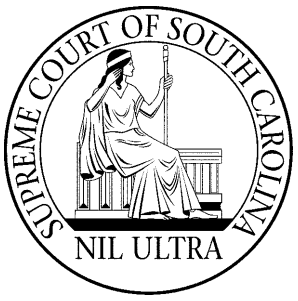

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
May 19, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

28029 – The State v. Terrance Edward Stewart 9

28030 – Leisel Paradis v. Charleston County School District 18

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

28012 – Nationwide v. Sharmin Walls Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5821-The Estate of Jane Doe 202 v. City of North Charleston 38

5822-Vickie Rummage v. BGF Industries 49

UNPUBLISHED OPINIONS

2021-UP-168-SCDSS v. Ivan Carter
(Filed May 12, 2021)

2021-UP-169-SCDSS v. Heather L. Dean
(Filed May 14, 2021)

2021-UP-170-SCDSS v. Joseph Kasey
(Filed May 14, 2021)

2021-UP-171-Anderson Brothers Bank v. Dazahea Monique Parson (3)

2021-UP-172-State v. Abin L. Lowman

2021-UP-173-State v. Leonard E. Scruggs, III

2021-UP-174-John K. Massey, Jr. v. SCDC

2021-UP-175-State v. Frederick C. Jones

2021-UP-176-State Ethics Commission v. Charles Houston

2021-UP-177-State v. Aaron B. Beach

2021-UP-178-State v. William Z. Newton

2021-UP-179-State v. Miranda K. Taylor

2021-UP-180-State v. Roy Gene Sutherland

2021-UP-181-State v. Keunte D. Cobbs

2021-UP-182-State v. Williams Lee Carpenter

2021-UP-183-State v. Michael Sullivan

2021-UP-184-State v. Jody L. Ward (2)

2021-UP-185-State v. Steven D. Hoover

PETITIONS FOR REHEARING

5802-Meritage Asset Management, Inc. v. Freeland Construction	Pending
5806-State v. Ontavious D. Plumer	Pending
5807-Road, LLC and Pinckney Point, LLC v. Beaufort County	Denied 05/14/21
5810-In the matter of Richland Ridley	Pending
5814-State v. Guadalupe G. Morales	Denied 05/13/21
5816-State v. John Ernest Perry, Jr.	Pending
5817-State v. David Matthew Carter	Pending
2021-UP-013-Federal National Mortgage Assn. v. Richard C. Ivey	Pending
2021-UP-045-Kenneth Davis v. Cole Dunn	Pending
2021-UP-060-John Doe v. The Bishop of Charleston (2)	Denied 05/13/21
2021-UP-074-State v. David Harold Campbell	Pending
2021-UP-086-State v. M'Andre Cochran	Pending
2021-UP-088-Dr. Marvin Anderson v. Mary Thomas	Pending
2021-UP-099-Boyd Rasheen Evans v. State	Pending

2021-UP-105-Orvelatta Alston v. Conway Manor, LLC	Pending	
2021-UP-112-John Cross and Steven Cross v. Gregory Weaver	Pending	
2021-UP-113-Raymond A. Wedlake v. Benjamin Acord	Pending	
2021-UP-122-Timothy Kearns v. Falon Odom	Denied	05/14/21
2021-UP-124-The Homestead Property Owners Association, Inc. v. Wanda Miller	Denied	05/13/21
2021-UP-125-Rico Dorsey v. Allwaste Services, Inc.	Pending	
2021-UP-129-State v. Warren Tremaine Duvant	Pending	

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5641-Robert Palmer v. State et al.	Pending
5691-Eugene Walpole v. Charleston Cty.	Pending
5714-Martha M. Fountain v. Fred's Inc.	Pending
5725-In the matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. SCDNR	Pending
5730-Patricia Damico v. Lennar Carolinas	Pending
5731-Jericho State v. Chicago Title Insurance	Pending
5735-Cathy J. Swicegood v. Polly A. Thompson	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5749-State v. Steven L. Barnes	Pending

5751-State v. Michael Frasier, Jr.	Pending
5755-Stephen A. Connelly v. The Main Street America Group	Pending
5758-State v. Deshanndon M. Franks	Pending
5759-Andrew Young v. Mark Keel	Pending
5760-State v. Jaron L. Gibbs	Pending
5764-State Farm v. Myra Windham	Pending
5767-State v. Justin Ryan Hillerby	Pending
5768-State v. Antwuan L. Nelson	Pending
5769-Fairfield Waverly v. Dorchester County Assessor	Pending
5773-State v. Mack Seal Washington	Pending
5783-SC Dep't of Commerce, Division of Public Railways v. Clemson	Pending
5784-Arrowpointe Federal Credit Union v. Jimmy Eugene Bailey	Pending
5790-James Provins v. Spirit Construction Services, Inc.	Pending
5792-Robert Berry v. Scott Spang	Pending
5797-In the interest of Christopher H.	Pending
5798-Christopher Lampley v. Major Hulon	Pending
5800-State v. Tappia Deangelo Green	Pending
5805-State v. Charles Tillman	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2020-UP-013-Sharon Brown v. Cherokee Cty. School District	Pending

2020-UP-144-Hubert Brown v. State	Pending
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-178-State v. Christian A. Himes	Pending
2020-UP-196-State v. Arthur J. Bowers	Pending
2020-UP-197-Cheryl DiMarco v. Brian DiMarco (3)	Pending
2020-UP-198-State v. Sidney Moorer	Pending
2020-UP-219-State v. Johnathan Green	Pending
2020-UP-235-Misty A. Morris v. BB&T Corp. (David Proffitt)	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Pending
2020-UP-237-State v. Tiffany Ann Sanders	Pending
2020-UP-238-Barry Clarke v. Fine Housing, Inc.	Pending
2020-UP-241-State v. Mimi Joe Marshall	Pending
2020-UP-244-State v. Javon Dion Gibbs	Pending
2020-UP-245-State v. Charles Brandon Rampey	Pending
2020-UP-255-State v. Angela D. Brewer	Pending
2020-UP-262-Neelu Choudhry v. Viresh Sinha	Pending
2020-UP-269-State v. John McCarty	Pending
2020-UP-271-State v. Stewart Jerome Middleton	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending
2020-UP-275-Randall Seels v. Joe Smalls	Pending

2020-UP-284-Deonte Brown v. State	Pending
2020-UP-290-State v. Phillip Wesley Walker	Pending
2020-UP-307-State v. Craig C. Busse	Pending
2020-UP-310-Christine Crabtree v. Donald Crabtree (3)	Pending
2020-UP-323-John Dalen v. State	Pending
2020-UP-336-Amy Kovach v. Joshua Whitley	Pending
2021-UP-009-Paul Branco v. Hull Storey Retail	Pending
2021-UP-029-State v. Tyrone A. Wallace, Jr.	Pending
2021-UP-032-Reginald Swain v. Daniel Allen Bollinger	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Terrance Edward Stewart, Petitioner.

Appellate Case No. 2019-001584

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Frank R. Addy Jr., Circuit Court Judge

Opinion No. 28029
Heard November 18, 2020 – Filed May 19, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Clarence Rauch Wise, of Greenwood, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch Jr., both of Columbia; Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

JUSTICE FEW: A jury convicted Terrance Edward Stewart of distribution of heroin and two crimes based on his knowing possession of illegal drugs: trafficking in heroin and what we commonly refer to as "simple possession" of oxycodone. We issued a writ of certiorari to review two aspects of the jury instructions: (1) the trial court's definition of constructive possession, and (2) the trial court's explanation of an inference of "knowledge and possession" that the court told the jury it may draw when illegal drugs are found on the defendant's property. We find the trial court erred by instructing the jury on the inference of knowledge and possession. We reverse the trafficking and simple possession convictions and remand those charges for a new trial. However, because the erroneous jury instruction did not prejudice Stewart on the distribution charge, we affirm the distribution conviction.

I. Facts and Procedural History

A confidential informant with the Laurens County Sheriff's Office purchased five small bags of heroin from Stewart with five marked $20 bills. The following day, the Sheriff's Office obtained a search warrant for Stewart's home, where he lived with his girlfriend and where the heroin sale occurred. The officers who searched the home found 23.83 grams of heroin in a large bag in a plastic basket on top of the refrigerator, fifty-six oxycodone tablets in a tinfoil wrapper in the same plastic basket, a digital scale with a powdery residue on it, and $2,730 in cash. Stewart was asleep on the couch when the officers entered. When he awoke, he asked for permission to put on his pants. An officer picked up Stewart's pants and found an additional $1,173—including the five marked $20 bills—in one of the pockets.

During trial, the trial court provided the parties a copy of its proposed jury instructions. Stewart objected to the trial court's definition of constructive possession and to the trial court's explanation of the inference of knowledge and possession. The trial court overruled the objections and gave the instructions as proposed. The jury convicted Stewart of trafficking in heroin, distribution of heroin, and simple possession of oxycodone. The trial court sentenced Stewart to concurrent prison terms of twenty-five years for trafficking, ten years for distribution, and five years for possession. The court of appeals affirmed in an unpublished opinion. *State v. Stewart*, Op. No. 2019-UP-209 (S.C. Ct. App. filed June 5, 2019). We granted Stewart's petition for a writ of certiorari.

II. The Possession Crimes

Trafficking and simple possession are statutory crimes. Simple possession was defined in the original Controlled Substances Act of 1971. Act No. 445, 1971 S.C. Acts 800, 822. The definition is now found in subsection 44-53-370(c) of the South Carolina Code (2018), which provides, "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." Trafficking was added to the Act in 1981. Act No. 33, 1981 S.C. Acts 42, 44-46. It is defined in subsection 44-53-370(e) of the South Carolina Code (2018), which provides in part,[1] "Any person . . . who is knowingly in actual or constructive possession . . . of . . . (3) four grams or more of . . . heroin . . . is guilty of . . . trafficking . . . ."

Beginning in 1974, this Court decided a series of four cases—*Ellis*, *Brown*, *Lane*, and *Hudson*—in which we discussed what facts the State must prove to establish a violation of the simple possession statute and related crimes based on possession. *See State v. Ellis*, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974) ("An accused[] . . . has possession of . . . contraband . . . within the meaning of the law when he has both the power and intent to control its disposition or use."). These opinions became the foundation for our law defining constructive possession in drug cases. They later became applicable to trafficking when the charge is based on possession. *See State v. Bultron*, 318 S.C. 323, 330 n.3, 333-34, 457 S.E.2d 616, 620 n.3, 622 (Ct. App. 1995) (discussing what the State must prove on a trafficking charge based on possession, citing *Ellis*).

From those four decisions, it is now clear that to prove trafficking (when based on possession) or simple possession, the State must prove two elements. First—as we originally stated—the State must prove the defendant had either actual physical custody of the drugs, or the right or power to exercise control over the drugs. *See State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981) ("Actual possession" requires "actual physical custody" of the drugs and "constructive possession" requires "the right to exercise dominion and control" of the drugs); *Ellis*, 263 S.C. at 22, 207 S.E.2d at 413 (similar, but stating the first element as "the

[1] Subsection 44-53-370(e) provides other ways the State may prove trafficking—inapplicable here—that do not require the State to prove knowing possession. In all trafficking cases, the State must prove the requisite quantity of the drugs. *Id.*

power . . . to control its disposition or use"). Second—as we originally stated—the State must prove the defendant had "knowledge of [the] presence" of the drugs. *State v. Brown*, 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976); *see also Hudson*, 277 S.C. at 202, 284 S.E.2d at 774 (requiring proof of knowledge). In *State v. Lane*, 271 S.C. 68, 245 S.E.2d 114 (1978), discussing *Ellis* and *Brown*, we explained "knowledge" means "the accused must have an 'intent to control [the] disposition or use'" of the drugs. 271 S.C. at 73, 245 S.E.2d at 116. Under *Lane*, the second element is now stated as the defendant must have knowledge of the drugs and the intent to control their disposition or use.

III. Constructive Possession Jury Charge

In these four decisions—*Ellis*, *Brown*, *Lane*, and *Hudson*—the Court addressed only the sufficiency of the evidence necessary for the State to prove a violation of subsection 44-53-370(c)[2] and to survive a motion for directed verdict.[3] While these decisions accurately defined constructive possession in the context of the sufficiency of the evidence presented in those cases, none of them dealt directly with fashioning a jury instruction defining a violation of the statute. Understandably, however, trial courts and commentators began drafting jury instructions under the guidance of

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[2] In *Ellis* and *Brown*, we addressed the same provision but from the previous Code, subsection 32-1510.49(c) of the 1962 South Carolina Code (Supp. 1975). *Brown*, 267 S.C. at 314, 227 S.E.2d at 676; *Ellis*, 263 S.C. at 15, 207 S.E.2d at 409-10.

