The Supreme Court of South Carolina

In the Matter of Jason Thomas Green, Deceased

Appellate Case No. 2014-000233

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Disciplinary Counsel has filed a Petition for Appointment of Receiver in this matter. The petition is granted.

IT IS ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for Mr. Green's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Green maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Green's clients. Mr. Lumpkin may make disbursements from Mr. Green's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Green maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Green, shall serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Green's mail and the authority to direct that Mr. Green's mail be delivered to Mr. Lumpkin's office.

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

s/ Costa M. Pleicones J.

Columbia, South Carolina

February 18, 2014

The Supreme Court of South Carolina

In the Matter of Frederick Carlos Lamar, Petitioner.

Appellate Case No. 2014-000009

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 27, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Frederick Carlos Lamar shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 21, 2014

The Supreme Court of South Carolina

In the Matter of Christopher F. Allison, Jr., Petitioner

Appellate Case No. 2014-000065

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 1, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 15, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Christopher F. Allison, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 21, 2014

The Supreme Court of South Carolina

In the Matter of Charles V.B. Cushman, Petitioner

Appellate Case No. 2014-000167

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 5, 1982, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 28, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Charles V.B. Cushman shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 21, 2014

The Supreme Court of South Carolina

In the Matter of Brad Allen Oliver, Petitioner

Appellate Case No. 2014-000228

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 5, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 31, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Brad Allen Oliver shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

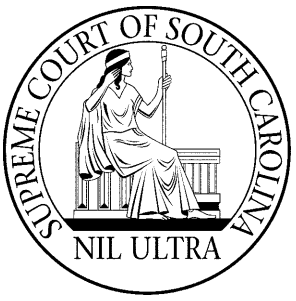
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 21, 2014



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 26, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Robert Paul Taylor, Respondent

Appellate Case No. 2014-000251

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) and to appoint the Receiver to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the petition.

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

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

February 19, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarence Robinson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-182548

ON WRIT OF CERTIORARI

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27357
Heard October 1, 2013 – Filed February 26, 2014

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Julie Kate Keeney, all of Columbia, and Scarlett Anne Wilson, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Clarence Robinson (Petitioner) appeals his conviction for armed robbery and possession of a firearm during the commission of a violent crime, claiming the trial court erred in finding the police had a reasonable, articulable suspicion to stop him and search the vehicle in which he was a passenger. We affirm.

FACTS/PROCEDURAL BACKGROUND

On February 26, 2008, at approximately 9:45 p.m., four men entered Benders Bar and Grill in the West Ashley area of Charleston, South Carolina, and robbed the patrons and the establishment, stealing approximately $875. Each man carried a gun and covered his face with some sort of fabric fashioned into a bandana. The men made the patrons and staff lie face-down during the robbery. As a result, the witnesses could not describe their facial features and were only able to identify the general coloring of their clothing glimpsed in the seconds between the men's entry and their demand for patrons to "get down."[1]

The men escaped out the front door of Benders, although no witness could attest whether they left in a vehicle or on foot. The police arrived at 9:51 p.m., within thirty-one seconds of the initial 911 call and two to three minutes of the robbery itself. The responding officer briefly interviewed the patrons and staff and issued an initial "be on the lookout" (BOLO) description to other patrolling officers via the police radio, describing the suspects as four armed African-American men, approximately twenty years old, and wearing all-black clothing.

At 10:06 p.m., a police officer spotted a parked vehicle with its lights off in the darkened, fenced-in parking lot of a closed church and decided to investigate, pulling his patrol car behind the parked vehicle and blocking it in. The officer was aware of the BOLO but testified that the BOLO did not include a description of the

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[1] However, several witnesses provided detailed information about the men's footwear because their feet were in their line of sight during the robbery. For example, one witness stated that two of the men wore black Timberland boots and black and white high-top Nike tennis shoes, known as "Willie-D's." Another witness remembered one of the men wearing red and black Air Jordan tennis shoes with white shoelaces. According to the witness, Air Jordan tennis shoes are only made with a red and black color scheme, and black shoelaces are standard. Therefore, the non-standard white shoelaces caught his attention.

getaway vehicle, so he initially "thought maybe it was a couple that was parked there, or somebody from the church left a car there." He called in the car's license plate to dispatch and then approached the car. At that point, he noticed that there were four men in the vehicle who matched the approximate description of the BOLO—the correct number of men, the correct race, the correct age, and the correct approximate clothing color. Further, the testimony at trial established that the church is located within a short drive of Benders. The officer asked the driver, Petitioner, for his driver's license and walked back to his patrol vehicle and requested backup. The officer claimed that he called in the license plate and requested the driver's license to check for outstanding warrants, which involved calling a police dispatcher and "run[ning] it with them." He "did not do anything [further] until the backup cars came," including returning the driver's license.

At 10:09 p.m., two backup police officers arrived. These two officers also received the BOLO alert and knew there were four robbery suspects at large. One backup officer testified:

> When I first pulled up we were in an unmarked vehicle. So I think they didn't know we were there yet. They were talking to just [the first officer] and seemed sort of relaxed.
>
> And it seems like when I approached and came around [one side of the vehicle], and my partner went around the other side [of the vehicle], everyone became really nervous and silent. And all four of them looked straight forward.

The officers found the men's behavior suspicious. Therefore, the officers requested Petitioner exit the vehicle so they could pat him down for weapons. Next, they requested each passenger exit the vehicle, one-at-a-time, and patted each down for weapons. While the police found no weapons on any of the men, when the final passenger—seated in the rear passenger-side of the vehicle—exited the vehicle at the officers' request, a .22 caliber revolver with its serial number removed became immediately visible on the floorboard.[2] Because none of the four men would admit who owned the gun, the officers arrested all four, including

[2] South Carolina law criminalizes possession of a handgun with its serial number removed or obliterated. S.C. Code Ann. § 16-23-30(C) (2013).

Petitioner, and read them their *Miranda*[3] rights. At this point, several other officers responded to the scene to help secure the four suspects and search the vehicle.

At first, the officers detained the four suspects near the vehicle's trunk while other officers searched the car.[4] The trunk was locked, and the suspects claimed to be unaware of the key's location. The owner of the car (not Petitioner) stood with his back to the trunk while talking to the officers; however, every time an officer searched near or touched the back seat, the suspect "would turn his head around extremely quickly just to see what was going on." Once the officer stopped searching that area, "he would act completely normal again." After this pattern repeated several times, the officers noticed a gap between the top of the backseat and the flat paneling between the seat and the back windshield. The officers pulled the seat forward slightly to peer into the trunk and saw three more guns in an area that would have been accessible to the suspects had they still been in the vehicle.[5]

Petitioner and his three co-defendants proceeded to trial for armed robbery and possession of a firearm during the commission of a violent crime. At trial, Petitioner and his co-defendants moved to suppress the guns and all other evidence found from the search of the vehicle based on their claims that the police lacked a reasonable suspicion to stop them initially and that, even if the police did have a reasonable suspicion, the warrantless search of the car's trunk exceeded the scope of their permissible authority. The trial court, relying in part on *State v. Culbreath*,

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The initial search of the passenger area of the vehicle revealed a pair of black gloves, a yellow Nike knit hat, and a piece of red cloth tied into a bandana.

[5] The officers also found a black hooded sweatshirt, two pairs of black gloves, a pair of clear latex gloves, a black and white knit hat, a black knit hat, a pair of black and red Nike Air Force One tennis shoes, and a piece of gray cloth tied into a bandana. The officers then escorted the manager at Benders—the same man who had identified the shoes of one of the men—to the parking lot to attempt to make a positive identification. The manager identified the black and red Air Jordan tennis shoes with the white laces as those on the car-owner's feet. Similarly, Petitioner wore black and white Willie-D's that another bar patron had described. A third suspect wore black Timberland boots described by the same patron. Between the four suspects, $870 was recovered.

300 S.C. 232, 387 S.E.2d 255 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990), admitted all of the evidence, finding that (1) the officer had a reasonable suspicion that criminal activity was afoot when he stopped the car initially and (2) several exceptions to the warrant requirement justified the warrantless search.[6] Ultimately, the jury found Petitioner and his co-defendants guilty, and the trial court sentenced each man to twelve years for the armed robbery and five years for the possession of a firearm during the commission of a violent crime, the sentences to run concurrently.

Petitioner notified his trial counsel of his desire to appeal; however, his trial counsel miscalculated the time for appeal. Therefore, the court of appeals dismissed Petitioner's direct appeal as untimely.

Petitioner filed a post-conviction relief (PCR) application, including a request for belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). The PCR court denied his claim for ineffective assistance of counsel, finding that Petitioner failed to prove either prong of the two-prong *Strickland*[7] test. However, the PCR court found that Petitioner had not knowingly waived his right to a direct appeal under *White v. State*.

Petitioner sought a writ of certiorari. This Court granted the writ of certiorari pursuant to Rule 243, SCACR, and *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

ISSUES

I. Whether the trial court erred in denying Petitioner's motion to suppress based on its finding that the police had a reasonable suspicion of criminal activity to justify detaining Petitioner.

II. Whether the trial court erred in denying Petitioner's motion to

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[6] Specifically, the trial court found the search was justified by the plain view exception with respect to the gun with the obliterated serial number, and either by the search incident to a lawful arrest exception, the automobile search exception, or the inventory search exception with respect to the three guns and other evidence found in the trunk.

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

suppress based on its finding that several exceptions to the warrant requirement justified the warrantless search.

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("Therefore, we will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is *any evidence* to support the ruling." (emphasis added)). However, this Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Tindall*, 388 S.C. at 520, 698 S.E.2d at 205.

ANALYSIS

I. Reasonable Suspicion

Petitioner argues that the trial court erred in failing to suppress the evidence under the Fourth Amendment because the officer did not possess reasonable suspicion to detain Petitioner. Specifically, Petitioner contends that the officer "did not provide any specific facts as to why there was an articulable suspicion to detain" Petitioner and his co-defendants other than "there might have been a couple parked at the site in the car." Therefore, Petitioner argues that once the driver's license and license plate came back free of outstanding warrants, there was no indication of criminal activity, so the officer should have released Petitioner, and any further action to detain Petitioner or search the vehicle exceeded the scope of a valid stop. We disagree.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee "protects against unreasonable searches and seizures, including seizures that only involve a brief detention." *State v. Pichardo*, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing *United States v. Mendenhall*, 446 U.S. 544 (1980)). A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave. *Mendenhall*, 446 U.S. at 554; *see also Pichardo*, 367

S.C. at 97, 623 S.E.2d at 847 ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.").

In general, a police officer "may [] stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." *Pichardo*, 367 S.C. at 97–98, 623 S.E.2d at 847. Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or hunch. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Instead, looking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity.[8] *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the intrusion. *Terry*, 392 U.S. at 21, 27.

If, during the stop of the vehicle, the officer's suspicions are confirmed or further aroused—even if for a different reason than he initiated the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require. *Culbreath*, 300 S.C. at 235, 387 S.E.2d at 257; *see also United States v. Hensley*, 469 U.S. 221, 235 (1985) (stating that once police officers detained the defendant, they "were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop"); *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999) (holding that an officer had reasonable suspicion to stop the defendant based on his presence near an abandoned truck, which had been carjacked, and his appearance, which closely matched that of the carjacking suspect, and could briefly detain him for investigative purposes).

