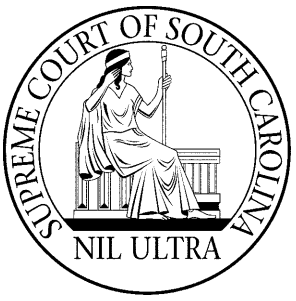

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
November 4, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wachesaw Plantation East Community Services Association, Inc., Respondent,

v.

Todd C. Alexander, Petitioner.

Appellate Case No. 2012-213400

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
The Honorable Joe M. Crosby, Master-in-Equity

Opinion No. 27585
Heard November 19, 2014 – Filed November 4, 2015

REVERSED AND REMANDED

Charles T. Smith, of Georgetown, for Petitioner.

Hal LaVaughn Beverly, Jr., of McCabe, Trotter & Beverly, P.C., of Columbia, for Respondent.

Jack M. Scoville, Jr., of Law Offices of Jack M. Scoville, Jr., P.A., of Georgetown, for Third-Party Bidder William George.

JUSTICE BEATTY: This action arose out of the foreclosure of a lien for delinquent homeowner regime fees against Todd C. Alexander. Alexander did not appeal the foreclosure; however, he moved to vacate the resulting sale. Alexander's motion to vacate the sale was denied and Alexander appealed. The Court of Appeals dismissed the appeal, finding Alexander failed to comply with section 18-9-170[1] of the South Carolina Code to stay the sale and, therefore, the master-in-equity's issuance of the deed rendered the appeal moot.

I. Facts

Alexander purchased a home for his elderly father in Murrells Inlet, South Carolina. After his father was released from a second hospitalization, he did not return to the house. Alexander neglected to pay the regime fees on the home and subsequently the homeowners' association's attorney informed him that a lien had been placed against the house.

The homeowners' association initiated a foreclosure action and served a summons, complaint and lis pendens on Alexander. He signed the certified receipt acknowledging that he received the documents. However, he never responded to

[1] Section 18-9-170 reads in relevant portion:

> If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking.

S.C. Code Ann. § 18-9-170 (2014).

the complaint, which led to a default. He was subsequently served with notice of the hearing, affidavit of default, and the order of default at the same address. He made no appearance and filed no appeal.

The homeowners' association properly proceeded to have the home auctioned off to the highest bidder at a foreclosure sale. Jerry Callahan, William George's authorized agent, was the highest bidder. By Report and Judgment of Foreclosure Sale filed on April 29, 2011, the master-in-equity sold the property but did not issue the deed.

Alexander, who lives in Pennsylvania, employed a property management company to inspect the house bi-weekly and maintain the property and grounds during the two years that the house had been vacant after his father moved out. In June 2011, while he was hospitalized[2], he learned from the property management company that the home had a new owner. He then asked a friend to bring his mail to the hospital. He alleges he first received notice of the foreclosure action and sale at that time.

He immediately tendered the regime fee payment in full to the homeowners' association's attorneys but they declined to accept it because of potential liability to the third-party bidder. Alexander then filed a motion to vacate the sale. In his memorandum in support of the motion, Alexander argued four grounds: (1) the sale price was inadequate and the sale was accompanied by other facts warranting the court's interference; (2) the sale should be vacated to avoid forfeiture; (3) the sale should be vacated to avoid the third-party bidder's unjust enrichment; and (4) he timely redeemed the property.

The master-in-equity denied the motion for several reasons. He found that Alexander failed to allege improper service, lack of notice, lack of jurisdiction, excusable neglect and offered no reason for not sending a check once he received the summons and complaint. Moreover, the master-in-equity found Alexander's failure to appeal the Decree of Foreclosure waived his equity-of-redemption rights.

The master-in-equity then issued the deed to Callahan, as agent for George, and it was duly recorded. Alexander timely filed and served a Notice of Appeal

[2] Alexander was not hospitalized at the time of the foreclosure sale.

from the master's order denying his motion. George filed and served a motion to dismiss the appeal on the ground that the issue appealed is moot because the foreclosure sale was finalized before Alexander filed and served his appeal.

The Court of Appeals agreed with George in its order of dismissal. It concluded that Alexander failed to stay the foreclosure sale because he did not comply with section 18-9-170 and the appeal is now moot because the master-in-equity properly issued the deed. This Court granted certiorari to review the Court of Appeals' decision.

II. Issue Presented

Does the subsequent issuance of a deed moot a timely appealed order denying a motion to vacate the sale of foreclosed property?

III. Discussion

A. Mootness

"A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court." *S.C. Ret. Syst. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). "[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties." 15 S.C. Jur. *Appeal and Error* § 19 (Supp. 2014). "Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010).

"In the civil context, there are three general exceptions to the mootness doctrine." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). "First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Id.* "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Id.* at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though

the appellate court cannot give effective relief in the present case." *Id*. at 568, 549 S.E.2d at 596.

B. Arguments

Alexander posits three arguments for why the Court of Appeals erred in issuing an order to dismiss the appeal. First, a nonparty filed the motion to dismiss the appeal in contravention of *Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003). Alexander notes that George could have intervened pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and Rule 213 of the South Carolina Appellate Court Rules. Second, the dismissal created a new rule that a judicial sale cannot be appealed unless a writ of supersedeas has been issued and a bond posted, which runs counter to the rule in *Ex Parte Moore*, 346 S.C. 274, 550 S.E.2d 877 (Ct. App. 2001). Finally, the dismissal conflicts with *McLemore v. Powell*, 32 S.C. 582, 10 S.E. 550 (1889), in that it holds the issuance of a deed renders an appeal from a judicial sale moot.

C. Analysis

Alexander argues the Court of Appeals' order conflicted with established precedent that the issuance of a deed does not moot an appeal. Although we offer no opinion on the merits of Alexander's appeal, we agree that the Court of Appeals erred.

Our jurisprudence establishes that, despite the master-in-equity's issuance of a deed, an appellate court may reach the merits of the appeal. *See Antrum v. Hartsville Prod. Credit Ass'n*, 228 S.C. 201, 89 S.E.2d 376 (1955) (deciding on petition to set aside foreclosure sale and declaring deed to purchaser void); *Nichols v. Andrews*, 157 S.C. 334, 154 S.E. 305 (1930) (deciding appeal from foreclosure and sale of property where deed was issued and no bond posted) ; *Ex Parte Andrews*, 152 S.C. 325, 150 S.E. 313 (1929) (explaining that purchaser of property was entitled to possession of property pending appeal because no bond was posted; remanding the case to be heard on the merits); *Muckenfuss v. Fishburne*, 68 S.C. 41, 46 S.E. 537 (1903) (deciding defendant's appeal from order to set aside judgment of foreclosure where deed was executed to the purchaser); *Scott v. Scott*, 29 S.C. 414, 7 S.E. 811 (1888) (deciding an action to enjoin the foreclosure of a mortgage for the sale of a mortgaged property after a deed was issued to plaintiff); *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condominiums*, 318 S.C. 535,

458 S.E.2d 561 (Ct. App. 1995) (deciding homeowners' association appeal from foreclosure and sale where a master deed was issued).

Based on the above-cited cases, it is clear that the issuance of a deed does not moot the appeal of a foreclosure sale and an appellate court may reach the merits. Accordingly, we find the Court of Appeals erred in declaring the case moot because a deed was issued after the sale of the property.

IV. Conclusion

The issuance of a deed does not render a motion to vacate the foreclosure sale moot. Our state appellate courts have reached the merits of such appeals time and again.

We therefore reverse and remand[3] this matter to the Court of Appeals to be considered on the merits.

REVERSED AND REMANDED.

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in a separate opinion.

[3] *See State v. Grovenstein*, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999) (explaining that remaining issues would be remanded to the Court of Appeals since they were not considered by that court previously).

JUSTICE PLEICONES: I agree with the majority that the Court of Appeals erred in dismissing petitioner's appeal as moot because the master issued a deed while the appeal was pending. I reach my conclusion by a different route, however, and therefore concur only in the result reached by the majority.

Here we are concerned with an appeal from an order refusing to set aside a judicial sale. Petitioner's timely appeal of that order acted as an automatic stay of further proceedings, including the issuance of a deed, pursuant to S.C. Code Ann. § 18-9-220 (Supp. 2014). As the Court has explained,

> The defendant certainly had the right to appeal from [the order confirming the judicial sale][4] and obtain the judgment of the tribunal of last resort as to its correctness before any proceedings could be had under it [here, the buyer seeking possession], for until such final judgment was obtained, it could not be known whether there was any valid order of confirmation. The notice of appeal from that order [confirming the judicial sale] operated as a stay of further proceedings under the provisions of section 356[5] of the code.

LeConte v. Irwin, 23 S.C. 106, 112 (1885).

In my view, the parties, the Court of Appeals, and the majority are in error when they analyze the question whether the appeal prevented the master from issuing the deed under S.C. Code Ann. § 18-9-170 (1985), and decisions applying that statute in appeals from orders of foreclosure.[6] While § 18-9-170 applies to an appeal from an order that directs the sale or delivery of possession of real property, such as an

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[4] Recall that under our earlier practice almost all foreclosure matters were referred to the master-in-equity to make a report, which was not final until confirmed by the circuit court. *See Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000).

[5] Now codified as § 18-9-220.

[6] An appellant's failure to post the statutory bond required by § 18-9-170 does not moot the foreclosure appeal. However, since the failure to post this bond permits the foreclosure sale to proceed during the appeal, *Ex parte Andrews*, 152 S.C. 325, 150 S.E. 313 (1929), the remedy available to the mortgager is limited to the recalculation of the debt owed. *E.g.*, *Nichols v. Andrews*, 157 S.C. 334, 154 S.E. 305 (1930).

order of foreclosure,[7] it does not apply to an appeal of an order refusing to vacate a judicial sale. *LeConte, supra*.

I agree that the master should not have issued a deed during the pendency of petitioner's appeal because that appeal acted as an automatic stay pursuant to § 18-9-220. I agree that this erroneous action did not moot the appeal. I agree that petitioner is entitled to have the merits of his appeal decided by the Court of Appeals. I therefore concur in the majority's decision to reverse the Court of Appeals' dismissal order and to remand the matter to that court for consideration of the direct appeal.

[7] *See, e.g., Gerald v. Gerald*, 30 S.C. 348, 9 S.E. 274 (1889).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Julie Freeman, Appellant/Respondent,

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley, Respondent/Appellant.

Appellate Case No. 2014-000642

Appeal From Pickens County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27586
Heard April 8, 2015 – Filed November 4, 2015

AFFIRMED

Terry E. Richardson, James David Butler and Brady Ryan Thomas, all of Richardson, Patrick, Westbrook & Brickman, L.L.C., of Barnwell, A. Camden Lewis, of Lewis, Babcock & Griffin, L.L.P., of Columbia, Gedney M. Howe, III, of Gedney M. Howe, III, P.A., of Charleston, and Michael E. Spears, of Michael E. Spears, P.A., of Spartanburg, for Appellant/Respondent.

James Y. Becker and Mary McFarland Caskey, both of Haynsworth Sinkler Boyd, P.A., of Columbia, Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, P.A., of Greenville, John T. Lay, of Gallivan, White & Boyd,

P.A., of Columbia, Marvin D. Infinger, of Nexsen Pruet, L.L.C., of Charleston, for Respondent/Appellant.

JUSTICE BEATTY: Julie Freeman, individually and on behalf of 5,314 similarly situated car buyers, filed a lawsuit against J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley ("Hendrick"), seeking damages under the South Carolina Dealers Act[1] (the "Dealers Act") on the ground that Hendrick "unfairly" and "arbitrarily" charged all of its customers "closing fees"[2] that were not calculated to reimburse Hendrick for actual closing costs. A jury returned a verdict in favor of Freeman in the amount of $1,445,786.00 actual damages. In post-trial rulings, the trial judge: (1) denied Hendrick's motions to overturn or reduce the jury's verdict; (2) granted Freeman's motions to double the actual damages award and to award attorneys' fees and costs[3]; and (3) denied Freeman's motion for

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[1] The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the "Dealers Act") is codified at S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2014). Section 56–15–40 provides in relevant part, "It shall be deemed a violation of paragraph (a) of § 56–15–30 for any manufacturer . . . distributor, 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." S.C. Code Ann. § 56-15-40(1) (2006); *see id.* § 56-15-30(a) ("Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful.").

[2] S.C. Code Ann. § 37-2-307 (2015) (identifying the procedural requirements that motor vehicle dealers must satisfy before charging closing fees to customers but not the methodology for calculating the amount of the closing fee).

[3] Section 56-15-110 of the Dealers Act provides in relevant part:

> (1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), *any person* who shall be injured in his business or property by reason of anything forbidden in this chapter 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.*
>
> (2) When *such action is one of common or general interest to many persons or when the parties are numerous* and it is impracticable to

prejudgment interest. This Court certified this case from the Court of Appeals. We affirm.

I. Factual / Procedural History

In 2000, the South Carolina Legislature enacted the "Closing Fee" Statute as a provision within the South Carolina Consumer Protection Code ("SCCPC").[4] Act No. 387, 2000 S.C. Acts 3311, Part II, § 82. The "Closing Fee" Statute, which is codified at section 37-2-307 of the South Carolina Code, provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

S.C. Code Ann. § 37-2-307 (2015). In 2001, the South Carolina Department of Consumer Affairs (the "Department") issued a formal interpretation of this code provision and identified four procedural requirements that a motor vehicle dealer must meet before charging a closing fee to its customers.[5] Danny Collins, the

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> bring them all before the court, *one or more may sue for the benefit of the whole*, including actions for injunctive relief.

S.C. Code Ann. § 56-15-110(1), (2) (2006) (emphasis added).

[4] The "South Carolina Consumer Protection Code" is codified in Title 37 of the South Carolina Code. S.C. Code Ann. §§ 37-1-101 to 37-29-130 (2015). "The purpose of the SCCPC is to clarify the law governing consumer credit and to protect consumer buyers against unfair practices by suppliers of consumer credit." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 401, 472 S.E.2d 242, 244 (1996) (citing section 37-1-102 of the SCCPC).

