future crimes. *Id.* However, the Supreme Court found neither point required a determination that the Act constituted a punishment. *Id.* First, a governmental program may deter crime without imposing punishment, and to find that the mere presence of a deterrent purpose rendered a sanction "criminal," would severely undermine the state's ability to engage in effective regulation. *Id.* Second, the Act's reporting requirements related to the danger of recidivism—consistent with a regulatory objective. *Id.*

The Supreme Court found the Act's rational connection to a non-punitive purpose the "most significant" factor in determining that the Act's overall effects were non-punitive:

> As the Court of Appeals acknowledged, the Act has a legitimate non-punitive purpose of "public safety, which is advanced by alerting the

> public to the risk of sex offenders in their communit[y]" . . . . A statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance. The imprecision [the respondents] rely upon does not suggest that the Act's non-punitive purpose is a "sham or mere pretext."

Id. at 102–03 (citation omitted).

Finally, the Supreme Court determined that the Act was not excessive in relation to its regulatory purpose. The Ninth Circuit's analysis of this issue found the Act excessive because it applied to all convicted sex offenders without regard to future dangerousness and placed no limitation on the number of persons with access to the information. *Id.* at 103. The Supreme Court viewed neither reason persuasive, finding first that the legislature made reasonable categorical judgments regarding the "high" rate of recidivism among convicted sex offenders, and second, that the notification system was passive in nature as it required an individual to seek access to the information. *Id.* at 104–05 ("The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy.").

Only the "clearest proof" will suffice to override legislative intent and transform a previously denominated civil remedy into a criminal penalty. *Id.* at 92, 105–06. In *Smith*, the respondents failed to establish that the effects of the Act negated the Alaska State Legislature's intent to create a civil regulatory scheme. *Id.* at 105–06.

In *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), the United States Court of Appeals for the Sixth Circuit relied on the reasoning of *Smith* in its analysis of registration and electronic monitoring statutes passed by the Tennessee General Assembly.

In that case, the defendant, Doe, pled guilty to attempted aggravated kidnapping and two counts of sexual battery by an authority figure. *Id.* at 1000. Following his conviction and sentence, the legislature passed the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act (the Monitoring Act) which authorized the Tennessee Board of Probation and Parole to enroll a

convicted sex offender into an electronic monitoring program. *Id.* Doe claimed that the imposition of electronic monitoring constituted an ex post facto violation. *Id.*

In enacting the law, the legislature stated its intent to utilize the latest technology to monitor and track serious and violent sex offenders. *Id.* at 1004. Additionally, the legislature cited statistics regarding the abnormally high rates of recidivism among sex offenders and law enforcement's ability to use electronic monitoring to narrow ongoing investigations to only those sex offenders that could be linked to the crime. *Id.* Similar to the Supreme Court's decision in *Smith*, the Sixth Circuit found that this purpose evinced an intent to create a civil scheme designed to protect the public. *Id.* (citing *Smith*, 538 U.S. at 93).

In analyzing the statute's practical effects, the Sixth Circuit relied on the factors the Supreme Court utilized in *Smith*. *Id.* (quoting *Smith*, 538 U.S. at 97). According to the Sixth Circuit, the Monitoring Act's registration, reporting, and surveillance components did not constitute an affirmative disability or restraint:

> The [Monitoring Act] does not increase the length of incarceration for covered sex offenders, nor . . . prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation. Perhaps most significantly, the Supreme Court held recently, in sustaining the Alaska Sex Offender Registration Act against an ex post facto challenge, that lifetime registration and monitoring of sexual offenders is "less harsh" than other sanctions that the Court has historically considered non-punitive, such as revocation of a medical license, preclusion from work as a banker, and preclusion from work as a union official.

Id. at 1005. The court also rejected the notion that the wearing of an electronic monitoring device served as a "catalyst for public ridicule," finding:

> The device that Doe must wear is relatively unobtrusive, measuring only 6 inches by 3.25 inches by 1.75 inches and weighing less than a pound. In its size, shape, and placement (hooked to a belt), it appears very similar to a walkie-talkie or other nondescript electronic device. Furthermore, we have every reason to believe that the dimensions of

> the system, while not presently conspicuous, will only become smaller and less cumbersome as technology progresses. We similarly cannot agree that the device's appearance would suggest to the casual observer that the wearer is a criminal, let alone a sex offender . . . . However, even assuming the public would recognize the device as a criminal monitor, there is no evidence to suggest an observer would understand the wearer to be a sex offender. These devices can be utilized in a variety of contexts, such as pretrial monitoring and work release, and are, in fact, advertised for use in such situations. Indeed, the dissent can only point to a single incident wherein a member of the public recognized the device as a monitor, and, even then, there was no evidence to suggest that the observer knew the device to be one that monitored sex offenders, as opposed to criminals generally.

Id. The Sixth Circuit further found that, analogous to the provision analyzed in *Smith*, the deterrent aspects of the Monitoring Act did not negate the overall remedial and regulatory nature of the statute, and that deterrence could serve both criminal and civil goals. *Id.*

The court also noted the legislature's citation of government statistics regarding sex offenders' tendency to reoffend. According to the Sixth Circuit, these statistics supported the notion that the legislature could rationally conclude that sex offenders presented an unusually high risk of recidivism, and that stringent electronic monitoring could both reduce that risk and protect the public without further "punishing" sex offenders. *Id.* at 1006. Finally, the court held that the Monitoring Act was not excessive in relation to its regulatory purpose. *Id.* The court rooted its reasoning on this point in the guiding principle that the excessiveness inquiry is not an exercise in determining whether the legislature made the best choice, but instead, whether the means chosen are reasonable in light of the non-punitive objective. *Id.* The court concluded that the chosen means, for example, ensuring an offender does not enter a prohibited location, supported the finding that those means were reasonable. *Id.* at 1007.

Thus, because of Doe's failure to demonstrate the Monitoring Act's punitive nature, his ex post facto claim necessarily collapsed. *Id.* at 1007–08.

The decisions in *Smith* and *Bredesen* provide an informative guide for examining whether electronic monitoring of sex offenders constitutes punishment for purposes of a constitutional analysis. Additionally, the United States Court of Appeals for the Fourth Circuit's decision in *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), offers an enlightening complement with regard to the specific juvenile context.

In *Under Seal*, the appellant resided with his mother, an active duty service-member, his stepfather, and two half-sisters ages ten and six. *Id.* at 259. The appellant's mother reported to the United States Naval Criminal Investigation Service (NCIS) that the appellant behaved in a sexually inappropriate manner with his two half-sisters, and an investigation confirmed that the appellant sexually molested both girls. *Id.* The appellant admitted to the allegations in the United States District Court for the District of South Carolina. *Id.* The district court adjudicated the appellant delinquent and sentenced him to incarceration as well as a period of juvenile delinquent supervision not to exceed his twenty-first birthday. *Id.* at 259–60. The district court also included a special condition requiring the appellant to comply with the mandatory reporting requirements of the Sex Offender Registration and Notification Act (the SORNA).[2] *Id.* at 260.

The SORNA's comprehensive national registration system requires that sex offenders "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." *Id.* at 260–61. The offender must "appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry." *Id.* at 261. Each jurisdiction is required to make public the contents of its sex offender registry, including each registrant's name, address, photograph, criminal history, and applicable probationary status. *Id.*

On appeal, the appellant contended, *inter alia*, that, because of his juvenile status, the SORNA's registration requirements violated the Eighth Amendment's

[2] In 2006, Congress enacted the SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 *et seq.*, "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators," and establish a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901.

prohibition on cruel and unusual punishment. The Fourth Circuit analyzed the SORNA's possible punitive effect utilizing the "two-part" test the United States Supreme Court explained in *Smith*, *supra*:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.

Id. at 263 (quoting *Smith*, 538 U.S. at 92 and relying on the seven factors discussed in *Mendoza-Martinez*, 372 U.S. at 168–69).

The Fourth Circuit concluded that the SORNA's language, legislative history, and place of codification all indicated Congressional intent to create a non-punitive regulatory framework to "keep track of sex offenders." *Id.* at 264. Further, the Fourth Circuit held that an analysis of the relevant *Mendoza-Martinez* factors compelled the conclusion that the SORNA's application to the appellant did not have a punitive effect.

According to the Fourth Circuit, the SORNA imposed no physical restraint, and does not require changes in employment or residence, but merely required that the appellant report those changes. *Id.* at 265 ("Although [the appellant] is required under the SORNA to appear periodically in person to verify his information . . . this is not an affirmative disability or restraint . . . . Appearing in person may be more inconvenient, but requiring it is not punitive." (citing *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2001), *cert. denied*, *W.B.H. v. United States*, 133 S. Ct. 524 (2012)).

Despite the Supreme Court's ruling in *Smith* that registration requirements have not been regarded as punishment, the appellant in *Under Seal* argued that because records in juvenile criminal cases are not made public, disseminating that information must be punitive. *Id.* The Fourth Circuit rejected this argument, holding:

> A court, however, may permit the inspection of records relating to a juvenile delinquency proceeding under some circumstances. Further,

> the Supreme Court has held that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."

Id. (quoting *Smith*, 538 U.S. at 98). Third, the Fourth Circuit concluded that the SORNA did not promote the traditional aims of punishment, relying wholly on the Supreme Court's conclusion in *Smith* that "any number of governmental programs might deter crime without imposing punishment." *Id.* (citing *Smith*, 538 U.S. at 102). The court next determined that SORNA contained a rational connection to a legitimate, non-punitive purpose—public safety—which is advanced by notifying the public to the risk of sex offenders in their community. *Id.* ("This according to the Supreme Court, is the 'most significant' factor in determining whether a sex offender registration system is non-punitive.").

Finally, the Fourth Circuit found that because the SORNA applied to a specific and limited class of juvenile offenders, the regulatory scheme was not excessive with respect to the SORNA's non-punitive purpose. *Id.* at 266. According to the National Guidelines for Sex Offender Registration and Notification, the SORNA does not require

> registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes.

Id. (citation omitted).

Thus, the Fourth Circuit held the SORNA's registration requirements, as applied to the appellant, did not violate the Eighth Amendment's ban on cruel and unusual punishment. *Id.* ("'The clearest proof' is lacking, as examination of the *Mendoza-Martinez* factors makes clear.").

The *Smith*, *Bredesen*, and *Under Seal* decisions, when taken together, provide the ideal lens through which to review the electronic monitoring scheme Appellant challenges.

II. Appellant's Claim

A. Legislative Intent

Section 23-3-400 of the South Carolina Code outlines the purpose of the state's sex offender registration and electronic monitoring statutory regime. The General Assembly specified that the intent of the article is to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." S.C. Code Ann. § 23-3-400 (2007). Section 23-3-400 provides that, statistically, sex offenders pose a high risk of re-offending and a lack of information about sex offenders impairs law enforcement's ability to "protect communities, conduct investigations, and apprehend offenders." *Id.* Nothing on the face of section 23-3-400 suggests that the General Assembly sought to create anything other than a civil scheme designed to protect the public from harm, or that the electronic monitoring requirement is incompatible with prior judicial determinations regarding restrictions placed on sex offenders. *Cf. Smith*, 538 U.S. at 93 ("Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm."); *Bredesen*, 507 F.3d at 1000 (citing the legislature's determination to utilize the technology to monitor violent sex offenders and narrow ongoing investigations to those sex offenders that could be linked to the crime evinced the legislature's intent to create a civil scheme designed to protect the public); *Under Seal*, 709 F.3d at 264 (concluding that the statute's language, legislative history, and place of codification all indicated Congressional intent to create a non-punitive regulatory framework to "keep track of sex offenders").

B. Application of the Mendoza-Martinez factors

Application of the *Mendoza-Martinez* factors demonstrates that in addition to the fact that the General Assembly intended section 23-3-540 as a civil scheme for the protection of the public, the statute is also not so punitive in effect as to negate the intention to deem it civil. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e will reject the legislature's manifest intent only where a party challenging the statute provides the 'clearest proof' that the 'statutory scheme is so punitive in purpose or effect as to negate [the State's] intention' to deem it 'civil.'") (citation omitted).

Electronic monitoring is not similar to those sanctions historically regarded as punishment. As the Supreme Court observed in *Smith*, historical punishments involved more than the collection of information, or the protection of the public, and held the individual "up before his fellow citizens for face-to-face shaming or expelled him from the community." *Smith*, 538 U.S. at 98.

Appellant failed to provide the Court with any evidence that the electronic monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices. Moreover, the Supreme Court has held that the lifetime registration requirement for sex offenders is non-punitive. *Id.* at 105–06. Electronic monitoring does not provide the same broad public dissemination of a sex offender's status. Thus, it does not logically follow that this Court can deem this prophylactic and non-invasive mechanism punitive. *Cf. Bredesen*, 507 F.3d at 1005 ("However, even assuming the public would recognize the device as a criminal monitor, there is no evidence to suggest an observer would understand the wearer to be a sex offender.").

Appellant may face adverse consequences from his inclusion in the sex offender registry or because someone may infer from an electronic monitoring device that he is a sex offender. However, in contrast to historical shaming punishments, any resulting stigma is not a basic component of the regulatory scheme. *Smith*, 538 U.S. at 99. Any unintended humiliation is a collateral consequence of a valid regulation. *Id.*

Section 23-3-540 does not impose an affirmative disability or restraint. Appellant is not subject to any physical restraint, nor does wearing an electronic monitor "resemble imprisonment," the archetypal affirmative disability. *See Bredesen*, 507 F.3d at 1010; *see also Smith*, 538 U.S. at 100. Moreover, requiring Appellant to submit to non-invasive electronic monitoring is less restrictive than occupational debarment, which is non-punitive. *Smith*, 538 U.S. at 100 (citing *Hudson v. United States*, 522 U.S. 93, 99–105 (1997) (upholding sanctions forbidding further participation in the banking industry)).

There is no evidence to demonstrate that section 23-3-540 increases the length of incarceration for sex offenders, prevents them from changing jobs or residences, or traveling to the extent otherwise permitted by their status as a sex

offender. *Bredesen*, 507 F.3d at 1005. Therefore, section 23-3-540's electronic monitoring requirement does not impose an affirmative disability or restraint.

The commonly accepted traditional aims of punishment are retribution and deterrence. *Mendoza-Martinez*, 372 U.S. at 168. Section 23-3-540 does not promote the traditional aims of punishment to the exclusion of the provision's civil goals. Though deterrence may serve criminal goals, the principle may also support civil goals. *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004). Section 23-3-540's electronic monitoring requirements may deter sex offenders from re-offending and thus support the civil purposes of protecting communities and aiding law enforcement in conducting investigations. Therefore, it is possible for deterrence to serve both criminal and civil goals. Moreover, as the Supreme Court noted in *Smith*, the mere presence of a deterrent purpose does not render a sanction "criminal." *Smith*, 538 U.S. at 102 (citation omitted).

Section 23-3-540's electronic monitoring scheme bears a clear and rational connection to a non-punitive purpose. The General Assembly expressly stated that the overall purpose of the registration and monitoring scheme is to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens," and to "protect communities, conduct investigations, and apprehend offenders." S.C. Code Ann. § 23-3-400. Statistical evidence demonstrates that sex offenders pose a high risk of re-offending. *Id.* Thus, it is rational to conclude the continuous monitoring of these offenders supports the General Assembly's valid purpose of aiding law enforcement in the protection of the community. *See Smith*, 538 U.S. at 102 ("The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective."). Perhaps the General Assembly could have created a scheme more narrow in scope and still accomplished its non-punitive purpose. Perhaps it could not have. In any event, however, a statute is not deemed punitive due to the absence of a "close or perfect" fit with its non-punitive purpose. *Id.* at 103.

The purpose of the registration and electronic monitoring scheme in the instant case is clear—to provide for the safety and welfare of the State's citizens, and eliminate information deficits which hinder law enforcement in their apprehension of those offenders. *See* S.C. Code Ann. § 23-3-400. These goals are a legitimate exercise of the State's police power, and Appellant fails to demonstrate that these objectives are mere pretext.

Finally, there is no basis to conclude that section 23-3-540's electronic monitoring requirement is excessive in relation to its legitimate non-punitive purpose.

