The Supreme Court of South Carolina

Re: Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

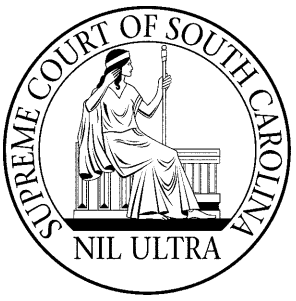
IT IS ORDERED that a Pilot Program is established for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas beginning December 9, 2015, in Clarendon County. In order for the E-Filing System to be implemented uniformly and effectively, all filings in all common pleas cases commenced or pending in Clarendon County after the effective date of the Pilot Program must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program.

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed.

The Pilot Program will be expanded to other counties pursuant to future Orders of the Court.

s/Jean Hoefer Toal
Chief Justice of South Carolina

Columbia, South Carolina
December 1, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 47
December 2, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Petitioners,

v.

South Carolina Department of Social Services, Respondent.

Appellate Case No. 2013-001332

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Fairfield County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 27593
Heard March 17, 2015 – Filed December 2, 2015

REVERSED

Lee Deer Cope, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton; John K. Koon and Jamie L. Walters, of Koon & Cook, PA, of Columbia, all for Petitioners.

Patrick John Frawley, of Davis Frawley, LLC, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: Diane and Otis Bass, individually and on behalf of their minor children (collectively, Petitioners), appeal the court of appeals' decision reversing a jury verdict in their favor against the South Carolina Department of Social Services (DSS) for gross negligence and outrage in connection with a DSS investigation. *See Bass v. S.C. Dep't of Soc. Servs.*, 403 S.C. 184, 742 S.E.2d 667 (Ct. App. 2013). We reverse.

FACTUAL/PROCEDURAL HISTORY

Diane and Otis Bass are married and have three children: Brittany, Hanna, and Alex. All three children have special needs, but Hanna and Alex are also autistic. Otis works outside the home, and Diane cares for the children.

Due to their forms of autism and their other cognitive issues, both Hanna and Alex were prescribed Clonidine to help them sleep at night, in addition to other medications. A compounding pharmacy filled the Clonidine prescription. In April 2008, the prescription was inadvertently mixed at one thousand times the recommended concentration.

On the evening of May 11, 2008, Diane administered the wrongly compounded Clonidine to Hanna. During her bath that evening, Hanna "went blank," "[h]er eyes turned around in the back of her head, and her skin turned cold." Diane took Hanna to Fairfield Memorial Hospital, but she was not admitted. Two days later, Hanna became lethargic, so Diane took her to their family doctor. At that time, the family doctor sent Hanna to Palmetto Richland Memorial Hospital (Richland Memorial) in Columbia due to his concern over Hanna's lethargy and respiratory issues, and Hanna was admitted.

On May 15, Alex became ill after taking the Clonidine. Diane took him to the family doctor. The nurse practitioner on call testified that Alex was very ill upon arrival. Alex was transported via ambulance to Fairfield Memorial Hospital, and then via helicopter to Richland Memorial and placed on life support.

That same day, DSS received a report that two special needs children were in the hospital due to "possible poisoning by parents." The agency assigned an overall danger rating of "medium" to the case because while Hanna and Alex were very young—seven and three at the time, respectively—they were not in imminent danger while they were in the hospital. Nonetheless, the "medium" danger rating mandated that a DSS employee respond to the report and initiate an investigation within twenty-four hours. Caseworker Monique Parrish arrived at the hospital within forty-five minutes after DSS received the report.

At the hospital, Parrish spoke to Otis, who "had no idea what was going on." She also questioned the oldest child, Brittany, who told Parrish that Diane "poured medicine in soda and gave it to Alex and Hanna," and that they became ill shortly thereafter. Moreover, the hospital staff speculated to Parrish that the children had been overly medicated. Parrish took the bottle of medicine, but did not arrange to have it tested and did not otherwise investigate its contents. After observing Hanna and Alex, Parrish asked Diane and Otis to meet her at the DSS office the next morning.

On May 16, after a family meeting with Diane, her sisters, and her niece, Parrish determined the children should be removed from the Bass home and placed with Diane's sister, Linda.[1] Diane and Otis signed a safety plan to this effect,[2] and

[1] Prior to this placement, Parrish performed the requisite home visit and background check. However, Parrish did not investigate whether Linda could address the children's special care requirements, instead relying on Diane's assurances that Linda was capable of addressing the children's basic needs.

[2] At trial, it was heavily disputed whether Diane and Otis voluntarily signed the safety plan. Some of the testimony indicated that Parrish informed Diane and Otis that their children would be separated and placed in foster care if DSS could not achieve placement with a relative. However, DSS's expert testified that Diane and Otis could have refused to sign the safety plan, at which time DSS would have been required to seek a court order to place the children.

Linda took custody of the three children.[3] Diane and Otis were permitted to visit the children "whenever they wanted" so long as Linda was present during the visit.

On May 20, in compliance with DSS policy, Parrish held a five-day staff meeting with other DSS employees, during which they determined that Diane and Otis were unfit parents.

On June 17, Linda received a telephone call from the compounding pharmacy's insurer concerning the improperly filled Clonidine prescription. Linda notified DSS, and the agency subsequently concluded that the medication was the cause of the children's hospitalization. This revelation led to the eventual return of the children to Diane and Otis. However, DSS continued to make announced and unannounced visits at the Bass home through the end of 2008 and still refuses to remove its finding that Diane and Otis "harmed their children" from the agency's file on Petitioners.

Petitioners filed a lawsuit against DSS, the compounding pharmacy, and the pharmacist, alleging negligence and gross negligence, and seeking actual and punitive damages. In May 2011, after settling with the pharmacy and the pharmacist, Petitioners served DSS with an amended complaint. In their amended complaint, Petitioners alleged causes of action for gross negligence, defamation, and outrage, and sought actual damages. In its answer, in addition to a general denial, DSS asserted affirmative defenses under the South Carolina Tort Claims Act (the TCA),[4] as well as the affirmative defenses of comparative negligence, negligence of a third party, legal privilege and justification, qualified privilege, and with respect to the defamation and outrage causes of action, failure to state a claim upon which relief can be granted.

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[3] Linda testified that she understood the placement to be temporary, but she testified that DSS never attempted to return the children to their parents, even after she inquired about alternative placement due to Alex's and Hanna's special needs and the stress incumbent upon their care. Instead, Hanna was placed with another relative.

[4] *See* S.C. Code Ann. § 15-78-30(f) (Supp. 2014) (defining "loss" and failing to include "outrage" as method of recovery under the TCA); S.C. Code Ann. § 15-78-60(3), (4), (5), (20), (25) (Supp. 2014) (detailing specific actions that a governmental entity is not liable for should a loss occur). *See also generally* S.C. Code Ann. §§ 15-78-10 to -220 (Supp. 2014) (containing the entire TCA).

Trial testimony established that DSS cannot remove a child unless there is an unreasonable safety threat to the child, and that the standard practice is to keep children in the home when possible. Moreover, in cases involving potential medical neglect, DSS caseworkers must consider medical evidence. To that end, Parrish testified that in order to complete a medical neglect investigation, a caseworker must communicate with medical treatment providers, and that children cannot be removed from the home without fact-finding to substantiate the medical claim.

Despite these prerequisites to removing a medically neglected child from the home, Parrish testified that she "did not look into the poisoning," but instead "wait[ed] for the lab results."[5] Parrish acknowledged that she did not speak to a doctor about the children's illnesses or the lab results, yet she based the removal of the children solely on the possibility that the children had been poisoned by medication.

Parrish stated that she did not consider her investigation "complete" because she never attempted to investigate the reasons for the potential poisoning by medication other than to wait for the lab results. Similarly, because the case involved a potential poisoning, Parrish's supervisor testified that DSS should have done more to investigate the medication, such as contacting the pharmacy or Poison Control.

Parrish testified further that she was unable to conduct a thorough investigation because she was unwell after a recent neck surgery, and was taking pain medication that affected her ability to perform her job functions. Specifically, Parrish stated that at the time of the investigation, she was experiencing substantial physical pain and was barely able to complete simple tasks such as typing or even walking. Parrish testified that although she was supposed to be on light work duty at the DSS office, her supervisor threatened her job and forced her to do field work on Petitioners' case instead.[6]

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[5] There is some indication in the Record that the toxicology testing was inconclusive; however, the Record does not indicate what testing was performed.

[6] Parrish's supervisor disputed Parrish's claim of debilitating illness.

In an attempt to justify the removal, Parrish testified that when she and another DSS employee inspected the Bass home on May 20, they found it to be in "disrepair."[7] In addition, Parrish testified that Diane had recently been diagnosed with diabetes, and that she had confessed to Parrish that she sometimes experienced feelings of "sadness," "hopelessness," and was "often overwhelmed."[8] Despite these purported grounds for removal, this information was not known to DSS when the agency removed the children for medical neglect.

Petitioners' expert, Michael Corey, is a social worker and consultant who has assisted states in implementing safety assessment models for investigation and treatment by child protective services. He opined to a reasonable degree of certainty that DSS did not exercise slight care under these circumstances. Corey testified that DSS has a duty to investigate allegations of abuse and neglect and the agency can do so negligently, gross negligently, or "competent[ly]." Corey testified that Parrish's initial response at the hospital was "very good" and that she properly provided Diane and Otis with a brochure explaining their rights and held a family meeting; therefore, Corey found that Parrish exercised care in responding to the report and at the beginning of her investigation. However, he opined that DSS should have only sought placement in a relative's home after determining that the children were not safe in their own home, and that DSS was grossly negligent in failing to conduct a proper investigation into the poisoning claims, and therefore was grossly negligent in removing the children from the home.

Corey specifically pointed to the following evidence to support his opinion that DSS was grossly negligent: (1) Parrish, by her own testimony, was not capable of conducting the investigation due to her extreme pain and medication; (2) After Diane and Otis stated that they did not know what happened to their children except that they administered the medication, Parrish removed the children from the home without an investigation into the medication; (3) Parrish did not interview or speak to any of the children's doctors, including Petitioners' family doctor; (4) Because DSS gave Diane and Otis a choice between removal to foster

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[7] Conversely, DSS's expert testified that the condition of the home did not present an immediate threat of harm to the children.

[8] However, Parrish admitted that Diane's personal feelings were not grounds for removal.

care or placement with family members and DSS did not consider whether the children would be safe in their own home, DSS coerced Diane and Otis into signing the safety plan; (5) Parrish did not inquire into the condition of Petitioners' home before making a decision that the children should be removed; (6) DSS asked for a list of the children's medical providers for the first time on May 30; and (7) Parrish did not investigate Diane's medical condition before assuming that her condition harmed the children.

