The Supreme Court of South Carolina

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N O T I C E

In the Matter of Harry C. DePew

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on January 28, 2020, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

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

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

December 10, 2019

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

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N O T I C E

In the Matter of John Michael Bosnak

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on January 28, 2020, beginning at 2:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

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

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
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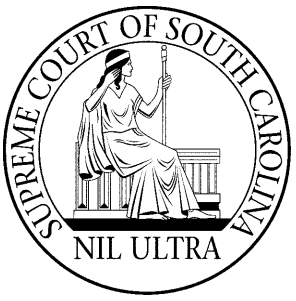

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 49
December 18, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of N. Douglas Brannon, Respondent.

Appellate Case No. 2019-001780

Opinion No. 27933
Submitted November 8, 2019 – Filed December 18, 2019

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Ericka McCants Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

N. Douglas Brannon, of Spartanburg, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. We further order Respondent to (1) complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the date of this opinion, and (2) pay the costs incurred in the investigation and prosecution of these matters by ODC and the Commission on Lawyer Conduct (the Commission) or enter into a reasonable payment plan with the Commission within thirty (30) days of the date of this opinion.

The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

On March 23, 2012, Respondent was retained to represent Client in a post-conviction relief (PCR) action for a $5,000 fee. Client's grandfather initially paid Respondent $1,000 for the representation. On February 5, 2013, Client's grandfather paid Respondent the remaining $4,000. Respondent filed Client's PCR action on November 21, 2014. The Office of the Attorney General filed a return requesting summary dismissal of the PCR application. The PCR court issued a conditional order of dismissal due to Respondent's failure to file the PCR application within the statute of limitations, and granted Respondent and Client twenty days to show why the conditional order should not become final.

Respondent filed a brief in response to the conditional order explaining the PCR action was untimely due to a clerical error within Respondent's office. Respondent represented he informed Client and Client's grandfather that no action would be taken on the PCR matter until Respondent's $5,000 fee was paid in full. The law firm's accounting system was set with a notice mechanism to notify Respondent when the fee was paid in full so that the PCR application could be filed. The second and final $4,000 payment was posted in Client's grandfather's name and listed the grandfather as a new client; therefore, Respondent never received the notification that the fee was paid in full. Respondent was unaware of the issue until Client's grandfather came to Respondent's office for a status update.

The PCR court issued a final order of dismissal on November 22, 2016. Upon receipt of the final order, Respondent met with Client, explained the error, refunded the entire amount of the fees received, and assisted Client with retaining new counsel for the representation.

At times during the representation, Respondent failed to adequately communicate with Client regarding the status of the case. Respondent represented he maintained communication with Client's grandfather, but admitted his communication with the grandfather did not satisfy his obligation to maintain reasonable communication with Client.

Comment 5 to Rule 1.5, RPC, Rule 407, SCACR, reminds attorneys a fee agreement "may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." Rule 1.5, RPC, Rule 407, SCACR cmt. 5. Although Respondent informed Client and Client's grandfather that no action would be taken on the PCR matter until Respondent's fee was paid in full, Respondent's duties to provide competent representation and act with reasonable diligence and promptness arose on the day he was retained. *See* Rule 1.1 RPC, Rule 407, SCACR (competence); Rule 1.3, RPC, Rule 407, SCACR (diligence). Once a lawyer accepts employment, the lawyer may, with reasonable warning, withdraw from representation due to the client's substantial failure to fulfill an obligation to pay for the lawyer's services. *See* Rule 1.16(b)(5), RPC, Rule 407 SCACR ("[A] lawyer may withdraw from representing a client if . . . the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefor and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled . . . ."). However, a lawyer may not condition the duties of representation on the payment of fees. Therefore, Respondent's advice to Client and Client's grandfather that he would take no action on Client's PCR case until receiving full payment does not in any way mitigate Respondent's failure to file Client's PCR claim within the statute of limitations.

Matter II

Respondent represented Husband and Wife in a domestic matter wherein Complainant's parental rights were terminated and Husband was allowed to adopt Complainant's minor child. The final order in the case was signed in December 2012.

Shortly after the domestic action, Respondent was approached by the Circuit Solicitor and asked to serve as a special prosecutor with the Solicitor's Office in the trial of Complainant on a charge of criminal sexual conduct with a minor (CSCM). Respondent was appointed as special prosecutor by a circuit court judge, and Complainant was convicted of CSCM following a jury trial. Complainant was represented by the same attorney (Attorney) in both the domestic matter and the criminal matter. In March 2016, Attorney accepted a position as an associate in Respondent's law firm.

On December 6, 2018, Respondent made an appearance on behalf of Husband and Wife to contest Complainant's motion to unseal the adoption file and motion for a new trial. At the time Respondent made the appearance on behalf of Husband and Wife, Attorney was still employed in Respondent's law firm. Respondent acknowledges his appearance on behalf of Husband and Wife at the December 6, 2018 hearing created a concurrent conflict of interest due to the employment of Attorney with Respondent's law firm. Respondent has since been relieved as counsel for Husband and Wife, and new counsel is representing the couple in the pending action.

Law

Respondent admits his actions violated Rules 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.7 (conflict of interest: current clients); 1.10 (imputation of conflicts of interest); and 8.4(a) (violating or attempting to violate the Rules of Professional Conduct), RPC, Rule 407, SCACR.

Respondent also admits the allegations contained in the Agreement constitute grounds for discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR (violating or attempt to violate the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent. Within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of these matters by ODC and the Commission or enter into a reasonable repayment plan with the Commission. Further, within nine (9) months of the date of this opinion, Respondent shall complete the Legal Ethics and Practice Program Ethics School.

PUBLIC REPRIMAND.

KITTREDGE, Acting Chief Justice, HEARN, FEW and JAMES, JJ., concur. BEATTY, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Winrose Homeowners' Association, Inc. and Regime Solutions LLC, Respondents,

v.

Devery A. Hale and Tina T. Hale, Petitioners.

Appellate Case No. 2018-001238

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 27934
Heard September 24, 2019 – Filed December 18, 2019

REVERSED AND REMANDED

Kathleen C. Barnes, of Barnes Law Firm, LLC, of Hampton; and Brian L. Boger, of Columbia, for Petitioners.

Eric C. Hale and Elias Fain, both of Clarkson & Hale, LLC, of Columbia, and Stephanie C. Trotter, of McCabe, Trotter & Beverly, PC, of Columbia, for Respondents.

JUSTICE KITTREDGE: Homeowners Devery and Tina Hale purchased their home (the Property) twenty-one years ago and have made timely mortgage payments ever since, accruing over $60,000 in equity in the Property, which has a fair market value of $128,000. However, after failing to pay $250 in homeowners' association dues to Winrose Homeowners' Association, Inc. (the HOA), the HOA foreclosed on the Property, and a third-party purchaser, Regime Solutions, LLC (Regime), bought it for a pittance. The Hales now challenge the judicial sale, arguing the winning bid price of approximately $3,000 was grossly inadequate compared to the value of the Property.

There are two methods used to determine whether a winning bid at a foreclosure is grossly inadequate. One method assumes the foreclosure purchaser will become responsible for the mortgage on the property and thus adds the value of the outstanding mortgage to the winning bid, whereas the other method does not. While we do not draw a bright-line rule requiring the use of one method over the other, here, Regime has taken no affirmative steps to assume the Hales' mortgage. As a result, in determining whether the purchase price was grossly inadequate, we find it would be wholly inappropriate to add the value of the mortgage to Regime's winning bid. When the value of the mortgage is not added to Regime's winning bid, the bid shocks the conscience of the court. We therefore reverse the judicial sale and remand to the master-in-equity (the Master).

I.

In April 1998, the Hales bought the Property for $104,250 and assumed the obligation to pay HOA dues. The HOA's covenants and restrictions provided:

> If the [HOA dues] assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the rate of eight percent per annum, and the [HOA] may bring legal action against the owner personally obligated to pay the same or may enforce or foreclose the lien against the lot or lots; and in the event judgment is obtained, such judgment shall include interest on the assessment as provided and a reasonable attorney's fee to be fixed by the court, together with costs of the action.

Petitioners fell behind paying their dues in January 2011. As a result, in April 2011, the HOA filed a lien against the Property in connection with the unpaid dues. The HOA subsequently filed a foreclosure complaint seeking the sale of the Property in exchange for satisfaction of $566.41 in principal and interest.

Petitioners failed to answer or otherwise respond to the complaint, so the HOA submitted an affidavit of default. Following the affidavit of default, the Hales received no further notice of any proceedings or orders, including the judgment of foreclosure or the foreclosure sale. *See* Rule 71(a), SCRCP ("Only parties who have appeared and filed pleadings in the [foreclosure] action shall be entitled to the usual notice of hearings and other proceedings . . . ."); Rule 77(d), SCRCP ("Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear . . . .").

Nonetheless, at some point after the HOA filed its complaint but before the Master entered a default judgment against the Hales, the HOA sent the Hales a bill for $250 in connection with their past due regime fees. The Hales promptly paid the bill, thinking the payment resolved the matter. In fact, the law firm representing the HOA sent the Hales a notice that the lien had been satisfied. The HOA, however, did not withdraw its suit.

Three months after the HOA filed the affidavit of default, the Master entered a default Judgment of Foreclosure and Sale against the Hales, calculating the amount due to the HOA as $2,898.67, which was comprised of: (1) $250 in principal due;[1] (2) $80.87 in interest; (3) $542.80 in litigation costs, such as service and filing fees; and (4) $2,025 in attorney's fees. As a result, the Master authorized a judicial sale of the Property at public auction, noting the sale would be subject to senior encumbrances, including a mortgage. As noted above, the Hales were not served with this order. *See* Rule 77(d), SCRCP.

Two weeks later, the Property was sold at public auction, again without notice to the Hales. Regime was the highest bidder with a bid of $3,036.[2] Regime then sought a rule to show cause seeking to evict the Hales from the Property.

Having at last received notice of the proceedings via Regime's efforts to evict them, the Hales filed a motion to vacate the foreclosure sale, arguing the winning

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[1] Specifically, the Master listed $500 in principal due, but credited the Hales for their $250 payment made after the HOA filed its complaint but before the order was filed.

[2] By that time, the amount due to the HOA had increased to $3,011.58. Therefore, Regime's bid resulted in a surplus of $24.42.

bid of $3,036 was so grossly inadequate as to shock the conscience of the court compared to the Property's fair market value of $128,000. Through an affidavit, Tina Hale explained the reason for the Hales' default:

> When we were served with the lawsuit to take away our home, I put the papers in a drawer and forgot about them. Some time after that, we received a bill from the HOA asking for the $250.00. I paid that without a problem. In November, we received a letter from the law firm of [the HOA] telling us that the Lien had been Satisfied. . . . I thought that everything was OK after that. The next thing I know, someone is knocking on my door telling me that they bought my home and that me and my family were being evicted.

At the subsequent rule to show cause hearing, the primary issue was whether and how to account for the senior mortgage in evaluating Regime's winning bid as a percentage of the Property's value. The Master apparently did not consider the fact that the Hales continued to make their monthly mortgage payment, and Regime had made no effort to assume responsibility for the senior mortgage. Ultimately, the Master denied the Hales' motion to vacate the sale, relying on this Court's plurality opinion in *Arrow Bonding Co. v. Warren*[3] and adopted the fiction that Regime had paid an "effective sales price" of $69,040, consisting of the successful bid ($3,036) plus the outstanding balance on the mortgage ($66,004). The Master reasoned this method of calculation of debt was appropriate because Regime was theoretically required to assume the mortgage in order to re-sell the Property.[4] As a result, the Master found the effective sale price ($69,040) was approximately

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[3] 399 S.C. 603, 732 S.E.2d 622 (2012) (plurality opinion).

[4] In fact, the Hales demonstrated that Regime's business model is *not* to assume the senior mortgage, instead either (1) allowing the senior lienor to (re)foreclose on the purchased property, *or* (2) quitclaiming the foreclosed property back to the original homeowners in exchange for a hefty fee. *See* Pet'r's Br. at 12 n.4 ("An updated search of the Richland County public records shows that between November 4, 2013 and October 11, 2016: (1) Regime [] purchased 38 properties as to which a bank later foreclosed, meaning Regime [] did not pay off the [senior] mortgage; (2) Regime [] purchased 15 properties that it quitclaimed back to the owners for a profit between $2,911 and $13,984 per property; and (3) Regime [] purchased 6 properties of which it is still the owner of record and there is still an open mortgage."). Regime has not disputed or otherwise responded to these allegations.

54% of the Property's fair market value ($128,000), and therefore it did not shock the conscience of the court.

On appeal, a majority of the court of appeals' panel affirmed. *Winrose Homeowners' Ass'n, Inc. v. Hale*, 423 S.C. 220, 813 S.E.2d 894 (Ct. App. 2018). Chief Judge Lockemy dissented, finding it was nonsensical to credit Regime for the balance of the outstanding mortgage because Regime had not actually assumed or made any attempt to assume the mortgage on the Property:

> A buyer at a judicial sale in which a senior lienholder is not a party takes the property subject to that lien, but the buyer is not responsible for its payment. The evidence in this case shows [the Hales] have continued to pay the mortgage for a home for which they have no title because they will suffer the severe consequences of default if they do not. The buyer [(Regime)] has paid nothing. I do not believe it proper to give a judicial sale buyer credit for assuming a debt which it is not legally required to pay.

Id. at 222–23, 813 S.E.2d at 900 (Lockemy, C.J., dissenting). We granted the Hales' petition for a writ of certiorari to review the court of appeals' decision.

II.

A judicial sale will not be set aside due to an inadequate sale price unless: (1) the price was so grossly inadequate as to shock the conscience of the court; or (2) an inadequate—but not grossly inadequate—price at the sale is accompanied by other circumstances from which the court may infer fraud has been committed. *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 351, 108 S.E.2d 414, 424 (1959); *see also BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 542 (1994) ("[I]t is 'black letter' law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside []under state foreclosure law . . . if the price is so low as to shock the conscience or raise a presumption of fraud or unfairness." (emphasis omitted) (some internal quotation marks omitted)); *In re Krohn*, 52 P.3d 774, 781 (Ariz. 2002) (en banc) (distinguishing between an inadequate price and a grossly inadequate price, and explaining a mere inadequate price must be accompanied by "some element of fraud, unfairness, or oppression," whereas a grossly inadequate price, standing alone, is prima facie proof of unfairness (emphasis omitted) (citing Restatement (Third) of Prop.: Mortgages §

8.3));[5] Restatement (Third) of Prop.: Mortgages § 8.3(a) (October 2019 Update) ("A foreclosure sale price obtained pursuant to a foreclosure proceeding that is otherwise regularly conducted in compliance with applicable law does not render the foreclosure defective unless the price is grossly inadequate.").

South Carolina courts have not established a bright-line rule for what percentage of the sale price must be met with respect to the actual value of the property in order to shock the conscience of the court. However, as the court of appeals recently noted in an unrelated case, "a search of South Carolina jurisprudence reveals only when judicial sales are for less than [10%] of a property's actual value[] have our courts consistently held the discrepancy to shock the conscience of the court." *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 70, 762 S.E.2d 729, 734 (Ct. App. 2014) (citation omitted). Because the parties have not argued for us to either formally adopt this threshold or choose a different threshold (as other states have done), we will analyze the sale of the Property using the 10% threshold as the measure of whether the sale shocked the conscience. *But see* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b ("Generally, [] a court is warranted in invalidating a sale where the sale price is less than 20[%] of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount."); *id.* at Reporter's Note cmt. b (collecting cases from other jurisdictions that use different thresholds, ranging from 10% to 40% of the value of the foreclosed property).[6]

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[5] Our court of appeals has made a similar distinction. *See E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 358, 644 S.E.2d 802, 807 (Ct. App. 2007).