In *McKune v. Lile*, 536 U.S. 24 (2003), the Supreme Court recognized that sex offenders pose a serious and increasing threat. When convicted sex offenders reenter society "they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33 (citation omitted). Moreover, sexual assaults disproportionately affect juveniles. *Id.* Nearly forty percent of imprisoned violent sex offenders stated that their victims were twelve years or younger. *Id.*

Nevertheless, a sex offender subject to section 23-3-540 is not required to comply with the provision's requirements any longer than they are required to register as a sex offender. Additionally, in light of our decision in *State v. Dykes*, Op. No. 27124 (S.C. Sup. Ct. filed May 22, 2013) (Shearouse Adv. Sh. No. 23 at 21), Appellant is entitled to judicial review of his continued compliance with section 23-3-540's electronic monitoring requirements. In *Dykes*, this Court found section 23-3-540(H) unconstitutional to the extent that the provision imposed lifetime electronic monitoring with no opportunity for judicial review. *Id.* at 22. Moreover, the Court held that the appellant, and other similarly situated sex offenders, must comply with the monitoring requirement mandated by section 23-3-540(C), but are entitled to "avail themselves of the section 23-3-540(H) judicial review process as outlined for the balance of the offenses numerated in section 23-3-540(G)." *Id.* at 29. Thus, Appellant may petition for judicial review ten years after the commencement of electronic monitoring. This fact only compounds the reasoning supporting the view that section 23-3-540 is not excessive.

CONCLUSION

Application of the above factors demonstrates that section 23-3-540 is a civil remedy. Moreover, the practical effects of the remedy are non-punitive.[3] In

[3] Because we find that this sanction is a civil remedy, we need not consider whether electronic monitoring constitutes cruel and unusual punishment, regardless of the age of the offender. *See Futch v. McAllister Towing of Georgetown, Inc.*,

enacting section 23-3-540, the General Assembly reasonably determined that advances in technology should be brought to bear in protecting some of society's most vulnerable individuals from some of society's most violent criminals.[4]

Thus, based on the foregoing, and in light of this Court's decision in *State v. Dykes*, *supra*, the family court's order is

AFFIRMED AS MODIFIED.

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

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335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (holding that appellate courts need not discuss remaining issues when determination of a prior issue is dispositive).

[4] *Cf. United States v. Kebodeaux*, No. 12–418 (U.S. June 24, 2013) slip op. at 8 ("Congress could reasonably conclude that [civil] registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns.") (alteration added).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Ervin Gamble, Petitioner.

Appellate Case No. 2011-192246

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27307
Heard January 24, 2013 – Filed August 28, 2013

REVERSED

Jerry Leo Finney and Stephanie Ruotolo Fajardo, both of The Finney Law Firm, Incorporated, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor John Gregory Hembree, of North Myrtle Beach, for Respondent.

CHIEF JUSTICE TOAL: Ervin C. Gamble (Petitioner) challenges his conviction for heroin trafficking. We reverse.

FACTUAL/PROCEDURAL HISTORY

On September 28, 2008, the Horry County Grand Jury indicted Petitioner for "attempt to distribute heroin" and "trafficking in heroin," in violation of sections 44-53-110 and -370 of the South Carolina Code, respectively.[1] However, at trial, the State elected to proceed only on the indictment charging Petitioner with trafficking, explaining that this decision rested, at least in part, on the fact that the confidential informant (CI) who provided critical information in the case died prior to trial.

At trial, the State moved to bar reference to the CI, arguing:

> [T]he CI is immaterial to the trafficking case. The trafficking case is basically . . . that: [Petitioner] drives up into the driveway . . . He comes in there. They arrest him—based on the information that they had. And the CI, as you know Your Honor, is deceased. I guess my point is this, that: If we start to talk about the CI, then I think we're going to also have to start to talk about the fact that he's deceased.

Defense counsel conceded that he did not anticipate mentioning the CI, but expressed concern regarding how the State could demonstrate probable cause for the search of Petitioner's vehicle, and his subsequent arrest. The trial court refused to bar reference to the CI in a pre-trial motion, but stated that as the trial ran its course, the court would not "allow the jury to get confused" due to the CI's absence.

As its first witness, the State presented the police officer who arrested Petitioner. The officer testified that, while conducting an investigation into possible drug activity, he received information regarding a drug dealer called "Fats." Defense counsel objected, arguing:

> For this officer to take the witness stand and say that they had gained information about a certain individual named "Fats[,]" that information was gained through hearsay . . . . He got that information from the [CI] in this case . . . . It is highly prejudicial if that person is

[1] S.C. Code Ann. §§ 44-53-110, -370 (Supp. 2012).

> not going to be called as a witness—and we know that he's not—for this witness to say that they had gained information about someone, that's hearsay.

The State argued that the officer did not offer this information for the truth of the matter asserted, but instead to explain the officer's actions. Defense counsel countered that the officer did offer the information for its truth: "The truth of the matter of why he was investigating this person, is that he had a conversation with someone. That's hearsay." The trial court held that the officer's testimony explained why police investigated Petitioner and decided to instruct the jury "not to take these statements as being truthful[,] that they are only to consider them to explain why the officer acted in the way he did." The trial court then issued the following instruction:

> The testimony that [the officer] is giving regarding what was told to him by someone else is not being . . . given or used under the assertion that the information was correct; or that the information was right. It is only being offered, and can only be considered by you, to explain why [the officer] acted in the way he did. So when he states that he was told something by someone else, whether or not it is true or not true is not your consideration as much as it is to determine or to explain why [the officer] acted in the way he did. So you cannot use it as proof of [Petitioner's] guilt to the extent that you think the truth—or the statement is false[,] only to explain [the officer's] actions.

Following this instruction, the officer's testimony resumed:

The State:	Officer . . . did you all have a tactical plan you had developed with . . . regard to [Petitioner]?
The Officer:	Yes, ma'am, we did . . . . Myself, along with other agents were in the area . . . . Planned on . . . speaking with a person in regards to . . . drugs.
The State:	And as a result of that tactical plan, were you at some particular location?
The Officer:	Yes ma'am, we were.
The State:	Where were you located?

The Officer: Uh—the exact address?

The State: Yes sir.

The Officer: 72 Offshore Drive in the Murrells Inlet section of Horry County.

. . . .

The State: And at some point, did you make contact with [Petitioner]?

The Officer: Yes ma'am, that is correct.

The State: And how did that happen?

The Officer: We con—conducted a phone call . . . .

At this point, the State interrupted the officer, presumably to prevent him from running afoul of the trial court's ruling:

The State: I don't want you—I don't want you to tell us what you did. I want you to tell me if you happened to come into contact with [Petitioner].

The Officer: Yes ma'am, we came in . . . contact with [Petitioner]. He arrived at the location of 72 Offshore Drive. At that time he was arrested on a separate charge. Upon . . . being placed under arrest he was searched . . . . Located on his person . . . was an amount of . . . brown powdered substance which subsequently field tested for . . . heroin . . . . Located in his vehicle, in the center console of the vehicle, was also . . . additional amount of . . . brown powdered substance that field tested positive for heroin.

Following this testimony, the State requested the trial court admit the seized drugs into evidence. Defense counsel objected:

> The foundation has not been laid . . . . We don't know about—He's going to testify that after an arrest on a separate charge, a search . . . I don't know if there is a basis for that arrest. I don't know what the charge was. I don't know if there was a consent to search. I know there wasn't a consent to search. And I don't believe that under the Constitution as provided by the 4th Amendment[2]. . . the law of search and seizure . . . they have the right to enter this into evidence at this time.

The trial court overruled defense counsel's objection, and admitted the drugs into evidence.

The jury found Petitioner guilty of "trafficking in heroin," and defense counsel moved for a judgment notwithstanding the verdict and requested a new trial. Defense counsel argued:

> There is a total lack of evidence in this case for the basis of the arrest. There's no evidence in the record that the arrest was lawful or unlawful . . . . There is no evidence in the record—or even what [Petitioner] was being arrested for; just that he was arrested, and that a search subsequent to that arrest brought about these drugs. There is no indicia of probable cause; no indication of reasonable suspicion for the arrest. If you cannot find that there is probable cause for the arrest—then we believe that it should be found that it did not exist. And therefore, judgment should not be granted against my client.

The trial court denied the motion, and sentenced Petitioner to twenty-five years' imprisonment. The court of appeals affirmed Petitioner's conviction in an unpublished opinion. *State v. Gamble*, Op. No. 2011-UP-095 (S.C. Ct. App. Mar. 10, 2011). This Court granted Petitioner's request for a writ of certiorari.

ISSUES PRESENTED

I. Whether the trial court erred in admitting narcotics evidence over Petitioner's objection that the State failed to provide the proper foundation.

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[2] U.S. Const. amend. IV.

II. Whether the trial court erred in denying Petitioner's motion for a new trial.

STANDARD OF REVIEW

In criminal cases, this Court only reviews errors of law. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citing *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

LAW/ANALYSIS

I. Admission of Heroin

Petitioner argues that the trial court erred in admitting the seized heroin into evidence. We agree, as the State failed to demonstrate that the drugs were seized as part of a legally permissible search and seizure.[3]

The Fourth Amendment prohibits unreasonable search and seizure, and requires that evidence seized in violation of the Amendment be excluded from trial. *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted). These exceptions include the following: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile; (5) plain view; (6) consent; and (7) abandonment. *Id.* The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures.

[3] The State asserts that Petitioner's argument is unpreserved. We disagree. While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court's review. *See State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.").

State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Wortman v. City of Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992).

The Record in the instant case is devoid of any evidence that police had probable cause to seize the drug evidence presented at trial. Although the arresting officer testified that the drugs were seized pursuant to a search incident to lawful arrest, it is not clear that the police had probable cause for the arrest. Specifically, we can only glean from the officer's testimony that he was present at a location where Petitioner later arrived, and upon Petitioner's arrival, he and another officer searched Petitioner and seized drugs.

Compare the facts of the instant case with those of *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). In that case, a police officer stopped the defendant for hitchhiking. *Id.* at 130, 620 S.E.2d at 739. The police officer questioned the defendant and conducted a pat-down search during which he discovered a .32 caliber revolver which later connected the defendant to a murder. *Id.* The defendant moved to suppress the weapon. *Id.* at 131, 620 S.E.2d at 740. The defendant argued that the search exceeded the permissible scope of a *Terry*[4] search, and that because he was not under arrest at the time of the search, the search was illegal and the gun should have been suppressed at trial. *Id.* at 131, 133, 620 S.E.2d at 740–41. However, at trial, the police officer testified in camera that he stopped the defendant because of recent accidents that had occurred involving people walking or hitchhiking on the same road, and that "we did a safety search before we put somebody in the car" to "check them to see if they have any weapons." *Id.* at 133, 620 S.E.2d at 741. This Court held that the seizure took place as part of a search incident to a lawful arrest. *Id.* The Court's decision rested primarily on one of the historical rationales for a search incident to a lawful arrest: the need to disarm the suspect in order to take him into custody. *Id.* at 132–33, 620 S.E.2d at 740–41 (noting that a search incident to arrest is also supported by the need to preserve evidence for later use at trial). In rejecting the defendant's claim, the Court explained:

> As noted above, one of the rationales for the exception to the warrant requirement in the case of a search incident to arrest is the need to disarm the suspect in order to take him into custody. Here, [the police

[4] *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

> officer's] testimony that [the defendant] was going to be arrested for hitchhiking and/or transported to the jail provides a sufficient basis upon which to conduct a limited pat-down search. It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons . . . . Moreover, the fact that [the defendant] was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause . . . . '[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'"

Id. at 133, 620 S.E.2d at 741 (finding police conducted a legitimate search incident to arrest and did not violate the Fourth Amendment) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)).

The Record in this case does not demonstrate that probable cause supported Petitioner's arrest. The officer's testimony describes Petitioner's arrival at a certain location, and Petitioner's subsequent arrest, but does not explain why these events triggered the search. Simply put, it is unknown what it was about Petitioner's arrival at the location that supported a good faith belief that Petitioner was guilty of a crime.

Additionally, the circumstances surrounding the search incident to arrest in this case do not contain any of the justifications discussed in *Freiburger*. For example, the officer's testimony did not allude to any need to disarm Petitioner for the officer's safety during transport, and any need to preserve evidence only arose after what appears to be a constitutionally infirm search and seizure. Thus, the trial court erred in admitting the drug evidence over Petitioner's objection that the evidence had been seized in contravention of the Fourth Amendment.[5]

[5] Our judicial process is best served when defendants raise Fourth Amendment evidentiary objections through a pre-trial motion to suppress. The rules of evidence are not strictly applied at hearings on a motion to suppress. The atmosphere of these proceedings can facilitate broader discussion before the trial court regarding the circumstances surrounding the evidence's seizure, and promote efficiency by resolving evidentiary disputes prior to a trial's commencement.

Contrary to the dissent's view, the trial colloquies described *supra*, and certainly contained in the Record, demonstrate that nothing need be *inferred* regarding the State's inability to establish probable cause in this case. The dissent cites no authority for the proposition that a defendant's failure to file a motion to suppress somehow forecloses his right to challenge the evidence at trial. *See, e.g.*, *State v. Goodstein*, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982) ("[W]e have no rule in this State requiring that a pretrial motion be made to suppress allegedly illegally obtained evidence."). The dissent confuses a defendant's "right"[6] or "entitlement"[7] to certain evidentiary hearings with a compulsory rule mandating that the defendant request the evidentiary hearing or cede all other objections. This is not an accurate statement of the law. Furthermore, the dissent ignores the trial court's hearsay ruling, and to a larger extent the Record in this case, by somehow placing responsibility for the State's failure to establish probable cause on the defendant. Moreover, the dissent proposes a rule that essentially eviscerates the Fourth Amendment's probable cause standard. Under the dissent's view, if a police officer performs a search and seizure, and then testifies to finding drugs as a result of that search, there is no need for a determination as to whether probable cause supported the search.

The security and protection of persons and property provided by the Fourth Amendment are fundamental values. *Alderman v. United States*, 394 U.S. 165, 175 (1969). The dissent characterizes the protection of these sacrosanct rights as some type of reward for a defendant. This view of the Fourth Amendment is erroneous. Thus, we strongly disagree with the dissent's observation that proper

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However, had Petitioner filed an unsuccessful motion to suppress, this would not have relieved him of the burden to make a contemporaneous objection if the evidence was later admitted at trial, and likewise, his failure to utilize the motion to suppress does not foreclose his right to challenge the evidence at trial.

[6] *State v. Blassingame*, 271 S.C. 44, 47–48, 244 S.E.2d 528, 530 (1978) (finding the trial court erred in denying the defendant's request for a hearing outside the presence of the jury regarding the admission of evidence seized from the defendant's home).

[7] *State v. Patton*, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996) ("To be entitled to a suppression hearing under [*Blassingame*] a defendant must, by way of oral or written motion to the trial court, articulate specific factual and legal grounds to support his contention that evidence was obtained by conduct violative of his constitutional rights.")

adherence to the guarantees provided by the Fourth Amendment is somehow accurately viewed as rewarding a criminal.

CONCLUSION

Our analysis of the trial court's evidentiary error is dispositive of Petitioner's case; thus, we need not reach his remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding an appellate court need not address remaining issues on appeal when a decision in a prior issue is dispositive).

For the foregoing reasons, the court of appeals' decision is

REVERSED.

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

JUSTICE PLEICONES: I respectfully dissent. The majority holds that the record in this case is devoid of any evidence that the police had probable cause to seize the drug evidence presented at trial. In my view, petitioner prevented the introduction of evidence on the issue of probable cause and should not be permitted to benefit from his deliberate avoidance of a suppression hearing on the issue. Thus, I respectfully dissent.