[5] Administrative Interpretation 2.307-0101 provides in relevant part:

> The assessment of a "closing" or "documentation" fee (also occasionally denominated as an "administrative," "processing," or "procurement" fee) in a consumer credit sale of a motor vehicle is dependant [sic] on four factors: 1.) The dealer must pay the

Deputy for Regulatory Enforcement and General Counsel for the Department, explained that the Department generally accepts all registration forms submitted by the dealers, but does not establish the closing fee charged by the dealer.

On July 12, 2006, Freeman purchased a pre-owned vehicle from Hendrick. Hendrick charged Freeman a $299.00 closing fee that was pre-printed on the final sales invoice and identified as "PROCUREMENT FEE." Hendrick informed customers that it charged closing fees by posting a notice approved by the Department, which stated:

> THIS DEALERSHIP CHARGES A **$299.00** CLOSING FEE AS [A] MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION. IT IS A CHARGE THAT IS PERMITTED BUT NOT REQUIRED BY LAW. THE FULL CASH PRICE CHARGED AT ANY DEALERSHIP DEPENDS ON MANY FACTORS, INCLUDING ALL PRODUCTS AND SERVICES BOUGHT WITH THE VEHICLE. (Emphasis added).

Hendrick has consistently registered with the Department its intent to charge closing fees, which have ranged from $249 to $399.

> Department a registration fee each state fiscal year in the amount of ten ($10.00) dollars prior to the assessment of a closing fee; 2.) The existence of a closing fee must be disclosed on the sales contract; 3.) The closing fee must be disclosed in a statement displayed in a conspicuous location in the motor vehicle dealership; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price. A dealership may use the attached form to make its filling [sic] with the Department. A closing fee may only be assessed once these factors are met and the dealership has in its possession a date stamped copy of its disclosure stamped by the Department. The charging of a "closing," "documentation," or similar fees in connection with a consumer credit sale of a motor vehicle in the absence of any of these requirements constitutes the charging of an excess charge for Consumer Protection Code purposes.

After discussing her purchase with a friend, who is an attorney, Freeman initiated this action on August 29, 2006 against Hendrick.[6] In her Complaint, Freeman alleged, *inter alia*, that Hendrick violated the Dealers Act by charging closing fees that "were not for reimbursement of certain closing costs"[7] from August 29, 2002 to August 29, 2006. Specifically, Freeman claimed Hendrick's "charging of closing fees in violation of § 37-2-307 renders the fees illegal and in violation of the Dealers Act."

Subsequently, Hendrick filed motions seeking judgment on the pleadings and summary judgment. In these motions, Hendrick posited that it was entitled to judgment as a matter of law on the grounds that Freeman: (1) could not pursue a cause of action under the Dealers Act because section 37-5-202, which is located within the SCCPC, provides her exclusive remedy; (2) had not complied with the provisions of Rule 23, SCRCP[8] for class certification; and (3) was precluded from recovery based on the voluntary payment doctrine.

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[6] Initially, the lawsuit was filed against multiple dealers some of whom settled, proceeded to trial, or were dismissed without prejudice pending the resolution of related lawsuits. This appeal only concerns the lawsuit against Hendrick.

[7] Freeman also alleged that Hendrick violated the "Closing Fee" Statute by failing to include the closing fees within the advertised price of its motor vehicles. However, at trial, the parties stipulated that this allegation was not a basis for the lawsuit.

[8] Rule 23 provides the following prerequisites for class certification:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP.

During the pre-trial proceedings, the trial judge adopted several rulings that were issued in a case similar to the one brought by Freeman. In particular, the judge interpreted "closing fee," which is undefined in section 37-2-307 or any other code provision, to mean: "A 'closing fee' is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, *but only those actually incurred by the dealer and necessary to the closing transaction*." (Emphasis added).

Ultimately, the judge denied Hendrick's pre-trial motions and the case proceeded to trial. A jury returned a verdict in favor of Freeman in the amount of $1,445,786.00 actual damages. Both parties filed post-trial motions. In her motions, Freeman sought an award of prejudgment interest, double the amount of actual damages, and attorneys' fees and costs under the Dealers Act. Hendrick moved for judgment notwithstanding the verdict ("JNOV") and, alternatively, a new trial *nisi remittitur*. Following a hearing, the trial judge denied Hendrick's motions, granted Freeman's motion for double actual damages, and denied Freeman's motion for prejudgment interest. The parties agreed to a consent order providing that Freeman was entitled to an established amount of attorneys' fees and costs contingent on the outcome of this appeal.

The parties filed cross-appeals to the Court of Appeals. This Court granted Freeman's unopposed motion to certify this case pursuant to Rule 204(b), SCACR.

II. Discussion

In the interest of logical progression, we have grouped Hendrick's eight issues into those that were raised during (1) pre-trial, (2) trial, and (3) post-trial. We have also incorporated into the post-trial category the issue raised by Freeman in her cross-appeal.

A. Pre-Trial Issues

Hendrick contends that "[t]his case should never have reached the trial phase as a 'group action' under the Dealers Act." Specifically, Hendrick claims that: (1) Freeman was precluded from pursuing an action under the Dealers Act because her exclusive remedy for an alleged closing fee violation was under the SCCPC; (2) the class action proceeding was impermissible because Freeman failed to plead or prove the prerequisites for class certification under Rule 23, SCRCP; (3) the trial judge misinterpreted the term "closing fee" to mean that a dealer may only charge a closing fee that equates to the actual costs incurred by a dealer during closing; (4)

procedural compliance with the "Closing Fee" Statute is sufficient to absolve a dealer from an alleged violation; and (5) Freeman waived her claim by voluntarily paying the closing fee.

1. Cause of Action Under the Dealers Act

As a threshold matter, we find that Freeman pursued the proper course of action in seeking recovery for a closing fee violation under the Dealers Act. Although the "Closing Fee" Statute identifies the procedural requirements that must be met before a dealer can charge a closing fee, neither the "Closing Fee" Statute nor other provisions of the SCCPC provide any remedy for a consumer claiming a closing fee violation.

As stated by this Court, "[t]he purpose of the SCCPC is to clarify the law governing consumer credit and to protect consumer buyers against unfair practices by suppliers of consumer credit." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 401, 472 S.E.2d 242, 244 (1996) (citing section 37-1-102 of the SCCPC); *see Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) ("One of the primary purposes of the Consumer Protection Code is to 'protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.' " (quoting section 37-1-102(2)(d))).

Despite the well-defined purpose to protect against unfair practices involving consumer credit transactions, Hendrick identifies several provisions in the SCCPC as potential avenues for recovery.[9] However, none of these are applicable to the type of claim brought by Freeman. A review of these code sections reveals that the remedies are directed at recovery for specifically identified acts involving lending transactions between creditors and debtors. Here, Freeman did not allege any unfair practice regarding the financing of her vehicle purchase. Rather, she claimed she was unfairly charged a "closing fee" that bore no relation to the actual expenses incurred by Hendrick. Given this claim did not involve an unfair consumer credit transaction between a creditor and a debtor, Freeman had no means of recovery under the SCCPC. Instead, Freeman's claim fell within the purview of the Dealers Act, which: (1) prohibits a motor vehicle dealer from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public;" and (2) provides a

[9] *See* S.C. Code Ann. § 37-5-202(2), (3), (8) (2015) (identifying effect of creditor's violations of the SCCPC on the rights of a consumer).

remedy for a consumer that is damaged by this action. S.C. Code Ann. §§ 56-15-40(1), -110(1), (2) (2006).

Furthermore, because the Legislature enacted the SCCPC and the Dealers Act both for the purpose of consumer protection, the statutes cannot be read in isolation. *See Tilley v. Pacesetter Corp.*, 355 S.C. 361, 378, 585 S.E.2d 292, 300 (2003) ("The Consumer Protection Code and the Dealers Act share a common purpose: protection of the consumer."); *see also Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). Considering this common purpose, we believe the Legislature intended for the statutes to be construed together as it expressly provided for the SCCPC to supplement remedies afforded to consumers in law and equity, which would necessarily include those provided in the Dealers Act. *See* S.C. Code Ann. § 37-1-103 (2015) ("Unless displaced by the particular provisions of this title, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause *supplement its provisions*." (emphasis added)).

Consequently, in reconciling the two statutes, we find that the "Closing Fee" Statute sets forth the procedural requirements that a dealer must satisfy before charging a closing fee whereas the Dealers Act sets forth the remedy for an alleged "closing fee" violation. *See Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.").

Significantly, the Department's Administrative Interpretation, when read in full, supports this construction as it references provisions of the Dealers Act and indicates that the "Closing Fee" Statute was not intended to be a comprehensive remedy. The Administrative Interpretation states:

> The Supreme Court specifically indicated in its holding in *Fanning* that it did not imply such fees might not be actionable under other applicable law. 322 S.C. at 404, 472 S.E.2d at 245, N.8. Likewise, the General Assembly did not further clarify the issue other than to indicate the fees might be legally charged for Consumer Protection Code purposes if the requisite filing and disclosures are made. The Department is aware of nothing in the General Assembly's

> enactment that legitimizes a closing fee or any fee or charge if it is assessed through fraud or misrepresentation.

Because the Department is charged with executing the "Closing Fee" Statute, we must give credence to its interpretation. *See Faile v. S.C. Emp't Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons.").

Finally, we note that our appellate courts have, in other contexts, rejected the assertion that the remedies found within the SCCPC are the exclusive remedy for a violation of consumer transactions. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998) (holding that consumers, who purchased home products secured by a mortgage on their homes, were not limited to the remedy under section 37-5-202 of the SCCPC because the Legislature did not specifically provide that this code section was the exclusive remedy). Our appellate courts have also implicitly approved proceeding under the Dealers Act for an alleged closing fee violation. *See Gardner v. Newsome Chevrolet-Buick, Inc*. 304 S.C. 328, 404 S.E.2d 200 (1991) (reversing, in a case pre-dating the enactment of the "Closing Fee" Statute, trial judge's denial of class certification for car buyers' suit alleging dealer committed an "unfair act" in charging a closing fee in violation of the Dealers Act). Accordingly, we conclude that Freeman properly pursued recovery under the Dealers Act.[10]

2. Class Action Lawsuit

With respect to Hendrick's claim regarding class certification, we find that Freeman's decision to proceed under the provisions of the Dealers Act rather than Rule 23 of the South Carolina Rules of Civil Procedure was permissible and does not warrant the granting of a new trial to Hendrick.

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[10] Even if we assume that Hendrick is correct in its averment that the SCCPC provides the sole remedy for Freeman, we question what would happen in cases of cash or non-credit financed sales. Taken to its logical extreme, a person who did not use credit financing to purchase a vehicle would have no method of recovery for a violation of the "Closing Fee" Statute. We do not believe the Legislature intended to leave these consumers without a remedy. By enacting the Dealers Act, the Legislature clearly sought to protect all automobile purchasers regardless of the method of purchase.

Although the South Carolina Rules of Civil Procedure are broadly worded to apply to "all suits of a civil nature,"[11] Rule 23 is not necessarily applicable to class action lawsuits brought under the Dealers Act. As previously stated, the Legislature enacted section 56-15-110(2) of the Dealers Act to create a statutory right for a person to sue in a representative capacity. Clearly, at the time the Legislature enacted section 56-15-110(2), it was aware of the existence of the general class action statute codified in section 15-5-50. *See Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (recognizing the basic presumption that the Legislature has knowledge of previous legislation). Notably, the language of section 56-15-110(2) mirrors that of section 15-5-50.[12] By enacting nearly identical provisions, we believe the Legislature intended for the statutes to operate independently. If the Legislature deemed section 15-5-50 sufficient to cover all class action lawsuits, it would have been unnecessary to incorporate identical language into section 56-15-110(2). We believe the inclusion of the class action language in section 56-15-110(2) was a purposeful decision by the Legislature to create an alternative method for a consumer to sue in a representative capacity under the Dealers Act.

After Rule 23 was adopted to replace section 15-5-50,[13] the Legislature did not repeal section 56-15-110(2). By leaving intact section 56-15-110(2), we believe the Legislature intended to provide those harmed by violations of the Dealers Act a specific procedural avenue to pursue their claims. The adoption of

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[11] *See* Rule 1, SCRCP (providing that the South Carolina Rules of Civil Procedure "govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81").

[12] *See* S.C. Code Ann. § 15-5-50 (1976) (repealed 1985)("When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."); *id.* § 56-15-110(2) (2006) ("When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.").

[13] Act No. 100, 1985 S.C. Acts 277 (adopting South Carolina Rules of Civil Procedure on July 1, 1985).

Rule 23, as a general procedural rule, cannot operate to eliminate the statutory right found in section 56-15-110(2).

Moreover, we discern no conflict between Rule 23 and section 56-15-110(2). While the requirements for class certification in Rule 23 are expressly enumerated, we interpret subsection (2) of section 56-15-110 to be the functional equivalent of the Rule 23 requirements. Similar to the provisions of Rule 23, section 56-15-110(2) authorizes a consumer to sue in a representative capacity if the following prerequisites are met: (1) the action is one of common or general interest; (2) the class is so numerous that it would be impracticable to bring them all before the court; and (3) the representative party can obtain relief for the benefit of the class as a whole. Accordingly, we conclude that Rule 23 and section 56-15-110(2) present independent, alternative methods for which a claimant may, in a representative capacity, pursue a cause of action under the Dealers Act on behalf of those similarly situated.

Even assuming that Rule 23 is applicable, the facts of the instant case satisfied the prerequisites of this rule. In his order denying Hendrick's post-trial motions, the trial judge found: (1) the lawsuit involved common claims on behalf of a large number of purchasers; (2) the testimony established that Freeman's claim was typical of every other customer's claim regarding the payment of a closing fee; and (3) the parties provided notice to all of the affected customers and provided a sufficient time period to allow those customers to opt out of the lawsuit. We agree with these findings and would add that the amount in controversy for each claimant exceeded $100 as Hendrick registered closing fees ranging from $249 to $399. Therefore, we conclude the class action lawsuit was properly brought under the Dealers Act. *Cf. Gardner*, 304 S.C. at 331, 404 S.E.2d at 202 (recognizing, in a case pre-dating the "Closing Fee" Statute, car buyers' suit seeking recovery under the Dealers Act against car dealer for charging a closing fee met all the class certification requirements of Rule 23).