[6] It is worth noting that our appellate courts have never had the opportunity to consider a case in which the winning bid amounted to between 10% and 30% of the actual value of the property, and thus have not had an opportunity to set a different threshold. *But see Poole v. Jefferson Std. Life Ins. Co.*, 174 S.C. 150, 159–60, 177 S.E. 24, 28 (1934) (discussing with approval a case in which the Court affirmed the circuit court's decision to set aside a foreclosure sale with a winning bid of approximately 26% of the actual value of the property, although the Court did not use the "shock the conscience" language (citing *In re Ragland*, 172 S.C. 544, 174 S.E. 592 (1934))).

III.

As alluded to above, there are two methods used to calculate whether a bid price is so grossly inadequate as to shock the conscience. The first method is known as the Debt Method, as it focuses on the amount of debt a foreclosure purchaser must incur before gaining a free-and-clear title to the foreclosed property. Under the Debt Method, the outstanding mortgage is considered a "debt" that must be assumed by the foreclosure purchaser before receiving a free-and-clear title, thereby freeing the purchaser to resell the foreclosed property to a third-party. Thus, the Debt Method is a ratio comparing the foreclosure purchaser's total debt related to the property (i.e., the winning bid plus the amount of the outstanding mortgage) to the fair market value of the property. Here, using this method of calculation, a court would acknowledge Regime had paid (or will have to pay in the future) approximately 53.9% of the Property's value.[7]

In contrast, the second method of calculation is known as the Equity Method, as it focuses on the amount of equity the foreclosure purchaser stands to gain through the foreclosure sale. Under the Equity Method, the outstanding mortgage is considered a liability that devalues the purchased property, meaning the outstanding mortgage is subtracted from the fair market value of the property rather than added to the winning bid price. Thus, the Equity Method is a ratio comparing the winning bid price to the amount of equity (i.e. the fair market value minus the amount of the outstanding mortgage) in the foreclosed property. Here, using this alternative method of calculation, Regime has only paid approximately 4.9% of the Property's value—a percentage that falls below the 10% necessary to shock the conscience of the court, which would require us to overturn the sale.[8]

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[7] Specifically, supposing Regime assumed the Hales' mortgage, its total debt incurred to obtain the Property would be $69,040 (the $3,036 winning bid plus the $66,004 outstanding mortgage), which is $53.9% of the Property's fair market value of $128,000.

[8] Specifically, Regime's $3,036 winning bid price is 4.9% of the $61,996 of equity in the Property (the $128,000 fair market value minus the $66,004 outstanding mortgage).

No appellate court in South Carolina has ever held courts must apply one method of calculation over the other. *See, e.g.*, *Arrow Bonding*, 399 S.C. at 606 & n.5, 732 S.E.2d at 624 & n.5 (applying the Debt Method, but specifically noting the parties had not challenged the propriety of this method of calculation on appeal, and the Court therefore would not consider alternative ways of calculating the percentage of the foreclosure sale, such as the Equity Method); *see also Winrose Homeowners' Ass'n*, 423 S.C. at 227, 813 S.E.2d at 898 ("*Arrow Bonding* does not conclusively establish whether the Debt or Equity Method is the law in South Carolina."). Nonetheless, in most circumstances, a foreclosure purchaser will assume any obligation to pay outstanding senior liens in order to obtain free-and-clear title to the property. In those cases, it follows the Debt Method should be used.

However, we reject the notion of a categorical, blind application of the Debt Method in all instances for exactly the circumstances presented in this case. Here, despite the foreclosure sale, the Hales have continued paying their mortgage and, thus, have continued to substantially reduce the amount of the outstanding senior lien. Just as Chief Judge Lockemy observed, it would be absurd under these circumstances to apply the Debt Method and give *Regime* credit for assuming the amount of the outstanding mortgage—it has taken no affirmative steps to legally obligate itself to take on the debt. Accordingly, the facts of this case demonstrate why, under certain circumstances, applying the Equity Method is the only logical option.

Under the Equity Method, Regime's bid accounted for approximately 4.9% of the value of the Property, which was far less than the 10% threshold we have looked to in the past. As a result, under the circumstances presented in this case, Regime's winning bid was so grossly inadequate as to shock the conscience of the court. We therefore set aside the foreclosure sale and remand to the Master for further proceedings, including accounting for the fact that the Hales have continued to pay the mortgage on the Property. Regardless of their previous default, we order the Master and the parties to give notice of any further proceedings to the Hales to ensure they are given an opportunity to participate.[9]

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[9] The issue of failing to give notice to the Hales of the foreclosure proceedings and sale is one of potential concern to the Court, despite the Hales' failure to respond to the initial summons and complaint. However, the absence of notice was not raised by the parties as an issue in this case, and we therefore do not address it. In any event, our reversal of the judicial sale renders the notice issue moot.

IV.

We note our concern about this foreclosure proceeding. A foreclosure proceeding is a solemn judicial proceeding. While the HOA had the legal right to pursue collection of the debt owed, including foreclosure of the Property to satisfy that debt, this foreclosure action quickly morphed into a proxy to capitalize on a small debt. We are especially troubled by Regime's participation in a foreclosure proceeding to accommodate its business model of leveraging a nominal debt to secure an exorbitant return from homeowners who fear the prospect of eviction.[10] Regime's manipulation of the foreclosure proceeding is perhaps best illustrated by its practice of not following the typical foreclosure course and assuming responsibility for the senior mortgage.

However, Regime would not have had an opportunity to engage in its questionable business practices had the HOA and its attorney not chosen to pursue foreclosure in the first place. The Hales were minimally in arrears on their HOA dues, yet the HOA foreclosed on a $128,000 home in its eagerness to collect the outstanding $250—an overdue amount less than 0.2% of the fair market value of the home, notwithstanding the amount of the outstanding mortgage. The true nature of this foreclosure action is illustrated by the service and filing fees (which are more than double the amount of the principal due) and attorney's fees (which were *eight times* the amount of the principal due).

Similarly, at the initial hearing on Regime's rule to show cause, the circuit court commented the HOA's attorney's law firm "ha[d] become a pioneer in that whole effort [to treat defaulted regime fees as ruthlessly and quickly as defaulted mortgages] and ha[d] yet to convince anybody . . . that there's anything wrong with what [it was] doing." In response, the HOA's attorney brazenly bragged her firm had already received seven judgments in favor of various HOA clients in their first two to three years of business.

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[10] Once they were aware the Property had been sold at a foreclosure sale, the Hales offered $9,000 to Regime to settle the approximately $3,000 debt. In response, Regime offered to let the Hales keep their home in exchange for a payment of $35,000. We acknowledge that settlement negotiations may not be considered "to prove liability for or invalidity of the claim or its amount." Rule 408, SCRE. Here, the settlement negotiations are referenced as evidence of Regime's manipulation of a foreclosure procedure to engage in strong-arm tactics.

A foreclosure proceeding is a last resort, not a business model to be swiftly invoked for the purpose of exploiting property owners. We do not countenance the improper use of foreclosure proceedings by the HOA, its attorney, *or* Regime. It is the utilization of the Equity Method (in terms of determining the effective sale price of the Property) that restores an objective measure of reasonableness to the facts presented and achieves a proper resolution of this matter.

V.

Our decision today should not be read as a shift toward providing relief to homeowners despite their own poor choices, in particular here, falling behind on a minimal amount of HOA dues and subsequently failing to respond to the summons and complaint. Rather, there are serious consequences to default, and had the HOA and Regime pursued foreclosure in the normal course and made affirmative efforts to assume the Hales' mortgage, this case could have turned out very differently.

However, under the unique facts of this case, the Hales have demonstrated Regime's winning bid price at the foreclosure sale—standing alone, as the outstanding mortgage cannot logically be added to it—is so grossly inadequate that it shocks the conscience of the court and cannot be sustained. For the foregoing reasons, we vacate the judicial sale of the Property and reverse and remand to the Master for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HEARN, FEW and JAMES, JJ., concur. BEATTY, C.J., concurring in a separate opinion.

CHIEF JUSTICE BEATTY: I concur in the conclusion that the bid in this case is grossly inadequate and shocks the conscience. I would go a step further and adopt the Equity Method of determining an adequate sale price for residential property in a foreclosure action. Additionally, I would require that a homeowner, who is in default, receive notice of the date and time of the foreclosure sale.

Homeownership is the quintessential American dream. Purchasing a home is the largest investment that most South Carolinians will make. To allow the hard-earned equity to be confiscated by a bidder's minimal investment is unconscionable. This is especially troubling when the foreclosure sale is the result of an HOA lien.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Marquez Devon Glenn, Petitioner.

Appellate Case No. 2018-001478

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27935
Heard October 29, 2019 – Filed December 18, 2019

REVERSED AND REMANDED

Christopher Todd Brumback and John Hampton Scully, both of Brumback & Langley, LLC, and Roy F. Harmon, III, of Harmon & Major, all of Greenville, for Petitioner.

Attorney General Alan McCrory Wilson; John Benjamin Aplin, of SC Department of Probation, Parole and Pardon Services, both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

JUSTICE HEARN: We granted Marquez Devon Glenn's petition for a writ of certiorari to determine whether the court of appeals erred in affirming the circuit court's denial of immunity from prosecution under the Protection of Persons and Property Act ("the Act"), S.C. Code Ann. §§ 16-11-410 to 450 (2015). *State v. Glenn*, Op. No. 2018-UP-169 (S.C. Ct. App. filed Apr. 25, 2018). We reverse the decision of the court of appeals and remand for a new immunity hearing.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of April 12, 2013, Petitioner Marquez Glenn was invited to the Spring Grove apartment complex in Taylors, South Carolina by tenants Shelricka Duncan and Kiana Grayson. Glenn, along with his brother, Tivarious Henderson, and two others went to Shelricka's apartment to "chill." Once there, Glenn drove one of Shelricka's friends to the store in her car, since she had been drinking and he had not.

While Glenn was at the store, Kevin Bruster showed up at the apartment uninvited, despite having been put on trespass notice less than twenty-four hours before due to an incident between him and his ex-girlfriend, Gloria Duncan, Shelricka's mother. Kevin was heavily intoxicated and forced his way into the apartment, yelling that he was going to kill Gloria. When Shelricka attempted to stop him, he hit her, and Tivarious intervened. Kevin then pulled a razor blade from his mouth, cutting Tivarious across the eye. Tivarious and another friend managed to get Kevin outside, where he ran off.

Kevin went to another apartment in the complex where his nephew, Elfonso Bruster, was visiting family, and he begged Elfonso to help him retrieve his moped, which he had left at Shelricka's apartment the day before. Around the same time, Glenn returned to Spring Grove with a bag from the convenience store, and Kiana waived him over to her apartment to warn him of what had happened in his absence. Glenn went to Kiana's apartment to get change back from money he had given her to buy a pizza, and he set his bag down there. Upon returning to the complex, Glenn was approached by the police who reported to the scene as a result of Kevin's altercation with Tivarious. The police officers asked Glenn whether he knew anything about the altercation, and he told them he knew nothing because he had been at the store. At that time, Tivarious got into Glenn's car and parked it in front of Kiana's apartment.

While Glenn was speaking with the officers, he noticed Kevin and Elfonso lurking in the shadows of a nearby apartment building. After speaking with the police, Glenn retrieved his belongings from Kiana's apartment to depart from Spring Grove. While walking to his car, Kevin and Elfonso abruptly approached him, blocking his way. Glenn believes Elfonso asked him, "who jumped my m----r f----g uncle?" to which he replied that he did not know because he had gone to the store.[1] Glenn then recalls Kevin saying, "Alf, let's do what we said -- what you just said we came to do. You said we gonna get one of these n-----s in this white Lincoln right here, we gonna get all these n-----s right here, so let's do what we came to do." Kevin then punched Glenn in the throat/neck, splashing the alcoholic drink he was carrying into his eyes.

The attack caused Glenn to stumble back and knocked him off balance. As he wiped the alcohol from his eyes and his vision cleared, Glenn saw Elfonso pulling something from his waistband and heard a female yell "GUN!" There was testimony by female witnesses nearby that they did not see a gun, but others present at the scene testified Elfonso had a gun, that he was known to carry a gun, and that his movements near his waistband indicated he was pulling a gun. At that moment, Glenn pulled out a handgun concealed in his pants pocket and fired three shots in Elfonso's direction. The shots rendered Elfonso paralyzed from the waist down. After the shooting, Glenn got in the car, pulled up to a nearby officer, and told him that he had just been in an altercation with two guys and that Elfonso was bleeding and needed help. There is conflicting testimony as to whether Glenn told the officer he was the shooter.

Glenn was charged with attempted murder and possession of a weapon during a violent crime. He filed a pretrial motion for statutory immunity under the Protection of Persons and Property Act, which the circuit court denied. Ruling from the bench, the court denied Glenn immunity from prosecution, finding that "the immunity argument fails solely on the issue of whether or not he had a right to be there." The court reasoned that Glenn did not have a right to be where he was at the time of the incident because he was on the apartment complex's no trespass list, and therefore, was a trespasser. According to testimony the State presented at the

[1] Although Glenn was apprised by the police that there had been an altercation in his absence that evening, it is unclear whether he knew that Kevin cut his brother with a razor blade. However, it is uncontroverted that Glenn did not know Kevin prior to the incident in the parking lot.

immunity hearing, Glenn had been placed on trespass notice, recorded on a list maintained by the Greenville County Sheriff's Office, for loitering on the property three years ago after his family had been evicted. Glenn's grandmother, who resided at the complex at the time of the incident, had no knowledge of this and disputed whether he was ever on such a list. However, the court found Glenn was not involved in any unlawful activity, notwithstanding the fact he was carrying an illegal weapon at the time of the shooting, and that his possession of the weapon was not the proximate cause of the incident. From the judge's oral ruling, it does not appear that he made any findings of fact or conclusions of law with respect to the elements of self-defense. Rather, during the immunity hearing, he steered counsel away from arguing the elements of self-defense and focused only on whether Glenn had the right to be there.

Following the circuit court's denial of immunity, Glenn was tried by a jury, convicted of assault and battery of a high and aggravated nature and possession of a weapon during a violent crime, and sentenced to twelve years and five years' imprisonment, respectively, to be served concurrently. Glenn appealed his convictions to the court of appeals, which affirmed the circuit court's order in an unpublished per curiam opinion, finding Glenn was not in a place where he had a right to be because he was a trespasser and declining to address other issues on appeal as unpreserved. We granted Glenn's petition for a writ of certiorari to review the decision.

ISSUES PRESENTED

1. In light of this Court's decision in *State v. Scott*,[2] did the court of appeals err in affirming the circuit court's denial of immunity under the Act, when Glenn proved by a preponderance of the evidence all of the elements of the common law of self-defense?

2. Did the court of appeals err in affirming the circuit court's denial of immunity under the Act solely on the determination that Glenn was not in a place where he had a "right to be"?[3]

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[2] *State v. Scott*, 424 S.C. 463, 819 S.E.2d 116 (2018).

[3] In his petition for a writ of certiorari, Glenn rejects the circuit court's determination that he was a trespasser as the basis for finding he was not in a place where he had a right to be. Because our analysis of the circuit court's legal error is dispositive of Petitioner's case, we need not address this issue. *See Futch v. McAllister Towing of*

STANDARD OF REVIEW

A defendant's entitlement to immunity from prosecution under the Protection of Persons and Property Act must be decided pretrial using a preponderance of the evidence standard. *State v. Duncan*, 392 S.C. 404, 410-11, 709 S.E.2d 662, 665 (2011). This Court reviews an immunity determination for abuse of discretion. *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). A trial court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

LAW

There are four elements a defendant must establish to justify the use of deadly force under the common law of self-defense:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). *See also Curry*, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4 (citing *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding an appellate court need not address remaining issues on appeal when a decision of a prior issue is dispositive).