In the instant case, the police officer seized Petitioner within the meaning of the Fourth Amendment at the time the officer pulled up behind the vehicle Petitioner was driving, blocking the vehicle in and preventing it from driving away. At that point, a reasonable person in Petitioner's position would not have felt free to leave. *See Mendenhall*, 446 U.S. at 554. Because the seizure began at

[8] We respectfully disagree with the dissent that our opinion implies that reasonable suspicion is "subjective rather than objective judgment." Rather, we explicitly state the opposite in the previous sentence.

that point, the requisite reasonable suspicion likewise must have been present at the same time.

When he pulled up behind the car, the officer knew the following: (1) there was a parked car in a closed and darkened church parking lot on a Tuesday night; (2) the car was behind a fence with its lights off; (3) the car had no reason to be within the fence at that time of night when the church was closed; and (4) the area where the car was parked was not readily open to the public. From these facts, the officer inferred that a couple might be parked in the vehicle "necking" on church grounds, a potential misdemeanor under section 16-11-760 of the South Carolina Code. We find these facts give rise to a reasonable suspicion that potential criminal activity was afoot and that the stop was therefore justified at that point based solely on the officer's assumption that there was a couple "necking" in the car.

When the officer approached the vehicle and found four young African-American men dressed in dark-colored clothing inside, he obtained additional information that further aroused his reasonable suspicions. In addition to the facts listed above, he knew that: (1) the police were looking for four African-American men in their twenties who robbed a bar within twenty minutes of the officer's encounter with the men; (2) the bar was in close proximity to the church parking lot; (3) there were four young men in the vehicle who matched the approximate description of the BOLO—the correct number of men, the correct race, the correct age, and the correct approximate clothing color—and (4) there were four potential suspects and only one of him.[9] These new facts changed the officer's suspicions regarding what type of potential criminal activity the vehicle's occupants could be

[9] Although the officer did not explicitly connect his awareness of the BOLO and the ongoing search for the robbers with the actions he took after initially approaching Petitioner and his co-defendants in the car, his testimony and actions raise a *strong* inference that he did so, and we therefore find this to be an objectively reasonable, articulable suspicion. Under the United States Supreme Court's definition of reasonable suspicion, the facts and inferences relied on by the officer must be articulable, not necessarily articulated. *See, e.g.*, *Terry*, 392 U.S. at 21. It is certainly preferable for the State to more clearly inquire of the officer as to whether he made the logical leap connecting the BOLO to the car's occupants. However, the failure to do so does not alone prevent the stop from being supported by objective, specific, articulable facts and the officer's rational inferences.

involved in, which consequently justified the officer enlarging the scope of his detention to investigate his new suspicions. *See Culbreath*, 300 S.C. at 235, 387 S.E.2d at 257. The enlarged scope of the stop permitted calling for backup so that the officer would not be so badly outnumbered prior to questioning the men about their involvement in the armed robbery at Benders. *See Hensley*, 469 U.S. at 235.

Finally, when the two backup officers arrived, both of whom were aware of the BOLO description and that the occupants of the vehicle could potentially be involved in the robbery, the four men's sudden "nervous[ness] and silen[ce]" and their "look[ing] straight forward" further aroused the officers' suspicions. At that point, there was a reasonable suspicion that the four vehicle occupants were the four armed robbers described in the BOLO. Thus, removing the men from the car and patting them down for weapons to ensure the officers' safety was eminently reasonable. *See id.* Further, once the last co-defendant stepped out of the vehicle and the altered gun became visible on the floorboard, as explained, *infra*, the gun supplied the probable cause needed to arrest the men and continue the search of the vehicle.

In a recent case, this Court affirmed a trial court's finding that the record contained evidence of reasonable suspicion where the officer testified to a defendant's extreme nervousness after he stopped the defendant in a routine traffic stop. *State v. Provet*, 405 S.C. 101, 105–06, 747 S.E.2d 453, 455 (2013). After the defendant produced his driver's license and vehicle registration, the officer noticed his hands shaking excessively and his breathing accelerated. *Id.* After the officer made several observations, such as the vehicle's registration to a third party and numerous air fresheners in the vehicle, the officer requested to search the car, to which the defendant consented. *Id.* at 106, 111–12, 747 S.E.2d at 456, 459. *Despite the fact that the Court agreed with the defendant that the existence of several factors were indicative of innocent travel*, the Court noted, "we must affirm when *any evidence* in the record supports" the trial court's finding. *Id.* at 112, 747 S.E.2d at 459 (emphasis added).

Similarly, here, we find there is evidence in the record that supports the trial court's finding that the police officers had a reasonable, articulable suspicion to detain Petitioner and his co-defendants.

II. Exceptions to the Warrant Requirement

Generally, the Fourth Amendment requires the police to have a warrant in

order to conduct a search. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). Evidence seized in violation of the warrant requirement must be excluded from trial. *Id.* However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement. *State v. Moore*, 377 S.C. 299, 308–09, 659 S.E.2d 256, 261 (Ct. App. 2008). "These exceptions include . . . : (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Furthermore, if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant. *See Colorado v. Bertine*, 479 U.S. 367, 372–73 (1987).

The trial court found that, because the police officers had reasonable suspicion of criminal activity afoot, the officers properly seized the gun with the serial numbers removed under the plain view exception. Additionally, the trial court found that the police officers did not need a warrant to search the rest of the vehicle after discovering the initial gun because: (1) under the search-incident-to-an-arrest exception, the officers had a reasonable belief that the vehicle contained evidence of the offense for which the co-defendants were arrested; (2) under the automobile exception, the officers had probable cause to believe the vehicle contained contraband; and (3) under the inventory exception, the officers would have inevitably discovered the evidence during an inventory check. We agree.

A. Plain View Exception

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). Therefore, for evidence to be lawfully seized under the plain view exception, the State must show: (1) the initial intrusion which afforded the police officers the plain view of the evidence was lawful; and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *Id.*

We find the initial intrusion that afforded the officers the plain view of the gun with the serial number removed was lawful because the officers had reasonable suspicion to initiate the stop. *See supra*. Further, the incriminating nature of the gun was immediately apparent upon the gun coming into view

because the officers each immediately noticed that the serial number had been removed. *See* S.C. Code Ann. § 16-23-30(C) (criminalizing possession of a handgun with its serial number removed or obliterated). In conjunction with the officers questioning the vehicle's occupants regarding their potential involvement in the armed robbery at Benders, we find the trial court properly admitted the gun into evidence.

B. Search Incident to a Lawful Arrest Exception

Petitioner contends that the evidence found in the trunk should have been excluded because the trunk search exceeded the scope of the search-incident-to-arrest exception. Specifically, Petitioner points out that he and his co-defendants were handcuffed and standing outside of the vehicle before the police officers searched the car after finding the gun with the serial number removed. Because we find the officers had a reasonable belief that the vehicle contained evidence of the criminal offense for which the co-defendants were arrested, we disagree.

The permissible scope of searches incident to lawful arrests changed between the time the officers searched the vehicle Petitioner was driving and the time Petitioner's trial occurred. It is therefore helpful to examine the recent evolution of the law.

In *Chimel v. California*, the United States Supreme Court initially held that, in the cases of a lawful custodial arrest, the police may conduct a contemporaneous, warrantless search of the person arrested and the immediate surrounding area. 395 U.S. 752, 763 (1969). The Supreme Court justified these warrantless searches because they (1) ensured officer safety by "remov[ing] any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "prevent[ed the] concealment or destruction" of evidence. *Id.*

Chimel's rule "proved difficult to apply, particularly in cases that involved searches inside of automobiles after the arrestees were no longer in them." *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011) (quoting *New York v. Belton*, 453 U.S. 454, 458–59 (1981)) (internal marks omitted). The Supreme Court therefore clarified the *Chimel* rule in *Belton* by outlining a bright-line rule concerning arrests of automobile occupants. Specifically, the Supreme Court held that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. The Supreme Court justified the

search on the grounds that the "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact *generally, even if not inevitably,* within the area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Id.* (emphasis added) (quoting *Chimel*, 395 U.S. at 763) (internal marks omitted). The Supreme Court held that, while searching the passenger compartment, the officers could also examine the contents of any containers found within the passenger compartment as well because "if the passenger compartment is within the reach of the arrestee, so also will containers be within his reach." *Id.*

The *Belton* court specifically excluded the trunk from the permissible scope of a search incident to an arrest. *Id.* at 460 n.4. In a separate Fourth Amendment case decided the same day as *Belton,* Justice Powell explained in his concurring opinion that *Belton* prohibited trunk searches because the trunk "is not within the control of the passengers either immediately before or during the process of arrest." *Robbins v. California*, 453 U.S. 420, 431–32 (1981) (Powell, J., concurring in the judgment), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982).

However, subsequent courts found that, in certain situations, the "'trunk' (in the traditional sense) [] constitut[ed] part of the passenger compartment for purposes of search incident to arrest." *United States v. Olguin-Rivera,* 168 F.3d 1203, 1205–06 (10th Cir. 1999). In general, courts would find the trunk part of the passenger compartment—and thus subject to a warrantless search incident to a lawful arrest—when the trunk was "reachable *without exiting the vehicle*, without regard to the likelihood in the particular case that such a reaching was possible." *United States v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994) (quoting 3 Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1(c), at 16–17 (2d ed. 1987)); *see also Olguin-Rivera*, 168 F.3d at 1206 n.1 (collecting cases); *United States v. Pino,* 855 F.2d 357, 364 (6th Cir. 1988) (holding that this rule "satisfies the twin objectives of *Belton* in preventing a suspect's access to weapons and easily-destroyed evidence within his vehicle and creating a standardized rule of criminal procedure which the police can follow routinely").

Courts faithfully applied the *Belton* rule for the next twenty-eight years and allowed the police to search the passenger compartment of a vehicle incident to the arrest of a recent occupant of the vehicle, even if the arrestee had been handcuffed and secured in the back of the officer's patrol car prior to the search. *See Davis*, 131 S. Ct. at 2424, 2424 n.3 (collecting cases). However, in *Arizona v. Gant*, 556

U.S. 332 (2009), the Supreme Court limited *Belton*'s bright-line rule. There, the Supreme Court found that, if the arrestee was already secured and outside of reaching distance from the passenger compartment of the vehicle at the time of the search, a search could not be justified under the traditional rationale—protecting officer safety and preventing the destruction of evidence. *Id.* at 343. Therefore, the Supreme Court set forth the new rule: police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if (1) the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search," or (2) it is reasonable to believe the vehicle contains evidence of the crime of arrest. *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)).[10] Absent either of those two instances, "a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Brown*, 401 S.C. at 91.

We note initially that the search of the vehicle here occurred while *Belton* was in effect. However, because this is Petitioner's belated direct appeal, we nonetheless must apply the law as it currently stands and therefore look to the *Gant* rule for direction on whether the search of the trunk was permissible. *Narciso v. State*, 397 S.C. 24, 31, 723 S.E.2d 369, 372 (2012) ("Newly announced rules of constitutional criminal procedure must apply retroactively to all cases, pending on direct review or not yet final, with no exception for cases in which a new rule constitutes a clear break with the past.") (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)) (internal quotation marks omitted); *see also Davis*, 131 S. Ct. at 2426 (applying *Gant* on direct appeal when the search occurred while *Belton* was the prevailing law); *Brown*, 401 S.C. at 94–95, 736 S.E.2d at 269 (same).