In rebuttal, DSS called its former director, Jocelyn Goodwyn, as an expert in "certain aspects of [c]hild [p]rotective [s]ervices." Like Corey, Goodwyn testified that DSS had acted appropriately in its initial response, and upon review of the file, testified that DSS properly gave Diane and Otis the DSS brochure and handbook explaining their rights under the law; held a family meeting; conducted an alternative site visit at Linda's home; entered a safety plan with Diane, Otis, and relative caregivers; held a staffing meeting within five days to consider the case; investigated Petitioners' home on May 20; and interviewed Diane, Otis, and family members. Therefore, Goodwyn opined that there was no evidence that DSS acted in "bad faith."

However, under cross-examination, Goodwyn admitted that DSS is required to conduct a thorough investigation before removing children from their parents, and DSS did not do so in this case. In addition, Goodwyn testified that there was no evidence that Diane and Otis harmed the children or that the children were in imminent risk of harm. In short, Goodwyn conceded that the removal should not have occurred "when it did."

The remaining evidence at trial established that Diane and Otis loved their children and attended to all of their medical needs. Moreover, Diane and Otis spent all of their free time with their children, and the children had never spent the night away from their parents prior to their removal by DSS. Aside from being separated from the children, Petitioners presented evidence that Diane and Otis were injured by the implication that they would harm their children, even though they were regarded by family and others, including their family doctors, as excellent parents. Further, Alex and Hanna cried because they missed their parents during their removal, and Hanna no longer enjoyed a close relationship with Linda upon her return to her parents. A child psychologist opined that Hanna would require therapy to overcome emotional trauma and other resulting problems caused by the removal, although Hanna's autism contributed to this diagnosis.

DSS moved for a directed verdict at the conclusion of Petitioners' case, and again at the conclusion of all of the evidence. The trial judge denied both motions. At the conclusion of the evidence, Petitioners withdrew their defamation cause of action, and moved for a directed verdict regarding DSS's defenses of discretionary immunity and negligence of a third party. The trial judge granted Petitioners' motions for directed verdict as to those defenses.

Ultimately, the jury returned a verdict for Petitioners, and awarded them $4 million in damages. DSS subsequently filed motions for judgment notwithstanding the verdict (JNOV), for new trial absolute, and to reduce the verdict. The trial court issued an order denying DSS's post-trial motions. However, the trial court granted DSS's motion to reduce the verdict in accordance with the TCA's limitations on damages.[9] DSS filed a timely notice of appeal.

The court of appeals reversed the jury's verdict. *See Bass*, 403 S.C. at 184, 742 S.E.2d at 667. First, the court of appeals found the trial court erred in refusing to grant DSS's motion for JNOV because there was no evidence in the record that DSS acted with gross negligence in conducting the investigation. *Id.* at 190, 742 S.E.2d at 670. The court of appeals found the twenty-four hour time constraint associated with the medium danger rating to be particularly instructive. *Id.* at 192, 742 S.E.2d at 671 (citing *Spartanburg Cnty. Dep't of Soc. Servs. v. Little*, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1991)). During this initial period, the court of appeals noted that (1) Parrish interviewed family members and learned the children became ill after Diane administered prescription medicine to the children; (2) Parrish obtained Diane's and Otis's consent to have the children's medical information released to DSS; and (3) Parrish procured the children's toxicology report, which was inconclusive. *Id.* Thus, the court of appeals found that DSS's investigation into the possible poisoning, "[w]hile far from perfect," demonstrated the exercise of slight care. *Id.* at 191, 742 S.C. at 671.

In so holding, the court of appeals found Corey's opinion that DSS failed to exercise slight care insufficient to defeat DSS's motion for JNOV because the record was "devoid of any indication that Corey in any way took into account the expediency with which DSS must investigate claims of abuse and neglect." *Id.* at

[9] *See* S.C. Code Ann. § 15-78-120 (Supp. 2014).

191–92, 742 S.E.2d at 671. Therefore, the court of appeals found "Corey failed to establish his opinion was based upon a proper statement of DSS's duty," and his opinion "could not, without more, defeat DSS's motion for JNOV." *Id.* at 192, 742 S.E.2d at 671 (citation omitted).

Finally, in reversing the trial judge's refusal to grant JNOV as to the outrage claim, the court of appeals held that, because it determined DSS was not grossly negligent, Petitioners' outrage claim must fail. More specifically, the court of appeals held that as a matter of law, DSS's conduct could not be reckless if the conduct was not found to be at least grossly negligent. *Id.* at 193, 742 S.E.2d at 672 (citations omitted).[10]

We granted Petitioners' petition for a writ of certiorari to review the decision of the court of appeals.

ISSUES

I. Whether the court of appeals erred in finding that the trial court should have granted DSS's motion for JNOV?

II. Whether the court of appeals erred in reversing the verdict as to the outrage claim?

STANDARD OF REVIEW

In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citing *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999)). "[T]he trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). Similarly, on appeal, "[t]he jury's verdict must be upheld unless no evidence reasonably supports

[10] The court of appeals found DSS's argument that the trial court erred in denying the JNOV motion because Diane and Otis voluntarily participated in the placement of the children unpreserved, and DSS did not appeal this finding. *Bass*, 403 S.C. at 192, 742 S.E.2d at 671 (citation omitted).

the jury's findings." *Id.* at 320, 585 S.E.2d at 274 (citing *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)). Moreover, neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Garrett v. Locke*, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992).

LAW/ANALYSIS

I. Gross Negligence

Petitioners ask this Court to reverse the decision of the court of appeals because under the applicable standard of review, the court of appeals was required to accept the jury verdict unless there was no evidence in the record that DSS acted with gross negligence. DSS argues that because the evidence only yielded one reasonable inference—that DSS exercised slight care—the court of appeals' decision should be upheld.

As an initial matter, we find as a matter of law that DSS did not act in a grossly negligent manner in the Emergency Protective Custody (EPC) removal of the poisoned children. EPC removal is typically associated with exigent circumstances and time constraints. Thus, this opinion should not be read to impose on DSS a duty to conduct the post-EPC investigation in a pre-EPC setting. However, because DSS's post-EPC investigation presented a jury question on the issue of gross negligence, we reverse the court of appeals.

Under the TCA, a "governmental entity is not liable for a loss resulting from . . . responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, ***except when the responsibility or duty is exercised in a grossly negligent manner***." S.C. Code Ann. § 15-78-60(25) (emphasis added).

"Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (citing *Clyburn v. Sumter Cnty. Dist. Seventeen*, 317 S.C. 50, 451 S.E.2d 885 (1994); *Richardson v. Hambright*, 296 S.C. 504, 374 S.E.2d 296 (1988)). In other words, "[i]t is the failure to exercise slight care." *Id.* at 310, 534 S.E.2d at 277 (citation omitted). "Gross negligence has also been defined as a

relative term, and means the absence of care that is necessary under the circumstances." *Id.* (citing *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 427 S.E.2d 654 (1993)). Normally, the question of what activity constitutes gross negligence is a mixed question of law and fact. *Id.* However, "when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.* (citation omitted).

Expert Testimony

Petitioners first argue that the court of appeals erred in holding that Corey's expert opinion lacked a sufficient evidentiary basis. We agree.

In finding Corey's opinion was not based on a proper statement of DSS's duty, the court of appeals relied on *Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, a professional malpractice case. *See* 390 S.C. at 275, 701 S.E.2d at 742. There, the Court found that summary judgment was appropriate because the plaintiff's experts failed to define the correct legal standard of care or opine specifically how the defendants breached the standard of care. *Id.* at 289, 701 S.E.2d at 749. For example, when asked about the definition of standard of care upon which he relied to form his opinion, one of the experts responded, "It's my standard." *Id.* He further explained that his standard was that "of someone reading this at the end of the case," or "that of a businessman's lawyer." *Id.* Thus, the Court found that because the expert did not accurately portray the proper standard of care, his conclusory statement that the defendants breached the standard of care did not create a genuine issue of material fact. *Id.*

Similarly, the plaintiff's second expert in *Harris Teeter* testified that the legal malpractice standard of care is a determination of what a "reasonably competent lawyer [would] do given the facts and situations they were handed." *Id.* While the Court agreed that this "generic" statement was "true in the abstract," it found that the expert's testimony about how the defendants breached the standard of care was too general. *Id.* at 290–91, 701 S.E.2d at 749–50. Thus, the Court found that this expert's testimony likewise did not create a genuine issue of material fact. *Id.* at 291, 701 S.E.2d at 750.

Unlike the experts in *Harris Teeter*, in this case, Corey stated the proper standard of care and provided specific examples to support his opinion that DSS breached the standard of care. Therefore, we find the court of appeals erred in

relying on *Harris Teeter* to discredit Corey's expert testimony and in finding that his testimony lacked a sufficient evidentiary foundation. *Cf. Carter v. R.L. Jordan Oil Co.*, 294 S.C. 435, 441, 365 S.E.2d 324, 328 (Ct. App. 1988) (stating "[a]n expert is given wide latitude in determining the basis of his testimony"), *rev'd on other grounds*, 299 S.C. 439, 385 S.E.2d 820 (1989).

Evidence of Gross Negligence

Having determined that the court of appeals erred in discrediting Corey's testimony, we must next decide if there was any evidence in the record to support the jury's verdict. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (stating that in deciding a motion for JNOV, "the trial judge is concerned with the existence of evidence, not its weight"). Petitioners argue that Corey's testimony constituted sufficient evidence in the record to support the jury finding that DSS was grossly negligence. In addition, Petitioners argue that, notwithstanding Corey's testimony, there was ample evidence in the record to support the jury verdict. We agree.

As an initial matter, we find the court of appeals misapprehended Parrish's trial testimony in finding that Corey's testimony did not constitute evidence of gross negligence. Rather than testifying that she had twenty-four hours to *conduct* the initial investigation, Parrish testified that she had twenty-four hours to *respond* to the initial report.