The record in this case shows that some pretrial discussions took place regarding the effect the confidential informant's death had on the case, although the substance of those discussions does not appear in the record. It can, nonetheless, be inferred from the record that petitioner was contesting the introduction of the drug evidence as lacking a foundation because the State would be unable to establish probable cause for the initial arrest due to the unavailability of the confidential informant. Upon questioning, petitioner specifically declined to make a suppression motion before trial. During trial, he objected to the introduction of the drug evidence. At the conclusion of the State's case, petitioner made a directed verdict motion, arguing that the State had failed to present evidence of probable cause for petitioner's arrest. Although the State offered to present its evidence for probable cause in a hearing outside the presence of the jury, petitioner made no request for such a hearing, arguing only that the State had failed to establish probable cause. At oral argument before this Court, petitioner argued that the judge's failure to conduct the hearing in response to the State's offer was error.

I disagree. The defendant's failure to request a hearing outside the presence of the jury to determine whether probable cause existed for the arrest constitutes a concession that the evidence is competent. *See State v. Rankin*, 3 S.C. 438, 448 (1872) (defendant's failure to object to evidence is a concession of its competency); *State v. Blassingame*, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury at this threshold point to establish the circumstances under which it was seized."); *State v. Patton*, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996) (to be entitled to such a hearing, the defendant must state specific grounds on which he objects to admission of

evidence). Petitioner repeatedly declined to avail himself of the opportunity to test the State's evidence of probable cause in a suppression hearing.[8]

Thus, to the extent the record fails to establish probable cause for petitioner's arrest, it is of petitioner's doing. *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1985)(defendant cannot complain of an error induced by his own conduct); *State v. Winestock*, 271 S.C. 473, 474, 248 S.E.2d 307, 307-308 (1978) (burden is on appellant to present sufficient record from which appellate court can determine whether trial court committed error). The majority shifts the burden to the State to place evidence of probable cause in the record contrary to well-established law that the defendant must challenge admissibility of evidence offered by the State. Likewise, the majority's comparison of the evidence in this record with the evidence in a case in which a suppression hearing was conducted is entirely inappropriate. *See State v. Freiburger*, 366 S.C. 125, 133, 620 S.E.2d 737, 741 (2005) (discussing officer's testimony at *in camera* hearing). The majority rewards petitioner's default, whether intentional or unintentional, with a reversal of his conviction.

Moreover, in this case the arresting officer testified without objection that petitioner was arrested and that in searches incident thereto a brown powdered substance that field tested positive for heroin was discovered on petitioner's person and in his car. Because the drugs themselves were cumulative once the officer's testimony had been admitted without objection, their admission was harmless even if improper. *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989); *State v. Rice*, 375 S.C. 302, 332, 652 S.E.2d 409, 424 (Ct. App. 2007), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011) (finding admission of documentary evidence harmless even if improper because cumulative to testimony admitted for same purpose).

Thus, I respectfully dissent.

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[8] It may be that petitioner sought to avoid a hearing outside the presence of the jury where neither the hearsay rule nor the right to confront adverse witnesses would apply. *See State v. Pressley*, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986) (approving use of hearsay evidence in a hearing before a judge to determine the admissibility of evidence); *State v. Burney*, 294 S.C. 61, 62, 362 S.E.2d 635, 636 (1987) (State not required to reveal name of confidential informant unless an active participant in the criminal transaction). Indeed, petitioner implicitly recognized the existence of evidence of probable cause in his attempt to argue it was inadmissible: "We know that they made . . . an arrest for attempt to distribute . . . . That . . . arrest was based on hearsay from an informant that's not here to testify today."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lavona Hill, Appellee,

v.

Bert Bell/Pete Rozelle NFL Player Retirement Plan; Retirement Board of the Bert Bell NFL Player Retirement Plan, Defendant,

v.

Barbara H. Sullivan, Appellant.

Appellate Case No. 2012-212193

Certified Question

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinion No. 27308

Submitted March 20, 2013- Filed August 28, 2013

CERTIFIED QUESTION ANSWERED

David B. Sherman and Lawrence Solomon, both of Solomon, Sherman & Gabay, of Philadelphia, Pennsylvania, for Appellee.

Robert T. Vance, Jr., of Philadelphia, Pennsylvania, for Appellant.

CHIEF JUSTICE TOAL: We certified the following question from the United States Court of Appeals for the Third Circuit:

> Does South Carolina recognize the "putative spouse" or "putative marriage" doctrine (hereinafter, putative spouse doctrine)?

We answer the certified question, "no."

I.

This action involves competing claims to the retirement benefits of the late Thomas Sullivan (Thomas), former National Football League (NFL) running back for the Philadelphia Eagles.

On March 15, 1979, Thomas married Lavona Hill (Hill) in Maryland. Thomas and Hill separated in 1983, but never divorced. On March 15, 1986, Thomas purported to marry Barbara Sullivan (Barbara) in South Carolina. The record indicates Thomas and Barbara obtained a marriage license, and that Barbara was unaware of Thomas' prior marriage to Hill. In 1991, Thomas submitted pension forms to the NFL indicating Barbara was his current spouse.

Thomas died on October 10, 2002. Thereafter, Barbara filed a claim with the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the Plan), which provides benefits to a player's "surviving [s]pouse" and defines that term as "a [p]layer's lawful spouse, as recognized under applicable state law." In November 2002, the Plan began paying Barbara benefits in the amount of $2,700 per month.

Four years later, Hill contacted the Plan to request benefits. Following an investigation, the Plan suspended payments to Barbara pending a court order identifying Thomas's surviving spouse. After Hill failed to obtain that order, the Plan resumed payments to Barbara.

In August 2009, Hill filed this action against the Plan in Pennsylvania state court, claiming entitlement to Thomas's retirement benefits. The Plan promptly removed the case to federal district court and filed an interpleader counterclaim, joining Barbara as a party to the action.

After a bench trial, the federal district court found Barbara and Thomas's purported marriage void under South Carolina's bigamy statute because Thomas and Hill never divorced. *Hill v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 09-4051, 2010 WL 4452523 (E.D. Pa. Nov. 4, 2010). The district court further found South Carolina had not adopted the putative spouse doctrine, and thus, Hill was entitled to receive Thomas's retirement benefits as his surviving spouse.

On appeal to the United States Court of Appeals for the Third Circuit, Barbara argues she should receive the same rights conferred upon a legal spouse under the putative spouse doctrine because she lived with Thomas with the good faith belief they were married. Barbara maintains she was unaware of Thomas's prior marriage to Hill, and that Thomas's benefits should therefore be apportioned between her and Hill in the interests of justice. Conversely, Hill contends she is entitled to all of Thomas's retirement benefits because she and Thomas never divorced, and South Carolina does not recognize the putative spouse doctrine.

II.

The putative spouse doctrine is codified in section 209 of the Uniform Marriage and Divorce Act as follows:

> Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited or declared invalid. If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

(internal citations omitted); *see also* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 6 (1985) (discussing the putative spouse

doctrine). South Carolina has not adopted the putative spouse doctrine. *See Lovett v. Lovett*, 329 S.C. 426, 432, 494 S.E.2d 823, 826 (Ct. App. 1997) (mentioning the putative spouse doctrine in dicta, but declining to address the applicability of the doctrine in South Carolina because the issue was not preserved for appellate review).

We decline to adopt the putative spouse doctrine, as it is contrary to South Carolina's statutory law and marital jurisprudence. *See* S.C. Code Ann. § 20-1-80 (Supp. 2012) ("All marriages contracted while either of the parties has a former wife or husband living shall be void."); *Lukich v. Lukich*, 368 S.C. 47, 56, 627 S.E.2d 754, 758 (Ct. App. 2006) ("Even if Wife was acting under a good faith belief, South Carolina will not recognize her bigamous second marriage because to do so would violate public policy."); *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable."); *Howell v. Littlefield*, 211 S.C. 462, 466, 46 S.E.2d 47, 48 (1947) ("[Husband's] existing marriage in North Carolina incapacitated him . . . to contract another marriage . . . .").

III.

For the foregoing reasons, we decline to adopt the putative spouse doctrine in South Carolina.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boykin Contracting, Inc., Respondent,

v.

K. Wayne Kirby d/b/a Carolina Gold Bingo, Appellant.

Appellate Case No. 2012-209067

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5133
Heard March 14, 2013 – Filed May 15, 2013
Withdrawn, Substituted and Refiled August 28, 2013

AFFIRMED

Edward Wade Mullins, III, and Benjamin C. Bruner, both of Bruner Powell Wall & Mullins, LLC, of Columbia, for Appellant.

Charles Harry McDonald, of Robinson McFadden & Moore, PC, of Columbia, for Respondent.

WILLIAMS, J.: K. Wayne Kirby d/b/a Carolina Gold Bingo (Kirby) appeals the circuit court's order awarding Boykin Contracting, Inc. (BCI) $59,494.31 plus prejudgment interest for electrical work performed by BCI on a bingo establishment in Columbia, South Carolina. Kirby contends BCI failed to prove the requisite elements of quantum meruit, requiring this court to reverse the circuit court's order and remand for entry of judgment in Kirby's favor. We affirm.

FACTS/PROCEDURAL HISTORY

BCI is a licensed general and mechanical contracting firm located in West Columbia, South Carolina. BCI performs work both as a general contractor and as a subcontractor. Kirby is the sole shareholder and president of Kirby Enterprises of South Carolina, Inc. (Kirby Enterprises). At times, Kirby Enterprises acted as a promoter for certain bingo operations in South Carolina. As promoter, Kirby Enterprises managed, operated, and conducted bingo sessions for non-profit organizations.[1] In exchange for these services, Kirby Enterprises received a portion of the admission fee and a percentage of the bingo operation's net proceeds.

In 2007, New Covenant Church entered into negotiations with Kirby Enterprises for the operation of a bingo parlor (Carolina Gold Bingo). As a result, Kirby executed a lease in 2008 with LN Dentsville Square, LLC, for two suites in a former Winn-Dixie building in Columbia, South Carolina. The 2008 lease listed "Wayne Kirby, d.b.a. Carolina Gold Bingo" as "Tenant."

To conduct the bingo operation, certain upfits and renovations needed to be undertaken. Initially, Hemphill & Associates, Inc. (Hemphill) was the general contractor on the project. Kirby testified he entered into a contract with Hemphill to upfit the space for $316,400. According to Kirby, $25,000 was allotted for electrical work in the contract. After executing the contract, Hemphill applied for a building permit in the amount of $100,000 and listed "Wayne K. Kirby" as the owner on the building permit application. However, Kirby maintained that after beginning the necessary renovations, the funds needed to accomplish the project were insufficient. As a result, Hemphill ceased work on the project in November 2007.

The project lay dormant until April 2008. At that time, Tom Brock (Brock), the vice-president of BCI and project manager for the renovation at issue, contacted Kirby after hearing Kirby needed help to complete the electrical work at the bingo parlor. Kirby and Brock met at the work site on April 8, 2008. During this initial meeting, Brock testified that he informed Kirby significant electrical work needed

[1] Pursuant to section 12-21-3920(4) of the South Carolina Code (Supp. 2012), a promoter is "an individual, corporation, partnership, or organization licensed as a professional solicitor by the Secretary of State who is hired by a nonprofit organization to manage, operate, or conduct the licensee's bingo game."

to be completed, and Kirby had likely overpaid the current electrical contractor, Larry Palmer (Palmer). Kirby requested BCI perform the remaining electrical work under Palmer's direction. Brock testified he emphatically opposed this arrangement and stated he and Kirby agreed BCI would complete the requisite work without Palmer's supervision and would send the bill directly to Kirby. Kirby, on the other hand, testified he thought BCI would be working for Palmer and would be paid from the proceeds of approximately $5,000 that remained due to Palmer for the completion of the electrical work. After their meeting, BCI commenced work on the bingo parlor the next day.

During the next month, BCI repaired the wiring in the main panel room located in the rear of the building, installed lighting in the back areas not associated with the main bingo floor, connected twenty rooftop HVAC units, repaired exterior lights on the building and in the parking lot, and repaired some lighting in the Comedy Club, which was adjacent to Carolina Gold Bingo. Upon completion of BCI's work, Kirby secured a certificate of occupancy on June 4, 2008, which listed "Wayne K. Kirby" as the owner. BCI subsequently hand-delivered an invoice on July 31, 2008, to Kirby's place of business, which was addressed to Carolina Gold Bingo[2] in the amount of $73,925.40. Of the amount due, $55,509.46 was allotted to labor and materials.

After receiving no payment for its work, BCI filed a mechanic's lien in the amount of $73,925.40 on October 27, 2008. BCI then filed suit on January 12, 2009, seeking to foreclose on the mechanic's lien. After a one-day bench trial, the circuit court issued an order on December 30, 2011, in which it ruled the parties had no meeting of the minds and, therefore, had no enforceable contract. However, the circuit court held that BCI was entitled to recover the reasonable value of its labor and materials under its quantum meruit claim. Accordingly, the circuit court awarded Boykin $59,494.31[3] plus prejudgment interest and costs in the amount of $160. Kirby filed a Rule 59(e), SCRCP motion to reconsider, which the circuit court denied. This appeal followed.

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[2] The circuit court found BCI addressed the invoice to Carolina Gold Bingo because this was the trade name Kirby used for the bingo operation and it was also the trade name Kirby used on the lease for the bingo space.

[3] The circuit court deducted the 15% profit BCI built into the project as well as $2,760.29 in credit card charges after finding BCI failed to demonstrate these charges were all incurred for purposes of work on Carolina Gold Bingo.

ISSUES ON APPEAL

(1) Did the circuit court err in finding BCI could recover from Kirby on its quantum meruit cause of action?

(2) Did the circuit court err in awarding BCI $59,494.31 in damages plus prejudgment interest?

STANDARD OF REVIEW

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). As such, an action based on a theory of quantum meruit sounds in equity. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

LAW/ANALYSIS

I. Quantum Meruit

Kirby first contends the circuit court erred in finding BCI conferred a benefit to Kirby in his individual capacity. Specifically, Kirby claims it was reversible error for the circuit court to conclude that Kirby, as opposed to Carolina Gold Bingo or Kirby Enterprises, realized value from any work performed by BCI. We disagree.

The elements of a quantum meruit claim are as follows: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617-18, 703 S.E.2d 221, 225 (2010).

In the circuit court's order, it found quantum meruit was an appropriate remedy because, although there was no meeting of the minds as required for an express contract, BCI was still entitled to recover the reasonable value of its labor and materials. We agree and find the circuit court's reasoning persuasive in resolving this issue.

First, BCI conferred a benefit on Kirby individually, and Kirby realized this benefit. Although Kirby did not sign the lease on the bingo space until after the work was completed, the court held "it [wa]s clear that Wayne Kirby exercised dominion and control over the area designated for his bingo operations well before this time."[4] In support of this conclusion, the circuit court noted Kirby was listed as the "owner" on the building permit application, which was issued *before* BCI started work, and as "owner" on the certificate of occupancy, which was issued *after* BCI completed its work. Although Kirby claims the circuit court improperly relied on these documents because he did not complete these documents or own Carolina Gold Bingo, we find these designations lend support to the court's conclusion he was in fact the intended beneficiary of BCI's work. Moreover, the circuit court acknowledged that Kirby was the point person for all the work. In this capacity, Kirby represented to Brock, BCI's vice-president, that the project was behind schedule and that renovations needed to be completed as soon as possible to prevent substantial financial loss.

On appeal, Kirby attempts to skirt responsibility by claiming that Kirby Enterprises, as opposed to Kirby, retained any benefits from BCI's electrical work. We disagree and find Kirby benefitted in his individual capacity from BCI's work. We find Kirby's argument unpersuasive, particularly when Kirby directed the project, maintained control over the premises, spent significant time on-site, and had a direct personal stake in the success of the venture. Moreover, the circuit court did not need to pierce Kirby Enterprises' corporate veil to hold Kirby individually liable. BCI never argued that Kirby Enterprises was the recipient of its services or attempted to recover against Kirby Enterprises under a corporate veil

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[4] Based on our review of the record, it appears Kirby signed both the 2007 and 2008 leases. The 2007 lease applied to the entire building (Comedy Club and Carolina Gold Bingo), whereas, the 2008 lease only applied to the bingo parlor. Kirby's name, social security number, driver's license number, and signature appear in the 2007 lease underneath the caption "tenant." When questioned, Kirby affirmed that his name was listed as a tenant in the 2007 lease.

theory. Rather, it was Kirby who raised the corporate veil theory as a defense to his individual liability.