[3] *See Hudson*, 277 S.C. at 201, 284 S.E.2d at 774 ("Appellant . . . asserts the trial judge erred in failing to direct a verdict of acquittal because the evidence was insufficient to sustain his conviction for possession . . . ."); *Lane*, 271 S.C. at 72, 245 S.E.2d at 116 (appellant "argues . . . there is no evidence that he had knowledge of the presence of the marijuana at his shop"); *Brown*, 267 S.C. at 315, 227 S.E.2d at 676 ("Brown contends . . . the State failed to introduce evidence from which a jury could reasonably infer that he had possession of the marijuana"); *Ellis*, 263 S.C. at 19, 207 S.E.2d at 412 (stating the "question presented for decision is whether the trial judge erred in refusing to grant the motion of the appellants for a directed verdict on the ground that the evidence was insufficient to sustain a verdict of guilty of possession of heroin").

these cases.[4] Later, as we will discuss in Section IV, this Court relied on these cases to direct circuit judges on how to fashion jury instructions regarding simple possession and related crimes based on possession. *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987).

In this case, the trial court began its jury instruction correctly, informing the jury the State must prove both required elements to convict Stewart of trafficking or simple possession. The trial court stated, "To prove possession, . . . the State must prove beyond a reasonable doubt the defendant had knowledge of, power over, and the intent to control the disposition or use of the drugs involved." As the court continued, however, it informed the jury, "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found."

This is the statement to which Stewart objected. If we considered the statement only in isolation as a complete definition of constructive possession, the statement would be problematic. The primary problem would be that the statement ignores the second element we described above. We are particularly concerned with the language "the property upon which the drugs were found." Under the four cases, if the State presents evidence the defendant had control over the property on which the drugs were located, then the trial court should deny a directed verdict motion. But, the mere existence of evidence the defendant had control over the property does not equate to a finding of constructive possession. It remains the burden of the State to convince the jury the defendant had the requisite knowledge and intent.

The legal principle of possession requires trial courts to instruct juries on both elements from *Ellis*, *Brown*, *Lane*, and *Hudson* when defining possession in cases in which the State is required to prove a violation of the statutes on trafficking (when based on possession), simple possession, and related crimes based on possession. First, the State must prove the defendant had the right and power to control the disposition or use of the drugs. For actual possession cases, the State may meet this

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[4] *See, e.g.*, Tom J. Ervin, *ERVIN'S* SOUTH CAROLINA REQUESTS TO CHARGE – CRIMINAL 161-63 (1st ed. 1994) (defining possession in reliance on *Hudson*, *Brown*, and others); F. Patrick Hubbard, JURY INSTRUCTIONS FOR CRIMINAL CASES IN SOUTH CAROLINA: DEFENDANTS' REQUESTED INSTRUCTIONS 194-97 (1st ed. 1994) (defining possession in reliance on *Hudson*, *Ellis*, and others).

burden by proving the defendant had actual physical custody of the drugs. For constructive possession cases, the State must prove by other evidence the defendant had the right and power to exercise control over the drugs. Second, the State must prove the defendant had knowledge of the drugs and the intent to control the disposition or use of the drugs. In slightly different terms, these are the same two elements we set forth in *Ellis*,[5] *Brown*, *Lane*, and *Hudson*. *See Lane*, 271 S.C. at 73, 245 S.E.2d at 116 (holding "the accused has such possession as is necessary for conviction 'when he has both the power (actual or constructive control) and intent to control its disposition or use'" (quoting *Ellis*, 263 S.C. at 22, 207 S.E.2d at 413)). In this case, the trial court instructed the jury on both elements. In addition, immediately after the potentially problematic statement, the trial court instructed the jury "mere presence at the scene where the drugs were found is not enough to prove possession." This likely had the effect of focusing the jury's attention on the second element.

If we consider the statement to which Stewart now objects only in isolation, it failed to convey both elements to the jury. However, we do not consider jury instructions in isolation, but as a whole. *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 502 (2020). When considered as a whole, the trial court's definition of constructive possession adequately conveyed both elements to the jury. Therefore, we find no error in the trial court's definition of constructive possession.

IV. The Inference of Knowledge and Possession

Stewart also contends the trial court erred when it instructed the jury, "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." We agree.

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[5] In *Adams*, we stated "language found in *State v. Ellis* . . . is no longer valid." 291 S.C. at 135, 352 S.E.2d at 486. We were not referring to the *Ellis* definition of possession, but to this statement, "Ordinarily, when articles are in a dwelling house they must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary." *Ellis*, 263 S.C. at 22, 207 S.E.2d at 413. This statement is incorrect because it suggests the defendant bears the burden of proof. Otherwise, *Ellis* contains a correct explanation of the law of possession.

In *Ellis*, the Court held the State presented evidence to support an inference of knowledge and possession sufficient to survive a directed verdict motion. 263 S.C. at 21-22, 207 S.E.2d at 413. Heroin belonging to the defendant's foster son was found in a guest bedroom in her home, the guest room was adjacent to her own bedroom, and she entered the guest room at least twice a week. 263 S.C. at 22, 207 S.E.2d at 413. In support of our holding, we stated "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." 263 S.C. at 22, 207 S.E.2d at 413 (citing *State v. Harvey*, 187 S.E.2d 706, 714 (N.C. 1972)). In *Lane*, we found it "inferable that the appellant had the requisite intent," and thus, we affirmed the submission of the case to the jury. 271 S.C. at 73, 245 S.E.2d at 117. Similarly, in *Hudson* and *Brown*, we considered only the sufficiency of the State's evidence to survive a directed verdict motion. *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (holding there was sufficient evidence of the defendant's knowledge and possession of the heroin to take the case to the jury); *Brown*, 267 S.C. at 316, 227 S.E.2d at 677 (holding there was not sufficient evidence of the defendant's dominion and control over the marijuana). We discussed in each case the inference of knowledge and possession,[6] but we did not suggest in any of the cases the trial court should explain the inference to the jury.

In *Adams*, this Court misinterpreted these decisions and directed trial courts to explain the inference of knowledge and possession to a jury. 291 S.C. at 135, 352 S.E.2d at 486. The challenged charge in this case was taken almost verbatim from *Adams*, in which we stated, "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." *Id.* (citing *Hudson*, 277 S.C. 200, 284 S.E.2d 773; *Brown*, 267 S.C. 311, 227 S.E.2d 674). Our reliance on *Hudson* and *Brown* was misplaced because neither case approves of the *trial court* explaining the inference of knowledge and possession to the jury. The inference is a valid one for the jury to draw, and the trial attorneys may argue to the jury whether the inference should be drawn. *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575,

[6] In *Brown*, we relied on the absence of the inference of knowledge and possession, finding "the State failed to introduce evidence from which a jury could reasonably infer that he had possession of the marijuana." 267 S.C. at 315, 227 S.E.2d at 676.

582 (2019).[7] The *jury instruction* explaining the inference, however, is improper. We overrule *Adams* on that point. The jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given.

V. Prejudice

We decided several cases recently addressing other jury charges "instructing juries on how to interpret and use evidence." *See Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (holding "the 'good character alone' charge . . . is improper" and listing cases). In one of those cases, *Burdette*, the trial court informed the jury it may infer the existence of malice from the defendant's use of a deadly weapon. 427 S.C. at 494, 832 S.E.2d at 577. We held the charge is never proper, in part because "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." 427 S.C. at 502-03, 832 S.E.2d at 582. In another case, *Cheeks*, we considered a "strong evidence" inference charge and stated it "unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence." 401 S.C. at 328-29, 737 S.E.2d at 484. The inference charge in this case had the same prejudicial effects we described in *Burdette* and *Cheeks*.[8]

The trial court's definition of constructive possession—including the requirement the State prove knowledge and intent—was followed almost immediately with the opposite statement, permitting the jury to infer the defendant's knowledge from the simple fact the drugs were on his property. To the extent the trial court earlier

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[7] In *Burdette*, we stated "some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" 427 S.C. at 503, 832 S.E.2d at 583 (quoting *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009)).

[8] In *Cheeks*, despite finding error, we did not reverse because "the evidence was that [the defendant] was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter." 401 S.C. at 329, 737 S.E.2d at 484. As quoted in the text of this opinion, however, the *Cheeks* Court explained the tendency of the erroneous inference charge to prejudice the defendant.

explained the knowledge and intent requirement, the inference of knowledge instruction negated that explanation. The improper explanation of the inference of knowledge and possession permitted the jury to find Stewart guilty of simple possession and trafficking without the State proving knowledge and intent, a scenario not permitted under the legal principle of possession as we explained it in *Ellis*, *Brown*, *Lane*, and *Hudson*.

We cannot say the error did not prejudice Stewart as to the trafficking and simple possession charges. *See Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 ("[O]ur 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." (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014))). As to the distribution of heroin charge, however, we find the erroneous jury instructions could not have contributed to the verdict. Proof of distribution does not require separate proof of possession. *See* S.C. Code Ann. § 44-53-370(a) (2018) (providing "it shall be unlawful for any person: . . . (1) to . . . distribute . . . a controlled substance").

VI. Conclusion

We reverse Stewart's convictions for trafficking and simple possession of heroin, and remand those charges to the court of general sessions for a new trial. We affirm Stewart's conviction for distribution of heroin.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leisel Paradis, Petitioner,

v.

Charleston County School District, James Island Charter High School, and Robert Bohnstengel and Stephanie Spann, in their individual capacities, Respondents.

Appellate Case No. 2018-002025

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28030
Heard December 12, 2019 – Filed May 19, 2021

REVERSED AND REMANDED

J. Lewis Cromer and J. Paul Porter, both of Cromer Babb Porter & Hicks, LLC, of Columbia, for Petitioner.

Rene Stuhr Dukes, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent Robert Bohnstengel; and Caroline Cleveland, Bob J. Conley, and Emmanuel Joseph Ferguson, all of Cleveland & Conley, LLC, of Charleston, for Respondent Stephanie Spann.

CHIEF JUSTICE BEATTY: A civil conspiracy claim brought by Leisel Paradis ("Petitioner") was dismissed by the circuit court for failing to plead special damages, and the dismissal was upheld by the court of appeals. We granted a petition for a writ of certiorari to consider the narrow question whether South Carolina's requirement of pleading special damages should be abolished. We conclude that it should. South Carolina is the only state with this unique requirement as an element, and we find it resulted from a misinterpretation of law. We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state. Consequently, we reverse the decision of the court of appeals and remand the matter to the circuit court for proceedings consistent with this opinion.

I. FACTS

Petitioner, a teacher, filed a complaint asserting a defamation claim against the Charleston County School District and James Island Charter High School (respectively, "the District" and "the High School"). In addition, Petitioner asserted a civil conspiracy claim against the High School's principal and assistant principal, Robert Bohnstengel and Stephanie Spann ("Respondents"),[1] in their individual capacities. Petitioner alleged Respondents targeted her for an unwarranted and invasive performance evaluation because they were unhappy with her desire to report a student's misconduct to the police, causing her to be blacklisted and ostracized and, ultimately, terminated from her teaching position.

The circuit court dismissed both the defamation and the civil conspiracy claims. The circuit court ruled, *inter alia*, that Petitioner failed to plead special damages as required to advance her civil conspiracy claim. The court of appeals affirmed. *Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 819 S.E.2d 147 (Ct. App. 2018). Petitioner sought a writ of certiorari, raising several issues regarding the civil conspiracy claim. This Court granted the petition for a writ of certiorari as to Petitioner's first question, which asks the Court to abolish the rule imposing a special pleading requirement for civil conspiracy claims—i.e., requiring a plaintiff to plead special damages—which evolved after the Court's decision in *Todd v. South*

[1] The District and the High School participated in the appeal below and filed a response to the petition for a writ of certiorari. However, they did not file briefs with this Court, presumably because they were not parties to the civil conspiracy action that is the subject of the appeal to this Court. As a result, "Respondents" shall be used to refer to the individual parties who submitted briefs, Bohnstengel and Spann.

Carolina Farm Bureau Mutual Insurance Co., 276 S.C. 284, 278 S.E.2d 607 (1981). This pleading requirement has been informally referred to as the *Todd* rule.