Therefore, Corey agreed with DSS that the agency exercised care in its initial response to the report, testifying that Parrish's response to the intake was "very good," in that Parrish arrived at the hospital within forty-five minutes, properly provided Petitioners with copies of required DSS brochures, conducted the required family meeting, and performed the required home study on Linda before placing the children with her. Where Corey found fault with DSS's investigation was in DSS's failure to conduct a post-EPC investigation into the stated reason for the children's removal from the home—potential poisoning by prescription medication. For example, Corey noted that Parrish failed to interview the children's doctors, other medical staff at the hospital, or their family doctor who initially treated the children, and failed to investigate the medication after being told that the children fell ill shortly after Diane administered the Clonidine to them. Thus, we find that the court of appeals improperly found that Corey's testimony did not constitute evidence of DSS's gross negligence.

Moreover, because there was other evidence in the record that DSS was grossly negligent with respect to the post-EPC investigation, we find that the court of appeals placed undue weight on Corey's expert testimony. *See Berkeley Elec. Co-op, Inc. v. S.C. Pub. Serv. Comm'n*, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991) (stating "[w]here the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value") (citation omitted)); *see also Madden v. Cox*, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (Ct. App. 1985) (stating an appellate court cannot judge the credibility or weight that should be given expert testimony, as these considerations are for the jury) (citation omitted)). In addition to Corey's testimony, DSS's employees testified that DSS failed to conduct *any* investigation into the medication during its post-EPC investigation, even though they claimed they based their decision to remove the children on the medicine. Even DSS's own expert testified that the children's post-EPC removal from the home was unlawful. Thus, there was additional, independent evidence that DSS acted in a grossly negligent fashion with respect to this investigation.

In sum, we agree with Petitioners that the court of appeals applied the wrong analysis, and in doing so, acted outside its limited scope of review. Rather than examining the record to discern whether there was any evidence put forward at trial to support the jury verdict, the court of appeals seems to have searched the record for evidence to corroborate DSS's theory of the case—that it acted with slight care. However, even though DSS presented some evidence that it acted with slight care regarding certain aspects of its investigation, especially in the pre-EPC removal setting, there was likewise ample evidence in the record that DSS acted with gross negligence with respect to the post-EPC investigation—or lack thereof. Accordingly, we cannot say that the record was devoid of evidence to support the jury's verdict, and we reverse the court of appeals.

II. Outrage

Next, Petitioners contend the court of appeals' misapprehended the scope of their outrage claim because that claim was not limited to the initial improper removal of the children, but involved Petitioners' averments that they were subjected to reckless, cruel, inhumane, and unwarranted family disruption over a period of eight months following the return of the children to the home. We disagree with Petitioners that the evidence supported a verdict in their favor for the outrage claim.

To recover for outrage—otherwise known as intentional infliction of emotional distress—a plaintiff must establish the following:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
>
> (3) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (quoting *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)). In *Hansson*, this Court stated:

> Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"—in the form of third party witness testimony and other corroborating evidence—in order to make a prima facie showing of "severe" emotional distress.

374 S.C. at 358–59, 650 S.E.2d at 72 (citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981)).

There is no evidence in the Record that DSS's conduct was so "extreme and outrageous" that it exceeded "all possible bounds of decency" and must be

regarded as "atrocious, and utterly intolerable in a civilized community." *Id.*; *see, e.g., Gattison v. S.C. State Coll.*, 318 S.C. 148, 157, 456 S.E.2d 414, 419 (Ct. App. 1995) (stating "these facts do not rise to the level required for outrage in South Carolina" because the plaintiff "has shown no hostile or abusive encounters, or coercive or oppressive conduct," even though the facts demonstrated "unprofessional, inappropriate behavior"). Thus, even considering the eight-month time period during which DSS continued to have contact with the Bass family, the evidence does not support the verdict as to the outrage cause of action.

However, because the jury was provided with (and neither party objected to) a general verdict form and because we have upheld the gross negligence finding, we reverse the court of appeals and reinstate the verdict. *See, e.g., Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978) (where a case is submitted to the jury on two or more issues and a general verdict is returned, the verdict will be upheld if the verdict is supported by at least one issue); *see also Harold Tyner Dev. Builders, Inc. v. Firstmark Dev. Corp.*, 311 S.C. 447, 429 S.E.2d 819 (Ct. App. 1993) (same); *Dwyer v. Tom Jenkins Realty*, 289 S.C. 118, 120, 344 S.E.2d 886, 888 (Ct. App. 1986) ("Where a decision is based on two grounds, either of which, independent of the other, is sufficient to support it, it will not be reversed on appeal because one of those grounds is erroneous" (quoting 5 Am. Jur. 2d *Appeal & Error* § 727 (1962)); *id.* ("[E]rroneous findings by the trial court . . . are [not] reversible error where the inclusion of such findings . . . would not change the judgment . . ." (quoting 5 Am. Jur. 2d *Appeal & Error* § 819 (1962)).[11]

CONCLUSION

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

REVERSED.

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

[11] We reinstate the verdict subject to the trial court's reduction of the award in accordance with the TCA's limitations on damages.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Scott F. Lawing and Tammy R. Lawing,
Petitioners/Respondents,

v.

Univar, USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants,

Of Whom Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, are Respondents/Petitioners.

Appellate Case No. 2013-002464

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27594
Heard April 9, 2015 – Filed December 2, 2015

AFFIRMED IN PART, REVERSED IN PART

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, Robert P. Foster, of Foster & Foster LLP, of Greenville, William P. Walker, Jr., and S. Kirkpatrick Morgan, Jr., both of Walker and Morgan,

LLC, of Lexington, and Larry C. Brandt, of Larry C. Brandt, PA, of Walhalla, all for Petitioners/Respondents.

Christian Stegmaier and Amy L. Neuschafer, both of Collins and Lacy, PC, of Columbia, for Respondents/ Petitioners.

CHIEF JUSTICE TOAL: In this products liability action, Trinity Manufacturing, Inc. (Trinity), and Matrix Outsourcing, LLC (Matrix), argue that the court of appeals erred in reversing the trial court's decision to grant summary judgment to them on a strict liability cause of action. *See Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (2013). In their cross-appeal, Scott and Tammy Lawing ask this Court to reverse the court of appeals' decision affirming the trial court's decision to charge the jury on the sophisticated user defense. We affirm in part and reverse in part the decision of the court of appeals.

FACTS/PROCEDURAL BACKGROUND

This case revolves around the packaging and labeling of sodium bromate, a chemical which contributed to a fire that occurred in a plant owned by Engelhard Corporation (Engelhard) in Seneca, South Carolina, in June 2004. At the time of the fire, Scott Lawing worked at Engelhard's Seneca plant as a maintenance mechanic.[1] Engelhard produced a precious metal catalyst used in the automobile industry, and refined metals from recycled materials.

To complete its refining process, Engelhard used approximately 120 metric tons per annum of sodium bromate, which is classified as an oxidizer. An oxidizer is a chemical that initiates or promotes combustion in other materials, thereby causing fire either by itself or through the release of oxygen or other gases. In other words, when an oxidizer such as sodium bromate is heated to a certain temperature, it releases oxygen and contributes to the combustion of other materials.

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[1] Engelhard was later purchased by BASF Corporation, which now operates the facility.

Engelhard purchased the sodium bromate from Univar USA, Inc. (Univar). Univar sourced the sodium bromate through Trinity, who in turn, utilized its subsidiary, Matrix, to obtain the sodium bromate from a Chinese manufacturer. The Chinese manufacturer shipped the sodium bromate to the Port of Charleston, and from there, a common freight carrier delivered the sodium bromate directly to Engelhard. Therefore, neither Univar, Trinity, nor Matrix ever inspected or handled the sodium bromate.

The shipment of sodium bromate involved in the fire was delivered to Engelhard on February 16, 2004, whereupon Engelhard inspected and accepted the shipment. The sodium bromate arrived packaged in woven plastic bags, each weighing twenty-five kilograms.[2] A warning label on one side of each bag displayed the universally recognized yellow oxidizer symbol.[3] The reverse side of each bag contained black text, including the words "sodium bromate," and other information regarding the material safety data sheet (MSDS)[4] for sodium bromate.

The bags of sodium bromate arrived at Engelhard stacked upon each other on wooden pallets, with thirty-six bags per pallet. The pallets were stacked two pallets high. Each of the pallets was "shrink-wrapped" so that the bags would remain on the pallet.

Paul Bailey, an Engelhard employee who was responsible for receiving shipments when the fire occurred, testified that none of the pallets in the February

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[2] Specifically, the bags were made of polypropylene and polyethylene—both combustible materials.

[3] The oxidizer symbol is a yellow diamond with black borders. Inside the diamond is a drawing of a flame, and underneath, the words "OXIDIZER" or "OXIDIZING AGENT" appear in black ink. The United States Department of Transportation requires this symbol be used in the labeling of oxidizers such as sodium bromate. *See* 49 C.F.R. § 172.426 (2003).

[4] Along with the delivery of the chemical, Engelhard was provided the MSDS for sodium bromate. The MSDS warned that if sodium bromate made contact with other materials, it could cause a fire, and that sodium bromate "[m]ay accelerate burning if involved in a fire." Engelhard maintained MSDSs in offices throughout its plant for the various chemicals used in its production.

2004 shipment contained warnings identifying the contents of the pallets as an oxidizer, and there were no warnings on the sides of the bags themselves that could be seen through the shrink-wrap. Within each shrink-wrapped pallet, some bags of the sodium bromate were stacked so that the black text on the bags appeared face-up, while other bags were positioned such that the yellow oxidizer symbol appeared face-up.

At trial, Dr. Jerry Purswell, who testified as an expert in the field of Occupational Health and Safety Administration (OSHA) regulations, opined that the labeling on the bags of sodium bromate did not satisfy the OSHA HazCom requirements[5] for an appropriate warning label because the oxidizer symbol was not prominently displayed on the bags. Dr. Purswell testified that in his opinion, the written material on the bags did, however, satisfy the relevant Department of Transportation (DOT) requirements.[6]

Upon receipt of a shipment of sodium bromate, Engelhard employees typically moved the double-stacked pallets of sodium bromate—still shrink-wrapped—directly to the warehouse for storage, where Engelhard stored the chemical until it was needed for production.

On May 20, 2004—the week before Engelhard's annual "shutdown week"—Engelhard employees moved four pallets of sodium bromate from the warehouse to the refinery hallway to be used in production. During the shutdown week, Engelhard stopped regular production in order to perform routine maintenance. However, Engelhard policies provided that production materials were not to be left in the refinery during shutdown week.

