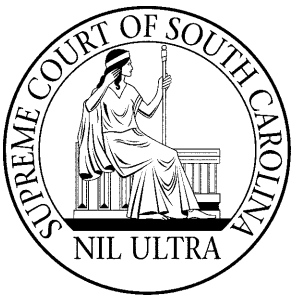

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 9, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

PETITIONS - UNITED STATES SUPREME COURT

27502 - The State v. Ortho-McNeil-Janssen	Pending
27569 - The State v. Shawn Reaves	Pending
2014-000324 - Cynthia E. Collie v. South Carolina Commission on Lawyer Conduct, et al	Pending
2015-MO-033 - The State v. Christopher Ryan Whitehead	Pending

PETITIONS FOR REHEARING

27562 - The State v. Francis Larmand	Pending
27568 - Michael Cunningham v. Anderson County	Denied 12/3/2015
27571 - The State v. Antonio Scott	Pending
27572 - Stokes-Craven Holding Corporation v. Scott L. Robinson	Pending
27579 - Whitney Lynn Moore v. Arthur Rose Moore, III	Pending
27580 - Lauren Proctor v. Whitlark & Whitlark	Denied 12/4/2015
27587 - Willie Homer Stephens v. CSX Transportation	Pending
2015-MO-057 - Quentin S. Broom, Jr. v. Ten State Street	Denied 12/3/2015
2015-MO-061 - Kennedy Funding v. Pawleys Island North	Pending
2015-MO-062 - Jane Doe v. Boy Scout Troop 292	Pending
2015-MO-065 - Edward Dean v. Mark Keel (SLED)	Denied 12/2/2015

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5362-The SPUR v. Sunil Lalla	Pending
2015-UP-311-State v. Marty Baggett	Pending
.	
2015-UP-328-Billy Lisenby v. SCDC (7)	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-465-Dushun Staten v. State	Pending
2015-UP-466-State v. Harold B. Cartwright, III	Denied 12/04/15
2015-UP-473-Mevers Kitchens v. Maryann Wagner	Pending
2015-UP-474-Edward Andrell Whitner v. State	Pending
2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr.	Pending
2015-UP-501-State v. Don-Survi Chisolm	Pending
2015-UP-503-Tracy Adams v. SCDMV	Pending
2015-UP-505-Charles Carter v. SCDC (3)	Pending
2015-UP-506-DRV Fontaine v. Fontaine Business Park	Pending
2015-UP-513-State v. Wayne A. Scott, Jr.	Pending
2015-UP-517-Kevin Fowler v. SCDC	Pending
2015-UP-518-SCDSS v. Bruce Walters	Pending
2015-UP-524-State v. Gary R. Thompson	Pending
2015-UP-538-State v. Teramine Lamont McCrorey	Pending
2015-UP-540-State v. Michael McCraw	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5253-Sierra Club v. Chem-Nuclear	Pending
5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Pending
5297-Trident Medical Center v. SCDHEC	Pending
5301-State v. Andrew T. Looper	Pending
5307-George Ferguson v. Amerco/U-Haul	Pending
5308-Henton Clemmons v. Lowe's Home Centers	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5313-State v. Raheem D. King	Pending
5314-State v. Walter M. Bash	Pending
5317-Michael Gonzales v. State	Pending
5322-State v. Daniel D. Griffin	Pending
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew McAlhaney v. Richard McElveen	Pending
5331-State v. Thomas Stewart	Pending
5332-State v. Kareem Harry	Pending

5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Phillip Flexon v. PHC-Jasper, Inc.	Pending
5337-Ruben Ramirez v. State	Pending
5341-State v. Alphonso Thompson	Pending
5344-Stoneledge v. IMK Development (Southern Concrete)	Pending
5347-George Glassmeyer v. City of Columbia	Pending
5348-Gretchen A. Rogers v. Kenneth E. Lee	Pending
5355-State v. Lamar Sequan Brown	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending
2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-031-Blue Ridge Electric v. Kathleen Gresham	Pending
2015-UP-041-Nathalie Davaut v. USC	Pending
2015-UP-065-Glenda Couram v. Lula Davis	Pending
2015-UP-069-Amie Gitter v. Morris Gitter	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-102-SCDCA v. Entera Holdings	Denied 12/02/15
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-155-Ashlie Outing v. Velmetria Weeks	Pending

2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-176-Charles Ray Dean v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-203-The Callawassie Island v. Arthur Applegate	Pending
2015-UP-205-Tri-County Dev. v. Chris Pierce (2)	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v.Harley)	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-256-State v. John F. Kennedy	Pending
2015-UP-259-Danny Abrams v. City of Newberry	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-269-Grand Bees Development v. SCDHEC	Pending
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-275-State v. David E. Rosier	Pending
2015-UP-280-State v. Calvin Pompey	Pending
2015-UP-281-SCDSS v. Trilicia White	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending

2015-UP-303-Charleston County Assessor v. LMP Properties	Pending
2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill	Pending
2015-UP-306-Ned Gregory v. Howell Jackson Gregory	Denied 12/02/15
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-320-American Community Bank v. Michael R Brown	Pending
2015-UP-327-State v. Shawn Justin Burris	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending
2015-UP-339-LeAndra Lewis v. L. B. Dynasty, Inc.	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-345-State v. Steve Young	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending
2015-UP-353-Wilmington Savings Fund v. Furmanchik	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-359-In the matter of the estate of Alice Shaw Baker (Fisher v. Huckabee)	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-372-State v. Sheldon L. Kelly	Pending

2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)	Pending
2015-UP-381-State v. Stepheno J. Alston	Pending
2015-UP-382-State v. Nathaniel B. Beeks	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Pending
2015-UP-391-Cambridge Lakes v. Johnson Koola	Pending
2015-UP-395-Brandon Hodge v. Sumter County	Pending
2015-UP-402-Fritz Timmons v. Browns AS RV and Campers	Pending
2015-UP-403-Angela Parsons v. Jane Smith	Pending
2015-UP-414-Christopher A. Wellborn v. City of Rock Hill	Pending
2015-UP-417-State v. Raheem Jamar Bonham	Pending
2015-UP-423-North Pleasant, LLC v. SC Coastal Conservation	Pending
2015-UP-427-William McFarland v. Sofia Mazell	Pending
2015-UP-428-Harold Threlkeld v. Lyman Warehouse, LLC	Pending
2015-UP-429-State v. Leonard E. Jenkins	Pending
2015-UP-432-Barbara Gaines v. Joyce Ann Campbell	Pending
2015-UP-439-Branch Banking and Trust Co. v. Sarah L. Gray	Pending
2015-UP-444-Bank of America v. Duce Staley	Pending
2015-UP-446-State v. Tiphani Marie Parkhurst	Pending
2015-UP-455-State v. Michael L. Cardwell	Pending

2015-UP-478-State v. Michael Camp Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarence Kendall Cook, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-000366

Appeal From Marlboro County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 27596
Submitted October 15, 2015 – Filed December 9, 2015

REVERSED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson , of Columbia, and Assistant Attorney General Joshua L. Thomas, of Greenwood, for Respondent.

JUSTICE BEATTY: A grand jury indicted Clarence Kendall Cook for murder, unlawful possession of a pistol, and possession of a weapon during the commission of a violent crime. After a jury trial, Cook was convicted of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Cook filed a post-conviction relief ("PCR") application, which was

dismissed after a hearing. Following the dismissal of his PCR application, Cook petitioned this Court for a writ of certiorari pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). We granted certiorari to determine whether the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter. We reverse.

I. Factual/Procedural History

At the time of the incident that gave rise to this appeal, Cook and Charles Hayes ("Victim") lived in the Marlboro Court apartment complex in Marlboro County. Cook, who lived in the apartment above Victim, contended that Victim had constantly been berating him, calling Cook, *inter alia*, a "snitch" for testifying in a murder trial against an individual tied to Victim as well as for telling their landlord that Victim was allegedly selling drugs out of his apartment.

At approximately 4:00 p.m. on June 10, 2010, Cook, his girlfriend, and his cousin were on their way to the grocery store when Cook and Victim exchanged the following text messages:

> Victim: "You f*** n***a I herd u being sh*t about me n***a and about the bullsh*t that going on around here. I don't have sh*t to do with it, so keep my name out your mouth."
>
> Cook: "U aint sh*t 2 b talkn bout I dnt care bout yal or wat u movn I dnt want u it aint me no words 4 u or los life goes on."
>
> Victim: "N***a f*** u."
>
> Cook: "Lol."

At approximately 6:00 p.m. that evening, the three returned to the apartment complex to find Victim sitting outside on the porch. As they walked upstairs, Victim made a series of threatening comments directed at Cook echoing similar sentiments from the text messages he sent earlier that day. According to Cook, Victim was saying "you ain't nothin' but a snitch ass p***y n***a."; "I can get that n***a touched"; and, "look at him and his b*tch." While Cook admitted Victim's last comment was "enough to really strike [him] in [his] heart," Cook continued up the stairs without saying anything to Victim.

Once inside the apartment, Cook ate some watermelon, placed the watermelon rinds inside a plastic bag, grabbed his gun from under the couch, and went downstairs to discard the bag. According to Cook, once downstairs, he did not have a chance to get to the dumpster because Victim was approaching him, grimacing and threatening to shoot him in "broad daylight." Cook stated Victim had one of his hands in his back pocket, acting as if he had a gun and was going to pull it out and shoot Cook at any moment.[1] At this time, Victim's nephew, Terrance Bridges, was approaching Cook in the opposite direction as if he was about to "jump" him. Cook and Victim then exchanged the following words:

Victim: "You f*** n***a. You ain't nothing but a snitch."

Cook: "Who you callin' a f*** n***a?"

Victim: "You."

Cook: "What?"

Cook said he tried to keep walking down the sidewalk, but Victim kept cutting him off. According to Cook, Victim continued to approach Cook huffing, grimacing, and threatening to kill him. At that point, Cook said "the dude was coming up" and "before I knew it, I fired a shot." Cook said he then fired a second shot and ran. Both shots struck Victim in the face. When asked why he fired the second shot, Cook replied "to make sure he was gone." In his oral statement, Cook further explained: "I was terrified." "I didn't even sit there for a second. As soon as I saw him reaching I just shot." "I wasn't taking any chances." "It was either me or him, man, it really was."

Bridges testified he saw Victim get up and walk over to Cook. He said "from there on they were just talking real softly." He stated he "could hardly tell it was an argument." Then Cook stepped back, pulled out a gun and shot Victim. According to Bridges, Cook then walked over Victim, did some kind of gesture, shot Victim again, and ran.

[1] A gun was never found on Victim.

Victim's girlfriend, Kim Brown, was also outside at the time of the incident. At trial, Brown testified that once Cook came downstairs she saw Victim approach Cook and say "keep my name out of all this mess y'all got going on out here. I don't have nothing to do with that." The next thing she heard was a gunshot. After seeing Victim fall to the ground, Brown testified she saw Cook walk over Victim and shoot him again. According to Brown, Cook then dropped the bag and ran.

A grand jury indicted Cook for murder, unlawful possession of a pistol, and possession of a weapon during the commission of a violent crime. At trial, Cook claimed self-defense. At the close of the State's case, the State withdrew the unlawful possession of a pistol charge. At the close of the defense, the trial court, upon the State's request, and over Cook's objection, instructed the jury on the law of the lesser-included offense of voluntary manslaughter.[2] After deliberations, the jury returned a verdict of guilty of voluntary manslaughter and guilty of possession of a weapon during the commission of a violent crime. The trial court sentenced Cook to twenty years' imprisonment and a consecutive, five-year sentence for possession of a weapon during the commission of a violent crime.

Cook filed a PCR application. After a hearing, the PCR judge denied relief and dismissed Cook's application. Cook then filed a petition for a writ of certiorari asserting the PCR judge erred in finding Cook was not entitled to a direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). We granted the petition and directed the parties to brief the issue of whether the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter.

II. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an

[2] Curiously, even though the State requested a voluntary manslaughter charge, in its closing argument, the State said: "Use your common sense. This is murder. It is not self-defense. It is not manslaughter it is murder."

error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "The trial court must determine the law to be charged based on the evidence at trial." *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005). "When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given." *Id.*

III. Discussion

Cook asserts the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence that he was acting in the sudden heat of passion. We agree.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). "Both heat of passion and sufficient legal provocation must be present at the time of the killing." *Id.* At trial, Cook conceded that there was sufficient legal provocation. Therefore, the narrow issue on appeal is whether Cook was acting in the sudden heat of passion when he killed Victim.

"Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015). This Court has defined the sudden heat of passion as that which:

> upon sufficient legal provocation, . . . mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

Id. (citing *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)).

We do not believe the facts of this case support a finding that Cook shot Victim in the sudden heat of passion. Here, Cook stated he tried to walk away from Victim, but Victim kept cutting him off. The fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off.

In addition, Bridges testified that Cook and Victim were talking softly and that he could hardly tell they were arguing. This too does not suggest that Cook was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during Cook's statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.

In finding otherwise, the trial court relied on the following facts: (1) that Cook was in fear; (2) Cook shot Victim twice; and (3) Cook's statement "before I knew it, I fired a shot." We believe these facts, without more, are insufficient to establish Cook was acting in the sudden heat of passion.

In *State v. Starnes*, we affirmed the principle that "to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010). We do not believe the fact that Cook shot Victim twice or his statement "before I knew it, I fired a shot" is evidence that Cook's fear manifested in an uncontrollable impulse to do violence.