We find that the first justification under the *Gant* rule (arrestee unsecured and within reach of area to be searched) does not apply here. Several officers had handcuffed Petitioner and his co-defendants at the back of the vehicle and were closely supervising them while other officers searched the car. The likelihood of the supervised, handcuffed men reaching the passenger compartment to either obtain a weapon or destroy evidence was therefore highly unlikely.

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[10] We find no indication in any subsequent case law that the new *Gant* rule in any way changed the scope of the permissible search area when searching incident to an arrest, *i.e.*, the passenger compartment only.

However, we find that the second justification under *Gant* (reasonable to believe vehicle contains evidence of a crime) does apply in this instance. The officers arrested the suspects for the unlawful possession of a handgun with its serial number removed. Finding this gun, in conjunction with their knowledge of the BOLO and their suspicion that Petitioner and his co-defendants were in fact the four men involved in the armed robbery at Benders, provided the officers probable cause to likewise arrest them for armed robbery.[11] Because there were four men involved in the armed robbery, and only one gun had thus far been recovered, it was reasonable to believe the vehicle contained further evidence of the armed robbery.

Furthermore, although *Belton*—and thus presumably *Gant*—excluded the trunk from the permissible scope of a search incident to a lawful arrest, we have not previously had the opportunity to address the issue of whether the trunk may, at times, be part of the passenger compartment, as many other courts have likewise found. We hereby adopt the view that the trunk may be considered part of the passenger compartment and may therefore be searched pursuant to a lawful arrest when the trunk is reachable without exiting the vehicle, as it was in this case. *See Olguin-Rivera*, 168 F.3d at 1205–06, 1206 n.1; *Doward*, 41 F.3d at 794; *Pino*, 855 F.2d at 364.

Here, the other three guns were found in the trunk and would normally be excluded from the permissible scope of the search; however, because the passenger compartment contained a gap into the trunk that made the guns visible and freely accessible from the backseat, we believe the guns and the trunk area were "within

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[11] Probable cause is defined as "a fair probability that contraband or evidence of a crime will be found." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Probable cause to arrest depends upon whether, at the moment the arrest was made . . . the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information was sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Adams v. Williams*, 407 U.S. 143, 148 (1972) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (internal marks omitted). The record is not clear whether the police arrested Petitioner solely for unlawful possession of a handgun with its serial number removed or for armed robbery as well. However, Petitioner has never raised this issue, and we find there was probable cause to arrest him for armed robbery after the officers saw the gun on the floorboards.

the control of the passengers either immediately before or during the arrest." *Robbins*, 453 U.S. at 431–32 (Powell, J., concurring in the judgment). We therefore find that the trial court properly admitted the evidence in the trunk as part of the search of the passenger compartment.[12]

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion in which BEATTY, J., concurs.

[12] The State argues in the alternative that the search of the trunk was justified by the automobile exception and the inventory search exception to the warrant requirement. However, because the other issues are dispositive, we need not reach these issues. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (finding that an appellate court need not discuss remaining issues when determination of prior issue is dispositive).

JUSTICE PLEICONES: I concur but write separately as I view the dispositive issues somewhat differently. I begin by noting there are only three issues raised by petitioner in his belated appeal. First, he contends that he was unlawfully detained when the officer pulled into the parking lot and blocked the parked car. Next, he argues he was unlawfully detained after the check of the car's license tag and his driver's license came back "clean." Finally, he contends that the search of trunk exceeded the permissible scope of a search under *Arizona v. Gant*, 556 U.S. 332 (2009). As explained below, I find no unlawful detentions, and while I agree the search here violated *Gant*, the trial judge also upheld the search as permissible under the automobile exception to the Fourth Amendment warrant requirement. *See United States v. Ross*, 456 U.S. 798 (1982). This unchallenged ruling, whether correct or not, is the law of the case. *E.g., State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012).

The record shows that the officer noticed the parked car at 10:06 p.m. He entered the lot and pulled in behind the vehicle, at which point he saw four individuals seated in the car. The officer ran the license plate and then approached the car to ask petitioner, seated in the driver's seat, for his driver's license. When he returned to his cruiser with the license, the officer called for back-up. Two additional officers arrived within one to two minutes of this call, driving into the parking lot while the first officer was speaking to the driver and returning the license.

To the extent petitioner contests the patrol officer's right to conduct an investigatory check of the parked car, I would find no Fourth Amendment violation. In my opinion, the patrol officer did not violate the Constitution when he conducted a welfare check on a car, parked in the dark area of a closed church parking lot, after 10 p.m. on a Tuesday evening. *See Cady v. Dombrowski*, 413 U.S. 433 (1973).

Petitioner next contends that the detention here was unreasonable. The four occupants matched the general description of four armed suspects who had robbed a bar and its patrons at about 9:50 p.m. The bar was located about 3-4 miles away from the lot and there was evidence it took less than ten minutes to drive from the bar to the church parking lot. The general description had

been given in a BOLO sent at approximately 9:53 p.m. As the two back-up officers approached the parked car less than five minutes had elapsed since the first officer observed it at 10:06 p.m. When the back-up officers approached the car, the men became silent, looked straight ahead, and acted nervous. Taken together, I find these facts created objective[13] reasonable suspicion permitting the continued detention of petitioner. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013). The trial judge correctly held this detention did not violate petitioner's Fourth Amendment rights.

Petitioner does not challenge the subsequent request that he and the passengers exit the vehicle, the seizure of the gun that was observed after the rear passengers vacated, or the subsequent arrests. Instead, petitioner argues only that the search of the trunk exceeded that permitted by *Gant*. Although this issue should be decided under the law of the case doctrine, *State v. Black*, *supra*, since I disagree with the majority's application of *Gant*, I will address the merits briefly.

Under *Gant*, officers may search a vehicle incident to the occupant's arrest only if (1) the arrestee is within reaching distance of the passenger compartment when the search is conducted or (2) "it is reasonable to believe the vehicle contains evidence of the arrest." *Gant*, 556 U.S. at 343. As the parties acknowledge, the search here could only be upheld under the second *Gant* scenario.[14] However, a *Gant* search is limited to the passenger compartment itself and the containers located therein, and the trunk is not within the permissible scope of an" evidence of the arrest" search. *Gant*, 556

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[13] The majority opinion may be read to suggest that reasonable suspicion is a subjective rather than objective judgment. *See* fn. 9, *supra*.

[14] The majority purports to apply this second *Gant* exception but apparently recognizes the weakness of upholding a vehicle search for evidence of a no-serial-number handgun which has already been seized. It thus transmogrifies the arrest for the weapon into one for the armed robbery, despite the arresting officer's testimony that "After we found the [altered] .22 they were all placed under arrest for that weapon."

U.S. at 344. [15] If this search is to be sustained, then it must be pursuant to a different exception to the Fourth Amendment's warrant requirement.

Gant recognizes the continued validity of the automobile exception, citing *United States v. Ross*, 456 U.S. 798 (1982). *Gant*, 556 U.S. at 347. Here, the trial judge held the officers had probable cause to search the vehicle for evidence of the bar robbery under *Ross's* automobile exception. This unchallenged ruling, whether correct or not, is the law of the case. *State v. Black, supra*.

I concur in the majority's decision to affirm petitioner's belated appeal.

BEATTY, J., concurs.

[15] The majority creates a hybrid third exception to *Gant*, holding that if the trunk would have been accessible to an occupant (which derives from the first *Gant* scenario), then even though the individual has been removed from the vehicle the trunk is part of the passenger compartment for purposes of the second permissible *Gant* search.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Quashon Middleton, Appellant.

Appellate Case No. 2011-196767

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 27358
Heard March 20, 2013 – Filed February 26, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Respondent.

CHIEF JUSTICE TOAL: Quashon Middleton (Appellant) appeals his convictions and sentences for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. We affirm.

FACTS

On September 28, 2010, Stephanie Mack was driving her vehicle in which Ryan Stephens was riding as a passenger. Mack stopped the vehicle at a school bus stop sign. They were 10-15 feet away from the school bus, facing the bus in the opposite lane, as kindergarten-aged children attempted to exit the bus. Appellant, driving a moped, approached Mack's stopped vehicle from the rear, and drove around to the passenger side. As he approached, he pulled out a gun and began firing into the passenger side of the vehicle, striking the vehicle repeatedly and shattering glass. He continued shooting into the vehicle as he rounded the front of the vehicle. Stephens testified that he and Mack were "laid back" in the seats at the time Appellant approached the vehicle, and he immediately jumped across Mack and into the driver's seat so that he could drive away. In the process, he struck Appellant with the vehicle. He stated these actions were the reasons that he and Mack were not shot and killed. Both Stephens and Mack testified that Appellant shot at them 5-7 times. None of the bullets struck Mack or Stephens. At trial, Mack testified that her only injuries were a few cuts from the broken glass. Stephens testified that he was upset by the incident but was not otherwise struck or injured in any way.

Appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. He requested a jury charge on the lesser-included offense of assault and battery in the first degree on both counts of attempted murder. The trial judge charged the jury on the lesser-included offense as to Mack but refused to charge the lesser-included offense as to Stephens.

ISSUE

Did the trial court err when it refused to instruct the jury on the lesser-included offense of assault and battery in the first degree?

ANALYSIS

Appellant argues that the trial judge erred in refusing to charge the jury on the lesser-included offense of assault and battery in the first degree as to Stephens and that this error requires reversal. We agree that the failure to charge the lesser-included offense was error; however, we find this error was harmless beyond a reasonable doubt.

Appellant committed the crimes alleged in September 2010, three months after the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act), which substantially overhauled the state's criminal law, became effective. *See generally* Act No. 273, 2010 S.C. Acts 1937. Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. *See* S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2012). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees. *See generally id.* § 16-3-600. Under the statute, ABHAN is a lesser-included offense of attempted murder. *Id.* § 16-3-600(B)(3). Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN. *Id.* § 16-3-600(C)(3). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. *Id.* §§ 16-3-600(D)(3) & (E)(3).

At trial, Appellant requested that the judge instruct the jury on the lesser-included offense of assault and battery in the first degree pursuant to section 16-3-600(C) as to both Mack and Stephens. That section provides, in relevant part:

> (C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) **injures** another person, and the act:
>
> (i) involves nonconsensual touching of the private parts . . . with lewd and lascivious intent; or
>
> (ii) occurred during the commission of a robbery,

> burglary, kidnapping, or theft, **or**
>
> (b) **offers or attempts to injure another person with the present ability to do so, and the act:**
>
> > (i) **is accomplished by means likely to produce death or great bodily injury**;[1] or
> >
> > (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code Ann. § 16-3-600(C)(1) (emphasis added). The trial judge agreed to charge the lesser-included offense of assault and battery in the first degree as to Mack, but he reasoned that because there was no evidence Stephens was injured, it would be inappropriate to instruct the lesser-included offense of assault and battery in the first degree as to Stephens. We find this was error.

The trial judge misconstrued the statutory definition of assault and battery in the first degree as requiring an injury to the victim. While subsection (a) does require an injury to the victim, assault and battery in the first degree also comprises subsection (b) of the statute. *See Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute, is a disjunctive particle that marks an alternative. The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both.") (citations omitted). Under subsection (b), "offer[ing] or attempt[ing] to injure a person with the present ability to do so by means likely to produce death or great bodily injury" constitutes assault and battery in the first degree. It is undisputed that the elements of subsection (b) are met in this case. Thus, the circuit court erred in refusing to charge the lesser-included offense of assault and battery in the first degree as to Stephens. *See State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) ("A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense."); *State v. Mathis*, 287 S.C. 589, 594, 340 S.E.2d 538, 541

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[1] "Great bodily injury" is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1).