In 2006, the South Carolina General Assembly promulgated the Protection of Persons and Property Act to provide immunity from prosecution to persons acting in defense of themselves or others if they are found to be justified in using deadly force. S.C. Code Ann. § 16-11-450 (2015); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. The Act codified the common law Castle Doctrine and extended its reach. S.C. Code Ann. § 16-11-420(A) (2015) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business"). "Under the Castle Doctrine, '[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.'" *Jones*, 416 S.C. at 291, 786 S.E.2d at 136 (citing *State v. Gordon*, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924)). The Legislature adopted the Act based on its finding that "no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

Specifically, the immunity section of the Act provides:

> A person who uses deadly force as permitted by the provisions of this article *or another applicable provision of law* is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (2015) (emphasis added). We have acknowledged that "another applicable provision of law" includes the common law of self-defense. *State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018). *See also Jones*, 416 S.C. at 300 n.8, 786 S.E.2d at 141 n.8. This means a defendant may seek immunity from prosecution under the Act by "demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *Curry*, 406 S.C. at 372, 752 S.E.2d at 267. For immunity claims under this theory, we stated in *Curry* that, "a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *Id*. at 371, 752 S.E.2d at 266. Accordingly, a

trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable.

Section 16-11-440(A) may, under appropriate facts, replace the reasonable fear element of self-defense by providing a presumption that the person's fear was reasonable under certain circumstances:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A) (2015). The presumption of subsection (A) does not apply, however, "if the victim has an equal right to be in the dwelling or residence." *Jones*, 416 S.C. at 292, 786 S.E.2d at 137 (citing *Curry*, 406 S.C. at 370, 752 S.E.2d at 266).

Similarly, in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because that provision was enacted to extend the protections of the Castle Doctrine to "'[ ]other place[s] where he has a right to be.'" *Scott*, 424 S.C. at 475, 819 S.E.2d at 121 (quoting S.C. Code Ann. § 16-11-440(C)). The section provides:

> A person who is not engaged in an unlawful activity and *who is attacked in another place where he has a right to be*, including, but not limited

> to, his place of business, has *no duty to retreat* and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (2015) (emphasis added). Where the section is applicable, it replaces the duty to retreat element required to establish self-defense. *Curry*, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4.

Generally, a defendant will be defaulted into satisfying subsection (C) when the Castle Doctrine does not apply or he cannot otherwise show he was excused from the duty to retreat. *Jones*, 416 S.C. at 292, 786 S.E.2d at 137 (defaulting the defendant into seeking immunity under subsection (C) where she and her assailant had an equal right to be in the apartment because they both resided there). *State v. Fuller*, 297 S.C. 440, 444, 337 S.E.2d 328, 331 (1989) (holding under the common law of self-defense that an individual has no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury). In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be. S.C. Code Ann. § 16-11-440(C).

We recognized in *Jones* the irrationality of foreclosing immunity based on the location of the incident provoking the use of self-defense. 416 S.C. at 297, 786 S.E.2d at 139 ("[W]e find the Legislature intended the protection of subsection (C) to apply to incidents, provided the other requirements are met, without a geographical restriction."). Similarly, analyzing a defendant's "right to be" in a place where he is attacked under section 16-11-440(C) without considering proximate cause or a causal connection to the incident leaves an innocent person's ability to seek the Act's protection up to happenstance, which we also do not believe was the intent of the Legislature. Such analysis in this context is supported by our longstanding self-defense precedent predating the Act. *See State v. Leeks*, 114 S.C. 257, 103 S.E. 549, 551 (1920) (holding that a defendant's presence at and participation in an unlawful gambling game "did not destroy the right to self-defense" because "[t]he causal connection between the unlawful act of gambling and the encounter . . . is too remote."); *State v. Gunter*, 126 S.C. 375, 376, 119 S.E. 844, 844 (1923) (refusing to hold "that a man, under the circumstances stated, is deprived of the right to self-defense, unless . . . his presence there was reasonably calculated

to provoke a difficulty with the deceased . . . ."). Indeed, to bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself. *Miller v. Aiken*, 346 S.C. 303, 307, 613 S.E.2d 364, 366 (2005) ("However plain the ordinary meaning of words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention."). This absurdity is readily illustrated through this example: A person peaceably jogging through a public municipal park at 8:59 p.m. would be entitled to defend herself from an attacker under the protection of the Act, but should the clock turn to 9:00 p.m., at which time the park "closes" under the municipal code, when she is attacked, then she is categorically barred from immunity under the Act due to her *technically* not having the "right to be" there. Such an absurd result would undoubtedly thwart the Legislature's intended objective to protect victims of crime.

In addition, we find a proximate cause analysis must also be applied to the unlawful activity element of subsection (C).[4] *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting."); *State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) ("[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide."). We now apply the foregoing legal principles to the facts of this case.

ANALYSIS

Here, Glenn argues that under this Court's holding in *State v. Scott*, he was entitled to immunity because he proved by a preponderance of the evidence all of the elements of the common law of self-defense. Specifically, he contends the holding that "[i]t was clearly the Legislature's intent that if a person seeking

[4] Here, the circuit court properly applied a proximate cause analysis to examine whether Glenn was engaged in unlawful activity at the time of the incident. In its oral ruling, the court found Glenn was not engaged in any unlawful activity—despite the fact he was carrying an illegal weapon at the time of the shooting—because his possession was not the proximate cause of the incident.

immunity under subsection 16-11-450(A) could prove the elements of self-defense in an immunity proceeding, immunity must be granted" establishes that a person's proof of the elements of self-defense by a preponderance of the evidence provides a standalone basis for immunity such that none of section 16-11-440 must be proven. *Scott*, 424 S.C. at 473, 819 S.E.2d at 120-21.

There, Scott's daughter and her friends called Scott's fiancé in the middle of the night and explained they were being chased by other girls from a party. *Id*. at 466-67, 819 S.E.2d at 117. The fiancé instructed them to drive to Scott's home and park in the driveway. After doing so, the ensuing events became less clear. Scott, his fiancé, and the children all testified they heard a gunshot as they were entering the house. The fiancé called 911, and Scott retrieved a gun and ran toward his front door. At this point, the vehicle carrying the other girls drove past the front of the house, turned around so that the driver's side of the vehicle was facing the house, turned off the headlights, rolled down the windows, and started to drive by Scott's house as one of the car's occupants opened fire. *Id*. at 467, 819 S.E.2d at 118. According to Scott, he fired a warning shot in the air, but when the car approached the house, he shot two or three more times before retreating inside. *Id*. at 468, 819 S.E.2d at 118. At that moment, another vehicle was located behind the car approaching Scott's home, and his gunshots killed the driver of that vehicle, who based on the evidence was not involved in the chase but instead appeared to be an innocent onlooker caught in the crossfire. *Id*.

Based on these facts, we found subsection 16-11-440(A) did not apply to Scott because the assailant was not "in the process of unlawfully or forcefully entering a dwelling or residence." *Id*. at 474, 819 S.E.2d at 121. Scott also "did not need a presumption of reasonable fear because he proved to the circuit court's satisfaction as a matter of fact that his fear was reasonable." *Id*. In addition, although Scott satisfied the requirements of subsection 16-11-440(C) to replace the duty to retreat element of self-defense, it was not essential to the circuit court's finding of immunity because he was in the curtilage of his home when he used deadly force against his assailant and was free to stand his ground under the Castle Doctrine. *Id*. at 474-75, 819 S.E.2d at 121; *State v. Grantham*, 224 S.C. 41, 45, 77 S.E.2d 291, 293 (1953) (holding that a person "in his home lawfully occupied by him and . . . without fault in bringing on the difficulty was not bound to retreat in order to invoke the benefit of the doctrine of self-defense, but could stand his ground and repel the attack with as much force as was reasonably necessary."). Accordingly, because Scott established a prima facie case of self-defense, the trial court did not need to apply

section 16-11-440 and instead granted him immunity based on satisfying the "another applicable provision of law" portion of section 16-11-450.

However, the traditional Castle Doctrine does not apply to Glenn because he was not attacked on his own premises but instead was attacked in the common area of the Spring Grove apartment complex. Subsection 16-11-440(A) also does not apply to Glenn for the same reason as in *Scott*—that the assailant was not "in the process of unlawfully or forcefully entering a dwelling or residence." Rather, to obtain immunity, Glenn must satisfy all four elements of self-defense by a preponderance of the evidence, or three of the elements plus subsection 16-11-440(C) if applicable.

Glenn asks us to overlook the circuit court's failure to address the self-defense elements with precision and to "glean from [the court's] order the necessary findings of fact to support the conclusion that [Glenn] established the four elements of self-defense" and grant him immunity. *Scott*, 424 S.C. at 469, 819 S.E.2d at 118. This we decline to do.

In determining a defendant's entitlement to immunity under the Act, the circuit court must necessarily consider the elements of self-defense. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. While we understand that written orders are not always practical given the timing of the immunity hearing, the circuit court, in announcing its ruling, should at least make specific findings on the elements on the record. *See State v. Cervantes-Pavon*, 426 S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n.4 (2019) ("While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve.").

Here, in its oral ruling from the bench, the circuit court did not address the elements of self-defense, thereby making appellate review difficult. Instead, the court went straight to consideration of subsection 16-11-440(C). This constituted reversible legal error. Glenn argues that the court's denial of immunity *solely* on that subsection implies it found the elements of self-defense were satisfied. The circuit court is the fact-finder in immunity hearings, and we are reluctant to infer findings of fact which do not appear in the record. Therefore, we reverse and remand the case for a new immunity hearing. *See Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569 (noting the trial court's immunity ruling must be based solely on the evidence presented at the pretrial hearing). On remand, the circuit court should analyze all of

the elements of self-defense and should also determine whether Glenn's alleged trespass was proximately related to the shooting.

CONCLUSION

For the foregoing reasons, we conclude the circuit court erred in failing to consider the elements of the common law of self-defense and denying Glenn immunity *solely* on the basis that he did not have a right to be where he was when he was attacked. We also hereafter require circuit courts during pretrial *Duncan* hearings to conduct a proximate cause analysis before determining whether a person seeking immunity under the Act satisfies subsection 16-11-440(C), if applicable. Accordingly, we **REVERSE** the decision of the court of appeals and **REMAND** to the circuit court for a new immunity hearing.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerald Lamar Harbin, Special Fiduciary of the Franklin N. Harbin and Edna F. Harbin Living Trust, Appellant,

v.

Susan H. Williams, George T. Williams, Citifinancial Inc., and CFNA Receivables (SC) Inc., Defendants,

Of whom Susan H. Williams is the Respondent.

Appellate Case No. 2017-001924

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

Published Opinion No. 5695
Submitted October 1, 2019 – Filed December 18, 2019

AFFIRMED

Charles M. Watson, Jr., of Greenwood, for Appellant.

Donna J. Jackson, of Clinton, for Respondent.

THOMAS, J: In this declaratory judgment action, Jerald Lamar Harbin, Special Fiduciary of the Franklin N. Harbin and Edna F. Harbin Living Trust, appeals the circuit court's denial of his motion for a directed verdict on the issue of a co-settlor's authority to transfer property from a trust to Susan H. Williams. Jerald argues the trial court erred in (1) denying his motion for a directed verdict; (2)

submitting the issue of a co-settlor's authority to the jury; and (3) denying his motion for judgment notwithstanding the verdict. We affirm.

FACTS

On January 16, 2000, Franklin N. and Edna F. Harbin created the Franklin N. Harbin and Edna F. Harbin Living Trust (the Trust). The same day, Franklin conveyed a farm on Old Laurens Highway and the property at issue, the Harbins' home at 313 Lakeshore Drive (the home property), to the Trust.

The Trust named Franklin and Edna as settlors of the Trust. Article 2 of the Trust provided, "The Settlors shall act as Trustees during their lives. Upon the death or incapacity of either Settlor, the other Settlor shall act as Trustee alone." Article 3 provided, "While both Settlors are living, either may: (1) withdraw property from this Trust . . . ." Article 4 provided for the Trust property to be divided equally among the children of the Trustees "[u]pon the death of both Settlors."

On March 31, 2000, Franklin and Edna conveyed the farm from the Trust to their son, Stephen Harbin.[1] Franklin died on June 23, 2000. On November 30, 2005, Edna, acting as Trustee, conveyed the home property to herself for life with the remainder to her daughter, Susan Williams. On January 10, 2008, Edna and Susan mortgaged the home property. Edna died on March 21, 2011.

Jerald Harbin was appointed Special Fiduciary of the Trust and filed this action seeking a declaration that the home property was part of the Trust. Jerald relied on Article 3, arguing it required both settlors to be alive to withdraw property from the Trust. Susan answered, demanding a jury trial.

At a pretrial hearing, Jerald agreed to a jury trial. Susan argued the Trust was ambiguous. The trial court found there was "no ambiguity in the Trust document. But, even if I were to find an ambiguity, it would be a patent ambiguity and no extrinsic evidence is allowed . . . ." The court stated that although the Trust was subject to different interpretations as to whether Edna had the authority to transfer the home property, it was not "the same thing as ambiguity," and the question of

[1] There were five siblings: Michael Harbin (deceased), Jerald Harbin (the appellant), John Randall "Randy" Harbin (deceased), Stephen Harbin, and Susan Williams (the respondent).

Edna's authority was for the jury. Jerald argued, "[I]n light of your rulings, there is nothing to submit to the jury." The court disagreed.

At trial, James Johnson, an attorney, testified he represented Franklin and Edna. He reviewed the Trust in 2000 and learned Susan and her husband were living with and taking care of Franklin and Edna in the home property. Johnson met with Franklin, Edna, and Susan to discuss the home property. However, the deed transferring the home property to Susan was not executed until 2005, after Franklin's death.

At the close of all evidence, Jerald moved for a directed verdict on the ground there was no genuine issue of material fact, and he was entitled to a directed verdict as a matter of law. The court found "the Trust document itself does create an issue in (sic) fact." Thus, the court denied the motion. The court charged the jury that the sole issue before it was to determine whether Edna had the authority under the Trust to transfer the home property. The jury found Edna had the authority under the Trust to deed the property. This appeal followed.

LAW/ANALYSIS

1. Directed Verdict

Jerald argues the trial court erred in denying his motion for a directed verdict because he construes Article 3 as unambiguously providing that the Trust limited the power to withdraw property specifically to the period of time when both settlors were living. We disagree.

Article 3 provides if both settlors of the Trust are living, either may withdraw property from the Trust. Article 2 provides for the remaining settlor, after one settlor dies, to act as trustee alone. The Trust did not specifically grant the power to the surviving trustee to withdraw property from the Trust. Instead, the Trust allows a trustee "to exercise such powers as are conferred upon Trustees generally by the Uniform Trustees Powers Act (S.C. Code Ann. 62-7-701 (1990)) . . . ."

Although the trial court stated the Trust was unambiguous, it also found the Trust was subject to different interpretations. We agree with the latter and find a trust that is subject to different, reasonable interpretations is inherently ambiguous. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d

299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). When a trust is susceptible of more than one reasonable interpretation, a motion for a directed verdict should be denied. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) ("If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created . . . . "); *Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005) (stating an appellate court will reverse a trial court's ruling "on a directed verdict motion only where there is no evidence to support the ruling or where the ruling is controlled by error of law"). Because we find the Trust was susceptible of more than one reasonable interpretation regarding Edna's authority to transfer property from the Trust after Franklin's death, we affirm the trial court's denial of Jerald's motion for a directed verdict.

2. Submission to the Jury

Jerald argues the trial court erred in submitting the issue of Edna's authority to the jury because either an unambiguous contract, or one with a patent ambiguity, present questions of law to be decided by the court. We disagree.