Kirby further argues that because he did not own Carolina Gold Bingo, any work that enabled Carolina Gold Bingo to open did not directly benefit him. We disagree and find the language of the 2008 leasehold agreement compelling. Specifically, the 2008 lease between LN Dentsville and Kirby, which Kirby signed, lists the tenant as "Wayne Kirby d.b.a. Carolina Gold Bingo."[5] In contemplation of this tenancy, Kirby took the initiative to hire Hemphill as general contractor over a year prior to the execution of the 2008 lease. Kirby also possessed keys to the facility and electrical plans for the installation of lighting and power, which he gave to BCI in order to start work on the bingo parlor.

Based on our review of this evidence, we find Kirby personally benefitted from BCI's successful completion of the electrical work. Because Kirby never paid BCI for the work it undertook to upfit the bingo parlor, we find Kirby was unjustly enriched at BCI's expense. Accordingly, the circuit court properly found BCI could recover under quantum meruit from Kirby.

II. Damages

Next, Kirby claims the circuit court erred in calculating the damages award and in permitting BCI to recover prejudgment interest. We disagree.

The general law is that when, as here, an express contract fails because there is no meeting of the minds as to the essential terms, the laborer or contractor may still recover the reasonable value of the labor and materials furnished under an implied in law or quasi-contractual theory. *See Costa & Sons Constr. Co. v. Long*, 306 S.C. 465, 468 & n.1, 412 S.E.2d 450, 452 & n.1 (Ct. App. 1991) (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 7 and 21 (1973)) (stating implied in

[5] Kirby claims the circuit court erred in finding Carolina Gold Bingo was the trade name he used for the bingo operation. We find this argument disingenuous, particularly when the 2008 lease agreement, which Kirby signed, lists the tenant as "Wayne Kirby d.b.a. Carolina Gold Bingo" and further lists "tenant's trade name" as "Carolina Gold Bingo." Kirby presents no evidence that another individual entered into the lease on his behalf or that he attempted to correct this portion of the lease, despite this alleged inaccuracy.

law or quasi-contracts are not considered contracts at all, but are akin to restitution, which permits recovery of the amount the defendant has benefitted at the expense of the plaintiff in order to preclude unjust enrichment); *Braswell v. Heart of Spartanburg Motel*, 251 S.C. 14, 18, 159 S.E.2d 848, 850 (1968) (finding under the theory of implied contract, when there is no agreement as to the price to be paid for services, one is entitled to recover the fair or reasonable value of the services rendered); *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 8, 8, 532 S.E.2d 868, 872 (2000) ("[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy."). This quasi-contractual right of recovery, also known as quantum meruit, has been defined by Black's Law Dictionary as follows: "1. The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. 2. A claim or right of action for the reasonable value of services rendered." Black's Law Dictionary 1006 (7th ed. 2000).

Our courts have also held that in "an action in quasi-contract, the measure of recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff." *Stringer Oil Co. v. Bobo*, 320 S.C. 369, 372, 465 S.E.2d 366, 369 (Ct. App. 1995); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part) (citing *Stringer*, 320 S.C. at 372-73, 465 S.E.2d at 368-69) (stating "[t]he proper measure of damages for an unjust enrichment claim is the amount of increase in the fair market value of the subject property due to the improvements made by the plaintiff").

As to damages, Kirby contends the circuit court improperly calculated BCI's damages based on the reasonable value of BCI's labor and materials. Relying on *Stringer Oil*, Kirby contends the court should have measured BCI's damages by determining, from Kirby's perspective, the value he received from BCI's work. We agree that the appropriate measure of recovery is expressed by the amount the defendant has been unjustly enriched at the expense of the plaintiff, but in the instant case, we find this to be Boykin's costs in completing the project.

We take a moment to clarify why we choose not to apply the measure of damages advocated by Kirby from *Stringer Oil*. In that case, Stringer Oil, a gasoline distributor, sued Alton Bobo, a gasoline station owner, claiming that it made over

$100,000 in improvements to the gas station with Bobo's express assurance that he would exclusively purchase gasoline from Stringer Oil. *Stringer Oil*, 320 S.C. at 371, 465 S.E.2d at 368. This court found Stringer Oil was only entitled to $40,000 in damages, which Bobo testified was the value of the improvements to him at the time the parties ceased doing business. *Id.* at 374, 465 S.E.2d at 369. Because Stringer Oil failed to present any competing evidence on damages, this court found that Bobo, as the owner of the gas station, was competent to present evidence on the issue of damages. *Id.*

We find this case, and thus the appropriate measure of damages, distinguishable in several respects. First, the damages in this case are liquidated; the damages in *Stringer Oil* were unliquidated. *Id.* at 372, 465 S.E.2d at 368. BCI and Kirby had a *quid pro quo* agreement that BCI would perform certain work in exchange for payment of those services. In *Stringer Oil*, however, the improvements to the gas station were made without expectation of repayment; rather, the expectation was that Bobo would continue to buy gasoline from Stringer Oil. *Id.* at 371, 465 S.E.2d at 368. In addition, Boykin does not own the property on which Carolina Gold Bingo is located, whereas Bobo owned the gasoline station which benefited from Stringer Oil's improvements. *Id.* As a result, we are not persuaded that BCI's claim should be measured by the extent to which BCI's work increased the value of the property.

Without any competent evidence to the contrary, we find it proper to defer to the circuit court's calculation of damages. *See Stringer Oil*, 320 S.C. at 374, 465 S.E.2d at 369 (calculating damages on appeal based on the only competent evidence presented to master-in-equity). As reflected in BCI's invoice, BCI sought $73,925.40[6] from Kirby for the electrical work. The circuit court reviewed BCI's job cost analysis, which calculated the costs for the project at $62,254.60, as well as BCI's invoice to Kirby.[7] From the amount owed, the circuit court deducted the

[6] This figure included material, labor, taxes, insurance, overhead, and profit.

[7] Kirby contends that if we conclude the proper measure of damages is BCI's labor and materials, the circuit court improperly calculated BCI's labor and material costs. We disagree and note that although the invoice denotes the labor and materials as $55,509.46, whereas the job cost analysis denotes BCI's labor and materials as $62,254.60, both of these documents were in evidence and considered by the circuit court. The circuit court specifically held in its order that it based its calculation on the "job cost total" as opposed to the invoice. Because the damages

15% profit BCI built into the project as well as $2,760.29 in credit card charges that BCI failed to prove were directly attributable to work on the bingo parlor. After accounting for these deductions, the circuit court awarded $59,494.31 to BCI. The circuit court acknowledged Kirby's belief that BCI would only be paid from the remaining proceeds due to Palmer, which totaled approximately $5,000. However, the circuit court discredited this testimony based on the evidence presented to the court, which demonstrated BCI performed significant electrical work. We find this amount to be fair and reasonable and within the circuit court's discretion based on the evidence presented by the parties. *See Braswell*, 251 S.C. at 18, 159 S.E.2d at 850 (1968) (finding that under the theory of implied contract, when there is no agreement as to the price to be paid for services, one is entitled to recover the fair or reasonable value of the services rendered).

Kirby also claims the circuit court improperly awarded BCI prejudgment interest. We disagree.

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and the sum is certain or capable of being reduced to certainty. *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). The fact that the sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. *Id*. Further, the circuit court has the discretion to award prejudgment interest in an action to recover under the theory of quantum meruit. *See McCutcheon*, 360 S.C. at 206, 600 S.E.2d at 110 (finding the entitlement to prejudgment interest proper in a quantum meruit claim). The proper test for determining whether prejudgment interest may be awarded in a quantum meruit claim is whether the measure of recovery is fixed by conditions existing at the time the claim arose. *Id.*

We find the circuit court properly awarded prejudgment interest because the amount owed to BCI was "capable of being reduced to a sum certain." In addition, the measure of recovery was fixed by conditions existing at the time BCI's claim arose against Kirby as the costs incurred by BCI at the time of the work were

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award was within the range of evidence presented to the court, we defer to the circuit court's calculation. *See Hawkins v. Greenwood Develop. Corp.*, 328 S.C. 585, 601, 493 S.E.2d 875, 883 (Ct. App. 1997) (finding damages award was proper because it was within range of evidence presented during trial).

established by BCI's invoices. Kirby's disagreement with BCI over the amount due for the work does not preclude an award of prejudgment interest. *See Smith-Hunger Constr. Co. v. Hopson*, 365 S.C. 125, 128-29, 616 S.E.2d 419, 421 (2005) (finding builder was entitled to prejudgment interest in action against homeowners for breach of contract, quantum meruit, and foreclosure of a mechanic's lien because the builder's costs were established by the builder's invoices at the time the homeowners breached the contract and were thus "fixed by conditions existing at the time the claim arose"). Accordingly, we affirm the circuit court on this issue.

CONCLUSION

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

AFFIRMED.

HUFF AND KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ritter and Associates, Inc., Respondent/Appellant,

v.

Buchanan Volkswagen, Inc. and David Buchanan, Appellants/Respondents.

Appellate Case No. 2011-198469

Appeal From Berkeley County
William L. Howard, Sr., Special Referee

Opinion No. 5137
Heard December 12, 2013 – Filed May 22, 2013
Withdrawn, Substituted, and Refiled August 28, 2013

AFFIRMED

Steven L. Smith, of Smith Closser PA, of Charleston, for Appellants/Respondents.

Robert B. Varnado, of Brown & Varnado LLC, of Mount Pleasant, for Respondent/Appellant.

WILLIAMS, J.: Ritter and Associates, Inc. ("Ritter") brought this claim to recover payment for twenty vehicles sold to Buchanan Volkswagen, Inc. ("BVW") through BVW's agent, Todd Taylor ("Taylor"). Taylor, who purchased vehicles on behalf of various parties at a used automobile auction in Florida, conducted a

check kiting scheme that defrauded several entities within the automobile dealership industry, including BVW and Ritter. BVW appeals the special referee's order finding for Ritter on its breach of contract cause of action, arguing that Taylor was not acting exclusively as BVW's agent when he purchased the vehicles and that Ritter's own negligence was the proximate cause of Ritter's damages. Ritter cross-appeals, arguing that the special referee erred in finding that the South Carolina Motor Vehicle Dealer's Act did not apply to its causes of action. We affirm.

FACTS / PROCEDURAL HISTORY

Ritter is a Florida corporation that operates as a licensed used car wholesaler. Ritter's offices are in close proximity to the Florida Auto Auction of Orlando ("FAAO"). The FAAO is a used automobile auction located in Ocoee, Florida, where hundreds of wholesalers and dealers purchase vehicles for resale. The FAAO is not open to the public. In order to be authorized to purchase vehicles at auction, dealers must be registered with the FAAO. In addition to buying vehicles directly from the auction, participants often conduct "outside" deals between one another. BVW was a South Carolina Subchapter S Corporation that operated a car dealership in Charleston County. David Buchanan ("Buchanan") was its principal shareholder.

In 1993, BVW ceased doing business as a car dealership and remained in existence only to rent out the parcel of real property held by BVW. In 2000, Buchanan was advised that to retain its Subchapter S status, BVW needed to generate more than just "passive" rental income. To remedy this problem, Buchanan entered into a business relationship with one of BVW's former employees, Todd Taylor. In 2000, BVW began operating a wholesale used car dealership whereby Taylor would purchase cars for BVW from the FAAO, and then Taylor would resell those cars on BVW's behalf to other dealers in the Charleston area. To facilitate this arrangement, Buchanan obtained a South Carolina Wholesale Dealer License for BVW from the South Carolina Department of Public Safety. The license listed Taylor as its employee/agent.

Prior to resuming work for BVW, Taylor regularly purchased used vehicles on behalf of a number of automobile dealers in the Charleston area from various sellers at the FAAO. During the time he was working for BVW, Taylor continued to act on behalf of other dealers to purchase automobiles from sellers at the FAAO.

Because Taylor was not authorized to purchase directly from the FAAO, he maintained relationships with several dealers who were authorized to purchase vehicles at auction. These authorized dealers would purchase vehicles from the FAAO at Taylor's instruction; these dealers would then resell the vehicles to Taylor in "outside" deals. Ritter was an authorized dealer with whom Taylor frequently transacted. Taylor would pay Ritter for vehicles with checks from various bank accounts, including accounts held by BVW and a separate company owned by Taylor. Over time, Taylor and Ritter's relationship became more familiar and, consequently, more casual. As a result of this increased familiarity, Ritter allowed Taylor to directly deposit checks into Ritter's account to serve as payment for vehicles sold to Taylor in the outside deals.

Beginning in February 2003, Taylor used this ability to deposit checks to initiate an elaborate check kiting scheme, which involved the checking accounts of BVW, Ritter, a separate company owned by Taylor, and at least one other dealer in the Charleston area, Cumbee Chevrolet ("Cumbee"). During the duration of Taylor's kiting scheme, Ritter sold twenty vehicles to BVW through Taylor.

On February 6, 2004, BVW filed a lawsuit against Taylor and several banks involved in the transactions. Thereafter, on April 5, 2004, Cumbee filed suit against Ritter, BVW, Buchanan, Taylor, and several banks involved in the transactions. These two suits were consolidated and, following this consolidation, Ritter cross-claimed against BVW and Buchanan to recover payment for the twenty unpaid vehicles sold to BVW through Taylor.

All claims were resolved, except the cross-claims between Ritter, BVW, and Buchanan. Ritter brought claims against BVW for breach of contract, negligence, negligent supervision, and violation of the South Carolina Dealer's Act[1] ("Dealer's Act"). BVW brought counterclaims against Ritter for negligence per se, negligence, civil conspiracy, and aiding and abetting. The case was ultimately referred to William L. Howard, as special referee, by a consent order signed by the Honorable R. Markley Dennis, Jr., on June 25, 2010. The case was tried without a jury on January 24-26, 2011 and February 10, 2011.

[1] *See* S.C. Code Ann. §§ 56-15-10 to -600 (Supp. 2012).

On May 19, 2011, the special referee issued an order granting judgment in favor of Ritter on its breach of contract claim and awarding Ritter $434,000.00 in damages and $280,286.71 in prejudgment interest. In this order, the special referee concluded that Ritter's allegations of negligence and negligent supervision were merely examples of the nonperformance of the contractual obligations between the parties, and therefore, granted judgment in favor of BVW on these causes of action. In addition, the special referee ruled that the Dealer's Act did not apply to the business dealings between Ritter and BVW and granted judgment in favor of BVW on that cause of action. Finally, the special referee granted judgment for Ritter with regard to BVW's counterclaims for negligence, negligence per se, and civil conspiracy.

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *McCall v. IKON*, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008). "An action in tort for damages is an action at law." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012). "[W]hen reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the [special referee]'s findings of fact as long as they are reasonably supported by the evidence." *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009).

LAW/ANALYSIS

I. BVW's Appeal

On appeal, BVW argues the special referee erred in three respects: (1) in concluding that Taylor was an exclusive agent of BVW; (2) in failing to apportion liability for damages to Ritter due to its own negligence; and (3) in concluding that Ritter's accounting expert demonstrated a nexus between Ritter's damages and the specific vehicles for which this suit was brought. We address each argument in turn.

A. Exclusivity of Taylor's Agency

BVW argues that the special referee erred in concluding that Taylor was exclusively an agent of BVW and in failing to consider agency relationships that Taylor had with others. We disagree.

In his order, the special referee found that "Taylor acted on behalf of, and as the agent of BVW throughout the dealings with Ritter." The special referee did not find that Taylor was an exclusive agent of BVW and did not make any findings related to Taylor's agency relationship with other dealers. BVW argues that the special referee "at least impliedly made" a finding that Taylor was exclusively BVW's agent due to the special referee's holding that BVW was liable for the contracts formed by Taylor. BVW argues that because Taylor acted on behalf of multiple dealerships when transacting at the FAAO, the contracts Taylor signed could have been intended for other dealerships. BVW's position is that "[t]he finding of liability [under the breach of contract claim brought by Ritter] rests not on the existence of an agency, but on the exclusivity of that agency." We disagree.

