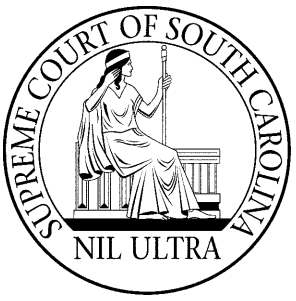

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 51
December 30, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Farid A. Mangal, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212701

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
J. Mark Hayes, II, Trial Court Judge
J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 5372
Heard November 3, 2015 – Filed December 30, 2015

REVERSED AND REMANDED

John R. Ferguson, of Cox Ferguson & Wham, LLC, of Laurens, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General Suzanne Hollifield White, and Assistant Attorney General Alicia A. Olive, all of Columbia, for Respondent.

MCDONALD, J.: In 2007, Farid A. Mangal was convicted of first-degree criminal sexual conduct (CSC) with a minor, two counts of second-degree CSC, lewd act upon a minor, and incest. He appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing (1) trial counsel was ineffective for failing to object to bolstering, (2) trial counsel was ineffective for failing to move for a mistrial in response to bolstering, (3) trial counsel was ineffective for failing to object to the qualification of a forensic interviewer as an expert, (4) trial counsel's performance as a whole was deficient and prejudicial, (5) the PCR court erred in finding the bolstering issue was not raised, and (6) PCR counsel was ineffective for not sufficiently raising the bolstering issue. We reverse and remand.

FACTS

Victim, who was nineteen years old at the time of the 2007 trial, testified that her father (Petitioner) sexually abused her from the time she was ten years old until she was sixteen. The first instance of alleged abuse occurred when Petitioner took her into a bedroom, forced her to remove her pants, and rubbed his penis around her anal area. Victim stated there was "some sort of penetration" on this occasion, but not full penetration. Victim testified that after such abuse began, it occurred nearly every day when she came home from school. According to Victim, she was fourteen or fifteen the first time full penetration occurred, and Petitioner took her virginity. Victim stated Petitioner used condoms occasionally and once pointed out a freckle on the shaft of his penis. According to Victim, the abuse became more painful and aggressive as she aged. Victim stated she initially disclosed the abuse to her brother (Brother) after she refused Petitioner's advances one night, and Petitioner took out his anger on Brother the next day.

On cross-examination, trial counsel questioned Victim extensively concerning inconsistencies in her story and her dislike for Petitioner's strict parenting methods.[1] Victim acknowledged that once Petitioner was out of the house, she

[1] Victim testified that Petitioner did not let her date or have friends, and would not allow her to talk on the phone, have pets, or celebrate Christmas. Additionally, family members testified that Petitioner was physically abusive.

began drinking, smoking, and had to seek counseling. Victim was presented with testimony from a 2005 family court hearing where she stated she began cutting herself because she was unhappy about her accusations against Petitioner. In this prior family court testimony, Victim stated she did not want to get Petitioner in trouble, she just wanted him away from her.

Brother testified there were numerous occasions over the years when Petitioner took Victim into a locked room for twenty or thirty minutes, and Victim would leave the room visibly upset and crying and would go to the bathroom.

Pediatrician Dr. Nancy Henderson testified as an expert "in the examination, diagnosis, and treatment of child sexual abuse." Dr. Henderson testified she examined Victim in July 2004 and discovered a "marked narrowing" on a portion of Victim's hymen, which she believed was "a sign of some type of penetration." During her testimony, the following exchange occurred:

> [The State:] Doctor Henderson, do you have an opinion, within a reasonable degree of medical certainty based upon your education, training, and experience and based upon your findings on examination of [Victim], whether those findings are consistent with a penetrating injury?
>
> [Dr. Henderson:] Based on the history that she shared with me and based on my examination I felt that it was consistent . . . that she had been abused.
>
> [The State:] All right. Also opinion as to whether she was sexually abused, that opinion is?
>
> [Dr. Henderson:] That she had been, yes, sir.

Dr. Henderson further testified that there could be "full penetration without any kind of trauma to the hymenal tissue" due to the effects of estrogen on the tissue during puberty. When asked whether this case involved "narrowing [of the hymen] consistent with penetration," Dr. Henderson stated, "Yes, sir."