(1986).

However, we find the circuit court's error was harmless beyond a reasonable doubt. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis.").

When considering whether an error with respect to a jury instruction was harmless, we must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998) (citation omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* Thus, whether or not the error was harmless is a fact-intensive inquiry. *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citation omitted).[2]

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[2] We do not disagree with the dissent that the failure to charge the lesser-included offense can be reversible error. However, we disagree that such failure is not subject to a harmless error analysis. As a practical matter, none of the cases cited by the dissent stand for the proposition that a harmless error analysis is inappropriate where the judge erroneously fails to charge the lesser included offense. *See State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007) (refusing to reverse the lower court for failing to charge the lesser-included offense after weighing the evidence and finding it did not support an involuntary manslaughter charge); *Beck v. Alabama*, 447 U.S. 625 (1980) (overturning an Alabama law prohibiting a judge from ever instructing a jury on the lesser-included offense in capital cases, even where the evidence supported such a charge); *Hopper v. Evans*, 456 U.S. 605 (1982) (finding, in the wake of *Beck*, that the respondent was not prejudiced by the Alabama statute invalidated by *Beck*, even though the jury was not permitted to consider the lesser-included offense, because, under the facts, a charge on the lesser-included offense was not supported by the evidence). In our view, it is elemental that the failure to charge the lesser-included offense is subject to a harmless error analysis, and the cited authority does not compel a different conclusion. *See Neder v. United States*, 527 U.S. 1, 15–16 (1999) (concluding that erroneous jury instruction that fails to charge an element of

In *Arnold v. State*, a death penalty case, the Court found that the trial judge unconstitutionally shifted the burden of proof to the co-defendants by charging the jury that malice could be inferred from the use of a deadly weapon in the commission of the murder. 309 S.C. 157, 163–65, 420 S.E.2d 834, 837–38 (1992). However, the Court held that this unconstitutional instruction was harmless in view of the evidence presented. *Id.* at 171–72, 420 S.E.2d at 842. In so holding, the Court looked to the evidence and found that there was no indication that the jury based their verdict on the erroneous part of the charge. *Id.* at 170–71, 420 S.E.2d at 841 ("Throughout the jury charge on malice, the trial judge continually reminded the jurors to base their verdict on all the evidence presented and to establish the fact beyond a reasonable doubt. Thus, we cannot assume that the jurors based their verdict on the presumption that malice existed with the use of a deadly weapon. A reasonable juror would have listened to all of the instructions and evaluated all of the evidence. Further, it is clear that the presumption of malice from the use of a deadly weapon beyond a reasonable doubt did not contribute to the verdict in this case. The direct evidence of the brutality of each of the participants is overwhelming . . . . The testimony established malice well beyond a presumption."); *cf. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("Having determined the source of the jury's confusion, we must review the facts the jury actually heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citation omitted).

The same analysis applies here. In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack. *See* S.C. Code Ann. § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice

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an offense was subject to a harmless error analysis and stating that the test for determining whether a constitutional error is harmless is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'") (citations omitted).

aforethought, either expressed or implied, commits the offense of attempted murder."). Therefore, we hold any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt.

CONCLUSION

The trial court erred when it refused to charge the jury on a lesser included offense of assault and battery in the first degree, but this error was harmless beyond a reasonable doubt. Therefore, Appellant's convictions and sentences are

AFFIRMED.

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

JUSTICE PLEICONES: I respectfully dissent and would hold that the refusal to give a jury charge on a lesser-included offense that is supported by the evidence is always reversible error and not subject to harmless error analysis. Here, despite holding that the evidence entitled appellant to the charge on first degree assault and battery, the majority nonetheless holds "Appellant could only have been convicted of attempted murder under the facts . . . ." It is not our prerogative to weigh the evidence and usurp the jury's function. The failure to give a lesser included offense where it is both supported by the evidence and requested by the defendant is *ipso facto* reversible error. *E.g. State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (refusal to charge lesser offense supported by the evidence is an error of law requiring reversal); *see Hopper v. Evans*, 456 U.S. 605 (1982); *Beck v. Alabama*, 447 U.S. 625 (1980).

The majority relies upon *Neder v. United States*, 527 U.S. 1 (1999), a decision which is irrelevant to the question before us today. In *Neder*, the defendant was charged with tax fraud, having underreported his income by five million dollars. An element of tax fraud is materiality, an issue the trial court erroneously considered and ruled on as a matter of law. On appeal, the issue was whether the failure to charge the jury on materiality was harmless error. The Supreme Court, in a 5-4 decision, held the failure to charge the jury on this element of the offense was harmless since materiality was not contested by the defendant, and since the evidence of it was overwhelming. It was these facts that allowed the majority of the Supreme Court to conclude the omitted jury charge "beyond a reasonable doubt . . . did not contribute to the verdict . . . ." In this case, however, there was evidence of the lesser offense, and it is only by weighing the evidence that the majority can conclude the failure to charge was harmless. Assuming we would follow *Neder* if the circumstances warranted it, this is not a case where an uncontested element of a crime was not charged to the jury, but rather one where the evidence would have supported a conviction for a lesser offense, a decision the jury was entitled to make.

I respectfully dissent and would reverse and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wachovia Bank, National Association, Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner; Watson E. Felder; Gary F. Ownbey and South Island Plantation Association, Inc., Defendants,

Of Whom William E. Blackburn; Judith Blackburn are, Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC, Third Party Defendants.

Appellate Case No. 2011-203088

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27359
Heard December 5, 2013 – Filed February 26, 2014

REVERSED IN PART, AFFIRMED IN PART

Robert C. Byrd and Alyson Smith Podris, both of Parker, Poe, Adams, & Bernstein, LLP, both of Charleston, for Petitioner.

Glenn V. Ohanesian, of Ohanesian & Ohanesian, of Myrtle Beach, for Respondents.

CHIEF JUSTICE TOAL: Wachovia Bank, National Association (Wachovia), appeals the court of appeals' decision reversing the circuit court's determination that William and Judith Blackburns' (collectively, Respondents) counterclaims in a mortgage foreclosure suit were within the scope of a jury trial waiver signed by Respondents. We reverse in part and affirm in part.

FACTS/PROCEDURAL BACKGROUND

On July 23, 2005, Winyah Bay Holdings, LLC (the Seller), held an event aimed at selling marsh-front lots located in South Island Plantation, an affluent, to-be-built housing development in Georgetown County. The Seller conducted the sale by lottery, using balls and numbers like the South Carolina Education Lottery,[1] and geared the event toward on-the-spot sales. To facilitate same-day sales, the Seller had Wachovia and two unrelated realty and marketing companies (the Realtors) set up booths to promote financing the lot sales. Respondents allege that the Seller, the Realtors, and Wachovia further enticed potential buyers by promising that "day docks, roads, infrastructure, pool [sic], marsh walks, and other amenities would be in place within 18 months of the lottery." Respondents claim that these promises induced them into participating in the lottery.[2]

Over six months later, on February 14, 2006, Respondent William Blackburn delivered a promissory note to Wachovia in the amount of $463,967 to finance the purchase of one of the South Island Plantation lots. The note was secured by a mortgage and unconditional personal guaranties executed by Tammy

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[1] It is a misdemeanor under South Carolina law to sell houses or land by lottery. S.C. Code Ann. § 16-19-10 (2003).

[2] Although unclear from the Appendix, Respondents presumably signed the sales contract on July 23, 2005, the day of the event.

Winner, Watson Felder, and Respondents.[3]

The note and guaranties contained virtually identical jury trial waivers:

> **WAIVER OF JURY TRIAL.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER . . . AND BANK . . . KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR *ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO*. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE . . . .

(Italic emphasis added).

Beginning in July 2008, Respondents failed to make payments on the note. Therefore, on November 13, 2008, Wachovia filed a foreclosure action. In its complaint, Wachovia stated that the note was in default, that they had accelerated the balance of the loan, and that they were thus entitled to judgment against the defendants in the amount of $473,747.24.

Respondents answered, asserting counterclaims against Wachovia, cross-claims against the South Island Plantation Association, Incorporated (the Homeowners' Association), and a third-party complaint against the Seller and the Realtors. At issue here are the counterclaims against Wachovia, which include claims for negligent misrepresentation, promissory estoppel, breach of contract/breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud/fraud in the inducement, breach of contract/negligence, breach of

[3] On October 12, 2007, Felder conveyed his interest in the property to Gary Ownbey. Respondents received assignments of rights from Winner and Felder to pursue their claims both individually and as assignees. As such, Winner, Felder, and Ownbey are not parties to this appeal.

contract, civil conspiracy, illegality of contract, and violations of the South Carolina Unfair Trade Practices Act (the SCUTPA).[4]

The gravamen of the counterclaims was that Wachovia "was an agent of, partner of, joint venture [sic] with, or conspirator with" the Seller and the Realtors such that the allegedly wrongful actions of the Seller and the Realtors were "imputed to" Wachovia. According to Respondents, Wachovia, the Seller, and the Realtors "artificially inflated [property values] through collusion by the parties" and promised that various amenities would be in place within eighteen months of the lottery. Respondents contended that the amenities were not completed in a timely manner as promised, and that they were damaged by the delays.[5] Respondents demanded a jury trial on their counterclaims, requesting monetary damages and rescission of the sales and loan contracts as a remedy for their claims.

Wachovia moved to strike the jury demand and refer the entire matter to the master-in-equity, arguing that Respondents contractually waived their right to a jury trial by executing the note and guaranties, all of which included the jury trial waivers. The circuit court granted Wachovia's motion, holding that the language of the waivers in the loan documents encompassed Respondents' counterclaims, and that Respondents knowingly and voluntarily waived their right to a jury trial through the clear and unambiguous waivers.[6]

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[4] As to the cross-claims and third-party complaint, the circuit court found that, because Respondents chose to raise those claims in a non-jury foreclosure proceeding, they had waived any right to a jury trial on those claims. Respondents did not appeal this ruling.

[5] According to Respondents, the amenities were in place as of the spring of 2008; however, Respondents did not miss a payment until July 2008.

[6] Respondents also argued that the waivers were unconscionable and that the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRCP. However, the circuit court did not rule on these issues in its order, and there is no indication in the Appendix that Respondents ever filed a motion to reconsider prior to their initial appeal to the court of appeals. *See* Rule 59, SCRCP. As such, these issues are not preserved, and we will not address them further. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003).

Respondents appealed, arguing, *inter alia*, that (1) their jury trial waivers were not knowingly and voluntarily entered into and that (2) South Carolina's so-called "outrageous and unforeseeable torts exception" to arbitration agreements applied to jury trial waivers as well, thus determining whether the sales transaction was "significantly related" to the loan transactions, and whether the counterclaims fell within the scope of the contractual jury trial waiver provisions.

The court of appeals affirmed in part and reversed in part. *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 590, 716 S.E.2d 454, 460 (Ct. App. 2011). It held that, although the circuit court correctly found that the waivers were knowing and voluntary, the outrageous and unforeseeable torts exception was "instructive" in determining that the counterclaims were not significantly related to the loan transactions. *Id.* at 584–90, 590 n.9, 716 S.E.2d at 457–60, 460 n.9. Further, the court of appeals found that the counterclaims involved only the sales transaction, and the jury trial waivers only applied to the loan transactions. *Id.* at 588–90, 716 S.E.2d at 459–60. Therefore, the court of appeals found that Respondents' counterclaims were outside the scope of the jury trial waivers and, thus, Respondents were entitled to a jury trial on those claims. *Id.* This appeal followed.