Generally, "[a]gency is a question of fact." *Gathers v. Harris Teeter Supermarket*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). We believe there is evidence in the record that shows Taylor was BVW's agent and had authority to bind BVW in contract. *See Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004) ("[A]ctual authority is that which is expressly conferred upon the agent by the principal."). As noted in the special referee's order, Buchanan specifically testified at the hearing that Taylor had the power to purchase vehicles, sign contracts, and issue checks on behalf of BVW. In addition, the contracts for all twenty vehicles identify BVW as the "Buyer (Transferee)" and contain Taylor's signature on the signature line labeled "Transferee's Signature - Buyer." Because Taylor had undisputed authority to enter into contracts on behalf of BVW at the time Ritter sold these vehicles to BVW, Taylor bound BVW in those contacts. Taylor's relationship with other parties does not affect the validity of these contracts. Additionally, we find nothing in the record indicating that Taylor intended to enter

into the purchase agreements listing BVW as the "Buyer (Transferee)" on behalf of some other principal, despite BVW's claims to the contrary.

Based on the foregoing, we find that the special referee properly found that an agency relationship existed between Taylor and BVW. Further, we find that Taylor's agency relationships with other dealerships are immaterial as to whether the contracts signed by Taylor on behalf of BVW are binding. Accordingly, we affirm on this issue.

B. Failure to Apportion Liability for Ritter's Negligent Conduct

BVW additionally argues that the special referee erred in failing to apportion liability to Ritter based upon Ritter's negligent business practices in dealing with Taylor. We disagree.

BVW argues Ritter negligently conducted business with Taylor and that "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." BVW argues that, under the doctrine of comparative negligence, Ritter's damages should be reduced based on the amount of fault attributable to Ritter's action or inaction.

However, under South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action. *See Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) ("[A] plaintiff *in a negligence action* may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." (emphasis added) (internal quotation marks and citations omitted)). In the current case, comparative negligence is inapplicable because the special referee found for Ritter under a breach of contract cause of action. Thus, the special referee was correct in not reducing the award to Ritter. Accordingly, we affirm on this issue.

C. Failure to Establish Damages

In its final argument, BVW argues the special referee erred in concluding Ritter presented adequate evidence that Ritter had not received payment for the twenty cars that form the basis for Ritter's damages. We disagree.

BVW specifically argues that the testimony of Ellison Thomas ("Thomas"), Ritter's forensic accounting expert witness, was inadequate to establish that Ritter had not received payment for the twenty cars. BVW contends that neither Thomas nor Ritter can trace with any degree of specificity the unpaid vehicles purchased by BVW from Ritter. BVW maintains that Thomas assigned responsibility for payment for these vehicles to BVW simply because "it's the end of a kiting scheme, and somebody had to get burned" and this unfounded assertion should not form the basis for a damages award against BVW.

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes*, 266 S.C. at 86, 221 S.E.2d at 775.

Evidence in the record supports the special referee's finding that Ritter had not been paid for the twenty vehicles. Specifically, the special referee found, based upon testimony from Ritter and Thomas, that "between the dates of August 12, 2003 and September 30, 2003, Ritter and BVW, acting through Taylor, contracted for the sale by Ritter to Taylor of twenty motor vehicles" and "that Ritter has not been paid for those cars." For example, Thomas testified, "I reviewed the records, and I reviewed the way [Ritter] tracked things and through process of elimination, these are the vehicles that [Ritter] purchased and didn't get paid for." Additionally, Robert Ritter described the contents of an exhibit that listed the twenty vehicles forming the basis for the actual damages award as "the vehicles that I sold to Buchanan Volkswagen that I was never paid for." Accordingly, we find that there is ample testimony in the record from Robert Ritter and Thomas to support the special referee's finding that Ritter was not paid for these vehicles; thus, we affirm on this issue.

II. Ritter's Arguments

On cross-appeal, Ritter argues that the special referee erred in three respects: (1) in determining the Dealer's Act did not apply to the business dealings between BVW and Ritter; (2) in declining to address Ritter's statute of limitations defense; and (3) in rejecting BVW's assertion that Florida's "open titles" statute was a ground for voiding the sales contracts between the parties without first expressly determining that the statute relied upon did not apply to the facts of this case. We address each argument in turn.

A. Dealer's Act

Ritter argues that the special referee erred in holding that the Dealer's Act was inapplicable to Ritter and BVW's business dealings. It argues that sufficient purposeful contacts within South Carolina existed for the Dealer's Act to apply. We disagree.

The Dealer's Act prohibits motor vehicle dealers and manufacturers from participating in unfair methods of competition and deceptive trade practices. In particular, subsection 56-15-40(1) of the South Carolina Code (Supp. 2012) declares it unlawful "for any . . . wholesaler . . . or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." The Dealer's Act applies to "[a]ny person who engages directly or indirectly in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale [of a motor vehicle] or has business dealings with respect to a motor vehicle within [South Carolina]." S.C. Code Ann. § 56-15-20 (Supp. 2012). The Dealer's Act provides "[i]n addition to temporary or permanent injunctive relief . . . , any person who shall be injured in his business or property by reason of anything forbidden in [the Dealer's Act] may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." S.C. Code Ann. § 56-15-110(1) (Supp. 2012).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

The special referee found the clear language of the Dealer's Act requires either purposeful contacts within South Carolina or business dealings with respect to a motor vehicle within South Carolina. Based on the finding that the entirety of the business dealings occurred and were consummated in Florida, the special referee

held that the Dealer's Act would not apply to the business dealings between Ritter and BVW.

Ritter now argues that "there need only be a sufficient nexus to South Carolina entities or South Carolina vehicles for the [Dealer's] Act to apply." Ritter argues that this nexus was established because: (1) BVW was a South Carolina corporation; (2) the parties understood that BVW intended to bring the vehicles back to South Carolina for resale to other dealerships; (3) BVW used checks issued by South Carolina banks to pay for the vehicles; and (4) South Carolina body shops performed work on the vehicles once they were transported from Florida. We find these arguments unpersuasive.

Section 56-15-20 creates two scenarios when the Dealer's Act will apply: (1) when a "person . . . engages directly or indirectly in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale" of a motor vehicle; and (2) when a person has "business dealings with respect to a motor vehicle within [South Carolina]." The facts of this case do not fit within either of these scenarios. These vehicles were selected by Taylor from the FAAO, which is located in Florida; the contracts and bills of sale were written and signed in Florida; payment was surrendered by Taylor to Ritter in Florida; and, finally, Ritter delivered possession of the vehicles to Taylor in Florida. Therefore, any purposeful contacts within South Carolina which would put these dealings under the first scenario contemplated by section 56-15-20 would not have occurred until after the business dealings between Ritter and BVW were concluded. Further, at the time the business dealings between the parties occurred, the motor vehicles were in Florida. Therefore, the second scenario contemplated by section 56-15-20 is also inapplicable.

We find that BVW's status as a South Carolina corporation and South Carolina banks providing the checks used to complete these transactions does not amount to "engaging . . . in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale" of a motor vehicle. S.C. Code Ann. § 56-15-20 (Supp. 2012). Further, we find that BVW's intention to transfer these vehicles back to South Carolina after completion of the sale fails to create a sufficient purposeful contact within South Carolina that would render the Dealer's Act applicable.

Because the entirety of the business dealings between Ritter and BVW occurred in Florida, we hold the special referee properly decided the Dealer's Act does not apply. Thus, we affirm on this issue.

B. Ritter's Additional Arguments

In addition to its argument regarding the Dealer's Act, Ritter makes two additional arguments relating to the special referee's treatment of BVW's counterclaims against Ritter. First, Ritter argues the special referee erred in declining to address Ritter's statute of limitations defense after concluding that BVW failed to prove the merits of its counterclaims. Secondly, Ritter argues the special referee erred in rejecting BVW's assertion that Florida's "open titles" statute was a ground for voiding the sales contracts between the parties without first expressly determining that the statute relied upon did not apply to the present circumstances. We decline to address these arguments.

The special referee found in Ritter's favor with regard to BVW's counterclaims; therefore, Ritter was not aggrieved by the special referee's order with regard to those rulings. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

In its reply brief, Ritter argues these issues are sustaining grounds. As sustaining grounds, Ritter contends it must raise these issues or risk abandoning its claims.[2] While Ritter properly cites the law, BVW has not appealed the special referee's rulings regarding BVW's counterclaims. Because those rulings are not on appeal, the sustaining grounds that further support those rulings need not be considered. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Accordingly, we decline to address these arguments.

[2] In making this argument, Ritter relies upon *I'on LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), which holds "a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief." 338 S.C. at 420, 526 S.E.2d at 723.

CONCLUSION

Based on the foregoing, the order of the special referee is

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Smith, Appellant.

Appellate Case No. 2010-178386

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 5167
Heard December 10, 2012 – Filed August 28, 2013

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General Julie Kate Keeney, all of Columbia, and Solicitor Barry Barnette, of Spartanburg, for Respondent.

SHORT, J.: Thomas Smith appeals his convictions for voluntary manslaughter, possession with intent to distribute marijuana within a half-mile radius of a school, and possession with intent to distribute marijuana. He argues the trial court erred

in denying his motion for a directed verdict because the undisputed evidence showed he shot the victim in self-defense. We affirm.

FACTS

Around midnight on March 12, 2009, Smith and three of his friends, Rocky Hadden, Ashley Smith, and James Ervin, arranged to sell marijuana to a person they had never met before named Markee Guest (the victim), and all four rode together in a small car to meet the victim. Hadden testified he drove the car, which belonged to Ashley, and Ashley was in the passenger seat. Smith sat in the backseat on the passenger's side, and Ervin was in the backseat on the driver's side. When the group met up with the victim near an elementary school, he had another person with him they did not know named Ronald Lipscomb. It was cold outside, and there was conflicting testimony as to whether Smith invited the victim and Lipscomb to get into the back seat of the car or whether they requested to get in. Regardless, the two got into the back seat, and Smith measured the marijuana.[1] The victim or Lipscomb asked for change for a $100 bill. When Ashley responded she did not have change, Lipscomb pulled out a gun, pointed it at Smith's temple, and said to "give him everything." Hadden testified that within seconds of Lipscomb pulling the gun, he ducked his head and heard the first of multiple gunshots. After the shots were fired, Hadden said Smith got out of the car and left. Hadden did not see anything in Smith's hands and did not know he had a gun. Ervin managed to escape and run away when he saw Lipscomb pull out the gun. Lipscomb climbed out the open window. Hadden drove away with Ashley, stopped the car on Railroad Avenue, and hid the marijuana under the railroad tracks.

Officer Tracy Medley responded to a call about gunshots, and when he arrived at the scene, he found two people laying in the road. The victim was deceased, and

[1] Hadden testified Smith slid over from the passenger's side towards the driver's side when the victim and Lipscomb got into the car through the rear passenger door. Therefore, Ervin was against the rear door on the driver's side, Smith was next to him, the victim was next to Smith, and Lipscomb was against the rear door on the passenger's side.

Lipscomb was moving. The victim was missing one shoe, and Lipscomb was missing both of his shoes. Officers found four to five shell casings at the scene.[2]

That same night, Officer Matt Earls responded to a 911 call about a suspicious vehicle. When he arrived at Railroad Avenue, he observed a vehicle on the side of the road and three people outside of the vehicle. Upon approaching the vehicle, he saw a silver handgun in plain view on the floorboard behind the driver's seat.[3] He also saw one bullet hole in the sunroof and one in the back passenger-side door. Captain Mike Segina testified he found three shoes in the passenger-side rear floorboard. Detective Ronnie Anderson testified the three people present at the vehicle were Hadden, Ashley Smith, and Ervin. Detective Anderson's police dog alerted him to marijuana near the railroad tracks. Officers did not find another gun.

Officer Alex Hammond went to Smith's house to look for him and found him hiding under a bed. Smith was arrested for murder, possession with intent to distribute marijuana near a school and/or playground, and possession with intent to distribute marijuana. Detective Jonathan Blackwell testified he interviewed Smith at the police department on March 13, 2009, at 4:15 in the morning. Detective Blackwell took a verbal and written statement from Smith.[4] In the statement, Smith said:

> On March 13th of 2009, a little after midnight, myself, Thomas Michael Smith, Rocky Hadden, James Ervin "Bug", and Ashley Smith, got into Ashley's black Mitsubishi Galant to go meet somebody at Mary Bramlett. We were going there to meet this guy to sell him two ounces of marijuana. Rocky was driving the car. Ashley was in the front passenger seat. Bug [Ervin] was in the back seat behind Rocky. And, I was behind Ashley. We met two black males at the alley beside Mary Bramlett. I showed them the pot, and they said

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[2] Captain Mike Segina testified the four shell casings found at the scene, and the one found under the driver's seat, were all 9mm Rugers.

[3] Captain Segina testified the gun was a Raven Model MP-25. He also found a magazine with five 0.25 caliber rounds in it.

[4] Smith did not testify at his trial.

> they wanted it and asked to get in the car. The two black males got into the back seat. The black male sitting beside me had on a black hoodie [the victim], and the black male sitting beside him against the door was wearing a red coat [Lipscomb]. We pulled to the other end of the alley to the stop sign. I asked them if they wanted it or not. And, they said yeah and started digging in their pockets to find money. Then the guy in the red coat [Lipscomb] pulled out a gun and reached around the guy in between us [the victim] and stuck the gun against my head. He tells me – he tells me to give him my money and everything I got. I told him no, quit playing. He put the gun against my head again and he said, "I'm not joking, don't move." One of the black males grabbed me and pulled me towards them. That's when I pulled my gun out. They were still pointing the gun at me, so I started shooting. My first three shots went into the roof of the car. My last two shots I was falling out of the car, so I don't know where they went. The guy in the red [Lipscomb] jumped and started rolling around on the ground. The guy in the black coat [the victim] just sat in the back seat moaning and wouldn't get out of the car. So I walked around to the passenger side and pulled him out. I left him in the road and I jumped back into the car and we drove to Railroad Avenue to Jacob's house. When we drove to Railroad Avenue the only people in the car was me, Rocky [Hadden] and Ashley [Smith]. Bug [Ervin] got out and ran when he saw the gun. When we got to Railroad Avenue I jumped out and I ran to [left blank]. While I was running I threw the gun and the clip in two different directions. The gun was a Ruger 9mm.

Officer Blackwell testified Smith's statement was that he started firing his gun in an effort to retreat from the car on the driver's side. Captain Segina testified the gun he found in the car had five bullets in the magazine and one in the chamber. Suzanne Cromer from the State Law Enforcement Division (SLED) testified the gun was not functioning properly and did not fire every time the trigger was pulled.

A trial was held on November 16 and 17, 2010. At the close of the State's case, Smith moved for directed verdict on the charge of murder, arguing he fired his gun in self-defense. The court denied the motion with no explanation. The court instructed the jury on self-defense, in addition to the other charges. The jury found Smith guilty of voluntary manslaughter, possession with intent to distribute marijuana near a school and/or playground, and possession with intent to distribute marijuana. The court sentenced Smith to twenty-five years imprisonment for voluntary manslaughter, ten years for possession with intent to distribute marijuana near a school and/or playground, and five years for possession with intent to distribute marijuana. This appeal followed.

STANDARD OF REVIEW

In considering a directed verdict motion, the trial court is concerned with the existence of evidence rather than its weight. *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt." *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69.

LAW/ANALYSIS

Smith argues the trial court erred in denying his motion for directed verdict because the undisputed evidence showed he shot the victim in self-defense. Specifically, Smith asserts the following evidence supported his claim of self-defense: (1) he was one of four passengers in the backseat of a small car; (2) he fired his gun only after another passenger in the backseat, who was acting in concert with the victim, pressed a gun to his temple and ordered him not to move; and (3) he was unable to escape the vehicle. We disagree.

In *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998), our supreme court provided four elements a court should use when determining whether a person was justified in using deadly force in self-defense:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

In *Wiggins*, our supreme court held the trial judge properly denied a directed verdict of acquittal for murder because the State presented sufficient evidence to create a jury issue regarding whether Appellant was acting in self-defense or was guilty of voluntary manslaughter. 330 S.C. at 548, 500 S.E.2d at 495. Further, the court noted, "'[r]eversal of a conviction because of the trial court's refusing to give a directed verdict on the ground of self-defense is rare.'" *Id.* at 545, 500 S.E.2d at 493 (quoting William S. McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina* 483 (3d ed. 1996) (Supp. 1997 at 77)).