When asked whether she could tell the jury that her findings were the "result of penetration by a penis," Dr. Henderson responded, "I can't say that the actual result that I saw was caused by the penis, but based on the history that she shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated." When asked whether she based her decision on possibly untrue information she received from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes." Dr. Henderson acknowledged that she learned there were allegations that Petitioner engaged in vaginal and anal intercourse with Victim and that the abuse began at age ten. Finally, Dr. Henderson stated that it varied between females as to whether a hymen or remnants of a hymen remained after childbirth or prolonged sexual intercourse, and that she had seen many sexually active teenagers with normal examination results.

The State also presented testimony from forensic interviewer Wiley Garrett, who was qualified as an expert in forensic interviewing without objection. Garrett testified that Victim's disclosure was "clear, consistent, and compelling."

Trial counsel's theory of the case was that Victim and Victim's mother (Mother) fabricated the abuse allegations because Victim wanted freedom from Petitioner's strict parenting and Mother wanted to continue having an extra-marital affair. Petitioner testified in his defense, denied the allegations against him, and stated that Victim and Mother "had a plan . . . going on."

Mother admitted that when Petitioner was arrested, she gave police a statement indicating Victim had disclosed the abuse to her but Victim stated she had not allowed penetration or oral sex. Mother also made a drawing of Petitioner's penis and indicated there was a dark marking like a mole or a freckle on the head of his penis but not on the shaft. During cross-examination, Mother stated that she believed Victim's allegations.

Petitioner's family doctor testified about a January 2002 record created by a former doctor in his practice that stated Victim's hymen was intact. The family doctor

explained that based on his nearly fifty years of practice, he expected the hymen of a sexually active person to not remain intact. Dr. Medlock also stated that another record indicated that on September 29, 2003, Victim had a rectal examination that was within normal limits.

Finally, a detention center employee who inspected Petitioner's penis testified that he did not recall seeing a freckle or a mole on Petitioner's penis.

STANDARD OF REVIEW

"In a PCR proceeding, the burden is on the applicant to prove the allegations in his application." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal." *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011). Thus, an appellate court "gives great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses." *Lee*, 396 S.C. at 319, 721 S.E.2d at 445.

LAW/ANALYSIS

"In order to receive relief for ineffective assistance of counsel, a defendant must make two showings." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "First, he must show that his trial counsel's performance was deficient, meaning that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable." *Id.*

I. Preservation of Bolstering Issue[2]

Petitioner argues the PCR court erred in finding the bolstering issue was not raised because PCR counsel questioned trial counsel on the subject, and PCR counsel raised the issue again in his Rule 59(e), SCRCP, motion. We agree.

At the PCR hearing, trial counsel admitted that he did not object when Dr. Henderson was asked whether her findings were consistent with a penetrating injury and she responded that she believed Victim was abused. On cross-examination, trial counsel stated he expected Dr. Henderson to opine that Victim was abused because her testimony was "canned testimony." Trial counsel explained that he had been in cases with Dr. Henderson before, and he probably should have objected when she gave an opinion on the ultimate issue. On redirect, trial counsel was asked if the comment struck "a cord as improper bolstering" during trial, and trial counsel stated it did not. During PCR counsel's summation, he stated that Dr. Henderson's opinion that abuse occurred should have received an objection because it was improper vouching. PCR counsel also cited case law supporting his position.

The PCR court's order did not address the issue concerning Dr. Henderson's testimony; thus, Petitioner filed a Rule 59(e) motion requesting a specific ruling on the bolstering issue. The PCR court then issued an order stating it would not alter or amend its judgment and "[a]lthough [Petitioner] alleges that the issues in the [m]otion were raised at the hearing[,] . . . this [c]ourt finds that the issues were not presented . . . in the application or in an amendment and no testimonial evidence from [Petitioner] was presented in support of these allegations."

The Uniform Post-Conviction Procedure Act provides that "[a]ll grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." S.C. Code Ann. § 17-27-90 (2014). However, in *Simpson v. Moore*, the supreme court considered an issue that was not raised specifically in a petitioner's application. 367 S.C. 587, 599–600, 627 S.E.2d 701, 707–08 (2006). The supreme court noted that during the PCR hearing, both the petitioner's trial counsel and a witness for the State testified about the issue. *Id.*

[2] We have chosen to analyze Petitioner's Issue 5 first and then address Issues 1 and 2 together.

at 599, 627 S.E.2d at 707–08. The supreme court held that petitioner "should have been permitted to amend his PCR application to conform to the evidence presented." *Id.* at 599, 627 S.E.2d at 708.