In *State v. Niles*, Niles shot at the victim twice after the victim pulled out his gun and shot at Niles, knocking out the rear windows of Niles' vehicle. 412 S.C. at 520, 772 S.E.2d at 879. Niles stated, "I shot twice. I went pow, pow." *Id.* Niles, like Cook, shot at the victim twice; yet, we determined that fact was not enough to establish Niles was acting under an uncontrollable impulse to do violence. We find the same here. Finally, we do not believe Cook's statement "before I knew it, I fired a shot" warrants a charge of voluntary manslaughter. The State argues this statement could be interpreted to mean Cook lacked self-control when he shot Victim, and thus acted under an uncontrollable impulse to do violence. We disagree. Due to the short, swift motion of firing a gun, we believe this statement could be heard in any case in which the defendant is charged with firing a weapon, even out of self-defense. Thus, we do not believe this statement is indicative as to whether Cook was acting under an uncontrollable impulse to do violence.

In addition to the facts articulated and relied upon by the trial court, the State relies on our holding in *State v. Lowry* to support its position that this Court should affirm the trial court's decision to charge voluntary manslaughter. 315 S.C. 396, 434 S.E.2d 272 (1993). We find *Lowry* distinguishable from this case.

In *Lowry*, the victim approached Lowry outside a grocery store and began berating him. *Id.* at 398, 434 S.E.2d 273. The two men began arguing and "bumping chests." *Id.* Lowry then aimed a pistol at the victim and pulled the trigger, but the pistol was unloaded. *Id.* After Lowry's friend broke up the fight, the victim went inside the store. *Id.* Lowry, loaded a clip of ammunition into his pistol, fired a single shot into a nearby sign, and followed victim into the store where the two began arguing again. *Id.* The victim then raised his arms above his head, taunting Lowry. *Id.* Lowry then shot him in the chest, cursed him, and shot him again, but this time in the head. *Id.* This Court determined the trial court erred in refusing to instruct the jury regarding the offense of voluntary manslaughter because there was testimony which, if believed, tended to show the victim and Lowry were in a heated argument. *Id*. at 399, 434 S.E.2d at 274.

In *Lowry*, there was both a physical and verbal altercation to support a finding of sudden heat of passion. Here, there was only a verbal altercation, which was very brief. Further, in *Lowry*, it was evident to the witnesses that there was an altercation between Lowry and the victim due to their conduct. In contrast, the witnesses here could hardly tell Cook and Victim were arguing. In addition, Lowry actively pursued the victim, whereas Cook attempted to walk away from Victim. Collectively, Lowry's actions suggest that he was acting in the sudden heat of passion. Cook's actions do not do the same.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611 (1982). "The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." *Id.* Here, the evidence presented at trial indicates Cook either shot Victim with malice or in self-defense. Unfortunately, however, as this Court has previously articulated:

> due to the error in granting the solicitor's request for a voluntary manslaughter charge, [Cook] will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for solicitors as to the pitfalls of requesting a potential "compromise" charge which is unsupported by the evidence.

State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000).

IV. Conclusion

For the foregoing reasons, we reverse Cook's voluntary manslaughter conviction.[3]

REVERSED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., not participating.

[3] Due to our reversal of Cook's voluntary manslaughter conviction, we also reverse his conviction for possession of a weapon during the commission of a violent crime, as the former conviction is a prerequisite for the latter. *See* S.C. Code Ann. § 16-23-490(e) (2003) (providing contemporaneous indictment and conviction of violent crime a prerequisite to punishment under section 16-23-490).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Demetrius Mack, Respondent,

v.

Leon Lott, in his Official Capacity as Sheriff of Richland County, Petitioner.

Appellate Case No. 2014-002229

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 27597
Heard November 17, 2015 – Filed December 9, 2015

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

Robert D. Garfield and Andrew F. Lindemann, both of Davidson & Lindemann, P.A., of Columbia, for Petitioner.

Joshua Snow Kendrick and Christopher S. Leonard, both of Kendrick & Leonard, P.C., of Columbia, and Neal

Michael Lourie, of Lourie Law Firm, L.L.C., of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in *Mack v. Lott*, 410 S.C. 28, 762 S.E.2d 719 (Ct. App. 2014). We now dismiss the writ as improvidently granted since both parties and the trial court agree that the proper standard for determining probable cause is an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because the Court of Appeals' language on this issue is arguably unclear, for the benefit of the bench and bar, we direct the Court of Appeals to depublish its opinion.

Accordingly, we

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED.

PLEICONES, Acting Chief Justice, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of David Ross Clarke, Petitioner.

Appellate Case No. 2015-000268

ORDER

In 1985, the Court disbarred petitioner from the practice of law in South Carolina. *In the Matter of Clarke*, 290 S.C. 494, 351 S.E.2d 573 (1986). Petitioner has now filed a Petition for Readmission pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The Court grants the Petition for Readmission. The Office of Bar Admissions shall schedule petitioner to be readmitted during the next regularly-scheduled swearing-in ceremony.

Until such time as he has been readmitted to the practice of law, petitioner is under a continuing obligation to keep his bar application current and must update responses whenever there is an addition to or a change to information previously filed with the Clerk of Court. *See* Rule 402(d)(2), SCACR. Petitioner shall further notify the Clerk of Court if there are any changes to his Petition for Readmission.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 2, 2015

The Supreme Court of South Carolina

In the Matter of Kristie Ann McAuley, Petitioner.

Appellate Case No. 2014-001408

ORDER

By opinion dated June 18, 2014, the Court suspended petition from the practice of law for eighteen (18) months, retroactive to August 24, 2011, the date of her interim suspension. *In the Matter of McAuley*, 408 S.C 402, 759 S.E.2d 743 (2014). Petitioner filed a Petition for Reinstatement pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). After referral to the Committee on Character and Fitness (Committee), the Committee has filed a Report and Recommendation recommending the Court reinstate petitioner to the practice of law.

The Court grants the Petition for Reinstatement provided, however, that petitioner shall pay all outstanding license fees and penalties, if any, to the South Carolina Bar and shall be in full compliance with all continuing legal education requirements prior to commencing the practice of law. Petitioner shall complete the Legal Ethics and Practice Program Ethics School no later than twelve (12) months from the date of this order as directed by the Court in its June 18, 2014, opinion. Petitioner shall file proof of completion of the program with the Commission on Lawyer Conduct no later than ten (10) days after the conclusion of the programs.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 3, 2015

The Supreme Court of South Carolina

In the Matter of Robert A. Gamble, Petitioner.

Appellate Case No. 2013-001939

ORDER

By opinion dated September 4, 2013, the Court suspended petitioner from the practice of law for eighteen (18) months, retroactive to August 24, 2011, the date of his interim suspension. *In the Matter of Gamble,* 405 S.C. 436, 748 S.E.2d 219 (2013). Petitioner filed a Petition for Reinstatement pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). After referral to the Committee on Character and Fitness (Committee), the Committee has filed a Report and Recommendation recommending the Court reinstate petitioner to the practice of law.

The Court grants the Petition for Reinstatement provided, however, that petitioner shall pay all outstanding license fees and penalties, if any, to the South Carolina Bar and shall be in full compliance with all continuing legal education requirements prior to commencing the practice of law. Petitioner shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School no later than twelve (12) months from the date of this order as directed by the Court in its September 4, 2013, opinion. Petitioner shall file proof of completion of the programs with the Commission on Lawyer Conduct no later than ten (10) days after the conclusion of the programs.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 3, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David R. Gooldy, Respondent,

v.

The Storage Center – Platt Springs, LLC, Appellant.

Appellate Case No. 2014-000741

Appeal From Lexington County
James O. Spence, Master-in-Equity

Opinion No. 5366
Heard November 4, 2015 – Filed December 9, 2015

REVERSED

Robert E. Stepp and Bess Jones DuRant, both of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellant.

James Randall Davis, of Davis Frawley Anderson McCauley Ayer Fisher & Smith, LLC, of Lexington, for Respondent.

THOMAS, J.: The Storage Center – Platt Springs, LLC (Storage Center) appeals the master-in-equity's order finding David R. Gooldy had easement rights over Storage Center's property and awarding Gooldy actual and punitive damages. On appeal, Storage Center argues the master erred in (1) finding the existence of an implied easement based on a deed that described the property by referencing a plat depicting a "50' Road" notation outside the boundary lines of the property

conveyed, (2) finding the existence of an implied easement when the common grantor's representative testified there was no intent to create an easement or road, and (3) awarding actual and punitive damages. We reverse.

FACTS AND PROCEDURAL HISTORY

Gooldy and Storage Center own adjacent properties in Lexington County. Gooldy's tract consists of .68 acres (the .68 acre tract) and Storage Center's tract consists of 7.35 acres (the 7.35 acre tract). Storage Center's property surrounds Gooldy's property like a horseshoe: it abuts Gooldy's property on the southern, western, and northern borders. Both properties border S.C. Highway 6 on their eastern boundaries. Gooldy claims to have an easement over an alleged road on Storage Center's property.

1. Background Information

In 1974, Congaree Associates[1] purchased a 500-acre tract of land containing the properties at issue. In 1983, Congaree recorded a subdivision plat for Westchester Phase I, containing thirteen lots bordering Highway 6 to the east and what would later become the .68 acre tract to the north. Robert Collingwood was the surveyor for the Westchester Phase I plat. Subsequently, Congaree commissioned Collingwood to prepare a preliminary plat for a proposed subdivision called Westchester Phase II. This plat depicts a 50-foot road abutting the southern border of what would later become the .68 acre tract. The Westchester Phase II plat was never recorded and the subdivision was never developed.

In 1985, James Loflin, Congaree's agent and employee, hired Collingwood to prepare a plat (the Loflin plat) of the .68 acre tract. The Loflin plat depicts only the .68 acre tract; neither Westchester Phase I nor the 7.35 acre tract is depicted. The plat includes the notation, "50' road" outside the southern boundary of the .68 acre tract, on what would later become the 7.35 acre tract. The 50-foot road notation is not listed as an easement and the length of the road is not discernible from the face of the plat. In 1986, Congaree, by its general partner Carroll McGee, conveyed the .68 acre tract to Loflin by a deed that referenced the Loflin plat. Every deed in the chain of title for the .68 acre tract incorporates the Loflin plat.

[1] Congaree is the common grantor of the .68 acre and 7.35 acre tracts.

Gooldy purchased the .68 acre tract on January 24, 2002, and used the area depicted as a 50-foot road on the Loflin plat to access his property. In describing the .68 acre tract, Gooldy's deed reads as follows:

> All those certain piece, parcel or lot of land, with all improvements thereon, situate, lying and being on the western side of S.C. Highway No. 6, approximately 580 feet south of the intersection of Platt Springs Road and S.C. Highway No. 6, near the town of Lexington, in the County of Lexington, State of South Carolina, and being shown and designated on [the Loflin plat]. The within described property contains .68 acre more or less.

Storage Center purchased the 7.35 acre tract on September 27, 2007. The deed to Storage Center's property does not reference the Loflin plat; instead, it references a plat (the Strasburger plat) that does not depict a 50-foot road on Storage Center's property. The Strasburger plat classifies the alleged road as a "parking and gravel drive encroachment." After purchasing the 7.35 acre tract, a Storage Center representative and Gooldy unsuccessfully attempted to negotiate a "shared access agreement" for the strip of land Gooldy used as a driveway. As a result, in 2009, Storage Center barricaded the driveway.

2. Procedural History

On February 1, 2010, Gooldy filed a complaint against Storage Center, seeking a declaratory judgment, injunctive relief, and damages. With the parties' consent, the circuit court referred the case to the master. Thereafter, both parties filed motions for summary judgment. In support of its motion, Storage Center filed an affidavit from Loflin, who attested the 50-foot road shown on the Loflin plat did not exist, was not part of the property he owned, and was not intended to create an easement. Loflin stated he never received an easement over the 7.35 acre tract.

The master denied the cross motions for summary judgment and the case proceeded to trial. At trial, Gooldy testified that after speaking with the seller's realtor and reviewing the Loflin plat, he believed he had an easement over the 7.35 acre tract for a driveway, and he relied on that belief in purchasing the property. Gooldy explained that as a result of Storage Center's barricade, he had to close his

business for one week to build a new driveway. He claimed it cost $10,000 to construct the new driveway and attributed half that cost to lost income.

McGee testified Congaree never installed the road in question. He acknowledged Congaree commissioned a plat for Westchester Phase II; however, he noted the plat was never recorded because the project was too costly. McGee testified Congaree did not intend to create any easement rights in conveying the .68 acre tract to Loflin. More specifically, McGee stated Congaree did not intend to convey any property outside the boundaries of the .68 acre tract depicted in the Loflin plat. McGee admitted he reviewed the Loflin plat before conveying the property to Loflin but stated he never gave Loflin permission to use the alleged 50-foot road. Additionally, McGee noted the Strasburger plat did not depict a road on the 7.35 acre tract because the road did not exist.

Charles Meeler, the surveyor who prepared the Strasburger plat, testified there was no road abutting the .68 acre parcel. Meeler explained he included the "parking and gravel drive encroachment" notation on the plat because he believed Gooldy was using Congaree's property as a driveway. Meeler did not include a 50-foot road on the Strasburger plat because after reviewing the Loflin plat and other county and state records, in his professional opinion, no road existed.