Smith argues the State did not present any evidence to prove he was at fault in bringing on the difficulty. He asserts he did not deliberately arm himself in

anticipation of a conflict that evening, and Lipscomb pulled his gun first without any provocation or act of aggression by anyone, including himself.

In *State v. Dickey*, 394 S.C. 491, 500, 716 S.E.2d 97, 101 (2011), our supreme court found the State did not produce any evidence to contradict Dickey's testimony he routinely carried his concealed weapon and did not deliberately arm himself in anticipation of a conflict that evening. Therefore, the supreme court determined the State did not carry its burden to disprove the elements of self-defense beyond a reasonable doubt, and Dickey was entitled to a directed verdict of acquittal on the ground of self-defense. *Id.* at 498-500, 716 S.E.2d at 100-01. We find *Dickey* distinguishable because Dickey was carrying his gun while performing his job as a security guard; although he was not required to carry a loaded gun by his employer, he had a valid concealed weapons permit for his gun; he was acting in good faith in removing the trespassers from the building at the request of a tenant in the course of his employment as a security guard; and Dickey was not brandishing his gun and pulled it only when the trespassers began advancing towards him in an aggressive manner.[5] *Id.* at 495-500, 716 S.E.2d at 98-102.

In contrast, in the present case, the State presented evidence Smith was not acting in good faith at the time of the shooting.[6] The State presented evidence Smith took a gun to a drug deal and violated the law by attempting to sell illegal drugs. In addition, it can be inferred from the evidence that Smith was in violation of the law by carrying a pistol. *Cf. State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52-53 (2007) (holding the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge, but rejecting the position that the unlawful possession of a weapon could never constitute an unlawful activity that would preclude the assertion of self-defense). We find going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty,

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[5] The court noted that "[h]ad [Dickey] accompanied the ejection with threatening words or posture, a jury question may have arisen." *Id.* at 500, 716 S.E.2d at 102. "However, under these facts, we find [Dickey] was exercising his right to eject trespassers in good faith and, as a matter of law, he was without fault in bringing about the difficulty." *Id.* at 501, 716 S.E.2d at 102.

[6] We further note Smith ran away from the scene of the crime after the shooting. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt.").

which is a question of fact that must be determined by the jury. Thus, whether Smith armed himself in anticipation of a conflict was an issue for the jury. *See State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide."); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) ("[O]ne cannot through his own fault bring on a difficulty and then claim the right of self-defense . . . ."); *cf. Slater*, 373 S.C. at 71, 644 S.E.2d at 53 (holding the trial court correctly found Slater was not entitled to a self-defense charge because his actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire and ultimately the death of the victim, and any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense).

Therefore, we find the State carried its burden to disprove the elements of self-defense beyond a reasonable doubt, and the trial judge properly denied Smith's motion for directed verdict based on self-defense. *See Wiggins*, 330 S.C. at 548, 500 S.E.2d at 495 (finding the trial judge properly denied a directed verdict of acquittal because the State presented sufficient evidence to create a jury issue regarding whether Appellant was acting in self-defense or was guilty of voluntary manslaughter); *State v. Strickland*, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (Ct. App. 2010) ("If the State provides evidence sufficient to negate a defendant's claim of self-defense, a motion for directed verdict should be denied.").

CONCLUSION

Accordingly, the trial court is

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, J., concurring in a separate opinion.

I concur in the majority's decision to affirm Smith's conviction. However, I do not believe a jury issue existed as to whether Smith brought on the difficulty which led to the shooting. The issue of self-defense and Smith's right to avail himself of that

defense was a matter of law, not fact. The facts in this case did not support an instruction on self-defense as a matter of law because the first element of self-defense, being without fault in bringing on the difficulty, was not present. Therefore, the trial court's denial of Smith's directed verdict motion on the ground of self-defense was not error.

To support his self-defense claim, Smith cites *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000). In *Starnes*, two shootings took place in a home where there was disputed testimony that a drug transaction was involved. 340 S.C. 316-18, 531 S.E.2d at 910-11. Our supreme court found the facts presented entitled Starnes to a self-defense charge in regard to both shootings. *Id.* at 322, 531 S.E.2d at 913. However, the facts in *Starnes* are very different from those in this case. In *Starnes*, the testimony centered on anger regarding an unpaid or late paid debt, victims bent on mischief, and a shooting to defend others. 340 S.C. 316-18, 531 S.E.2d at 910-11. The purported drug transaction was only one element, and one could argue it had dissipated as a reason for the shootings. Here, Smith willingly brought a loaded weapon to the scene solely for the purpose of furthering his efforts to conduct the illegal sale of drugs.

I believe the reasoning in *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007), is more akin to the facts of this case. In *Slater*, Slater willfully entered into an altercation in progress with a loaded weapon. 373 S.C. at 68, 644 S.E.2d at 51. After shots were fired, Slater returned fire killing the victim. *Id.* Our supreme court reversed this court and agreed with the trial court that Slater was not entitled to a self-defense charge. *Id.* at 71, 644 S.E.2d at 53. The court stated, "[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." *Id.* at 70, 644 S.E.2d at 52 (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 332 (1999)). In other courts, this reasoning has been applied to deny the accused the right to a self-defense charge. In *United States v. Desinor*, 525 F.3d 193 (2d Cir. 2008), the Second Circuit determined the defendants were not entitled to self-defense charges for killing an unintended victim. The Second Circuit held, "[i]t has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill." *Desinor*, 525 F.3d at 198 (quoting *United States v. Thomas*, 34 F.3rd 44, 48 (2d Cir. 1994)).

At the time of the shooting, Smith was engaged in the crime of selling illegal drugs. This activity, in addition to damaging the lives of untold numbers of

people, also results in shootings and deaths on a very frequent basis. Smith's decision to bring a loaded weapon to the drug deal clearly shows his knowledge of the danger of the situation. His criminal conduct brought on the necessity to take the life of another. Smith created a situation fraught with peril. He cannot be excused for the violence that logically and tragically often occurs when engaging in such conduct, nor can he claim he did not anticipate the high probability of such violence.

Therefore, I would affirm the denial of the directed verdict motion on the ground that Smith was not entitled under the facts of this case to the defense of self-defense. The self-defense charge, although not warranted in my view, was not objected to by either party nor has it been argued to this court that it was prejudicial to Smith. Thus, Smith's conviction should be affirmed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ralph A. Froneberger and Anna M. Froneberger,
Appellants,

v.

Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortgage Bankers, Inc., and Countrywide Bank, FSB,
Defendants,

Of Whom Euro Mortgage Bankers, Inc. is the Respondent.

Appellate Case No. 2011-191306

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5168
Heard October 3, 2012 – Filed August 28, 2013

REVERSED IN PART, VACATED IN PART, AND REMANDED

Lucy L. McDow, of Rock Hill, for Appellant.

Walter Keith Martens, of Hamilton Martens & Ballou, LLC, of Rock Hill, for Respondent.

WILLIAMS, J.: Ralph A. Froneberger and Anna M. Froneberger (collectively, the Fronebergers) appeal the circuit court's order granting summary judgment in favor of Euro Mortgage Bankers, Inc. (Euro) on all but one of their causes of action. The Fronebergers argue the circuit court erred (1) in finding that Kirkland Smith was not Euro's actual or apparent agent, (2) in finding that Janel Smith's actions in furtherance of her husband's investment scheme were outside of her scope of employment, and (3) in improperly dismissing two of their causes of action against Euro that did not relate to the alleged agency. We agree and reverse.

FACTS

The Fronebergers are a married couple who own a home in Rock Hill, South Carolina. Euro is a New York corporation with its principal place of business in Melville, New York. From 2007 through 2009, Euro was licensed as a mortgage loan broker in South Carolina and employed Janel Smith as a mortgage loan officer. During this time, Mrs. Smith was the sole employee of Euro for both its North Carolina and South Carolina offices. Mrs. Smith is married to Kirkland Smith.

Until her retirement in 2008, Mrs. Froneberger was a counselor for the Catawba Mental Health Center. In March 2008, Mr. Smith was referred to Catawba for a mental health evaluation, and Mrs. Froneberger was assigned to conduct his evaluation. During this evaluation, Mr. Smith engaged Mrs. Froneberger in a discussion about her contemplated retirement. Mr. Smith explained that he was a mortgage broker for Euro and could provide Mrs. Froneberger with an investment plan to fund her retirement. During this discussion, Mr. Smith provided Mrs. Froneberger with a business card, which identified him as the branch manager for Euro's Charlotte office.

That evening, Mrs. Froneberger told her husband about her discussion with Mr. Smith and gave him Mr. Smith's business card. Mr. Froneberger then contacted Mr. Smith and made an appointment to meet Mr. Smith in Charlotte, North Carolina. On March 27, 2008, the Fronebergers traveled to Charlotte and met Mr. Smith at an office[1] located in a high-rise building on Tryon Street.

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[1] The record is unclear as to whether this office was in fact the office for Euro's Charlotte branch. The Fronebergers assert that this office was the office maintained by Euro for their Charlotte branch. Euro does not deny this assertion, but instead

At this meeting, Mr. Smith suggested an investment plan that involved the Fronebergers taking out an equity loan from Euro against their home in Rock Hill, "so that [they] could use that money to make some investments" for Mrs. Froneberger's retirement. Mr. Smith suggested that the Fronebergers could invest their loan proceeds with a large investment bank, such as "Merrill Lynch or AIG." The investment plan was premised on the assumption that the returns from their investment portfolio would be greater than the cost of the interest on the mortgage, and the excess could be used for Mrs. Froneberger's living expenses during retirement. The Fronebergers did not make any commitments at this March 27 meeting, indicating to Mr. Smith that they needed to talk about his recommendations before making a decision.

The Fronebergers returned to Charlotte the following day and decided to go forward by applying for a mortgage refinancing through Euro. Mr. Smith and the Fronebergers were the only people present at this second meeting. Mr. Smith had the Fronebergers complete a Uniform Residential Loan Application. This form was later signed by Mrs. Smith as "interviewer" and submitted to Euro's underwriting department in New York. On April 10, 2008, Euro approved the loan application, and Mr. Smith contacted the Fronebergers to convey Euro's acceptance of their application.

On April 11, 2008, both Mr. and Mrs. Smith accompanied the Fronebergers to a meeting with a Smith Barney investment advisor to determine if Smith Barney would invest and manage the funds secured from the refinance loan. Upon arriving at Smith Barney and prior to meeting with a representative, Mrs. Smith excused herself to care for the Smiths' child and did not return. Mr. Smith and the Fronebergers then met with a Smith Barney representative. This representative informed the Fronebergers that Smith Barney did not "do investments with equity home loans." The Fronebergers and Mr. Smith then returned to Mr. Smith's office.

On the way back to the office, Mr. Smith informed the Fronebergers that AIG and Merrill Lynch no longer had programs that would invest mortgage loan proceeds

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highlights that "Mr. Smith's office was not marked with any signs, placards, or other indicia that the office was operated by Euro, and Mr. Smith did not wear any nametag or logo reflecting that he was affiliated with Euro." Throughout the Fronebergers' deposition testimony, they refer to this office as "Mr. Smith's office."

for clients. Immediately following this, Mr. Smith told the Fronebergers that he believed he could manage their money "about as well as" an investment bank. Mr. Smith then told the Fronebergers about several companies that he owned or operated, including his family's trucking business. During this discussion, Mr. Smith would "refer back" to Euro, but never directly told the Fronebergers that Euro had any involvement with the proposed investments.

Ultimately, the Fronebergers decided to go through with Mr. Smith's proposed investment plan, and on April 18, 2008, the Fronebergers withdrew $20,000 from their savings account and delivered these funds to Mr. Smith to invest in the trucking company. Upon receipt of these funds, Mr. Smith executed a promissory note, promising to pay the Fronebergers "the sum of twenty thousand 00/100 dollars ($20,000.00) together with interest thereon in the sum of 5% of principal one thousand dollars ($1,000.00) per month." The note identified "Kirkland Smith" as the "Borrower" and "Ralph A. Froneberger & Martina A. Froneberger" as the "Lender."

Later that day, the refinance loan from Euro was closed at a law office in Rock Hill. Both Mrs. and Mr. Smith went to the closing. However, Mr. Smith stayed in the car with the Smiths' infant child during the closing. Mr. Froneberger testified that Mrs. Smith helped with the closing, but the Fronebergers "thought she was just being helpful [and] didn't know she had anything to do with the business." After paying the closing fees and the $1,083.43 remaining balance on their previous mortgage, the closing yielded $128,432.45.

On May 7, 2008, the Fronebergers gave Mr. Smith a second payment of $20,000. Again, on June 18, 2008, the Fronebergers gave Mr. Smith a third payment for $20,000. Both of these additional payments were to be invested in Mr. Smith's family owned trucking business. Following each of these additional payments, Mr. Smith executed additional promissory notes. Initially, the Fronebergers received the promised payments from Mr. Smith as returns on their investments. However, beginning in July 2008, the checks from Mr. Smith began to bounce for having "insufficient funds." Shortly thereafter, the payments stopped all together. Despite repeated efforts, the Fronebergers were unable to get Mr. Smith to make further payments or return the money they had invested with him.

PROCEDURAL HISTORY

As a result of their transactions with the Smiths, the Fronebergers brought suit against Mr. Smith, Mrs. Smith, Euro, and Bank of America,[2] as successor in interest to Euro's mortgage, on June 16, 2009. The Fronebergers filed an amended complaint on December 14, 2009. The Fronebergers sought recovery against the Smiths and Euro jointly for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act. The Fronebergers also sought recovery against Euro for negligent hiring and retention of the Smiths, for failure to comply with the attorney preference statute as required by section 37-10-102(a) of the South Carolina Code (2002), for rescission of the mortgage transaction based on common-law fraud, and for rescission or reformation of the mortgage under the South Carolina Consumer Protection Code.

Euro timely answered both the original complaint and the amended complaint. The Smiths, who were pro se, each filed an answer to the original complaint, but they failed to timely answer the amended complaint.[3] In their answers to the Fronebergers' complaints, Mr. and Mrs. Smith admitted Mr. Smith was an employee of Euro.[4] On February 2, 2010, the circuit court found the Smiths in default for their failure to respond to the amended complaint.

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[2] Bank of America was replaced by Countrywide Bank, who is the actual current holder of the Fronebergers' Mortgage, in the amended complaint.

[3] Mrs. Smith also provided an untimely answer to the Fronebergers' amended complaint.

[4] On three separate occasions in his answer to the Fronebergers' original complaint, Mr. Smith indicates that he acted as an agent or employee of Euro.

> Answering the allegations of Paragraph 8 of the Complaint, Defendant Kirkland Smith admits that Kirkland Smith represented Euro Mortgage at the closing of the loan in Rock Hill, South Carolina.
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> . . .
>
> Answering the allegations of Paragraph 10 of the Complaint, Defendant Kirkland Smith admits that he was an employee of Euro Mortgage.

On November 2, 2010, Euro filed a motion for summary judgment with the circuit court. In support of this motion, Euro presented an affidavit from Lisa Vitale, Euro's president and sole stock holder, which stated that (1) Euro did not permit its employees to provide investment advice; (2) Mrs. Smith was employed as a loan originator from mid-2007 through mid-2009; and (3) Euro never employed Mr. Smith or authorized him to hold himself out as its agent. On December 16, 2010, a hearing was held before the circuit court to address this motion. On December 28, 2010, the circuit court granted the motion for summary judgment on all of the Fronebergers' causes of action against Euro, except their attorney preference claim, finding that (1) Euro was not liable for the acts of Mr. Smith under a theory of either actual or apparent authority; (2) Euro was not liable for the actions of Mrs. Smith because any actions relating to her husband's solicitation of money were outside the scope of her authority; and (3) the Fronebergers' damages arose solely from their loans to Mr. Smith and were unrelated to the mortgage loan transaction with Euro.