ISSUES

I. Whether the circuit court and court of appeals applied the correct law regarding counterclaims brought in response to an equitable action?

II. Whether the jury trial waivers were knowingly and voluntarily executed by Respondents?

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976). However, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings.

Id. at 15, 690 S.E.2d at 772–73.

ANALYSIS

I. Counterclaims in an Equitable Action

Wachovia's foreclosure action is an action in equity. *Hayne Fed. Credit Union*, 327 S.C. at 248, 489 S.E.2d at 475. "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). However, counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial. As we have previously explained:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:
>
> (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
>
> (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
>
> (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the

> equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Johnson v. S.C. Nat'l Bank (*Johnson II*), 292 S.C. 51, 55–56, 354 S.E.2d 895, 897 (1987) (citation omitted) (internal quotation marks omitted), *modifying C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301–02, 350 S.E.2d 191, 193 (1986); *see also N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (utilizing the same rules as *Massengale* and *Johnson II*, but focusing on the difference between permissive and compulsory counterclaims).

Because the issue of jury trial waivers has not arisen in subsequent cases involving this analytical framework, we have not had the opportunity to address where such waivers might fit into the framework. We take the opportunity now to modify the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims.

(1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.

(2) If both are at law, the issues are triable by a jury.

(3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.

(4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will

be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

As will be discussed, *infra*, this case is unusual in that the dispositive issue is whether the claims are permissive or compulsory; therefore, we address that issue first.

"'By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim.'" *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct. App. 2012) (quoting *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991)); *see also* Rule 13(a), SCRCP.[7] Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRCP.

Respondents argued consistently throughout the litigation that the sales and

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[7] We have previously adopted the "logical relationship" test to determine whether a counterclaim is compulsory under this definition. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518, 381 S.E.2d at 905. Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333; *see also N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905 (finding counterclaims involving breach of an oral agreement purporting to modify a note that the bank was foreclosing on were logically related to the enforceability of the note and thus were compulsory); *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333 (determining a counterclaim alleging a note was unconscionable was logically related to the enforceability of the note and thus was compulsory).

loan transactions were *separate transactions*, and that the wrongs done to them were related solely to various torts committed in the sales transaction. They therefore asserted that the jury trial waivers found in the loan documents—which applied to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the note or the guaranties—only applied to torts committed during the loan transactions, but not to those committed during the sales transaction. Thus, Respondents claimed that the jury trial waivers they executed in connection with the loan documents did not bar their counterclaims related to the sales transaction. However, Respondents simultaneously argued that their counterclaims were *compulsory*, *i.e.*, that they arose out of the same transaction or occurrence as Wachovia's loan foreclosure action.

We find it unnecessary to determine whether the claims were permissive or compulsory because, in either event, Respondents are not entitled to a jury trial. For example, if we found that, as Respondents contended, the sales transaction was separate from the loan transactions, then by definition the counterclaims would be permissive. Wachovia's action is a foreclosure action centered entirely on obligations created by the loan documents. If the sale was separate from the loan, then the counterclaims involving the sale did not "aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP. Therefore, because Respondents raised such permissive counterclaims in an equitable action, they waived their right to a jury trial on the claims. *See Johnson II*, 292 S.C. at 55, 354 S.E.2d at 897.

On the other hand, if we found that the sales and loan transactions were all one continuous transaction or occurrence such that the counterclaims could possibly be considered compulsory under Rule 13(a), SCRCP, the jury trial waivers necessarily apply. Respondents waived their right to a jury trial for any claim related to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the loan documents. Therefore, if we view the sales and loan transaction as one continuous transaction, the sales transaction falls squarely within the coverage of the waiver provisions.

Accordingly, as stated, *supra*, whether the counterclaims were legal or equitable makes no difference *in this instance*. To the extent any of Respondents' counterclaims were equitable in nature, they did not have a right to a jury trial on those claims. *Id.* To the extent any of Respondents' counterclaims were legal—regardless of whether the claims were permissive or compulsory—Respondents waived their right to a jury trial, either through the waiver provisions or because

they raised their permissive claims in an equitable action. Respondents may only avoid this result if the contractual jury trial waivers executed in connection with the loan documents are invalid and unenforceable. Therefore, we turn next to that issue.

II. Knowing and Voluntary Waivers

Both the court of appeals and the circuit court found that the jury trial waivers were enforceable because Respondents executed them knowingly and voluntarily. We agree and find the waivers enforceable.

"A party may waive the right to a jury trial by contract." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). However, although the right to a trial by jury is a substantial right, and we "strictly construe" such waivers, *id.* at 64, 566 S.E.2d at 866, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. *Id.* at 663–64, 582 S.E.2d at 440 (citing several of this Court's cases). "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Id.* at 664, 582 S.E.2d at 440 (citing *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)).

By signing the note and guaranty, Respondents are charged with having read their contents; therefore, although they assert via affidavit that they were "not aware of any jury trial waiver clause until the motion to strike [their] request for jury trial was made by" Wachovia, they cannot avoid the effects of the waivers merely by arguing that they were unaware that such provisions were included in the note and guaranty.[8] *See Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440. We

[8] Further, the waivers here are conspicuous and unambiguous. Unlike the other provisions in the note and guaranties, the waivers are printed in all capital letters and have a bold heading called "**WAIVER OF JURY TRIAL**." They are located at the very end of the six-page document, directly above the signature line, thus

therefore find the waivers enforceable and applicable to any of Respondents' counterclaims that are legal and compulsory.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals is affirmed in part and reversed in part. We affirm the portion of the judgment finding that the waivers were executed knowingly and voluntarily; however, we reverse the portion finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.

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

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making the conspicuous font even more noticeable, even at a quick glance.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Estate of Margaret Dever Hover Gurnham, a/k/a Margaret D. Hover.

Beach First National Bank, Respondent,

v.

The Estate of Margaret Gurnham, a/k/a Margaret D. Hover and/or Brian Hover, Its Personal Representative, Appellants.

Appellate Case No. 2012-207047

Appeal From Beaufort County
The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

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Opinion No. 27360
Heard December 4, 2013 – Filed February 26, 2014

REVERSED

Jonathan Brent Kiker, of Kiker Law Firm and Richard Bryan Allen, both of Hilton Head Island, for Appellants.

William Weston Jones Newton, of Jones Simpson & Newton, PA, of Bluffton and James B. Richardson, Jr., of Columbia, for Respondent.

JUSTICE BEATTY: Brian Hover (Hover), who is the son of Margaret Dever Hover Gurnham and the Personal Representative of her Estate, appeals the circuit court's order confirming the probate court's grant of summary judgment in favor of Beach First National Bank (Bank) to enforce a deficiency judgment against the Estate. Hover asserts the Bank's claim, which arose following a

foreclosure action, was untimely and, thus, barred by section 62-3-803[1] of the South Carolina Probate Code (Probate Code). We hold the Bank's claim is barred as it was presented outside the time limits of the nonclaim statute. Accordingly, we reverse the grant of summary judgment in favor of the Bank.

I. Factual / Procedural History

On March 24, 2005, Margaret Gurnham executed a promissory note (the Note) in the amount of $750,000 and obtained an equity line of credit for $260,000 as an advance against the Note. Hover, as Trustee of the "Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 (Residence Trust)," secured payment of this debt by executing: (1) a first mortgage, which was assigned to Hudson City Savings Bank, for the Note with a maturity date of April 1, 2035; and (2) a second mortgage to the Bank for the credit line. Both mortgages covered real property located on Hilton Head Island that was owned by Gurnham and conveyed to Hover as Trustee of the Residence Trust.

On December 8, 2005, Gurnham died testate. On February 23, 2006, Gurnham's estate was opened in probate court with Hover being appointed as Personal Representative. Hover properly notified creditors by publication[2] in *The Beaufort Gazette* on March 2, 9, and 16, 2006. Hover continued to make payments on the Note and mortgages, but ceased to do so after March 29, 2008.

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[1] S.C. Code Ann. § 62-3-803 (2009) (providing the limitations on presentation of claims against a decedent's estate). We note that in 2013 the South Carolina General Assembly extensively amended the Probate Code. Act No. 100, 2013 S.C. Acts 1, 1-498. Because these amendments are effective on January 1, 2014, we have cited to the code provisions in effect at the time this case arose. We do, however, reference these amendments to glean legislative intent as "the 2013 amendments contain effective date provisions that generally apply the amendments retroactively, except when that would divest otherwise vested rights." S. Alan Medlin, *The South Carolina Probate Code Patched and Refurbished: Version 2013*, 65 S.C. L. Rev. 81, 130 (2013).

[2] S.C. Code Ann. § 62-3-801(a) (2009) ("Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred.").

On July 15, 2008, Hudson City Savings Bank commenced an action in the circuit court seeking foreclosure of the real property that was the subject of the first mortgage. On August 18, 2008, the Bank, as a named defendant in the foreclosure action, answered and filed a cross-claim against Hover as Personal Representative of the Estate for foreclosure of the second mortgage and, if necessary, a deficiency judgment. The next day, the Bank filed in probate court a Statement of Creditor's Claim for $247,168.23 ("as of July 29, 2008") against the Estate.

After Hover defaulted in the foreclosure proceedings, the circuit court entered judgment of foreclosure and sale of the real estate by order dated October 9, 2008. On December 11, 2008, following the sale of the real estate, the court entered a deficiency judgment against Hover as Personal Representative of the Estate in the amount of $259,620.63.

On December 30, 2008, while the Estate was still open, the Bank filed in probate court a Supplemental Statement of Creditor's Claim for the full amount of the deficiency judgment.

On July 29, 2009, Hover filed a Notice of Disallowance of the Bank's claim on the ground that it was not timely filed and was, therefore, barred under section 62-3-803[3] of the Probate Code. In response, the Bank filed a Petition for

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[3] Section 62-3-803 provides in relevant part:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:
>
> (1) one year after the decedent's death; or
>
> (2) within the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication; provided, claims barred by the nonclaim statute at

Allowance of the Creditor's Claim, alleging the claim was timely presented under section 62-3-803(b)(2) and that the deficiency judgment constituted an allowance of the claim under section 62-3-806(c).[4] Additionally, the Bank asserted causes of action based on waiver, res judicata, estoppel, fraud, constructive fraud, negligent misrepresentation, and breach of contract. In support of these causes of action, the Bank asserted that "Brian Hover and/or others carefully kept both the first mortgage and second mortgage accounts current until well after the passage of the usual six (6) months for filing of claims had passed." The Bank further noted that Hover, in the "official inventory filed March 7, 2007 [with the probate court], did

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> the decedent's domicile before the giving of notice to creditors barred in this State are also barred in this State.
>
> (b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> > (1) a claim based on a contract with the personal representative within eight months after performance by the personal representative is due;
> >
> > (2) any other claim, within the later of eight months after it arises, or the time specified in subsection (a)(1).
>
> (c) Nothing in this section affects or prevents:
>
> > (1) any proceeding to enforce any mortgage, pledge, lien, or other security interest upon property of the estate;
> >
> > . . . .

S.C. Code Ann. § 62-3-803 (2009).

[4] Subsection (c) of section 62-3-806 states, "A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim." S.C. Code Ann. § 62-3-806(c) (2009).

not disclose any debt to [the Bank], thus indicating an intent opposite to [Hover's] representations to [the Bank]."