3. Effect of Procedural Compliance

Having found that the class action lawsuit was proper, we hold that Hendrick was not entitled to judgment as a matter of law simply because the Department accepted Hendrick's closing fee registration form. Essentially, Hendrick contends its procedural compliance with the "Closing Fee" Statute, as interpreted by the

Department and this Court in *Fanning*,[14] effectively absolved it from any liability via the Filed Rate Doctrine,[15] the Good Faith Error Defense,[16] and the Safe Harbor Defense.[17]

Freeman does not dispute that Hendrick complied with the procedural requirements of the "Closing Fee" Statute.[18] However, meeting these procedural

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[14] *See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (holding, in a case pre-dating the "Closing Fee" Statute, "Procurement Fee" was not an "unauthorized fee" or "unconscionable" under the SCCPC but, rather, was an element of the negotiated price of the vehicle).

[15] *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005) ("The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." (citation omitted)).

[16] S.C. Code Ann. § 37-5-202(7) (2015) ("A creditor may not be held liable in an action *brought under this section* for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error." (emphasis added)).

[17] S.C. Code Ann. § 37-6-506(3) (2015) ("No provision of this title or of any statute to which this title refers which imposes any penalty on any creditor shall apply to any act done, or omitted to be done, in conformity with any rule or regulation so adopted, amended or repealed or in conformity with any written order, opinion, interpretation or statement of the Commission or of the administrator, notwithstanding that such rule, regulation, order, opinion, interpretation or statement may, after such act or omission, be amended, or rescinded or be determined by judicial or other authority to be erroneous or invalid for any reason."); *see id.* § 37-6-104(4) ("Except for refund of an excess charge, no liability is imposed under this title for an act done or omitted in conformity with a rule of the administrator notwithstanding that after the act or omission the rule may be amended or repealed or be determined by judicial or other authority to be invalid for any reason.").

requirements only entitled Hendrick to charge a closing fee. As testified by Danny Collins, the Department neither determines the amount of the fee nor reviews the dealer's financial records to evaluate how the amount was calculated. Notably, Collins stated that "[i]t's pretty much just a registration." Moreover, the "Closing Fee" Statute does not require a dealer to inform the Department of the amount of its closing fee nor does it empower the Department to approve or disapprove the amount of a closing fee. Rather, as acknowledged by Collins, the Department is "simply charged with the day-to-day enforcement of the procedural portions of the Closing Fee Statute." Because the Department is not vested with the authority to determine a reasonable "closing fee," the Filed Rate Doctrine does not apply to bar Freeman's claim. Additionally, Hendrick does not claim that it made a bona fide error in calculating the amount of the closing fee.

Furthermore, neither the Good Faith Error Defense nor the Safe Harbor Defense, codified at sections 37-5-202(7) and 37-6-506(3) respectively, provides Hendrick immunity from liability as these code sections only apply to consumer credit transactions brought under Title 37 of the SCCPC. Here, Freeman brought this action pursuant to section 56-15-40 of the Dealers Act and not under the SCCPC.

Although procedural compliance with the "Closing Fee" Statute enabled Hendrick to charge a closing fee, it was still required to accurately assess the amount of the fee charged because, as noted in *Fanning*, these fees may be attacked on grounds "such as claims for fraud, misrepresentation or unfair trade practices." *Fanning*, 322 S.C. at 404 n.8, 472 S.E.2d at 245 n.8.

4. Definition of "Closing Fee"

The trial judge interpreted "closing fee" to mean: "A 'closing fee' is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only those actually incurred by the dealer and necessary to the closing transaction." Hendrick challenges this definition primarily by differentiating between the definitions of the word "fee" and "cost."

Hendrick contends that "[g]iven the ordinary definition of fee, the proper construction of the [Closing Fee] Statute is that a closing fee is simply a fee

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[18] The parties stipulated that the remaining procedural requirement was not at issue because Freeman did not purchase her vehicle as the result of seeing a publicized advertisement.

charged at closing for services rendered by a dealership." Hendrick further asserts that the term "cost" in the context of the "Closing Fee" Statute "would refer to the amount of money a dealer is required to expend to perform the services it provides to a customer at closing, and to otherwise comply with the disclosure, documentation, and record retention requirements imposed under state and federal law." For reference, Hendrick cites to several statutes from other jurisdictions where the state legislature expressly directed how a closing fee should be determined. Because our Legislature failed to provide specific directives regarding the amount of the fee, what can be included in the fee, and how the fee should be set, Hendrick maintains the "Closing Fee" Statute is effectively a disclosure statute that is administered by the Department.

For several reasons, we agree with the trial judge's definition of the term "closing fee" and conclude that it did not render the "Closing Fee" Statute unconstitutionally vague[19] or require prospective application.[20] Because this term is undefined in the "Closing Fee" Statute, the judge properly looked to the usual and customary meaning of the term "fee". *See Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000) ("When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning.").

While we recognize the difficulty a dealer may face in determining the exact amount of a specific purchaser's closing fee prior to closing, we agree with the trial judge's interpretation that the amount charged must bear some relation to the actual

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[19] *See S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) ("[A]ll the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices."(quoting *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 599 (2001))); *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 599 (2001) (recognizing that an undefined term in a statute does not automatically render the statute unconstitutionally vague (citing *State v. Hamilton*, 276 S.C. 173, 276 S.E.2d 784 (1981))).

[20] *See Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) ("The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Prospective application is required when liability is created where formerly none existed." (citations omitted)).

expenses incurred for the closing.[21] As stated in language recommended by the Department, Hendrick posted a notice that it charged a closing fee "as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation." By notifying customers that it sought to be reimbursed, Hendrick clearly communicated that the closing fee was intended to be repayment for that which was expended. *See Black's Law Dictionary* 1157 (5th ed. 1979) (defining "reimburse" to mean "to pay back, to make restoration, to repay that expended, to indemnify; or make whole").

Notwithstanding this notice, Hendrick failed to offer any evidence that it calculated the costs that comprised the closing fee. When questioned as to how Hendrick arrived at the closing fee, Don Pendleton, the General Manager, testified that he "didn't sit there and do the math," he was not sure about the actual costs of retrieving and preparing documents for closing, and he did not know "the exact charge." Further, Pendleton believed that Hendrick was "limited to seeking reimbursement for [Hendrick's] closing costs." Pendleton also acknowledged that he did not know how the original $199 closing fee was determined and that Hendrick's subsequent increases in the amount charged for the closing fee were not tied to Hendrick's costs.

Although Hendrick's expert, Michael Thompson, testified regarding the average closing cost per year, he admitted that he did not see anything to suggest that Hendrick did any kind of analysis at the time Hendrick set the closing fee. Moreover, in calculating the average closing cost, Thompson included expenses for the salaries of finance and sales managers, the building, utilities, and "outside services." All of these are general operating expenses and not directly tied to the closing of a motor vehicle sale. If a motor vehicle dealer wishes to be compensated for these expenses, it may include them as part of the overall purchase price of a vehicle. However, by specifically delineating a "closing fee" from the purchase price of the vehicle, the dealer must account for the costs that comprise this fee. Without such an accounting, a dealer is charging a consumer an additional amount that is not directly related to the expenses incurred in closing the sale of a motor vehicle but is, nevertheless, identified as a closing fee. We find that such practice effectively circumvents the purpose of the "Closing Fee" Statute and the Dealers Act, which is, in part, to protect consumers from charges that are above the advertised price listed by the dealer.

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[21] If the Legislature disagrees, it is free to correct our interpretation and specifically direct how a dealer determines the amount of a closing fee.

Thus, although we agree with Hendrick that the "Closing Fee" Statute is a disclosure statute and the Department serves as a repository for the required filings, we find that the "Closing Fee" Statute does more than require disclosure of the "closing fee." It also requires that the "closing fee" be included in the advertised price in order to avoid unexpected, additional costs for the purchase of an automobile.

Consequently, we affirm the trial judge's definition of "closing fee." We emphasize that a "closing fee" is not limited to expenses incurred for document preparation, retrieval, and storage. However, any costs sought to be recovered by a dealer under a closing fee charge must be directly related to the services rendered and expenses incurred in closing the purchase of a vehicle. Given that each vehicle purchase is different, compliance with the "Closing Fee" Statute does not require that the dealer hit the "bull's-eye" for each purchase. While each sale may be different, it is inconceivable that each closing requires performance of dissimilar tasks. To the contrary, the category of tasks required to close a sale is the same in every sale. However, the number of times a certain task is performed may differ. As a result, a dealer may comply with the statute by setting a closing fee in an amount that is an average of the costs *actually incurred* in all closings of the prior year.

5. Voluntary Payment Doctrine

We also disagree with Hendrick's reliance on the voluntary payment doctrine as a complete defense. Freeman acknowledged that the "Procurement Fee" in an amount of $299 was identified on her sales contract and that she paid this amount at the time of purchase. However, Freeman paid the closing fee without full knowledge of what comprised the fee. In fact, even if Freeman had inquired, no Hendrick employee could have explained how Hendrick arrived at this amount. Accordingly, we find that Hendrick's reliance on the voluntary payment doctrine is misplaced. *See Hardaway v. S. Ry. Co.*, 90 S.C. 475, 488-89, 73 S.E. 1020, 1025 (1912) ("It is an elementary principle that no action will lie to recover money *voluntarily paid with full knowledge of all the facts*" and "without any fraud, duress, or extortion" to make such payment. (emphasis added)).

Based on the foregoing, we agree with the trial judge that none of the affirmative defenses or arguments asserted by Hendrick entitled it to judgment as a matter of law prior to trial.

B. Trial Issues

Even if the class action lawsuit was properly tried and submitted to the jury, Hendrick asserts the trial judge erred with respect to the jury charge. Initially, Hendrick claims the judge erred in refusing to charge its proposed instructions on the following: (1) the Good Faith Error and Safe Harbor Defenses identified in the SCCPC; (2) the voluntary payment doctrine, waiver, and estoppel; and (3) a claimant's duty to read the contract under which she seeks to recover. Hendrick further argues that the judge erred in declining to charge Hendrick's proposed instruction warning the jury against awarding speculative damages. Hendrick also challenges the propriety of the judge's charge on the definitions of: (1) a "closing fee"; and (2) what constitutes an "unfair, "arbitrary," or "unconscionable" action for purposes of the Dealers Act. Finally, Hendrick contends that the judge erred in submitting a general verdict form to the jury rather than the special verdict form proposed by Hendrick.

1. Jury Charge

We find the trial judge did not abuse his discretion in charging the jury. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion."). Based on our review of Hendrick's proposed jury instructions, the charges were another attempt to assert its pre-trial arguments.

Hendrick requested that the judge charge the Safe Harbor Defense, the Good Faith Error Defense, the voluntary payment doctrine, waiver, estoppel, and the duty of a claimant to read the subject contract. As previously discussed, Hendrick was precluded as a matter of law from relying on the Safe Harbor Defense, the Good Faith Error Defense, and the voluntary payment doctrine. Thus, the trial judge properly refused to charge these requests.

By the same reasoning, we find the remaining charges of waiver, estoppel, and the duty of a claimant to read the subject contract were inapplicable as Freeman paid the closing fee without knowledge of what comprised the amount of the fee. Therefore, we discern no reversible error as to the judge's refusal to charge Hendrick's requests. *See Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("A trial court must charge the current and correct law."); *see also Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005) ("A trial court's

refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.").

Furthermore, reviewing the jury charge as a whole, the judge charged the current and correct law and any alleged error did not result in prejudice to Hendrick. *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (citation omitted)). As previously discussed, the judge properly defined the term "closing fee" by its usual and customary meaning. Moreover, the judge's instructions regarding an "arbitrary," "bad faith," or "unconscionable" action were consistent with the applicable statutes and case law interpreting these statutes. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000) (defining "bad faith" and "arbitrary" under the Dealers Act; discussing "arbitrary," "bad faith," and "unconscionable" conduct under the Dealers Act). The judge's instructions also covered the substance of Hendrick's requests to charge.

Additionally, despite Hendrick's challenge to the judge's definition of an "unfair" act, we discern no error as the judge's instruction was based on a specific provision of the Dealers Act that declares "unfair" acts to be unlawful and case law defining the term "unfair." *See* S.C. Code Ann. § 56-15-30(a) (2006) ("Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful."); *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999) (defining an "unfair" act as "when it is offensive to public policy or when it is immoral, unethical, or oppressive"), *overruled on other grounds by Proctor v. Whitlark & Whitlark, Inc.*, Op. No. 27580 (S.C. Sup. Ct. filed Oct. 7, 2015) (Shearouse Adv. Sh. No. 39 at 46).[22]

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[22] Hendrick takes issue with the trial judge utilizing case law involving the South Carolina Unfair Trade Practices Act ("SCUTPA") to define the term "unfair." Because this term is undefined in the Dealers Act, the judge properly looked to this case law as SCUTPA is modeled after the language of the Federal Trade Commission Act and, thus, was appropriate for interpretation. *See* S.C. Code Ann. § 56-15-30(b) (2015) ("In construing paragraph (a) the courts may be guided by the definitions in the Federal Trade Commission Act (15 U.S.C. 45)."); *see also State v. Ortho-McNeil-Janssen Pharm., Inc.*, Op. No. 27502 (S.C. Sup. Ct. filed July 8, 2015) (Shearouse Adv. Sh. No. 26 at 8) (recognizing that the language in SCUTPA is modeled after the Federal Trade Commission Act; noting the FTC Policy Statement on Unfairness provides the following general characteristics of an unfair practice claim "(1) whether the practice injures consumers; (2) whether it violates

With respect to the judge's charge on damages, we find the judge accurately charged the jury on how to arrive at an amount of damages and specifically instructed the jury that it had discretion to award a value of $0 up to the full amount of the charged closing fee. Thus, even though the judge declined to charge Hendrick's instruction warning the jury against awarding speculative damages, the charge was correct and did not result in prejudice to Hendrick. Accordingly, even giving credence to Hendrick's claim that portions of the charge were incomplete or erroneous, we find that Hendrick was not prejudiced because the charge as a whole was reasonably free from error.