On January 12, 2011, the Fronebergers filed a Rule 59(e), SCRCP, motion for reconsideration, arguing that (1) sufficient evidence had been presented to preclude summary judgment as to the issues of actual or apparent agency; and (2) Euro's motion for summary judgment solely addressed agency and therefore should not have affected the Fronebergers' causes of action for rescission and negligent hiring and retention. On January 20, 2011, a second hearing was held before the circuit court to address the Fronebergers' motion to reconsider. On March 10, 2011, the

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> Answering the allegations of Paragraph 16 of the Complaint, Defendant Kirkland Smith admits that his actions towards accomplishing the mortgage loan transaction were made in his capacity as a [sic] office manager and consultant agent of Euro Mortgage.

Additionally, Mrs. Smith provided a similar statement in her untimely answer to the amended complaint when she stated: "Responding to Paragraph 10, Janel Smith admits she was an employee of Euro Mortgage Bankers. Janel Smith is of the opinion or belief that Kirkland Smith was an employee, agent, or representative of Euro."

circuit court issued a Form 4 order denying the motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* at 122, 708 S.E.2d at 769; *see also* Rule 56(c), SCRCP. "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, . . . the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* (citation omitted).

LAW/ANALYSIS

I. Agency

The Fronebergers first contend that the circuit court erred in granting summary judgment because sufficient evidence was presented to create genuine issues of material fact regarding the existence of an actual or apparent agency between Mr. Smith and Euro. Additionally, the Fronebergers argue that the circuit court erred in granting summary judgment based on its finding that the actions of Mrs. Smith were outside the scope of her employment. While we agree with the circuit court's treatment of the alleged apparent agency between Mr. Smith and Euro, we find sufficient evidence exists to withstand summary judgment as to the issue of an

actual agency relationship between Mr. Smith and Euro. Further, we find that sufficient evidence exists in the record to withstand summary judgment on the question of whether Mrs. Smith's actions were within the scope of her employment.

A. Mr. Smith's Apparent Agency

Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* at 245, 473 S.E.2d at 868. "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction. *See Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986) (discussing the elements of apparent agency and finding the first element may be established "by either affirmative conduct or conscious and voluntary inaction"); *Graves*, 306 S.C. at 63, 409 S.E.2d at 771 (the first element of apparent agency requires "that the purported principal *consciously or impliedly represented* another to be his agent." (emphasis added)). Under the first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf. *See Frasier*, 323 S.C. at 244, 473 S.E.2d at 868 (apparent agency is created by "written or spoken words or any other conduct of the principal" showing consent to allow another to act on a principal's behalf). Under the second, the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) ("Such authority is implied where the principal passively permits the agent to appear to a third person

to have the authority to act on his behalf.")*; Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal.").

In the instant case, we hold that the Fronebergers have failed to satisfy the first element of apparent agency, which requires "that the purported principal *consciously or impliedly represent*[] another to be his agent." *Graves*, 306 S.C. at 63, 409 S.E.2d at 771 (emphasis added).

There is no evidence that Euro, through conduct or manifestations, ever made any direct representation that Mr. Smith was an employee or agent of its company. The Fronebergers stated in their deposition testimony that no one "other than Kirkland Smith ever [told them] that he was employed by Euro Mortgage Bankers." The Fronebergers did not testify to having any contact with Euro's New York office and had little contact with Mrs. Smith. In fact, the Fronebergers testified that they did not even realize Mrs. Smith was an employee of Euro.[5]

Consequently, the only remaining way for the Fronebergers to establish the first element of apparent agency is to demonstrate Euro knowingly permitted Mr. Smith to appear to others to be its agent. *See R & G Constr.*, 343 S.C. at 433, 540 S.E.2d at 118 (requiring "acts or conduct" demonstrating a principal "has knowingly . . . permitted another to appear to be his agent"). If Euro knew Mr. Smith was holding himself out as its Charlotte office branch manager, was using its office space, and was handing out business cards containing its logo but consciously decided not to stop or correct this behavior, then that inaction could serve as conduct to satisfy the first element. However, we find that the Fronebergers have failed to demonstrate evidence indicating Euro knew Mr. Smith was acting in this manner. Without knowledge of Mr. Smith's conduct, Euro cannot have permitted this behavior with conscious inaction. *See Fernander*, 278 S.C. at 143, 293 S.E.2d at 426 ("[A]gency may be . . . proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority *with the knowledge of the alleged principal*." (emphasis added)). Accordingly, the record contains no evidence that Euro, by any

[5] Mr. Froneberger stated, "[w]e just saw [Mrs. Smith] only as [Mr. Smith's] wife. We didn't even know that she was involved at all." Mrs. Froneberger provided a similar view when she said, "I thought [Mrs. Smith] was just [Mr. Smith's] wife just coming in talking to him in his office."

acts or conduct, knowingly caused or passively permitted Mr. Smith to appear to be its agent.

Because this first element fails, we need not consider the remaining elements required to prove apparent agency. We find there is no genuine issue of material fact regarding an apparent agency relationship between Mr. Smith and Euro. Accordingly, the circuit court properly found Euro was entitled to judgment as a matter of law on the apparent agency issue.

B. Mr. Smith's Actual Agency

Although we agree with the circuit court's treatment of the apparent agency issue, we find that there is evidence in the record creating a genuine issue regarding an actual agency relationship between Euro and Mr. Smith, sufficient to survive a motion for summary judgment.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006). Generally, "[a]gency is a question of fact." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). "[Q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted). "If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury[,]" and the grant of summary judgment is inappropriate. *Gathers*, 282 S.C. at 226, 317 S.E.2d at 752.

When ruling on a motion for summary judgment, the circuit court should examine the "pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits" to determine if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP; *see also Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). In the case at hand, the circuit court granted summary judgment to Euro based on its finding that it was "undisputed that Mr. Smith was never an employee of Euro." However, Mr. and Mrs. Smith both indicate in their answers to the Fronebergers' complaints that Mr. Smith was in fact an employee of Euro. These admissions in the Smiths' answers

are contrary to Euro's president's affidavit submitted with Euro's motion for summary judgment.

It is well settled in South Carolina that a party "may not rest upon the mere allegations or denials of his pleading" to defeat a motion for summary judgment. Rule 56(e), SCRCP; *see also Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994) (stating "an adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion"). However, in the instant case, the Fronebergers are not merely relying on the allegations of their own pleadings. Instead, they point to the pleadings provided by adverse parties containing admissions that indicate the existence of an agency relationship between Mr. Smith and Euro.

The dissent argues that the Fronebergers failed to present any evidence of an agency relationship because the Smiths' answers "contain only the bare conclusion that [Mr. Smith] was an agent" while failing to provide evidence to support this conclusion. We disagree. Rule 56 of the South Carolina Rules of Civil Procedure requires the circuit court to consider the submitted pleadings, along with depositions, answers to interrogatories, admissions, and affidavits, when ruling on summary judgment. The Fronebergers directed the circuit court's attention to the Smiths' pleadings as evidence of an actual agency in both their return to summary judgment and their motion for reconsideration. We believe the admissions in the Smiths' pleadings satisfy the mere scintilla of evidence required to withstand summary judgment.[6] Accordingly, the issue of actual agency is a question for the jury. *See Gathers*, 282 S.C. at 226, 317 S.E.2d at 752 ("If there are *any* facts

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[6] Additionally, the instant case is distinguishable from the case law cited by the dissent. The admissions in the Smiths' answers were before the circuit court as pleadings of Euro's co-defendants, and not in the pleadings of the party resisting summary judgment. *Cf. Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (finding an affidavit submitted by the party resisting summary judgment that contained a "conclusory statement as to the ultimate issue in [that] case [was] not sufficient to create a genuine issue of fact for purposes of resisting summary judgment"). We also note that the only evidence that conflicts with the admissions in the Smiths' pleadings is a similar conclusory statement in the affidavit from Euro's president stating that Euro never employed Mr. Smith or authorized him to hold himself out as its agent.

tending to prove the relationship of agency, it then becomes a question for the jury." (emphasis added)); *Fernander*, 278 S.C. at 142, 293 S.E.2d at 425 ("[Q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." (internal quotation marks omitted)).

In reaching this conclusion, we do not suggest that the Fronebergers have presented sufficient evidence to establish an agency relationship at trial. Ultimately, evidence may demonstrate that Euro and Mr. Smith never entered into an agency relationship. However, given the minimal amount of discovery the parties had conducted at the time summary judgment was granted,[7] we find the Smiths' answers created a mere scintilla of evidence that precluded summary judgment.

Utilizing the mere scintilla of evidence burden, the inconsistencies among the Smiths' answers create a genuine issue of material fact that precludes summary judgment.[8] Accordingly, we find the circuit court erred in concluding that the Fronebergers could not proceed under a theory of actual agency.

C. Mrs. Smith's Scope of Employment

The Fronebergers also contend that the circuit court erred in granting summary judgment based upon its finding that the actions of Mrs. Smith in furtherance of her husband's investment scheme were outside the scope of her employment with Euro.

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[7] The record indicates that at the time summary judgment was granted, the only discovery before the circuit court was the Fronebergers' depositions and the affidavit of Euro's president.

[8] We recognize that one of the Fronebergers' causes of action is fraud, which requires a heightened standard of proof at the summary judgment stage. *See Turner*, 392 S.C. at 125, 708 S.E.2d at 770 (finding that "more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment" when fraud is the cause of action). However, because the circuit court's summary judgment order focused solely on the existence of agency and did not address the merits of the underlying fraud claim, we find it appropriate to apply the mere scintilla burden to the agency question for all causes of action.

"The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986). "An act falls within the scope of the servant's employment if it was reasonably necessary to accomplish the purpose of the servant's employment, and it was done in furtherance of the master's business." *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). Accordingly, "the master is liable for the torts of his servant even when the servant acts against the express instructions of his master, so long as the servant acts to further the master's business." *Id.* "What is within the scope of employment may be determined by implication from the circumstances of the case." *Id.* "Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." *Id.*

In the instant case, the proper question for the circuit court was whether Mrs. Smith's acts facilitating her husband's investment scheme were: (1) in furtherance of Euro's business and (2) reasonably necessary to accomplish the purpose of her employment. We believe that several of Mrs. Smith's actions, particularly allowing her husband access to Euro's office and signing the loan application that was submitted to Euro's underwriting office, served to further her master's business of lending money and obtaining mortgages and were reasonably necessary to accomplish the purpose of her employment. These actions were also integral in facilitating the transaction between the Fronebergers and her husband.

The dissent argues that the circuit court properly held that the Fronebergers' damages arose solely from the investment transactions with Mr. Smith and were unconnected to the mortgage loan from Euro. However, there is evidence in the record that shows these two transactions were closely related. The Fronebergers' testified at their depositions that their sole purpose in obtaining this mortgage was to fund the investment plan provided by Mr. Smith. This contention is supported by the fact that their prior mortgage with Wells Fargo only had a remaining balance of $1,086.43 at the time they closed on the mortgage. Accordingly, we find the circuit court inappropriately concluded that Mr. Smith's investment scheme and the mortgage loan from Euro were separate and unrelated. Instead, under *Wade*, we find this determination was a question for the jury. 330 S.C. at 319, 498 S.E.2d at 688 ("Any doubt as to whether the servant was acting within the

scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury.").

Based on the foregoing, we find that there are genuine questions of material fact regarding whether the actions of Mrs. Smith were within the scope of her employment that are sufficient to withstand summary judgment. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (requiring only "a mere scintilla of evidence" to withstand summary judgment in cases applying the preponderance of the evidence burden of proof); *Wade*, 330 S.C. at 319, 498 S.E.2d at 688 ("Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury."). Therefore, we find that the circuit court erred in granting summary judgment.

Due to the circuit court's errors regarding the grant of summary judgment on the existence of an actual agency with Mr. Smith and the scope of Mrs. Smith's employment, we reverse the circuit court's grant of summary judgment on the Fronebergers' causes of action for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act.

II. Negligent Hiring and Consumer Protection Code Claims

The Fronebergers additionally argue that the circuit court improperly dismissed their causes of action for (1) negligent hiring and retention and (2) rescission based upon unconscionability under Section 37-10-105 the South Carolina Code (2002) (the "Consumer Protection Code") because the circuit court provided no reasoning for dismissing these claims. Furthermore, because these causes of action are separate and distinct from agency, the Fronebergers contend that the court's ruling on agency was not dispositive on the viability of their negligent hiring and Consumer Protection Code claims. We agree.

"[A circuit] court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review." *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 237, 536 S.E.2d 86, 88 (Ct. App. 2000). "Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Id.* at 237-38, 536 S.E.2d at 88-89 (internal quotation marks omitted). The order should also "provide clear

notice to all parties and the reviewing court as to the rationale applied in granting . . . summary judgment." *Id.* at 38, 536 S.E.2d at 89 (alteration in original) (internal quotation marks omitted).

In this case, Euro moved for summary judgment on all of the Fronebergers' causes of action. However, their memorandum in support of summary judgment focuses on the nonexistence of an agency relationship between Mr. Smith and Euro. At the hearing for this motion, the Fronebergers argued to the circuit court that at least one of their causes of actions did not depend on the finding of an agency relationship.[9] The circuit court's order granting summary judgment on six of the seven causes of action brought by the Fronebergers does not contain specific findings or reasoning for the dismissal of any particular cause of action. Instead, the order, under a section entitled "Discussion," generally finds that there was no agency relationship between Mr. Smith and Euro and that the Fronebergers' losses arose solely from their loans to Mr. Smith and were unrelated to their mortgage transaction with Euro. With their motion for reconsideration, the Fronebergers argued that the order failed to address all of their causes of action, specifically pointing out the negligent hiring and consumer protection code claims. The circuit court denied the motion for reconsideration in a Form 4 order.

We find the circuit court has failed to provide adequate reasoning for its grant of summary judgment as to the Fronebergers' claims for negligent hiring and rescission. *See Bowen*, 342 S.C. at 237, 536 S.E.2d at 88 (stating that the circuit court "must set out facts and accompanying legal analysis" to support its grant for summary judgment). The circuit court did not discuss either the undisputed material facts or applicable law which support its grant of summary judgment in relation to Mrs. Smith's hiring and retention or the alleged unconscionable inducement regarding their loan. Neither of these claims turn on the existence of an agency relationship between Mr. Smith and Euro. The circuit court failed to provide either further findings of fact relating to these claims or more defined rationale explaining the grant of summary judgment. We therefore vacate the circuit court's grant of summary judgment for the Fronebergers' claims for negligent hiring and violation of the Consumer Protection Code and remand the matter to the circuit court for an order "identifying the facts and accompanying

[9] Counsel for the Fronebergers stated: "There is one other, your honor, . . . that's not affected by agency or apparent agency and that's the negligent hiring and retention."

legal analysis on which it relied in granting Defendants' summary judgment motion" as to these two causes of action.

CONCLUSION

The Fronebergers have presented at least a mere scintilla of evidence that there was an actual agency relationship between Mr. Smith and Euro. Further, there are genuine questions of fact regarding whether the actions of Mrs. Smith were within the scope of her employment. Hence, the grant of summary judgment based on the court's findings that there was no agency relationship with Mr. Smith and that the acts of Mrs. Smith were outside the scope of her employment was improper. Additionally, the circuit court failed to provide adequate reasoning for its dismissal of the Fronebergers' claims for negligent hiring and rescission under the Consumer Protection Code. Therefore, we reverse the grant of summary judgment on the Fronebergers' causes of action for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act. Further, we vacate the circuit court's grant of summary judgment for the Fronebergers' claims for negligent hiring and violation of the Consumer Protection Code and remand the matter to the circuit court for an order identifying the facts and accompanying legal analysis on which it relied in granting Euro's motion for summary judgment as to these two causes of action.

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

REVERSED IN PART and VACATED IN PART and REMANDED.

PIEPER, J., concurs.

FEW, C.J., dissenting: Kirkland and Janel Smith fraudulently and tortiously misappropriated the Fronebergers' retirement funds. There is no evidence in this record, however, that in doing so either of them acted as an agent of Euro Mortgage Bankers, Inc. Therefore, I would affirm the circuit court's order granting summary judgment to Euro.

A. Apparent Authority

The majority correctly concludes there is no evidence of agency through apparent authority. In reaching this correct conclusion, however, the majority has confused the elements of apparent authority and has misstated the first element.

