The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who were administratively suspended from the practice of law on April 1, 2012, under Rule 419(b)(2), SCACR, and remain suspended as of June 1, 2012. Pursuant to Rule 419(e)(2), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by July 1, 2012.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
June 8, 2012

LAWYERS SUSPENDED FOR NON-COMPLIANCE
WITH MCLE REGULATIONS FOR THE
2011-2012 REPORTING PERIOD
AS OF JUNE 4, 2012

J. Reid Anderegg
PO Box 73129
North Charleston, SC 29415

James R. Berry
PO Box 186
Cottageville, SC 29435

William A. Boyd
302 Main Street
Andrews, SC 29510
INTERIM SUSPENSION (7/14/11)

James Michael Brown
102 Greenbow Court
Columbia, SC 29212
INTERIM SUSPENSION (4/13/11)

Mark F. Dahle
PO Box 6629
Lakeland, FL 33807
ONE YEAR SUSPENSION (7/25/11)

Margaret L. Drake
3722 Heyward Street
Columbia, SC 29205

Douglas F. Gay
PO Box 10506
Rock Hill, SC 29731
INTERIM SUSPENSION (1/13/12)

Donna S. Givens
125 Misty Oaks Place
Lexington, SC 29072
9-MONTH SUSPENSION (2/7/11)

Chad B. Hatley
PO Box 51
North Myrtle Beach, SC 29597
INTERIM SUSPENSION (9/28/11)

Christopher M. Hill
2672 Bayonne Avenue
Sullivan's Island, SC 29482
SUSPENDED BY SC BAR (2/1/12)

Christine A. Hofmann
210 Joey Drive
St. Augustine, FL 32080

Gary D. James, Sr.
PO Box 806
North Myrtle Beach, SC 29597
INTERIM SUSPENSION (11/15/11)

Kenneth C. Krawcheck
310 Broad Street, Apartment 14-S
Charleston, SC 29401

Wilton Darnell Newton
PO Box 887
Easley, SC 29641
INTERIM SUSPENSION (11/17/11)

Anthony C. Odom
262 Eastgate Drive, PMB 185
Aiken, SC 29803
INTERIM SUSPENSION (5/17/06)

Richard J. Raeon
253 de la Gaye Point
Beaufort, SC 29902
SUSPENDED BY SC BAR (2/1/12)

Sara Jayne Rogers
347 Southport Drive
Summerville, SC 29483
INTERIM SUSPENSION (12/9/11)

Chavvah P. Sanders
4500 Bowling Boulevard, Suite 200
Louisville, KY 40207

Michael D. Shavo
4017 Yale Avenue
Columbia, SC 29205
INTERIM SUSPENSION (9/22/09)

Jeffery Glenn Smith
171 Church Street, Suite 160
Charleston, SC 29401
INTERIM SUSPENSION (1/13/12)

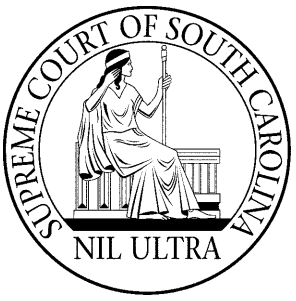
James H. Swick
1421 Bull Street
Columbia, SC 29201
SUSPENDED BY SC BAR (2/1/12)

Andrea L. Taylor
2027 Country Manor Drive
Mt. Pleasant, SC 29466
SUSPENDED BY SC BAR (2/1/12)

John Michael Turner, Jr.
1085 Shop Road, Apartment 436
Columbia, SC 29201

Deborah W. Witt
14525 Cabarrus Station Road
Midland, NC 28107
SUSPENDED BY SC BAR (2/1/12)

Ted W. Wooten III
8205 Dunwoody Place, Building 19
Atlanta, GA 30350



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
June 13, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Mutual Insurance Company, Petitioner,

v.

Kelly Rhoden, Ashley Arrieta and Emerlynn Dickey, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 27131
Heard November 15, 2011 – Filed June 13, 2012

AFFIRMED

J. R. Murphy and Ashley B. Stratton, both of Columbia, for Petitioner.

Dennis J. Rhoad and Salley H. Rhoad, both of Murphy & Grantland, of Moncks Corner, for Respondents.