On June 1, 2004, Lawing, along with Keith Black and Curtis Martin, were assigned to work under Steve Knox during the shutdown week as part of a

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[5] 29 C.F.R. § 1910.1200(f) (2003). Essentially, the regulation requires labels on the containers of hazardous chemicals; states that the labels must provide the identity of the hazardous chemicals and appropriate hazard warnings; and describes other requirements for the labels, i.e., that the warnings must be "prominently displayed on the container." *See id.*

[6] 49 C.F.R. § 172.406 (2003) (describing the proper placement of labels on packages containing hazardous materials); 49 C.F.R. § 172.407 (2003) (setting forth requisite label specifications, such as durability, design, size, and color).

maintenance crew tasked with using an oxyacetylene cutting torch to cut out and replace condensate pipe in the refinery hall—not far from where the four pallets of sodium bromate had recently been moved.

Pursuant to Engelhard's policies, use of the oxyacetylene torch required the issuance of a hazardous work permit prior to the commencement of the project. Engelhard policies provided that before the permit could be issued, "a thorough inspection of the immediate work area and all areas adjacent for the presence of combustible and/or flammable materials" must take place and that "[a]ll such materials will be removed to a safe location for the duration of the Hotwork [sic]." Therefore, to obtain a hazardous work permit for the project, Knox toured the work area prior to the start of the maintenance work. Knox testified that he noticed the pallets of sodium bromate within the work area, and walked close enough to the pallets to ensure that there was no oxidizer symbol on them. Although Knox did not see the oxidizer symbol, he noticed black text on the sides of the bags. Knox did not know what sodium bromate was, but admitted that if he had seen an oxidizer symbol on the pallets, he would have ensured that employees moved the pallets from the work area before the maintenance began.[7]

Martin and Lawing each testified that they noticed the bags of sodium bromate in the work area on the day of the fire, but saw no label indicating that they should move the bags. Lawing testified that when he saw the bags, he looked for a "label or something that told me I needed to move it" and when he did not see one, he "thought they were fine." Lawing stated that if he had seen an oxidizer symbol, he would have moved the pallets. Lawing testified that at the time, he thought the bags contained baking soda.

The maintenance crew used the oxyacetylene torch to cut the pipe, which was suspended approximately fifteen to twenty feet above the floor. After about two hours of work, a piece of hot slag fell and landed on or near one of the pallets of sodium bromate. There was a "flash" on the pallet, which erupted into a ball of fire that engulfed Lawing, Martin, and Black. According to Knox, the eruption of fire "sounded like a jet taking off."

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[7] Prior to the project, each of the maintenance workers received hazard communication training which taught them to recognize warning symbols—including the oxidizer symbol—on packages of chemicals as well as the importance of such labels.

Each of the men suffered severe burns and serious injuries which totally disabled them and rendered them in need of substantial medical care for the rest of their lives. Lawing testified that he suffered second and third degree burns on forty-two percent of his body, and that his lungs and eyes were also burned.

The Lawings—as well as Black and Martin (collectively, the plaintiffs)[8] commenced lawsuits against Univar, Trinity, and Matrix (collectively, the defendants), each alleging causes of action for strict liability, negligence, and breach of the implied warranty of merchantability.[9] The Lawings also asserted a breach of express warranty cause of action against Univar. Further, Tammy Lawing contended that she suffered loss of consortium as a result of her husband's injuries.

Prior to trial, the defendants made a number of dispositive motions, including motions for summary judgment on the Lawings' claims. In particular, the defendants filed a joint motion for summary judgment on the Lawings' strict liability cause of action. The trial court addressed these motions and other matters during a two-day pre-trial hearing. The trial court granted the defendants' motion for summary judgment on the strict liability claim, ruling that Lawing was not a "user" of sodium bromate as required by section 15-73-10 of the South Carolina Code. S.C. Code Ann. § 15-73-10 (2005) (requiring a plaintiff to be a "user" or "consumer" of a product to recover under a strict liability theory).

The trial court consolidated the plaintiffs' cases and bifurcated the trial into a liability phase and a damages phase. Five causes of action were submitted to the jury. Three were against all of the defendants: negligence as to packaging,

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[8] Of the three plaintiffs whose cases were consolidated for trial, the Lawings are the only plaintiffs involved in this appeal.

[9] Each plaintiff sought and received workers' compensation benefits as a result of the fire. Accordingly, the Workers' Compensation Act provided the exclusive remedy against Engelhard. *See* S.C. Code Ann. § 42-1-540 (2015) (providing that the rights and remedies granted to an employee under the Workers' Compensation Act "shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury loss of service or death").

negligence as to warning labels,[10] and breach of the implied warranty of merchantability. Two causes of action were against Univar only: breach of express warranty as to packaging and breach of express warranty as to warning labels.

Although the trial court had denied the defendants' motion for a directed verdict as to the sophisticated user defense at the conclusion of all of the evidence, the court charged the defense to the jury. As to the negligence cause of action, the trial court charged the jury, in pertinent part:

> Federal regulations impose a duty on suppliers to warn of possible dangers arising from the use of their product. This requirement comes from the [OSHA] regulation[] 1910.1200(f), which says that the chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following: [i]dentity of the hazardous chemicals; appropriate hazard warnings; and the name and address of the chemical manufacturer, importer, or other responsible party. The federal regulations are in evidence. The court has ruled that the circumstantial evidence in the case proves that the bags were labeled. The plaintiff alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags.

The trial court then explained that South Carolina common law requires a supplier of a dangerous product to provide a warning to the user, consumer, or purchaser. The trial court stated:

> A supplier may provide the information needed for the safe use of the product to a third person, but this may not relieve the supplier of responsibility in all cases. Where the supplier provides the information to a third person, and not directly to the user, consumer, or purchaser, the supplier must give all the information needed for the product's safe use and must use a method of giving that information that reasonably ensures that it will reach the user, consumer, and

[10] With regard to the claims involving the warning labels—or lack thereof—on the sodium bromate, the plaintiffs proceeded under the theory that the suppliers should be held liable because the requisite warning labels were not prominently displayed or clearly visible.

purchaser. The supplier must inform the third person of the dangerous character of the product or of the precautions which must be used in using the product to make it safe. The supplier has a duty to be reasonably sure that the information or warning about the product will reach those the supplier should expect to use the product. To determine whether the supplier should reasonably expect the method used to reach the user, consumer, or purchaser, you should consider the magnitude of the danger, the purpose for which the product is made, and the practical means of disclosing the information. If the supplier should reasonably foresee that the warnings given to third parties, will not be adequately passed on to the probable users, consumers, or purchasers of the product and that the dangers will not be obvious to the users, consumers, or purchasers, the supplier's duty to warn may extend to those persons endangered or affected by the foreseeable use of the product. A sophisticated user defense could be appropriate under the circumstances. I will charge you on the sophisticated user defense later.

After explaining the elements of negligence, the trial court charged the sophisticated user defense:

> The [defendants] have also pled the sophisticated user defense. Now, ladies and gentlemen, under the South Carolina law, a distributor or supplier has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, therefore, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business and can be reasonably relied upon to warn ultimate users of the product. Such an employer has a duty to warn his employees of the danger of the product.
>
> You may consider a number of factors in determining whether the sophisticated user [defense] applies. Those factors include: The

> dangerous condition of the product; the purpose for which the product is used; the form of any warnings given; the reliability of the third party as a conduit of necessary information about the product; the magnitude of the risk involved and the burdens imposed on the supplier by requiring that it directly warn all users.
>
> If you find that the sophisticated user defense applies in this case, then you must find that the defendants owed no duty to warn; therefore, you must find in favor of the defendants on the plaintiffs' negligence claim.

The jury found for the Lawings on only one cause of action: breach of express warranty as to warning labels against Univar. The jury returned defense verdicts on the Lawings' other causes of action. Thereby, Trinity and Matrix were absolved of liability.[11]

A consolidated appeal to the court of appeals followed. However, during the pendency of the appeal, Univar settled with all of the plaintiffs. Only the Lawings' appeal of the grant of summary judgment on their strict liability claim and their appeal of the jury verdict in favor of Trinity and Matrix proceeded to disposition at the court of appeals.

The court of appeals affirmed the trial court's decision to charge the sophisticated user defense on the negligence and breach of the implied warranty of merchantability claims. *Lawing*, 406 S.C. at 33, 749 S.E.2d at 136. In addition, the court of appeals reversed the trial court's decision to grant Trinity and Matrix's summary judgment motion on the strict liability claim, finding that the trial court too narrowly interpreted the term "user" under section 15-73-10, and holding that Lawing was indeed a "user" of sodium bromate for purposes of the statute. *Id.* at 37, 749 S.E.2d at 138. Therefore, the court of appeals remanded the matter for a new trial on the Lawings' strict liability claim. *Id.* at 37, 749 S.E.2d at 139.

The Lawings, as well as Trinity and Matrix, filed petitions for writs of certiorari, asking this Court to review the court of appeals' decision. This Court granted both petitions for writs of certiorari to review the court of appeals' opinion pursuant to Rule 242, SCACR.

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[11] Black and Martin settled with Trinity and Matrix before trial.

ISSUES PRESENTED

I. Whether the court of appeals erred in holding that Lawing was a "user" of the sodium bromate for purposes of section 15-73-10, and thus reversing the trial court's decision to grant Trinity and Matrix summary judgment on the Lawings' strict liability cause of action?

II. Whether the court of appeals erred in affirming the trial court's decision to charge the jury on the sophisticated user defense?

LAW/ANALYSIS

I. Strict Liability Cause of Action

Trinity and Matrix argue that the court of appeals erred in holding that Lawing was a "user" of the sodium bromate, and therefore, the court of appeals erred in reversing the trial court's grant of summary judgment on the strict liability claim, which was based on the trial court's finding that Lawing was not considered a "user" under section 15-73-10 of the South Carolina Code. Moreover, Trinity and Matrix argue that the court of appeals set forth a far too expansive definition of "user" for purposes of a strict liability analysis under South Carolina law.

a. Standard of Review

When reviewing an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Turner*, 392 S.C. at 766, 708 S.E.2d at 769.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252–53 (2014) (citation omitted).

b. Section 15-73-10

Section 15-73-10 of the South Carolina Code provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to **the user or consumer** . . . is subject to liability for physical harm caused to the ultimate user or consumer . . . ." S.C. Code Ann. § 15-73-10 (2005) (emphasis added).[12] This section imposes strict liability upon the manufacturer and seller of a product for an injury to any "user or consumer" if the product reaches the user or consumer without substantial change in the condition in which it is sold. *Id.*; *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592 (1994).