Similarly, we hold the issue here concerning Dr. Henderson's testimony is preserved for our consideration. Not only was trial counsel questioned and cross-examined about the issue during the PCR hearing, PCR counsel specifically mentioned it again during his concluding remarks. When the PCR court's order failed to address the issue, PCR counsel took appropriate action to preserve it by requesting a ruling in a Rule 59(e) motion. *See Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding when a PCR court fails to rule on an issue, the petitioner must file a Rule 59(e), SCRCP, motion requesting a ruling on the issue to preserve it for review).

Accordingly, we hold the bolstering issue—as it related to Dr. Henderson's testimony—is preserved for review. However, we find any bolstering issues related to other witnesses are unpreserved because they were not raised in Petitioner's PCR application, the PCR hearing, or in the Rule 59(e) motion. *See id.* at 338, 548 S.E.2d at 866 (holding arguments not raised to and ruled upon by the PCR court are not preserved for review).

II. Bolstering

Because the bolstering issue as it relates to Dr. Henderson's testimony was preserved, we must next determine whether trial counsel was ineffective for failing to object or move for a mistrial in response to Dr. Henderson's comments.

"The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (citing *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989); *State v. Dempsey*, 340 S.C. 565, 568–71, 532 S.E.2d 306, 308–09 (Ct. App. 2000)).

At the PCR hearing, trial counsel admitted he did not object when Dr. Henderson was asked whether her findings were consistent with a penetrating injury and she responded that she believed Victim was abused. Trial counsel testified there was no reason he did not object to Dr. Henderson's answer, and he stated that it may have had a significant impact on the jury. On cross-examination, trial counsel

reiterated that the case centered on credibility, and he did not remember any physical evidence against Petitioner.

At trial, Dr. Henderson was qualified as an expert "in the examination, diagnosis, and treatment of child sexual abuse." Thus, it was proper for her to opine that based on her examination, Victim's injuries were consistent with sexual abuse. *See* Rule 702, SCRE ("If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *cf. State v. Douglas*, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009) (finding no prejudice from a forensic interviewer's allegedly improper testimony when there was also evidence that a pediatric nurse practitioner examined the victim and determined she had vaginal tearing and scarring consistent with past penetration). However, she stated her opinion was based not only on her examination, but also "on the history that [Victim] shared with [her]." Directly after this comment, Dr. Henderson opined that Victim had been sexually abused. On cross-examination, Dr. Henderson elaborated on these statements and testified that "based on the history that [Victim] shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated."

When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."

We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding a child abuse assessment expert's recommendation that the defendant should not be around the victim for any reason was improper because it could only be interpreted as the expert's believing the victim's sexual abuse claims); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding an expert's reports were erroneously admitted when there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); *Dempsey*, 340 S.C. at 568–72, 532 S.E.2d at 308–10 (finding a child sex abuse expert's testimony

improperly vouched for a victim's credibility when the expert concluded victim was reliable and the expert testified that a very high rate of children who made sex abuse allegations were truthful); *Dawkins*, 297 S.C. at 393–94, 377 S.E.2d at 302 (holding a psychologist's testimony indicating he believed a victim's allegations were genuine was improper). Accordingly, Dr. Henderson's testimony was improper bolstering, and trial counsel was deficient for failing to object to it or otherwise bring it to the trial court's attention.

Additionally, we find Petitioner is able to demonstrate prejudice. *See Strickland*, 466 U.S. at 694 (defining prejudice as a reasonable probability that but for trial counsel's errors, the result of the proceeding would have been different). As trial counsel admitted, the case lacked physical evidence and hinged on credibility. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94–95 (holding the erroneous admission of reports that contained vouching language was not harmless when the children's credibility was the most critical determination in the case) (citing *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) ("An . . . improper opinion which goes to the heart of the case is not harmless."))). During the trial itself, trial counsel repeatedly sought to attack Victim's credibility through cross-examination, and his theory of the case was that the abuse allegations were fabricated by Victim and Mother. Given a lack of physical evidence, we believe Dr. Henderson's testimony was critical because she explained how Victim—who claimed full penetration occurred on multiple occasions—had a narrowed but otherwise intact hymen. As a result, Dr. Henderson's improper testimony insinuating that she found Victim credible was particularly prejudicial.