CHIEF JUSTICE TOAL: Petitioner, Nationwide Mutual Insurance Company (Nationwide), contends that the court of appeals erred in ruling that Respondents Kelly Rhoden and Emerlynn Dickey are entitled to underinsured motorist (UIM) coverage under Kelly Rhoden's policy covering two "at-home" vehicles. We affirm based on South Carolina's well-settled public policy that UIM coverage is personal and portable.

FACTS/ PROCEDURAL BACKGROUND

Respondents Kelly Rhoden (Rhoden) and her daughters, Ashley Arrieta (Arrieta) and Emerlynn Dickey (Dickey), were involved in a motor vehicle accident while riding in a vehicle owned and operated by Arrieta. The parties stipulated that the Respondents are relatives residing in the same household, and that Arrieta's insurance policy with Nationwide did not provide UIM coverage.

Rhoden owned two vehicles that she also insured through Nationwide under a policy that did provide UIM coverage. Rhoden's policy contained a term specifying that the insurance it provided was primary when the covered vehicle was involved in the accident but excess when the involved vehicle was not the covered vehicle but was owned by the policyholder or a resident relative. The policy provides:

> 3. If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:
>
>   a) be primary if the involved vehicle is your auto described on this policy; or
>
>   b) be excess if the involved vehicle is not your auto described on this policy. *The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.*

(Emphasis added).

Nationwide brought a declaratory judgment action seeking a determination that UIM coverage was not available to any of the Respondents under Rhoden's policy. Nationwide contends that because Arrieta's policy had no UIM coverage, clause 3(b), a portability limitation clause, operates to prevent any of the Respondents from recovering under Rhoden's policy.[1]

The trial court held that UIM coverage under Rhoden's policy was available to all three Respondents because such coverage is personal and portable, and Respondents were either named insureds or resident relatives under Rhoden's policy. Nationwide appealed the decision to the court of appeals, which reversed the trial court with regard to Arrieta. Nevertheless, the court of appeals affirmed the trial court's ruling that UIM coverage was available to Rhoden and Dickey under Rhoden's policy. It held that, while public policy supports the 3(b) portability limitation as against owners of an involved vehicle who have the ability to purchase UIM coverage but choose not to do so, it is offended when the limitation operates against non-owners, including resident relatives, because such non-owners are unable to ensure that the owner purchases UIM coverage. We granted certiorari to review this ruling.

ISSUE

Whether public policy is offended by a portability limitation clause preventing non-owner resident relatives from importing UIM coverage from an at-home vehicle's policy when the involved vehicle lacks UIM coverage.

STANDARD OF REVIEW

The standard of review in a declaratory action is determined by the underlying issues. *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). When the purpose of the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law. *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004) (citation omitted). In an action at law, tried without a jury, the appellate court will not

[1] Under 3(b), if the vehicle involved in the accident had no UIM coverage, then UIM coverage from other vehicles owned by Rhoden could not be used.

disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, "[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (citation omitted). In such a situation, the appellate court does not have to defer to the trial court's findings. *Id.* at 301–02, 584 S.E.2d at 155 (citations omitted).

ANALYSIS

The court of appeals determined that public policy is offended by a limitation on UIM portability when applied to resident relatives like Rhoden and Dickey who do not own the vehicle involved in the accident. We agree.

It is axiomatic that "freedom of contract is subordinate to public policy[, and] agreements that are contrary to public policy are illegal." *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 169 (1961); *United Servs. Auto. Ass'n v. Markosky*, 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000) ("[I]nsurers have the right to limit their liability and impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy."). Our state's well-settled public policy that UIM coverage is personal and portable can be traced as far back as *Hogan v. Home Insurance Company*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973), where this Court found that limitations placed on the portability of UIM coverage contravened "the broad coverage required by [ ] statute." Through the years, this public policy has been consistently reaffirmed by this Court. *See, e.g.*, *Burgess v. Nationwide Mutual Insurance Company*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007) ("[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is 'personal and portable.'"). Such a long and established precedent must be followed faithfully again here.