Both parties moved for summary judgment. Following a hearing, the probate court granted summary judgment in favor of the Bank. In so ruling, the court initially noted there was no dispute as to the facts of the case or the validity of the deficiency judgment entered in circuit court. Consequently, the court found the entry of this judgment in circuit court constituted an allowance of the Bank's claim in probate court pursuant to section 62-3-806(c). Based on this ruling, the court declined to address the parties' remaining issues, particularly "whether the Claim was timely presented under other provisions of the Probate Code or is barred by the statute of limitations."

Following the denial of his motion to alter or amend, Hover appealed the probate court's order to the circuit court. The circuit court confirmed the probate court's order, but clarified that Hover was not individually liable as he "was not an individual Defendant" in the action. Hover then appealed to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Discussion

A. Arguments

Hover argues the circuit court erred in confirming the probate court's grant of summary judgment to the Bank as the creditor claim was untimely and "forever barred" by the Probate Code's "claims-barring process." Specifically, Hover asserts the claim arose prior to Gurnham's death and, therefore, section 62-3-803(a) mandated that the Bank present its claim no later than one year after Gurnham's death on December 8, 2005. Given the fact that the Bank first attempted to present its claim in probate court on August 19, 2008, Hover maintains the claim was not timely presented. Alternatively, Hover avers the Bank's untimely filing divested the circuit court of subject matter jurisdiction to issue the order for the deficiency judgment, thus rendering the judgment invalid.

Finally, Hover urges this Court to reverse the circuit court's order as a matter of policy because a decision in favor of the Bank would "moot the entire claims-barring process established by the South Carolina General Assembly." Hover explains that "[b]y creating a date certain by which all creditors' claims have to be

resolved, the claims-barring statute assures the determination of ownership within a reasonable time so that the decedent's property becomes marketable."

B. Standard of Review

The parties presented this case in the posture of a motion for summary judgment; thus, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Because the facts of this case are undisputed, the resolution of this appeal is limited to the legal determination of whether the Bank's claim against the Estate was enforceable under the applicable provisions of the Probate Code. Accordingly, the analysis of this case is controlled by rules of statutory construction.

" 'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.' " *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting *CFRE, L.L.C. v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

C. Two Avenues for Secured Creditors

1. Statutory Progression

Pursuant to the general statutory scheme of the Probate Code, all claims against a decedent's estate and his successors must be presented after a personal representative is appointed and within the time limits prescribed by section 62-3-803, which our appellate courts have designated as a "nonclaim statute." *See* S.C. Code Ann. § 62-3-104 (2009) ("No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [§§ 62-3-101 et seq.]."); *In re Estate of Tollison*, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995) ("Section 62-3-803 is a nonclaim statute.").

The Probate Code generally defines "claims" to include "liabilities of the decedent . . . whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent . . . , including funeral expenses and expenses of administration." S.C. Code Ann. § 62-1-201(4) (2009). As stated in the nonclaim statute, claims against a decedent's estate include all claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis." *Id.* § 62-3-803(a), (b).

Thus, "[b]roadly speaking, all claims against the decedent should be presented for allowance, and the word 'claims' includes such debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the recovery of money." 34 C.J.S. *Executors & Administrators* § 548 (Supp. 2013) (footnotes omitted). "Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate." *Id.* "However, claims against an estate are not limited to obligations of the decedent that could have been enforced against him or her while living." *Id.*

Despite this seemingly all-inclusive language, the General Assembly has provided exemptions for certain claims filed by secured creditors. Section 62-3-803, the nonclaim statute, provides that "[n]othing in this section affects or prevents any proceeding to enforce any mortgage, pledge, lien, or other security interest upon property of the estate." *Id.* § 62-3-803(c)(1); *see id.* § 62-3-812 ("No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, *but this*

section shall not be construed to prevent the enforcement of mortgages, pledges, liens, or other security interests upon real or personal property in an appropriate proceedings." (emphasis added)).

These exemptions, however, are not without limitation as a secured creditor may only present a claim outside of the time limits of the nonclaim statute if the creditor's recovery is confined to the security. Specifically, section 62-3-104 provides that the statutes governing probate code proceedings have no application "to a proceeding by a secured creditor of the decedent to enforce his right to his security *except as to any deficiency judgment which might be sought therein*." *Id.* § 62-3-104 (emphasis added); Reporter's Comments to § 62-3-104 ("[T]he secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions in this section and Part 8 of this article.").[5] *See generally* G. Van Ingen, Annotation, *Nonclaim Statute as Applied to Real Estate Mortgage or Mortgage Debt*, 78 A.L.R. 1126 (1932 & Supp. 2013) (citing state and federal court decisions regarding the general rule that the failure to present a mortgage claim to the personal representative of the estate of the deceased mortgagor, as required by a general nonclaim statute, does not bar the mortgagee's right to foreclose or enforce his mortgage against the mortgaged property, but *only* bars a recovery of any deficiency judgment, or participation in the general assets of the estate).

Thus, the General Assembly has created two avenues by which a secured creditor may seek recovery following the opening of an estate and the appointment of a personal representative. Under the first avenue, the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate and, thus, may do so outside the time limits of the nonclaim statute. Alternatively, the secured creditor may seek to recover directly from the assets of the estate, which then requires the claim to be presented in the probate court within the time limits of the nonclaim statute. However, if the creditor chooses the first avenue and the foreclosure proceedings fail to yield the

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[5] Section 62-3-804(7)(b) of the 2013 amendments "clarifies that, as earlier stated in Section 62-3-104, an *in rem* proceeding by a secured creditor is not suspended until a personal representative is appointed, unless that proceeding includes an action for a deficiency judgment against a decedent or his estate." Reporter's Comments to S.C. Code Ann. § 62-3-804(7)(b) (2013 amendments) (outlining the manner of presentation of claims against a decedent's estate).

full amount of the security, the creditor must have presented a claim on the security in probate court within the time limits prescribed by the nonclaim statute.[6]

2. Effect of the Nonclaim Statute

If the secured creditor fails to timely present a claim in compliance with the nonclaim statute, the creditor's right of action against the estate is barred. *See In re Estate of Tollison*, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995) ("Section 62-3-803 is a nonclaim statute. Thus, unless the statute is complied with, the creditor's claim is barred." (citation omitted)); *see also Phillips v. Quick*, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct. App. 2012) (contrasting the nonclaim statute with a statute of limitations and recognizing that " '[u]nless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created' " (quoting *Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1138-39 (Ind. 1997))).

In contrast to the Bank's characterization, the nonclaim statute is not a general statute of limitations as the two statutes are fundamentally and operationally distinct.[7] "Although a nonclaim statute is in the nature of, and is similar to, a statute of limitations, in that it prevents the enforcement of stale demands, it is not wholly such." 34 C.J.S. *Executors & Administrators* § 556 (Supp. 2013). "An untimely claim filed pursuant to a jurisdictional statute of

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[6] Notably, the method of payment by the personal representative to a secured creditor is dependent upon whether the creditor "surrenders his security" or "exhausts his security before receiving payment." S.C. Code Ann. § 62-3-809 (2009) (outlining method of payment for secured claims); *see id*. § 62-3-805 (establishing priority of claims for payment when assets of the estate are insufficient to pay all claims in full).

[7] The Bank maintains that the phrase "other statute of limitations" in section 62-3-803 means the nonclaim statute is "itself [] a statute of limitations." *See* S.C. Code Ann. § 62-3-803(a) (2009) ("All claims against a decedent's estate which arose before the death of the decedent, . . . , *if not barred earlier by other statute of limitations*, are barred against the estate." (emphasis added)). We note, however, that the General Assembly has now clarified section 62-3-803(a) to state, "if not barred earlier by another statute of limitations or nonclaim statute." Although this amendment is effective January 1, 2014, after the matter at issue here, we believe it provides guidance in this case as it constitutes evidence of legislative intent and is consistent with this Court's classification of section 62-3-803 as a nonclaim statute.

nonclaim is automatically barred, so that the filing of a claim within the period specified is mandatory." *Id.* (footnotes omitted). "However, a claim filed beyond the time set forth in a statute of limitations ordinarily is barred only if the statute of limitations is raised as an affirmative defense or by way of a motion to dismiss, if the defense appears on the face of the prior pleading." *Id.*

These operational differences are based on fundamental distinctions between the two types of statutes, which are explained as follows:

> A nonclaim statute is a self-contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period. *While nonclaim statutes limit the time in which a claim may be filed or an action brought, they are separate and distinct from statutes of limitation, and are broader in their operation*. Such statutes also are sometimes called special statutes of limitation.
>
> A statute is a nonclaim statute if there is a clearly evidenced legislative intent in the statute to not merely withhold the remedy, but to take away the right of recovery when a claimant fails to present his or her claim as provided in the statute. The language creating a nonclaim statute must indicate clearly that a failure to comply with its terms bars the claim, that filing is a condition to the existence of the claim, or that failure to file deprives the court of jurisdiction.
>
> The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.

51 Am. Jur. 2d *Limitation of Actions* § 3 (2011) (footnotes omitted) (emphasis added).[8]

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[8] Relying on a footnote in *Moultis v. Degen*, 279 S.C. 1, 6 n.3, 301 S.E.2d 554, 557 n.3 (1983), which states "[w]hile we recognize that the claims barring statute is an affirmative defense to be pled by way of answer," the Bank contends that Hover's failure to plead the claims-barring statute as an affirmative defense in the foreclosure proceedings waived its operation. For several reasons, we reject the Bank's contention. First, as discussed, the nonclaim statute is not a statute of limitations that must be pled but, rather, is one that affects a claimant's right of action against the Estate. Thus, we find the footnote upon which the Bank relies is

Furthermore, although the nonclaim "bar" is often cursorily categorized as "jurisdictional," it does not implicate subject matter jurisdiction as asserted by Hover. *See In re Estate of Ongaro*, 998 P.2d 1097, 1103 (Colo. 2000) (en banc) (discussing cases that state a nonclaim statute "operates to deprive a court of jurisdiction" and finding these cases mischaracterized the precise effects of the nonclaim statute because "the nonclaim statute does not deprive courts of jurisdiction over untimely claims").

As this Court recently explained, "The word 'jurisdiction' does not in every context connote subject matter jurisdiction, but rather, is 'a word of many, too many, meanings.' " *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 467 (2007)). Rather, "[j]urisdiction is generally defined as 'the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.' " *Id.* at 104, 744 S.E.2d at 572 (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007) (footnotes omitted)). "Specifically, '[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested.' " *Id.* (quoting *Indep. Sch. Dist. No. 1 of Okla. County v. Scott*, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000)).

Thus, a failure to comply with the nonclaim statute would not divest either the probate court or the circuit court of subject matter jurisdiction with respect to issues arising out of the probate of an estate. *See* S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law."); S.C. Code Ann. § 62-1-302(a)(1) (2009 & Supp. 2012) (recognizing probate court's exclusive original jurisdiction over all subject matter related to the estates of decedents). Instead, noncompliance eliminates a claimant's right of action against a decedent's estate and, in turn, deprives the court of the power to adjudicate the claim. *See* 54 C.J.S. *Limitations of Actions* § 33 (Supp. 2013) ("Nonclaim statutes operate to bar untimely claims without any action by the opposing party and deprive a court of the *power* to adjudicate those claims." (emphasis added)).