Accordingly, we reverse the PCR court's finding that trial counsel was not ineffective for failing to object or move for a mistrial in response to bolstering testimony given by Dr. Henderson.

In light of our decision regarding the bolstering issue, we decline to address Petitioner's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when the disposition of prior issues is dispositive).

CONCLUSION

We reverse the PCR court's dismissal of Petitioner's PCR application and remand to the trial court for a new trial.

REVERSED AND REMANDED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert S. Jones, Appellant,

v.

Builders Investment Group, LLC, Brian D. Boone, and Arden Homebuilders, LLC, Defendants,

Of whom Builders Investment Group, LLC and Brian D. Boone are Respondents.

Appellate Case No. 2013-002673

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5373
Heard September 10, 2015 – Filed December 30, 2015

AFFIRMED

D. Reece Williams, III and Kathleen McColl McDaniel, both of Callison Tighe & Robinson, LLC, of Columbia, for Appellant.

Thornwell F. Sowell, III, of Sowell Gray Stepp & Laffitte, LLC, of Columbia, and David Cochran Dick, Jr., of the Law Office of David C. Dick, of Charleston, for Respondents.

WILLIAMS, J.: In this civil appeal, Robert Jones contends the circuit court erred in granting Builders Investment Group, LLC (BIG) and Brian D. Boone's (collectively "Respondents") motion for judgment notwithstanding the verdict (JNOV). Jones claims the circuit court (1) erroneously held his personal payment of the parties' business loan discharged Respondents from their legal responsibility to contribute toward the payoff of the business loan and (2) misconstrued the terms of the parties' operating agreement regarding personal guaranties. We affirm.

FACTS/PROCEDURAL HISTORY

This appeal stems from a dispute between Jones and Respondents over whether Jones is entitled to contribution from Respondents for debts arising out of a joint business venture. In 2005, Holt Family Homes, LLC was formed to develop, build, and sell residential homes. At its inception, the company had four Class A members, one of whom was Jones.[1] BIG was a Class B member, and Boone had no ownership interest in Holt Family Homes.

In January 2007, Holt Family Homes obtained a loan from Southern First Bank[2] (SFB) for $300,500. Three of the Class A members—Jones, Keisler, and Buck—signed and personally guaranteed the loan. In April 2007, Holt Family Homes obtained a second loan from SFB for $199,250. The same Class A members signed and guaranteed this second loan.

In the summer of 2007, Boone and BIG agreed to make capital contributions and investments in Holt Family Homes.[3] BIG contributed additional capital of

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[1] The remaining Holt Family Homes Class A members were Robert Keisler, Carl Buck, and Wetzel Holt.

[2] SFB was operating as Greenville First Bank, N.A. at the time of the September and April 2007 loans to Holt Family Homes.

[3] Boone's eventual involvement in Holt Family Homes—and subsequently in Arden Homebuilders, LLC—stemmed from Boone's spousal relationship with the managing member of BIG, Kathy Boozer Boone. Prior to BIG and Boone's involvement, Jones and Keisler worked for Boozer Lumber Company. Jones and Keisler discussed the idea of creating Holt Family Homes with Kathy Boone's father, Dale Boozer, who was the president and CEO of Boozer Lumber Company. Jones suggested at trial that Dale Boozer came up with the idea of creating this

$625,000,[4] and Boone contributed capital of $125,000. In exchange for these investments, Boone and BIG became Class A members. To reflect these investments and changes in membership status, the company amended its operating agreement (Arden Operating Agreement) on July 31, 2007. As part of these amendments, the company's name was also changed from Holt Family Homes to Arden Homebuilders, LLC (Arden).

On September 25, 2007, Jones, Keisler, and Buck—the guarantors on the initial two loans with SFB—consolidated these two loans into one new loan for $498,000 in Arden's name (Arden Loan). Similar to the initial two loans, only these three individuals signed and personally guaranteed the newly consolidated Arden Loan.