Rosser Baxter, an expert surveyor, opined the 50-foot road notation on the Loflin plat is not a plat of a road, does not create a road, and does not mean a road actually exists. Baxter testified the Loflin plat is a survey only of the .68 acre tract and nothing outside the boundaries of the tract was included in the survey. He stated the Loflin plat was "an individual lot plat," not a "subdivision plat." Baxter concluded, after reviewing the Loflin plat and public records, the 50-foot road designation was erroneously included on the Loflin plat.

The master concluded Gooldy was entitled to an easement because his deed referenced a plat showing the .68 acre tract bordered by a 50-foot road. The master also concluded evidence surrounding the initial conveyance of the .68 acre tract demonstrated Congaree and Loflin intended to create an easement over the road. Additionally, the master awarded Gooldy $2,500 for lost income and $7,500 in punitive damages. This appeal followed.

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action, and this [c]ourt reviews factual issues relating to the existence of an easement under a highly deferential standard." *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 153 (2008) (citation omitted). "In an action at law tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidentiary support for the judge's findings." *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct. App. 2008).

LAW/ANALYSIS

Storage Center argues the master erred in finding (1) the existence of an easement based on the deed's reference to the Loflin plat and (2) that Congaree and Loflin intended to create an easement in favor of the .68 acre tract. We agree.

"An easement is a right given to a person to use the land of another for a specific purpose." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). "Easements can arise by both express creation and by implication." *Inlet Harbour*, 377 S.C. at 91, 659 S.E.2d at 154. "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Ward v. Evans*, 387 S.C. 401, 409, 693 S.E.2d 7, 11 (Ct. App. 2010). "[W]here a deed describes land as is shown as a certain plat, such becomes a part of the deed." *Murrells Inlet*, 378 S.C. at 232, 662 S.E.2d at 455 (alteration in original).

"Although the incorporation by reference in a deed to a plat or map may create an easement by express grant, an easement by reference to a map or pla[t] is not an express easement but rather an easement by implication." 28A C.J.S. *Easements* § 96 (2008) (footnote omitted). "The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement." *Inlet Harbour*, 377 S.C. at 92, 659 S.E.2d at 154. "The purpose of an implied easement is to give effect to the intentions of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are not favored." *Id.* at 91-92, 659 S.E.2d at 154.

"[T]he intentions of the parties to the transaction are the overriding focus when examining implied easements." *Id.* at 92, 659 S.E.2d at 154. However, our courts have "developed various presumptions regarding the creation of implied easements in certain circumstances." *Id.* "One such presumption arises when an owner subdivides his land and has the land platted into lots and streets." *Id.* We have "recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat." *Id.* Thus, "[o]nce an easement is referenced in a plat, the easement is dedicated to the use of the owners of the lots, their successors in title, and to the public in general." *Ward*, 387 S.C. at 409, 693 S.E.2d at 11. "As to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made." *Murrells Inlet*, 378 S.C. at 233, 662 S.E.2d at 456.

Although a grantee is entitled to a presumption that a grantor intended to create an easement over a road appearing in a plat referenced in a deed, the presumption is not a rigid one. *See Inlet Harbour*, 377 S.C. at 93, 659 S.E.2d at 155 (discussing "problems that might occur if [appellate courts] were to apply a rigid presumption based solely upon particular geography or land division"). The presumption may be rebutted by evidence demonstrating the parties did not intend to create an easement. *See id.* ("[T]o the extent the [appellant] urges this [c]ourt to ignore everything except the deed's reference to a residential subdivision plat, this argument fails to remain true to the principles underlying implied easements."); *Murrells Inlet*, 378 S.C. at 234, 662 S.E.2d at 456 ("*Absent evidence of the seller's intent to the contrary*, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use." (emphasis added)).

Furthermore, a plat "is not an index to encumbrances." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 575, 635 S.E.2d 660, 668 (Ct. App. 2006) (emphasis omitted) (quoting *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 469, 144 S.E.2d 209, 211 (1965)). A deed that references a plat merely "for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of a clear intention that it so operate." *Id.* (emphasis omitted) (quoting *Lancaster*, 246 S.C. at 469, 144 S.E.2d at 211). Thus, in determining the existence of an

easement, "[o]ur guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance." *Inlet Harbour*, 377 S.C. at 93, 659 S.E.2d at 155.

1. Presumption of an Easement

We find the master erred in determining Gooldy was entitled to the presumption of an easement based on the deed's reference to the Loflin plat. We are mindful of the general rule "that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat." *Id.* at 92, 659 S.E.2d at 154. Nonetheless, our courts disfavor implied easements "because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself." *Id.* at 91-92, 659 S.E.2d at 154.

Both *Lancaster* and *Bennett* make clear that a plat "is not an index to encumbrances," and a deed that references a plat "for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of a clear intention that it so operate." *Lancaster*, 246 S.C. at 469, 144 S.E.2d at 211; *Bennett*, 370 S.C. at 575, 635 S.E.2d at 668. In the instant case, Gooldy's deed references the Loflin plat in a paragraph describing the .68 acre tract. The paragraph does not provide the metes and bounds of the property. However, the sentence following the reference to the Loflin plat states, "The within *described* property contains .68 acre more or less." (emphasis added). We find this sentence refers to the property *described* in the Loflin plat. In our view, the deed references the Loflin plat for descriptive purposes—to show the metes and bounds of the .68 acre tract—not for the purpose of granting an easement in favor of the .68 acre tract over an alleged road depicted outside the boundaries of the property. Accordingly, we hold the record does not support the master's finding that Gooldy was entitled to the presumption of an easement because his deed referenced the Loflin plat. *See Inlet Harbour*, 377 S.C. at 91, 659 S.E.2d at 153 ("The determination of the existence of an easement is a question of fact in a law action, and this [c]ourt reviews factual issues relating to the existence of an easement under a highly deferential standard." (citation omitted)).

2. Intent Analysis

We find the master also erred in determining the evidence surrounding the initial conveyance of the .68 acre tract demonstrated the parties' intent to create an easement. "The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement." *Id.* at 92, 659 S.E.2d at 154. In evaluating the parties' intent, we note "the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance." *Id.* at 93, 659 S.E.2d at 155.

First, uncontroverted evidence demonstrates the parties to the initial conveyance did not intend to create an easement. McGee testified Congaree did not intend to create any easement rights when it conveyed the .68 acre tract to Loflin. He stated Congaree did not intend to convey any property outside the boundary lines of the .68 acre tract depicted on the Loflin plat. He also claimed Congaree never gave Loflin permission to use the strip of land depicted as a 50-foot road. Similarly, Loflin attested the 50-foot road shown on the Loflin plat did not exist, was not part of the property he owned, and was not intended to create an easement. Loflin stated he never received an express or implied easement over the 7.35 acre tract. Accordingly, the testimony of the parties to the initial conveyance demonstrates neither party intended to create an easement.

Second, the deed itself does not manifest the parties' intent to create an easement. We recognize "[r]ecordation of a plat containing an easement *may* be sufficient to show that the owner intended to dedicate that easement." *Murrells Inlet*, 378 S.C. at 234, 662 S.E.2d at 456 (emphasis added). However, recordation of the Loflin plat is not dispositive of the parties' intent in this case. *See Inlet Harbour*, 377 S.C. at 93, 659 S.E.2d at 155 ("[T]o the extent the [appellant] urges this [c]ourt to ignore everything except the deed's reference to a residential subdivision plat, this argument fails to remain true to the principles underlying implied easements."). As previously discussed, Gooldy's deed incorporates the Loflin plat only to describe the metes and bounds of the property, not to create an easement in an alleged road depicted outside those boundaries.

Third, although the master noted the unrecorded Westchester Phase II plat depicted a road in the same location as the Loflin plat, Congaree never developed Westchester Phase II, and McGee testified Congaree never installed the road

depicted in the Westchester Phase II plat. Indeed, no recorded plat—other than the Loflin plat—depicts the road Gooldy was using as a driveway. Moreover, Meeler and Baxter—both surveyors who reviewed the properties, Loflin plat, and other public records—testified no road existed in the area Gooldy claimed an easement.

Based on our analysis of the facts and circumstances surrounding the conveyance, the property, the parties, and other characteristics, we find there is no evidence to support the master's conclusion that Congaree and Loflin intended to create an easement. Accordingly, we reverse the master's order finding Gooldy had easement rights over Storage Center's property.

3. Damages

Based on our conclusion that the master erred in determining Gooldy had easement rights over Storage Center's property, we find the master also erred in awarding damages arising from Storage Center's conduct. As a result, the master's damages awards are reversed.

CONCLUSION

We hold the master erred in finding Gooldy had easement rights over a road on Storage Center's property and awarding Gooldy damages. The master's order is therefore

REVERSED.

HUFF, and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Auto-Owners Insurance Company, Appellant,

v.

Elouise Woody Benjamin, Melvin Benjamin, Joshua Lee Cail, Naida L. Singleton, and Pee Dee Heating and Cooling Specialists, Defendants,

Of whom Elouise Woody Benjamin and Melvin Benjamin are the Respondents.

Appellate Case No. 2013-001321

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

Opinion No. 5367
Heard November 4, 2014 – Filed December 9, 2015

AFFIRMED

Dominic Allen Starr and Alan Grant Jones, both of McAngus, Goudelock, & Courie, of Myrtle Beach, for Appellant.

Robert Norris Hill, of the Law Office of Robert Hill, of Lexington, and William P. Hatfield, of Hatfield Temple, LLP, of Florence, for Respondents.

MCDONALD, J.: In this declaratory judgment action, Auto-Owners Insurance Company (Auto-Owners) appeals the circuit court's grant of summary judgment in favor of Respondents Elouise and Melvin Benjamin (collectively, the Benjamins). Auto-Owners argues the circuit court erred in determining that a commercial general liability policy (CGL Policy) issued to Pee Dee Heating and Cooling Specialists, Inc. (Pee Dee) provided additional coverage for injuries sustained by Elouise Benjamin in an automobile accident involving a Pee Dee employee. We affirm.

FACTS/PROCEDURAL BACKGROUND

Naida Singleton and Brett Singleton own and operate Pee Dee, which is located in Chesterfield County. On February 14, 2008, Auto-Owners issued Pee Dee an automobile insurance policy (Auto Policy). The Auto Policy provided $300,000 in coverage for combined liability, uninsured, and underinsured protection on five scheduled drivers and six scheduled vehicles, as well as comprehensive coverage, collision, and "road trouble service."

On February 15, 2008, Auto-Owners issued Pee Dee a CGL Policy providing $2,000,000 in commercial general liability coverage and an endorsement providing $1,000,000 in liability coverage for "hired auto" and "non-owned auto." The policy provisions forming the basis of the inquiry in this case are contained in three portions of the CGL Policy: (1) the commercial general liability Aircraft, Auto or Watercraft Exclusion (the Exclusion); (2) the commercial general liability Other Insurance Condition (the Condition); and (3) the commercial general liability Endorsement (the Endorsement).

Pursuant to the Exclusion, found in **Section I - COVERAGES, Coverage A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, Exclusion g. Aircraft, Auto or Watercraft**, no coverage exists for the following:

> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading".
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the

supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured.

The Condition, found in **Section IV - COMMERCIAL GENERAL LIABILITY CONDITIONS**, provides in pertinent part:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, or contingent or on any other basis:

. . . .

(d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I -** Coverage **A** - Bodily Injury and Property Damage Liability.

. . . .

> We will share the remaining loss, if any, with any other insurance that is not described in the Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

Finally, the Endorsement modifies the insurance provided by the CGL "**COVERAGE PART**." Pursuant to the second section of the Endorsement, titled "**HIRED AUTO AND NON-OWNED AUTO LIABILITY**," the CGL Policy states the following:

> Coverage for "bodily injury" and "property damage" liability under **SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**, is extended as follows under this item, but only if you do not have any other insurance available to you which affords the same or similar coverage.
>
> **Coverage**
>
> We will pay those sums the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" arising out of the maintenance or use of an "auto":
>
> a. You do not own;
>
> b. Which is not registered in your name; or
>
> c. Which is not leased or rented to you for more than ninety consecutive days and which is used in your business.
>
> **Exclusions**
>
> With respect only to **HIRED AUTO AND NON-OWNED AUTO LIABILITY**, the exclusions which apply to **SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE**

> **LIABILITY**, other than the Nuclear Energy Liability Exclusion Endorsement, do not apply . . .

Although the CGL Policy generally excluded automobile accidents under the Exclusion, Pee Dee purchased the Endorsement, which, in limited circumstances, provided liability coverage under the CGL Policy for "bodily injury" and "property damage" arising out of an automobile accident. However, the CGL Policy contained a clause stating the Endorsement only applied "if you do not have any other insurance available to you which affords the same or similar coverage." April 1, 2008 was the effective date for both the CGL Policy and its Endorsement as well as the Auto Policy.

On April 7, 2008, a Pee Dee employee, Joshua Lee Cail, was involved in an automobile accident with Elouise Benjamin. At the time of the accident, Cail was driving a 2004 Toyota Tacoma pickup truck owned by Naida Singleton, used by Pee Dee for business purposes, and insured by the Auto-Owners Auto Policy. Elouise Benjamin's medical expenses exceed $500,000.