As to Jerald's argument that the Trust was unambiguous, we already determined we find the Trust ambiguous regarding Edna's authority to transfer Trust property after Franklin's death. Thus, we review whether the trial court erred in submitting the issue to the jury because any ambiguity was patent.

Jerald correctly notes that our South Carolina jurisprudence has long distinguished between patent and latent ambiguities in determining whether extrinsic evidence was admissible and whether the construction of an ambiguous document was a question of law for the court or a question of fact for the jury. In *Hann v. Carolina Casualty Insurance Co.*, 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969) (quoting *Jennings v. Talbert*, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)), our supreme court defined the different ambiguities as follows:

> Ambiguities, however, are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which

> they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed, or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Our supreme court explained the distinction more fully and discussed the admissibility of extrinsic evidence in *In re Estate of Prioleau*, 361 S.C. 627, 632, 606 S.E.2d 769, 772 (2004) as follows:

> Ambiguities may be patent or latent. "[T]he distinction being that in the former case the uncertainty is one which arises upon the words of the . . . instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the . . . instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe." *In re Estate of Fabian*, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997) (*citing Jennings v. Talbert*, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)). A court may admit extrinsic evidence to determine whether a latent ambiguity exists. *Id.* at 353, 483 S.E.2d at 476.

Our appellate courts have also noted only latent ambiguities present questions of fact for a jury. *See Hann*, 252 S.C. at 526, 167 S.E.2d at 423 ("[T]his court in a long line of cases dealing with ambiguities in insurance policies, which were in fact patent ambiguities, has held, either expressly or in effect, that the construction of the particular policy was a matter for determination by the court and that no jury issue was involved."); *Cogdill v. Equity Life & Annuity Co.*, 262 S.C. 248, 253, 203 S.E.2d 674, 677 (1974) (explaining a patent ambiguity in an insurance policy is to be construed by the court); *Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 526, 709 S.E.2d 85, 95-96 (Ct. App. 2011) ("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." (citations omitted)).

In recent years, however, our supreme court has seemingly discarded the distinction between patent and latent ambiguities in determining whether the interpretation of a document is for the court or the jury. In interpreting an insurance policy, our supreme court did not distinguish between patent and latent ambiguities in *Williams v. Government Employees Insurance Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014), and stated the following:

> "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The *construction* of a clear and unambiguous contract is a question of law for the court to determine. *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). If the court decides the language is ambiguous, however, evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder.

Likewise, in interpreting a deed in *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (internal citations omitted), our supreme court discussed ambiguities without distinguishing between patent and latent, stating:

> It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. On the other hand, the construction of a clear and unambiguous deed is a question of law for the court.

Following our supreme court's recent trend and its analyses in *Williams* and *Town of McClellanville*, we find the ambiguity in the Trust presented a question of fact, and the trial court did not err in submitting the ambiguity to the jury.

3. Judgment Notwithstanding the Verdict (JNOV)

Jerald summarily argues the trial court erred in denying his motion for JNOV. We disagree.

"[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). "When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

After the jury rendered its verdict, Jerald moved for JNOV "on the same grounds as set forth" in his directed verdict motion. The court denied the motion. For the same reasons set forth in our analysis of the directed verdict issue, we affirm.

4. Reply Brief

For the first time in his reply brief, Jerald argues only a settlor of the Trust had authority to distribute property from the Trust. He next argues the Trust required both settlors to be alive. Jerald maintains a trustee never had the authority to distribute property and Edna as the remaining trustee had no authority. We decline to address this issue because it was raised for the first time in the reply brief. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); *Divine v. Robbins*, 385 S.C. 23, 44 n.4, 683 S.E.2d 286, 297 n.4 (Ct. App. 2009) (declining to address an issue raised for the first time in a reply brief).

CONCLUSION

Based on the foregoing analysis, we affirm the jury's verdict.

AFFIRMED.[2]

SHORT and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis, Appellants.

Appellate Case No. 2014-001524

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

Opinion No. 5696
Heard May 7, 2019 – Filed December 18, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Ian S. Ford and Neil Davis Thomson, both of Ford Wallace Thomson, LLC, of Charleston, for Appellants.

M. Dawes Cooke, Jr., John William Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort; James Andrew Yoho, of Carlock Copeland & Stair, LLP, of Charleston; and Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, for Respondent.

LOCKEMY, C.J.: This case comes before this court on remand after the supreme court's decision in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193,

821 S.E.2d 667 (2018), with instructions to address the Dennises' remaining issues on appeal.

FACTS/PROCEDURAL BACKGROUND

In 1999, Ronnie and Jeanette Dennis purchased property on Callawassie Island. At that time, the Dennises joined a private non-profit club known as the Callawassie Island Club, and paid $31,000 to become "equity members." In their application, the Dennises agreed their membership would be governed by the "Plan for the Offering of Memberships in The Callawassie Island Club," which the developer of Callawassie Island created in 1994. The 1994 Plan included exhibits labeled as Bylaws and Rules. The 1994 Plan stated, "An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club." Similarly, the 1994 Bylaws stated, "Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees, and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club."

The 1994 Plan contemplated that the members would eventually take over the assets and operation of the Island Club. In 2001, the members of the Island Club formed The Callawassie Island Members Club, Inc. (the Club) for this purpose. The Club assumed ownership and operations of all Island Club amenities, including a golf course and driving range, tennis courts, a swimming pool, and a clubhouse. The members of the Island Club—including the Dennises—received a membership certificate to the Club and continued to enjoy the benefits of membership. The Club established its own Bylaws, Plan, and Rules in 2001, each of which was amended several times over the years.

In 2010, the Dennises decided they no longer wanted to be in the Club, so they submitted a "letter of resignation" and stopped making all payments. Those payments included $634 per month for the membership, "special assessments" that totaled $100 per month, and yearly food and beverage minimums of $1,000. In 2011, the Club filed a breach of contract action against the Dennises, alleging the unambiguous terms of the membership documents required the Dennises to continue to pay their membership dues, fees, and other charges until their membership is reissued. The Dennises denied any liability, alleging they were told by a club manager that their maximum liability would be only four months of dues, because after four months of not paying, they would be expelled. The Dennises also alleged the membership arrangement violates the South Carolina Nonprofit

Corporation Act. *See* S.C. Code Ann. §§ 33-31-101 to -1708 (2006 & Supp. 2019).

The Club filed a motion for summary judgment. The circuit court held a hearing and issued an order granting summary judgment. The circuit court found the membership documents unambiguously require a resigned member to continue to pay dues, fees, and other charges until the membership is reissued. The court rejected the Dennises' arguments relating to the Nonprofit Corporation Act.

The Dennises appealed, and this court reversed on both issues. *See Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016). We found there was "some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." 417 S.C. at 616, 790 S.E.2d at 438. In addition, we found the provisions of the documents that require the Dennises to continue to pay their membership dues after resignation violate section 33-31-620 of the Nonprofit Corporation Act. 417 S.C. at 618-19, 790 S.E.2d at 439. We found it unnecessary to address the other issues raised on appeal, 417 S.C. at 619 n.5, 790 S.E.2d at 440 n.5, and remanded to the circuit court for trial, 417 S.C. at 619, 790 S.E.2d at 440.

The Club filed a petition for a writ of certiorari, which the supreme court granted. In a 3-2 decision, the supreme court reversed this court and reinstated summary judgment in favor of the Club. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). The supreme court held the membership documents[1] unambiguously provide that club members are required to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued. *Id.* at 200, 821 S.E.2d at 670. The court found this requirement was not prohibited by section 33-31-620 of the Nonprofit Corporation Act. *Id.* at 206, 821 S.E.2d at 673. The supreme court remanded to this court to address the remaining issues on appeal. *Id.* at 206, 821 S.E.2d at 674.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as

[1] The supreme court found the 2008 Plan, the 2009 Bylaws, and the 2009 Rules were in effect when the Dennises resigned in 2010. *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *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). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

The Dennises assert the following issues were neither addressed by this court nor reached by the supreme court.

I. Standard of Review

The Dennises contend the circuit court improperly shifted the burden of proof and failed to apply the "mere scintilla" standard. This issue was decided by the supreme court when the court cited the applicable standard of review. *See Dennis*, 425 S.C. at 198, 821 S.E.2d at 669. Accordingly, we need not address this issue.

II. Governing Documents

A. Ability to Concede/Swap Memberships

The Dennises argue genuine issues of fact exist as to whether they were treated differently from other Club members. The Dennises contend (1) the Club refused to allow them to swap memberships with another willing club member, and (2) the Club allowed other members to concede memberships but refused to do so for the Dennises.

The circuit court found that to the extent club members were treated differently, such treatment was in furtherance of the negotiated settlements of debts owed to the Club. The circuit court held the board of directors was authorized by the Club's governing documents and section 33-31-302 of the Nonprofit Corporation Act to take such actions. Therefore, the circuit court stated it would not review the *intra vires* corporate action of the Club, where it was exercising its business judgment, and there was no evidence suggesting self-dealing, fraud, or bad faith on the part of the board.

The Dennises argue they have been injured by the Club's denial of their request to swap a golf membership with the less costly social membership of another member. Jeannette Dennis testified the Dennises, unlike other club members, were unable to swap memberships. The Dennises rely on the Club's 1994 Bylaws to support their position that such swaps were permitted by the Club. Pursuant to the 1994 Bylaws,

> Social Members may, at all times subject to availability, upgrade to a Golf Membership upon the payment of the difference between the membership contribution for a Golf Membership, and the membership contribution for a Social Membership, at the time of the upgrade. The downgrade of a Golf Membership to a Social Membership is not permitted unless there is another equity member who desires to upgrade to the Golf Membership.

The 1994 Bylaws were not in effect when the Dennises resigned in 2010. The full version of the 2009 Bylaws, which were in effect at the time the Dennises resigned, is not in the record.

Next, the Dennises argue they were injured by the Club's refusal to allow them to concede their membership. The Dennises cite a number of examples of the Club allowing some members to concede their memberships and end all financial obligations to the Club. The record includes concession letters from the Club, the Club's resale list which documents the members who conceded their memberships, and deposition testimony from a former board member and membership director. The governing documents do not contain any provisions governing the concession of a club membership.

We find the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act. We discuss the Act below.

B. Nonprofit Corporation Act

The Dennises argue the circuit court failed to consider sections 33-31-610 and 33-31-611(c) of the Act. The Dennises assert that while these provisions of the Act

require all club members to have the same rights, they were treated differently from other members with regard to previous requests to swap or concede their membership.

Section 33-31-610 provides,

> [a]ll members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

S.C. Code Ann. § 33-31-610 (2006). Section 33-31-611(c) states, "[w]here transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member." S.C. Code Ann. § 33-31-611(c) (2006).

The circuit court treated the determination of whether the Club violated the Act by allowing other members to concede memberships as a question of law. We hold the determination of whether the Club violated the Act is more appropriately an issue to be determined by a factfinder. Accordingly, we reverse the circuit court's grant of summary judgment and the accompanying award of damages.

C. Amendment of Governing Documents

The Dennises argue genuine issues of fact exist as to whether the Club's governing documents were properly amended. Specifically, they contend the Club changed language in section 13.3.1 of the Rules from "shall be expelled" to "may be expelled" without discussion among the board and without presentation to club members. The Dennises rely on the deposition testimony of Karen Norwood, former board president, who testified the change was made without consultation with club members.

Pursuant to section 13.3.1 of the 2001 Rules, "[a]ny member whose account is delinquent for sixty (60) days from the statement date *may* be suspended by the Board of Directors. . . . Any member whose account is not settled within the four

(4) months' period following suspension *shall* be expelled from the Club." (emphasis added).

The record does not contain any subsequent version of section 13.3.1. Assuming this rule remains unchanged except for the "shall" and "may" language in the 2009 Rules, which were in effect when the Dennises resigned in 2010, we need not decide this issue. As noted by the supreme court, the rules regarding expulsion are clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. *See Dennis*, 425 S.C. at 204, 821 S.E.2d at 673. Here, the Dennises resigned; they were never suspended. Thus, the expulsion provision was never triggered.

In addition, pursuant to the 2001 Rules, the board had the right to change the rules without a vote of the membership. Section 1.3 of the 2001 Rules provides "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships."[2] Accordingly, we find a genuine issue of fact does not exist as to whether the governing documents were properly amended.

D. Contract

The Dennises argue there is no evidence in the record supporting the circuit court's conclusions that club members voted to take over the assets of the Club. This issue was addressed by this court and the supreme court; therefore, we need not address this issue on remand. The supreme court held:

> We begin our analysis of this case with a general discussion of the membership arrangement and the membership documents that govern that arrangement. Three documents governed the Dennises' membership in the Island Club and the Members Club—the Bylaws, the Plan, and the Rules. The three documents reference each other and are intended to operate together. When the Dennises first joined the Island Club, the 1994 versions of those documents applied. However, these documents were amended several times over the years, as permitted

[2] The 2009 Rules contain the same provision.

> by the Bylaws, the Plan, and the Rules. The first amendments occurred when the club assets were transferred from the Island Club to the Members Club in 2001, at which point the Members Club enacted its own Plan, Bylaws, and Rules. All three documents were further amended several times during the 2000s. There is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.

Dennis, 425 S.C. at 198-99, 821 S.E.2d at 670. Noting our prior rejection of the Dennises's argument that there was no evidence their Island Club membership transferred to the Club, the supreme court specifically found there was "no question" the Dennises were contractually bound to the Club.

III. Attorney's Fees

Because of our reversal of the grant of summary judgment to the Club, we also reverse the award of attorney's fees to the Club. *See Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be reversed [when] the substantive results achieved by counsel are reversed on appeal.").

CONCLUSION

We affirm the circuit court's grant of summary judgment on the Dennises' claim that the Club improperly amended the governing documents. In addition, we find a genuine issue of fact exists as to whether the Club violated the Nonprofit Corporation Act by allowing some club members to concede their memberships and not others. Accordingly, we reverse the grant of summary judgment as to this issue and remand to the circuit court for trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State Farm Mutual Automobile Insurance Company,
Respondent,

v.

Beverly Goyeneche, David R. Gray, III and Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray), individually and as Parent and Natural Guardian of S.G.,
Defendants,

Of Whom Beveryly Goyeneche, and Amanda Goyeneche are the Appellants.

Appellate Case No. 2016-000840

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

Opinion No. 5697
Heard June 7, 2018 – Filed December 18, 2019

AFFIRMED

Karl Huggins Smith, of Smith Watts & Associates, LLC, of Hartsville, for Appellants.

Jonathan M. Robinson, of DuBose Robinson Morgan, PC, of Camden, for Respondent.

MCDONALD, J.: This is a declaratory judgment action to determine whether State Farm Mutual Automobile Insurance Co. (State Farm) has a duty to defend and provide liability and underinsured motorist (UIM) coverage following the death of an unattended child (S.G.) in a vehicle insured by a State Farm automobile policy. Appellants Beverly Goyeneche (Grandmother) and Amanda Goyeneche (Mother) appeal the circuit court's order finding their claims arising from S.G.'s death are excluded from coverage and State Farm has no duty to defend or indemnify Grandmother, Mother, or David R. Gray, III (Father).[1] Appellants argue the circuit court erred in (1) finding the State Farm policies issued to S.G.'s parents and grandmother provide no coverage for S.G.'s death; (2) rejecting persuasive authority from other jurisdictions; and (3) determining S.G. was a resident relative of only Mother's household. We affirm.

Stipulated Facts[2]

The underlying facts of this case are tragic. On the morning of May 8, 2014, Father placed thirteen-month-old S.G. into her car seat in the back seat of his truck, intending to take her to daycare. However, Father instead drove to work, leaving S.G. unattended in the back seat of the truck. Father's truck was parked, with the ignition off, from approximately 9:30 a.m. until 1:00 p.m., 1:15 p.m. until 2:15 p.m., and again from 2:30 p.m. until 5:15 p.m. At the end of his work day, Father found S.G. unresponsive in his vehicle; she was pronounced dead from complications of hyperthermia at 5:50 p.m.