Almost one year later, on September 24, 2008, Buck was removed as a personal guarantor on the Arden loan. Only Jones and Keisler signed the renewed note. Jones confirmed that neither Boone nor BIG was asked about removing Buck as a personal guarantor, and neither Boone nor BIG personally guaranteed the amended Arden loan. On December 8, 2009, Jones obtained a personal loan with SFB in the amount of $449,326.33 to satisfy the Arden loan.[5] SFB marked the Arden loan as satisfied and transferred the balance to Jones's personal loan.

Jones was unable to repay the personal loan and subsequently executed a confession of judgment to SFB regarding his personal loan on November 8, 2012. Jones testified at trial that he had not made any payments on his personal loan or on the confession of judgment. The president of SFB, Justin Strickland, also affirmed Jones's testimony. Strickland acknowledged that Jones's personal loan was charged off in varying increments between December 29, 2009, and December 20, 2010. Despite writing off Jones's personal loan, Strickland testified SFB eventually sued Jones on the promissory note, which resulted in the confession of judgment against him.

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business venture in an effort to vertically integrate into the Charlotte housing market and expand their market share.

[4] BIG had already contributed $300,000 in capital as a Class B member.

[5] At trial, Jones testified he liquidated certain assets he had placed in SFB's security vault in an effort to decrease the $498,000 loan prior to executing the personal loan with SFB.

On March 23, 2011, Jones filed suit against Respondents for breach of contract and breach of fiduciary duty. Jones alleged in his complaint that Respondents were required to personally guarantee the Arden loan based on their status as Class A members under the Arden Operating Agreement. In support of his position, Jones cited to section 2.3 of the Arden Operating Agreement, which states as follows:

> **2.3 Guaranty of Loans to Company.** Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). . . . Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.

Jones contended the Arden Operating Agreement—by the plain terms of section 2.3—required Respondents to pay their proportionate share of the loan, and Respondents' failure to do so entitled Jones to contribution for the full amount of the loan, plus interest, costs, and reasonable attorney's fees.

Prior to trial, Respondents moved for summary judgment on both causes of action. As to the breach of contract cause of action, Respondents acknowledged section 2.3 and its requirement for all Class A Members to pay their proportionate share of any guaranteed loans. However, Respondents claimed Jones had never paid his proportionate share of the loan and, thus, could not seek contribution pursuant to the Arden Operating Agreement until he had done so. In addition, Respondents claimed the plain language of section 6.6(a)[6] of the Arden Operating Agreement requires a Class A member to personally guarantee a loan before liability can

[6] Section 6.6(a) of the Arden Operating Agreement states, "No member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise unless a Member guarantees any debt or obligation as required under Article 2.3."

attach, noting the Arden loan was entered into before BIG and Boone became Class A members. Because SFB never required Respondents to guarantee the Arden loan, Respondents contended they could not be liable for any portion of the loan as a matter of law.

Prior to trial, the circuit court granted Respondents' summary judgment motion on Jones's breach of fiduciary duty claim. On December 10–11, 2012, the case proceeded to trial on Jones's breach of contract claim against Respondents. Respondents moved for a directed verdict at the close of evidence, which the circuit court denied. The jury returned a verdict in Jones's favor. Respondents then filed a motion for JNOV or, in the alternative, a new trial, reiterating the grounds they raised in support of their directed verdict motion at trial. After hearing arguments from counsel, the circuit court granted Respondents' motion for JNOV on May 15, 2013. Thereafter, Jones timely filed a Rule 59(e), SCRCP, motion. On November 18, 2013, the circuit court denied Jones's Rule 59(e) motion in an eight-page order. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in holding Jones's personal payment of the Arden loan discharged Respondents from their legal responsibility to contribute toward the payoff of the Arden loan?

II. Did the circuit court misconstrue the terms of the Arden Operating Agreement regarding personal guaranties?

STANDARD OF REVIEW

When reviewing the circuit court's ruling on a directed verdict or JNOV motion, this court must apply the same standard as the circuit 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). The circuit court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). Moreover, "[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). In deciding such motions, "neither the [circuit] court nor the appellate court has the authority to

decide credibility issues or to resolve conflicts in the testimony or the evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). This court will reverse the circuit court's ruling only if no evidence supports the ruling below. *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012).