II. DISCUSSION

Petitioner contends this Court should overrule precedent requiring the pleading of special damages for civil conspiracy claims, which arose after the issuance of the *Todd* decision in 1981. We agree.

Civil conspiracy has long given rise to uncertainty as to its elements and proper application. *See* 4 James Lockhart, *Cause of Action for Civil Conspiracy*, Causes of Action § 4, at 530 (2d ed. 1994) ("The elements of civil conspiracy are not always defined in exactly the same way."). Over 100 years ago, a law professor analyzed the emerging action, noting its varying definitions and the distinction between civil and criminal conspiracy, and he distilled the following core principles:

> A combination between two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, subjects the confederates to criminal prosecution; and, if injury ensues to an individual therefrom, it subjects them to a civil action by their victim.

Francis M. Burdick, *Conspiracy as a Crime, and as a Tort*, 7 Colum. L. Rev. 229, 246 (1907).

South Carolina employed similar language in defining civil conspiracy. In an early case involving motions to strike and to make the pleadings for civil conspiracy more definite and certain, this Court stated:

> [A] definition of conspiracy has been given as the conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.

Charles v. Texas Co., 192 S.C. 82, 101, 5 S.E.2d 464, 472 (1939) (*Charles I*).

The Court reiterated this description in the appeal from the verdict in the same case, finding no error in a jury charge defining a civil conspiracy in these terms. *See Charles v. Texas Co.*, 199 S.C. 156, 176, 18 S.E.2d 719, 727 (1942) (*Charles II*)

("Ordinarily a conspiracy is where two or more persons combine or agree to do something to the detriment or hurt of another. If they agree to do an unlawful thing for the detriment or hurt of another or if they agree to do a lawful thing but agree to do it in an unlawful manner that would be a conspiracy."); *cf. Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 387, 9 S.E.2d 796, 803–04 (1940) (observing "the second cause of action [failed to] allege the required elements of a conspiracy to accomplish an unlawful purpose or a lawful purpose unlawfully").

In *Charles II*, the Court pointed out the "well known principle" that resulting damages are the gist of any civil conspiracy action and an unexecuted conspiracy does not give rise to a civil cause of action. 199 S.C. at 177, 18 S.E.2d at 727. Thus, the Court emphasized that proof of an overt act and resulting damages were also fundamental elements to sustain a civil claim, and it found these points were adequately conveyed in the trial judge's instructions. The Court further explained, "Each conspirator is liable for all damages naturally resulting from any wrongful act of a co-conspirator in exercising the joint enterprise," and "[w]hether the damages proximately resulted from the wrongful act of the conspirators is ordinarily a question for the jury." *Id.* at 174, 18 S.E.2d at 726 (citation omitted).

Appeals involving civil conspiracy were somewhat infrequent immediately following *Charles I* and *Charles II*, but the two decisions were recognized as authoritative, even when later cases did not fully articulate all of the requisite elements. *See, e.g.*, *Lakewood Water Co. v. Garden Water Co.*, 222 S.C. 450, 453, 73 S.E.2d 720, 721 (1952) ("The two decisions of *Charles v. Texas Company*, 192 S.C. 82, 5 S.E.2d 464, and *Id.*, 199 S.C. 156, 18 S.E.2d 719, rather fully enunciate the principles which govern civil actions for conspiracy and they need not be repeated here.").

The definition of civil conspiracy approved in *Charles I* and *Charles II* is also fairly universal in contemporary tort law.[2] *See generally* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("Although stated variously from jurisdiction to jurisdiction, the basic elements of a civil conspiracy are (1) an agreement between two or more individuals,

[2] Most states provide by common law for the claim, and a few states have also enacted statutes in this regard. *See* 54 James L. Buchwalter, *Cause of Action for Civil Conspiracy*, Causes of Action § 2, at 603 (2d ed. 2012) ("Civil conspiracy is a claim recognized under the common law of most states. A civil conspiracy may also be actionable under state statutes specifically forbidding various types of concerted action for certain purposes." (citation omitted)).

(2) to do an unlawful act or to do a lawful act in an unlawful way, (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators, and (4) pursuant to a common scheme."); 15A C.J.S. *Conspiracy* § 4 (2012) ("The requisite elements [for civil conspiracy] are: (1) a combination between two or more persons; (2) to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means; (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object; (4) which act results in damage to the plaintiff.").

In 1981, however, the Court issued the *Todd* decision, which has been interpreted as creating a new element for civil conspiracy claims in South Carolina—a requirement that a plaintiff plead special damages. In *Todd*, the plaintiff alleged five causes of action stemming from the termination of his employment, and each cause of action incorporated all of the prior allegations: "(1) intentional interference with contractual relations, (2) extreme and outrageous conduct, (3) bad faith termination of the employment contract, (4) invasion of privacy, and (5) conspiracy to so damage the plaintiff." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 287, 278 S.E.2d 607, 608 (1981). One of the issues considered by the Court was whether Todd's fifth cause of action stated a claim for civil conspiracy. *Id.* at 292, 278 S.E.2d at 610.

The *Todd* Court began by citing, *inter alia*, *Charles I*, and stating: "Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Id.* at 292, 278 S.E.2d at 611. The Court generally observed the difference between a criminal conspiracy and a civil conspiracy is that the agreement is the gravamen of the offense of criminal conspiracy, whereas "the gravamen of the tort [of civil conspiracy is] the damage resulting to [the] plaintiff from an overt act done pursuant to the common design." *Id.* (citing a former version of *Corpus Juris Secundum*).[3] The Court reiterated that a civil conspiracy becomes actionable only once overt acts occur that proximately cause damage to the plaintiff; therefore, "conspiracy in and of itself is not a civil wrong." *Id.* (citation omitted).

The Court found Todd did not plead overt acts in furtherance of the conspiracy, so the complaint failed to state a claim for civil conspiracy as a matter of law:

[3] Similar language is in the updated version. *See* 15A C.J.S. *Conspiracy* § 104 (2012) (distinguishing civil and criminal conspiracy).

> As noted, the fifth cause of action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. *No additional acts in furtherance of the conspiracy are plead*. The only alleged wrongful acts plead are those for which damages have already been sought. . . .
>
> The trial judge erred by overruling the demurrer to the conspiracy cause of action in the complaint, since Todd can recover no additional damages for the alleged fifth cause of action. The rule applicable to these pleadings is stated at 15A C.J.S. Conspiracy § 33, at 718.
>
> > "Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong."
>
> Todd seeks damages in his first four causes of action *for the same acts* incorporated by the fifth cause. He is therefore precluded from seeking damages *for the same acts yet again*. As such, the fifth cause fails to state an action.

Id. at 293, 278 S.E.2d at 611 (emphasis added). Although *Todd* ostensibly spoke in terms of the failure to plead *additional acts* to support the civil conspiracy claim and not allowing duplicative recoveries for the same acts, cases after *Todd* began enumerating three required elements to assert an allegation of civil conspiracy, including the element of pleading "special damage":

> A civil conspiracy . . . consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10, 344 S.E.2d 379, 382 (Ct. App. 1986); *accord Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 600, 358 S.E.2d 150,

152 (Ct. App. 1987) (citing *Lee* and its three-part definition of civil conspiracy); *Yaeger v. Murphy*, 291 S.C. 485, 487, 354 S.E.2d 393, 394 (Ct. App. 1987) (citing the definition in *Lee*).

While the requirement of pleading special damages became known as the *Todd* rule, notably none of the foregoing cases (*Lee*, *Island Car Wash*, and *Yaeger*) specifically cited *Todd* for the three-part definition of civil conspiracy incorporating this element. *Island Car Wash* and *Yaeger* relied solely on the definition in *Lee* and did not cite *Todd* for any legal proposition. *Lee* did cite *Todd*, but it was in the context of distinguishing civil and criminal conspiracy and reiterating the need to show an overt act and resulting damage for a civil claim.

In *Lee*, the court of appeals indicated the parties had confused civil and criminal conspiracy. 289 S.C. at 10, 344 S.E.2d at 381. The court stated the definition involving an agreement to undertake "an unlawful act or a lawful act by unlawful means" defined only a criminal conspiracy, and instead enumerated a three-part test for a civil action—"(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." *Id.* at 10, 344 S.E.2d at 382. In doing so, it cited this Court's decision in *Charles I*, along with a 1915 Tennessee decision and several United Kingdom cases.[4] *Id.*

We note this Court's precedent demonstrates the definitional elements of civil conspiracy actually parallel the elements of criminal conspiracy.[5] *See Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (observing the elements of criminal conspiracy and civil conspiracy "are quite similar" and noting

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[4] While the United Kingdom cases have some efficacy, we do not find them determinative of South Carolina law. In particular, we note some of the decisions consist of a collection of individual determinations, with each individual expressing his own, singular opinion. Although such decisions reach one ultimate result, they are not all in agreement in their reasoning.

[5] *See* S.C. Code Ann. § 16-17-410 (2015) ("The common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means."); *see also State v. Davis*, 88 S.C. 229, 232, 70 S.E. 811, 812–13 (1911) ("[T]he description which seems to have the widest recognition and approval by the authorities declare a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." (citation omitted)).

civil conspiracy turns on the existence of damages). The similarity is logical because the major difference between civil and criminal conspiracy is a plaintiff's need to additionally prove an overt act and resulting damages to obtain a civil recovery. *See* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("The elements of civil conspiracy are quite similar to those required of a criminal conspiracy, with the distinguishing factor being that an agreement is the essence of a criminal conspiracy, while damages are the essence of a civil conspiracy."); *id.* § 55 ("The gist of a civil conspiracy is not the unlawful agreement or combination but *the damage caused by the acts committed in pursuance* of the formed conspiracy." (emphasis added)); *see also* 15A C.J.S. *Conspiracy* § 7 (2012) ("Although criminal and civil conspiracy have similar elements, the distinguishing factor between the two is that damages are the essence of a civil conspiracy, and the agreement is the essence of a criminal conspiracy.").[6]

Later cases began reciting *Lee*'s three-part test for civil conspiracy that developed post-*Todd* and which included the requirement of pleading special damages. *See LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *see also Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006); *Lawson v. S.C. Dep't of Corr.,* 340 S.C. 346, 532 S.E.2d 259 (2000); *Future Group II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Inexplicably, this new requirement for special damages was labeled the *Todd* rule.

Although the Court did not mention "special damages" in *Todd*, several years after *Todd* a few cases, such as *Lee*, 289 S.C. at 10, 344 S.E.2d at 382, recited the three-part test for civil conspiracy that appeared to contain the pleading requirement as an element of the claim. This definition, in turn, was then quoted repeatedly by our appellate courts. This pleading requirement became known as the *Todd* rule.

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[6] In a case discussing criminal conspiracy, this Court has observed that "unlawful" merely means "contrary to law" and is not limited to criminal conduct. *State v. Davis*, 88 S.C. 229, 233, 70 S.E. 811, 813 (1911) ("It is enough if the acts agreed to be done, although not criminal, are wrongful; that is amount to a civil wrong." (citations omitted)). As for civil conspiracy, early English law has noted that, "[i]n view of the infinite variations of oppressive misconduct[,] no definition [of "unlawful means"] can be given which is at once satisfactory and exhaustive." *Pratt v. Brit. Med. Ass'n*, [1919] 1 K.B. 244, 260 (1918). However, *Pratt* stated precedent recognized that violence or threats of physical violence, threats not involving physical harm, nuisance, and fraud, are readily encompassed, although they are not the only examples. *See id.* at 260–61.

See, e.g., *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 ("hold[ing] the conspiracy action is barred under *Todd*" where special damages were not properly alleged). However, the pleading requirement's relationship to *Todd* is rendered somewhat tenuous because, as previously noted, the earliest cases did not specifically cite *Todd* for this requirement. *See, e.g.*, *Island Car Wash*, 292 S.C. at 600, 358 S.E.2d at 152; *Yaeger*, 291 S.C. at 487, 354 S.E.2d at 394.

This test resulted in the dismissal of civil conspiracy actions that did not expressly plead special damages on the basis they failed to adequately allege a cause of action. South Carolina courts held that, because special damages are a required element of a civil conspiracy claim, a plaintiff must plead special damages that go beyond the damages alleged in other claims to state a cause of action. Those cases further stated that, if a plaintiff merely repeated the damages from another claim without specifically listing special damages as part of the civil conspiracy allegation, then the civil conspiracy action must be dismissed. *See, e.g.*, *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim *instead of specifically listing special damages* as part of their civil conspiracy claim, their conspiracy claim should be dismissed." (emphasis added)); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*.").[7]

We granted Petitioner's motion to argue against the *Todd* rule in the current case, where her civil conspiracy claim was dismissed at the pleadings stage for the failure to plead special damages.[8] Petitioner contends the requirement of pleading special damages for civil conspiracy should be abandoned because it resulted from,

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[7] The law requiring the dismissal of a civil conspiracy claim for failing to plead special damages has also been cited in federal courts applying South Carolina law. *See, e.g.*, *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015); *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F. Supp. 2d 645 (D.S.C. 2009).