Mother made claims under the liability and UIM coverage of the following insurance policies (the Policies) issued by State Farm:

> 1. Policy Number 4891-309-40: issued to Father on February 28, 2014, insuring a 2001 Ford F150 pickup truck, and providing liability and UIM coverage of $25,000 per person, $50,000 per occurrence, and $25,000 for property damage.

[1] Father was a defendant in the underlying action but is not a party to this appeal.

[2] S.G.'s residence is disputed.

2. Policy Number C483241E: issued to Mother on October 30, 1998, insuring a 2013 Jeep Wrangler, and providing liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 for property damage.

3. Policy Number 1003667A: issued to Grandmother on September 27, 2004, insuring a 2004 Chevrolet Impala, and providing liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 for property damage.

4. Policy Number 1772085A: issued to Grandmother on June 3, 2008, insuring a 2007 Chevrolet C1500, and providing liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 for property damage.

The Policies provided coverage for "bodily injuries and property damage caused by an accident and arising out of the ownership, maintenance or use of the insured automobile, and otherwise subject to the terms of the policy."

Procedural History

On September 24, 2014, State Farm brought this declaratory judgment action seeking a declaration that the Policies did not provide coverage for S.G.'s death, and, therefore, State Farm owed no duty to defend or indemnify Grandmother, Mother, or Father. Appellants filed a joint answer and counterclaim, asserting S.G.'s death arose from the operation, ownership, maintenance or use of vehicles covered by the Policies. Appellants also sought a declaration that the Policies provide coverage for S.G.'s death.

The parties entered a stipulation of facts, and Appellants gave deposition testimony. The circuit court held a nonjury trial on April 7, 2015; State Farm's South Carolina Policy Form 9840a and the deposition testimonies were offered into evidence without objection. By order dated June 1, 2015, the circuit court declared that the Policies did not provide coverage in this matter. Specifically, the circuit court concluded there was no evidence Father's truck was an "active

accessory" in S.G.'s death. The court further determined that even if a causal connection existed between the truck and the injury, Father's neglect was an act of independent significance severing the causal connection. The court also found the third prong of the *Aytes* test, the "transportation" element, was not satisfied.[3] Finally, the circuit court determined S.G. was a resident solely of Mother's home. Defendants' filed a Rule 59(e), SCRCP, motion to alter or amend; following a hearing, the circuit court denied this motion.

Standard of Review

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* at 46–47, 717 S.E.2d at 592 (quoting *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009)). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (quoting *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)). "In such cases, the appellate court owes no particular deference to the trial court's legal conclusions." *Id.* at 301–02, 584 S.E.2d at 155 (quoting *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)).

[3] *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) (discussing the factors analyzed when determining whether damages arose from the "ownership, maintenance, or use" of an insured vehicle).

Law and Analysis

I. The *Aytes* Test

Appellants assert the circuit court erred in applying the three-pronged test of *State Farm Fire & Casualty Co. v. Aytes* in determining the Policies provide no coverage. We disagree.

In *Aytes*, the insured, Donna Dawson, and Randy Aytes became involved in an altercation while at the home of Aytes's mother. *Id.* at 32, 503 S.E.2d at 745. Aytes took Dawson's keys and forced her into her car. *Id.* Although Aytes was forbidden to drive Dawson's car, he drove Dawson to his mother's property with the expressed intent of killing her. *Id.* While standing outside the car on the passenger side, Aytes fired a pistol towards Dawson, striking her in the foot. *Id.*

In response to certified questions from the United States district court, our supreme court restated South Carolina's three-prong test for determining whether "[a]n insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *Id.* at 33, 503 S.E.2d at 745; *see also* S.C. Code § 38-77-140(A) ("An automobile insurance policy may not be issued or delivered in this State . . . unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles . . . ."). "First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. . . . [Third,] it must be shown the vehicle was being used for transportation at the time of the assault." *Id.*

In applying this test to the facts presented, the supreme court concluded:

> There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot. Therefore, we

> do not find Dawson's injuries resulted from the ownership, maintenance, or use of her vehicle.

Id. at 35, 503 S.E.2d at 746.

This court considered the first two requirements that later became part of the *Aytes* test in *Hite v. Hartford Accident and Indemnity Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986). Hite was employed by a car dealership, which provided an automobile for his use. *Id.* at 617, 344 S.E.2d at 174. On the evening of his injury, Hite returned to the dealership and, leaving the car running, exited the vehicle. While approaching the dealership on foot, Hite heard the night watchman yell that someone (William Martin) had backed into a new truck. *Id.* at 618, 344 S.E.2d at 175. Hite walked fifty feet across the parking lot to tell Martin, who was sitting in a car, not to leave. *Id.* However, Martin accelerated the vehicle and ran over Hite's legs. *Id.* In holding there was no causal connection between the insured vehicle Hite had been driving and Hite's injuries, this court concluded, "[i]t is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident." *Id.* at 621–22, 344 S.E.2d at 177.

Before *Aytes*, our supreme court considered the availability of automobile insurance coverage for a passenger's gunshot injuries in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). There, a passenger in a Chevrolet Blazer was injured when an unknown assailant in another vehicle bumped, pursued, and then shot at the Blazer. *Id.* at 271, 422 S.E.2d at 107. Relying on *Continental Western Insurance Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987), the supreme court explained:

> In *Klug*, the court first considered the causal connection between the vehicle and the injury. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. We employed a similar analysis in *Chapman v. Allstate Insurance Co.*, 263 S.C. 565, 211 S.E.2d 876 (1975), wherein an uninsured motorist assaulted the insured while traveling in the uninsured's vehicle. The insured was injured when she fell or jumped from the moving vehicle as a result of the attack. Accordingly, we held it was clear the injury arose out of the use of the

> uninsured automobile. Although the assault, not the use of the vehicle, was the cause of the insured's injuries, we found that the use of the vehicle causally contributed to the claimant's injuries.

Howser, 309 S.C. at 272–73, 422 S.E.2d at 108 (citations omitted). In determining the necessary causal connection for coverage that existed between the uninsured vehicle and the injuries Howser sustained, the court stated, "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape." *Id.* at 273, 422 S.E.2d at 108.

Again relying on *Klug*, the *Howser* court further explained, "[o]nce causation is established, the court must determine if an act of independent significance occurred breaking the causal link." *Id.* The court noted consideration of the existence of such an independent act is consistent with South Carolina precedent:

> In *Plaxco v. United States Fidelity and Guaranty Co.*, 252 S.C. 437, 166 S.E.2d 799 (1969), the vehicle's battery was used to start the engine of an airplane. Once this was accomplished, the airplane's brakes failed, causing it to move forward and damage another plane. This Court found the only connection between the vehicle and the plane was the use of the vehicle to start the plane. Since that purpose had been completed when the plane moved forward, any causal connection was broken and the accident resulted from the use of the plane and not the vehicle.
>
> In this case, no independent act occurred to break the causal link. Here, as in *Klug*, the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault. Accordingly, we conclude that for the purposes of Howser's uninsured motorist coverage, her injuries arose out of the use of her assailant's vehicle.

Howser, 309 S.C. at 273–74, 422 S.E.2d at 108–09 (citations omitted).

The supreme court added an additional factor to the coverage test in *Canal Insurance Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993). There, the owner and operator of a truck crane was using the crane to lift a condenser onto a roof when the crane became unbalanced, tipped over, and crashed into the building. *Id.* at 2–3, 431 S.E.2d at 578–79. In construing section 38-77-140, the court defined "'use of a motor vehicle' as limited to transportation uses." *Id.* at 4, 431 S.E.2d at 579. Thus, because the truck crane was not being used for transportation at the time of the accident, the supreme court reversed the circuit court's judgment finding coverage available under the subject policy. *Id.* at 4, 431 S.E.2d 577, 579–80; *see also Peagler v. USAA Ins. Co.*, 368 S.C. 153, 165, 628 S.E.2d 475, 481 (2006) (finding no coverage for decedent's fatal injury due to accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle that had been used for hunting purposes the previous day).

Our appellate courts have subsequently addressed the "ownership, maintenance, or use" of a vehicle numerous times in the context of assaults involving intentional conduct by an assailant. *See e.g.*, *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (holding injuries arising from gunshots fired from a truck in a restaurant parking lot were excluded from coverage because such injuries are not "foreseeably identifiable with the normal use of an automobile" (quoting *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746)); *Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 297, 523 S.E.2d 457, 45 (1999) (concluding injuries suffered by sexual assault victims were not covered by police department's automobile and general liability policies because the injuries did not arise out of "use" of officer's patrol car within meaning of auto policy); *Home Ins. Co. v. Towe*, 314 S.C. 105, 107–08, 441 S.E.2d 825, 827 (1994) (holding necessary causal connection existed between use of insured's vehicle and serious injuries sustained by tractor trailer driver struck by bottle thrown from passing vehicle; the causal connection was not broken by the insured's passenger's intentionally throwing bottle at a road sign). But our supreme court has clarified that "[n]o distinction is made as to whether [an] injury resulted from a negligent, reckless, or intentional act." *Towe*, 314 S.C. at 107, 441 S.E.2d at 827.

A. Causal Connection

Appellants challenge the circuit court's application of the *Aytes* coverage factors to the facts here, arguing the court erroneously found there was no causal connection between the "ownership, maintenance or use" of Father's truck and S.G.'s death. Regarding the initial "causal connection" prong of the coverage inquiry, our supreme court has found a party must demonstrate: "(a) the vehicle was an 'active accessory' to the assault; and (b) something less than proximate cause but more than mere site of the injury; and (c) that the 'injury must be foreseeably identifiable with the normal use of the automobile.'" *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (quoting *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46). "The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the [injury] occurred." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746.

We agree with Appellants that Father's truck was an active accessory to S.G.'s death. At trial, State Farm argued S.G.'s hyperthermia was "caused by the atmospheric conditions around us when we were in Hartsville [in] May 2014. The heat is what caused the hyperthermia to eventually—if this happened in February, we'd likely have a different story." However, Appellants contend it is well known that vehicles trap heat and the vehicle itself was the producing cause of the onset of S.G.'s hyperthermia. At trial, Appellants stated they did not know whether S.G. would have died if she had been left outside the vehicle: "[She] may have had a sunstroke. [She] may have had heat exhaustion. [She] may have died of dehydration but in this particular case[, she] died from being inside a vehicle."

In their brief to this court, Appellants assert, "Hyperthermia would not have happened just anywhere—the nature of the injury is inextricably linked to the fact that Infant was in Father's vehicle, which he then drove and parked, leaving her inside, prior to completing his transport of her to daycare." And at oral argument, Appellants explained Father's truck was not merely the site of the injury, it caused the injury; the very nature of the vehicle produced the excessive heat that concentrated inside, causing S.G.'s fatal injury. *See e.g.*, *Towe*, 314 S.C. at 107, 441 S.E.2d at 827 (determining automobile was an active accessory that gave rise to the injuries because insured's use of the automobile placed his passenger in the position to throw a bottle at a road sign and the vehicle's speed contributed to the velocity of the bottle, which increased the seriousness of victim's injuries); *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 (finding a sufficient causal connection

existed between use of assailant's vehicle and insured's injuries because the use of the vehicle allowed the assailant to closely pursue Howser; the gunshot was the culmination of an ongoing assault in which the vehicle played "an essential and integral part;" and only an automobile could have provided the assailant with the means to escape).

It is undisputed that Father placed S.G. in his truck to transport her to daycare and that she was ultimately harmed because Father forgot she was in her car seat and left her in the vehicle for over seven hours. Because the physical makeup of automobiles and trucks causes them to trap heat—and the excessive temperature caused S.G.'s death—we find Father's truck not only contributed to but played "an essential and integral part" in her death. *Contra Aytes*, 332 S.C. at 33, 503 S.E.2d at 746 ("The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred.").

Additionally, the fatal injury was foreseeably identifiable with the normal use of a vehicle. *See Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46 ("The injury must be foreseeably identifiable with the normal use of the vehicle."). Many vehicles in South Carolina are used to transport children; transporting children to and from daycare is neither an abnormal nor an unanticipated use. Significantly, our Legislature has recognized that the intentional or unintentional act of leaving a child inside a locked vehicle is foreseeably identifiable with the normal use a vehicle. *See* S.C. Code Ann § 15-3-700 (2016) ("A person is immune from civil liability for property damage resulting from his forcible entry into a motor vehicle for the purpose of removing a minor or vulnerable adult from the vehicle if the person has a reasonable good faith belief that forcible entry into the vehicle is necessary because the minor or vulnerable adult is in imminent danger of suffering harm."). Accordingly, we find Appellants established the necessary causal connection between Father's truck and S.G.'s death.

B. Act of Independent Significance

However, we disagree with Appellants' contention that the circuit court erred in finding Father's leaving the child unattended in the truck for over seven hours was an act of independent significance that broke any causal connection between Father's truck and S.G.'s death.

While our appellate courts have not addressed the factual scenario presented here, South Carolina courts have previously found an assailant's exiting an insured vehicle prior to injuring another to be an act of independent significance breaking the causal chain. *See e.g.*, *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 ("[I]f there was a causal link, it was broken when the assailant exited the vehicle."); *Carraway v. Smith by S.C. Ins. Co.*, 321 S.C. 23, 26, 467 S.E.2d 120, 121 (Ct. App. 1995) ("Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions."). We agree with the circuit court that Father's act of abandoning S.G. for over seven hours, however unintentional, was an act of independent significance breaking the causal connective link between Father's truck and S.G.'s death.

C. Transportation

Appellants next contend the circuit court erroneously found that even if no act of independent significance existed to break the causal chain, the Policies provide no coverage because the truck was not being used for transportation at the time of S.G.'s death. We find no error.

The parties stipulated that Father turned off his ignition, left the truck unattended in the parking lot at his place of employment, and did not occupy the truck for approximately seven hours. The truck never left the parking space, and only S.G. occupied the vehicle. Thus, we agree with the circuit court's finding that Father's truck was not being used for transportation at the time of S.G.'s fatal injury.

II. Authority from Other Jurisdictions

When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions. *Williams v. Morris*, 320 S.C. 196, 200, 464 S.E.2d 97, 99 (1995). However, in considering such cases, we may not apply them in such a manner that we overrule supreme court precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

Appellants rely heavily on *Lincoln General Insurance Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006) to support their argument that the circuit court erred in finding the Policies provide no coverage here. There, the Fifth

Circuit applied Texas law, reasoning that because a vehicle was being used to transport children to a destination—even though the vehicle had been parked for seven hours and was no longer in motion—the vehicle's intended purpose had not yet been fulfilled and was thus ongoing. *Id.* at 860. The Fifth Circuit acknowledged "Texas courts define 'use' broadly: "the phrase 'arising from use' is treated as being a 'general catchall . . . designed and construed to include all *proper* uses of the vehicle not falling within other terms of definition.'" *Id.* at 859 (quoting *Tucker v. Allstate Tex. Lloyds Ins. Co.*, 180 S.W.3d 880, 886 (Tex. App. 2005). The Fifth Circuit's analysis includes not only a broader meaning of the term "use" than our supreme court has set forth, but also a fundamentally different consideration of "transportation" in the context automobile insurance coverage.

As noted above, South Carolina courts have held the party seeking coverage must show the vehicle was being used for transportation at the time of injury. *See Canal*, 315 at 4, 431 S.E.2d at 479 (construing section 38-77-140 and defining "'use of a motor vehicle' as limited to transportation uses"). The law on which the Fifth Circuit relied, however, has no such transportation requirement. The Fifth Circuit applied Texas's test, which considers a person's "intended" use of a vehicle. *See Lincoln General*, 486 F.3d at 861 ("Whether a person is using a vehicle as a vehicle depends not only on his conduct but on his intent." (quoting *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999)). South Carolina courts have not adopted a party's intended use of a vehicle in relation to the *Aytes* test; thus, we believe the Fifth Circuit's expanded definitions of the terms "use" and "transportation" are inconsistent with existing South Carolina law. *See Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (recognizing "it must be shown the vehicle was being used for transportation at the time of the assault.").