2. Verdict Form

Finally, we find the judge did not abuse his discretion in refusing to submit Hendrick's proposed special verdict form to the jury. *See Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477, 483, 445 S.E.2d 468, 471 (Ct. App. 1994) ("The question of whether to grant a party's request for a special verdict form is a matter committed to the sound discretion of the trial court."); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300-01, 641 S.E.2d 903, 906 (2007) (recognizing that trial judge has discretion to determine how a case is submitted to the jury).

The jury was tasked with answering the narrow question of whether Hendrick charged an improper amount as its closing fee in violation of the Dealers Act. Contrary to the first question on the special verdict form proposed by Hendrick, there was no dispute that Hendrick complied with the procedural requirements of the "Closing Fee" Statute. Furthermore, the judge properly charged the jury regarding the "Closing Fee" Statute, the Dealers Act, and the award of damages. We would also note that the exhibit submitted by Freeman regarding actual damages broke down the amount of closing costs charged per year, which was similar to the third question on Hendrick's proposed verdict form. Thus, we conclude that the general verdict form was sufficient. Accordingly, we find that Hendrick was not prejudiced by the trial judge's refusal to submit the special verdict form to the jury. *See Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct. App. 1997) ("Error in the refusal to submit special interrogatories or special issues to the jury will constitute ground for reversal only if prejudice results to the complaining party." (quoting 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958))).

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established public policy; (3) whether it is unethical or unscrupulous." (emphasis added) (footnote and citation omitted)).

C. Post-Trial Issues

Hendrick contends the judge erred in denying its motion for JNOV and, alternatively, a new trial *nisi remittitur*. Hendrick further argues that the judge erred in doubling the jury's award of actual damages.

1. JNOV / New Trial *Nisi Remittitur*

In its JNOV motion, Hendrick essentially reiterated all of its pre-trial arguments that were rejected by the judge. Furthermore, as the basis for its motion for new trial *nisi remittitur*, Hendrick claimed the verdict should have been reduced to only those damages incurred by Freeman and not the other members of the class.

Having rejected Hendrick's arguments regarding pre-trial issues, we discern no errors of law for which to reverse the judge's denial of Hendrick's motions. *See Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005) (noting that an appellate court will reverse the trial court's ruling on a directed verdict motion or JNOV motion only where there is no evidence to support the ruling or where the ruling is controlled by error of law); *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000) ("The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

Furthermore, viewing the evidence in the light most favorable to Freeman, there is evidence to support the judge's denial of Hendrick's motions for a direct verdict and JNOV as the evidence yielded more than one reasonable inference regarding the cause of action under the Dealers Act. *See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012) ("When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.").

Freeman offered evidence that Hendrick charged closing fees on every vehicle sold between August 29, 2002 and August 29, 2006. As stipulated by the parties, Hendrick collected $1,445,786 in closing fees from 5,314 car buyers during the relevant time period. Despite notifying customers that the closing fee

was a "means of reimbursing it for certain overhead costs such as document retrieval and document preparation," there was no evidence presented that Hendrick calculated what accounted for the amount of the charged closing fee. Randy Watkins, Hendrick's Vice-President of Transaction Compliance, acknowledged that it would be unfair for a dealership to charge a closing fee that was not tied to the actual closing costs. Without evidence that the closing fee constituted an amount directly related to the closing of a vehicle, the jury could have reasonably found that Hendrick's actions were arbitrary and unfair. Additionally, the jury could have reasonably found that Freeman and the other similarly situated car buyers were damaged as these consumers paid a closing fee that was not equal to the actual closing costs incurred by Hendrick. Finally, as stated in the judge's instructions, the jury was given discretion to award an amount between $0 and the full amount of the closing fee. The jury's decision to award the full amount of the closing fees is supported by the evidence. Accordingly, we find that the trial judge properly denied Hendrick's post-trial motions.

2. Double Award of Actual Damages

Additionally, we conclude the judge properly doubled the jury's award of actual damages as subsection (1) of section 56-15-110 expressly provides that a person who recovers under the Dealers Act "shall" recover double the actual damages sustained. *See Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The term 'shall' in a statute means that the action mandatory.").

As previously discussed, subsection (2) of section 56-15-110 authorizes a person to sue in a representative capacity. Here, Freeman brought the action individually and on behalf of all other affected customers. The jury awarded actual damages in an amount equal to the closing fees charged to all Hendrick customers between 2002 and 2006. Because an award of double actual damages is statutorily mandated, whether the amount is awarded by the jury or the judge during post-trial proceedings is inconsequential. Thus, we affirm the judge's decision to double the award of actual damages. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 331, 404 S.E.2d 200, 202 (1991) (recognizing that section 56-15-110 "mandates the court to double actual damages as a statutory award to a prevailing plaintiff"); *cf. Adams v. Grant*, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986)

(holding that jury properly doubled actual damages awarded to car buyer under section 56-15-110(1) of the South Carolina Code).[23]

3. Prejudgment Interest

In her cross-appeal, Freeman avers the judge erred in declining to award her prejudgment interest in addition to the award of actual damages. Although Freeman is correct that prejudgment interest is statutorily authorized by the provisions of section 34-31-20 of the South Carolina Code,[24] Freeman's damages were not liquidated or ascertainable at the time the class action claim arose. Because Freeman's theory of the case was that she paid a closing fee that was not equal to the actual closing costs, her actual damages could have been a portion of the fee that exceeded the actual closing costs. As a result, the judge properly denied Freeman's motion for prejudgment interest. *See S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (recognizing that 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, if the sum is certain or capable of being reduced to certainty).

III. Conclusion

Based on the foregoing, we affirm the rulings of the trial judge and the verdict rendered by the jury.

AFFIRMED.

TOAL, C.J., and HEARN, J., concur. KITTREDGE, J., dissenting in a separate opinion in which Acting Justice James E. Moore, concurs.

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[23] As its final issue, Hendrick asserts the judge erred in awarding Freeman attorneys' fees and costs. However, as previously noted, the parties agreed to a consent order providing that Freeman would be awarded an established amount of attorneys' fees and costs if she prevailed on appeal.

[24] S.C. Code Ann. § 34-31-20 (Supp. 2014).

JUSTICE KITTREDGE: I respectfully dissent. As a matter of law, there was no violation of the Closing Fee Statute.[25] I would reverse the $2,891,572 verdict against J.L.H. Investments, LP, also known as Hendrick Honda.

I.

The General Assembly enacted the Closing Fee Statute in 2000. Prior to the passage of that statute, automobile dealers routinely included in the price of a vehicle a closing fee, sometimes referred to as a procurement fee. In 1996, this Court addressed a challenge to a dealer-imposed $87 closing fee in *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996). The Fannings claimed, among other things, that the closing fee violated the South Carolina Consumer Protection Code (SCCPC), which makes up title 37 of the South Carolina Code. *Id.* at 401, 472 S.E.2d at 244. We rejected the Fannings' claim, reasoning that, because the fee "was charged to all of Fritz's customers in establishing total cash price," it was "an element of the negotiated cash price of the vehicle." *Id.* at 402, 472 S.E.2d at 244. The Fannings' unconscionability claim was similarly rejected.[26] *Id.* at 403, 472 S.E.2d at 245.

The legislature responded to our decision in *Fanning* by adding the Closing Fee Statute to the SCCPC. The Closing Fee Statute provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

S.C. Code Ann. § 37-2-307 (2015). In implementing the statute, the South Carolina Department of Consumer Affairs (Department) issued an "Administrative Interpretation" on June 7, 2001, setting forth the process and guidelines for automobile dealers to follow to ensure compliance with the statute:

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[25] S.C. Code Ann. § 37-2-307 (2015).

[26] The *Fanning* Court nonetheless noted that its holding did "not imply that inclusion of such fees may not be attacked on other grounds, such as claims for fraud, misrepresentation[,] or unfair trade practices." *Fanning*, 322 S.C. at 404 n.8, 472 S.E.2d at 245 n.8.

> The assessment of a "closing" or "documentation" fee (also occasionally denominated as an "administrative," "processing," or "procurement" fee) in a consumer credit sale of a motor vehicle is depend[e]nt on four factors: 1.) The dealer must pay the Department a registration fee each state fiscal year in the amount of ten ($10.00) dollars prior to the assessment of a closing fee; 2.) The existence of a closing fee must be disclosed on the sales contract; 3.) The closing fee must be disclosed in a statement displayed in a conspicuous location in the motor vehicle dealership; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price. A dealership may use the attached form to make its filing with the Department. A closing fee may only be assessed once these factors are met and the dealership has in its possession a date stamped copy of its disclosure stamped by the Department. The charging of a "closing," "documentation," or similar fee[] in connection with a consumer credit sale of a motor vehicle in the absence of any of these requirements constitutes the charging of an excess charge for Consumer Protection Code purposes.

S.C. Dep't of Consumer Affairs, Administrative Interpretation 2.307-0101, at 1 (2001).

It is undisputed that Hendrick Honda complied with the Department's Administrative Interpretation in every respect. Hendrick Honda: (1) timely paid the registration fee; (2) disclosed the closing fee on its sales contracts; (3) displayed the notice of a closing fee in a conspicuous place in the dealership; and (4) included the closing fee in the advertised price of each of its vehicles. The Department annually authorized Hendrick Honda to charge a closing fee, not to exceed a designated amount. Having complied with the Department's Administrative Interpretation, there can be no liability under the SCCPC. *See* S.C. Code Ann. § 37-6-104(4) ("Except for refund of an excess charge, no liability is imposed under this title for an act done or omitted in conformity with a rule of the administrator notwithstanding that after the act or omission the rule may be . . . determined by judicial or other authority to be invalid for any reason."); *id.* § 37-6-506(3) ("No provision of this title or of any statute to which this title refers which imposes any penalty on any creditor shall apply to any act done, or omitted to be done, in conformity with any rule or regulation so adopted, amended[,] or repealed or in conformity with any written order, opinion, interpretation[,] or statement of the Commission [on Consumer Affairs] or of the administrator, notwithstanding that such rule, regulation, order, opinion, interpretation[,] or statement may, after

such act or omission . . . be determined by judicial or other authority to be erroneous or invalid for any reason."). Unlike the majority, I would give efficacy to the legislature's placement of the Closing Fee Statute in the SCCPC. While Julie Freeman's Complaint seeks recovery for an alleged violation of the Dealers Act,[27] she concedes there can be no violation of the Dealers Act without a violation of the Closing Fee Statute found in the SCCPC. Because there has been no violation of the Closing Fee Statute, I would reverse the judgment against Hendrick Honda.

II.

While my disposition of the appeal would not require further analysis, I add the following in response to the majority opinion.

As noted, all of the statutory and Department-imposed requirements of the Closing Fee Statute were satisfied when Freeman purchased her Honda Accord from Hendrick Honda. Freeman testified to the negotiation of the car's purchase price and acknowledged she was fully aware that price included a $299 closing fee. In fact, far from feeling she had been taken advantage of, Freeman testified that she "was very happy at the time [she] bought the car." Nonetheless, Freeman, individually and purportedly on behalf of other similarly aggrieved customers of Hendrick Honda, parlayed this transparent, "happy" vehicle purchase into an approximately $3,000,000 judgment.

Regarding the amount of a closing fee, the Department has provided little guidance. The Administrative Interpretation issued by the Department merely included a sample form dealers could use to provide notice to customers of the fee, which the form describes "as a means of reimbursing [the dealer] for certain overhead costs such as document retrieval and document preparation." S.C. Dep't of Consumer Affairs, *supra*. The sample notice goes on to inform consumers that the amount of the fee "depends on many factors, including all products and

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[27] *See* S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2014) (commonly referred to as the Dealers Act). Among other things, the Dealers Act prohibits "unfair or deceptive acts or practices." *Id.* § 56-15-30(a) (2006). This includes "any action which is arbitrary, in bad faith, or unconscionable." *Id.* § 56-15-40(1). Freeman points to the alleged violation of the Closing Fee Statute in the SCCPC to establish this "arbitrary" and "unconscionable" conduct. However, Hendrick Honda did not violate the Closing Fee Statute. There has thus been no arbitrary or unconscionable conduct upon which to base a claim for a violation of the Dealers Act.

services bought with the vehicle." *Id.* Suffice it to say, neither the terms of the statute nor the Department's guidance represent a model of clarity. However, two certainties emerge concerning the Closing Fee Statute.

First, as noted above, dealers are given little guidance in determining what costs may or may not be included in a closing fee. This lack of guidance is at odds with ideal legal frameworks, which are designed to provide reasonably discernable and objective criteria. In my view, the absence of known objective criteria renders it difficult to characterize a dealer's closing fee as arbitrary. On the other hand, I acknowledge that the absence of known objective criteria should not be a license for dealers to charge a disguised profit. The legislature, whether by design or not, has entrusted the Department with the role of protecting consumers from such charges by requiring Department approval of dealers' requests to charge closing fees. And, contrary to the majority's suggestion, the Department does not merely rubber-stamp those requests. *See id.* at 2 ("Forms considered to be deceptive or to misstate the law will be rejected by the Department."). Specifically, Danny Collins, General Counsel and then-Deputy of Regulatory Enforcement for the Department, testified to the Department's rejection of an excessive closing fee request and indicated that the Department closely scrutinized others.

Second, it is axiomatic that a closing fee must be predetermined, thus rendering it impossible for the fee to equal the actual closing costs associated with a particular transaction. I reject as meritless the trial court's determination that the legislature intended the predetermined closing fee to equal the dealer's precise closing costs in unknown, future transactions.

Even assuming Freeman may pursue a claim under the Dealers Act, a new trial would nevertheless be warranted due to the trial court's erroneous construction of the Closing Fee Statute. While the trial court initially and properly found that a closing fee was of necessity predetermined, it further paradoxically found the closing fee must equal the actual dealer costs incurred in the transaction.[28] This latter erroneous finding, and the resulting jury instructions based on it, effectively required the jury to return a verdict in favor of Freeman. This becomes readily apparent upon reading excerpts from those instructions. Regarding the definition of a closing fee, the court charged the jury:

[28] Because the closing fee is predetermined, it will, at best, only approximate actual closing costs.