Section 15-73-10 does not define "user." Instead, the General Assembly expressly adopted the comments to section 402A of the Restatement of Torts (Second)—which discuss the meaning of "user"—as the expression of legislative intent for that section. *See* S.C. Code Ann. § 15-73-30 (2005) ("Comments to [section] 402A of the Restatement of Torts, Second, are incorporated herein by reference as the legislative intent of this chapter.").

Comment *l* to section 402A of the Restatement of Torts (Second), titled "User or consumer," provides in pertinent part:

> In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, **or his employee,** or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.
>
> . . .

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[12] "This provision, which was adopted by the General Assembly in 1974, codified, nearly verbatim, Restatement (Second) of Torts § 402A." *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 545, 503 S.E.2d 445, 447 (1998).

> **"User" includes** those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes**, as well as those who are utilizing it for the purpose of doing work upon it,** as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Restatement (Second) of Torts § 402A cmt. l (1965) (emphasis added).

Comment *o*, however, explains that in comment *l*, the American Law Institute (ALI) did not intend to express either approval or disapproval of expanding section 402A to allow recovery to those other than users or consumers. Comment *o* provides, in pertinent part:

> Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l*. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery.

Restatement (Second) of Torts § 402A cmt. o (emphasis added).

We have not yet applied the comments to section 402A to determine whether a plaintiff should be considered a "user" under section 15-73-10. In fact, there has been only one occasion on which we have addressed the interpretation of the term "user" under section 15-73-10 for purposes of a strict liability claim. *See Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003).

In *Bray*, we found that an employee who suffered an emotional injury after watching a coworker being crushed by a trash compactor was a "user" of the trash compactor for purposes of section 15-73-10 because she was operating the controls of the defective trash compactor at the time of the accident. 356 S.C. at 116, 588 S.E.2d at 95. Further, in line with comment *o*, we provided that a bystander analysis does not apply to a strict liability cause of action, stating that a "user of a defective product is not a mere bystander but a primary and direct victim of the product defect." *Id.* at 117, 588 S.E.2d at 95.

The Lawings argue that Lawing was precisely the type of user for whom any warnings on the sodium bromate should have been intended, and therefore, the

comments to section 402A support reversal of the trial court's decision on this issue. We agree.

As an expert at trial testified, a product's labeling is considered part of the product's package. *See also* Restatement (Second) of Torts § 402A cmt. h ("No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole."). The very purpose of warnings issued through labels on products is "to provide information to people about hazards and safety information they do not know about so they may avoid the product altogether or avoid the danger by careful use." David G. Owen, *Products Liability Law* 621 (2d ed. 2008). Indeed, labels and other aspects of packaging are typically a user's first line of defense in assessing a product's danger, and oftentimes, the only indication that a product is a highly flammable or otherwise dangerous product.

The fact that Lawing noticed the pallets of sodium bromate within the work area on the day of the fire—but failed to request their removal because he did not see a label indicating their dangerous nature—is crucial for purposes of determining whether he should be considered a "user" of the sodium bromate. According to Lawing's testimony, he used the sodium bromate's labeling—or the lack thereof—to evaluate the safety of the product the day of the fire. Therefore, we find that Lawing's actions fall under comment *l* because Lawing used the information on the sodium bromate's packaging to complete work in close proximity to the pallets of sodium bromate, and to assess the need to avoid or move the nearby sodium bromate, regardless of the fact that he did not actually handle the sodium bromate.

Similar to the court of appeals, we find that Lawing was not a "casual bystander" with regard to the sodium bromate. *See Lawing*, 406 S.C. at 34, 749 S.E.2d at 137. On the day of the fire, there was the potential for Lawing to interact with the sodium bromate while completing his work in the refinery hall, especially after Engelhard employees failed to move the sodium bromate from the work area before the maintenance began. As the court of appeals stated, the examples set out in comment *o* "illustrate that the [ALI] intended that the people to be excluded from the definition of 'user' and 'consumer' are much farther removed from the product than Lawing and his co-workers were from the sodium bromate." *Id.*

c. Court of Appeals' Definition of "User"

Although the court of appeals properly found that Lawing should be considered a "user" under section 15-73-10, we agree with Trinity and Matrix's contention that the court of appeals set forth far too broad a definition of "user" for purposes of a strict liability analysis in South Carolina.

After citing the comments to section 402A discussing the definition of "user," the court of appeals stated:

> **Considering the comments together, we believe the legislature intended that the term "user" include persons who could foreseeably come into contact with the dangerous nature of a product.** Thus, a person who examines a product for warnings and other safety information is one whom the seller intends will use that information to avoid the dangers associated with the product, and thus is a person who foreseeably could come into contact with its dangerous nature.

Lawing, 406 S.C at 34–35, 749 S.E.2d at 137 (emphasis added).

As evident from our application to Lawing in this case, we would not restrict the term "user" to plaintiffs who are injured while handling or operating the dangerous product. However, the court of appeals' expansive definition including as a "user" all "persons who could foreseeably come into contact with the dangerous nature of a product" could be interpreted as to allow a bystander employee to recover under section 15-73-10. As discussed, *supra*, *Bray* clearly prohibits bystander recovery for purposes of strict liability. *See Bray*, 356 S.C. at 117, 588 S.E.2d at 95. Furthermore, including a foreseeability analysis in a determination of whether a plaintiff constitutes a "user" under section 15-73-10 is improper. *See Bray*, 356 S.C. at 117, 588 S.E.2d at 96 ("Because [section] 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting.").

A case-by-case analysis is more appropriate for courts' determination of who constitutes a "user" under section 15-73-10. Therefore, we hold that the court of appeals erred in setting forth its broad definition of "user," and affirm as modified the court of appeals' decision on this issue.

II. Sophisticated User Jury Instruction

The Lawings argue that the court of appeals erred in affirming the trial court's decision to charge the sophisticated user defense to the jury. We agree.

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) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). 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.*

Suppliers and manufacturers of dangerous products are generally under a duty to warn the ultimate user of the dangers associated with the use of the product. *See Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987) (citing *Gardner v. Q.H.S., Inc.*, 448 F.2d 238, 242 (4th Cir. 1971) (finding that the duty to warn arises when the user may not realize the potential danger of a product)). However, the sophisticated user doctrine, which arose from comment *n* to section 388 of the Restatement (Second) of Torts,[13] recognizes that a supplier may rely on an intermediary to provide warnings to the ultimate user if the reliance is reasonable under the circumstances. *See* Restatement (Second) of Torts § 388 cmt. n. The sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product, and the supplier therefore relies on the intermediary or employer to warn the end user. *See id.*

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[13] Section 388 provides that one who supplies a chattel directly or through a third person a chattel for another to use is subject to liability for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier: (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. Restatement (Second) of Torts § 388 (1965).

In arguing that the court of appeals erred in affirming the trial court's decision to charge the jury on the sophisticated user defense, the Lawings contend that the sophisticated user defense is not the law of South Carolina. We agree that prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the defense.[14] However, we need not formally adopt the doctrine at this time because as discussed, *infra*, the facts of this case do not implicate the sophisticated user defense.[15]

When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977)).

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[14] The court of appeals stated in its opinion that when it affirmed a trial court's decision to charge the jury on the sophisticated user defense in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (1995), the court "recognized that the sophisticated user doctrine is part of the products liability law of South Carolina." *Lawing*, 406 S.C. at 23, 749 S.E.2d at 131. In affirming the jury charge in *Bragg*, however, the court of appeals referenced section 388 of the Restatement (Second) of Torts—upon which the sophisticated user doctrine is based—but did not state whether South Carolina courts had adopted that section. *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 ("The sophisticated user defense outlined in section 388 of the Restatement (Second) of Torts has been adopted by numerous jurisdictions."). We note that the only mention of section 388 from this Court—albeit not in the context of whether the sophisticated user defense is a viable one—was in a dissent in *Claytor v. General Motors Corporation*, 277 S.C. 259, 267, 286 S.E.2d 129, 133 (1982) (Lewis, C.J., dissenting). Further, although the court in *Bragg* found that the jury's charge was an "accurate recitation" of the sophisticated user doctrine as "adopted by a majority of jurisdictions," it did not provide that the sophisticated user defense was in fact the law of South Carolina. *See Bragg*, 319 S.C. at 550–51, 462 S.E.2d at 332.

[15] Likewise, to the extent that the Lawings contest the correctness of the trial court's sophisticated user defense jury charge—which took a common law approach to the doctrine, as opposed to the Restatement approach—we do not address that issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the Court need not address remaining issues when resolution of a prior issue is dispositive).

Accordingly, the threshold question in determining whether the trial judge erred in charging the sophisticated user defense to the jury is whether the law was implicated by the evidence in this case. We find that it was not, and therefore hold that the trial court erred in charging the sophisticated user defense.

Trinity and Matrix—similar to the court of appeals—center their argument around Engelhard's knowledge of the nature and use of sodium bromate, an unsurprising approach given that the sophisticated user defense revolves around an intermediary's knowledge and awareness of the danger associated with the use of a particular product. *See Lawing*, 406 S.C. at 30–32, 749 S.E.2d at 135–36. Indeed, based on the testimony in this case, there is no doubt that Engelhard was very familiar with sodium bromate and understood its dangerous nature.

However, a sophisticated user has a responsibility separate and apart from the responsibility to adequately label a dangerous product. Under the specific factual circumstances in this case, the proper focus is the *labeling* on the sodium bromate shipped to Engelhard, not the *use* of sodium bromate in Engelhard's plant. Engelhard's knowledge of the dangers of sodium bromate does not affect the suppliers' duty to properly label sodium bromate as a hazardous and flammable product, because the knowledge of sodium bromate's inherent qualities are useless to a person who comes into contact with the chemical but cannot identify it.[16]

In other words, there is a critical distinction between an intermediary's knowledge of the dangerous qualities and nature of a product, and the ability of the third party user to identify and recognize that product on its face. When considering only Engelhard's use of sodium bromate in its manufacturing process, it follows that Engelhard is a "sophisticated user." However, when, as here, labeling is the underlying issue, the adequacy of the labeling on the sodium bromate does not require a sophisticated user analysis. If we conflate the two analyses—as the dissent would have us do—we would absolutely absolve suppliers of their responsibility to label dangerous products during shipment and upon delivery. The fact that a sophisticated user of a particular product ultimately receives the product does not permit the supplier to decide whether or not to adequately label the dangerous product as such.

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[16] The trial court apparently had a similar concern while hearing pre-trial motions, as it asked counsel, "How is a sophisticated user like Engelhard and their employees going to know the stuff is what it is unless it is properly labeled?"