The California state court case cited by Appellants offers another illustration of a broader standard of coverage that does not include the transportation prong required in South Carolina. In *Prince v. United National Insurance Co.*, the California Court of Appeals noted "[p]ast California cases have established beyond contention that this language of 'arising out of the use,' when utilized in a coverage or insuring clause of an insurance policy, has a broad and comprehensive application, and affords coverage for injuries bearing almost any causal relation with the vehicle." 47 Cal. Rptr. 3d 727, 730 (Cal. App. 2006) (quoting *State Farm Mut. Auto Ins. Co. v. Partridge*, 514 P.2d 123, 127 (Cal. 1973)). Because these jurisdictions apply a broader definition of "use" than that recognized in existing

South Carolina precedent and do not require a similar "transportation" analysis, we find the circuit court appropriately declined to follow these authorities.

III. Residency

Appellants argue the circuit court erred in finding S.G. was a resident relative of only Mother's household. Appellants further argue the circuit court erred in declaring the residency issue unpreserved for appellate review.

In *Elam v. South Carolina Department of Transportation*, our supreme court explained:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review." *Id.* at 25, 602 S.E.2d at 780.

In their Rule 59(e) motion to alter or amend, Appellants listed the following grounds:

> 1. The Court's Order denies the Defendants' grounds for insurance coverage under the existing vehicular policies of the Plaintiff. The Court further found that the death of [Infant] did not arise out of the ownership, maintenance or use of the vehicle.
>
> 2. The Court based the ruling on *State Farm Fire and Casualty Company v. Aytes*, 322 S. C. 30, 503 S.E. 2d

> 744 (1998), which sets forth a three (3) pronged test for determining coverage. The Order ignored the case law presented by the Defendants to support their argument or the Order failed to fully explain why said cases and arguments are different from the facts set forth in the present case.
>
> 3. The stipulated facts further failed to set forth the details of the "use" of the vehicle by the Defendant driver during the lunch hour while the infant was still present in the vehicle and ignored the fact that the infant's transportation to the daycare facility had never ceased. The Defendants request the Court reopen its judgment, take additional testimony or evidence, amend its findings of fact and conclusion of law or make new findings and conclusions and direct entry of a new judgment.

In its order denying Appellants' motion to alter or amend, the circuit court reaffirmed its prior ruling and noted Appellants failed to raise the resident relative issue in their motion to reconsider. However, Appellants' motion stated, "The Court's Order denies the Defendants' grounds for insurance coverage under the existing vehicular policies of the Plaintiff." Arguably, this statement placed the circuit court on notice that Appellants were seeking a review of *all* of the court's rulings—including its ruling on the question of S.G.'s residency. Furthermore, because Appellants made a permissive motion for reconsideration and not a mandatory motion necessary to preserve an unaddressed error, we find the residency issue is preserved for our review.

Our supreme court first analyzed whether a person was a resident relative of the same household as a named insured in *Buddin v. Nationwide Mutual Insurance Co.*, 250 S.C. 332, 157 S.E.2d 633 (1967). The court stated "'a resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently.'" *Id.* at 339, 157 S.E.2d at 636 (quoting *Hardware Mut. Cas. Co. v. Home Indem. Co.*, 50 Cal.Rptr. 508, 514 (Cal. App. 1966)). The supreme court noted several factors for possible consideration—rent or boarding payments; the presence or absence of control over the relative; and

whether there was a lack of a permanent living arrangement—but found none were determinative of the issue. *Id.* at 338–39, 157 S.E.2d at 636.

In *Auto-Owners Insurance Company v. Horne*, 356 S.C. 52, 66, 586 S.E.2d 865, 873 (Ct. App. 2003), this court concluded "there is no single test to determine whether a minor child is a resident of a noncustodial parent's household for purposes of determining UIM benefits. Rather, the courts generally look at the facts and circumstances of each case in totality to determine the child's residency." While the *Horne* court found the seventeen-year-old child was not a resident relative of her non-custodial father's household, the question of whether a person may be a resident relative of more than one household has not yet been addressed. *See Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 516, 660 S.E.2d 271, 273 (Ct. App. 2008) ("No statute provides guidance concerning whether an insured may maintain more than one household simultaneously. Although the courts have contemplated the meaning of 'resident relative' on numerous occasions, the issue of whether an insured may reside in multiple households simultaneously is one of first impression." (footnote omitted)).

Here, Father admitted Mother was S.G.'s primary custodian because she lived with Mother. Father explained that while he was allowed very liberal visitation with S.G., the parties had no set visitation schedule. Father testified S.G.'s first overnight visit with him occurred in January 2014, and Mother sent an overnight bag whenever S.G. stayed with him. Father also acknowledged he has never claimed S.G. as a dependent on his taxes.

At the time of S.G.'s death, Mother lived with her parents, whose home was listed as the principal address for documentation relating to S.G. Mother testified she and Father never shared a residence and S.G. stayed exclusively with her during her six-week maternity leave. She explained that beginning in December 2013, S.G. began staying with Father on a regular basis. According to Mother, she and Father had a "four-three schedule" meaning S.G. "would stay four days with one parent, three days with the [other parent,] and then we would often alternate and change the schedule if something came up." Mother admitted Father kept a Pack N' Play (portable crib) while she had a permanent wooden crib at her home. Mother concluded her deposition testimony by stating, "I believe we had shared custody but I would say I would be primary."

Grandmother testified Mother was living at her home on April 8, 2013, the day S.G. was born. She characterized S.G.'s home in May 2014 as Mother's house and Father's house. Grandmother explained that in the last three or four months of her life, S.G. stayed "so many nights at [Father's] house and so many nights at our house with [Mother]." Cognizant of our standard of review, we find evidence exists to reasonably support the circuit court's decision that S.G. was a "resident relative" of only Mother's household. *See Crossmann Cmtys. of N.C., Inc.*, 395 S.C. at 46–47, 717 S.E.2d at 592 ("In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." (quoting *Newman*, 385 S.C. at 191, 684 S.E.2d at 543)).

Conclusion

We find Father's act of leaving S.G. in his truck for over seven hours was an act of independent significance breaking any causal link between the use of the truck and her tragic death. Moreover, Appellants are unable to establish the vehicle was being used for transportation during the time S.G. was left in the truck. Finally, evidence supports the circuit court's finding that S.G. was a resident relative of only Mother's household. Thus, the judgment of the circuit court is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gunjit Rick Singh, Respondent,

v.

Simran P. Singh, Appellant.

Appellate Case No. 2015-000434

Appeal From Charleston County
Gordon B. Jenkinson, Family Court Judge
Judy L. McMahon, Family Court Judge
Jocelyn B. Cate, Family Court Judge
Jack A. Landis, Family Court Judge
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5698
Heard February 12, 2019 – Filed December 18, 2019

VACATED AND REMANDED

O. Grady Query, Michael W. Sautter, Michele Patrão Forsythe, and Brooke Hurt Maiden, all of Query Sautter & Associates, LLC, of Charleston, for Appellant.

C. Vance Stricklin, Jr., and J. Mark Taylor, both of Moore Taylor Law Firm, P.A., of West Columbia, Robert N. Rosen, of Rosen Law Firm, LLC, of Charleston, and Katherine Carruth Goode, of Winnsboro, for Respondent.

LOCKEMY, C.J.: Simran P. Singh appeals various family court orders[1] approving agreements to arbitrate, arguing binding arbitration of issues pertaining to child custody, visitation, and support violates the children's constitutional rights and contradicts state law and court rules. We vacate and remand.

FACTS

Simran P. Singh (Mother) and Gunjit Rick Singh (Father) separated in January 2012 and subsequently entered into a settlement agreement (the Settlement Agreement). Mother and Father have two children: S.K.S., who was born in 2001, and H.K.S.S., who was born in 2010. In the Settlement Agreement, Mother and Father agreed the children would reside primarily with Mother. The parties also agreed to submit certain potential disputes regarding child custody, child support, and visitation to a mutually agreed-upon arbitrator for binding arbitration. They further agreed the arbitrator's decisions as to such issues would "be binding and non-appealable" and the arbitrator's written award would "operate as a conclusive resolution" of such issues. In 2013, the family court granted the parties a divorce based on one year's separation and approved the Settlement Agreement, which the family court incorporated into its final divorce decree.

Later that year, Father filed an action in the family court seeking modification of custody, visitation, and child support. Mother and Father entered a consent order, agreeing to dismiss Father's complaint and submit the matter to arbitration. Pursuant to this agreement, the family court issued an order to arbitrate, noting the parties understood the arbitrator's decision would "be final and binding upon them" and they had no right to apply to any court for relief if either was dissatisfied with that decision.

An arbitration was held, and the arbitrator issued a temporary arbitration award, determining Mother was to retain physical custody over the children and Father would have visitation every other weekend. Thereafter, the arbitrator conducted a final arbitration to determine custody, visitation, and other matters.[2] Before the arbitrator issued the final award, the parties again amended their agreement to

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[1] Five family court judges issued orders in this case.

[2] Prior to the final arbitration, the parties modified their agreement and the family court issued an order reflecting this modification; the only change was the addition of a specification that attorney's fees and costs would include the fees and costs incurred in arguing an earlier motion.

arbitrate, and the family court issued an order to arbitrate reflecting the amendment. That order included the following:

> d. The parties understand that the Arbitration rules do not give explicit authority for the parties to submit child-related issues . . . to binding arbitration. However, the parties, upon advice of counsel and believing it to be in the best interest of their minor children, are submitting the issues . . . related to custody and support of their minor children . . . to binding arbitration. . . . The parties further acknowledge that this provision is submitted with their mutual consent and upon the authority of this Order of the Family Court. . . .
> . . . .
>
> h. . . . . The parties' decision to refer this case for final, binding arbitration is made pursuant to the South Carolina Uniform Arbitration Act[3] . . . . It is the intention of the parties and the Order of this Court that beyond a request to the Arbitrator to reconsider issues which he had decided, the decision of the Arbitrator shall be final and binding except to the limited extent provided in the statutory procedure.
>
> j. The parties also understand that the decision of the Arbitrator shall, pursuant to the South Carolina Uniform Arbitration Act . . . , become the Order of the Family Court and shall be enforceable by the Family Court, just as any Final Order. . . . The parties have agreed that they shall abide by and perform any and all aspects of the award rendered under arbitration and that a judgment shall be entered on each and every aspect of the award, as would otherwise be allowed with any Order of this Court.

The amended agreement to arbitrate also contained a provision requiring a party to immediately pay a monetary penalty as liquidated damages if either party attempted to avail himself of the family court's judgment by appealing the award or asking the family court to change or modify the award. Although we are struck by

[3] S.C. Code Ann. §§ 15-48-10 to -240 (2005).

the parties' assumption of the authority to instruct the family court that it *must* accept the award as an order *of the family court*, the most astonishing condition of the amended agreement to arbitrate imposed an automatic and immediate penalty of $10,000 upon any party seeking to exercise their rights in a court of law as a punishment for challenging the arbitrator's decision.

Thereafter, the arbitrator issued a partial arbitration award and, subsequently, a final arbitration award. In both, the arbitrator found a substantial and material change in circumstances had occurred and awarded custody of the children to Father with Mother to have visitation every other weekend and every other Wednesday. The final arbitration award also addressed child support and other issues between the parties.

In a departure from her previous endorsement of arbitration, Mother moved for emergency relief, asking the family court to vacate the partial and final arbitration awards as to the issues of custody, visitation, and child support. Mother argued the awards were void pursuant to Rule 60(b)(4) of the South Carolina Rules of Civil Procedure[4] because they violated the South Carolina Constitution and South Carolina statutory and case law. The family court held a hearing and issued two orders: the first denied Mother's Rule 60(b) motion as premature, and the second confirmed the partial and final arbitration awards.

Mother then filed five motions to vacate the various orders of the family court relating to the parties' agreements to arbitrate, including the orders confirming the arbitration awards and denying Mother's Rule 60(b) claims. In these motions, Mother argued the orders were void under Rule 60(b)(4) because they purported to approve agreements to submit children's issues to binding arbitration or facilitate binding arbitration of children's issues.

The family court held hearings on each motion. The court initially granted the motion to vacate the order approving the Settlement Agreement and the consent order dismissing Father's complaint and submitting the matter to arbitration; however, the court subsequently reversed itself and denied the motion, finding (1) Mother was estopped from objecting to the arbitration because she procured and accepted a benefit from the Settlement Agreement and the consent order of

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[4] Rule 60(b)(4) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . . [when] the judgment is void."

dismissal, (2) she waived her right to object by participating in the arbitration proceedings, (3) her due process rights were not violated because parents have the right to make decisions for their children, and (4) she waived her constitutional rights by agreeing to the arbitration and failing to timely challenge the arbitration. The family court ultimately denied the remainder of Mother's Rule 60(b)(4) motions.[5]

While Mother's Rule 60(b)(4) motions were pending before the family court, Mother filed a Notice of Appeal of the order confirming the partial and final arbitration awards, which we held in abeyance until the family court ruled upon Mother's motions. Thereafter, Mother timely appealed all orders denying her Rule 60(b)(4) motions. We now consider all of the orders Mother appealed.

STANDARD OF REVIEW

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (2019). The family court has discretion in deciding whether to grant or deny a motion made pursuant to Rule 60(b). *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013). Thus, our review of such procedural rulings "is limited to determining whether there was an abuse of discretion." *BB&T v. Taylor*, 369 S.C. 548, 633 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). "We review questions of law de novo." *Ziegler v. Dorchester County*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

Although the family court's resolution of a motion under Rule 60(b) is addressed to its sound discretion, the crux of the question presented to this court on appeal—whether issues involving children can be subject to binding arbitration—is a question of law. Thus, we review this issue de novo.

LAW/ANALYSIS

I. Arbitration of Children's Issues

As evidenced in the Settlement Agreement and the family court's various orders approving the parties' modifications to their agreement to arbitrate, both parties repeatedly agreed any arbitration award would be non-appealable. We also

[5] The family court dismissed two of Mother's motions due to mootness, finding subsequent orders superseded the orders challenged in those motions.

acknowledge that throughout the foregoing proceedings, Mother expressly agreed to submit these issues to binding arbitration and availed herself of the benefits of arbitration until the outcome no longer suited her. Nonetheless, the resolution of this question does not depend upon the rights of either parent or their waiver thereof; rather, the question we must decide is whether the family court—upon the request of the parents—can delegate its duty to determine the best interest of children to a private individual. We find it cannot.

"Both federal and state policy favor arbitrating disputes." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). In South Carolina, arbitration agreements are governed by the Uniform Arbitration Act (the Arbitration Act). S.C. Code Ann. §§ 15-48-10 to -240 (2005). The Arbitration Act provides that a "written agreement to submit *any* existing controversy to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." § 15-48-10(a) (emphasis added). Section 15-48-10(b) sets forth exceptions to the application of the Arbitration Act. As our supreme court has explained, because the terms of section 15-48-10 are clear, "the court must apply those terms according to their literal meaning." *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996). Further, "[w]here the terms of statutes are positive and unambiguous, exceptions not made by the Legislature cannot be read into the Act by implication." *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964). Section 15-48-10 does not specifically exclude the arbitration of issues involving child custody, visitation, and support. Therefore, we cannot read such an exception into the Arbitration Act.