[8] The *Todd* rule requiring the pleading of special damages was previously called into question in another case before this Court, but we declined to abandon the rule at that time because a trial had been held some twelve years prior in that matter, and there was concern that it would be unfair to change the requirements for pleadings and proof upon remand, given the age of the case. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 34 n.3, 791 S.E.2d 140, 145 n.3 (2016).

inter alia, a misreading of *Corpus Juris Secundum*. We agree the *Todd* rule should be abolished.

In *Todd* the Court cited 15A C.J.S *Conspiracy* § 33 and held a plaintiff in a civil conspiracy action must allege acts in furtherance of the conspiracy. The Court noted the only wrongful acts alleged were those for which damages had already been sought, so the claim failed as a matter of law. This was taken in cases after *Todd* as imposing a requirement of pleading (and proving) special damages for a civil conspiracy claim. We find this section of *Corpus Juris Secundum* simply addressed a prohibition on duplicative recoveries; it did not establish a requirement of pleading special damages for civil conspiracy claims. The plaintiff in *Todd* failed to plead any overt acts in furtherance of the conspiracy. Thus, the Court correctly concluded the civil conspiracy claim failed as a matter of law. In that situation, the Court noted, the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim.

We note that, in addition to perhaps resulting from a misinterpretation of *Corpus Juris Secundum* and *Todd*, the pleading requirement for civil conspiracy also perhaps resulted, at least in part, from differing interpretations of the term "special damages." Traditionally, general damages are implied by law and can be alleged without particularity because they are the proximate and foreseeable consequences of the defendant's conduct. Special damages, in contrast, are those that might be the natural result of an injury, but not the necessary or usual consequences of the defendant's conduct, and they typically are unique to a particular case. *See* 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1310 (4th ed. 2018) (distinguishing general and special damages). Under the South Carolina Rules of Civil Procedure ("SCRCP") and under the federal procedural rules, special damages must be specifically pled to avoid surprise and give notice to the opposing party. *See, e.g.*, Rule 9(g), SCRCP.

In this context, however, it seems South Carolina precedent has varied in what it considers "special damages." *See generally* Michael G. Sullivan, *Elements of Civil Causes of Action* 89–90 (5th ed. 2015, Douglas MacGregor, ed.) ("The requirement that the plaintiff plead special damages means essentially this - that the complaint must describe damages that occurred as a result of the conspiracy in *addition* to any alleged as a result of other claims."). *But see Hackworth*, 385 S.C. at 116–17, 682 S.E.2d at 875 ("Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. . . . Special damages . . . are not implied at law because they do not necessarily result from the wrong. Special damages must, therefore, be specifically alleged in the complaint to

avoid surprise to the other party." (internal citation omitted)). We further note the SCRCP, which require that special damages be specifically pled, were not in effect at the time *Todd* was decided.

The essential principle *Todd* intended to address was the need to plead an overt act in furtherance of the agreement, not special damages. As a result, we overrule *Todd* and cases relying on *Todd* or other precedent, such as *Lee*, to the extent they impose or appear to impose a requirement of pleading (and proving) special damages. South Carolina's position in this regard was an outlier, as our research indicates South Carolina was the only state to require the pleading of special damages.

In light of our decision today, we are returning to our long-standing precedent pre-*Todd* and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *See Charles II*, 199 S.C. at 176, 18 S.E.2d at 727; *Charles I*, 192 S.C. at 101, 5 S.E.2d at 472; *see also* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. *Conspiracy* § 4 (2012) (same). By doing so, we are returning not only to our historical roots, but also to the traditional elements of a civil conspiracy claim as they have been similarly defined by the majority of jurisdictions.[9]

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[9] Most states incorporate the elements of an agreement to do an unlawful act or a lawful act by unlawful means (or the common variation of an unlawful purpose or a lawful purpose by unlawful means). *See, e.g.*, *Harp v. King*, 835 A.2d 953, 972 (Conn. 2003); *Mustaqeem-Graydon v. SunTrust Bank*, 573 S.E.2d 455, 461 (Ga. Ct. App. 2002); *Yoneji v. Yoneji*, 354 P.3d 1160, 1168 (Haw. Ct. App. 2015); *Hall v. Shaw*, 147 N.E.3d 394, 407–08 (Ind. Ct. App. 2020); *Coghlan v. Beck*, 984 N.E.2d 132, 151 (Ill. App. Ct. 2013); *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 260–61 (Ky. Ct. App. 2008); *Franklin v. Erickson*, 146 A. 437, 438 (Me. 1929); *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 428 (Md. 2009); *Swain v. Morse*, No. 346850, 2020 WL 3107696, at *7 (Mich. Ct. App. June 11, 2020); *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013); *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. Ct. App. 2008); *George Clift Enters., Inc. v. Oshkosh Feedyard Corp.*, 947 N.W.2d 510, 537 (Neb. 2020); *Jay Edwards, Inc. v. Baker*, 534 A.2d 706, 709 (N.H. 1987); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253, 263 (N.J. 2005); *In re Fifth Third Bank, N.A.*, 719

We disagree with the concurring/dissenting opinion to the extent it goes beyond the sole question accepted by this Court—which asks, "Should the Court reverse the special damages pleading requirement on civil conspiracy claims arising from Todd v. S.C. Farm Bureau Mut. Ins. Co.?"— and appears to consider a point raised by Respondents in their brief. Namely, whether civil conspiracy itself should be "abolished" as an independent claim in this state and should, instead, always be dependent on an underlying actionable wrong or tort. Respondents have not cross-appealed in this matter, and we reject Respondents' attempt to advance this issue for the first time on appeal. Any further arguments potentially affecting the viability of Petitioner's claim, whether they arise from this Court's decision or otherwise, are properly raised upon remand to the circuit court, in the first instance, particularly where the case was halted at the pleadings stage.

We note a few jurisdictions recognize two forms of civil conspiracy. The first, which is the general rule, requires an underlying actionable wrong or tort, and liability is imposed on an individual for the tort of another. A second form, also described as an exception to the general rule, exists when the conduct complained of would not be actionable if done by one person, but where by force of numbers or other exceptional circumstances, the defendants possess a peculiar power of coercion that gives rise to an independent tort of civil conspiracy (often referred to as the "force of numbers" or "economic boycott" exception). *See Am. Diversified Ins. Servs., Inc. v. Union Fid. Life Ins. Co.*, 439 So. 2d 904 (Fla. Dist. Ct. App. 1983); *Baker v. Wilmer Cutler Pickering Hale & Dorr LLP*, 81 N.E.3d 782 (Mass. App. Ct. 2017); *see also Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013) (observing "[s]ome courts have applied an 'economic boycott' or 'force of numbers' exception to the general rule that the basis for a civil conspiracy must be an independent wrong or tort," but not deciding whether to adopt the exception in that state because it would not be applicable, in any event). Early South Carolina law pre-*Todd* appeared to reference similar concepts. *See, e.g.*, *Howle v. Mountain Ice Co.*, 167 S.C. 41, 58, 165 S.E. 724, 729 (1932); *Charles II*, 199 S.C. at 170, 18 S.E.2d at 724. However, to rule on whether this Court has or ever will recognize an exception to the general rule would require the Court to issue an advisory opinion on a distinct subject that has not yet been disputed in this case.

S.E.2d 171, 181 (N.C. Ct. App. 2011); *Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013); *Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. Ct. 2008); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002); *Pohl, Inc. of Am. v. Webelhuth*, 201 P.3d 944, 954–55 (Utah 2008); *Wilson v. State*, 929 P.2d 448, 459 (Wash. Ct. App. 1996); *N. Highland Inc. v. Jefferson Mach. & Tool, Inc.*, 898 N.W.2d 741, 747 (Wis. 2017).

III. CONCLUSION

Because the court of appeals upheld the dismissal of Petitioner's civil conspiracy claim based on the failure to plead special damages, we reverse and remand the matter to the circuit court for further proceedings on Petitioner's claim for civil conspiracy. Our decision in Petitioner's case is based solely on the narrow question before the Court regarding the abolishment of the *Todd* rule, and we do not reach any other issue concerning the viability or merits of Petitioner's claim. Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis.

REVERSED AND REMANDED.

HEARN and JAMES, JJ., concur. KITTREDGE, J., concurring in result in a separate opinion. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur in result. In overruling the so-called "special damages" requirement of *Todd v. South Carolina Farm Bureau Mutual Insurance Co.*,[10] the Court must necessarily examine the elements of civil conspiracy. I commend Chief Justice Beatty for his excellent opinion, which tracks this Court's meandering civil conspiracy jurisprudence and properly restores the elements of a civil conspiracy claim to its original understanding. As a result of today's opinion, it is again settled that a civil conspiracy claim requires proof of (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. Stated differently, we have abandoned the standardless formulation that required only (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) which caused the plaintiff special damage. I write separately to address the effect of *Todd* on the election of remedies and note my support for the concurrence of Justice Few.

First, in my judgment, *Todd* is more properly viewed as an election of remedies case, not a pleading case. *Todd* created a fiction that special damages caused by the civil conspiracy were somehow different than the damages caused by the underlying unlawful conduct. That misunderstanding, in turn, led to a misapplication of our election of remedies law. Because a civil conspiracy claim was purportedly supported by special damages, some trial courts would avoid an election of remedies and permit a double recovery. Today's rejection of a special damages requirement should restore a proper approach to election of remedies. For one wrong, there is one recovery.

Next, I view Justice Few's concurrence as well within the question accepted by this Court for review. The misguided pleading rule that grew out of *Todd* spawned a series of cases that further separated civil conspiracy from its original moorings. Justice Few compellingly frames the amorphous nature of the civil conspiracy cause of action that resulted from *Todd* and its progeny. It is the second element—to commit an *unlawful act* or a lawful act by *unlawful means*—that restores an objective legal standard to this cause of action. When the appellate courts of this state approved of an analytical framework that allowed one's personal sense of fairness and right and wrong to be sufficient for a civil conspiracy claim, we created a rudderless cause of action. Justice Few correctly observes that the post-*Todd*

[10] 276 S.C. 284, 278 S.E.2d 607 (1981).

sanctioned civil conspiracy claim "permit[ted] the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror's sense of fairness or responsibility." I do not construe Justice Few's concurrence as "abolishing" civil conspiracy. Rather, by restoring the traditional elements of a civil conspiracy claim and overruling *Todd*'s so-called special damages pleading requirement, this Court returns civil conspiracy to its historical roots. Because the Court has reset the elements of civil conspiracy and restored an objective standard, I would apply today's decision prospectively with one exception: for those cases that were tried under the *Todd* rubric and are on appeal now, I would evaluate the merits of the appeal under the *Todd* framework.

JUSTICE FEW: I agree with the majority that the requirement of pleading and proving special damages in a civil conspiracy action is based on a misunderstanding of law, and the requirement must be eliminated. To that extent, I concur in the majority opinion. However, the special damages requirement we now hold legally invalid previously served the valid practical purpose of restraining the use of the undefined civil conspiracy cause of action. In almost all legitimate civil actions, there are no "special damages" as that term was used in civil conspiracy. In other words, it was hardly ever possible to allege or prove "damages that go beyond the damages alleged in other causes of action." As a practical matter, therefore, the requirement of special damages prevented civil conspiracy from being a significant cause of action in civil litigation. Now, any plaintiff may bring a civil conspiracy action against any defendant—even for lawful, non-tortious conduct—and the law imposes no meaningful standards on courts and juries by which they must judge the defendant's conduct. I disagree with the majority that we should unleash this still-undefined and now-unrestrained menace on the public as an independent tort. To that extent, I respectfully dissent.

Certainly, civil conspiracy is a proper cause of action in its derivative form. If two people conspire to commit fraud, for example, but the actual fraudulent conduct is carried out by only one of them, the injured plaintiff should be able to sue both of them. The law imposes specific requirements a plaintiff must meet for a fraud cause of action, and those requirements provide standards by which courts and juries must judge the conduct of both defendants. The same is true for defamation, one of the plaintiff's theories of recovery in this case. If one defendant who did not personally commit defamatory acts conspired with another who did defame the plaintiff, the legal elements the plaintiff must establish in a defamation case—along with the legal requirements for conspiracy—guide the court and the jury in deciding whether the conspirator should also be liable for defamation.