Black testified that employees like himself utilized labeling on products as their "first line of defense" within the plant. Because maintenance workers, including Lawing, received training to familiarize themselves with hazard labels, i.e., the oxidizer symbol, with no visible hazard label, these employees who encountered the shrink-wrapped pallets of sodium bromate were unable to identify it as a dangerous product. Under these facts, Engelhard's knowledge regarding the properties of sodium bromate and its transfer of that information to its employees is insignificant.

Therefore, we find that the evidence does not support a jury charge on the sophisticated user defense because the evidence in this case that *does* support that charge—i.e., Engelhard's experience with sodium bromate, the fact that it employed chemical engineers, and the MSDSs which were available—is merely a distraction from the real issue: the visibility of the labels indicating danger on the pallets of sodium bromate. Accordingly, the trial court abused its discretion in charging the sophisticated user defense to the jury, and we reverse the court of appeals' decision on this issue.

CONCLUSION

Based on the foregoing, we affirm the court of appeals' decision reversing the trial court's grant of summary judgment to Trinity and Matrix on the Lawings' strict liability claim, but in doing so, modify the definition of "user" set forth by the court of appeals for purposes of section 15-73-10.

Further, because the evidence in this case does not support the sophisticated user defense, we find that trial court erred in charging the defense to the jury. Accordingly, we reverse the court of appeals' decision affirming the jury charge, and remand the Lawings' negligence and implied warranty of merchantability claims for a new trial.

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

JUSTICE KITTREDGE: I concur in part and respectfully dissent in part. I join the majority in its construction of the term "user" for purposes of section 15-73-10 of the South Carolina Code (2005). I dissent with respect to the "sophisticated user" doctrine and would adopt what I believe to be the excellent analysis of the court of appeals concerning the doctrine and its application to this case.

I offer two additional comments. First, I do not agree with the majority "that prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the [sophisticated user] defense." The doctrine was clearly recognized in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct. App. 1995), when the court of appeals "conclude[d] the trial court properly charged the jury concerning the sophisticated user defense." Nevertheless, I would modify *Bragg* in one respect. The jury charge approved in *Bragg* instructed the jury that manufacturers have no duty to warn of risks associated with a product when the product is to be distributed to a "learned intermediary" or sophisticated user. *Id.* at 549, 462 S.E.2d at 331. A similar charge was given in this case. *See Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 32, 749 S.E.2d 126, 136 (Ct. App. 2013). However, contrary to the jury charges in *Bragg* and in this case, the sophisticated user doctrine does not negate the existence of a duty on the part of the manufacturer. As the court of appeals correctly observed, "the sophisticated user doctrine does not operate to defeat any duty. It simply identifies circumstances the jury must consider when determining whether the supplier's duty to warn was breached."[17] *Id.* at 28, 749 S.E.2d at 133.

Second, I would not avoid the issue of the sophisticated user doctrine's existence and applicability by creating a distinction between the labeling and the use of the sodium bromate, as if the two are not related. I view the issues of labeling and use as inextricably connected in this case. It is undisputed that Trinity Manufacturing and Matrix Outsourcing knew that Engelhard employees would be in close proximity to the sodium bromate, working with or around the dangerous product. While acknowledging "Engelhard was very familiar with sodium bromate and understood its dangerous nature," the Court states that "Engelhard's knowledge of the dangers of sodium bromate does not affect the suppliers' duty to properly label

[17] The court of appeals did not address, and properly so in my judgment, the effect of this erroneous jury instruction in this case because it was not preserved for appellate review. *Id.* at 32, 749 S.E.2d at 136.

sodium bromate as a hazardous and flammable product." I believe Engelhard's knowledge of the dangers of sodium bromate is at the heart of the sophisticated user defense. Engelhard's knowledge of those dangers is a critical factor in assessing "'whether the supplier . . . acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees.'" *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 (quoting *O'Neal v. Celanese Corp.*, 10 F.3d 249, 253 n.2 (4th Cir. 1993)). Again, I refer to the court of appeals' opinion:

> Considered as a whole, this evidence supports the trial court's decision to charge the jury on the sophisticated user doctrine. It shows Trinity and Matrix knew Engelhard used large quantities of sodium bromate and had tested samples of the product in its laboratory before deciding to buy it. It also shows that employees of Matrix, a wholly-owned subsidiary of Trinity, and Univar, the company to which Trinity directly sold the sodium bromate, believed Engelhard had a safety program that ensured employees were adequately informed of the dangers of the chemicals in the facility. Finally, it shows Trinity and Matrix knew about the MSDS and that Engelhard received it. A jury could infer from this evidence that Trinity and Matrix acted reasonably in providing warnings on the bags and in the MSDS, relying on Engelhard to provide its employees any additional warnings about the dangers of sodium bromate.

Lawing, 406 S.C. at 31–32, 749 S.E.2d at 135–36. I would affirm the court of appeals with respect to the sophisticated user doctrine.

JUSTICE PLEICONES: I respectfully dissent. I agree with Justice Kittredge that the Court of Appeals properly decided the "sophisticated user" issue, and that the doctrine has been part of South Carolina's jurisprudence since 1995. I disagree with the majority, with Justice Kittredge, and with the Court of Appeals, however, on the question whether Lawing was a 'user' within the meaning of S.C. Code Ann. § 15-73-10 (2005), and would therefore uphold the trial court's decision to grant summary judgment to Trinity and Matrix on Lawing's strict liability claim.

Section 15-73-10 imposes strict liability on sellers to users and consumers under certain circumstances. The meaning of the terms "user" and" consumer" are elucidated by the Comments to § 402A of the Restatement of Torts Second.[18] Comment l provides: ""User" includes those who are passively enjoying the benefit of the product . . . as well as those who are utilizing it for the purpose of doing work upon it . . . ." At the time of this horrific accident, the sodium bromate was being stored, albeit in an improper location, "until it was needed for production." *Lawing v. Univar, USA, Inc.*, Op. No. 27594 (S.C. Sup. Ct. filed December 2, 2015) (Shearouse Adv. Sh. No. 47 at 27, 30) Moreover, the accident occurred during "shutdown week" when no "regular production" took place. *Id*. Given these circumstances, I would find that Lawing was not a 'user' within the meaning of § 15-73-10 when the fire occurred, because at that juncture neither he nor Engelhard was "utilizing [the sodium bromate] for the purpose of doing work upon it" within the meaning or contemplation of Comment l.

This is a tragic case, but for the reasons given above, I respectfully dissent, and would affirm the Court of Appeals on the "sophisticated user" issue, and reverse that court on the "user within the meaning of § 15-73-10" issue and reinstate the trial court's order granting summary judgment to Trinity and Matrix.

[18] Pursuant to S.C. Code Ann. § 15-73-30 (2005), these comments are incorporated by reference and are deemed to express the General Assembly's legislative intent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alton Wesley Gore, Jr., Petitioner.

Appellate Case No. 2014-001496

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Special Circuit Court Judge

Opinion No. 27595
Heard October 21, 2015 – Filed December 2, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Nicole Nicolette Mace and Amy Kristan Raffaldt, both of The Mace Law Firm, of Myrtle Beach, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina Catoe Bigelow, both of Columbia, for Respondent.

PER CURIAM: After careful consideration of the Appendix and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Russell Warren Mace, III, Respondent.

Appellate Case No. 2015-002418

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent is transferred to incapacity inactive status 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).

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.
FOR THE COURT

Columbia, South Carolina

November 30, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas P. and Desiree J. Lyons, Respondents,

v.

Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore, Defendants,

Of whom The Security Title Guarantee Corporation of Baltimore is the Appellant.

Appellate Case No. 2013-002137

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

Opinion No. 5365
Heard November 3, 2014 – Filed December 2, 2015

AFFIRMED

Ray Coit Yarborough Jr., of Florence, for Appellant.

David K. Haller, of Haller Law Firm, of Charleston, for Respondents.

MCDONALD, J.: The Security Title Guarantee Corporation of Baltimore (Security Title) appeals the circuit court's grant of partial summary judgment in

favor of Thomas P. Lyons and Desiree J. Lyons (collectively, the Lyons). Security Title argues the circuit court erred in (1) finding the Lyons' claims were not barred by the statute of limitations; (2) holding a county "no-build" resolution appeared in the public record and was available for title examination when the policy was issued; (3) holding a zoning resolution imposing a land restriction was a defect in title triggering coverage under the policy; (4) finding the Lyons did not fail to mitigate their damages; and (5) determining the date of loss. We affirm.

FACTS/PROCEDURAL BACKGROUND

The real property (the Property) at issue is a residential lot located in Horry County, which previously held a mobile home with numerous extensions and additions. Unbeknownst to the Lyons at the time of their purchase, the Property had been encumbered since 1932 by a properly recorded easement allowing for the construction and maintenance of the Intracoastal Waterway. Moreover, the Property has been subject to a county "no-build" resolution since 2003.

The Lyons purchased the Property in two separate transactions. On May 5, 2005, they purchased a lot (Lot 1) for $240,000, along with a title insurance policy from Lawyers Title Insurance Corporation (Lawyers Title).[1] On October 28, 2005, the Lyons purchased a portion of a lot (Lot 2) adjacent to Lot 1 for $100,000. In conjunction with this transaction, they purchased a title insurance policy from Security Title.[2] Lots 1 and 2 were subsequently combined into the Property at issue, which is shown as "Lot 1" on a plat dated August 24, 2005, and recorded with the Horry County Register of Deeds.

On July 3, 1930, Congress enacted the River and Harbor Act, which provided for the construction of the Atlantic Intracoastal Waterway.[3] In 1931, our General

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[1] Fidelity National Title Insurance Company is the successor by merger to Lawyers Title. Fidelity is a defendant in the underlying action but is not a party to this appeal.

[2] The title insurance policies are substantially identical.

[3] *See* River and Harbor Act, ch. 847, § 2, 46 Stat. 945 (1930) (current version at 33 U.S.C. § 426 (2001)).

Assembly passed an act to provide for rights-of-way for the construction project.[4] On August 17, 1932, the governor executed a deed to rights of way (Spoil Easement), which granted the federal government the following:

> [T]he perpetual right and easement to enter upon, excavate, cut away and remove any and all of the tracts hereinafter described as composing a part of the canal prism,[5] as may be required at any time for construction and maintenance of the said Inland Waterway . . . and . . . to enter upon, occupy, and use any portion of . . . the spoil disposal area[6] . . . [and] to deposit on the . . . spoil disposal area, or any portion thereof, any and all spoil or other material excavated in construction and maintenance of the aforesaid waterway and its appurtenances.