Article V, sections 1 and 12 of the South Carolina Constitution empowered the General Assembly to vest "[j]urisdiction . . . in matters appertaining to minors" with the courts. Pursuant to this authority, the General Assembly enacted section 63-3-530 of the South Carolina Code (2010 & Supp. 2019), which vested family courts with exclusive jurisdiction over matters involving child custody, visitation, and support. However, this provision also gave family courts jurisdiction

> to require the parties to engage in court-mandated mediation pursuant to Family Court Mediation Rules or *to issue consent orders authorizing parties to engage in any form of alternate dispute resolution which does not*

> *violate the rules of the court or the laws of South Carolina*; provided however, the parties in consensual mediation must designate any arbiter or mediator by unanimous consent subject to the approval of the court . . . .

§ 63-3-530(39) (emphasis added). In addition, the Arbitration Act provides that when parties enter into an agreement to arbitrate pursuant to section 15-48-10, the making of such agreement "confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder." § 15-48-180.

Rule 3 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules (the ADR Rules) identifies the actions subject to alternative dispute resolution:

> All civil actions filed in the circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code § 15-79-125(A), and *all contested issues in domestic relations actions filed in family court*, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration. The parties may select their own neutral and may mediate, arbitrate or submit to early neutral evaluation at any time.

Rule 3(a), SCADR (emphasis added); *see also* Rule 2, SCADR (defining arbitration as "[a]n informal process in which a third-party arbitrator issues an award deciding the issues in controversy" and providing such "award may be binding or non-binding as specified in these rules"). Pursuant to Rule 3(b) of the ADR Rules, "ADR is not required for" the following:

> (1) special proceedings, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
>
> (2) requests for temporary relief;
>
> (3) appeals;
>
> (4) post-conviction relief (PCR) matters;

> (5) contempt of court proceedings;
>
> (6) forfeiture proceedings brought by governmental entities;
>
> (7) mortgage foreclosures;
>
> (8) family court cases initiated by the South Carolina Department of Social Services; and
>
> (9) cases that have been previously subjected to an ADR conference, unless otherwise required by this rule or by statute.

Rule 3(a) provides all domestic relations actions filed in family court are subject to court-ordered mediation. Further, Rule 3(b) does not specifically except actions involving children's issues from alternative dispute resolution.

Rule 4 of the ADR rules gives parties express permission to submit certain issues in a domestic relations action to binding arbitration but does not specifically include issues relating to children. *See* Rule 4(d)(2), SCADR (providing "the parties may submit the *issues of property and alimony to binding arbitration* in accordance with subparagraph (5)") (emphasis added); Rule 4(d)(5), SCACR ("In lieu of mediation, the parties may elect to submit *issues of property and alimony to binding arbitration* in accordance with the . . . Arbitration Act . . . or submit all issues to early neutral evaluation pursuant to these rules.") (emphasis added). Although the language of Rule 4 suggests only issues of property and alimony may be resolved by binding arbitration, neither rule expressly prohibits parties from agreeing to arbitrate disputes involving child custody, visitation, or support. Because neither our arbitration statutes nor the ADR rules speak directly to disputes involving child custody, visitation, and support, we look to the role of the family court in protecting the best interests of children.

Family courts in South Carolina have a unique role concerning the protection of children's fundamental rights and interests. In *Ex Parte Tillman*, our supreme court recognized children have fundamental rights under our state's Privileges and Immunities Clause, stating,

> [T]here is a liberty of children above the control of their parents, which the courts of England and this country

> have always enforced. When the parent, in asserting his claim to the custody of his child, disregards the correlative right of the child to care and maintenance at his hands, it is universally held that the right of the parent is at an end, and the child for itself, or another on its behalf, may assert the custody and control of the parent to be an illegal restraint upon its liberty.

84 S.C. 552, 560, 66 S.E. 1049, 1052 (1910). More recently, in *South Carolina Department of Social Services v. Cochran*, our supreme court determined,

> [A] child has a fundamental interest in terminating parental rights if the parent-child relationship inhibits establishing secure, stable, and continuous relationships found in a home with proper parental care. In balancing these interests, the best interest of the child is paramount to that of the parent.

364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005). "Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether [termination of parental rights] is appropriate." *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 343, 741 S.E.2d 739, 749-50 (2013).

In addition, we recognize a child's fundamental rights in many other circumstances. *See Schall v. Martin*, 467 U.S. 253, (1984) (recognizing the due process rights of juveniles in pretrial detentions); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment."); *Doe v. Bd. of Trustees, Richland Sch. Dist. Two*, 2015 WL 3885922, at *2 (S.C. Ct. App. June 24, 2015) (recognizing a student's procedural due process rights in a school transfer proceeding); *In re Arisha K.S.*, 331 S.C. 288, 293, 501 S.E.2d 128, 131 (Ct. App. 1998) (recognizing a child's due process rights in a juvenile proceeding).

Longstanding tradition of this state places the responsibility of protecting a child's fundamental rights on the court system. As our supreme court expressed in 1910,

> The question of the custody of minors and their illegal restraint has always been recognized as a judicial question to be determined by the courts. That it is the function of the courts to decide issues of this kind has

> been held in this state by unbroken authority from the [c]ase of [*In re*] *Kottman*, [11 S.C. Eq. (2 Hill Eq.) 363 (1834) . . . and *Prather v. Prather*[, 4 S.C. Eq. (4 Des. Eq.) 33 (1809)], to *Ex parte Rembert*, 82 S.C. 336, 64 S.E. 150 [(1909)].

Tillman, 84 S.C. at 563, 66 S.E. at 1053 (citation omitted). This responsibility originates from our recognition of the doctrine of *parens patriae*. The United States Supreme Court explained this doctrine as follows:

> *Parens patriae* means literally "parent of the country." The *parens patriae* action has its roots in the common-law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons "who are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600 (1982) (alteration in original) (footnotes omitted) (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)).

Our supreme court explained the doctrine in *Cook v. Cobb*:

> [T]he state, as *parens patriae*, may limit one's parental rights in order to promote a minor child's best interests. This principle is founded upon the state's duty to protect those of its citizens who are unable because of infancy to take care of themselves, and on the right of the child, as citizen and ward, to the state's protection. The right of a

> parent to the custody of his or her child is therefore subject to the power of the court to protect the child's welfare.

271 S.C. 136, 145, 245 S.E.2d 612, 617 (1978) (citations omitted). Our supreme court, quoting *Tillman*, proclaimed, "The rights of the father and mother are both subject to the still higher right of the child to have its welfare safeguarded." *Id.* at 145, 245 S.E.2d at 617 (quoting *Tillman*, 84 S.C. at 561, 66 S.E. at 1052).

Likewise, our supreme court recognized as a part of *parens patriae*, the "[f]amily [c]ourt is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration." *In re Stephen W.*, 409 S.C. 73, 78, 761 S.E.2d 231, 234 (2014) (quoting *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992)); *see also Cook*, 271 S.C. at 140, 245 S.E.2d at 614 ("The welfare of the child and what is in [his] best interest is the primary, paramount and controlling consideration of the court in all child custody controversies."); *Powell v. Powell*, 256 S.C. 111, 116, 181 S.E.2d 13, 16 (1971) ("It is the duty of all courts to do that which is for the best interest of minor children and to protect their rights at every stage of a proceeding, and this is particular[ly] true where their custody is involved."); *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000) (noting our courts have a "duty to zealously guard the rights of minors").

Our laws governing child custody reflect the legislature's recognition of this duty. *See* S.C. Code Ann. §§ 63-15-10 to -260 (2010 & Supp. 2019). Section 63-15-30, which pertains to a child's preference for custody, provides, "In determining the best interests of the child, *the court* must consider the child's reasonable preference for custody. *The court* shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference." (emphasis added). Section 63-15-230(A) states, "*The court* shall make the final custody determination in the best interest of the child based upon the evidence presented." (emphasis added). Moreover, section 63-15-240(B) provides that "[i]n issuing or modifying a custody order, *the court* must consider the best interest of the child." (emphasis added). Thus, South Carolina law and the public policy of this state require the family court to maintain jurisdiction over issues involving children to ensure their best interests are served.

Binding arbitration prevents family courts from acting as *parens patriae* to protect the best interests of children because it largely precludes judicial review of an arbitration award. "When a dispute is submitted to arbitration, the arbitrator

determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (citations omitted). In *Gissel*, our supreme court further explained parties seeking to vacate an arbitration award face an extremely high hurdle:

> [F]or a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. The focus is on the conduct of the arbitrator and **presupposes something beyond a mere error in construing or applying the law**. An arbitrator's "manifest disregard of the law," as a basis for vacating an arbitration award[,] occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.

Id. at 241-42, 676 S.E.2d at 323-24 (citations omitted).

Additionally, in *Swentor v. Swentor*, 336 S.C. 472, 520 S.E.2d 330 (Ct. App. 1999), we considered whether an arbitration award determining the parties' property division was binding on the family court. Applying the Arbitration Act, we concluded "the family court's traditional power to approve property and separation agreements, which includes the power to consider the substantive fairness of the agreement, simply does not extend to arbitration agreements and awards presented to the family court." *Id.* at 482, 520 S.E.2d at 336. Thus, we determined "the Arbitration Act prohibits the family court from exercising this power when presented with arbitration agreements." *Id.* at 484, 520 S.E.2d at 337. However, we also noted our holding was "limited to arbitration agreements resolving issues of property or alimony, and d[id] *not apply to agreements involving child support or custody*." *Id.* at 485 n.6, 520 S.E.2d at 338 n.6 (emphasis added).

As the foregoing demonstrates, the law governing arbitration generally forecloses the family court's ability to review the merits of an arbitrator's decisions. Furthermore, here, the parties' agreement to arbitrate goes one step further by imposing a $10,000 fine upon any party who seeks review of the arbitrator's decision.

Although our supreme court has not specifically addressed binding arbitration and the family court's duty to protect the best interests of children,[6] in *Moseley v. Mosier*, our supreme court considered whether a family court could hold a party in contempt for failing to pay the full amount of child support as provided in the parties' separation agreement. 279 S.C. 348, 306 S.E.2d 624 (1983). There, the court held the following with regard to the family court's jurisdiction concerning child support:

> Family courts may always modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability. Today we clarify the issue by stating that family courts have continuing jurisdiction to do whatever is in the best interests of the child *regardless of what the separation agreement specifies*.

Id. at 351, 306 S.E.2d at 626 (emphasis added) (citation omitted).

Subsequently, in *Ex parte Messer*, we recognized the enforceability of arbitration clauses in separation agreements, generally. 333 S.C. 391, 509 S.E.2d 486 (Ct. App. 1998). However, we noted, "*Moseley* makes it clear *except for matters relating to children, over which the family court retains jurisdiction to do whatever is in their best interest*, parties to a separation agreement may 'contract out of any continuing judicial supervision of their relationship by the court.'" *Id*. at 395, 509 S.E.2d at 487-88 (emphasis added) (quoting *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627). We concluded, "Parties to a separation agreement may agree to submit all disputes, *other than those involving their children*, to arbitration and thus deprive

[6] However, in *Kosciusko v. Parham*, Op. No. 5690 (S.C. Ct. App. filed Nov. 6, 2019) (Shearouse Adv. Sh. No. 43 at 48, 52), we recently concluded the court rules and established law of this state "preclude[d] the submission of children's issues to binding arbitration" and held the family court lacked "subject-matter jurisdiction to sanction or approve binding arbitration of children's issues").

the family court of its traditional powers of enforcement over those disputes." *Id.* at 395, 509 S.E.2d at 488 (emphasis added).

Although we did not expressly address the enforceability of arbitration clauses pertaining to the determination of children's issues in *Messer*, based on the principles our supreme court expressed in *Moseley*, we find family courts must retain jurisdiction over matters involving children to serve their best interests.

In the eyes of the court, an agreement to arbitrate matters involving children stands in the same position as an agreement to award custody. The North Carolina Supreme Court, in addressing the same issue we face, reasoned:

> Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration. Those provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court. With regard to these issues, the need for the court to protect the welfare of children outweighs the advantages of arbitration.

Crutchley v. Crutchley, 293 S.E.2d 793, 798 (N.C. 1982). We apply the same rationale here. A court cannot be bound by an arbitration award and simultaneously act as *parens patriae* on behalf of a child. Therefore, although parties are free to agree to submit these issues to alternative dispute resolution, any agreement to limit the family court's ability to review such an award is unenforceable.

Prohibiting courts from overseeing arbitration decisions that involve the best interest of a child infringes upon the public policy of this state. Our society has an inherent interest in every child. As we stated, family courts are charged with protecting that interest for every child. Arbitrators are not held to the same standards as family court judges, and the law does not impose upon them the same duty to act in the best interest of a child. According to the arbitration agreements Mother and Father entered into, the arbitrator usurped all of the decision-making authority of the family court but undertook none of the duties imposed upon the court. Under the arbitration agreements, this court would not have the ability to review the arbitrator's decision regardless of whether it conflicted with the best interest of the children. This opens the question of whether family courts would

have the ability to modify such arbitration awards should a change in circumstance occur after a final award.

We find the court rules, decisions, and laws of this state vest the family court with exclusive jurisdiction to decide issues involving children in the best interests of the children. Therefore, we hold any provision in an agreement or order that seeks to bind the court or limit its jurisdiction to determine the best interests of a child is unenforceable. Thus, the family court had no authority to order the submission of or approve the parties' agreement to submit such issues to binding arbitration. By doing so, the court improperly delegated its duty to safeguard the best interests of the children. Although parties are free to agree on their own to engage in alternative dispute resolution as to issues involving children, family courts must retain continuing jurisdiction over those matters, and any agreement of the parties to submit such issues to binding arbitration is unenforceable. [7] The family court has the duty to review any awards de novo and may modify, change, or vacate an arbitrator's findings as to child custody, visitation, and support in its own determination of the best interests of the children. Accordingly, to the extent the family court's orders sanctioned or ordered the submission of children's issues to binding arbitration, we hold such orders are void ab initio.

II. Estoppel

The doctrine of equitable estoppel is often confused with waiver. "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Id*. However, "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) (citations omitted) (internal quotations omitted).

Father argues Mother is estopped from challenging the arbitration of issues pertaining to their children because she agreed to the arbitration provision in the Settlement Agreement. We believe the argument presented by Father supports an assertion of waiver, rather than estoppel. Regardless, as we explained above, this case involves the fundamental rights of children in a custody action and the court's

[7] Father concedes in his brief that the family court retains jurisdiction over issues of custody, visitation, and support.

duty to protect the rights and interest of children. Thus, any waiver on the part of the parent cannot be found to abrogate the rights of the child or the duty of the court. *See* S.*C. Dep't of Soc. Servs. v. Parker*, 275 S.C. 176, 178, 268 S.E.2d 282, 283 (1980) (finding the doctrine of estoppel cannot "be applied to deprive [the State] of the due exercise of its police power or to thwart its application of public policy."); *Blair v. Owens*, 153 S.C. 94, 97, 150 S.E. 612, 613 (1929) ("The authority of a guardian does not extend to the doing of any act detrimental to the ward. He cannot waive, abandon, or release without consideration any right or interest of the ward . . . .").

We acknowledge the parties made a conscious decision to include an arbitration provision in the Settlement Agreement and reaffirmed their desire to arbitrate those issues by entering into agreements to arbitrate, not once, but three times. A parent *cannot* waive the rights of any child or the duty of the family court. *See Am. Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621-22, 274 S.E.2d 416, 418 (1981) (finding an illegal insurance policy cannot be made valid by the invocation of the doctrine of waiver or estoppel); *Kelm v. Kelm*, 749 N.E.2d 299, 304 (Ohio 2001) (finding because arbitration of visitation and custody matters violates public policy, "appellee has not, by virtue of her acquiescence to the original shared parenting plan, waived her right to challenge that plan's provision for arbitration of custody and visitation matters."); *see also Kosciusko*, Op. No. 5960 (Shearouse Adv. Sh. 43 at 50 n.12) (noting "subject-matter jurisdiction cannot be waived").