> The dealer may only charge the buyer closing costs that are actually incurred and are a necessity to the closing[,] thus reimbursing the dealer for actual closing costs incurred. That is the definition that I charge you is the law in this case defining what a closing fee is under the statute . . . .
>
> . . . If you determine that the costs charged [were] a closing fee under the statute and under the definition, that would pretty much be the end of your inquiry, because [the defendant] had complied with the law. If, however, you determine that it is not a closing fee, that the costs were not in connection with the closing of the transaction, as defined [how] I just said, then you have to decide whether or not [the defendant] has violated what we call the Dealers Act.

In the damages portion of the charge, the requirement that the closing fee must equal actual closing costs was made with even greater clarity:

> [I]f the [d]efendant's closing fees exceeded the amount to necessarily reimburse the [d]efendant for his actual closing costs, then actual damages [are] a portion of that fee which exceeded the actual closing costs. So if you find that [the plaintiff is] entitled to damages, obviously you've got a wide range in this case, anywhere from zero to two hundred ninety-nine dollars.

Hendrick Honda, of course, never contended that its closing fee mirrored the actual closing costs incurred in each transaction. By charging the jury that every cent of the closing fee had to be justified by a concomitant cost, Hendrick Honda was essentially charged out of court.[29]

The majority joins me in rejecting the trial court's construction of the Closing Fee Statute and related jury instructions, which required the closing fee to exactly match the actual closing costs in each transaction. The majority freely

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[29] Hendrick Honda presented expert testimony that its average closing costs greatly *exceeded* the amount of the closing fee. The expert testified that, in 2006, when Freeman purchased her Honda, Hendrick Honda's average closing costs were $507.96, well above the $299 closing fee. No one has ever suggested the impossible—that Hendrick Honda incurred zero closing costs. Yet that is what the jury found. I believe this glaring error is the result of the burden being effectively placed on Hendrick Honda, despite the boilerplate language in the jury charge that the plaintiff has the burden of proof.

acknowledges that "compliance with the 'Closing Fee' Statute does not require that the dealer hit the 'bull's-eye' for each purchase." I therefore do not understand the majority's insistence on upholding this jury verdict, which was based on an erroneous jury instruction that required the closing fee to equal the "actual closing costs incurred."

In sum, the legislature placed the Closing Fee Statute in the SCCPC, the provisions of which control the outcome of this case. I would reverse the trial court judgment on the basis of Hendrick Honda's compliance with the Department's Administrative Interpretation of those provisions. Moreover, even if I accepted the potential for a Dealers Act violation under these circumstances, the erroneous jury instruction would mandate reversal and remand for a new trial with a proper construction of the Closing Fee Statute, one that does not require the predetermined closing fee to equal the "closing costs that are actually incurred and are a necessity to the closing," as the trial court charged the jury. Not only were Hendrick Honda's actions not prohibited by statute, they were specifically approved. Under the Court's ruling today, Hendrick Honda is being punished for doing exactly what South Carolina law permitted it to do.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor, Petitioner,

v.

CSX Transportation, Inc. and South Carolina Department of Transportation, Respondents.

Appellate Case No. 2013-000133

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27587
Heard March 17, 2015 – Filed November 4, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John Paul Detrick, John E. Parker, Grahame Ellison Holmes, Matthew Vernon Creech, all of Peters Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton; and Carl H. Jacobson, of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., of Charleston, all for Petitioner.

Ronald K. Wray, II, and Thomas Edward Vanderbloemen, both of Gallivan, White & Boyd, P.A., of Greenville; Jonathan P. Harmon, of McGuire Woods, L.L.P., of Richmond, VA; James W. Purcell of Fulcher Hagler, L.L.P., of Augusta, GA; Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia, and Peden B. McLeod, Sr., of McLeod, Fraser & Cone, L.L.C., of Walterboro, all for Respondents.

JUSTICE BEATTY: This negligence action arose out of a collision involving a train and an automobile at a railroad crossing. Willie Homer Stephens ("Petitioner"), as Guardian ad Litem for his minor granddaughter who suffered a traumatic brain injury while a passenger in her mother's vehicle, filed suit against CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("SCDOT"). Following a jury verdict in favor of the defendants, Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed, finding the trial judge did not err in admitting certain evidence, charging the jury, and in denying Petitioner's motions for a directed verdict and judgment notwithstanding the verdict ("JNOV"). *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012). This Court granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals. We affirm in part, reverse in part, and remand for a new trial.

I. Factual / Procedural History

CSX maintains a railroad track in Hampton County, which passes through the town of Yemassee. At issue in this case is the passive-grade crossing at Hill Road near state Highway 68. The crossing has no active traffic-control devices such as lights or gates. Vehicle traffic is controlled by a stop sign, a stop line, and a cross-buck that is similar to a "Yield" sign as it is an X-shaped sign with the words "Railroad Crossing" in black lettering.

On the afternoon of February 3, 2004, as Tonia Colvin drove down Hill Road towards Highway 68, a CSX train approached the crossing from her right. Colvin's boyfriend sat in the front passenger seat and her twelve-year-old daughter Lillian sat in the back seat on the right side. When Colvin reached the railroad crossing, she stopped at the stop sign and then pulled forward to the stop line. SCDOT had placed the stop sign at a distance of thirty-six feet and the stop line at

a distance of 9.75 feet from the near rail of the railroad track. Colvin testified that she did not hear or see the train before she drove onto the track. She stated that she heard the train's horn when she drove onto the track. Colvin claimed she accelerated to get out of the way, but she could not cross the track before the train struck her vehicle.

Colvin, her boyfriend, and Lillian all sustained injuries in the accident. An emergency responder testified she smelled alcohol at the accident scene. While Colvin was being treated for her injuries at the emergency room, doctors ordered a test of Colvin's blood and urine to determine whether Colvin had alcohol and/or drugs in her system. Medical records revealed that Colvin had opiates in her system and had a blood alcohol content of .018%. Although Colvin denied being impaired at the time of accident, she admitted she consumed two wine coolers the morning of the accident and had taken Darvocet, a muscle relaxer, and cough syrup with codeine.

Lillian's injuries were the most severe as she suffered a traumatic brain injury that required her to be placed in a medically induced coma for approximately one month. After she awoke from the coma, Lillian received extensive physical, occupational, and speech therapy. However, at the time of trial, Lillian still suffered intellectual, behavioral, and physical impairments.

Petitioner instituted an action for negligence against CSX and SCDOT on behalf of Lillian. With respect to CSX, Petitioner primarily alleged that CSX was negligent in failing to sound the train's horn far enough in advance of the railroad crossing and failing to remove trees and other vegetation that obstructed Colvin's view of the railroad track. As to SCDOT, Petitioner alleged that SCDOT was negligent because it failed to properly inspect the railroad crossing and installed the stop sign and the stop line at improper locations.

At trial, Petitioner presented evidence that CSX, in 2000, started a program to improve sight distances for vehicles approaching its passive-grade crossings in South Carolina by removing vegetation at crossings. Several months before the accident, CSX's clear-cutting crew attempted to cut down a line of trees adjacent to the Hill Road crossing, but they were prevented from cutting the trees until a dispute with the purported landowner, Thomas Jackson, was resolved. At the time of the accident, the crossing had been partially cleared. Contrary to Colvin's testimony, other witnesses testified that the view was unobstructed for about 2,000 feet from the stop line at the crossing. Jackson also testified that he was unaware

of any accidents at the crossing in forty years and he never had a problem with trees blocking his view down the railroad tracks.

Petitioner offered Dr. Kenneth Heathington as an expert who testified regarding the safety issues at the Hill Road crossing. While Dr. Heathington acknowledged that there were no reports of prior accidents at the crossing, he opined that CSX did not provide adequate sight distance for a motorist. Dr. Heathington further testified that the stop sign and stop line were placed at an improper distance. Ultimately, Dr. Heathington concluded that the accident would not have occurred had the defendants complied with the established standards of care. In contrast, SCDOT offered evidence that the crossing had been inspected on November 7, 2002, there was no obstruction at the time of the inspection, and the crossing met with the standards for the placement of stop signs and stop lines.

Petitioner also offered evidence that South Carolina law requires that a train's horn be sounded continuously from a distance of at least 1,500 feet from the road until the engine has crossed it.[1] CSX's counsel admitted in his opening statement that the train's engineer did not begin sounding the train's horn at the proper time. The engineer testified that he "believed" he blew the horn on time; however, the train's event recorder revealed that he did not blow the horn until the engine was 1,161 feet from the crossing.

After CSX and SCDOT presented their evidence, Petitioner moved for a directed verdict as to both defendants. With respect to CSX, Petitioner argued that he was entitled to a directed verdict because there was no issue that CSX was "negligent [in] failing to cut the crossing" and "blow the horn as required by law." Petitioner conceded that there were "issues about proximate cause."

Following the denial of his motion, Petitioner presented rebuttal evidence, which included a stipulation with CSX that the data from the train's event recorder was accurate. Petitioner then rested his case without renewing his motion for a directed verdict.

After charging the jury, the judge submitted to the jury a verdict form that contained special interrogatories. The first question on the form asked the jury to determine whether CSX or SCDOT was negligent. The jury answered "NO" as to

[1] S.C. Code Ann. § 58-15-910 (1977) (mandating that a bell and whistle be installed on locomotives and sounded at least 1,500 feet from railroad crossing).

both defendants and, as a result, did not answer any of the remaining questions on the verdict form regarding proximate cause or damages.

Petitioner filed a timely post-trial motion in which he moved for JNOV, pursuant to Rule 50(b) of South Carolina Rules of Civil Procedure,[2] on the grounds the trial judge erred in failing to direct a verdict in favor of Petitioner against CSX on the issue of negligence given CSX admittedly failed to: (1) sound the train's horn in accordance with section 58-15-910 of the South Carolina Code; and (2) clear the subject railroad crossing in accordance with its own rules and regulations. Alternatively, Petitioner moved for a new trial on the grounds the trial judge erred in: (1) declining to admit certain evidence; (2) failing to charge the jury with Petitioner's proposed instructions; and (3) charging intervening or superseding cause and inapplicable South Carolina Code provisions. After the judge denied these motions, Petitioner appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals affirmed.[3] *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012). The court unanimously affirmed the trial judge's denial of Petitioner's motions for directed verdict and JNOV on the ground the issue was not preserved for appellate review. *Id.* at 515-20, 735 S.E.2d at 512-14. The court found that Petitioner's failure to renew his directed verdict motion after he presented evidence in reply waived his right to move for JNOV. *Id.* at 520, 735 S.E.2d at 514.

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[2] Rule 50(b) provides in pertinent part:

> Whenever a motion for a directed verdict made *at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict.

Rule 50(b), SCRCP (emphasis added).

[3] In his appeal to this Court, Petitioner does not challenge the evidentiary rulings by the trial judge or the Court of Appeals' decision on this issue. Accordingly, we have not addressed this portion of the Court of Appeals' opinion.

The court, however, issued a divided opinion with respect to Petitioner's challenges to the trial judge's rulings involving the jury charge. *Id.* at 520-25, 735 S.E.2d at 514-17. Initially, because the jury determined that neither CSX nor SCDOT breached its duty of reasonable care, the majority found it unnecessary to address any ruling on the jury charge "unless it relates to breach of CSX's and DOT's duty of reasonable care." *Id.* at 520, 735 S.E.2d at 514. The majority rejected each of Petitioner's arguments regarding the jury charge. *Id.* at 520-25, 735 S.E.2d at 514-17.

First, the majority found no error in the judge's refusal to give Petitioner's requested jury instructions regarding a railroad company's: (1) liability for injuries occurring at crossings; and (2) duty to exercise added care when approaching and crossing an intersection where vegetation obstructs a motorist's view of an oncoming train. *Id.* at 521, 735 S.E.2d at 515. The majority concluded that the judge's charge adequately covered the substance of the proposed instructions and correctly conveyed to the jury that a motorist and a railroad must exercise due care at a railroad crossing. *Id.* at 522-23, 735 S.E.2d at 515-16.

Second, the majority held that the trial judge did not err in charging: (1) section 56-5-1010 of the South Carolina Code, which requires railroad companies to install and maintain cross-buck signs at crossings; (2) section 58-17-1390, which requires railroad companies to install and maintain signs reading "Railroad Crossing" at crossings; (3) section 56-5-1020, which prohibits unauthorized signals or other devices at crossings; and (4) section 58-15-1625, which authorizes SCDOT to close railroad crossings to public traffic when SCDOT finds the increased public safety of closing the crossing outweighs the inconvenience caused to motorists who will have to take another route. *Id.* at 523-24, 735 S.E.2d at 516. In so ruling, the majority found the charges contained accurate statements of the law and there was evidence to support the trial judge's decision to give each of them. *Id.* at 524, 735 S.E.2d at 516.

Finally, the majority rejected Petitioner's contention that the trial judge erred in charging the jury on section 15-78-60(5) of the South Carolina Code, which immunizes governmental entities from liability for injuries caused by the "exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." *Id.* at 524, 735 S.E.2d at 516 (quoting S.C. Code Ann. § 15-78-60(5) (2005)). The majority agreed with Petitioner that SCDOT did not present sufficient evidence to prove its discretionary

act immunity claim. *Id.* at 525, 735 S.E.2d at 517. However, it concluded that Petitioner's argument was not preserved because Petitioner raised a different ground on appeal than at trial. *Id.* Specifically, the Court of Appeals found Petitioner failed to argue at trial that SCDOT was not entitled to the immunity defense on the basis SCDOT did not follow an acceptable professional standard in its placement of the stop sign or stop line. *Id.*

The dissent disagreed with the majority's decision regarding the alleged erroneous jury charges. *Id.* at 526-27, 735 S.E.2d at 517-18. While the dissent agreed with the majority that SCDOT failed to present sufficient evidence to entitle it to a charge on discretionary immunity, the dissent found Petitioner was prejudiced because the charge could have confused the jury. *Id.* at 526, 735 S.E.2d at 517. The dissent further found the judge erred in charging the jury on section 56-5-2930, which makes it unlawful for a person to drive a motor vehicle under the influence of alcohol or drugs, but declining to charge section 56-5-2950(G)(1), which provides that a person with a blood alcohol level of .05% or less is conclusively presumed not to be under the influence. *Id.* The dissent also found the trial judge erred in charging CSX's proposed charge, which stated that "It's Always Train Time at the Crossing." *Id.* The dissent believed this instruction could have suggested to the jury that the defendants had lesser duties of care than a motorist. *Id.* at 526, 735 S.E.2d at 518. Ultimately, the dissent would have reversed and remanded for a new trial. *Id.* at 527, 735 S.E.2d at 518.