"The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations." *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To analyze the existence of apparent authority, a court must focus on "the relationship between . . . the principal and the third party." *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642-43, 598 S.E.2d 717, 721 (Ct. App. 2004).

> Based upon these general principles, our courts have required three elements be proven to establish apparent authority: "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment."

359 S.C. at 643, 598 S.E.2d at 721 (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)); *see also Simmons v. Tuomey Reg'l. Med. Ctr.*, 341 S.C. 32, 46, 533 S.E.2d 312, 319 (2000) (listing the three elements).

In this case, the circuit court correctly focused on the relationship between the principal and the third party and determined that because there was no evidence Euro made any representation to the Fronebergers, they failed to satisfy the first element of apparent authority. The majority, however, has incorrectly analyzed the circuit court's ruling by repeating language our courts have used to explain and analyze the second element. The majority has used that language as support for its

incorrect conclusions that "inaction could serve as conduct," and thus that the first element can be satisfied by evidence of "conscious and voluntary inaction" or that "the principal . . . passively permit[ed] another to appear to third parties to have authority to act on his behalf." The majority is incorrect because the first element cannot be satisfied by inaction. Rather, to survive a motion for summary judgment as to the first element of apparent authority, the plaintiff must produce evidence of some action by the purported principal through which the principal represented to the third party that the alleged agent had authority to act on the principal's behalf.

The majority cites *Watkins v. Mobil Oil Corporation*, 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986), in support of its argument that the first element can be proven by "conscious and voluntary inaction" by Euro. For two reasons, I believe the majority incorrectly relies on *Watkins*. First, *Watkins* specifically states that apparent authority *cannot* be proven by "conscious and voluntary inaction." 291 S.C. at 67, 352 S.E.2d at 287 (stating "it is not enough simply to prove . . . conscious and voluntary inaction"). Second, *Watkins* relates only to the second element of apparent authority, not the first. In framing our explanation that no evidence of apparent authority existed, we limited the discussion to the second element, specifically stating, "only the factor of reliance warrants discussion . . . ." *Id.* Because *Watkins* specifically states apparent authority *cannot* be proven by inaction, and because the analysis in *Watkins* relates only to the second element of apparent authority, the majority's reliance on *Watkins* is misplaced.

I believe the majority has incorrectly interpreted the word "impliedly." In numerous cases, our courts have stated the first element may be satisfied by evidence showing "the purported principal . . . impliedly represented another to be his agent." *See, e.g., Charleston, S.C. Registry for Golf & Tourism, Inc.*, 359 S.C. at 643, 598 S.E.2d at 721 (quoting *Graves*, 306 S.C. at 63, 409 S.E.2d at 771); *see also Simmons*, 341 S.C. at 46, 533 S.E.2d at 319 (stating "the injured patient must establish that [] the hospital consciously or impliedly represented the physician to be its agent"). By using the word "impliedly," however, our courts did not intend to allow proof of the first element by inaction. Rather, our courts used the word impliedly to indicate that a principal who made no express representation of authority, but who took action that amounts to an implicit representation of authority, may still be held vicariously liable under the doctrine of apparent authority.

The majority relies on cases such as *R & G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). The language the majority relies on, however, relates only to the second element of apparent authority. In *R & G Construction*, this court explained that reliance under the second element must be reasonable. 343 S.C. at 433, 540 S.E.2d at 118 (stating "[t]he elements of apparent agency are: . . . (2) third party *reasonably* relied on the representation . . . " (emphasis added)). Because the court's focus must be on the relationship between the principal and the third party, a proper evaluation of the reasonableness of the third party's reliance also focuses on that relationship. A court must ask whether "third persons are justified in believing the agent is acting within his authority" based on the "conduct or other manifestations of the principal's consent." 343 S.C. at 434, 540 S.E.2d at 118 (citing *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997)). In this context, we further explained the second element, and particularly how a court may determine whether the third party's reliance is reasonable, stating, "Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." *Id.* (citing *Genovese*, 327 S.C. at 572, 490 S.E.2d at 611).

Genovese demonstrates that this "passively permits" language relates to the second element of apparent authority, not the first. In *Genovese*, the issue was whether the landlord's employee had authority to inform the tenant she could vacate the leased property without further obligation under the lease. 327 S.C. at 570, 490 S.E.2d at 610. We stated, "It is undisputed that [the employee] was the landlords' agent," and proceeded to consider the "extent of [the employee's] agency" under the doctrine of apparent authority. 327 S.C. at 571, 490 S.E.2d at 610. After reciting evidence supporting the existence of the first element, *id.*, we discussed the dispositive issue—whether the evidence satisfied the second element. We concluded the discussion of apparent authority by holding:

> [W]e find there is some evidence in the record . . . that . . . the conduct of the landlords in clothing [the employee] with so much authority to manage the property would allow a reasonably prudent person in the tenant's position to believe [the employee] had the authority to release the tenant from her obligations under the lease.

327 S.C. at 572, 490 S.E.2d at 611. Because *Genovese* was decided based on the second element of apparent authority, not the first, the statements quoted from *R & G Construction* that cite *Genovese* for authority are correctly understood to relate to the second element.

The majority has also quoted other opinion excerpts that relate to analysis of the second element, and thus have no place in a discussion of a trial court's ruling on the first element. For example, the majority correctly quotes *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996) for the test for analyzing the first element of apparent authority—"Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal . . .*"—but in continuing the quotation, the majority enters into the test for the second element—"which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." The majority further quotes *Frasier*, stating, "the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* The majority has also quoted language from *R & G Construction*, 343 S.C. at 433, 540 S.E.2d at 118, to the effect that apparent authority may be established when a principal "has knowingly . . . permitted another to appear to be his agent," and the following language from *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982), "agency may be . . . proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." These are correct statements of law when considered in relation to the second element, but these statements are misplaced in a discussion of the first element.

Thus, the majority's analysis of whether the Fronebergers were reasonably justified in believing Mr. Smith was an agent of Euro and whether Euro knew Mr. Smith was holding himself out as Euro's agent is also misplaced in a discussion of the first element. Further, the majority's contention that the Fronebergers could prove the first element simply by "demonstrat[ing] Euro knowingly permitted Mr. Smith to appear to others to be his agent," and its conclusion, "Without knowledge of Mr. Smith's conduct, Euro cannot have permitted this behavior with conscious inaction," are incorrect. The only issue before this court regarding apparent authority is whether the circuit court correctly found no evidence of the first element. To the extent the majority opinion suggests that the first element could be satisfied by anything other than evidence of action taken by Euro, the majority

opinion is incorrect.[10] Analyzing the first element of apparent authority, the law requires a court to focus on the actions of the purported principal—not the inaction of the principal, not the actions of the alleged agent, and not what the third party might have inferred from the agent's actions. In this case, the Fronebergers produced no evidence of any action by Euro, and the circuit court correctly granted summary judgment on the basis of their failure to satisfy the first element.

I do not intend to suggest that a purported principal's "inaction" is irrelevant to the first element from an evidentiary standpoint. In some cases, certain inaction may assist the factfinder in understanding the significance of the purported principal's action. Thus, inaction may be relevant and admissible under Rules 401 and 402, SCRE. The majority asserts that if Euro knew Mr. Smith held himself out as Euro's Charlotte branch manager, used Euro's office space, and handed out business cards with Euro's logo on them, Euro could be liable if it did nothing to stop Mr. Smith. It is true that evidence of Euro's inaction in the face of this conduct is relevant, and, if the Fronebergers had offered evidence of action taken by Euro, would be admissible at trial. None of that evidence, however, satisfies the first element of apparent authority on a motion for summary judgment. Rather, the Fronebergers must offer evidence that Euro took some action amounting to an express or implied representation to them that Mr. Smith had authority to act as Euro's agent. There is no such evidence in this case, and thus the circuit court correctly granted summary judgment as to the first element of apparent authority.

B. Actual Authority

The majority incorrectly concludes there is evidence of agency through actual authority. Actual authority is based on the relationship between the purported principal and agent. *See Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority as authority that is "expressly conferred upon the agent by the principal"). For agency to exist through actual authority, the principal must consent to and intend for the agent to act on his behalf, and likewise, the agent must accept the authority to act on behalf of the principal. *See* Restatement (Third) of Agency § 1.01 (2006) (explaining agency arises when the

[10] The majority's statements that the first element may be proven by inaction, or by anything other than evidence of action taken by Euro, are also dicta because they are not necessary to the resolution of this appeal.

principal consents "that the agent shall act on the principal's behalf and subject to the principal's control," and the agent consents to act on the principal's behalf); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) ("Agency . . . results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."). The test to determine whether an agency relationship exists is whether the purported principal has the right to control the conduct of the alleged agent in the performance of his work and the manner in which the work is to be done. *Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009); *Newell v. Trident Med. Ctr.*, 359 S.C. 4, 12, 597 S.E.2d 776, 780 (2004). Thus, an agency relationship based on actual authority exists when a purported principal and an alleged agent mutually consent to the principal controlling the agent in the work the agent has agreed to do on the principal's behalf.

Applying the law to the facts of this case, we must affirm the circuit court unless the Fronebergers offered evidence of a relationship between Euro and Mr. Smith that meets this test for actual authority. To determine whether this evidence exists, courts examine the relationship between the purported principal and the alleged agent. In *Newell*, for example, the court focused on the language of the hospital's bylaws in concluding no actual agency relationship existed between the hospital and a non-employee physician at the hospital. 359 S.C. at 14, 597 S.E.2d at 781. Similarly, the court in *Jamison* looked at the documents governing the parties' relationship to determine whether the purported principal had the right to control the alleged agent in its performance of alcoholic beverage sales. 385 S.C. at 222-23, 684 S.E.2d at 171-72. Here, there is no evidence of any relationship between Euro and Mr. Smith. Therefore, there can be no evidence that Euro and Mr. Smith mutually consented to Euro controlling him, and there is no evidence of agency through actual authority.

The majority argues the Smiths' answers are evidence of actual authority. Unless the answer is verified, or unless it is the moving party's own answer, it is not evidence that can be considered on summary judgment. The point is proven by the opinion the majority cites for the standard to be applied to a summary judgment motion—*Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005). The majority omits from its quotation from *Miller* the key language applicable to this case—"the opponent [of summary judgment] cannot simply rest

on mere allegations or denials contained in the pleadings." 365 S.C. at 220, 616 S.E.2d at 730.

Moreover, the Smiths' answers do not suffice because they contain only the bare conclusion that Mr. Smith was an agent, with no evidence to support the conclusion. *See Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (stating a "conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment"). The Smiths' answers contain no evidence of any action by Euro. Thus, there is no evidence that Euro consented to Mr. Smith acting on its behalf and under its control. It makes no difference that the answers were filed by Euro's co-defendants. The answers contain no basis for a factfinder to infer that Euro and Mr. Smith mutually consented to a relationship through which Euro had the authority to control Mr. Smith's conduct. The majority actually defeats its own argument by observing in its section on apparent authority that there is no evidence "indicating Euro knew Mr. Smith was acting" on Euro's behalf. I would affirm the circuit court's order granting summary judgment to Euro.

The majority's reliance on the "minimal amount of discovery" conducted before the summary judgment hearing is also misplaced. By including the reference to discovery, the majority suggests the existence or non-existence of evidence sufficient to overcome a summary judgment motion depends on the extent to which additional discovery could be conducted. However, whether the party opposing a summary judgment motion has had a full opportunity to complete discovery is a separate legal issue than whether that party met its burden to produce sufficient evidence. The Fronebergers did not move for a continuance of the summary judgment hearing to pursue further discovery and did not argue at the summary judgment hearing or in their appellate brief they were afforded incomplete discovery. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (stating in order to delay a summary judgment ruling, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence"); *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (refusing to consider whether "summary judgment was premature because . . . discovery [was] outstanding" when appellants "took no steps to protect their interests in this regard"); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (holding incomplete discovery issue unpreserved because appellant did not "move for a continuance in which to pursue further discovery"). If the need for more discovery

was an issue, the Fronebergers should have requested it. Once the summary judgment question is before the court, the sole question is whether the evidence creates a question of fact for the jury.

C. Scope of Employment

Likewise, I would affirm the circuit court's finding that Mrs. Smith's actions were not within the scope of her employment. For the purposes of determining whether the doctrine of *respondeat superior* applies, an employee's tortious act is within the scope of his or her employment when it is "reasonably necessary to accomplish the purpose of his [or her] employment *and* in furtherance of the master's business." *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006) (emphasis added). This test requires the employee's actions be (1) tortious, (2) reasonably necessary to accomplish the purpose of the employment, and (3) in furtherance of the employer's business, before the actions may subject the principal to liability.

Thus, the only actions that are pertinent to determining whether Euro is liable under the doctrine of *respondeat superior* are those that were tortious. *See James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008) ("The doctrine of *respondeat superior* provides that the employer . . . is called to answer for the *tortious acts* of . . . the employee, when those acts occur *in the course and scope* of the employee's employment." (emphasis added)). In this case, Mrs. Smith's only tortious actions were those related to the investment transaction. Her act of signing the mortgage loan resulted only in Euro transferring $127,647 to the Fronebergers, which caused them no harm. The Fronebergers suffered no injury until they gave Mr. Smith money, and it was the investment transaction that caused their harm. When we consider just the investment transaction, there is no evidence that Mrs. Smith's act of allowing her husband to use her office to provide investment advice was within the scope of her employment. Euro's business is mortgage lending. Euro does not provide investment advice, nor does it broker investments. Therefore, Mrs. Smith's actions that relate to the investment transaction were not reasonably necessary to accomplish Euro's business of mortgage lending and did not further Euro's business.

The majority argues, however, that Mrs. Smith's actions to obtain the mortgage loan were within the scope of her employment, and subject Euro to liability, because those actions were "integral in facilitating the [investment] transaction

between the Fronebergers and [Mr. Smith]." It is true that the fraud on the Fronebergers could not have been perpetrated but for the loan from Euro. However, the Fronebergers' theory of Euro's liability depends on Mr. Smith and Mrs. Smith acting intentionally, not merely negligently,[11] to misappropriate their retirement funds. Therefore, to the extent Mrs. Smith's actions in obtaining the loan were part of her husband's fraud, she was necessarily acting to enable him to misappropriate the Fronebergers' money. Under the majority's theory, therefore, she was not acting in furtherance of Euro's business, but defrauding Euro by exposing it to a loan whose proceeds she intended to help her husband steal. By participating in the theft of the proceeds of the loan, as the majority theorizes, she was depriving Euro of a substantial component of its security. This was not "in furtherance" of Euro's business but, instead, made Euro a victim of fraud. It is simply not possible to hold Euro liable for civil damages by using its role as victim as evidence that the perpetrator of the fraud acted as its agent.

The majority asserts the circuit court erred in concluding the mortgage and investment loan transactions were separate and unrelated because that determination was a question for the jury. I disagree because the evidence in the record conclusively demonstrates the two transactions were independent. The Fronebergers retained control over the loaned money because Euro never restricted how the Fronebergers could spend it, which is demonstrated by the fact that the Fronebergers spent approximately $5,000 of the loan proceeds on personal expenses. Also, the Fronebergers received the mortgage loan after they first entrusted their money to Mr. Smith. Finally, there is no evidence the Fronebergers were obligated to give Mr. Smith any of the loaned money they received. Thus, the two transactions were distinct, and the circuit court correctly found the loans "were independent transactions, unconnected with their mortgage loan with Euro."

D. Conclusion

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[11] The Fronebergers' causes of action against Euro relevant to this appeal are fraud and conversion—both of which require proof of intentional conduct—and negligence. However, Euro cannot be liable for negligence because neither Euro nor Mrs. Smith owed the Fronebergers a duty of due care regarding investment of the proceeds of the loan. Therefore, the Fronebergers can recover from Euro only if they prove Mrs. Smith intentionally participated, within the scope of her employment, in her husband's fraudulent scheme.

I deeply sympathize with the Fronebergers for the loss of their retirement money. The law, however, does not allow a remedy for every wrong. Here, their loss was exclusively the result of Mr. Smith's fraudulent investment scheme, not Euro's mortgage loan. Accordingly, I believe the circuit court properly granted summary judgment.