As an independent tort, however, the undefined theory of civil conspiracy leaves courts and juries free to determine civil liability—both of the alleged tortfeasor and the supposed conspirator—not based on the law, but by using the individual judge or juror's sense of fairness or responsibility. Imagine in a fraud case that the dispute arose out of business competition between the plaintiff and the defendant. The defendant intentionally made a false statement to the plaintiff for the purpose of gaining competitive advantage. Imagine further the plaintiff's fraud cause of action fails because the court or the jury finds—applying the law—the plaintiff had no right to rely on the false statements. The defendant's conduct might have been unfair or

irresponsible, but the plaintiff loses on the fraud claim—rightfully—because the law does not support the claim.

If, however, the plaintiff's lawyer thought to add a cause of action for civil conspiracy, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Civil conspiracy—as the majority "return[s] . . . to our historical roots"—permits the court and jury to impose liability for lawful, non-tortious conduct.

We need not imagine how a defamation claim could unfold; we can turn to the plaintiff's allegations in this case. The plaintiff alleged in her complaint the principal of the school where she taught became angry when she asked him to report a student to the police for disruptive behavior in her classroom. She claimed the principal retaliated against her by placing her into a formal job evaluation process she did not deserve and her conduct did not warrant. By the time the evaluation results were reported, the principal was no longer involved, both because he did not participate in the evaluations and because he was no longer employed at the school. She claimed statements made about her during the evaluation process—not by the principal—defamed her as being a bad teacher. On a derivative claim for conspiracy to commit defamation, the principal would have the defenses of truth, fair reporting privilege, the two-year statute of limitations for defamation,[11] and perhaps others. If the statements made by those conducting the evaluation were true or fair, or if the claim was brought outside the limitations period, the principal—like those who made the defamatory remarks—would rightfully benefit from those legally defined defenses.

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[11] *See* S.C. Code § 15-3-550(1) (2005) (requiring "an action for libel [or] slander" be brought "[w]ithin two years"). The General Assembly, in enacting subsection 15-3-550(1), made a policy judgment that defamation actions must be brought in a shorter time than the general limitations period of three years set forth in section 15-3-530 of the South Carolina Code (2005). In this case, the defendants prevailed on the statute of limitations defense as to the plaintiff's defamation claims. By now permitting the plaintiff to sue for the very same conduct—defamation—outside the limitations period for defamation cases—simply because the defamation claim is labeled as civil conspiracy—the majority frustrates the General Assembly's intent to require defamation cases be brought within two years.

The plaintiff's lawyer in this case did think to add a cause of action for civil conspiracy. Thus, on the majority's remand for trial, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Defamation defenses do not apply to civil conspiracy, which—as confirmed by the majority to be an independent tort—permits the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror's sense of fairness or responsibility. In other words, the civil conspiracy claim we remand for trial permits a court and jury to impose liability for defamation despite the fact the law provides valid defenses that prevent liability.

My point is illustrated by a case I tried years ago when I was a circuit judge. I have modified the facts slightly for simplicity. In an aging twenty-four unit condominium building in a beachfront city here in South Carolina, owners could sell individual units for an average of $250,000. A real estate developer believed he could renovate the building and sharply increase the value of each unit. The developer offered to purchase each unit for $400,000 on the condition that each of the twenty-four owners must sell. The owners realized their units were undervalued; they predicted that even this offer was less than full value; and they decided to seek competing offers from other developers. After receiving a superior offer from a second developer, and a counter offer from the first, the owners voted to accept the offer from the second developer. Twenty-three of them entered contracts to sell their units to the second developer.

The first developer—understandably—did not give up. He had figured out a way to bring a combined financial benefit of $3.6 million ($150,000 each) to the twenty-four unit owners, to renovate an aging building in the city, to employ quite a few people in the renovation and resale process, and to make a considerable profit for himself. He knew the condominium owners' association by-laws did not permit a sale or renovation of the entire building on less than a unanimous vote. Thus, he knew the second developer could not complete the deal without successfully purchasing all twenty-four units. So, the first developer approached one of the unit owners and purchased that individual unit for $600,000. By doing so, he placed himself back in control of the deal he had conceived.

Everybody was furious with the first developer, and they all sued him on every conceivable cause of action. The breach of contract claim failed because the developer had no contract with anyone except the one owner who sold to him. The breach of fiduciary duty claim failed because the developer owed no such duty. The

fraud and slander of title claims failed because the developer made no false statement. The intentional interference with a contract claim failed because the developer was justified in purchasing real estate to further his own financial interests. The interference with prospective contractual rights claim failed because the unit owners had a contract to sell to the second developer, not prospective contractual rights. I dismissed each of those claims because—applying the law—the plaintiffs had no right to recover from the developer. Nothing was left, except civil conspiracy.

In a hearing on the developer's motion for a directed verdict, the plaintiffs acknowledged the developer's actions were lawful. Quoting, however, from this Court's opinion in *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988), the plaintiffs argued "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another,'" and, "An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used."

The plaintiffs' arguments were facially correct. The first developer intentionally conspired with the owner of one unit for the purpose of preventing the other twenty-three owners from realizing the extra value in their units, and for the purpose of preventing the second developer from profiting from renovation of the building and resale of the renovated units. Yet, I granted a directed verdict on the civil conspiracy claim. I did so because the law should never permit a court or a jury to impose civil liability for lawful, non-tortious conduct. Without specific requirements, elements, or standards, the decision maker is left with nothing but its own sense of what is fair or responsible. That is neither fair nor responsible.

In our free-enterprise economy, we encourage entrepreneurs to use aggressive tactics to seize competitive advantage, create jobs for our people, and build value for our communities. For these efforts, entrepreneurs rightfully expect to earn handsome profits. Participants in this healthy competition use every lawful tactic at their disposal. Those who lose out are understandably envious, and often angry. But, actions that conform to the law—even when motivated by anger or an intent to harm—must not be the basis of civil liability. As the Supreme Court of the United States admonished 160 years ago,

> An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of

> actions in their relation to motives, but jurisprudence deals with actions in their relation to law . . . .

Adler v. Fenton, 65 U.S. 407, 410, 16 L. Ed. 696, 698 (1860).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe, Appellant,

v.

City of North Charleston; Leigh Anne McGowan, individually, Charles Francis Wholleb, individually, and Anthony M. Doxey, individually, Respondents.

Appellate Case No. 2017-002392

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5821
Submitted May 15, 2020 – Filed May 19, 2021

AFFIRMED

Gregg E. Meyers, of Mt. Pleasant, for Appellant.

Sandra J. Senn and Christopher Thomas Dorsel, both of Senn Legal, LLC, of Charleston, for Respondents.

HEWITT, J.: This is an appeal from a defense verdict in a case about whether police officers violated the civil rights of "Jane Doe," a vulnerable adult. The first issue is whether the trial court erred in directing a verdict on Jane Doe's claim that the officers created the risk Jane Doe would be harmed when they arrested Jane

Doe's adult daughter and left Jane Doe unattended in her home. The other issue is whether the trial court abused its discretion in handling the jury's second question about the charges for liability under 42 U.S.C. § 1983 (2018).

We affirm. We hold the trial court's grant of a directed verdict was correct, as the evidence did not rise to the level necessary for a claim that the police violated the constitution when they left Jane Doe at her house. On the jury charges, the trial court did not abuse its discretion when it repeated its earlier jury charges on liability and declined to repeat its instructions on damages.

FACTS

Daughter moved into Jane Doe's home in 2012 after it became clear Jane Doe was struggling to live alone. In 2013, Jane Doe was diagnosed with Alzheimer's disease and dementia.

The City of North Charleston Police Department dispatched police officers to Jane Doe's home one night in March 2014 after one of Jane Doe's neighbors reported a potential domestic disturbance. The neighbor reported seeing Daughter banging on the door and yelling for Jane Doe. The scene supposedly "seemed like a mess."

The first officer to arrive said no one was in Jane Doe's yard and no one answered knocks on the front and back doors. Other things were out of sorts as well: there was a pair of high heel shoes on the ground beside the driver's side door of the vehicle parked in the driveway, the vehicle's interior dome light was on, there were wine bottles in the back of the car, and a purse was on the ground in the backyard. The officer could not recall whether the vehicle's driver's side door was open, but the officer said the purse appeared to have fresh blood on it.

Other officers arrived, and they eventually determined an exigent entrance was necessary to check on the welfare of the woman who had reportedly been yelling outside the house. The officers did not have a warrant.

The officers met Jane Doe when they entered the house. They asked Jane Doe if she needed medical attention. All three officers reported that Jane Doe gave no indication in her response that she was suffering from dementia, was incapable of caring for herself, or could not be left alone. Jane Doe told the officers that Daughter was upstairs and led them to Daughter's room.

The parties disagree about what happened next. The officers said they found Daughter asleep in her bed but on top of her covers, fully dressed, and with a large red wine stain down the front of her shirt. They also said Daughter woke up and spoke with the officers, who observed that she was unsteady on her feet and that she declined medical assistance. They claimed that when the two male officers left the bedroom to help gather Daughter's belongings, she began screaming at her mother and flailing her arms, and she struck the remaining female officer. For her part, Daughter claimed that a large figure woke her up in the middle of the night and flipped her out of the bed. Daughter stated she believed she was about to be raped and that she yelled for her mother to "stay out of it" while struggling with the figure.

Daughter was arrested for assaulting a police officer. Daughter claimed the officers refused her request that she be allowed to call someone to look after Jane Doe. The officers disputed this and said they did not recall Daughter ever telling them Jane Doe had dementia, could not be left alone, or could not care for herself. Daughter remained in jail overnight.

Jane Doe stayed in the home by herself until her brother came to check on her around lunchtime the next day, shortly after learning about the situation. He said that Jane Doe was "a wreck" but he was able to calm her down after fifteen or thirty minutes. After that, he left Jane Doe at the house so he could get Daughter out of jail. When Daughter returned home she discovered Jane Doe had been wearing a soiled diaper for some time.

The police came to the residence again two days later, after an unattended Jane Doe had a neighbor call police to report a suspicious vehicle in Jane Doe's driveway. The responding officer determined the vehicle was actually Daughter's vehicle. Once Jane Doe's family returned to the home, EMS was called and Jane Doe was transported to the hospital.

Jane Doe was initially taken to the hospital because she had increasing levels of confusion from being left alone on multiple occasions over a forty-eight hour period. While at the hospital, Jane Doe was also diagnosed with a urinary tract infection, and she stayed in the hospital for approximately two weeks.

Litigation, Trial, and Directed Verdict

Jane Doe brought this lawsuit against the City of North Charleston and the three officers involved in Daughter's arrest. Her complaint alleged eleven different causes of action.

Three claims went to trial: deprivation of civil rights by North Charleston; invasion of privacy against North Charleston; and deprivation of civil rights by the responding officers. The civil rights claims were brought pursuant to 42 U.S.C. § 1983.

A key dispute at trial was whether the officers knew or should have known Jane Doe had diminished mental abilities and was unable to care for herself. Jane Doe's doctor testified the officers likely would not have recognized that Jane Doe had dementia unless they had been told. There was conflicting evidence on the point: as already noted, the officers disputed Daughter's testimony that she insisted she be allowed to contact someone to look after Jane Doe. A recording of the police dispatcher's conversation captured the dispatcher mentioning over the radio that Jane Doe had dementia. Still, the officer testified she did not hear the dispatcher mention dementia, explaining she may have been focused on assessing the scene at that moment rather than the radio.

At the close of all the evidence, the trial court directed a verdict on Jane Doe's "state-created danger" theory of liability. The court gave several reasons for its ruling, including that the officers could not be responsible for a danger (Jane Doe's dementia) that already existed. Jane Doe's claims against North Charleston proceeded to the jury, as did Jane Doe's claims that the individual officers violated her civil rights by making a warrantless entry into her home.

Jury Charges

The trial court gave the following charge on nominal damages during the lengthy jury instructions:

> Ladies and gentlemen[,] if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim[,] then you must award nominal damages of one dollar for that claim.

> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

Later, at the jury's request, the trial court gave a second instruction covering the elements of each cause of action. The court re-administered the entire section 1983 charge, including all of the charges on damages.

The jury submitted two additional notes to the trial court. The relevant part of the final note stated: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages[?]"