The Spoil Easement was filed in the Horry County Register of Deeds on September 17, 1932.

In 1983, the Army Corps of Engineers began managing the Spoil Easement. Horry County's obligations were established in a tri-party agreement dated December 8, 1982. On or about November 4, 2003, the Horry County Council adopted Resolution R-143-03 (the no-build resolution), providing that,

> Horry County Council resolved to authorize the issuance of building permits to repair, remodel or replace existing structures within the spoil easements along the Intracoastal Waterway, but to otherwise continue the policy of denying building permits in this area. Mobile homes within the spoil area may only be replaced with mobile homes.

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[4] *See* Act No. 163, 1931 S.C. Acts 225–26 (current version at S.C. Code Ann. § 3-5-20 (1986)).

[5] The Property abuts the Intracoastal Waterway and is part of the canal prism.

[6] The Property is part of the spoil disposal area.

Horry County Res. 143-03. In May 2011, Horry County refused to issue the Lyons a building permit due to the no-build resolution. The Lyons assert that when their building permit was refused, "they learn[ed] for the first time that there is an easement on the property[,] which essentially makes their property useless." Thereafter, they removed the existing mobile home structure from the Property and listed the Property for sale for $539,000.

The Lyons subsequently submitted claims against Fidelity and Security Title under their title insurance policies. On October 11, 2011, Security Title denied the Lyons' claim and rejected their $80,000 demand. The Lyons filed an action for breach of contract and bad faith failure to pay insurance claims on July 5, 2012, followed by an amended summons and complaint on July 19, 2012. The Lyons subsequently moved for partial summary judgment on December 20, 2012.

At the May 15, 2013 summary judgment hearing, the Lyons brought to the circuit court's attention that United States District Court Judge R. Bryan Harwell had granted partial summary judgment for a neighboring insured on the liability question in a similar case. *See Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011).[7] The circuit court granted the Lyons' motion for partial summary judgment by order filed July 12, 2013. Security Title moved to reconsider on July 26, 2013; the circuit court denied the motion to reconsider on August 9, 2013. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56, SCRCP." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (quoting *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)). The circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[7] The question of the applicable date for establishing the measure of damages was certified to the South Carolina Supreme Court, which concluded that when "faced with the task of construing an insurance policy, and in the presence of an ambiguity we are constrained to interpret it most favorably to the insured. In this case, the date the property was purchased is the proper valuation date." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 616, 732 S.E.2d 626, 629 (2012).

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Wachovia Bank*, 404 S.C. at 425, 746 S.E.2d at 38 (quoting *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505 (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)).

LAW/ANALYSIS

I. Statute of Limitations

Security Title argues that the "mere affixation of a corporate seal" does not make the title policy a "sealed instrument;" thus, the three-year statute of limitations applies to bar the Lyons' claims. We disagree.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* "The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation." *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005). "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.*

South Carolina Code section 15-3-530(1) provides for a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." S.C. Code Ann. § 15-5-530(1) (2005). Under the discovery rule, "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."

Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The discovery rule applies to breach of contract actions." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010). "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

The Lyons asserted below that when their building permit was refused in May 2011, "they learn[ed] for the first time that there is an easement on the property[,] which essentially makes their property useless." However, the circuit court ruled there was evidence that the Lyons knew or should have known of the Spoil Easement as early as October 26, 2006, when they received a letter from the Army Corps of Engineers informing them of a disposal easement held by the United States on or adjacent to the area where they planned to construct a dock. The Lyons had previously received a substantively identical letter dated March 19, 2006.

South Carolina Code section 15-3-520(b) provides for a twenty-year statute of limitations for "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530." S.C. Code Ann. § 15-3-520(b) (2005). "We adhere to our general three-year statute of limitations for most contract actions and acknowledge the availability of the twenty-year limitations period where the contract clearly evidences an intent to create a sealed instrument." *Carolina Marine*, 363 S.C. at 175, 609 S.E.2d at 552. We acknowledge that South Carolina has not specifically considered whether an insurance policy containing a seal is a sealed instrument under section 15-3-520(b).

A sealed instrument is defined as "an instrument to which the bound party has affixed a personal seal, [usually] recognized as providing indisputable evidence of the validity of the underlying obligations." *Sealed Instrument*, BLACK'S LAW DICTIONARY (9th ed. 2010). A seal is defined as "an impression or sign that has legal consequences when applied to an instrument." *Id.*; *see also* 68 Am. Jur. 2d *Seals* § 6 (2014) ("Devices or impressions held to be seals include . . . a printed impression of a seal."). The prevailing view is that "the seal may consist of any substance affixed to the document or the use of an impression such as that customarily used by notaries and corporations, or the use of any other mark, work,

symbol, scrawl, or sign intended to operate as a seal." 1 WILLISTON ON CONTRACTS § 2:4 (2007).

For purposes unrelated to the applicable statute of limitations, our supreme court addressed whether a particular deed was a sealed instrument in *Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901). The deed at issue in *Cook* lacked a seal "upon its face." *Id.* at 562, 38 S.E. at 219. However, it presented the following features: (1) an attestation clause; (2) the word "seal" was adjacent to the grantor's signature; and (3) the deed concluded with "Signed, Sealed and Delivered in the [presence] of [names of witnesses]." *Id.* The *Cook* court, relying in part on the predecessor to section 19-1-160, found that the parties intended to create a sealed instrument. *Id.*

In *Stelts v. Martin*, 90 S.C. 14, 72 S.E. 550 (1911), the court addressed the statute of limitations applicable in a foreclosure action. In *Stelts*, the validity of a mortgage was at stake. Our supreme court explained the following:

> We are unable to agree with the Circuit Judge that a paper, in form a mortgage and *lacking a witness or a seal or other formal requisite of a legal mortgage,* but valid between the parties as an equitable mortgage, is barred by the statute of limitations six years after its maturity. The paper is . . . a sealed instrument importing an obligation to pay money and a lien as between the obligor and obligee upon the land to secure payment. This being so . . . the [action falls] under [the predecessor to code section 19-1-160,] providing a limitation of twenty years . . . .

Id. at 17, 72 S.E. 551–52 (emphasis added).

In *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, this court concluded that although the contract at issue did not include a seal, the language of the contract manifested the parties' intent to create a sealed instrument. 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984). "The attestation clauses state that 'the parties hereto have set their hands and seals.' The notation 'L.S.' follows the signatures of the agents for both DSS and the Nursing Home." *Id.* "L.S. is an abbreviation for *locus sigilli*, which means 'the place of the seal; the place occupied by the seal of written instruments.' L.S. usually appears on

documents in place of, and serves the same purpose as, a seal." *Carolina Marine*, 363 S.C. at 174, 609 S.E.2d at 551 (citing *Locus Sigilli*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

Likewise, in *Treadaway v. Smith*, this court found the parties to a separation agreement (incorporated into a 1974 Haitian divorce) intended to create a sealed instrument. 325 S.C. 367, 378, 479 S.E.2d 849, 855 (Ct. App. 1996), *abrogated by Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). The parties' agreement stated, "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written" and "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF [signatures of parties and witnesses]." *Id.* This court concluded that the plaintiff's action, which sought to enforce a provision of the agreement in which the defendant agreed to pay the children's college expenses, was governed by the twenty-year statute of limitations. *Id.*

However, in *Carolina Marine*, this court concluded that the sophisticated parties to a commercial lease agreement did not intend to create a sealed instrument. 363 S.C. at 174, 609 S.E.2d at 551. Thus, the lease at issue was not sealed, and the general three-year statute of limitations applied to the tenant's counterclaim for breach of contract against a subtenant. *Id.* Although the lease contained an attestation clause reading "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," the lease did not contain an actual seal, the letters "L.S.," referring to the place where a seal would be affixed, or such a phrase as "signed, sealed, and delivered." *Id.* at 174–75, 609 S.E.2d at 551–52. This court cautioned, "Were we to construe this boilerplate attestation clause, *by itself*, as requiring a finding of intent to create a sealed instrument in an otherwise non-sealed instrument, we would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state." *Id.*

In the present case, we find Security Title's residential title insurance policy includes a seal "upon its face." The seal states "THE SECURITY TITLE GUARANTEE CORPORATION OF BALTIMORE, Incorporated 1952 Baltimore." In both *Cook* and *Stelts*, our supreme court implied that if the document at issue had a seal "upon its face," the court would not have needed to determine whether the parties intended to create a sealed instrument. Moreover, this court found the inclusion of "L.S." to be significant in *Winyah*.

Security Title argues that the purpose of the seal is "to show that it is the act of the corporation . . . [and] that the company's agent is authorized to complete the policy schedules to make the Policy valid." It asserts that the "mere affixation of a corporate seal" does not make the policy a "sealed instrument," citing *Central National Bank of Columbia v. Charlotte, Columbia & Augusta Railroad Co.*, 5 S.C. 156, 158 (1874) (explaining that the seal of corporation is not, in itself, conclusive of an intent to make a specialty as it is equally appropriate as means of evidencing the assent of a corporation to be bound by a simple contract as by a specialty), in support of its position.

In *Republic Contracting Corp. v. South Carolina Department of Highways & Public Transportation*, this court concluded that a statute requiring an engineer to place his professional engineer's seal and endorsement on bridge plans did not render the plans a "sealed instrument" triggering the application of the twenty-year statute of limitations. 332 S.C. 197, 205–06, 503 S.E.2d 761, 766 (Ct. App. 1998); *see* S.C. Code Ann. § 40-22-370(3), (4), and (6) (Supp. 1997) (requiring plans prepared by a registered engineer to include the engineer's seal and endorsement when filed with public authorities and when issued for use as job site record documents). Moreover, nothing in the statute "lead[s] to the inference that a purpose of the mandate for affixing a seal and an endorsement is to extend the time in which an action can be brought concerning a document on which these items appear." *Republic Contracting*, 332 S.C. at 205–06, 503 S.E.2d at 766; *see also Landmark Eng'g, Inc. v. Cooper*, 476 S.E.2d 63, 64 (Ga. Ct. App. 1996) (explaining that a surveyor's seal ensures responsibility for his work but does not create a twenty-year statute of limitations prescribed for documents under seal).

The same cannot be said under the unique circumstances of this case. There is no statutory requirement that a title insurance company place its corporate seal and endorsement on a policy; this alone distinguishes the seal in this case from the engineer's seal in *Republic*. The court is bound by the rules of contract construction requiring that insurance policies be construed against the drafter and in favor of coverage. Therefore, we find the presence of the seal on the face of the policy, next to the president's signature, evidences an intent to create a sealed instrument.