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an incorrect statement of the law. Second, the statement constitutes dicta as it was in reference to an unpreserved appellate issue that did not serve as a basis for the Court's decision.

D. Application

1. Bank's Actions

Applying the foregoing principles to the facts of the instant case, we hold the Bank's failure to present a timely claim barred its right to recover the deficiency judgment from the Estate.

We find and the Bank concedes that the second mortgage constituted a "claim" within the meaning of the Probate Code and, therefore, subject to the nonclaim statute. The mortgage, which was executed during Gurnham's lifetime, constituted a contractual liability that arose prior to her death but was to become due in the future. Thus, although the mortgage was "unmatured" at the time the Estate was opened, liability was certain. *See* 34 C.J.S. *Executors & Administrators* § 522 (Supp. 2013) ("Fixed claims that will become due and payable in the future, although presently unmatured, may be proper claims against the estate of the decedent."); *id.* at § 552 ("A contingent claim within the meaning of the statutes relating to presentation of claims against a decedent's estate is one under which the existence of any right or liability is not presently certain or absolute, but is dependent on some future event that may or may not happen; if the right or liability exists independent of the event, the claim is absolute, notwithstanding that it may be uncertain in amount or unenforceable until the happening of the event."); *see also In re Estate of Thomas*, 743 S.W.2d 74, 77 (Mo. 1988) (en banc) ("In probate the term 'liability' typically, if not exclusively, refers to a debt or a pecuniary obligation.").

Because the Bank pursued foreclosure proceedings, its right of recovery was limited to the sale of the real estate unless it timely filed a claim in probate court to recover any potential deficiency. The Bank did not do so as it filed a Statement of Creditor's Claim on August 19, 2008, which was clearly more than one year after Gurnham's death and more than eight months after Hover served creditors notice by publication on March 2, 2006. Although the deficiency judgment was entered after the claims-filing time limits and arguably "arose after the decedent's death,"[9]

[9] For claims arising after the decedent's death, the nonclaim statute allows the claim to be filed within eight months after it arises. S.C. Code Ann. § 62-3-803(b)(2) (2009). These types of claims normally include funeral expenses and costs incurred by the personal representative in administering the estate. *See* 34 C.J.S. *Executors & Administrators* § 553 (Supp. 2013) ("The statutes of nonclaim usually apply only to claims that existed against the decedent in his or her lifetime,

this fact did not "toll" the time limits of the nonclaim statute as the claim that formed the basis of the deficiency judgment arose long before the deficiency judgment was entered.

Our conclusion is consistent with the decisions of other jurisdictions addressing similar facts. *See, e.g.*, *Harter v. Lenmark*, 443 N.W.2d 537, 540 (Minn. 1989) (recognizing that a mortgagee may proceed against property of the estate encumbered by a mortgage without the necessity of filing a claim, but finding "there is no statutory provision authorizing the entry of a deficiency judgment on a debt in the absence of the requisite claim"; finding noteholder's failure to file a claim in probate court was "dispositive"); *Gandy v. Citicorp*, 985 So. 2d 371 (Miss. Ct. App. 2008) (finding that bank, which chose not to probate its claims but proceeded with foreclosure against security, was precluded from a claim for any deficiency from the assets of the estate); *Provident Inst. for Sav. in Jersey City v. W. Bergen Trust Co.*, 20 A.2d 437, 439 (N.J. Ct. of Errors & Appeals 1941) (barring bank's suit for deficiency judgment against the estate where bank proceeded with foreclosure action but did not file "claims upon the bonds and mortgages" within the "time fixed by law"); *Alexander v. Galloway*, 80 S.E.2d 369, 372 (N.C. 1954) ("Where a secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate and thus to enforce his claim against property not covered by his lien or held by him as security, presentation of his claim is necessary to preserve the right to payment out of the general assets of the estate."); *Meissner v. Murphy*, 647 P.2d 972, 974 (Or. Ct. App. 1982) (stating, "the failure to present to an executor or administrator for allowance a claim secured by mortgage, only operates to prevent a judgment for a deficiency that might remain after exhausting the mortgaged property, but does not affect the right to a foreclosure where no recovery is sought beyond the proceeds of the mortgaged lands" (citation omitted)).

2. Deficiency Judgment did not "Override" Nonclaim Statute

Despite the Bank's admission that it failed to file a timely claim against the Estate in probate court, the Bank maintains the filing of the foreclosure action in circuit court and the entry of the deficiency judgment cured this mistake. However, contrary to the analysis of the lower courts, the entry of the deficiency

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and do not require presentation of claims that come into existence after his or her death, such as claims for funeral expenses, or administration expenses, or claims based on contracts entered into by the executor or administrator." (footnotes omitted)).

judgment could not "override" or eliminate the mandatory provisions of the nonclaim statute.

Although section 62-3-806(c) provides that "[a] judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim," this provision does not eliminate the requirement that the claim must be timely filed in probate court. *See Ocean Nat'l Bank v. Spang*, 675 A.2d 983, 984 (Me. 1996) (recognizing that judgment constitutes an allowance of a probate claim, but stating that "[w]e would eliminate the time limits of the Probate Code if we were to conclude that a judgment obtained without presentment of a timely claim or commencement of a timely action is likewise allowed"). Thus, the entry of the deficiency judgment merely constituted a valid debt against the Estate that must have also been presented within the time limits of the nonclaim statute.[10]

3. Equitable Considerations

Furthermore, even though a decision in favor of the Estate may appear inequitable, equitable considerations are not a factor in the claims-barring analysis. Thus, neither Hover's continued payment on the Note after his mother's death or the act of default in the foreclosure proceedings can "override" or eliminate the nonclaim statute as this statute has been strictly applied in similar circumstances. *See Phillips v. Quick*, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct. App. 2012) (" 'While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.' " (quoting *Estate v. Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997))); 34 C.J.S. *Executors & Administrators* § 547 (Supp. 2013) ("Misleading statements, assurances, or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim."). *See generally* E.W.H., Annotation, *Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim*, 66 A.L.R. 1415 (1930 & Supp. 2013) (citing state and federal cases addressing the general rule that no promise on the part of a personal

[10] Notably, the General Assembly has clarified section 62-3-806 to define an "allowance of a claim" as merely constituting a valid debt of the decedent's estate. *See* S.C. Code Ann. § 62-3-806(e) (2013 amendments).

representative is sufficient to prevent the bar of the statute as to a claim not filed within the statutory period).

III. Conclusion

Although we recognize that the Bank's deficiency judgment will not be satisfied, we decline to let this dictate a result that is contrary to the terms of the Probate Code and the intent of the legislature. Instead, we reverse the grant of summary judgment in favor the Bank as it is mandated by our rules of statutory construction and effectuates the purpose of the nonclaim statute, which is to expedite and resolve claims against a decedent's estate with finality. *See In re Estate of Ongaro*, 998 P.2d 1097, 1102 (Colo. 2000) (en banc) (analyzing nonclaim statute and stating, "Allowing creditors to toll claims against estates would frustrate the speedy and efficient settlement of estates and distribution of assets"); *Ragan v. Hill*, 447 S.E.2d 371, 374 (N.C. 1994) ("The time limitations prescribed by [the nonclaim statute] allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate. The statute also promotes the early and final resolution of claims by barring those not presented within the identified period of time.").

Moreover, had the Bank timely presented a claim, it could have assumed its position as a general creditor to seek recovery against the remaining assets of the Estate. *See* 34 C.J.S. *Executors & Administrators* § 555 (Supp. 2013) ("In any case, where a mortgagee, pledge, or other secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate, and, thus, to enforce his or her claim against property not covered by his or her lien or held by him or her as security, the claim stands on the same footing with the claims of other creditors and must be presented for allowance."); *In re Lundy Estate*, 804 N.W.2d 773, 778 (Mich. Ct. App. 2011) (noting that a "bank is in the same position as other creditors with respect to any claim against the estate for the amount of any deficiency existing after exhausting the security").

Based on the foregoing, we reverse the order of the circuit court.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tynaysha Horton, Appellant,

v.

City of Columbia, Respondent.

Appellate Case No. 2012-211168

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5200
Heard October 16, 2013 – Filed February 26, 2014

AFFIRMED

James Emerson Smith, Jr. and Dylan Ward Goff, both of James E. Smith Jr., PA, of Columbia, for Appellant.

Jeanne J. Brooker and David Amado Fernandez, both of Columbia, for Respondent.

KONDUROS, J.: Tynaysha Horton appeals the circuit court's grant of summary judgment in favor of the City of Columbia regarding her claims for false arrest, false imprisonment, malicious prosecution, negligence, and assault and battery. We affirm.

FACTS/PROCEDURAL HISTORY

On September 9, 2009, a cinder block was thrown through a glass door to break into the Roly Poly restaurant in Columbia. Officer Peter Currie of the City of Columbia Police Department lifted a partial latent fingerprint from the door where the glass had been pushed up to gain entry. Officer Currie ran the print through the Automatic Fingerprint Identification System (AFIS) of the South Carolina Law Enforcement Division (SLED). AFIS returned twenty possible matches, with the fingerprint of Horton identified as the most probable match. Officer Currie then conducted a review of Horton's AFIS print and determined it matched the partial print taken from the crime scene.[1] Officer Currie informed Officer Roberta Tyler, the detective assigned to investigate the robbery, that he had matched the fingerprint of the robber and identified Horton as the person who broke into the restaurant.

On September 15, 2009, Officer Tyler called Horton's probation officer, Albert Smith, in Bennettsville, South Carolina, and informed Agent Smith her department was seeking a warrant for Horton's arrest based on fingerprints lifted from a crime scene in Columbia. Agent Smith informed Officer Tyler of his personal reservations regarding the possibility that Horton committed the crime based upon her lack of transportation and the recent birth of her third child. On September 17, 2009, Officer Tyler appeared before a ministerial recorder of the City of Columbia and disclosed relevant facts about the crime. Officer Tyler did not disclose any information relayed to her by Agent Smith. The ministerial recorder issued warrants for Horton's arrest for second-degree burglary and petit larceny. Agent Smith assisted in having Horton surrender herself to Marlboro County law enforcement officers later that day. Officer Tyler transported Horton to Columbia and took her to the detention center on September 18, 2009. Horton was not fingerprinted at the time of her arrest. After three days in detention and several requests to be fingerprinted, Horton was fingerprinted by Officer Currie on September 21, 2009. After examining the prints and sending them to SLED for further review, the authorities could not confirm a match for the prints taken from the crime scene. Horton was immediately released from custody and police officials drove her to Bishopville to meet her mother and return home.

[1] This review included analysis of the fingerprint by two other officers.

Horton filed suit alleging causes of action for false arrest, false imprisonment, malicious prosecution, negligence, and assault and battery. The City moved for summary judgment as to all claims and the circuit court granted the City's motion. This appeal followed.

LAW/ANALYSIS

I. The Two-Issue Rule

The City argues this court should affirm the circuit court's grant of summary judgment based on the two-issue rule. We agree in part.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

In *Jones*, Jones's estate sued the Richland County sheriff and other officers for wrongful death after Jones was shot attempting to escape police custody. 387 S.C. at 344, 692 S.E.2d at 902. At trial, Jones asserted the sheriff was grossly negligent.[2] *Id.* The trial court granted a directed verdict in the defendant's favor finding he was not grossly negligent under the circumstances, and because he had immunity under subsection 15-78-60(6) of the South Carolina Code (2005) (the Tort Claims Act). *Id.* On appeal, Jones stated his issue as follows: "Did the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?" *Id.* at 347-48, 692 S.E.2d at 904. In determining whether the two-issue rule procedurally barred Jones's appeal, the supreme court stated:

> There was no mention of [sub]section 15-78-60(6) or Tort Claims Act immunity [in Jones's issues on appeal]. . . . The issue raised by [Jones] was not concise and direct,

[2] The circuit court granted summary judgment in favor of the other defendants but allowed the case to proceed as to Jones's claim of gross negligence against the sheriff in his official capacity.