The trial court believed the jury was confusing damages as an element of liability under section 1983, insisting it was convinced the jury was asking whether Jane Doe needed to prove bodily harm. After discussion, the court decided to reinstruct the jury on the elements of a section 1983 claim, and not the various damages the jury could award for a valid claim, to avoid further confusion. Jane Doe asked the court to reinstruct the jury on nominal damages, but the court declined. The court said it would reinstruct the jury on damages if the jury asked to be reinstructed on damages.

The jury returned a verdict in favor of North Charleston and the officers. The trial court denied Jane Doe's motion for a new trial. This appeal followed.

ISSUES

1. Did the trial court err by granting a directed verdict on the "state-created danger" portion of Jane Doe's civil rights claims?

2. Did the trial court err in declining to re-charge the jury on nominal damages?

STATE-CREATED DANGER

Jane Doe argues the trial court erred in directing a verdict on her claim that officers violated her civil rights when they arrested Daughter, removed Daughter from the

house, and left Jane Doe home by herself. She claims the officers knew or should have known Jane Doe suffered from dementia and that the officers' actions unconstitutionally created a danger or increased the risk Jane Doe would be harmed.

The state-created danger doctrine arises from a line of U.S. Supreme Court cases finding that the government does not have a duty to protect people from privately-inflicted harm. A key case is *DeShaney v. Winnebago County Department of Social Services*, where the guardian of a young child alleged a child protection agency failed to respond to multiple child abuse complaints over an extended time period and should have prevented a father from severely beating his son. 489 U.S. 189, 191–94 (1989). *DeShaney* is commonly understood to turn on the reasoning that the constitution does not require the government to affirmatively protect citizens from private harms. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1, 2–3 (2007). Instead, the government has limited responsibility for a citizen's safety and well-being if the government takes a person into custody or when "the government is responsible for creating the danger." *Id.* at 3 (citing *DeShaney*, 489 U.S. at 199–200).

After *DeShaney*, courts around the country developed numerous "tests" for liability under the state-created danger doctrine. *See, e.g., Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). These cases tend to have tragic facts because recovering against the government requires a plaintiff to carry a heavy burden. Pursuant to *DeShaney* and its progeny, there is no due process violation unless a plaintiff shows a state actor engaged in reckless behavior or acted with deliberate indifference. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). Negligence and gross negligence are insufficient. *See Daniels*, 474 U.S. at 327.

This court previously employed the Fourth Circuit's formulation that due process does not require the government to affirmatively protect its citizen's rights; due process is a negative prohibition designed to protect people from the State rather than requiring the State to act. *See Pack v. Associated Marine Insts., Inc.*, 362 S.C. 239, 248–49, 608 S.E.2d 134, 139–140 (Ct. App. 2004) (quoting *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995)). More recently, the Fourth Circuit explained a plaintiff must show "that the state actor created or increased the risk of private

danger, and did so directly through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015).[1]

Here, the trial court based its directed verdict, at least in part, on the fact that there was no evidence the officers' actions allowed a third party to harm Jane Doe. Although some jurisdictions require a third party "bad actor" to establish liability under the state-created danger doctrine, we were unable to find any precedent from South Carolina or the Fourth Circuit establishing this requirement.

Still, we find the trial court appropriately granted the police officers a directed verdict. *See* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). The police did not take Jane Doe into custody, place any restraints on her freedom, or assume the responsibility of caring for her. At best, the testimony shows the officers may have been negligent or grossly negligent, for when the facts are viewed in Jane Doe's favor, the absolute most someone can say is that officers were told, either by Daughter or by the dispatcher, Jane Doe had dementia before they left Jane Doe home alone.

Nothing suggests the North Charleston officers knew a high probability of harm would follow their actions. There is no evidence the police had any reason to think Jane Doe was at risk of harming herself. Indeed, the circumstances and scene suggested Jane Doe had been home alone before Daughter came home intoxicated. The police had no reason to think Jane Doe was incapable of summoning help if she encountered any danger. It is undisputed that Jane Doe responded to the officers' questions and told them where to find Daughter.

We note that, as mentioned above, our analysis is controlled by the fact that negligence and gross negligence are insufficient to move forward on a claim that police action was so wanton that it amounts to a violation of due process. For these reasons, we affirm the trial court's grant of directed verdict on Jane Doe's "state-created danger" theory of liability.

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[1] *Pinder* reads *DeShaney* to require a "special relationship" between the state actor and the plaintiff. *Pinder*, 54 F.3d at 1174–75. *Doe* appears to take a different view and says that "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive." 795 F.3d at 438 (quoting *Pinder,* 54 F.3d at 1177).

JURY INSTRUCTION

Jane Doe also argues the trial court's refusal to re-charge the jury on nominal damages was misleading and "distorted" the standard for liability under section 1983.

The standard of review on this issue is weighted heavily in favor of affirming. "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Also, "[w]hen the jury requests additional charges, it is sufficient for the [trial] court to charge only the parts of the initial charge which are necessary to answer the jury's request." *The Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 165, 791 S.E.2d 152, 164 (Ct. App. 2016) (quoting *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985)). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378).

We cannot say the trial court abused its discretion when it perceived the jury to be confusing the various types of available damages with the elements of a successful 1983 claim. The "injury" in a section 1983 case is the violation of the plaintiff's rights. *See Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988) (elements are that the defendant acted under color of state law and deprived plaintiff of a federally-protected right). To this end, the threshold question for liability was whether the circumstances justified the officers' warrantless entry into Jane Doe's home.

The jury's question was an awkwardly worded and confusing one: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages[?]" The trial court interpreted the question as asking whether there had to be bodily harm for there to be a legal "injury," and the court believed this indicated the jury was confusing the concepts of an injury and damages. The court was convinced that the jury did not need to hear the entire charge on section 1983 a third time and the best way to answer the jury's question was to repeat the charges on "liability" the court had given twice before.

The trial court could just as well have reached the conclusion the jury was asking about damages and not liability. There is much force and appeal to the reasoning in the dissent. Still, given that we believe both views of the jury's question are possible, we believe the trial court did not abuse its discretion.

Again, we note precedent's instructions that it is sufficient for the trial court to re-charge only that which is necessary to answer the jury's question and that failing to re-charge in greater detail is not necessary when the original charge fully covered the details. *See Winthrop Univ. Trs.*, 418 S.C. at 165, 791 S.E.2d at 164 ("When the jury requests additional charges, it is sufficient for the [trial] court to charge only the parts of the initial charge which are necessary to answer the jury's request." (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378)); *id.* ("[The trial court's] failure to charge in greater detail is not error if the details were fully covered in the original charge." (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378)). Jane Doe's arguments on appeal do not challenge the sufficiency of the jury instructions on nominal damages, but merely that they were not given for a third time, which precedent states is not an error.

CONCLUSION

For the foregoing reasons, the trial court's judgment is

AFFIRMED.[2]

LOCKEMY, C.J., concurs.

GEATHERS, J., dissenting: I respectfully depart from the well-written decision reached by the majority. The jury submitted a question seeking to determine whether the plaintiff was required to show an actual injury in order to establish a violation of her civil rights for purposes of her section 1983 claim.[3] To respond to this question, it was necessary to repeat the initial nominal damages charge, which included the

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

[3] Accompanying this question was the jury's request to obtain a copy of the language in section 1983, which the circuit court denied.

language quoted below, because the essence of this charge is the idea that a plaintiff does not have to incur a traditional injury to successfully prosecute a 1983 claim:

> [I]f you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim then you must award nominal damages of one dollar for that claim.
>
> A person whose federal rights were violated is entitled to a recognition of that violation *even if he or she suffered no actual injury*. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

(emphasis added). In other words, the violation of a right is itself considered an injury. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("Because 'every violation [of a right] imports damage,' nominal damages can redress [the plaintiff's] injury even if he cannot or chooses not to quantify that harm in economic terms." (second alteration added) (citation omitted) (quoting *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 509 (C.C.D. Me. 1838) (No. 17,322))). In the absence of this key language, the circuit court's re-charge on the claim's general elements, especially proximate cause, likely confused the jury or gave the jury the impression that a traditional injury is required.

I am not suggesting that the circuit court always has to repeat a charge in its entirety when responding to a jury's question. However, in the instant matter, the court included the nominal damages language in the first two charges on the requirements for a section 1983 claim and omitted the nominal damages language in the third and final charge in response to the jury's question concerning an actual injury. Under these circumstances, I believe the omission of this key language de-emphasized it or removed it from the jury's consideration when, in fact, it was the only language that would have directly responded to the jury's question. *See Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 165, 791 S.E.2d 152, 164 (Ct. App. 2016) ("When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge [that] are *necessary to answer the jury's request*." (emphasis added) (quoting *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985)).

In sum, the denial of counsel's request to re-charge the jury on nominal damages was based on the erroneous conclusions that (1) the nominal damages charge was unnecessary to respond to the jury's question and (2) a re-charge on the claim's general elements, in the absence of the nominal damages language, would be more responsive. *See id.* Because the circuit court's ruling was based on errors of law, I would reverse and remand for a new trial. *See First Union Nat. Bank v. First Citizens Bank & Tr. Co. of S.C.*, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) ("An abuse of discretion can occur where the trial court's ruling is based on an error of law."); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) ("An abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vickie Rummage, Employee, Appellant,

v.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, Respondents.

Appellate Case No. 2018-000359

Appeal From The Workers' Compensation Commission

Opinion No. 5822
Heard September 23, 2020 – Filed May 19, 2021

AFFIRMED

Andrew Nathan Safran, of Andrew N. Safran, LLC, of Columbia, for Appellant.

Michael Allen Farry and Jeremy R. Summerlin, both of Horton Law Firm, P.A., of Greenville, for Respondents.

KONDUROS, J.: Vicki Rummage (Claimant) appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) denying her claim for aggravation of a preexisting psychological condition. We affirm.

FACTS/PROCEDURAL BACKGROUND

Claimant worked the third shift as a weaver for BGF Industries. On May 18, 2012, at approximately 3 a.m., she fell after stumbling backward into a hand truck that had been placed behind her while she was doffing her weaving machine. Claimant fell backward and struck her head causing a laceration and scrape marks along her neck. She declined going to the hospital at that time, and the wound was closed with glue from the company's first aid supplies. She finished her shift but later stated she had some blurred vision and a headache after the accident. She drove home and returned to work for her next shift two days later. Claimant worked for a week, and her supervisor sent her for evaluation at the local hospital where she had a CT scan that showed normal results.

Dr. John McLeod, III, a workers' compensation physician for BGF Industries and its insurer Great American Alliance Insurance Co. (collectively, Respondents), evaluated Claimant on May 30, 2012, and noted he "suspected some element of concussion." It was noted her medications included Xanax, Percocet, Prinivil, Lopid, Fiorcet, Ambien, and Lorcet. She complained of headaches and soreness in her upper back and neck. A follow-up appointment on June 6, 2012, did not reveal any significant new information.

In September 2012, Claimant was referred to Dr. Jeff Benjamin at Grand Strand Specialty Associates. Claimant admitted a history of migraine headaches to Dr. Benjamin but indicated the ones she was suffering post-injury were different and "quite excruciating." She also complained of fatigue, nausea, blurred vision, spasms in her legs, and mood swings. Dr. Benjamin noted Claimant's symptoms were consistent for closed-head injury. She subsequently complained of fogginess and extreme fatigue. Claimant began physical therapy for her neck and was prescribed Trileptal for headaches and cervical strain. Claimant reported being an "emotional mess" based on the nausea and headaches she was experiencing. Dr. Benjamin gave Claimant trigger point injections,[1] and she received an occipital

[1] "A trigger point injection (TPI) is an injection that is given directly into the trigger point for pain management. The injection may be an anesthetic such as lidocaine (Xylocaine) or bupivacaine (Marcaine), a mixture of anesthetics, or a corticosteroid (cortisone medication) alone or mixed with lidocaine." Catherine

nerve block. Eventually, in November, Dr. Benjamin indicated he did not think there was much more he could do to assist Claimant except refer her to a pain clinic.

In December of 2012, Claimant began seeing Dr. Daniel Collins, another workers' compensation physician, who treated her for the next three years. His initial note reflects a prior medical history of only sinus troubles. Claimant complained of pain in her neck and head, ringing in her ears, and lightheadedness with slight memory loss. Dr. Collins prescribed Neurontin, which Claimant indicated she had not tried before; physical therapy; and a speech therapy evaluation. In a follow-up a month later, Dr. Collins's notes reflect Claimant was attending speech therapy for mild cognitive impairments, physical therapy, and she would begin taking Lyrica. Claimant was still experiencing significant headaches and neck pain. In the following months, Dr. Collins noted worsening depression. He administered trigger point injections for neck pain and Botox injections for headaches. He prescribed various medications for depression, anxiety, sleep issues, and pain.