Following the denial of his petition for rehearing and the rejection of a suggestion for rehearing *en banc*, this Court granted Petitioner's request for a writ of certiorari.

II. Discussion

A. Motions for Directed Verdict and JNOV

Petitioner contends the Court of Appeals erred in affirming the trial judge's denial of his motions for a partial directed verdict and JNOV. In support of this contention, Petitioner posits that the decision of the Court of Appeals: (1) is contrary to the provisions of Rule 50, SCRCP and is based on case law that does not apply to the procedural posture of the instant case, i.e., where a plaintiff presents rebuttal evidence; (2) constitutes an unconstitutional rule change to existing Rule 50; and (3) is incorrect in light of CSX's admission that it breached its duty to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code.

We find the Court of Appeals correctly ruled that Petitioner was precluded from requesting JNOV because he failed to renew his motion for a directed verdict after offering evidence in rebuttal. The text of Rule 50(b) clearly requires renewal of a directed verdict motion as it states the motion should be made after "all" the evidence, which necessarily includes that presented in rebuttal. *See* Rule 50(b), SCRCP (stating, in part, "[w]henever a motion for a directed verdict made at the close of *all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion" (emphasis added)).

This interpretation is consistent with decisions in our state that require strict compliance with the rule. *See, e.g., RFT Mgmt. Co. v. Tinsely & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (" 'When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV' " (quoting *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006))); *Henderson v. St. Francis Cmty. Hosp.*, 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (holding that Rule 50(b) is strictly applied), *overruled on other grounds by* 303 S.C. 177, 399 S.E.2d 767 (1990); *cf. State v. Bailey*, 368 S.C. 39, 43 n.4, 626 S.E.2d 898, 900 n.4 (Ct. App. 2006) (stating, "[i]f a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency to the evidence").[4]

Moreover, additional support for this interpretation may be gleaned from decisions in other state and federal jurisdictions that have adopted a rule of procedure similar in text to our state's Rule 50.[5] *See, e.g., Klavens v. Siegel*, 260 A.2d 637 (Md. 1970) (ruling that movant, by offering evidence in rebuttal, withdrew the motion for a directed verdict by the presentation of the evidence); *Spulak v. Tower Ins. Co.*, 559 N.W.2d 197, 201 (Neb. 1997) (holding that "[a]

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[4] Petitioner contends the cited cases, particularly *Henderson*, are limited to a factual scenario where the defendant fails to renew a motion for a directed verdict after presentation of the defense case. We disagree with Petitioner's interpretation of these cases as we discern no reason, and Petitioner does not offer any, why the same rule would not be equally applicable to a plaintiff who presents evidence in rebuttal.

[5] *See* 25 S.C. Jur. *Rules of Civil Procedure* § 50.2 (2015) ("State Rule 50 substantially conforms to the pre-1991 Federal Rule.").

plaintiff who moves for a directed verdict at the close of the defendant's evidence and, upon the overruling of such motion, proceeds to introduce rebuttal evidence waives any error in the ruling on the motion" when the motion for a directed verdict is not renewed at the close of all the evidence). *See Generally* E. H. Schopler, Annotation, *Practice and Procedure With Respect to Motions for Judgment Notwithstanding or in Default of Verdict under Federal Civil Procedure Rule 50(b) or Like State Provisions*, 69 A.L.R.2d 449 (1960 & Supp. 2015) (collecting state and federal cases addressing proper procedure for procuring a ruling on a motion for JNOV). Accordingly, we affirm the Court of Appeals' interpretation of Rule 50(b) and conclude that it did not constitute a rule change.

Further, despite CSX's admission concerning the untimely sounding of the train's horn and stipulation regarding the accuracy of the data from the train's event recorder, Petitioner waived any argument that he was entitled to a partial directed verdict as to CSX's breach of its duty of reasonable care. Not only did Petitioner fail to renew his motion for a directed verdict at the close of all the evidence, but he also approved a special verdict form that asked the jury to consider *all* elements of his negligence claim, including whether CSX and SCDOT breached their respective duties of care. *See Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012) ("When an appellant acquiesces to the trial court's ruling, that issue cannot be raised on appeal."); *see also Lord v. D & J Enters., Inc.*, 407 S.C. 544, 558, 757 S.E.2d 695, 702 (2014) ("To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages.").

B. Jury Charges

Petitioner next argues that the Court of Appeals erred in affirming the trial judge's: (1) refusal to charge Petitioner's two requested instructions regarding CSX's duty of care, (2) decision to charge discretionary immunity as to SCDOT, and (3) decision to charge three statutes pertaining to signage at railroad crossings. Additionally, Petitioner asserts the Court of Appeals erred in declining to address his challenges regarding the trial judge's decision to charge: (1) inapplicable statutes, (2) an intervening or superseding cause, (3) CSX's proposed request that "it is always train time at a railroad crossing," and (4) the criminal statute of driving under the influence.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when

the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.*

"A trial court must charge the current and correct law." *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence. *Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983). "A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

When an appellate court reviews an alleged error in a jury charge, it "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citations omitted). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.' " *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (quoting *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997)).

1. Issues Addressed by the Court of Appeals

a. Trial Judge's Refusal to Charge Proposed Jury Instructions

We find Petitioner cannot demonstrate that the trial judge erred in refusing to charge his Nos. 2 and 3 proposed instructions.[6] Although the judge's charge did

[6] Petitioner's proposed instruction No. 2 states:

> A railroad corporation has a duty to maintain its right-of-ways and highway railroad grade crossings in a reasonable safe condition. If a railroad corporation negligently allows vegetation to grow on its right-of-way adjacent to the crossing to such an extent that it obscures or obstructs the vision of the driver of a motor vehicle using the roadway, it is liable to anyone who is injured in a collision, if the

not include the particular verbiage requested by Petitioner, the charge adequately covered the substance of Petitioner's proposed instructions.

In terms of proposed instruction No. 2, the trial judge fully explained the elements of negligence. The judge also expressly instructed the jury that "a railroad corporation has a duty to maintain a reasonably safe grade crossing," which accurately addressed the railroad's duty and was a correct statement of the law. As to proposed instruction No. 3, the judge charged the jury that a railroad corporation must use "reasonable and ordinary caution to prevent accidents at such crossing, and this degree of care may be affected by obstructions which prevent the track from being seen as a train approaches."

Further, we reject Petitioner's assertion that the trial judge's refusal to give his proposed instructions effectively placed the duty of care only on the motorist. Contrary to Petitioner's claim, the judge instructed the jury that a motorist and a railroad corporation have a mutual duty to exercise reasonable care at a railroad crossing. Specifically, the judge charged that "there is a mutual duty on [the] traveler and [the] railroad to exercise due care" and that "[b]oth the traveler and the company are charged with the same degree of care: the one to avoid being injured; and the other to avoid inflicting injury." Consequently, we agree with the Court of Appeals that the trial judge did not err in refusing to charge Petitioner's requested instructions.

Nevertheless, even assuming error, we discern no prejudice to Petitioner as each party's respective duty of care was accurately conveyed to the jury. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a lookout for danger, and the degree of vigilance required of both is in proportion to the known risk; the greater the danger, the greater the care required of both.").

> obstructing vegetation contributed as a proximate cause to the collision.

Petitioner's proposed instruction No. 3 states:

> When vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming train, the railroad has a duty to exercise added care in the operation of timing of its train as the train approaches and crosses the crossing.

b. Discretionary Immunity

Petitioner asserts the Court of Appeals erred in affirming the trial judge's charge on section 15-78-60(5) of the South Carolina Code, which immunizes governmental entities from liability for injuries caused by "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."[7] Petitioner contends the ruling was inconsistent because the Court of Appeals unanimously found that SCDOT failed to present sufficient evidence to entitle it to a jury charge on discretionary immunity, yet still concluded there was no reversible error since Petitioner changed his argument on appeal to include SCDOT's failure to follow professional standards in the placement of the signs at the Hill Road crossing. Petitioner concedes that the phrase "professional standards" was not specifically used in objecting to the discretionary immunity charge; however, he maintains the objection was sufficient to preserve the issue for appellate review.

We agree with Petitioner that his objection was sufficient to preserve the issue for appellate review as Petitioner clearly challenged the judge's instruction on discretionary immunity at the charge conference and cited section 15-78-60(5) in his post-trial motion. *See Buist v. Buist*, 410 S.C. 569, 574-75, 766 S.E.2d 381, 383-84 (2014) ("While a party is not required to use the exact name of a legal doctrine in order to preserve the issue, the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error." (citations omitted)).

Although we disagree with the Court of Appeals' error preservation analysis, we agree with its ultimate conclusion to affirm the trial judge. However, we reach this decision on a different basis than the Court of Appeals. Unlike the Court of Appeals, we find SCDOT did in fact present evidence that entitled it to a charge on discretionary immunity.

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). "Furthermore, the governmental entity must show that in weighing the competing considerations and

[7] S.C. Code Ann. § 15-78-60(5) (2005).

alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* (citation omitted).

SCDOT pled the affirmative defense of discretionary immunity in its Answer and offered evidence at trial to support this defense. Specifically, SCDOT witnesses Richard Jenkins, Joel Smith, and Richard Reynolds identified the factors that were considered in the placement of the stop sign and stop line. These witnesses also testified how the positioning of the stop sign was affected by the presence of an access road, driveway, culvert, and fiber optic lines. Additionally, these witnesses opined that the placement of the stop sign and stop line was proper and in substantial compliance with the guidelines provided by the Manual of Uniform System of Traffic-Control Devices ("MUTCD").

Finally, we note that Petitioner has not raised any challenge to the other discretionary immunity provisions charged by the trial judge, which included sections 15-78-60(13) and 15-78-60(15).[8] Thus, even assuming error, we cannot definitively determine that Petitioner was prejudiced because the jury may have based its decision on one of these unchallenged provisions and not section 15-78-60(5). *Cf. Anderson v. Short*, 323 S.C. 522, 476 S.C. 475 (1996) (stating that where a trial judge's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

c. Statutes Involving Signage and SCDOT's Authority to Close Railroad Crossings

Petitioner argues that the Court of Appeals erred in affirming the trial judge's decision to charge statutes related to the placement of signs at railroad crossings[9]

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[8] S.C. Code Ann. § 15-78-60(13) (2005) (immunizing governmental entities for liability of a loss resulting from regulatory inspection powers or functions); *id.* § 15-78-60(15) (immunizing governmental entities for liability of a loss resulting from the absence or malfunction of warning devices unless it is not corrected within reasonable time after actual or constructive notice).

[9] *See* S.C. Code Ann. § 56-5-1010 (2006) (requiring railroad companies operating in South Carolina to place and maintain cross-buck signs at crossing of highway and railroad); *id.* § 56-5-1020 (prohibiting placement of unauthorized signs, signals, or traffic-control devices in view of any highway); *id.* § 58-17-1390 (1977) (requiring railroad corporation to maintain signs at crossings with public roads).

and the authority of SCDOT to close unsafe railroad crossings.[10] Petitioner claims these statutes should not have been charged as they were inapplicable and created confusion for the jury.

We agree with the Court of Appeals that the challenged jury instructions correctly stated the law and were applicable to the issues and evidence presented at trial. Sections 56-5-1010 and 58-17-1390 regarding a railroad company's duties to install certain signs at crossings were relevant because Petitioner alleged that CSX was negligent "[i]n maintaining an unreasonably hazardous and unsafe crossing" and "[i]n failing to maintain adequate warning devices at the crossing."

Section 56-5-1020, which prohibits unauthorized signs, signals, or other devices at crossings, was relevant because Dr. Heathington opined that the Hill Road crossing could have been made safer with the installation of active traffic-control devices. Thus, section 56-5-1020, informed the jury that CSX could not legally install active traffic-control devices without SCDOT's authorization. Finally, section 58-15-1625, which authorizes the SCDOT to close unsafe railroad crossings, was relevant to inform the jury that CSX could not of its own accord close the Hill Road crossing.

2. Issues Not Addressed by the Court of Appeals

We conclude the Court of Appeals erred in restricting its analysis only to those jury charge issues related to the breach of CSX's and SCDOT's duty of reasonable care. As will be discussed, we find that portions of the judge's charge were erroneous and may have tainted the jury's consideration of the initial question on the special verdict form regarding negligence, particularly where CSX admitted that the train engineer failed to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code.[11]

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[10] *See* S.C. Code Ann. § 58-15-1625 (Supp. 2005) (authorizing SCDOT to eliminate unsafe railroad crossings).

[11] Throughout the appellate proceedings, CSX has argued that there was conflicting evidence as to whether it breached its duty of reasonable care. As a result, CSX maintains that there is evidence to support the jury's determination that it was not negligent. We believe this argument is disingenuous given the admission of CSX's counsel during opening statements that the train's engineer failed to timely sound the train's horn in accordance with section 58-15-910 and the

a. Statutes Concerning a Driver's Duty to Stop

Petitioner contends the trial judge erred in charging sections 56-5-2330[12] and 56-5-2740[13] concerning a driver's duties at stop signs on intersecting highways because these statutes are inapplicable and conflict with the judge's instruction on section 56-5-2715,[14] which specifically addresses a driver's duty to stop at a railroad crossing that SCDOT has deemed particularly dangerous.