LAW/ANALYSIS

I. Jones's Entitlement to Contribution

Jones first claims that because he paid more than his proportionate share of the Arden Loan, he is entitled to contribution from Respondents pursuant to section 2.3 of the Arden Operating Agreement. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). When the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *Id.* A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001).

In support of his position, Jones cites to section 2.3 of the Arden Operating Agreement, which states as follows:

> **2.3 Guaranty of Loans to Company.** Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). . . . *Any Class A Member who pays more*

> *than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.*

(emphasis added).

The dispositive question in this case is whether Jones "paid" the Arden Loan such that he is entitled to contribution from Respondents pursuant to section 2.3. We agree with the circuit court and find Jones's signing of a personal promissory note with SFB in satisfaction of the Arden Loan was insufficient, as a matter of law, to fulfill the plain requirements of section 2.3. Our law is clear that a promissory note is only a promise to pay, not actual payment of a debt. *See* S.C. Code Ann. § 36-9-102(65) (Supp. 2014) ("'Promissory note' means an instrument that evidences a *promise to pay* a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds." (emphasis added)). We also believe that neither SFB's decision to write off Jones's promissory note nor its execution of a confession of judgment against Jones satisfied the requirement for payment under the Arden Operating Agreement. By signing the promissory note and satisfying Arden's obligation to SFB, Jones simply incurred a liability on Arden's behalf. Because Jones submitted no proof at trial[7] that he had paid more than his proportionate share of the Arden loan as required by the plain language of the Arden Operating Agreement, we conclude he has suffered no actual damages and is not entitled to contribution from Respondents pursuant to section 2.3 of the Arden Operating Agreement.[8] *See Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 (noting when the

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[7] The circuit court's Rule 59(e) order indicates Jones attempted to introduce evidence at the Rule 59(e) hearing to document that he had paid SFB some portion of either the Arden loan or his personal loan. Because Jones did not submit this evidence prior to the court's order granting JNOV, the court refused to consider it. On September 2, 2015, this court received a motion from Jones, requesting to supplement the record pursuant to Rule 212(a), SCACR, with a May 8, 2014 letter documenting payments he has made on the loan. This court denied Jones's motion.

[8] We also concur with the circuit court's ruling that section 2.3 was a contract for indemnity against loss, thereby requiring proof of loss before Jones could assert a claim for breach of contract. Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for

contract's language is clear and unambiguous, the language alone determines the contract's force and effect).

II. Construction of the Arden Operating Agreement

Next, Jones contends the circuit court misconstrued the terms of the Arden Operating Agreement regarding personal guaranties. Specifically, Jones argues the court erred in finding section 2.3 unambiguously provided that a Class A member would not have to personally guarantee a loan if a lender did not specifically require that particular member to do so. We disagree.

We hold Jones abandoned this issue on appeal. "An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011). In his brief, Jones presented the following one-paragraph argument regarding the circuit court's construction of the Arden Operating Agreement:

> The express terms of the Operating Agreement state that, "[e]ach of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender." Respondents BIG and

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indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 108 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Id.* (quoting 1 JOSEPH A. JOYCE, JOYCE ON INSURANCE § 27b (2d ed. 1917)). Because the Arden Operating Agreement specifically requires a member to "pay" more than this proportionate share before he is entitled to recover against other members, we believe this is a contract for indemnity against loss and, as such, "liability does not attach until loss has been suffered, that is when the [indemnitee] has *paid* the damages." *Id.* (emphasis added) (quoting 1 JOYCE, *supra*); *see also Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 83, 66 S.E.2d 461, 462 (1951) (noting that when a contract is for indemnity against loss, "no action will lie in favor of the [indemnitee] until some loss or damage has been sustained by him, either by payment of the whole or some part of the claim").

> Boone were Class A Members of Arden, and Southern First Bank required the Renewed Loan to be personally guaranteed. Therefore, pursuant to the express terms of the Operating Agreement, Respondents BIG and Boone were required to personally guaranty the Renewed Loan. The fact that they did not want to guaranty the Renewed Loan and did not do so does not mean that they were not contractually required by the Operating Agreement to give the guaranty.

Because Jones cited no authority in this section and his argument was largely conclusory, we find this issue is abandoned on appeal. *See id.*

CONCLUSION

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

AFFIRMED.

HUFF and THOMAS, JJ., concur.