On May 15, 2008, the Benjamins filed suit against Naida Singleton, Cail, and Pee Dee for injuries and damages resulting from the automobile accident. Auto-Owners filed a declaratory judgment action on December 19, 2008, seeking a declaration that the Auto Policy did not provide coverage for Cail because, at the time of the accident, he was not a permissive driver as required by the Auto Policy. The circuit court disagreed, determining that Cail was a permissive driver under the Auto Policy at the time of the accident.[1]

On June 14, 2011, Auto-Owners and the Benjamins entered into a settlement agreement providing that Auto-Owners would pay the Benjamins the Auto Policy limits of $300,000. In turn, the Benjamins released Cail and Auto-Owners under the Auto Policy and signed a covenant not to execute against Singleton and Pee Dee. The settlement agreement further provided that Auto-Owners reserved the right to seek a declaratory judgment to determine whether the CGL Policy provided coverage for the automobile accident. The Benjamins agreed that if the circuit court determined the CGL Policy provided coverage for their claims, the total recovery available would be the aggregate amount of $300,000 from the Auto Policy and the applicable limits of the CGL Policy.

[1] This order was not appealed.

Auto-Owners filed the current declaratory judgment action on July 8, 2011. Both Auto-Owners and the Benjamins filed cross motions for summary judgment as to whether the CGL Policy provided coverage for the Benjamins' claims. Following a January 28, 2013 hearing, the circuit court granted the Benjamins' motion for summary judgment and denied Auto-Owners' cross-motion by order filed March 22, 2013. On June 3, 2013, the circuit court denied Auto-Owners' motion to alter or amend.

ISSUE ON APPEAL

Did the circuit court err in finding Pee Dee's CGL Policy provided coverage in addition to that provided by the Auto Policy?

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). The circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). "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." *Id.* (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)).

LAW/ANALYSIS

Auto-Owners contends the circuit court erred in granting the Benjamins' motion for summary judgment, arguing that the CGL Policy's Endorsement provides no coverage for the automobile accident due to the "same or similar coverage" provided by the Auto Policy. We disagree.

"Insurance policies are subject to the general rules of contract construction." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628

(2012) (quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574). Whether the language of a contract is ambiguous is a question of law for the court. *Id.* "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" *Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, this court must construe "[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer." *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (quoting *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797). "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).

In *Beaufort County School District*, this court explained the differences between a patent ambiguity and a latent ambiguity:

> A patent ambiguity is one that arises upon the words of a will, deed, or contract. A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. Interpretation of an unambiguous policy, or a policy with a patent ambiguity, is for the court. Interpretation of a policy with a latent ambiguity is for the jury.

392 S.C. at 526, 709 S.E.2d at 95–96 (citations omitted).

Here, the Benjamins' "bodily injury" and "property damage" arose out of the maintenance or use of an "auto" owned by Naida Singleton, driven by Cail, and insured under Auto-Owners' Auto Policy. Pee Dee is the named insured on the Auto Policy as well as the CGL Policy and its Endorsement. Although Cail was not listed as a scheduled driver on the Auto Policy, the circuit court found that he was a permissive user and was therefore covered under the Auto Policy.

Our review of the record reveals Pee Dee satisfied the requirements for CGL coverage as listed in the Endorsement. Specifically, Pee Dee did not own the 2004 Toyota Tacoma pickup truck involved in the accident; the truck was not registered in Pee Dee's name; the truck was not leased or rented to Pee Dee for more than ninety consecutive days; the truck was used in Pee Dee's business; and the truck was one of the six automobiles described in the Declarations Section of the Auto Policy. Despite the fact that the truck was covered by Auto-Owners' Auto Policy, we agree with the circuit court that the Endorsement also provided coverage.

According to Auto-Owners, "[t]he Endorsement is neither supplemental nor excess coverage to the Auto Policy. . . . [I]t provides coverage to Pee Dee for a different set of facts." We disagree. The exclusions applicable to **SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY** of the CGL Policy—with the exception of one, which is not applicable here—do not apply to Pee Dee's CGL Policy because Pee Dee purchased the Endorsement. Consideration of the Condition, found in **SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS**, demonstrates that the CGL Policy and its Endorsement are in fact supplemental or excess coverage to the Auto Policy because "the loss [arose] out of the maintenance or use of" the 2004 Toyota Tacoma, which is "not subject to Exclusion **g.** of Section **I -** Coverage **A -** Bodily Injury and Property Damage Liability." Thus, we find the circuit court properly concluded that Auto-Owners' "CGL Policy provides coverage for the accident at issue through its Endorsement" and did not err in granting the Benjamins' motion for summary judgment on the additional coverage argument.

A. The Term "Same"

Auto-Owners argues "the inclusion of the term 'same' precludes the court from interpreting [similar] to mean 'the same' or 'identical.'" However, Auto-Owners did not address the term "same" in its motion for summary judgment, its reply to Respondents' response in opposition, or its motion to alter or amend. Additionally,

the circuit court did not address the interpretation of the term "same" in its order granting the Benjamins' motion for summary judgment or its order denying Auto-Owners' motion alter or amend. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Moreover, Auto-Owners' argument regarding the term "same" is limited to one sentence and fails to cite to any authority. *See* Rule 208(b)(1)(D), SCACR (requiring discussion of the appellant's legal arguments and citations to authorities); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal). Therefore, we find this argument is not preserved for appellate review.

B. "Similar Coverage" Provision

Auto-Owners argues the circuit court erred in finding the "similar coverage" provision of the Endorsement was ambiguous and in relying on *South Carolina Farm Bureau Mutual Insurance Company v. Courtney*, 342 S.C. 271, 536 S.E.2d 689 (Ct. App. 2000), *aff'd on other grounds*, 349 S.C. 366, 563 S.E.2d 648 (2002) (holding an automatic termination clause allowing unilateral cancellation by insurer when the insured obtains similar coverage on a covered automobile is invalid). We disagree.

In *Courtney*, a husband and wife owned a Saturn and a Chevrolet Camaro, which were insured by Farm Bureau under separate policies. 342 S.C. at 273, 536 S.E.2d at 690. Both policies included underinsured motorist coverage (UIM) in limits of $100,000 per person and $300,000 per occurrence, with property damage limits of $25,000 per accident (100/300/25). *Id.* In September 1997, wife was involved in an accident, and the Camaro was subsequently declared a total loss. *Id.* Farm Bureau tendered payment under the vehicle's collision coverage. *Id.* Although the policy on the Camaro was set to expire on October 4, 1997, Farm Bureau neither issued husband a notice of cancellation nor refunded any unearned premiums. *Id.* Using the proceeds from the policy on the Camaro, wife purchased a pick-up truck, which she insured with Unisun on October 8, 1997, without husband's knowledge or consent. *Id.* The Unisun policy provided personal liability limits of $15,000 per person and $30,000 per occurrence, with property damage limits of $25,000. *Id.* Although the Unisun policy provided identical uninsured motorist coverage, it did not provide any UIM coverage. *Id.* at 274, 536 S.E.2d at 690.

On October 27, 1997, husband was seriously injured in an accident while driving the Saturn. *Id.* Husband's medical bills and other losses exceeded the amount received from the at-fault driver's insurer. *Id.* Farm Bureau paid husband the UIM limits from the Saturn's policy "but denied his attempt to stack UIM coverage from the Camaro's policy, claiming the Unisun policy obtained by [wife] automatically terminated Farm Bureau's policy on the Camaro." *Id.* Farm Bureau brought a declaratory judgment action, seeking a determination as to its obligation under the Camaro's policy. *Id.* The circuit court found that the Unisun policy on the pick-up truck was not "similar" insurance sufficient to invoke the automatic termination clause in the Farm Bureau policy on the Camaro. *Id.* at 275, 536 S.E.2d at 691. This court affirmed, concluding that because the Unisun policy differed "in both the amount of coverage and the kind of coverage provided, the policies will not be held to be 'similar' insurance." *Id*. at 279, 536 S.E.2d at 693. Our supreme court agreed with this construction of the automatic termination clause, but went a step further, concluding "such a clause is not valid in any event." *Courtney*, 349 S.C. at 372, 563 S.E.2d at 651.

Here, the circuit court found the "similar coverage" provision of the Endorsement to be ambiguous, and thus was required to construe the provision liberally in favor of the Benjamins and strictly against Auto-Owners. *See, e.g.*, *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (explaining that appellate courts must construe "[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer" (quoting *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797)); *Clayton*, 364 S.C. at 560, 614 S.E.2d at 614 (clarifying that insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability"). The circuit court was not persuaded by Auto-Owners' argument that "the *Courtney* decisions are inapplicable here" and instead "[found] them instructive."[2]

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[2] The circuit court explained: "The court of appeals' discussion [in *Courtney*] as to the ambiguity of the term 'similar' focused on the ambiguous nature of the term itself rather than its unique context within automatic termination clauses, stating, 'It is difficult to imagine being called upon to interpret a more imprecise term.' *Id*. at 275, 536 S.E.2d at 691."

Several jurisdictions have concluded that the term "similar" is inherently vague in a number of contexts. *See, e.g.*, *McCuen v. Am. Cas. Co. of Reading, Pa.*, 946 F.2d 1401, 1408 (8th Cir. 1991) (explaining the term "similar" is "so elastic, so lacking in concrete content," that it imports "substantial ambiguities" into an officer and director's liability policy); *Am. Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51, 56 (Mo. Ct. App. 2006) (concluding the clause "other similar insurance" is ambiguous because it could mean the underinsured coverage is excess over any other applicable coverage or it could mean the underinsured coverage is excess over any other underinsured motorist coverage); *Knowlton v. Nationwide Mut. Ins. Co.*, 670 N.E.2d 1071, 1074 (Ohio Ct. App. 1996) (finding that "'similar coverage' given its ordinary and usual meaning, is reasonably susceptible of more than one interpretation and is therefore ambiguous. By its very definition 'similar' is a broad term and would permit [insurer] to deny uninsured coverage to any 'other person' who has applicable coverage under some sort of insurance policy, not just uninsured motorist coverage."); *Caldwell v. Transp. Ins. Co.*, 364 S.E.2d 1, 2–3 (Va. 1988) (holding a policy exclusion of loss of property "while below ground surface in mining, tunneling, or *similar operation*" was insufficiently precise to exclude coverage of loss of equipment during drilling of well) (emphasis added)).

Conversely, other jurisdictions have concluded that the term "similar" is not ambiguous. *See, e.g.*, *Cal. Dairies Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1037–38 (E.D. Cal. 2009) (noting that if the court were to define the term "similar" as the "same" or "identical," that definition would defeat the exclusionary provision's purpose of avoiding the moral hazard of employers insuring against labor law violations); *Gangi v. Sears, Roebuck & Co.*, 360 A.2d 907, 908 (Conn. Super. Ct. 1976) (explaining that the word "similar" as ordinarily used means "general likeness although allowing for some degree of difference"); *Newman v. Raleigh Internal Med. Assocs., P.A.*, 362 S.E.2d 623, 626 (N.C. Ct. App. 1987) (finding that "similar" is a commonly used word, with an easily ascertainable definition in an employment contract dispute).

In this case, the Endorsement clause provides coverage under the CGL Policy for "bodily injury" and "property damage" arising out of an automobile accident in limited circumstances, "but only if you do not have any other insurance available to you which affords the same or similar coverage." Because the term "similar" is not defined in the CGL Policy or its Endorsement, it must be defined according to the usual understanding of the ordinary person. *See Beaufort Cty. Sch. Dist.*, 392

S.C. at 518, 709 S.E.2d at 91 (stating policy language must be given its "plain, ordinary, and popular meaning").

The term "similar" means "having likeness or resemblance especially in a general way." *Random House College Dictionary* 1226 (rev. ed. 1980). The term "similar" is also defined as:

> Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness, although allowing for some degree of difference. . . . [S]imilar is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases "similar" may mean identical or exactly alike. It is a word with different meanings depending on [the] context in which it is used.

Similar, BLACK'S LAW DICTIONARY (6th ed. 1990).

That the term "similar" is not defined in the Endorsement creates ambiguity as to its precise meaning.[3] We find *Courtney*, as well as case law from other jurisdictions, supports our conclusion that "similar" is ambiguous as used in the policy because it is neither defined by the policy nor is the definition easily ascertainable. As the drafter of the CGL Policy and Endorsement, Auto-Owners could have easily defined the phrase "similar coverage" to include the Auto Policy. Likewise, Auto-Owners could have excluded coverage in the event of "any other insurance policy." Moreover, Auto-Owners could have drafted the Endorsement so that the "similar coverage" exclusion applied to a different insurance policy with different coverage sold by Auto-Owners to the same policy holder. Because the burden rests with the insurer to clearly enumerate the terms in its policy—and ambiguous terms are to be construed strictly against the insurer—we find the circuit court properly construed the Endorsement in favor of coverage. *See Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d

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[3] *See Courtney*, 342 S.C. at 275 n.2, 536 S.E.2d at 691 n.2 (stating "words are ambiguous when 'their signification seems doubtful and uncertain to persons of competent skill and knowledge to understand them'" (quoting *Similar*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

912, 915 (1995) (holding that ambiguities are strictly construed against the insurer).

C. Interpretation of "Similar" within the Context of the Policy

Auto-Owners further contends that the circuit court erroneously interpreted the term "similar" without properly considering the context in which it was used in the policy. We disagree.

In its order, the circuit court concluded that the *Courtney* court's focus was "term-centric" and that the word "similar" was as ambiguous in the Endorsement as it was in the *Courtney* policy. Like the circuit court, we recognize "the 'vast difference' in coverage between the two policies," and we agree that the coverage provided by the two policies is not "similar."