Claimant attended speech therapy with Martha Williams at Sandhills Regional Medical Center Rehab Services beginning in January 2013. After testing, Williams reported Claimant had mild impairment of attention, memory, executive function, and visuospatial skills. Williams indicated Claimant's fatigue or preoccupation would increase deficits to a moderate level. Williams worked with Claimant to use different strategies to manage and complete daily tasks. On Williams's advice, Claimant was using games to aid with focus and cognitive abilities. By October, Williams noted improvements in language and task management but the therapy had benefitted Claimant as much as possible at the time.

During the course of litigation, it was discovered Dr. Fred McQueen had treated Claimant for years prior to her workplace injury for various conditions. His notes in the record begin in 2006 and continue to the date of Claimant's injury and a few months beyond. In 2006, Dr. McQueen noted Claimant suffered from cervical and lumbrosacral disc disease with radiculopathy down her extremities. Over the course of the next six years, Dr. McQueen prescribed a variety of medications for anxiety, depression, sleep problems, muscle spasms and soreness, headaches, and

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Burt Driver, M.D., *Trigger Point Injection*, MedicineNet (July 30, 2020), https://www.medicinenet.com/trigger_point_injection/article.htm.

pain. He noted the various stressors in her life including caring for her husband and adult son, who both suffered health issues, caring for both parents through the end of their lives, and working multiple jobs. He noted twice he was concerned with how much longer Claimant would be able to keep working like she was and that her body was breaking down. Dr. McQueen's notes characterize her at times as having chronic depression and chronic pain, and the notes consistently showed she was taking medication for pain and Xanax, while the prescribing of some other medications seem to fluctuate slightly in being prescribed or filled.

Respondents deposed Claimant in December 2013. She testified she had a previous workers' compensation claim with a different employer in 2007 that had been denied, she had not been represented by an attorney in that case, and that it did not progress to a hearing. She also denied being deposed in the prior case. With regard to her treatment and condition after her fall, Claimant testified she complained of neck, arm, back, and leg pain during her visit with Dr. McLeod but was mainly concerned with her head. Claimant testified she then saw Dr. Benjamin and complained of neck and head pain. She next saw Dr. Collins and provided him with a history of Dr. Benjamin's treatment but according to Claimant, Dr. Collins did not ask about any other prior medical history. Claimant acknowledged Dr. McQueen had given her pain medications in the past but claimed she could not remember if it was for her neck and back; she thought it was mainly for her leg. Claimant also acknowledged Dr. McQueen had prescribed depression medications for her in the past when she was experiencing difficult times. She only recalled taking blood pressure medication at the time of her workplace injury. Claimant indicated the problems that began after her fall included headaches, dizziness, ringing in the ears, loss of memory, depression, and neck pain. She stated her neck pain radiated down her arm and she had not had similar neck or arm pain before. Finally, Claimant stated she could no longer manage her housework or caregiving duties and she is very easily confused and distracted. She indicated she sometimes used Facebook to stay in touch with people and played games on the computer for short periods of time as recommended by her speech therapist.

Dr. Collins's deposition was taken March 13, 2014. He stated he was not made aware of a lot of Claimant's prior medical history which concerned him. He stated, "[I]t's really impossible to tell at this point how much or how little the work injury from May 2012 played into symptoms that she had apparently been experiencing for a few years, several years." Dr. Collins noted some of Claimant's current

medications were very similar to prior medications, but some of them were new, for example the Botox injections. Dr. Collins stated, "It becomes harder and harder to figure out what is related specifically to the work injury from May and what is possibly an exacerbation of a preexisting or possibly a completely new diagnosis." Dr. Collins noted Claimant's speech issues were new and that he had no doubt she wanted to get better. Dr. Collins opined a long-term physician would be able to give the best information about the progression of her issues.

That same day, March 13, 2014, Dr. McQueen, Claimant's long-time physician completed a form sent to him by Claimant's attorney in January. It indicated Dr. McQueen's opinion, to a reasonable degree of medical certainty, that Claimant's current headaches, frequency of cervical symptoms, and depression were made worse by her fall and were consistent with post-concussive syndrome. He also opined the treatment for these aggravated symptoms was different and more focused than prior to the fall and she was previously able to continue to work in spite of any preexisting conditions.

Several specialists evaluated Claimant for this case. Tora Brawley, Ph.D., a clinical psychologist and neuropsychologist, evaluated Claimant on May 15, 2014. Claimant's neurocognitive test was discontinued due to interference of her psychiatric symptoms, and Dr. Brawley indicated Claimant could be reevaluated once those were better managed. Dr. Brawley stated "formal assessment of effort did not reveal attempts to malinger." Dr. Amanda Salas, a forensic psychiatrist, evaluated Claimant in April 2015 and issued a report of her findings in September 2015. Dr. Salas indicated Claimant presented as honest and determined, not overly exaggerated or dramatic. In talking with Claimant, Dr. Salas observed she had trouble with landmark dates and some word-finding difficulties. Claimant's husband stated Claimant had gotten lost driving in familiar places and had frequent crying spells. Dr. Salas diagnosed Claimant with Major Depressive Disorder, different than her prior depression. She opined Claimant was not at maximum medical improvement as to mood symptoms and memory impairments, and that she should be stabilized emotionally and then evaluated for cognitive deficit. Finally, Dr. Donna Schwartz Maddox, a psychiatrist with added qualifications in forensic psychiatry, interviewed Claimant in June of 2014 and prepared a report dated April 2016.[2] Dr. Maddox stated Claimant was not malingering and exhibited good effort on the cognitive portion of her mental status exam and did not over

[2] No explanation is provided for the delay between the interview and report.

endorse symptoms. She noted Claimant's pseudobulbar affect[3] was difficult to feign. Dr. Maddox indicated that, in her opinion, Claimant had increased depression since the accident and needed therapy along with better pharmacological treatment. Claimant's neurocognitive deficits could then be evaluated. Dr. Maddox met with Claimant again in October of 2016 and opined she remained depressed with a flat and tearful affect.

All of the aforementioned providers reviewed Claimant's prior medical history, and Claimant acknowledged prior depression and osteoarthritic pain to each. Claimant also complained to each of worsening depression and headache pain in addition to the new symptoms previously mentioned including ringing in the ears, memory loss, speech impairment, low energy, and a general inability to focus.

In April 2015, at Employer's request, Claimant was evaluated at NC Neuropsychiatry in Charlotte, North Carolina.[4] Dr. Thomas Gualtieri administered various tests to Claimant, which primarily involved her responding to questions on a computer. Dr. Gualtieri stated:

> The patient's evaluation today demonstrates a non-credible clinical presentation with dramatic inconsistencies. The patient's overt memory performance and indeed general appearance, fluency and lucidity is quite a variance with her claimed symptomatology. There was clear evidence of symptom exaggeration. There is no reason to believe that her current problems are related to a head injury . . . . [H]er subsequent course is not at all typical of recovery from concussion.

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[3] "Pseudobulbar affect . . . is a condition [that is] characterized by episodes of sudden uncontrollable and inappropriate laughing or crying. Pseudobulbar affect typically occurs in people with certain neurological conditions or injuries, which might affect the way the brain controls emotion." Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/pseudobulbar-affect/symptoms-causes.

[4] The report is actually dated 12/11/14, but Employer indicates that was error. Claimant suggests the erroneous date indicates this was something of a canned report preprepared by Dr. Gualtieri.

He opined Claimant may suffer from somatization disorder.[5]

Drs. Brawley and Salas both questioned Dr. Gualtieri's choice of tests and methodology. Additionally, they both felt the results of Dr. Gualtieri's testing were invalid because Claimant's significant depressive disorder would interfere with her performance, rendering them unreliable.

Dr. Gualtieri responded to the criticisms of his evaluation. He indicated a main factor in evaluating brain injury was the nature of the initial injury itself and Claimant's description of the injury and delay in seeking treatment rendered this a "non-event." In light of her history, it was not reasonable to assume any current issues were attributable to her fall. Dr. Gualtieri also expressed the validity of his Neuropsych Questionnaire test and noted it was more reliable than just an interview assessment of whether a person was exaggerating or feigning symptoms. He cited to numerous journal articles he had authored on the subject. Dr. Gualtieri indicated Claimant had presented herself well and recalled her history fluently although she was occasionally tearful. He stated she did not appear depressed and was not impaired from taking the tests he administered. Additionally, the test scores she received were inconsistent with each other and not consistent with a profile of someone with a traumatic brain injury.

After all the evaluations, and after having provided Claimant's prior medical history in full, Claimant's attorney solicited final opinions—such as the one issued by Dr. McQueen—from Dr. Collins, Dr. Salas, and Dr. Maddox. They all opined to a reasonable degree of medical certainty Claimant was not malingering, presented clinical evidence of depression and anxiety (probably Major Depressive Disorder), had suffered an increase in her psychological issues after her workplace injury, had not reached MMI, and required psychiatric treatment including therapy.

Finally, a hearing on Claimant's case was held in November of 2016. At that time, Claimant acknowledged seeing Dr. McQueen and that she had previously struggled with depression, including taking medication for it. However, she indicated it was nothing she was not able to overcome; she was working, taking care of her responsibilities, and never received psychiatric therapy. Claimant testified she had

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[5] "Somatization occurs when psychological concerns are converted into physical symptoms." GoodTherapy, https://www.goodtherapy.org/learn-about-therapy /issues somatization (last visited December 11, 2020).

headaches before her fall but the ones after the accident were different. The nausea accompanying her headaches became worse, and she began experiencing new symptoms including ringing in the ears, speech issues, and dizziness. Claimant indicated she received Botox injections from Dr. Collins and was prescribed medications that helped. However, after Dr. Collins left his practice she "got nothing." At the time of the hearing, she was no longer receiving workers' compensation benefits and was not receiving Botox injections. She indicated her crying and depression were worse, she could not be in a crowd, and did not "have a life" anymore. She also testified her memory issues were new. Claimant further testified she used Facebook at her speech therapist's suggestion as a means to stay in contact with people. Her primary Facebook activity centered on offering prayers to others and commenting on pictures of her grandchildren and their activities. Claimant indicated she had not tried to hide prior issues from her providers.

On cross-examination, Claimant stated she did not go to the doctor immediately after her accident and continued working until August 2012, approximately three months after the injury, although she struggled every day. She acknowledged taking medication for pain and depression since 2005. She admitted her medications had included Xanax, Ambien, and Cymbalta. Claimant acknowledged receiving medications for pain and depression in 2007 and 2009, while being treated for pain, depression, anxiety, and headaches. Claimant did not recall her specific medications, but again, did not dispute anything reflected in the records. In December 2009, Dr. McQueen was still treating Claimant for chronic pain, migraines, and generalized anxiety disorder (GAD), but according to Claimant these issues were not like they became after the accident. Claimant did not recall how she responded during her deposition to questions about her prior workers' compensation claim except that her husband's insurance had paid for her shoulder surgery which was the subject of the claim. Claimant remembered being treated for pain prior to the accident but she did not know if it was called chronic pain. She admitted Dr. Collins prescribed some of the same medications as Dr. McQueen had previously for depression and anxiety.

The single commissioner denied Claimant's claim, by and large based on her assessment of Claimant's credibility. The single commissioner found Claimant to be "wily and manipulative" and noted her belief Claimant was "using the worker[s'] compensation system for purposes of secondary gain." The single commissioner gave little weight to the medical opinions of Drs. Collins, Brawley,

Salas, and Maddox because they had not been provided Claimant's accurate medical history and had based their opinions on Claimant's unreliable self-reporting. The single commissioner gave greater weight to Dr. Gualtieri's opinion that Claimant was untruthful because it "mirrored" her own impressions and "matched the evidence." According to the single commissioner, Dr. Gualtieri "was not fooled or manipulated" by Claimant. Over Claimant's objection, the single commissioner had admitted the order of Commissioner Barry Lyndon from Claimant's prior workers' compensation case. This document was admitted to impeach Claimant's deposition testimony regarding whether a deposition, attorney, or hearing was involved in that case. In her order, the single commissioner indicated she had not relied on Commissioner Lyndon's credibility analysis in making her own assessment in the present case.