We agree with Petitioner that the trial judge erred in charging sections 56-5-2330 and 56-5-2740. Without dispute, these statutes were irrelevant as neither governs a driver's duty to stop at a railroad crossing. The statutes also conflict with

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stipulation regarding the accuracy of the data from the train's event recorder. Although CSX did not concede that it breached its duty of reasonable care, the admission of counsel and the stipulation clearly equate to a finding of negligence per se, i.e., breach of duty. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (recognizing that the violation of an applicable statute constitutes negligence per se). However, as acknowledged by Petitioner, there remained questions of fact as to proximate cause and damages.

[12] *See* S.C. Code Ann. § 56-5-2330(b) (2006) (providing requirements for motorists when they approach a stop sign and stating in part that "every driver of a vehicle approaching a stop sign *shall stop at a clearly marked stop line* but, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it" (emphasis added)).

[13] *Id.* § 56-5-2740 (providing requirements for motorists when they approach a stop sign at a crosswalk and stating, in part, that "[e]very driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection").

[14] *Id.* § 56-5-2715 (authorizing SCDOT to designate "particularly dangerous" railroad crossings and erect stop signs thereat and stating that "[w]hen such signs are erected, the driver of any vehicle *shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care*" (emphasis added)).

the directive of section 56-5-2715 that a driver "shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad." Had Colvin complied with the general provisions of sections 56-5-2330 and 56-5-2740 and stopped at the stop line, which was located 9.75 feet from the near rail of railroad track, she would have violated the fifteen-foot limit mandated by section 56-5-2715. Given this conflict, we believe the jury could have been confused as to which statutory provisions governed Colvin's duty to stop at the railroad crossing. If the jury applied sections 56-5-2330 and 56-5-2740, it may have deemed Colvin negligent for violating section 56-5-2715. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (recognizing that the violation of an applicable statute constitutes negligence per se).

In turn, the jury may have concluded that Colvin's negligence superseded any admitted or proven negligence of CSX or SCDOT. *See Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged." (citation omitted)); *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E. 321, 325 (1962) ("In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury." (citation omitted)). Consequently, we find that Petitioner was prejudiced by the judge's error.

b. Intervening or Superseding Cause

Next, Petitioner asserts the trial judge erred in charging the law of intervening or superseding cause because any allegation of negligence against Colvin was "foreseeable as a matter of law, and therefore, could not serve as an intervening, superseding cause." Petitioner claims it was foreseeable that a motorist might not stop at the stop line at the Hill Road crossing as that stop line was improperly placed at a location that was too close to the railroad track.

We find Petitioner's argument to be without merit as evidence was presented that any negligence on the part of Colvin was not limited to the issue of the stop line. Rather, there was evidence that even though Colvin stopped at the line, she failed to yield, failed to exercise due care, and admitted to consuming alcohol and prescription medication prior to driving her vehicle. Any of these actions on the part of Colvin, none of which was reasonably foreseeable, could have served as the

intervening cause of the accident. *See Bishop v. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) ("The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances."); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997) ("For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated."). Accordingly, we find the charge was proper and supported by the evidence presented at trial.

c. "It is Always Train Time at a Railroad Crossing"

Petitioner argues the trial judge erred in charging the jury that "it is always train time at a railroad crossing"[15] because the charge misstates the respective duties of a motorist and the railroad company at crossings. Petitioner maintains that the charge, coupled with the judge's refusal to charge his proposed instruction No. 9,[16] improperly placed a higher duty of care upon motorists at railroad crossings.

Although the text of this segment of the judge's charge may be found in a series of cases decided in 1936 and 1940,[17] a careful review of these decisions

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[15] This portion of the charge states:

> I further charge you it is the law of this state it has been well said that it is always train time at a railroad crossing. The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train.

[16] Petitioner's proposed instruction No. 9 provides:

> A driver of a motor vehicle is under no absolute duty to stop, look, and listen before going on the track at a railroad crossing, unless the exercise of ordinary care and prudence under all surrounding facts and circumstances requires the adoption of such a course.

[17] *See, e.g., Bingham v. Powell*, 195 S.C. 238, 245, 11 S.E.2d 275, 278 (1940) ("We are not unmindful of the principles long established by this Court that it is

reveals that the quoted language constitutes dicta and conflicts with case law that correctly assigns a mutual duty to a motorist and a railroad company at railroad crossings. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a lookout for danger, and the degree of vigilance required of both is in proportion to the known risk; the greater the danger, the greater the care required of both."). Due to the erroneous charge, the jury may have improperly assigned a higher duty of care to Colvin or shifted the duty of care entirely to Colvin. Accordingly, we find that Petitioner was prejudiced by this error.

d. Impaired Driving

Finally, Petitioner asserts the trial judge erred in charging the jury section 56-5-2930,[18] the criminal statute involving the charge of driving under the influence ("DUI"), but refusing to charge section 56-5-2950(b)(1)[19] to show that Colvin was presumptively not impaired by alcohol as her blood alcohol content was .018%. Additionally, Petitioner claims the prejudice from the refusal to

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'always train time at a railroad crossing' and that one approaching must make use of his senses, to the best of his ability under the circumstances, to ascertain the presence or approach of a train and do so in time and place, so far as is reasonably within his control, to be effective[.]"); *Breeden v. Rockingham R.R. Co.*, 193 S.C. 220, 224, 8 S.E.2d 366, 368 (1940) ("It is the duty of a traveler, upon the approach to a railroad crossing of which he is aware, to use due care to observe the approach of trains at said crossing for, as stated in *Robison v. Atlantic Coast Line R. Co.*, 179 S.C. 493, [501], 184 S.E. 96, 100 [1936], 'it is always train time at a railroad crossing.' ").

[18] S.C. Code Ann. § 56-5-2930 (2006) (outlining offense of operating a vehicle while under the influence of alcohol or drugs or a combination of both). We note that this statute has since been amended. Therefore, we cite to the version of the statute in effect at the time of the accident.

[19] *Id.* § 56-5-2950(b)(1) (providing that in a criminal prosecution for violation of section 56-5-2930 an alcohol concentration of .05 or less is conclusively presumed that the person was not under the influence of alcohol). We note that section 56-5-2950(b)(1) is now codified as section 56-5-2950(G)(1). S.C. Code Ann. § 56-5-2950(G) (Supp. 2014).

charge section 56-5-2950(b)(1) was exacerbated by the judge's decision to charge section 15-78-60(20),[20] which led the jury to infer that SCDOT could not be liable for its omissions because of criminal activities committed by Colvin.

Like the dissent in the Court of Appeals' opinion, we are most troubled by this issue. Given the evidence, it was necessary to provide the jury with some type of instruction regarding impaired driving as the emergency responder testified the accident scene smelled of alcohol, Colvin admitted that she consumed alcohol and took prescription medication the morning of the accident, and Colvin's blood test after the accident revealed the presence of opiates. However, because Petitioner presented evidence that Colvin's blood alcohol content was .018%, we find Petitioner was entitled to have the jury instructed on the statutory presumption provided in section 56-5-2950(b)(1). In the absence of this instruction, it is arguable the jury found Colvin was impaired while driving and that this criminal act negated any negligence on the part of CSX and SCDOT. Accordingly, we find Petitioner was prejudiced by the judge's refusal to charge his proposed instruction.

III. Conclusion

Based on the foregoing, we affirm the rulings of the Court of Appeals regarding the denial of Petitioner's JNOV motion and the jury charge issues that it addressed. However, we find the Court of Appeals erred in restricting its analysis only to those jury charge issues related to the breach of CSX's and SCDOT's duty of reasonable care. Because portions of the judge's charge were erroneous and prejudiced Petitioner, we reverse and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

[20] *Id.* § 15-78-60(20) (2005) ("The governmental entity is not liable for a loss resulting from an act or omission of a person other than an employee including but not limited to the criminal actions of third persons.").

JUSTICE KITTREDGE: I respectfully dissent. I would affirm the court of appeals in result. I begin by commending Justice Beatty on his well-written and thorough opinion. I further take no issue with the finding of error concerning the challenged jury instructions related to Tonia Colvin. However, given the verdict form and the jury's determinations that CSX Transportation and the South Carolina Department of Transportation were not negligent in the first instance, I would find the erroneous jury instructions did not prejudice Petitioner.

The Court finds no reversible error in the jury's findings of no negligence against CSX and SCDOT, while finding a new trial is warranted due to jury instructions related to Colvin. The Court even speculates that "the jury may have concluded that Colvin's negligence superseded any admitted or proven negligence of CSX or SCDOT." The jury's findings of no negligence against CSX and SCDOT preclude such speculation. Absent a reversible error in a jury's findings, I believe the law requires a court to give effect to the jury's determinations.

On a final note, this appeal presents the frequent tension between the practical realities of jury deliberations and established legal principles. The established principle at issue here is seen in the jury's threshold findings of no negligence against CSX and SCDOT. As a practical matter, is it possible that the jury ignored the trial court's instructions and allowed its possible view of Colvin's alleged responsibility for the accident to influence the verdict of no negligence against CSX and SCDOT? The answer is, of course, yes. Yet there are compelling policy reasons to resist such speculation and for honoring the agreed-upon verdict form. In sum, because the jury determined that CSX and SCDOT were not negligent, the unrelated erroneous jury instructions should not serve as a basis for granting a new trial.

PLEICONES, J., concurs.

The Supreme Court of South Carolina

In the Matter of Robert Clenton Campbell, Respondent.

Appellate Case No. 2015-002218; Appellate Case No. 2015-002220

ORDER

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

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

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

This Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

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

Finally, within fifteen (15) days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Jean H. Toal C.J.

Columbia, South Carolina

October 29, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dorchester County Assessor, Appellant,

v.

Middleton Place Equestrian Center, LLC, Respondent.

Appellate Case No. 2013-002320

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 5358
Heard April 21, 2015 – Filed November 4, 2015

AFFIRMED

Andrew T. Shepherd and Kathryn H. Hyland, both of Hart Hyland Shepherd, LLC, of Summerville, for Appellant.

Thomas Bacot Pritchard, of Pritchard Law Group, LLC, of Charleston, for Respondent.

MCDONALD, J.: The Dorchester County Assessor (the Assessor) appeals the Administrative Law Court's (ALC) order affirming the Dorchester County Board of Assessment Appeals' finding that Middleton Place Equestrian Center, LLC (Middleton Place) is entitled to retain the "agricultural use" classification for

eleven parcels of land that the Assessor attempted to reclassify for the 2012 tax year. The Assessor argues the ALC erred in upholding the application of the agricultural use classification to the parcels at issue because they are dedicated solely to residential use by certain restrictive covenants. The Assessor further argues the ALC erred in concluding that an agricultural use classification still applies to the parcels at issue even if they are not timberland properties. We affirm.

FACTS AND PROCEDURAL HISTORY

This case involves eleven parcels of land in the Middleton Oaks Subdivision (Middleton Oaks) in Dorchester County. The parcels at issue range in size from 0.29 to 3.08 acres, and constitute a portion of a larger tract of approximately sixty-six hundred acres owned by Middleton Place.

In 1970, Charles H.P. Duell (Duell) inherited property from his grandfather that is currently part of Middleton Place,[1] as well as a significant amount of additional property, which includes the historic manor remains and gardens designated as the Middleton Place National Historic Landmark (National Historic Landmark). In conjunction with landscape architect Robert Marvin, Duell subsequently developed a master plan to sell approximately twenty-five home sites in an effort to raise the capital necessary to restore and make improvements to the National Historic Landmark. The entire tract within the master plan was classified as "agricultural use." Each time a house site was sold, the site was individually platted, and the plat was recorded with the Dorchester County Register of Mesne Conveyances (RMC). The Assessor would then revise the classification for the purchased house site, and the site would be taxed at the then-applicable market rate.

After the creation of the master plan, Duell established the Middleton Oaks Property Owners Association, Inc., now known as the Middleton Place Property Owners Association, Inc. (MPPOA), and created a "Declaration of Covenants and Restrictions of Charles H.P. Duell as Pertain to Middleton Oaks" (Covenants and Restrictions).[2] The purpose of the Covenants and Restrictions was to create a residential community, "which is aesthetically pleasing and functionally

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[1] Duell is the Middleton Place's principal and sole member.

[2] The Covenants and Restrictions were filed in Dorchester County on December 21, 1979.

convenient." Under the Covenants and Restrictions, Duell retains the sole and exclusive final authority for all determinations related to the covenants and restrictions although, at his discretion, Duell may appoint an architectural review board (ARB) to advise him in the process.

In 1990, the Dorchester County Planning Board contacted Duell to request that he record a plat reflecting each of the potential house sites to aid in the recording process when a house site was sold. At that time, Duell was concerned that recording such a plat might require common "subdivision" type developments, such as standard curb and gutter, sidewalk, and roadway requirements. More significantly, Duell was concerned that recording a plat reflecting the individual house sites might impact the agricultural use classification tract as a whole.

Duell brought these concerns to the attention of Joe Murray, the Dorchester County Assessor in office at the time of the County Planning Board's platting request. Duell sought and received Murray's assurance that the agricultural use classification would not be affected. Duell confirmed this understanding to Murray in an August 11, 1993 letter. From the time the plat was recorded on November 20, 1990, and until 2012, the subject property (as a whole) received the agricultural use classification for all unsold house sites.

Both prior to and after the platting change requested by Dorchester County in 1990, the house sites were sold at an average rate of less than one every two years. The last house site sale took place in 2007. Since the creation of the master plan, less than twenty house sites have been sold and fewer than a dozen homes constructed.

In 2012, approximately $40,000 worth of timber was cut from property in Middleton Place. Prior to the hearing before the ALC, the ARB had approved plans for the MPPOA to perform improvement cutting within the footprint of the parcels. Such improvement cutting is conducted periodically. Duell has cut timber from each of the eleven parcels at issue since the agriculture use designation was reaffirmed in 1993.

For the 2012 tax year, the Assessor denied Middleton Place's agricultural land use classification for the eleven non-divided parcels at issue, determining that they did not meet the statutory requirements for the agricultural land use classification. The Assessor sent assessment notices to Middleton Place informing it of the parcels' new assessed value for *ad valorem* tax purposes. Middleton Place subsequently

appealed the classification denial to the Dorchester County Board of Assessment Appeals, which reversed the Assessor's determination.