Auto-Owners contends the Auto Policy and Endorsement have "characteristics in common" and are "alike although not identical." Both policies provide coverage for "bodily injury" and "property damage" liability from the maintenance or use of an automobile, coverage to Pee Dee and any permissive user, and protection from personal liability arising out of an auto accident. However, our review of the policies as a whole reveals a number of differences between the Auto Policy and the CGL Policy's Endorsement:

	Auto Policy	**CGL Policy Endorsement**
Issued	February 14, 2008	February 15, 2008
Effective	April 1, 2008	April 1, 2008
Limits	$300,000	$1,000,000
Coverage	Liability, UM, UIM, collision, and "road trouble service"	Liability in limited circumstances
Scheduled Drivers	5 total	None
Scheduled Vehicles	6 automobiles including the 2004 Toyota Tacoma	None
Application	5 scheduled drivers as well as any permissive drivers and the 6 scheduled automobiles as described in the Declarations	Automobile must be used in your business and must be one which you do not own; is not registered in your name; and is not leased or rented to you for more than 90 consecutive days

In the context of the Endorsement providing coverage for "bodily injury" and "property damage" liability under the CGL Policy, "but only if you do not have any other insurance available to you which affords the same or similar coverage[,]" the term "similar" modifies "coverage." The circuit court concluded that "[d]ue to the $700,000 difference in coverage between the two policies . . . the coverage provided by the two policies is not 'similar.'" *See Motors Ins. Corp. v. Bodie*, 770 F. Supp. 547, 550 (E.D. Cal. 1991) (holding the motors policy is not enough like the financial policies to be found similar, "they provide different limits for third party liability . . . likely to be the most important and significant difference in the eyes of the insured"); *Emp'rs Mut. Cas. Co. v. Martin*, 671 A.2d 798, 801 (R.I. 1996) (finding the disparity in coverage between the policies precluded any interpretation that they represented similar insurance as intended by the policy language).

Here, the Endorsement coverage differs from that of the Auto Policy in not only the amount of coverage, but also the type of coverage provided, as well as its application. Therefore, the policies do not afford "similar coverage" as contemplated in the Endorsement. Accordingly, we find the circuit court properly granted the Benjamins' motion for summary judgment.

CONCLUSION

For the foregoing reasons, we hold the circuit court properly determined that Pee Dee's CGL Policy provided coverage in addition to that disbursed under the Auto Policy. Accordingly, the ruling of the circuit court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Transportation,
Respondent,

v.

David Franklin Powell, Appellant.

Appellate Case No. 2013-001759

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5368
Heard December 10, 2014 – Filed December 9, 2015

AFFIRMED

Howell V. Bellamy, Jr. and Robert S. Shelton, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Appellant.

John B. McCutcheon, Jr., of Thompson & Henry, P.A., of Conway; and Beacham O. Brooker, Jr., of the South Carolina Department of Transportation, of Columbia, for Respondent.

LOCKEMY, J.: In this appeal from a condemnation action, David Powell argues the circuit court erred in granting the South Carolina Department of Transportation's (SCDOT) motion for partial summary judgment. We affirm.

FACTS/PROCEDURAL BACKGROUND

On August 27, 2010, SCDOT filed a notice of condemnation acquiring 0.183 acres of a 2.51 acre tract of unimproved land owned by Powell at the northeast corner of Old Socastee Highway and Emory Road in Horry County. The acquisition occurred in conjunction with a highway improvement project involving nearby Highway 17. SCDOT offered Powell $72,000 for the condemned property. Powell rejected SCDOT's offer and requested a jury trial to determine just compensation.

Prior to the condemnation, Powell's property was accessible from Highway 17 via Emory Road. As a result of SCDOT's highway improvement project, the intersection of Emory Road and Highway 17 was closed and Powell's property was accessible only from Highway 17 via an entrance one mile north of his property on to Old Socastee Highway. Powell's property was taken for the purpose of converting the corner of Emory Road and Old Socastee to a curve. Prior to the start of trial, SCDOT changed its road plan. As a result of the change, Old Socastee Highway would no longer extend to the entrance to Highway 17, but would dead-end into a cul-de-sac just north of Powell's property. In order to access Powell's property from Highway 17 after the road change motorists would have to travel a longer distance (roughly 2 miles).

On March 14, 2013, SCDOT submitted the revised appraisal report of its real estate valuation expert, Corbin Haskell, outlining his opinion of just compensation under SCDOT's changed road plan. Whereas Haskell had assessed no damages to Powell's remaining property in any of his three prior reports, in his fourth report Haskell determined Powell's remaining property had been damaged fifty percent as a result of the taking, and he was entitled to compensation in the amount of $517,000.

One week later, SCDOT submitted a fifth appraisal report from Haskell. As he did in his first three reports, Haskell determined there were no damages to the remainder of Powell's property. On the cover of his report, Haskell included the following disclaimer: "I have been requested to revise my appraisal since legal counsel advises that the reconfiguration of the roadways does not constitute damages to the remainder in this case. Therefore, there are no damages to the subject as the property will have full ingress/egress via an adjoining road 'after' the acquisition."

On March 25, 2013, SCDOT filed a motion in limine to exclude any evidence of diminution in the value of Powell's remaining property caused by the loss of access to Highway 17. SCDOT asserted Powell's property did not abut Highway 17 and he had no private property right with respect to that road. SCDOT maintained Powell's easements with respect to the public roads his property abutted had not been disturbed by the project. Additionally, SCDOT requested the court exclude damages to the remainder of Powell's property caused by loss of visibility from Highway 17. At the hearing on SCDOT's motion, Powell's counsel requested SCDOT convert its motion to one of partial summary judgment to accommodate an appeal. SCDOT agreed to do so. In a May 14, 2013 order, the circuit court granted SCDOT's motion for partial summary judgment. Citing *Hardin v. South Carolina Department of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007), the court found Powell's loss of access was not compensable and excluded any evidence regarding change in access from the trial. The court declined to rule on the issue of loss of visibility. Powell's subsequent Rule 59(e), SCRCP, motion to alter or amend was denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. *Hardin*

Powell argues the circuit court erred in finding our supreme court's holding in *Hardin v. South Carolina Department of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007), an inverse condemnation case, prevents the consideration of access damages to remaining property in direct condemnation actions.

Under South Carolina's Constitution, "private property shall not be taken for public use . . . without 'just compensation' being first made for the property." S.C. Const. art. I, § 13(A). "In determining just compensation, only the value of the property

to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered." S.C. Code Ann. § 28-2-370 (2007).

> In order for the landowner to be compensated fully, the government must "put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking."

S.C. Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 148, 522 S.E.2d 822, 826 (Ct. App. 1999) (quoting *Phelps v. United States*, 274 U.S. 341, 344, 47 S.Ct. 611 (1927)).

In *Hardin*, the plaintiffs filed an inverse condemnation action against SCDOT alleging the closure of a break in the median of an abutting highway deprived the traffic leaving their properties of the ability to cross the highway and constituted a taking. 371 S.C. at 603, 641 S.E.2d at 440. The trial court ruled the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *Id.* at 603, 641 S.E.2d at 440. The supreme court reversed the court of appeals and found there was no taking. *Id.* at 610, 641 S.E.2d at 444.

Prior to *Hardin*, "a landowner's ability to recover damages as a result of a re-configuration of road access depended on the location of his land with reference to the road vacated and the effect of the vacation on his rights as an abutting landowner." *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citing *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946)). "The *Cothran* [c]ourt held a landowner is not entitled to recover damages unless he has sustained a 'special injury,' which is an injury different in kind and not merely in degree from that suffered by the public at large." *Id.* (citing *Cothran*, 209 S.C. at 368-69, 40 S.E.2d at 243-44). "In *Hardin*, the [c]ourt abandoned the 'special injury' analysis which previously existed in this state's jurisprudence, and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements." *Id.* (citing *Hardin*, 371 S.C. at 609, 641 S.E.2d at 443).

Pursuant to *Hardin*, "a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road." 371 S.C. at 606, 641 S.E.2d at

442. A property owner "also has an easement for access to and from the public road system." *Id.* The *Hardin* court held

> [a]s long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Further, as long as a landowner still has access to the public road system, this easement is unaffected. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction.

Id. at 607, 641 S.E.2d at 442 (footnote omitted). The *Hardin* court found the plaintiffs continued to have a means of ingress and egress from the highway and the public road system, and therefore, their property rights had not been disturbed. 371 S.C. at 610, 641 S.E.2d at 444.

Here, Powell argues the issue of admissibility of evidence relating to the increased remoteness and complexity of access to his property resulting from the SCDOT road project is essential to the determination of just compensation. He asserts that because his property is zoned "highway commercial," the ease of access to his property affects its value. Powell contends the route to his property is no longer visible to northbound travelers on Highway 17 and is only accessible indirectly.

Powell further maintains that had the legislature intended to prevent consideration of any particular evidence of diminution in value to remaining property, it could have inserted limitation language into the Eminent Domain Procedure Act. Instead, Powell notes, section 28-2-370 provides *any* diminution in value of a landowner's remaining property is to be considered in determining just compensation. *See* S.C. Code Ann. § 28-2-370 (2007) ("In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered.").

Powell argues the circuit court's reliance on *Hardin* is improper. In *Hardin*, our supreme court held the first step in determining if a taking occurred is to look at the property right the plaintiff held prior to the government action for which the plaintiff complained. 371 S.C. at 609, 641 S.E.2d at 443. Next, the court must determine whether the government action materially injured the property right such that the plaintiff "no longer enjoyed the reasonable means of access to which it was

entitled." *Hilton Head Auto., LLC v. S.C. Dep't of Transp.*, 394 S.C. 27, 31, 714 S.E.2d 308, 310 (2011). Powell contends the *Hardin* analysis is unnecessary in direct condemnation cases, like the present case, where a taking has already been established. He asserts that pursuant to section 28-2-370, the court must consider *all* evidence of damage to the landowner.

Conversely, SCDOT argues redesigning highways and redirecting traffic are police power regulations. SCDOT asserts any diminution in the value of Powell's remaining property after the closure of the intersection of Emory Road and Highway 17 is an incidental result of a police power of the State, not one of eminent domain, and is not compensable. SCDOT contends the closure of the intersection was not a taking that deprived Powell of any pre-existing property right. Additionally, SCDOT contends Powell's property still has full access to each of the roads it abuts (Emory Road and Old Socastee Highway) and to the general system of roads by traveling south on Emory Road. SCDOT argues the added distance is not unreasonable and neither of the easements described in *Hardin* have been taken.

We find *Hardin* is not applicable to the present case. *Hardin* is an inverse condemnation case which does not involve the physical appropriation of private property. Here, the relevant question to consider is whether Powell is entitled to compensation for access damages to his remaining property where there was physical appropriation of land by SCDOT.

The factual scenario presented here is similar to that in *South Carolina State Highway Department v. Carodale Associates*, 268 S.C. 556, 235 S.E.2d 127 (1977). In *Carodale*, the highway department acquired 0.47 acres of land from the landowner for the construction of an exit ramp off Interstate 77 in Richland County. 268 S.C. at 560, 235 S.E.2d at 128. Part of the project also involved the relocation of part of Highway 1 upon which the landowner's property abutted. *Id.* The property was afforded access to the relocated Highway 1 by the construction of a connecting street. *Id.* The supreme court reversed the award of damages to the landowner's remaining land attributable to the diversion of traffic previously passing its property. *Id.* at 564, 235 S.E.2d at 130. The court declared the State is under no duty to maintain a minimum level of traffic flow. *Id.* at 561, 235 S.E.2d at 128. Further, the *Carodale* court held

> [c]losing a street inherently produces a diversion of traffic and loss of frontage on a viable traffic artery. However, these repercussions are not compensable

> elements of damage. Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation.

Id. at 561, 235 S.E.2d at 129.

Viewing the evidence in the light most favorable to Powell, we hold the circuit court did not err in finding any diminution in value of Powell's property as a result of the change in road access is not compensable. While the circuit court's reliance on *Hardin* was error, pursuant to *Carodale*, a landowner has no vested rights in the continuance of a public highway and in the continuation of maintenance of traffic flow past his property. Therefore, any damage to the remainder of Powell's property as a result of the closure of the intersection of Emory Road and Highway 17 is not compensable. Moreover, we note Powell has not lost his right of ingress or egress to and from his property. Powell had access to Old Socastee Highway and Emory Road prior to the road project and will continue to have access to Old Socastee Highway and Emory Road following the completion of road project.

II. *Wilson*

The circuit court found Powell's property was taken for the purpose of rounding the intersection of Emory Road and Old Socastee Highway, and SCDOT could have eliminated the intersection of Emory Road and Highway 17 without taking Powell's property. On appeal, Powell asserts this finding is not supported by any evidence in the record. Powell argues this finding by the court created an inference that could erroneously distinguish the closure of the intersection and the creation of the Old Socastee Highway cul-de-sac from the highway project for which the present action was filed. Relying on *South Carolina State Highway Department v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970), Powell asserts SCDOT's condemnation of a portion of his property was part of its overall road project and he is entitled to recover access damages to his remaining property.

In *Wilson*, the highway department took a portion of Wilson's property in order to align a county road running alongside her property with U.S. 15 which her property abutted. 254 S.C. at 363, 175 S.E.2d at 393. Concurrently, the department constructed a raised concrete median in the center of U.S. 15 eliminating her ability to make left turns onto U.S. 15 from her property. *Id.* at 363-64. The supreme court found that "[w]hile the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting

compensable damage to an abutting property owner, in the instant case the proposed median is only an incidental part of the overall Department plans and contemplated construction." *Id.* at 368, 175 S.E.2d at 396. The court held

> [b]ut for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain . . . .

Id. at 369, 175 S.E.2d at 396.

SCDOT argues *Wilson* represents a close factual case between acts of eminent domain and police power actions for which no compensation is due. It contends the federal courts have formalized a three part rule to distinguish damages resulting from a taking and damages resulting from concurrent police power acts in the same project. The "*Campbell* rule," SCDOT asserts, is contained in three cases: *Campbell v. United States*, 266 U.S. 368 (1924); *West Virginia Pulp & Paper Co. v. United States*, 200 F.2d 100 (4th Cir. 1952); and *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961).

In *Campbell*, the United States condemned 1.81 acres of Campbell's land along with 1,300 acres owned by other landowners to construct a nitrate plant. 266 U.S. at 369. Campbell appealed the refusal of the district court to award him any damages for diminution in value to his remaining land. *Id.* at 369-70. The government did not propose to use Campbell's land for industrial purposes. Rather, the plant would be physically located on land taken from the other landowners. The Supreme Court held that the proposed use of land by the government taken from others did not constitute a taking of Campbell's property. 266 U.S. at 371. It noted that, if the neighboring landowners had put their land to the identical use that the government proposed, Campbell would have no right to prevent it. *Id.* at 371-72. In summary, the court stated,

> [t]he rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in

> value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Id. at 372.

The Fourth Circuit in *West Virginia Pulp & Paper* distinguished *Campbell* and awarded compensation for damages to the remainder of the condemnee's property for the diminution in value to two other contiguous tracts owned by the condemnee. 200 F.2d at 103. The court noted that just compensation "includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted." *Id.* at 102 (quoting *United States v. Grizzard*, 219 U.S. 180, 183 (1911)).

The Ninth Circuit in *Pope & Talbot*, established a corollary rule to *Campbell*. There, the United States had taken part of Pope & Talbot's land and the land of other owners for a dam project. 293 F.2d at 823. The land taken from Pope & Talbot was flooded along with the other lands. *Id.* In addition, the remaining Pope & Talbot land suffered a loss of accessibility due to having to drive around the lake instead of straight across its bed. *Id.* at 823-24. The Court held three elements are necessary to negate the application of *Campbell*: indispensability, substantiality, and inseparability. *Id.* at 825. The Court found (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from the damages to the land not taken flowing from the condemnor government's use of its adjoining land in the dam project. *Id.*

We agree with SCDOT that it could have eliminated the intersection without taking part of Powell's property. Powell's property was taken for the purpose of rounding the intersection of Emory Road and Old Socastee Highway, not for the Highway 17 intersection closure. While the intersection closure and the taking of Powell's property were part of the same SCDOT highway improvement project, the relevant question to consider is whether the taking of Powell's property was necessary for the intersection closure. In light of the cases discussed above, we find the taking of Powell's property was only an incidental result of the closure and was not indispensable to and inseparable from the overall project. We further hold the taking of Powell's property was not a substantial part of the overall road project.

CONCLUSION

We affirm the trial court's grant of SCDOT's motion for partial summary judgment.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boisha Wofford, alleged surviving spouse, and Kaelyn Wofford, surviving child, on behalf of Brian Wofford, deceased employee, Appellants,

v.

City of Spartanburg, through the South Carolina Municipal Insurance Trust, Respondents.

Appellate Case No. 2014-001269

Appeal From The Workers' Compensation Commission

Opinion No. 5369
Heard October 14, 2015 – Filed December 9, 2015

AFFIRMED

Kenneth C. Anthony, Jr., and Kenneth Jay Anthony, both of the The Anthony Law Firm, P.A., of Spartanburg, for Appellants.

Helen Faith Hiser, of McAngus Goudelock & Courie, LLC, of Mount Pleasant; and Stephanie Lamb Pugh, of Turner Padget Graham & Laney, P.A., of Greenville, for Respondents.

LOCKEMY, J.: Boisha Wofford and Kaelyn Wofford (Claimants) appeal the Appellate Panel of the South Carolina Workers' Compensation Commission's order finding Brian Wofford was not acting within the course and scope of his

employment at the time of his death under an exception to the "going and coming rule."[1] We affirm.

FACTS

Wofford, the former Superintendent of the Parks and Recreation Department for the City of Spartanburg (the City), died in a motorcycle accident in Moore, South Carolina. Wofford was on his way from his mother's home in Moore to one of the City's recreational centers. The accident occurred around 11:15 a.m.

At the hearing before the single commissioner, the City's aquatics director, Tracey Ballew, recalled calling Wofford on the morning of the accident to ask him to meet her at the City's swim center to sign some forms and retrieve a key from the Department's C.C. Woodson Recreational Center. Ballew stated Wofford told her he "was going directly to [C.C. Woodson Recreational Center] to get the key, and then coming to the Swim Center."

Scott Page, the City's Parks Manager, testified Wofford often worked out of other recreation centers, including the C.C. Woodson Recreational Center. Similarly, Deborah McClary, an administrative assistant, stated Wofford often worked at several different locations, including the Department's main office, the four recreational centers, the swim center, and the City's parks.

Mitchell Kennedy, the City's Director of Community Services and Wofford's supervisor, testified Wofford's job duties involved traveling between the various recreational centers and parks. Kennedy testified he often communicated with employees via phone, e-mail, and text, even when he or the employees were not at work. Kennedy explained, "I have communicated with employees, based upon certain circumstances, where I knew that they were not at work and I may have a task . . . . So I would not consider [them] on the job if I knew that . . . person was not at work." Kennedy stated it was not unusual for Wofford to fulfill requests like Ballew's to retrieve keys and sign forms. Additionally, Kennedy explained it was common for Wofford to travel among the various recreational centers, parks, and swim centers. According to Kennedy, Wofford had discretion in setting his work hours.

Janice Littlejohn, Wofford's mother, testified Wofford came to her house in Moore on the morning of the accident to pick up his motorcycle, which he stored at her

[1] Boisha is Wofford's surviving spouse and Kaelyn is Wofford's surviving child.

home. Littlejohn stated her home was in the opposite direction of Wofford's office. Littlejohn recalled Wofford had two business-related phone calls while he was visiting her. Wofford was at Littlejohn's home for approximately three hours. When Wofford left Littlejohn's home, he told her he was on his way to work.

The single commissioner concluded Wofford did not suffer a compensable injury because Claimants failed to show his accident arose out of and in the course of his employment as Wofford was not working at the time of his accident. Further, the commissioner found the remote communication that Wofford had with other City employees did not rise to the level such that his actions were within the course and scope of his employment. Even if his communication made his actions within the course and scope of his employment, the commissioner concluded Wofford's decision to drive to his mother's home to visit her for three hours and pick up his motorcycle resulted in a substantial deviation from his employment.

Finally, the commissioner found there were no applicable exceptions to the going and coming rule. The commissioner noted Wofford's accident occurred on the way to work, and Wofford did not have any work-related duties to perform on the way to work nor was he under the control of the City. The commissioner also found the special errand exception to the going and coming rule was inapplicable because Wofford was not charged with a task on his way to work. The commissioner further found Wofford was going to work to perform his typical job duties and it was common for Wofford to work at his office, the recreational centers, or at a City event.

The parties cross-appealed to the Appellate Panel of the Commission. On appeal, Claimants argued two points to reverse the single commissioner. First, Claimants asserted Wofford was working while he was visiting his mother because he was emailing and calling employees. Second, Claimants maintained Wofford's accident met an exception to the going and coming rule because he was on a special errand to retrieve keys for Ballew. The Appellate Panel affirmed the single commissioner's findings in full. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380 (Supp. 2014)). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Commission as to

the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456.

LAW/ANALYSIS

I. Two Issue Rule

Initially, the City claims the two issue rule bars Claimants' appeal because the Appellate Panel denied their claim on multiple grounds, but the Claimants appealed only one of those grounds. The City asserts even if this court reverses the Appellate Panel's findings on the going and coming rule, Claimants could not succeed on appeal because the Appellate Panel found Wofford's trip to his mother's house was a substantial deviation from his employment. Second, the City maintains Wofford did not meet an exception to the going and coming rule. Initially, the City notes Claimants have not indicated which exception to the going and coming rule applies. Further, the City argues none of the exceptions apply because Wofford was on his way to work to perform his normal job duties and merely volunteered to pick up a key for Ballew.

Claimants assert the two issue rule does not apply here. Claimants argue that if Wofford was engaged in a special task for his employer and met an exception under the going and coming rule, then the Appellate Panel's other rulings would be "invalidated." We find the two issue rule does not apply here.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "It should be noted that although cases generally have discussed the 'two issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996).

> For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Id.

We find the two issue rule does not apply here because Claimants presented two reasons why their claim was compensable—(1) Wofford had worked all morning by communicating remotely with other City employees and (2) he met an exception to the going and coming rule once he left his mother's home. The Appellate Panel found Wofford's communications did not rise to the level that would bring his actions at his mother's home within the course and scope of his employment, and even if they did, he substantially deviated from his employment by visiting his mother in Moore. Further, the Appellate Panel found no applicable exceptions to the going and coming rule applied because retrieving the key and signing forms for Ballew was within Wofford's ordinary job duties. Although Claimants did not appeal the Appellate Panel's ruling that Wofford's phone calls and e-mails to other employees at his mother's home did not rise to the level such that his actions were within the scope of his employment, they did appeal the Appellate Panel's finding that Wofford did not meet an exception to the "going and coming rule" once he left his mother's home. We find the Appellate Panel's order addresses two different points in time—(1) Wofford's actions at his mother's home and (2) his actions when he was on his way to work.

II. Exception to Going and Coming Rule

Claimants argue the Appellate Panel erred in finding Wofford was acting outside the course and scope of his employment at the time of his death because his claim fell within an exception to the going and coming rule. Claimants assert that once Wofford left his mother's home, he was in the process of executing a specific task for the City—retrieving a spare key from a recreational center. Thus, Claimants maintain Wofford was performing an act in connection with his duties as the superintendent of the Department. We disagree.

Generally, an employee going to or coming from the place where he works is not engaged in performing a service growing out of and incidental to his employment, and thus, an injury from an accident at such time does not arise out of and in the course of his employment. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998). However, South Carolina has recognized five exceptions to this rule. Among these are where (1) "the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages;" (2) "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment;" (3) the way to work is inherently dangerous and is either the exclusive way or is constructed and maintained by the

employer; (4) the injury occurred in close proximity to the workplace and there is an express or implied requirement that the employee use that approach in going to and coming from work; and (5) an employee is injured "while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work." *Id.* at 95-96, 495 S.E.2d at 449.

Under the duty or task exception, "an employee will not be precluded from receiving benefits where the employee, on his way to or from his work, is charged with some duty or task in connection with his employment." *Whitworth v. Window World, Inc.*, 377 S.C. 637, 641, 661 S.E.2d 333, 336 (2008). In *Whitworth*, a window installer loaded his equipment onto his truck and proceeded to the jobsite to install windows. *Id*. at 639, 661 S.E.2d at 335. After stopping for a drink, the window installer was involved in an automobile accident. *Id*. The supreme court held the window installer failed to show he was charged with a work-related duty or task under the duty or task exception of the going and coming rule because the primary purpose of his trip was a personal objective—to travel to the place where he would perform his work. *Id*. at 641, 661 S.E.2d at 336. Further, the court noted he did not have any work-related duties to perform on his way to work, he was not under the control of his employer, and he was free to conduct personal business. *Id*.

Additionally, the special task exception "allows compensation where an employee sustains an injury while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work." *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 189, 528 S.E.2d 435, 443 (Ct. App. 2000). In *Bickley v. South Carolina Electric & Gas Co.*, the supreme court held an electrical lineman's death arose out of and in the scope of his employment because he was on a special errand or mission for his employer. 259 S.C. 463, 471, 192 S.E.2d 866, 870 (1972). There, a lineman was called to repair storm damage to electrical lines in Charleston. *Id*. at 467, 192 S.E.2d at 868. He left his home in Columbia at 3:30 a.m. *Id*. The lineman and his crew worked until 11:30 p.m. and decided to return to Columbia. *Id*. at 467-68, 192 S.E.2d at 868. After arriving in Columbia and leaving work at 3:30 a.m. the following morning, the lineman drove home and crashed into a truck. *Id*. at 468, 192 S.E.2d at 868. The collision killed the lineman. *Id*. The court explained the lineman was entitled to compensation from the time he left his home until his return because he was obligated to make emergency calls or perform services at times other than his regular working hours and he was on a special errand or mission for the employer. *Id*. at 470, 192 S.E.2d at 870.

In *McDaniel v. Bus Terminal Restaurant Management Corp.*, the supreme court held a cook who was injured in an automobile accident on the way home from an employee meeting did not suffer a compensable injury under the "special errand exception." 271 S.C. 299, 301-03, 247 S.E.2d 321, 322-23 (1978). The court concluded that unlike the lineman in *Bickley*, the cook was not called to perform an emergency service and the employee meetings were not unusual or "special." *Id*. The court found the cook's attendance at the employee meetings was a normal, customary aspect of her job and she did not perform a special errand by attending the meeting. *Id*. Further, the court noted she had not performed any service to her employer while enroute to or from her place of employment and the trip was not a substantial part of the service for which she was employed. *Id*.