Claimant appealed the single commissioner's order raising numerous allegations of error, primarily the single commissioner had ignored the great weight of medical evidence and relied solely on her credibility assessment to deny the claim. At the hearing before the Appellate Panel, Claimant offered the case of *Michau v. Georgetown*, 396 S.C. 589, 723 S.E.2d 805 (2012), and argued Dr. Gualtieri's opinion, which was not stated to a reasonable degree of medical certainty, did not qualify as "medical evidence" sufficient to rebut the medical evidence offered by Claimant. Respondents acknowledged Dr. Gualtieri's opinion was not so stated.

The Appellate Panel affirmed the single commissioner, and its order essentially adopted the single commissioner's order[6] with only a minor deviation. This appeal followed.

STANDARD OF REVIEW

"In an appeal from the Commission, [the appellate court] . . . may [not] substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law." *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008). "Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." *Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). "Accordingly,

[6] The Appellate Panel unanimously affirmed the single commissioner's order and stated "the same shall constitute the Decision and Order of the Appellate Panel."

we limit review to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law." *Jones*, 376 at 378, 656 S.E.2d at 774.

"Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." *Lockridge*, 344 S.C. at 515, 544 S.E.2d at 844. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Lee v. Harborside Cafe*, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (quoting *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

LAW/ANALYSIS

I. Medical Evidence—Admission of Dr. Gualtieri's Report

Claimant contends the Appellate Panel erred in affirming the single commissioner's order because the single commissioner relied on the medical opinion of Dr. Gualteri, although that opinion was not stated to a reasonable degree of medical certainty as required by section 42-9-35 of the South Carolina Code (2015) and as discussed in *Michau v. Georgetown*, 396 S.C. 589, 723 S.E.2d 805 (2012).[7] We conclude this issue is not preserved for our review.

The workers' compensation scheme provides for the manner of review of a single commissioner's order. "Either party or both may request Commission review of the Hearing Commissioner's decision by filing the original and three copies of a Form 30" and "[t]he grounds for appeal must be set out in detail on the Form 30 in the form of questions presented." S.C. Code Ann. Regs. 67-701(A)(3) (2012). "Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error." S.C. Code Ann. Regs. 67-701(A)(3)(a). As to what this requirement means in terms of preservation, our courts have said "[o]nly issues raised to the [Appellate Panel] within the application for review of the single commissioner's order are preserved

[7] In *Michau*, the court concluded a medical opinion offered by the opponent of a workers' compensation claim must be stated to a reasonable degree of medical certainty. *Id.* at 596, 723 S.E.2d at 808.

for review." *Hilton v. Flakeboard Am. Ltd*., 418 S.C. 245, 249, 791 S.E.2d 719, 722 (2016). *See also Ham v. Mullins Lumber Co*., 193 S.C. 66, 7 S.E.2d 712 (1940) ("[A]ll findings of fact and law by the [single c]ommissioner became and are the law of this case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission."). This issue was not raised in Claimant's exceptions to the single commissioner's order. [8]

Claimant first raised the *Michau* argument during her hearing before the Appellate Panel. Afterward, when reviewing a draft order denying the claim, Claimant, via letter, persuaded the Appellate Panel to include a mention of the *Michau* case and section 42-9-35 in its final order. Therefore, Claimant argues the issue was raised to and ruled on by the Appellate Panel, and the issue is therefore preserved. Indeed, an oft-cited rule of appellate preservation instructs an issue must be raised to and ruled upon to be preserved for appellate review. However, other requirements for preservation cannot be disregarded. To successfully preserve an issue for appellate review, the issue must be: "(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Therefore, even if we look to general appellate rules of preservation in deciding this issue, we cannot conclude Claimant's argument was "raised in a timely manner." Dr. Gualtieri's report was provided to Claimant prior to the hearing before the single

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[8] Claimant argues she raised this issue to the Appellate Panel prior to the hearing by stating in her prehearing memo that there was an absence of "competent evidence which support[ed] the fact finder's determination [Claimant] did not meet her burden of proof." However, "[e]ach issue raised to the Commission must be done with specificity, not through blanket general exceptions." *Hilton*, 418 S.C. at 251 n.2, 791 S.E.2d at 722 n.2. *See also Adcox v. Clarkson Bros. Constr. Co.*, 773 S.E.2d 511, 516 (N.C. Ct. App. 2015) (noting a claimant's very generalized exception to the hearing commissioner's order was "like a hoopskirt—cover[ing] everything and touch[ing] nothing"). Furthermore as to Dr. Gualtieri's opinion specifically, Claimant alleged only that he created the report prior to meeting Claimant, that he used his own diagnostic tests when evaluating Claimant, that he was not qualified to evaluate neuropsychological test data, and that his findings do not align with Claimant's experts' findings.

commissioner and any defect it suffered could have been raised before the hearing in front of the Appellate Panel. Consequently, Claimant's point is unpreserved.

II. Admissibility of Prior Order

Claimant also maintains the Appellate Panel erred in affirming the single commissioner's order when the single commissioner admitted the prior workers' compensation order of Commissioner Lyndon. We disagree.

Rule 608(b), SCRE, provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness'[s] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002), a medical malpractice action, the defendant impeached the plaintiff's expert witness with a jury interrogatory from a prior court case in which the expert was found untruthful. The supreme court considered whether the introduction of the interrogatory was error.

> Essentially, Rule 608(b) allows specific instances of conduct to be *inquired into* on cross, but does not allow those instances of conduct *to be proved* by extrinsic evidence. Reading a jury interrogatory into the record is more than inquiry into past conduct; the purpose of doing so is to prove past conduct. Although [the witness] could have been questioned (and was questioned) about the conduct that was the subject of the suit, he should not

> have been questioned directly regarding what a previous jury allegedly concluded about such conduct.

Id. at 401, 570 S.E.2d at 180-81 (omitted parenthetical).

Additionally, the court found the admission of the interrogatory was not harmless because the issue of the expert's credibility was of paramount consideration in the case. *Id*. at 401, 570 S.E.2d at 181.

In this case, the single commissioner, over Claimant's objection, admitted Commissioner Lyndon's order. Respondents maintain this was done to impeach Claimant's deposition testimony that she had never been deposed before, she did not have an attorney in the prior case, and the prior case did not proceed to a hearing. However, extrinsic proof is not permitted under these circumstances and Rule 608 and, at the very least, the entire order, which commented on Claimant's credibility, was not relevant to impeach as to those specific points. Commissioner Lyndon's order calls Claimant's credibility into question at least five times and gives little weight to Dr. McQueen's opinion based on inconsistencies and contradictions therein. There can be little doubt Respondents offered this evidence in an attempt to establish Claimant had been untruthful in a prior workers' compensation case and, in conformity therewith, was being dishonest in this case. Additionally, the prior order commented on the credibility of Dr. McQueen, a key medical provider in the present case. Undoubtedly, the admission of the order was erroneous.

Nevertheless, the admission of the prior order is subject to a harmless error analysis. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 299, 519 S.E.2d 583, 600 (Ct. App. 1999) (subjecting the erroneous admission of letters in a workers' compensation case and finding their admission harmless when the information contained therein was cumulative of other admissible evidence). The admission of this evidence is troubling. It speaks directly to the credibility of Claimant and a key medical provider in the case. The single commissioner's credibility findings are the foundation of her decision. Nevertheless, the single commissioner indicates she did not consider Commissioner Lyndon's credibility findings, and as an officer of the court, we give credence to the veracity of that assertion. Additionally and importantly, as will be discussed in Section III, other substantial evidence in the record supports the single commissioner's credibility determination. Therefore,

while the admission of the prior order was clearly erroneous, we conclude the error was harmless under the particular facts of this case.

III. Expert Medical Evidence and Credibility

Finally, Claimant argues the decision of the single commissioner, and its affirmance by the Appellate Panel, was arbitrary and capricious as it was based on lay observations and non-medical evidence as opposed to the medical evidence presented in the case. We disagree.

"The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009). "The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011).

In a case brought under section 42-9-35, the burden is on the claimant to produce medical evidence to establish a claim for the exacerbation of a preexisting condition. *See* §42-9-35(A) ("The employee shall establish by a preponderance of the evidence, including medical evidence, that: (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment . . . ."). However, this does not require the fact finder to ignore medical evidence that is not expert opinion, other lay evidence, or the credibility of the Claimant. In some instances the medical evidence and credibility determination can be tidily separated. For example, a recent case from the supreme court, *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 643, 842 S.E.2d 349, 352 (2020), discussed the interplay of credibility determinations and medical evidence in workers' compensation cases.

> The commission often makes findings of fact based on credibility determinations
>
> . . . .

> The reason we consistently affirm these findings derives from a principle that applies beyond credibility to all factual determinations of the commission: "an award must be founded on evidence of sufficient substance to afford a reasonable basis for it." When the commission's factual determination is "founded on evidence of sufficient substance," and the evidence "afford[s] a reasonable basis" for the commission's decision in the case, the evidence meets the "substantial evidence" standard and we are bound by the decision. This point is illustrated in the hundreds of cases in which our appellate courts have affirmed factual determinations by the commission.

Crane, 429 S.C. at 643, 842 S.E.2d at 352 (quoting *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012)).

> In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact. This case illustrates that point. Even if [the claimant] was untruthful in his testimony at the hearing, his claims for future medical care, temporary total disability, and permanent impairment caused by hearing loss are based on objective medical evidence. The opinions of his treating physicians that he suffers from severe to profound hearing loss as a result of his work-related accident are similarly based on objective medical evidence. There is little in [the claimant]'s medical records—or anywhere in the record before us—that indicates [the claimant]'s credibility reasonably and meaningfully relates to whether he actually suffered hearing loss on [the date of the incident].
>
> To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to

> understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision. In most cases, this is obvious from context.

Id. at 646-47, 842 S.E.2d at 354.

In this case, credibility was a substantial issue because the deterioration in Claimant's psychological condition was not objectively measureable like the employee's hearing loss in *Crane*. Therefore, the Appellate Panel could have properly given less weight to Claimant's doctor's opinions if it believed Claimant was untruthful in her self-reporting of symptoms or her presentation. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."); *see also Fishburne*, 384 S.C. at 87, 681 at 601 (noting the single commissioner gave less weight to a physician's opinion "because of the objective evidence and [her] own observations and impressions at the hearing," which included finding the claimant was not credible).

Although the single commissioner's unforgiving assessment of Claimant's credibility was unduly harsh and unwarranted, the record is not without substantial evidence that Claimant lacked credibility, even in the absence of Commissioner Lyndon's order. In particular, in her deposition, Claimant denied some relatively major prior issues entirely. For example, she denied any real neck problems or dizziness prior to the accident even though she had complained of both many times according to Dr. McQueen's notes and had undergone a CT scan prior to her injury for "headaches and dizziness." She characterized her depression as manageable and somewhat episodic although Dr. McQueen and/or his nurse practitioner characterized it as chronic and major at different times. Claimant appeared to downplay the frequency and intensity of prior headaches in spite of McQueen's notes indicating she suffered from tension headaches, sinus headaches, and later, migraine headaches. With respect to medications, Claimant frequently indicated she did not remember whether she was taking a particular medication at a given time, although she did not deny taking medicines generally. Her greatest misleading statement as to specific medications was that she was only taking "something for blood pressure" at the time of her fall when the records reveal she had been taking Percocet and Xanax consistently for many years and other

medications with frequency. The record also demonstrated two occasions in which Claimant had been dishonest with providers regarding the filling of her pain medications. The single commissioner also relied on her lay observations of Claimant's demeanor.

Claimant's medical records demonstrated a long-standing history of serious psychological issues. Additionally, the medical evidence showed Claimant did not lose consciousness when she fell and two weeks postfall, she exhibited no "focal neurological deficits." Dr. Gualtieri's report also indicated Claimant's injury was not the type that should have produced the issues she was suffering and that in his opinion, Claimant was malingering.

In sum, substantial evidence in the record supports the Commission's decision. Claimant's medical experts' opinions were substantially weakened in light of the credibility findings of the Appellate Panel as the opinions rely, at least in part, on an unexaggerated presentation of symptoms. The medical evidence presented by Respondents established Claimant had long-standing significant psychological issues prior to her workplace fall and the fall itself may not have been the source for any deterioration in her condition. Ever mindful of our limited standard of review in workers' compensation cases, the order of the Appellate Panel denying Claimant's compensation is

AFFIRMED.

LOCKEMY, C.J., concurs.

MCDONALD, J., concurring in result only.