Moreover, the purpose of residential title policies—the protection of homeowners from unknown title defects—lends additional support to this result. The Lyons purchased the Property with the intent to build their retirement home upon it. The

standard terms for a residential note and mortgage are fifteen to thirty years. A twenty-year statute of limitations allows policyholders to carefully monitor situations as they unfold, ultimately preventing the bringing of unnecessary claims or litigation. Thus, we agree with the circuit court that "the policies are indeed sealed instruments and that the twenty-year statute of limitations applies."

II. Governmental Police Power Exclusion

Security Title further asserts the circuit court erred in granting the Lyons partial summary judgment because the title policy's "governmental police power" exclusion (Exclusion 1) excludes coverage as a matter of law. We disagree.

> Insurance policies are subject to the general rules of contract construction. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.
>
> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. It is a question of law for the court whether the language of a contract is ambiguous. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.

Whitlock, 399 S.C. at 614–15, 732 S.E.2d at 628 (citations omitted).

Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005). This rule applies to title insurance contracts. *First Carolinas Joint Stock Land Bank of Columbia v. N.Y. Title*, 172 S.C. 435, 445, 174 S.E. 402, 406 (1934). "Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured

takes title." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981).

In this case, Exclusion 1 states the following:

> In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:
>
> 1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
>
>   - land use
>   - improvements on the land
>   - land division
>   - environmental protection
>
>   This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.
>
>   This exclusion does not limit the zoning coverage described in Items 12 and 13 of the Covered Title Risks.

The "Covered Title Risks" section of the policy provides that the policy covers certain listed title risks if the listed risk affects title on the policy date. The Covered Title Risks include but are not limited to the following:

> 10. Someone else has an easement on your land.
>
> . . . .
>
> 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.
>
> 14. Other defects, liens, or encumbrances.

Security Title contends the county's no-build resolution—prohibiting the issuance of building permits on property located in the Spoil Easement—was neither in the "public record" as defined by the policy nor available for title examination on the date the policy was issued. Thus, according to Security Title, coverage is excluded by the "governmental police power" provision of Exclusion 1. We disagree.

The title policy defines "public records" as "title records that give constructive notice of matters affecting your title—according to the state statutes where your land is located." As to such public records, section 30-7-10 provides, in pertinent part:

> [G]enerally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds . . . are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds . . . of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10 (1976); *see also Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 169, 714 S.E.2d 869, 876 (2011) (explaining that zoning designations are part of the public record).

It is the Lyons' position that a government regulation is inherently a public record and that, as a result, Exclusion 1 is inapplicable. After considering the purpose of the title policy, the circuit court construed the term "public record" against Security Title because the term "public record" may be fairly and reasonably understood in more than one way. *See Farr v. Duke Power Co.*, 265 S.C. 356, 362, 281 S.E.2d 431, 433 (1975) ("A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.").

In reaching this conclusion, the circuit court referenced the South Carolina district court's opinion considering "the same spoils easement, no-build resolution, and title insurance policy language." *See Whitlock*, 2011 WL 4549367 at *2–4. We, like the circuit court, find the district court's reasoning logical and its conclusion persuasive. *See Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (stating that ambiguities are construed against the

insurer); *Phillips v. Periodical Publishers' Serv. Bureau, Inc.*, 300 S.C. 444, 446, 388 S.E.2d 787, 789 (1989) (explaining that although a district court's decision is not binding, it is nevertheless persuasive authority).

The title policy provides broad coverage for title problems created by laws and regulations addressing land use and improvements on land. Because Security Title drafted the contract, it could easily have defined the term "public record" to exclude zoning laws and regulations or drafted other exclusionary language. Like the circuit court and district court, we find the term "public record" to be ambiguous as defined in the policy. Thus, we hold the circuit court properly granted partial summary judgment in favor of coverage because the Spoil Easement and no-build resolution were public records not located during the title search.

III. Zoning Regulation as Land Use Restriction Triggering Coverage

The parties dispute whether a mobile home, which would be permitted on the Property, is a "single-family residence" as the term is used in the policy, and whether the zoning regulation preventing construction of the site-built house the Lyons intended to construct on the Property triggers title coverage. It is undisputed that a mobile home with numerous extensions and additions was previously located on the Property. It is also undisputed that due to the no-build resolution, Horry County will not permit the Lyons to construct a "site-built" home.

Security Title concedes that its policy does not define "single-family residence" but argues that the "General Assembly implicitly recognizes that mobile homes are ordinarily used as single-family residences." *See* S.C. Code Ann. § 27-40-210(14) (2007) (defining "single family residence" as "a structure maintained and used as a single dwelling unit"); S.C. Code Ann. § 27-40-210(3) (2007) (defining "dwelling unit" to include landlord-owned mobile homes). Here, Exclusion 1 "does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks." "Covered Title Risks" item 13 states that the policy provides coverage if "[one] cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law." The circuit court concluded that, like "public record," the term "single-family residence" is ambiguous. Therefore, the circuit court construed the term in favor of the Lyons and found that "Covered Title Risks" item 13 provided coverage because the Lyons "cannot use [the

Property] as a single-family residence due to the existing zoning law preventing them from building a site-built home."

Our review of the record reveals that the term "single-family residence" is not defined by the policy. As this term's precise meaning is unclear, we find the circuit court properly construed the policy against the drafter so as not to include a mobile home. Thus, Exclusion 1 does not bar coverage because the Lyons cannot use the Property for a "single-family residence." *See Diamond*, 318 S.C. at 236, 456 S.E.2d at 915 (stating that ambiguities are construed against the insurer). Therefore, we hold the circuit court did not err in granting summary judgment as to this issue.

IV. Mitigation of Damages

Security Title argues the circuit court erred in determining that the Lyons did not fail to mitigate their damages.

"A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages." *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002); *see also Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955) ("It is the undoubted general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to minimize the damages."). "The duty to mitigate losses applies to contracts." *Cisson Constr., Inc. v. Reynolds & Assocs., Inc.*, 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993). "Whether the party acted reasonably to mitigate damages is ordinarily a question for the jury." *Baril*, 352 S.C. at 285, 573 S.E.2d at 838.

A defendant who claims a plaintiff's damages could have been mitigated has the burden of proving that mitigation is possible and reasonable. *Moore v. Moore*, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct. App. 2004). "Moreover, the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced." *Id.* (quoting *Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 420, 426 S.E.2d 834, 835 (Ct. App. 1993)). The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when conflicting evidence is presented. *Chastain*, 310 S.C. at 420, 426 S.E.2d at 836; *Hinton v. Designer Ensembles, Inc.*,

335 S.C. 305, 320, 516 S.E.2d 665, 672 (Ct. App.1999), *overruled on other grounds by* 343 S.C. 236, 246, 540 S.E.2d 94, 99 (2000).

The "Limitation of Company's Liability" section of the policy provides in part:

> a. We will pay up to your actual loss or the Policy Amount in force when the claim is made -- whichever is less.
>
> . . . .
>
> e. If you do anything to affect any right of recovery you may have, we can subtract from our liability the amount by which you reduced the value of that right.

A. Offer to Purchase Subject Property

Security Title argues the Lyons failed to mitigate their damages when they rejected an offer to purchase the Property. We disagree.

In his deposition, Mr. Lyons testified that he "thinks" he was offered $475,000 for the Property in September 2006. Security Title contends that "[h]ad the Lyons accepted the offer, they would not only have recouped their initial investment but would have reaped a profit from the sale." Security Title further contends that the circuit court should have let a jury determine "the amount of damages, or lack thereof as a consequence of the Lyons' failure to mitigate." The circuit court acknowledged the duty to mitigate, but cogently explained:

> [I]t cannot be said that after the discovery of an easement held by the United States that prevents construction of a dock, the law requires one to sell the entire property or be thwarted from bringing suit against his title insurance company at a later date; such a requirement would call for a party to exert himself unreasonably.

We agree with the circuit court that the Lyons did not fail to mitigate their damages. *See Baril*, 352 S.C. at 285, 573 S.E.2d at 838 (explaining that the law does not require an injured party "to exert himself unreasonably or incur

substantial expense to avoid damages"). Moreover, we find that Security Title's argument fails given that the Lyons could not have provided a potential purchaser with clean title to the Property because the Spoil Easement is properly recorded.

B. Demolition of Mobile Home

Security Title further contends that the Lyons failed to mitigate their losses when they demolished the mobile home previously located on the Property. We disagree.

Although Security Title raised this argument in its Rule 59(e) motion to reconsider, it did not raise this issue to the circuit court at the hearing on the Lyons' motion for summary judgment or by way of written opposition. Thus, this issue is not preserved for appellate review. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue not preserved because "a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment").

V. Date of Loss

The circuit court determined that damages "are to be calculated based on the diminution in value caused by the title defects, measured from the date the property was purchased." Security Title contests this, arguing that any loss (diminution in value) should be calculated based on the value of the lot when Security Title received the Lyons' claim.

The circuit court further held, however, that summary judgment was not appropriate as to damages "[b]ecause the amount of diminution of value is a genuine issue of material fact . . . [and f]urther hearings will be necessary to establish the amount of damages." *See Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411–12, 661 S.E.2d 62, 65–66 (2008). Because the circuit court denied the Lyons' motion for summary judgment as to damages,[8] we find this issue is not properly before this court. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380

[8] The circuit court also declined to accept the Lyons' argument that the title policies insure their loss to the full value of the policies, explaining that the "spoilage easement and no-build resolution have not rendered the property useless or completely unmarketable."

(1994) (explaining that the denial of a motion for summary judgment is not immediately appealable because it does not finally determine anything about the merits or strike a defense); *Kinard v. Richardson*, 407 S.C. 247, 263–64, 754 S.E.2d 888, 897 (Ct. App. 2014) ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment." (quoting *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003))).[9]

CONCLUSION

For the foregoing reasons, we hold the circuit court properly found that (1) the Lyons' claims were not barred by the statute of limitation, (2) Exclusion 1 does not bar coverage, and (3) the Lyons did not fail to mitigate their damages. Accordingly, the decision of the circuit court granting partial summary judgment is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

[9] In any event, as noted above, our supreme court's ruling on the certified question in *Whitlock* is likely determinative of this question. *See* 399 S.C. at 616, 732 S.E.2d at 629 (holding that, in the presence of the policy's ambiguity, it was constrained to interpret the provision "most favorably to the insured. In this case, the date the property was purchased is the proper valuation date.").