> but rather a broad general statement that ought to be disregarded by this court. Hence, because [Jones] failed to preserve the issue for review, it became the law of the case under the two issue rule.

Id. at 348, 692 S.E.2d at 904.

In this case, the circuit court spent the bulk of its time considering the probable cause issue in deciding to grant summary judgment. However, in section E of the final order, the circuit court addressed the City's Tort Claims Immunity argument as an additional sustaining ground. Subsection 15-78-60(5) of the South Carolina Code (2005) precludes liability by a governmental entity for a loss resulting from the exercise of discretion or judgment by a governmental employee, or the performance or failure to perform any act or service that is in the discretion or judgment of the employee. The final order and the City's argument clearly focused on this section as it applied to Officer Currie's erroneous identification of Horton's fingerprints, suggesting the only cause of action at issue is Horton's negligence claim. However, the order states, "The City is also entitled to summary judgment on the claims for false arrest, false imprisonment, malicious prosecution and negligence based upon this provision of the South Carolina Tort Claims Act." While this ruling by the circuit court may be erroneous as to the false arrest, false imprisonment, and malicious prosecution claims, Horton makes no mention of subsection 15-78-60(5) or the Tort Claims Act in her appellate brief. We cannot conclude that an attack on the Tort Claims Act ruling is inherent in Horton's argument as to lack of probable cause.[3] Therefore, the circuit court's grant of summary judgment to the City with respect to negligence, false arrest/imprisonment, and malicious prosecution is affirmed based on the two-issue rule.

[3] Horton's issue on appeal is broad and does not provide any direction as to why the application of the Tort Claims Act was erroneous. It states: "Did the order issued by the circuit court granting the City's motion for summary judgment constitute a clearly arbitrary and capricious abuse of discretion as there were genuine issues of material fact in dispute?"

II. Claims on the Merits

Horton's only remaining cause of action is for assault and battery. She maintains the circuit court erred in finding that because her arrest was based on a facially valid warrant and she did not allege the use of excessive force, the claim failed as a matter of law. We disagree in some respects with the circuit court's rationale but affirm its granting of summary judgment to the City.

In *Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671-72 (D.S.C. 1995), the court concluded as a matter of law that no assault and battery occurred when an officer lawfully arrested Roberts based on probable cause and the use of excessive force was not alleged. The court found Roberts's arrest "was lawful because it was supported by probable cause. Therefore, [the officer's] action in arresting [him] did not constitute assault or battery. . . . " *Id.* at 672. The court further provided Roberts "does not allege [the arresting officer] used excessive force. . . . [His] actions are insufficient, as a matter of law, to support a claim of assault or battery, given this court's conclusion that [Roberts's] arrest was based on probable cause." *Id.* at 672 n.2. In addressing assault and battery claims against police authority the Supreme Court of South Carolina has stated:

> An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes a wrongdoer . . . .

State v. McGowan, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (emphasis omitted) (quoting *State v. Francis*, 152 S.C. 17, 34-35, 149 S.E. 348, 355-56 (1929)).

South Carolina appears to be in the minority of jurisdictions where an unlawful arrest, even in the absence of excessive force, can support a claim for assault and

battery.[4] In *Roberts*, the district court, applying South Carolina state law to the claim of assault and battery, rested its conclusion to dismiss the claim upon the fact that Roberts's arrest was lawful—based on probable cause. *Roberts*, 902 F. Supp. at 672 n.2. In *McGowan*, the court was concerned with whether McGowan had used excessive force in resisting arrest. *McGowan*, 347 S.C. at 624-26, 557 S.E.2d at 661-62. Although Horton did not resist arrest, the basic principle of law that an unlawful arrest may constitute a battery is still applicable. Furthermore, in *Francis*, upon which *McGowan* relies in part, the court recited a jury instruction that was not objected to on appeal. *Francis*, 152 S.C. at 32, 149 S.E. at 354. That charge supports the notion that police officers are not immune from assault and battery claims if they effect an unlawful arrest. The charge stated: "If an arrest is unlawful, the defendant had the right not only to resist it, but it made the person or officer attempting such arrest liable for assault and battery and false arrest." *Id.* Based on the foregoing cases, we conclude a police officer may be liable for assault and battery for making an unlawful arrest even in the absence of excessive force allegations.

The next question presented is whether Horton's arrest was lawful.

> The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise.

Law v. S.C. Dep't of Corr., 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2008) (citation omitted).

The question of whether probable cause exists is ordinarily a jury question unless the evidence yields but one conclusion as a matter of law. *Id.* The party alleging a

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[4] "While, in some jurisdictions, a police officer who makes an unlawful arrest is liable for battery for touching the arrestee, it is usually held a battery does not occur in making an unlawful arrest absent the use of excessive force." 6 Am. Jur. 2d *Assault and Battery* § 98 (2008) (footnote omitted).

lack of probable cause bears the burden of proof on that point. *Jackson v. City of Abbeville*, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005).

Horton contends the circuit court erred in finding Officer Tyler's affidavit provided probable cause for her arrest, because Officer Tyler omitted any information from Agent Smith regarding Horton's transportation and family issues. We disagree.

"*Franks* [*v. Delaware*, 438 U.S. 154 (1978)] addressed an act of *commission* in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). "To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." *Id.* (footnote omitted). Entitlement to a *Franks* hearing is a matter of law subject to *de novo* review. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

> While omissions may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit. The potential for endless rounds of *Franks* hearings to contest facially sufficient warrants is readily apparent.

United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990) (citations omitted).

Inferring bad motives from an officer's omission of information "collapses into a single inquiry the two elements–'intentionality' and 'materiality'–which *Franks* states are independently necessary." *Id.* A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. *Tate*, 524 F.3d at 454. "'[M]ere[ ] negligen[ce] in . . . recording

the facts relevant to a probable-cause determination' is not enough." *Colkley*, 899 F.2d at 301 (quoting *Franks*, 438 U.S. at 170).

In this case, as the circuit court noted, Horton offered no evidence Officer Tyler omitted Smith's statements with the intent to mislead the ministerial recorder. *Colkley* makes clear the Fourth Circuit's disdain for the notion that bad motive can be inferred from the materiality of the omitted information. However, it is less clear how the Fourth Circuit would evaluate the omission under the reckless disregard prong of *Franks*.[5] If reckless disregard can only be established by affirmative proof, without reference to the nature of the omitted material, it is difficult to imagine how any party would ever be entitled to a *Franks* hearing on omitted information. Nevertheless, the Fourth Circuit has clearly set a very high standard for establishing entitlement to a *Franks* hearing. Therefore, we agree with the circuit court that Horton did not establish her entitlement to a *Franks* hearing. Officer Tyler's affidavit and the arrest warrants are therefore reviewed without the inclusion of Smith's statements and provide probable cause for Horton's arrest. Consequently, her arrest was lawful, and it follows that her claim for assault and battery fails as a matter of law and summary judgment was appropriate.

CONCLUSION

We affirm summary judgment in favor of the City as to Horton's claims for false arrest/imprisonment, malicious prosecution, and negligence based on the two-issue rule. We affirm the grant of summary judgment in favor of the City on assault and battery based on Horton's failure to meet the high burden of proving the intentional or reckless omission of Agent Smith's statements from Officer Tyler's affidavit.

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

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[5] Notably, *Colkley* was a direct response to the district court's finding that because the officer chose to omit certain information, as opposed to omitting it accidentally, the intentionality requirement for a *Franks* hearing was satisfied. *Colkley*, 899 F.2d at 300.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip D. Grimsley, Sr. and Roger M. Jowers, on behalf of themselves and others similarly situated, Appellants,

v.

South Carolina Law Enforcement Division and the State of South Carolina, Defendants,

Of whom South Carolina Law Enforcement Division is the Respondent.

Appellate Case No. 2012-212815

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5201
Heard January 8, 2014 – Filed February 26, 2014

REVERSED AND REMANDED

A. Camden Lewis and Ariail E. King, both of Lewis, Babcock & Griffin, L.L.P., of Columbia, and Richard A. Harpootlian, of Richard A. Harpootlian, P.A., of Columbia, for Appellants.

William H. Davidson, II and Kenneth P. Woodington, both of Davidson & Lindemann, P.A., of Columbia, for Respondent.

FEW, C.J.: This is an appeal from the circuit court's order granting summary judgment to the South Carolina Law Enforcement Division (SLED). We reverse and remand for trial.

The supreme court set forth the facts of this case and described the appellants' theory of recovery in *Grimsley v. South Carolina Law Enforcement Division*, 396 S.C. 276, 721 S.E.2d 423 (2012) (reversing the circuit court's dismissal of the appellants' claims and remanding). On remand, the parties engaged in discovery and both sides moved for summary judgment. After the appellants dismissed the State, the circuit court granted summary judgment to SLED.

SLED required employees who wished to participate in its "retirement/rehire program" to sign a series of forms. SLED contends (1) the forms unambiguously set each employee's salary upon rehire at 13.6%[1] below the salary paid to the employee before retirement, and (2) it paid the required employer contribution to retirement based on the reduced salary figure. *See* S.C. Code Ann. § 9-11-90(4)(b) (Supp. 2013) (requiring "[a]n employer [to] pay . . . the employer contribution for active members prescribed by law with respect to any retired member"). The appellants concede SLED paid the employer contribution based on the reduced figure, but contend the reduced figure is not what they agreed their salary would be. Specifically, the appellants argue this sentence in one of the forms—"You will have a reduction of 13.6% in your salary to cover the amount it will cost SLED to pay the employer portion of retirement"—is evidence the parties agreed to the same salary the appellants received before retirement.

We agree the evidence concerning the amount of the appellants' salaries is conflicting, and thus the circuit court should have denied summary judgment. The form quoted above identifies the reduced figure as "a reduction . . . in *your* salary." (emphasis added). If the reduced figure was calculated as a percentage reduction from "your salary," then the salary of each rehired employee was the figure before reduction, not the reduced figure. SLED contends the quoted sentence refers to the pre-retirement salary figure simply for purposes of calculating the reduced post-retirement salary. We understand SLED's argument, but do not agree the evidence supports the argument as a matter of law. Rather, we hold that a reasonable jury could find SLED agreed to pay each rehired employee the same salary it paid before retirement, and the percentage reduction represents an illegal requirement

[1] This percentage varies depending on the date each employee was rehired.

that the employee pay the retirement contribution the employer is required to pay under subsection 9-11-90(4)(b).

Therefore, the circuit court erred in granting summary judgment. *See Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (stating to overcome summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine"); *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (stating "the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party").

Our finding that the evidence is conflicting as to the amount of salary SLED agreed to pay the rehired employees requires the reversal of summary judgment on all grounds stated in the circuit court's order. On remand, the circuit court shall make the determination required by Rule 23(d)(1), SCRCP, and set the case for trial.

REVERSED and **REMANDED**.

PIEPER, J., and CURETON, A.J., concur.