Accordingly, we find that our state's well-settled public policy that UIM coverage is personal and portable entitles Rhoden and Dickey to UIM coverage notwithstanding the portability limitation contained in the insurance contract. However, the denial of coverage to Arrieta, consistent with the insurance contract's portability limitation, does not violate public policy pursuant to our decision in *Burgess* and section 38-77-160 of the South Carolina Code given that Arrieta

chose not to purchase UIM coverage for her vehicle, which was involved in the accident. 373 S.C. at 41, 644 S.E.2d at 42 ("Public policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at-home' UIM coverage when the insured has a vehicle involved in the accident.").[2]

The dissent would deny coverage to all three Respondents based on the notion that public policy "requires limitation of UIM coverage portability when an insured seeks coverage beyond that purchased on the involved vehicle." The dissent does not elaborate on the reasons which would support the adoption of such a public policy, but finds the logic for such a public policy from the express words of section 38-77-160 of the South Carolina Code, concluding that the "General Assembly has seen fit to . . . . limit excess UM and all UIM coverage for 'insureds.'"

As we stated in *Burgess*, section 38-77-160 does not apply in a non-stacking[3] case such as this:

---

[2] With UIM coverage, the insured is "[e]ssentially . . . buying insurance coverage for situations, as where he is a passenger in another's vehicle or . . . where he cannot otherwise insure himself." *Burgess*, 373 S.C. at 42, 644 S.E.2d at 43. Here Rhoden purchased UIM coverage for herself and Dickey for situations in which they could not otherwise insure themselves, like when they were passengers in Arrieta's car. Despite Nationwide's assertion, it was unlikely that Rhoden and Dickey had any more influence over the insurance coverage purchased on a relative's vehicle, such as Arrieta's, than that of any other individual with whom they may travel. Furthermore, the same considerations underpinning the exception to the general public policy that UIM is personal and portable in *Burgess* are not present in this case because unlike the petitioner in *Burgess*, Rhoden and Dickey are not owners of the vehicles. *See id.* ("[P]ublic policy [is not] offended . . . . [w]hen [ ] the insured is driving *his own* vehicle [because] he has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so when insuring his motorcycle.") (emphasis added).

[3] Stacking is defined "as the insured's recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met." *Giles v. Whitaker*, 297 S.C. 267, 376 S.E.2d 278 (1989).

> The Court of Appeals held the "If, however" sentence in § 38-77-160 applied only to stacking cases, found the issue here was not stacking . . . .
>
> . . . [W]e agree with the Court of Appeals that the "if, however" sentence in § 38-77-160, relied upon by Nationwide here, does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage from his Nationwide policy . . . . The "If, however" sentence in § 38-77-160 evinces the legislature's intent, in a *stacking situation,* to bind the insured . . . .
>
> *Neither § 38-77-160* nor our prior decisions decide the [non-stacking] issue presented here[.]

373 S.C. at 41–42, 644 S.E.2d at 42–43 (emphasis added); *see also S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 445, 405 S.E.2d 396, 398 (1991) ("[W]e interpret the pertinent language of [38-77-160] as setting a cap on the amount which can be *stacked* . . . ."). (emphasis added). In *Burgess*, we decided a non-stacking case by considering the public policy that UIM is personal and portable rather than looking to section 38-77-160. *Id.* Consequently, we must do so again here.

Even if we assume arguendo that section 38-77-160 applies, legislative intent as reflected in the statutory language is ambiguous.[4] Section 38-77-160 states:

> If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage *he has on the vehicle involved in the accident.*

S.C. Code Ann. § 38-77-160 (2002) (emphasis added).

[4] If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way because "[t]he primary source of the declaration of the public policy of the state is the General Assembly[, and] the courts assume this prerogative only in the absence of legislative declaration." *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925).

The dissent argues that this provision does not distinguish between insureds who are owners and insureds who are not owners and speaks only of the "insured and named insured," which by definition includes resident relatives like Rhoden and Dickey. However, the dissent's interpretation takes the inherent ambiguity contained in the phrase, "has on the vehicle involved in the accident," and rules out the possibility that the legislature could have intended to make a distinction between an owner of the vehicle involved in the accident, like Arrieta, and non-owners such as Rhoden and Dickey. To the contrary, prior cases of this Court and the court of appeals have interpreted this provision to mean that a Class I insured is an insured or named insured who "has" a vehicle involved in the accident. *Mooneyham*, 304 S.C. at 443 n.1, 405 S.E.2d at 397 n.1 ("There are two classes of insureds under S.C. Code Ann. § 38-77-160 (1989). The first class, or Class I, applies when an insured or named insured *has a vehicle involved* in the accident.") (emphasis added); *Ohio Casualty Ins. Co. v. Hill*, 323 S.C. 208, 473 S.E.2d 843 (Ct. App. 1996); *Am. Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993). "Having" a vehicle involved in the accident reasonably implies ownership of the vehicle.[5] The court of appeals, reading the same language,