On appeal to the ALC, the Assessor testified that the reason for his denial was two-fold: (1) the eleven parcels at issue are all less than five acres; and (2) the Covenants and Restrictions do not allow for timber management and wholesale harvesting of timber from the contested parcels. The Assessor subsequently testified that the parcels at issue are "all -- it's all timberland, yeah." The following questioning ensued on cross-examination:

> Q: You said that the restrictive covenants that you relied on had somewhere in them an indication that you could not sell things for commercial purposes. And I'm asking you where in the restrictive covenants you're referencing. Is it this that you're referencing?
>
> A: I didn't say that about Middleton. I basically made a statement that it prohibited you from doing that in the Boyle Plantation. I can't tell you exactly what it said.
>
> Q: Okay.
>
> A: But it basically said the same thing as Middleton that -- it's -- the basis for it is, it's there to protect the subdivision itself from other influences, such as cutting timber, growing this, doing that, whatever. It's there to protect the buyers of the subdivision. If you go to buy -- if you pay a huge amount of money for a lot in a subdivision, I don't think you want to wake up the next -- one morning and there's a logging crew next door to you cutting all the trees off the adjacent lot. And so that's where I think any -- the restrictions -- the restrictive covenants prohibit you from doing that. They may say it in different ways. It all boils down, they're there to protect the homeowner. It's there to protect the subdivision as a whole from -- from other influences, commercial influences.

> Q: But Mr. Welch, you'll agree by your own admission, both on direct examination, just now on restatement, that your interpretation of the covenants and restrictions takes into account a whole lot of assumptions on your part.
>
> A: Yes, but I -- I read the -- the assumption I make is what I read is correct; that that's what it says.
>
> . . .
>
> But that is why they -- I said, "I assume." I use that word quite freely sometimes, but that is why --
>
> Q. Okay.
>
> A. -- you have covenants and restrictions.
>
> Q. Okay.
>
> A. I don't assume that. I know that the reason you have covenants and restrictions [is] to protect the owners of the subdivision, as well as the subdivision as a whole. I say "assume" sometimes when I shouldn't, but I don't assume that. I know that. That's a fact. And that's why they're there.

The ALC found in favor of Middleton Place by order filed August 20, 2013. The ALC denied the Assessor's motion to alter or amend on September 30, 2013, and simultaneously entered an amended order reversing its award for attorney's fees to Middleton Place. The Assessor appeals, contending the ALC erred in awarding the agricultural use designation for the eleven parcels. We disagree and affirm.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC. This court may reverse or modify the decision only if:

> substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the

> statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014).

"[T]his court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." *Trident Med. Ctr. v. S.C. Dep't of Health and Envtl. Control*, 412 S.C. 341, 348, 722 S.E.2d 177, 181 (Ct. App. 2015). Accordingly, this court's review "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *Id.* (quoting *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010)). "In determining whether the AL[C]'s decision was supported by substantial evidence, this [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the AL[C] reached." *Hill*, 389 S.C. at 9–10, 698 S.E.2d at 617. "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Id.* (quoting *Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 304, 682 S.E.2d 282, 287 (Ct. App. 2009)).

LAW AND ANALYSIS

The Assessor argues that because the Covenants and Restrictions for Middleton Oaks limit the eleven parcels to residential use, the parcels do not satisfy the statutory requirements for classification as agricultural real property for *ad valorem* tax purposes. We disagree.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (quoting *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting *Scott*, 351 S.C. at 588, 571 S.E.2d at 702). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration in original) (quoting

Scott, 351 S.C. at 588, 571 S.E.2d at 702)); *see also Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.").

South Carolina Code section 12-43-230(a) defines "agricultural real property" as

> any tract of real property which is used to raise, harvest or store crops, feed, breed or manage livestock, or to produce plants, trees, fowl or animals useful to man, including the preparation of the products raised thereon for man's use and disposed of by marketing or other means. It includes but is not limited to such real property used for agriculture, grazing, horticulture, forestry, dairying and mariculture.

S.C. Code Ann. § 12-43-230(a) (2005). The statute further explains that "[i]n the event at least fifty percent of a real property tract shall qualify as 'agricultural real property', the entire tract shall be so classified, provided no other business for profit is being operated thereon." *Id.* Section 12-43-230(a) requires that the South Carolina Department of Revenue promulgate a regulation that provides a more detailed definition of "agricultural real property" for county assessors to utilize "in determining entitlement to special assessment under this article." *Id.*

South Carolina Code of Regulations provision 117-1780.1 was promulgated "to address the application of the property tax laws to agricultural property and how property may qualify as agricultural use property." S.C. Code Ann. Regs. 117-1780.1 (2004). Pursuant to the regulation, "[r]eal property must meet the requirements for agricultural real property of Code Sections 12-43-220(d), 12-43-230, and 12-43-232 in order to be classified as agricultural real property." *Id.* Moreover, agricultural real property "shall not include any property used as the residence of the owner or others." *Id.* The following factors are considered by county assessors in determining whether the tract in question is bona fide agricultural real property:

1. The nature of the terrain
2. The density of the marketable product (timber, etc.) on the land

3. The past usage of the land
4. The economic merchantability of the agricultural product
5. The use or not of recognized care, cultivation, harvesting and like practices applicable to the product involved, and any implemented plans thereof.
6. The business or occupation of the landowner or lessee, however, the fact that the tract may have been purchased for investment purposes does not disqualify it if actually used for agricultural purposes.[3]

Id. In cases in which the real property is committed to more than one use—one being agricultural and the other being unrelated to agriculture—the agricultural use "must comprise the most significant use of the property in order for it to be classified as agricultural real property." *Id.*

Section 12-43-232(1)(a) explains that:

> If the tract is used to grow timber, the tract must be five acres or more. *Tracts of timberland of less than five acres which are contiguous to or are under the same management system as a tract of timberland which meets the minimum acreage requirement are treated as part of the qualifying tract.* Tracts of timberland of less than five acres are eligible to be agricultural real property when they are owned in combination with other tracts of nontimberland agricultural real property that qualify as agricultural real property. For the purposes of this item, tracts of timberland must be devoted actively to growing trees for commercial use.

S.C. Code Ann. 12-43-232(1)(a) (2005) (emphasis added).

Here, there is no dispute that each of the eleven parcels at issue is less than five acres. The Assessor asserts there is no evidence in the record that the parcels at issue are used to "raise, harvest or store crops, feed, breed or manage livestock, or

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[3] "These factors are not, however, meant to be exclusive and all relevant facts must be considered." S.C. Code Ann. Regs. 117-1780.1 (2004).

to produce plants, trees, fowl or animals useful to man, including the preparation of the products raised thereon for man's use and disposed of by marketing or other means." *See* S.C. Code Ann. § 12-43-230(a) (2005). However, Middleton Place persuasively argues the parcels at issue are "contiguous to" and "are under the same management system" as tracts of timberland exceeding the minimum acreage requirement. *See* S.C. Code Ann. § 12-43-232(1)(a) (2005).

The record reveals that Duell has been the sole and exclusive owner of the eleven parcels since inheriting them in 1970.[4] At the hearing before the ALC, Duell testified that from the time the plat was recorded in 1990, the parcels have been part of a timber management plan, which he follows throughout the whole Middleton property, both within the National Historic Landmark and otherwise. He further testified "we do have a forester full time on staff and we have a manager of the woodlands who the forester works for."

Duell explained:

> [W]e don't do clear cutting with exceptions, special exception, but basically we do what we call "improvement cutting" and you have to harvest pine trees. Mr. Welch said that he had hardwoods; well, that's fine. But the bulk of our timbering has been pine trees.
>
> Pine trees don't live, you know, more than 150 years. They start to rot. They're [lightning] rods. And at a certain point, it's just they stop growing. At a certain point, from a timber management standpoint, it's unquestionably wise to take them out. And we do that on all the property. We respect live oaks that can live to be hundreds of years old and we respect a lot of hardwoods that make up the conservation efforts that we do. So I also would like to point out that when Mr. Shepherd and Mr. Welch referred to the covenants talking about commercial activities on residential lots, the residential lots are where people live. The word "residential" means a residence.

[4] Duell's family has owned the entire tract of approximately sixty-six hundred acres (including the eleven parcels at issue) for over three hundred years.

> And these are not residential lots. They're timber -- they’re part of the whole timberland until, under our system, that we -- that I sell them and they become residential lots.
>
> . . . .
>
> We're not doing any kind of clear cutting. We have cut raised last year approximately $40,000.00 in timbering on another part of the LLC property, but the same property.
>
> Now we have plans this year to harvest timber on several sites here and the board of architectural review has already passed on that as an advisory board. As Mr. Pritchard said, I appoint when needed, ad hoc, and the advisory board already approved the timber sale for this year, which will take these mature pines and leave the land probably looking better with live oaks allowed to grow and naturalize and so on.

Despite Dorchester County's request that each parcel be separately platted in 1990, we agree with the ALC that Duell has continued to treat these parcels as a part of the entire several hundred acres, which significantly exceed the statutory minimum acreage requirement. *See* S.C. Code Ann. 12-43-232(1)(a) (2005). Moreover, he has managed the parcels in the same manner as the remainder of the property within the National Historic Landmark.

Significantly, at the hearing before the ALC, the Assessor testified the eleven parcels are "all timberland" and in his appellate brief, the Assessor argues "[t]he record contains no evidence that Middleton Place has utilized or attempted to treat the [parcels] at issue as anything other than timberland." Consequently, we are unable to find that the ALC's finding that "Respondent owns contiguous tracts of timberland which greatly exceed the minimum requirements set forth in the statute and are managed in the same manner as the subject parcels" was arbitrary, capricious, or in any way erroneous in light of the substantial evidence in the record as a whole. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2014).

Covenants, Restrictions, and the Assessor's Assumptions

In denying the eleven parcels the "agricultural use" classification, the Assessor, by his own admission, made a number of assumptions about the application of the Middleton Oaks Covenants and Restrictions to the parcels. As the ALC properly recognized, the Assessor sought to interpret the Covenants and Restrictions in the context of a traditional subdivision, failing "to apprehend and appreciate the unique nature and character of this property."

Although the Assessor testified that he read all of the Covenants and Restrictions, he admitted he interpreted two provisions in making his determination:

> (1) All of the residential lots in Middleton Oaks shall be used for residential purposes exclusively.[5]
> (2) No trees, bushes, or underbrush of any kind may be removed without the written approval of the [ARB].

However, as the ALC pointed out in its amended final order, the Assessor failed to give credence to clear language in the Covenants and Restrictions granting Duell the sole and exclusive power to "appoint an [ARB] to counsel him; but ultimate authority for the decisions of the [ARB] shall in all cases rest with the Owner, his heirs and assigns." Moreover, as previously noted, the Assessor testified that the parcels at issue are "all timberland" and concedes on appeal that "[t]he record contains no evidence that Middleton Place has utilized or attempted to treat the [parcels] at issue as anything other than timberland."

With respect to the Covenants and Restrictions, Duell explained:

> [T]he commercial aspect of it had not to do with the business of timbering, but it had to do with people having commercial establishments in their houses. We didn't

[5] Under the Covenants and Restrictions, a "residential lot" is defined as "any unimproved parcel of land located within the Property which is intended for use as a site for a single family detached dwelling . . . as shown upon any recorded final subdivision plat of any part of the Property."

> want someone to set up a shop or manufacturing or anything else in the residential lots.
>
> The covenants, I would suggest, are not only simply to protect the owner. Owners all have different ideas of how they should be protected. But to protect the whole property in its -- in its effort to attract co-stewards for Middleton Place and its effort to have people living in natural surroundings…

As we are unable to find any specific language indicating the Covenants and Restrictions were intended to restrict the selective cutting and appropriate timber management of the land, we must resolve all doubts "in favor of free use of the property." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (holding that a restriction on the use of property must be created in express terms or by plain and unmistakable implication, and "all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property"). Indeed, there is specific language within the Covenants and Restrictions vesting Duell with final authority for every decision as principal and sole member of Middleton Place.

Nontimberland

The Assessor argues the ALC erred in concluding that pursuant to sections 12-43-232(2) and 12-43-232(3)(e), an agricultural use classification would still apply to the parcels at issue even if they were determined to be "nontimberland." We disagree.

For tracts *not* used to grow timber as provided in section 12-43-232(2),

> the tract must be ten acres or more. Nontimberland tracts of less than ten acres which are contiguous to other such tracts which, when added together, meet the minimum acreage requirement, are treated as a qualifying tract. For purposes of this item (2) only, contiguous tracts include tracts with identical owners of record separated by a dedicated highway, street, or road or separated by any other public way.

S.C. Code Ann. 12-43-232(2) (2005). Under section 12-43-232(3)(e), a nontimberland tract not meeting the requirements of section 12-43-232(2), must nevertheless be classified as agricultural real property if the current owner or an immediate family member[6] "has owned the property for at least the ten years ending January 1, 1994, and the property is classified as agricultural real property for property tax year 1994." S.C. Code Ann. § 12-43-232(3)(e) (2005). "The property must continue to be classified as agricultural real property until the property is applied to some other use or until the property is transferred to other than an immediate family member, whichever occurs first." *Id.*

Our review of the record reveals that in 1970, Duell inherited this property from his grandfather, an immediate family member. In the early-1990s, Duell obtained and recorded the plat reflecting the eleven parcels not due to any desire or intent to ever create a traditional "subdivision" development at Middleton Place, but at the request of the Dorchester County Planning Board. Thus, even if the court were to accept the Assessor's "nontimberland" argument, the Assessor's effort to reclassify the eleven parcels was erroneous because Middleton Place would be entitled to retain the "agricultural use" classification under section 12-43-232(3)(e).

CONCLUSION

Accordingly, the ruling of the Administrative Law Court reinstating the "agricultural use" classification for the eleven parcels is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

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[6] "Immediate family member" is defined as "a person related to the current owner within the third degree of consanguinity or affinity and a trust all of whose noncontingent beneficiaries are related to the grantor of the trust within the third degree of consanguinity or affinity." S.C. Code Ann. § 12-43-232(3)(e) (2005).