We find substantial evidence supports the Appellate Panel's finding that Wofford's accident did not meet an exception to the going and coming rule. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981) (providing this court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence). Although we agree with the City that Claimants have not specifically indicated which exception was met, the Claimants generally argue Wofford's death arose out of and in the course of his employment because he met either the duty or task exception or the special errand exception. For example, Claimants argue Wofford was "in the process of executing a specific task given [to] him by Tracy Ballew" and the "task was one of value to the employer." Additionally, Claimants assert Wofford was "embarking on [an] errand" to retrieve the spare key for Ballew and he had "no discretion" to stop on his way to work. The Appellate Panel also ruled on these two exceptions. Accordingly, we analyze Claimants' arguments under these two exceptions.

First, we agree with the Appellate Panel's finding that the duty or task exception did not apply. Similar to *Whitworth*, the primary purpose of Wofford's trip was a personal objective to travel to the recreational center where he performed his work. *See* 377 S.C. at 641, 661 S.E.2d at 336 (holding a window installer did not meet an exception to the going and coming rule when he was involved in an accident transporting a piece of equipment to a job site). We note retrieving the key was Wofford's first task of the day and three employees, including Wofford's immediate supervisor, testified it was common for Wofford to work out of his office, the various recreational centers, and the swim center. Kennedy, Wofford's supervisor, also testified retrieving a key and signing forms for Ballew were within Wofford's typical job responsibilities. Thus, Kennedy and the other employees' testimonies support the Appellate Panel's finding Wofford was "merely on his way

to work to engage in his typical job responsibilities," which included retrieving a key and signing forms for Ballew, and he was not charged with any work-related duties at the time of the accident. *See Medlin*, 329 S.C. at 95, 495 S.E.2d at 449 (stating an employee going to or coming from the place where he works is not engaged in performing a service growing out of and incidental to his employment, and thus, an injury from an accident at such time does not arise out of and in the course of his employment).

Second, we agree with the Appellate Panel's finding the special errand exception did not apply. Similar to *McDaniel*, Wofford was on his way to work to perform his typical job duties like retrieving keys and signing forms, and thus, he did not perform a special errand by driving to the swim center. *Compare McDaniel*, 271 S.C. at 303, 247 S.E.2d at 323 (providing a cook did not suffer a compensable injury under the special errand exception when injured in an automobile accident on her way home from an employee meeting because the meeting was a normal, customary aspect of her job and she did not perform a special errand by attending the meeting), *with Bickley*, 259 S.C. at 470, 192 S.E.2d at 870 (holding a lineman was entitled to compensation because he was obligated to make emergency calls or perform services at times other than his regular working hours and he went on a special errand for the employer).

CONCLUSION

Based on the foregoing, we affirm the Appellate Panel's finding Wofford was not acting within the course and scope of his employment at the time of his death.

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ricky Rhame, Appellant,

v.

Charleston County School District, Respondent.

Appellate Case No. 2010-175566

Appeal From The Workers' Compensation Commission

Opinion No. 5370
Heard September 17, 2015 – Filed December 9, 2015

REVERSED

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Kenneth W. Harrell and Patrick L. Jennings, both of Joye Law Firm, LLP, of North Charleston, for Appellant.

Stephen Lynwood Brown, Leslie Michelle Whitten, and Catherine Holland Chase, all of Young Clement Rivers, of Charleston, for Respondent.

LOCKEMY, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel), Ricky Rhame argues the Appellate Panel erred in finding his claim for a repetitive trauma injury to his back was barred by the statute of limitations. We reverse.

FACTS/PROCEDURAL BACKGROUND

The Charleston County School District (the District) employed Rhame as a heating and air conditioning technician from 1987 to 2009. His job frequently required him to lift heating and air conditioning equipment. According to Rhame, some of this equipment weighed as much as one hundred pounds.

Rhame admitted he began experiencing off-and-on back pain as far back as 1994 or 1995. Additionally, in 2006, Rhame developed a problem with his neck due to his employment and underwent cervical fusion surgery. After speaking with someone with the District about the neck problem, Rhame was told they would not provide benefits. The District sent Rhame a follow-up letter confirming the denial of benefits for his neck injury. Rhame did not contact anyone else concerning the incident.

On September 29, 2009, Rhame filed a Form 50 with the Commission. He alleged that on May 4, 2009, he sustained a back injury from repetitively lifting heavy air conditioning units. Rhame amended the form shortly after filing to specifically "reflect repetitive trauma for the nature of the injury."

The District answered by filing a Form 51 on October 7, 2009. The District denied Rhame had sustained an injury by accident. Additionally, the District asserted Rhame had not complied with the Workers' Compensation Act's (the Act's) notice requirement and the claim was barred by the statute of limitations. The District contended that in 1994 or 1995, as soon as Rhame realized he was having back pain caused by his job, Rhame knew or should have known he had a compensable injury and brought a claim for benefits. Rhame explained his delay in filing a workers' compensation claim, stating (1) his back pain was off-and-on and was never the result of a single discreet or identifiable injury; (2) he had a fear of losing his job; (3) his ability to complete his work-related duties was not affected until 2009; and (4) he was ignorant of the workers' compensation system and the concept of repetitive trauma injuries until retaining counsel in 2009.

The single commissioner heard the case on December 3, 2009, and issued an order in February 2010 finding Rhame's claim was not barred by the statute of limitations and awarding benefits for temporary total disability and medical treatment.

On March 1, 2010, the District filed a Form 30 requesting a review of the single commissioner's decision by the Appellate Panel. Both parties submitted briefs.

The Appellate Panel conducted a hearing in May 2010, and in an order filed August 6, 2010, the Appellate Panel reversed the single commissioner's decision. The Appellate Panel found Rhame was aware of his "back injury" in 1994 or 1995 and he did not file a claim within two years of when he knew or should have known that his claim was compensable. The Appellate Panel also found Rhame "showed awareness of the workers' compensation system" by trying to file a claim for his 2006 neck injury and he delayed bringing the present claim out of fear of losing his job.

Rhame filed a petition for rehearing on September 8, 2010, which the Appellate Panel dismissed on September 21, 2010. On October 21, 2010, Rhame served and filed a notice of appeal with this court.

This court dismissed Rhame's appeal, finding the notice of appeal was not filed within thirty days from the date the Appellate Panel denied his claim. *Rhame v. Charleston Cty. Sch. Dist.*, 399 S.C. 477, 481-83, 732 S.E.2d 202, 204-05 (Ct. App. 2012), *rev'd*, 412 S.C. 273, 772 S.E.2d 159 (2015). This court held motions for rehearing were not permitted before the Appellate Panel on review of a single commissioner's decision. *Id.* at 483, 732 S.E.2d at 205. The supreme court granted Rhame's petition for a writ of certiorari and held Rhame's motion for rehearing to the Appellate Panel was proper and stayed the time for serving the notice of appeal for thirty days from receipt of the decision denying the motion. *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 772 S.E.2d 159, 160 (2015). The supreme court remanded to this court to consider Rhame's appeal. *Id.* at 279, 772 S.E.2d at 162.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the [Appellate Panel]." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380 (Supp. 2011)). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting

S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

Rhame argues the Appellate Panel erred in finding his claim for a repetitive trauma injury to his back was barred by the statute of limitations. Specifically, Rhame asserts the Appellate Panel erred in (1) finding the first time Rhame experienced back pain was a back injury; (2) applying the statute of limitations; and (3) finding Rhame was aware of the workers' compensation system by no later than 2006.

I. Back Injury

Rhame contends the Appellate Panel's characterization of his first experience of back pain as a back injury is inconsistent with the gradual nature of a repetitive trauma and is not supported by the evidence in the record. We agree.

The Appellate Panel found Rhame (1) was aware he "had a back injury related to his is job . . . in 1994 or 1995"; (2) "continued to receive pain medications, injections, and physical therapy . . . since 1994 or 1995"; and (3) "missed days from work on and off from 1994 and 1995 due to ongoing pain in his back."

The District argues these findings are supported by Rhame's testimony regarding his back pain. Rhame asserts the Appellate Panel's decision did not account for the gradual and progressive nature of repetitive trauma injuries. Rhame contends the evidence in the record suggests not that he suffered an *injury* in 1994 or 1995 but that he began at that time to have off-and-on back *pain* which he knew was caused by his work.

Section 42-1-172(A) of the South Carolina Code (2015) defines "repetitive trauma injury" as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." In *Schurlknight v. City of North Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002), our supreme court held repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." The court noted "it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." *Id.*

We find the substantial evidence in the record does not support the Appellate Panel's finding Rhame suffered a back injury in 1994 or 1995. The evidence in the record indicates Rhame began experiencing back *pain* in 1994 or 1995, not that he suffered an *injury* in 1994 or 1995.

Rhame admitted he began having back pain in 1994 and 1995 and he knew this pain was work-related. Rhame testified the pain was "off-and-on" and he would sometimes seek medical attention where he would receive medication for pulled muscles and return to work after his back pain eased. The evidence in the record describes progressive and intermittent back pain that took Rhame to the doctor in either 1994 or 1995, as well as for visits in 2001, 2002, 2006, and 2007. According to Rhame, his back pain retained its off-and-on character until May 2009, when he moved a particularly heavy unit and "couldn't even stand up straight" afterwards. Following the May 2009 incident, Rhame's doctors told him he could no longer work. Rhame testified that since May 2009, he has experienced a constant, throbbing pain from his lower back down the front of his right leg. He further testified he cannot walk more than a block, stand upright for any substantial length of time, put on his pants, get clothes out of the dryer, or tie his shoes without pain.

The Appellate Panel's decision takes an early occurrence of Rhame's back pain and finds that occurrence of pain to be an injury. However, Rhame continued to work his same duties for the District for another fifteen years, was never given any light duty restrictions, and never missed work for more than "a day or two, here and there, for pulled muscles." The first evidence of the possibility of a permanent injury appears in a 2007 notation in Rhame's medical records, which reads "[h]e may be at risk because of his job to get lumbar [meaning lower back] problems also." The evidence again was that since 1994 or 1995, Rhame was having intermittent back pain that was not diagnosed as relating to any permanent injury and did not appear to create any permanent restriction on his ability to perform his job. This court has previously rejected the argument that a worker with a repetitive trauma injury experiences an injury when the worker first experiences adverse symptoms. *See Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct. App. 2005) (rejecting the argument that claimant suffered a single injury on the date she began to experience problems with her arms and holding the only evidence in the record was that claimant suffered a sustained repetitive trauma injury over a period of time which later culminated in disability). Accordingly, we reverse the Appellate Panel's finding that Rhame suffered a back injury in 1994 or 1995.

II. Statute of Limitations

Next, Rhame argues the Appellate Panel erred in finding he failed to file his claim within the statute of limitations. We agree.

"For a 'repetitive trauma injury' . . . , the right to compensation is barred unless a claim is filed with the commission within two years after the employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure." S.C. Code Ann. § 42-15-40 (2015).

As stated above, repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events. Determining the date an accident occurs in a repetitive trauma case is difficult because repetitive trauma injuries, by their nature, lack a definite time of injury.

We find the substantial evidence in the record does not support the Appellate Panel's finding Rhame failed to file his claim within two years of when he knew or should have known his claim was compensable. The record contains no evidence Rhame was aware he was suffering from a repetitive trauma injury prior to May 2009.[1] While Rhame experienced off-and-on back pain since 1994 or 1995, it was not until May 2009 that he began experiencing constant, throbbing pain that interfered with his ability to perform his job. Furthermore, it was not until May 2009 that Rhame was diagnosed with disc disruption and lumbar radiculitis and told by his doctor he could not work. For the foregoing reasons, we find Rhame was not aware his back injury was compensable until May 2009. Therefore, his Form 50, filed in September 2009, was timely pursuant to section 42-15-40. Accordingly, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

III. Rhame's Awareness of the Workers' Compensation System

Rhame argues the Appellate Panel erred in finding he was aware of the workers' compensation system by no later than 2006. Based upon our decision to reverse above, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding an

[1] We note that although a 2007 notation in Rhame's medical records indicated he *may* be at risk of developing lumbar problems, Rhame was not diagnosed with an injury at that time.

appellate court need not address remaining issues when disposition of prior issue is dispositive).

CONCLUSION

We reverse the Appellate Panel's finding Rhame's claim for a repetitive trauma injury to his back was barred by the statute of limitations.

REVERSED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty Fisher, as Real Representative for Alice Shaw-Baker, Appellant,

v.

Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants,

Of whom Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten are the Respondents.

Appellate Case No. 2014-000175

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

Opinion No. 5371
Heard October 14, 2015 – Filed December 9, 2015

AFFIRMED

John Hughes Cooper, of John Hughes Cooper, P.C., of Mount Pleasant; and Lisa Fisher, pro hac vice, for Appellant.

Peter A. Kouten, of Johns Island, pro se; and Warren W. Wills, III, of the Law Office of W. Westbrook Wills, III, of Folly Beach, for Respondents Bessie Huckabee, Kay Passailaigue, and Sandra Byrd.

WILLIAMS, J.: In this civil matter, Betty Fisher appeals the circuit court's grant of summary judgment in favor of Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten (collectively "Respondents"). Fisher argues the court erred in (1) holding she lacked standing to bring a survival action against Respondents on behalf of her deceased aunt as a "real representative"; (2) failing to find Kouten waived the issue of standing; (3) failing to find she had standing based on equitable principles of trust law; (4) failing to find South Carolina public policy supports giving her third-party standing; (5) granting summary judgment when genuine issues of material fact existed as to her claims; (6) failing to rule upon the motion to disqualify Kouten as counsel for Huckabee, Slade, and Byrd; and (7) considering trial counsel's arguments as factual contentions. We affirm.