CONCLUSION

Based upon the foregoing, we vacate the family court's order confirming the arbitration award and remand this case to the family court for a de novo hearing on the issues of child custody, visitation, and support. Moreover, to the extent they submit issues of child custody, visitation, and support to binding arbitration, any portions of any orders appealed by Mother that purport to divest the family court of its ability to determine the best interest of the minor children are void and unenforceable.

VACATED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

PCS Nitrogen, Inc., Appellant,

v.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America), Respondents.

Appellate Case No. 2016-001140

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

Opinion No. 5699
Heard March 12, 2019 – Filed December 18, 2019

AFFIRMED

William Howell Morrison, of Haynsworth Sinkler Boyd, PA, of Charleston; and Michael H. Ginsberg and Matthew R. Divelbiss, both of Pittsburgh, PA; all for Appellant.

Morgan S. Templeton, of Wall Templeton & Haldrup, PA, of Charleston, and Patrick F. Hofer, of Washington, D.C., for Respondent Continental Casualty Company; Robert Holmes Hood, Jr., of Hood Law Firm, LLC, of Charleston, and Robert F. Walsh, Patricia B. Santelle, and Thomas M. Going, of Philadelphia, PA, for Respondents United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America); R. Scott Wallinger, Jr. and Christian Stegmaier, of Collins & Lacy, PC, of Columbia, and John S. Favate and Michael Forino, of Springfield, NJ, for Respondent United States Fire Insurance Company; John Robert Murphy, Adam J. Neil, and Wesley Brian Sawyer, of Murphy & Grantland, PA, of Columbia, for Respondent Admiral Insurance Company; John Thomas Lay, Jr. and Laura Watkins Jordan, of Gallivan, White & Boyd, PA, of Columbia, and Helen Franzese, of Greensboro, NC, for Respondent Certain London Market Insurance Companies; Robert Michael Ethridge, of Ethridge Law Group, LLC of Mount Pleasant, and Wayne S. Karbal and Paul Parker, of Chicago, IL, for Respondent First State Insurance Company; John C. Bonnie, of Weinberg Wheeler Hudgins Gunn & Dial, LLC, of Atlanta, GA, for Respondent Lexington Insurance Company; Edward K. Pritchard, III, of Pritchard Law Group LLC, of Charleston, and Richard McDermott and Seth M. Jaffe, of Chicago, IL, for Respondent Certain Underwriters at Lloyd's London, Respondent the Aviva Companies, Respondent the Winterthur Companies, Respondent Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Respondent Starr

Indemnity & Liability Company (f/k/a Republic Insurance Company); Elizabeth Janelle Palmer, of Rosen Rosen & Hagood, LLC, of Charleston, and Harry Lee and Molly Woodson Poag, of Washington, DC, for Respondent Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company); and Elizabeth Fraysure Fulton, of Hall Booth Smith, PC, of Mount Pleasant, for Respondents Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company).

MCDONALD, J.: In this insurance coverage dispute, PCS Nitrogen, Inc., argues the circuit court erred in finding it was not entitled to coverage rights under Columbia Nitrogen Corporation's (Old CNC) insurance policies issued by Respondents.[1] Specifically, PCS Nitrogen asserts the circuit court erred in finding it was not entitled to coverage rights under either a post-loss assignment of the rights under Old CNC's policies or as the corporate successor of Old CNC via de facto merger. We affirm the circuit court's order granting Respondents' motions for summary judgment.

[1] The coverage determination is necessary due to the Fourth Circuit's affirmance of the South Carolina District Court's allocation of responsibility to PCS Nitrogen for Old CNC's superfund liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2013). *See PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161 (4th Cir. 2013).

Facts and Procedural History

From 1966 until 1972, Old CNC operated phosphate fertilizer plants in Charleston (the Charleston Site). From 1966 to 1985, Old CNC purchased primary and excess liability insurance policies from Respondents. Old CNC was the named insured on the policies, which stated, "The company will pay *on behalf of the insured* all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, *caused by an occurrence* . . . ."[2] (emphasis added). The policies further provided, "Assignment of interest under this policy *shall not bind* the company *until its consent is endorsed hereon*." (emphasis added). Regarding actions against the insurer, the policies stated:

> No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company*.
>
> Any person or organization or the legal representative thereof *who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy* to the extent of the insurance afforded by the policy.

(emphasis added).

In October 1986, Old CNC entered into a transaction with CNC Corp. (New CNC) in which it sold some of its assets to New CNC via an acquisition agreement; this transaction did not include the sale of the Charleston Site, which was sold to a third party in 1985. In addition to some of Old CNC's assets, New CNC assumed some

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[2] This language is from Continental Casualty's policy; however, the circuit court found all of Respondents' policies contained substantially similar language, and the parties do not dispute this finding.

of Old CNC's liabilities as detailed in the acquisition agreement, which stated New CNC assumed liabilities related to the "acquired business." The acquisition agreement defined the acquired business as "a business that produces and sells ammonia and nitrogen-based products." Additionally, the acquisition agreement included a document titled "Assignment of Insurance Benefits," which was signed by Old CNC. It stated,

> [B]y an Acquisition Agreement, dated as of October 31, 1986, entered into between [Old CNC] and [New CNC] . . . [Old CNC] has agreed to sell, convey, transfer, and assign . . . all of [Old CNC]'s rights, proceeds and other benefits to and under all of [Old CNC]'s insurance policies . . . .
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> [Old CNC] by these presents does hereby transfer and assign to [New CNC], its successors and assigns forever, all of [Old CNC]'s rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned* . . . .

(emphasis added).

Prior to the closing of the asset sale, Old CNC composed a checklist of tasks that needed to be completed before or on the date of closing. The checklist included a section titled "Documents to be exchanged at Closing." This section stated the parties were to exchange "[a]ssignment of insurance policies *with the consent of the insurance companies endorsed thereon*." (emphasis added).

By letter dated December 6, 1986, the parties summarized the disposition of Old CNC's insurance policies at the closing on November 1, 1986. The letter stated,

> [Old CNC] had insurance coverages as listed on the attached insurance policy schedule as of October 31, 1986. Most all of those policies were cancelled at closing . . . and pre-payments were refunded . . . . In

> these cases, new separate policies were issued to . . . [New CNC].

According to an attached schedule, New CNC obtained insurer consent and endorsement as to one liability policy[3] and cancelled the remaining policies.

Following the closing of the transaction, Old CNC filed a certificate of dissolution on November 19, 1986. Subsequently, New CNC changed its name to Columbia Nitrogen Corporation. On November 29, 1989, New CNC merged with Fertilizer Industries, Inc., which changed its name to Arcadian Corporation on November 30, 1989. In March 1997, Arcadian Corporation merged with PCS Nitrogen.

On September 26, 2005, Ashley II of Charleston, LLC, then owner of the Charleston Site, filed a declaratory judgment action against PCS Nitrogen in federal court, alleging PCS Nitrogen was liable for environmental remediation at the Charleston Site because New CNC acquired Old CNC's CERCLA liabilities in the 1986 transaction.[4] The district court found PCS Nitrogen liable as a corporate successor to Old CNC under three theories, including a de facto merger theory. *PCS Nitrogen*, 714 F.3d at 172–73. PCS Nitrogen appealed, and the Fourth Circuit affirmed the district court but only as to one theory. *Id.* at 173–76. Specifically, the Fourth Circuit held PCS Nitrogen was liable as a corporate successor to Old CNC because New CNC contractually assumed Old CNC's liabilities via the 1986 transaction. *Id.* at 176.

On March 24, 2015, PCS Nitrogen filed an amended complaint in state court, seeking to enforce its coverage rights under Old CNC's liability insurance policies.[5] Specifically, PCS Nitrogen asserted it was entitled to enforce these

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[3] This insurer is not a party to this appeal.

[4] In the federal litigation, PCS Nitrogen denied any liability as a corporate successor to Old CNC. *PCS Nitrogen*, 714 F.3d at 171.

[5] PCS Nitrogen originally filed its complaint with the circuit court on January 18, 2011, after the district court held it was liable as Old CNC's corporate successor, but the circuit court stayed the action until PCS Nitrogen's appeal to the Fourth Circuit on the underlying allocation of CERCLA responsibility had concluded.

rights because (1) Old CNC contractually assigned its insurance rights to benefits and proceeds under the policies to New CNC and (2) it was the corporate successor to Old CNC via de facto merger. Continental Casualty moved for summary judgment; the other carriers joined in this motion. Following a hearing, the circuit court granted summary judgment to Continental Casualty and the other moving insurers. The circuit court found none of the challenged policies were assigned to New CNC because Old CNC did not obtain consent from the insurers as required by the language of the policies and South Carolina law. The court held that because there were no vested claims from prior actions against Old CNC at the time of the assignment, PCS Nitrogen was not entitled to anything under the policies, explaining post-loss assignments were only enforceable if assigning a chose in action. The circuit court additionally found PCS Nitrogen was not entitled to Old CNC's insurance rights under a theory of de facto merger. The court explained the de facto merger theory was "legally untenable" because New CNC contractually assumed Old CNC's liabilities; therefore, it was an available party for any potential "creditors of the predecessor." PCS Nitrogen moved for reconsideration, which the circuit court denied.[6]

Standard of Review

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

> Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings,

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[6] Continental Casualty and certain other insurers simultaneously moved for summary judgment based on a "pollution exclusion" contained in the various policies. The circuit court issued a separate order on these motions, finding the question of the pollution exclusions moot in light of its grant of summary judgment on the carriers' assignment and corporate succession grounds. However, a South Carolina district court, affirmed by the Fourth Circuit, has already resolved the issue of the pollution exclusion adversely to PCS Nitrogen in a related matter. *See Ross Dev. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013) (affirming district court's ruling that pollution exclusion applied to bar coverage for underlying CERCLA liability and potential liability in two related actions).

> depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Id. "We review questions of law de novo." *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018). "Because the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous." *Id.*

Law and Analysis

Assignment of Insurance Policies

PCS Nitrogen argues the circuit court erred in granting Respondents' motions for summary judgment because New CNC received a valid assignment of Old CNC's insurance coverage rights through the 1986 transaction. Thus—PCS Nitrogen asserts—it is entitled to seek coverage under those policies. PCS Nitrogen claims it was not required to obtain insurer consent for the assignment of the benefits under the policies because these were post-loss assignments made after the environmental contamination of the Charleston Site occurred during the policy terms. PCS Nitrogen contends this argument is supported by the supreme court's reasoning in *Narruhn v. Alea London Limited*, 404 S.C. 337, 343–45, 745 S.E.2d 90, 93–94 (2013) (noting in dicta that "it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent.").

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (quoting *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* (quoting *Schulmeyer*, 424 S.C. at 460, 818 S.E.2d at 733). "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Id.* (quoting *Schulmeyer*, 424 S.C. at 460, 818 S.E.2d at 733). Thus, "[t]his court is 'without

authority to alter an unambiguous contract by construction or to make new contracts for the parties.'" *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

In determining whether the circuit court erred in granting summary judgment, we must look to the terms of the policies and the assignment agreement at issue. Under the policies, Old CNC was the named insured. The policies stated, "The company will pay *on behalf of the insured* all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, *caused by an occurrence* . . . ." (emphasis added). The policies further provided, "Assignment of interest under this policy *shall not bind* the company *until its consent is endorsed hereon*." (emphasis added).

The policies additionally included a section titled "Actions Against Company," which stated:

> No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company*.
>
> Any person or organization or the legal representative thereof *who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy* to the extent of the insurance afforded by the policy.

(emphasis added).

The portion of the acquisition agreement titled "Assignment of Insurance Benefits" stated:

> [B]y an Acquisition Agreement, dated as of October 31, 1986, entered into between [Old CNC] and [New

> CNC] . . . [Old CNC] has agreed to sell, convey, transfer, and assign . . . all of [Old CNC]'s rights, proceeds and other benefits to and under all of [Old CNC]'s insurance policies . . . .
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> . . . .
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> [Old CNC] by these presents does hereby transfer and assign to [New CNC], its successors and assigns forever, all of [Old CNC]'s rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned* . . . .

(emphasis added).

Although the policies included the aforementioned anti-assignment clause, the majority rule is that such clauses are generally only enforceable *before* a loss occurs. *See* 3 *Couch on Insurance* § 35:8 (3d ed. 2018) ("Although there is some authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, *as distinguished from a claim arising under the policy*, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim." (emphasis added)); 17 *Williston on Contracts* § 49:126 (4th ed. 2018) ("As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—*consisting of the right to receive the proceeds of the policy*—after a loss has occurred." (emphasis added)); *id.* ("After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.").

Our supreme court has noted this principle in prior opinions. *See Narruhn*, 404 S.C. at 343–45, 745 S.E.2d at 93–94 ("Although we need not reach the issue here, it appears the referee did not believe Insurer's approval of the assignment of RKC's

rights was required, and we note it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent."); *Ligon v. Metropolitan Life Ins., Co.*, 219 S.C. 143, 155, 64 S.E.2d 258, 264 (1951) ("It is well stated in 29 Am. Jur., Sec. 506, Page 410: 'General stipulations, in policies, prohibiting assignment thereof, except with the insurer's consent or upon giving some notice, or like conditions, have universally been held to apply only to assignments before loss, and, accordingly, not to prevent an assignment after loss or death, or the maturity of the policy, of the claim or interest in the insurance money then due.'").

Therefore, the pivotal inquiry in the case *sub judice* is at what point did the "loss," or as stated in the policy, the "occurrence," triggering coverage occur? *See Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007) ("South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity."); *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201–02, 447 S.E.2d 869, 870 (Ct. App. 1994) ("An assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment."); *id.* at 202, 447 S.E.2d at 870 ("Under South Carolina law, a party is not entitled to receive insurance proceeds in excess of their interest in the property.").

Although the property damage insured against—environmental contamination—occurred during the covered policy terms, the plain language of the policies state that Old CNC was not entitled to coverage "*until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured*, the claimant and the company." (emphasis added). Because no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against—as defined in the terms of these particular policies—had not yet occurred, and thus, no vested claims existed. Therefore, we find no error in the circuit court's determination that the assignments to the benefits and proceeds were pre-loss assignments requiring insurer consent, which was not obtained. Accordingly, the assignment agreement was essentially ineffective, and if PCS Nitrogen wanted to ensure its rights to enforce potential claims under the policies, it should have obtained insurer consent as it did for the liability policy not at issue in this case. *See Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); *id.* ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the

policy to extend coverage."); *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008) (where injuries had occurred but not yet been reported at the time of the relevant transactions, they did not constitute transferable choses in action for purposes of coverage when considered in context of consent-to-assign clauses); *Del Monte Fresh Produce (Haw.) Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 369–70, 183 P.3d 734, 746–47 (2007) (no duty to defend or indemnify in CERCLA fumigant contamination action where attempted assignment by contract was invalid due to failure to obtain insurer consent).

AFFIRMED.[7]

LOCKEMY, C.J., and SHORT, J., concur.

[7] PCS Nitrogen further contends the circuit court erred in the analysis of its argument that PCS is entitled to coverage under a "de facto merger" theory. *See Simmons v. Mark Lift Industries*, 366 S.C. 308, 622 S.E.2d 213 (2006) (setting forth the circumstances in which a plaintiff may maintain a product liability claim under a successor liability theory against a successor corporation which has purchased the predecessor's assets). We decline to address this argument because the cases PCS cites do not address the question of insurance coverage, and it is unclear how a finding of successor liability under a de facto merger theory would provide access to coverage rights under Respondents' policies. *See Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 172–73 (Ct. App. 2016) (noting the court may decline to address the merits of a question when appellant provides no legal authority regarding the particular argument).