FACTS/PROCEDURAL HISTORY

Alice Shaw-Baker died testate in Charleston County, South Carolina, at the age of 79 on February 25, 2009. Originally from San Francisco, California, Shaw-Baker enlisted in the Navy and was subsequently stationed in Charleston. After her service, Shaw-Baker worked in accounting-related jobs for several employers in the Charleston area, including Charleston Memorial Hospital for over twenty years. Shaw-Baker married and divorced twice, and she had no children.

Shaw-Baker, a passionate advocate for animals, had executed prior wills that left the vast majority of her estate to animal welfare and rescue organizations. Her prior wills also included bequests to Huckabee and Slade, who were Shaw-Baker's friends and former colleagues at Charleston Memorial Hospital. In her last will and testament, executed on May 21, 2001, Shaw-Baker devised her entire estate to Huckabee, Slade, and another former colleague, Byrd. Shaw-Baker also named Slade the sole beneficiary of her state deferred compensation plan and a life insurance policy. Further, Shaw-Baker nominated Huckabee as personal representative. Huckabee petitioned the probate court for informal probate of the will on March 11, 2009. The probate court admitted the will and appointed Huckabee as personal representative.

Shaw-Baker's closest living heir is her niece, Fisher, of Long Beach, California. On April 27, 2009, Fisher contested the will and sought removal of Huckabee as

personal representative.[1] Fisher alleged Huckabee and Slade had unduly influenced Shaw-Baker by inducing her to execute the May 21, 2001 will naming them the sole beneficiaries of the entire estate—with the exception of a $4,000 bequest to Byrd—in exchange for the promise they would provide care for Shaw-Baker such that she could avoid being placed in an assisted living facility. Fisher alleged that, despite their promise, Huckabee and Slade failed to provide adequate care for Shaw-Baker, allowing her health and home to deteriorate to the point that her grand-niece was appointed as her guardian–conservator in her last year of life. Fisher also alleged Kouten, Shaw-Baker's court-appointed guardian ad litem and attorney, acted contrary to Shaw-Baker's interests and failed to exercise reasonable care in advising her on conservator and estate matters.

Based on these allegations, Fisher filed the instant lawsuit in circuit court on February 23, 2012, as Shaw-Baker's "real representative" under the survivability statute.[2] In her complaint, Fisher requested damages and attorney's fees, bringing causes of action against all Respondents for, *inter alia*, violation of the Omnibus Adult Protection Act[3] and breach of fiduciary duty. Additionally, Fisher asserted a legal malpractice claim against Kouten.

Respondents filed a motion for summary judgment on December 17, 2012, claiming Fisher—as Shaw-Baker's real representative—lacked standing to bring this action. The circuit court granted Respondents' motion in a Form 4 order issued on May 8, 2013.[4] Fisher filed a motion to alter or amend judgment on May 28, 2013.

In its December 12, 2013 order, the circuit court denied Fisher's motion to alter or amend and affirmed its prior order granting Respondents' motion for summary judgment. The court held a real representative could not sue on behalf of a

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[1] The will contest is still pending in the probate court.

[2] *See* S.C. Code Ann. § 15-5-90 (2005).

[3] S.C. Code Ann. §§ 43-35-5 through -595 (2015).

[4] The circuit court made a scrivener's error in this order by granting summary judgment to Fisher. The court corrected this mistake in a September 3, 2013 order, in which it granted summary judgment to Respondents.

decedent for injuries to his person or personal property under the survivability statute. Noting a real representative historically was only able to bring actions related to the decedent's real estate, the court found only a personal representative could bring those actions. Accordingly, the court concluded Fisher's only remedy was to seek removal of Huckabee as personal representative in probate court. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court." *Columbia/CSA–HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

LAW/ANALYSIS

I. Standing as "Real Representative"

Fisher contends the circuit court erred in finding she lacked standing to bring personal causes of action on behalf of Shaw-Baker as her "real representative" under the survivability statute. According to Fisher, because Huckabee—Shaw-Baker's personal representative—will not conceivably sue herself and the other Respondents, Fisher may bring this action as Shaw-Baker's real representative. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The [General Assembly]'s intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia-Carolina Bail Bonds, Inc. v.*

Cty. of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003)). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose." *Id.* "The construing court may additionally look to the legislative history when determining the legislative intent." *Id.*

Section 15-5-90 of the South Carolina Code (2005) provides the following:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . .

Because the language in section 15-5-90 is broad and does not explicitly state which causes of action survive to the personal or real representative, we look to the legislative intent behind this statute to resolve the question of whether Fisher may bring this action on behalf of Shaw-Baker. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (explaining "the [survivability] statute's language is broad and ostensibly appears to include almost every conceivable cause of action" with few exceptions).[5]

"At common law, a personal action *ex delicto* did not survive the death of either party." *Id.* at 564, 564 S.E.2d at 97. In 1859, the General Assembly passed a wrongful death statute, a version of Lord Campbell's Act in England, that provided a cause of action against a defendant who wrongfully killed a decedent for the benefit of certain family members. Act No. 4480, 1859 S.C. Acts 825–26; *see also* Robert L. Wynn, III, Note, *Death of the Head of the Family—Elements of Damages Under South Carolina's Lord Campbell's Act*, 19 S.C. L. REV. 220, 220–21 (1967) (providing a history of wrongful death and survival actions in South Carolina). The General Assembly also enacted the first survivability statute in 1892, stating that "causes of action for and in respect to any and all injuries and

[5] We note that some, if not all, of Fisher's causes of action include allegations of fraud and deceit, both of which are well-recognized common law exceptions to the survivability statute. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. Therefore, even if Fisher had standing, she could not bring these actions on Shaw-Baker's behalf under the statute.

trespasses to and upon *real estate* shall survive both to and against the personal or real representative (as the case may be) of deceased persons." Act No. 15, 1892 S.C. Acts 18 (emphasis added). Our supreme court later held the wrongful death statute did not provide for the survival of a decedent's cause of action for personal injuries suffered prior to death for the benefit of his estate. *In re Estate of Mayo*, 60 S.C. 401, 413–14, 38 S.E. 634, 637–38 (1901). Therefore, in 1905, the General Assembly amended the survivability statute—which initially covered only real property—and inserted the words "and any and all injuries to the person or to personal property" after the words "real estate." Act No. 471, 1905 S.C. Acts 945; *see also Grainger v. Greenville, Spartanburg & Anderson Ry. Co.*, 101 S.C. 399, 403, 85 S.E. 968, 969 (1915) (noting the legislative intent behind the amendment). The 1905 change is reflected in the current survivability statute. *See* § 15-5-90.

At common law, real and personal property were two distinct "species" during the administration of an estate. *Hull v. Hull*, 24 S.C. Eq. (3 Rich. Eq.) 65, 91 (1850). Title to a decedent's real property passed directly to his intestate heirs at law or devisees. *Id.* Thus, those individuals succeeding to the real property stood in the place of the decedent in regard to his affairs concerning the land and were sometimes called the "real representatives." 33 C.J.S. *Executors and Administrators* § 2 (2009).

Legal title to the decedent's personal property vested upon his death with his executor or administrator, otherwise referred to as the "personal representative." *Hull*, 24 S.C. Eq. at 91. A testator, however, could devise title to his real property to his personal representative and direct him to sell it to pay off estate debts or distribute the sale proceeds to his legatees. *See* S.C. Code of 1902 § 2600 (Civ. Code); *Hull*, 24 S.C. Eq. at 91. Therefore, a real or personal representative, but not both, could be vested with title in the decedent's real property. *See Hull*, 24 S.C. Eq. at 91 ("If [real property] is devised, unless devised to the executor, or power is given to him to dispose of it, [the executor] has no power to interfere with it, and the devisee takes it without his assent.").

The dichotomy between a personal and real representative is reflected in the 1892 Act. The General Assembly established the right to pursue survival actions involving a decedent's real estate to the "personal or real representative (as the case may be)." Act No. 15, 1892 S.C. Acts 18. The use of the words "as the case may be" demonstrates the General Assembly intended that either the personal or real representative could pursue a survival action, depending on how the title in real

property vested upon the decedent's death. If the title vested to a testator's personal representative, then he would be the proper individual to bring a suit for injuries or trespass to the land as its legal owner. *See* Act No. 15, 1892 S.C. Acts 18. If, on the other hand, the title vested in an heir at law or devisee, then he could bring an action on behalf of the decedent as the real representative. *See* Act No. 15, 1892 S.C. Acts 18; *see also, e.g.*, *Duke v. Postal Tel. Cable Co.*, 71 S.C. 95, 98–99, 50 S.E. 675, 676 (1905) (holding the decedent's intestate heirs are real representatives under the Act). After the 1905 amendment, the General Assembly expanded a personal representative's power in survival suits, allowing that person to also bring actions regarding injuries to the decedent's person or personal property, while a real representative remained constrained to actions related to injury or trespass to the decedent's real property. *See Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 29, 81 S.E. 189, 189 (1914) (concluding the 1905 amendment "provides, among other things, that causes of action for and in respect to 'any and all injuries to the person' shall survive to the *personal representative* of the deceased" (emphasis added)); *id.* at 30, 81 S.E. at 189 (stating the recovery, if any, in a personal survival action goes to the decedent's personal representative to hold as assets of the estate). Therefore, based on the legislative history of the survivability statute, we find the "real representative"—a decedent's intestate heir or devisee of his real property—is a remnant of the 1892 Act and only continued to have standing after the 1905 amendment in survival actions involving trespass or injury to the decedent's real estate.

In addition to the legislative history of the survivability statute, we find the current version of the South Carolina Probate Code lends support to our conclusion that a real representative has no role in a survival suit for injuries to the decedent's person. In 1986, the General Assembly enacted a modified version of the Uniform Probate Code that modernized and made sweeping changes to the state's antiquated probate law on which the survivability statute was based. Act No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C. Code Ann. §§ 62-1-100 through -7-1106 (Supp. 2014)); *see also generally* S. Alan Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C. L. REV. 611 (1987) (discussing the substantive changes made to South Carolina probate law). Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate. *See* S.C. Code Ann. §§ 62-3-701 through -721 (Supp. 2014). The personal representative, for example, is afforded the same standing to sue that the decedent had immediately prior to death. S.C. Code Ann.

§ 62-3-703(c) (Supp. 2014). The personal representative also may prosecute and defend against claims for the protection of the estate. S.C. Code Ann. § 62-3-715(20) (Supp. 2014). Most importantly, for purposes of this case, the personal representative retains authority to compromise and settle suits for "pain and suffering[,] or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State." *Id.* § 62-3-715(24). The real representative, on the other hand, is mentioned nowhere in the modern Probate Code.

Nevertheless, in the instant case, Fisher argues specific language in *Duke* supports her contention that she may bring a survival action for any cause of action as Shaw-Baker's real representative. In *Duke*, the circuit court dismissed a landowner's action for damages against a telegraph company when it constructed a telegraph line through his land without a permit in 1903. 71 S.C. at 96–97, 50 S.E. at 675. The landowner died intestate that same year, leaving his wife and children as heirs. *Id.* at 97, 50 S.E. at 675. His wife and children brought a subsequent action against the defendant telegraph company for the construction of the telegraph line, and a jury returned a verdict in their favor. *Id.* at 97–98, 50 S.E. at 675–76.

On appeal, the telegraph company argued the heirs had no standing to bring the action on behalf of the deceased landowner. *Id.* at 98, 50 S.E. at 676. Our supreme court disagreed and held the heirs had a right to sue under the survivability statute. *Id.* Specifically, the court noted the following:

> [T]he right to sue is conferred by sec[tion] 2859 of the Code of Laws [of 1902], which provides that "causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons . . . ." *The heirs at law are the real representatives*.

Id. at 98–99, 50 S.E. at 676 (emphasis added).

Relying upon *Duke*, Fisher claims she is a real representative because she is Shaw-Baker's heir at law. In *Duke*, the decedent's intestate heirs succeeding to his real

property brought the action for injury and trespass to his land under the 1892 Act.[6] As heirs at law who succeeded to his real estate, the decedent's wife and children were the proper real representatives to bring a survival action on his behalf. *See* 33 C.J.S. *Executors and Administrators* § 2 (2009). In the present case, however, Shaw-Baker died testate, and the probate court appointed a personal representative to manage the estate. As discussed above, although Fisher desires to bring personal causes of action on behalf of Shaw-Baker, we find these actions may only be properly pursued by the personal representative. *See Bennett*, 97 S.C. at 29, 81 S.E. at 189.

Based on the foregoing, we hold the circuit court properly granted Respondents' motion for summary judgment because Fisher lacked standing to bring a survival action against them as Shaw-Baker's real representative.

II. Unpreserved Issues

Fisher argues Kouten waived the issue of standing by failing to identify himself as a moving party in his motion for summary judgment. Fisher also asserts she has standing to bring the survival action under equitable principles of trust law. We find these issues are not preserved for appellate review because they were not properly raised to and ruled upon by the circuit court. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

III. Remaining Issues

Because our finding that Fisher lacked standing is dispositive in this case, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

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[6] The opinion in *Duke* was filed only seven days after the General Assembly passed the 1905 amendment.

CONCLUSION

Based on the foregoing, we hold a real representative does not have standing to bring personal actions on behalf of a decedent.[7] Accordingly, the circuit court's grant of summary judgment in favor of Respondents is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

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[7] The instant case does not present the occasion for us to determine whether a real representative continues to have standing to pursue a survival action based on trespass or injury to a decedent's real property after the enactment of the South Carolina Probate Code.