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[5] The dictum in *Concrete Services, Inc. v. United States Fidelity and Guaranty*, 331 S.C. 506, 512, 498 S.E.2d 865, 868 (1998), suggests a contrary interpretation of section 38-77-160 more in line with the dissent's viewpoint. After deciding the case on different grounds, *Concrete Services* engaged in a "purely academic" discussion to clarify "whether, in order to stack UIM coverage, an insured must own the vehicle involved in the accident." *Id.* The court held that a Class I insured need not "own" the vehicle in order to stack UIM coverage. *Id.* at 513, 498 S.E.2d at 868. The Court stated, "[I]n order to 'have' a vehicle involved in the accident, it is necessary only that the insured qualify as a Class I insured . . . . We have never required 'ownership' as a prerequisite to *stacking* . . . . Accordingly, we hold that prior cases requiring a person to 'have' a vehicle involved in the accident as a prerequisite to *stacking* mean[s] only that a person must be a Class I insured." *Id.* *Concrete Services* is distinguishable as a stacking case. *Id.* More to the point, the ambiguity of section 38-77-160 remains the same, although *Concrete Services* has chosen an alternative interpretation in light of the different public policy considerations in a stacking context not present in this case. Accordingly, *Burgess*'s public policy of UIM portability is determinative in this case, and not the public policy considerations of *Concrete Services*. *See Burgess*, 373 S.C. at 42, 644 S.E.2d at 43.

believed it did, and this Court in *Burgess* raised that possibility. *See* 373 S.C. at 41–42, 644 S.E.2d at 43 (stating the issue to be whether "public policy [is] offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he *owns*, but does not insure under the policy[.]" (emphasis added)). Thus, at best, the statutory language is ambiguous, and until the legislature clarifies this particular provision of section 38-77-160 to the contrary, the public policy stated in *Burgess* that UIM is "personal and portable" governs this case.[6]

Thus, we hold South Carolina's public policy that UIM coverage is personal and portable requires UIM coverage to be provided to Rhoden and Dickey, who did not own the vehicle involved in the accident, while denied to Arrieta, who owned the vehicle involved in the accident but chose not to purchase UIM coverage.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

AFFIRMED.

BEATTY, J., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

[6] *See* n.2, *supra*, for a discussion of this public policy.

JUSTICE PLEICONES: I respectfully dissent. In my view, public policy as expressed in S.C. Code Ann. § 38-77-160 (2002) requires the limitation on portability in Nationwide's policy. Section 38-77-160 reads, in relevant part:

> If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

In Burgess v. Nationwide Mut. Ins. Co., we stated that "the 'If, however' sentence in § 38-77-160 . . . does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage from his Nationwide policy." 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007). However, we also said that "the statute itself contains a limit on the 'portability' of UIM coverage" because "[t]he 'If, however' sentence in § 38-77-160 evinces the legislature's intent, in a stacking situation, to bind the insured to the amount of coverage he chose to purchase in the policy covering the vehicle involved in the accident." Id. at 41, 644 S.E.2d at 42-43. Because we found that, regardless of whether § 38-77-160 applied literally, it provided enough indication of the intent of the General Assembly to bar portability under the facts of that case, a determination of the exact application of § 38-77-160 was not necessary to our holding.

A plain reading of the statute reveals that the "If, however" sentence is not limited to stacking situations. Section 38-77-160 provides the entire legislative directive on the contents of policy provisions for UIM and excess UM coverage. It applies whenever "an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits." That is, it governs in every policy that provides UIM or excess UM coverage ("the excess or underinsured coverage"). It must apply in a case in which a policy holder seeks to import UIM coverage from a policy covering a non-involved vehicle, regardless of whether the particular facts include stacking.[7]

[7] Even if the provision did not apply to a non-stacking situation by its terms, that distinction would not remove it from the evident legislative intent to limit

The statute does not distinguish between insureds who are owners and insureds who are not owners. Rather, the statute speaks of "the insured or named insured." By definition, the "insured" includes resident relatives.[8] Under Arrieta's policy, Arrieta is the "named insured." Rhoden and Dickey are "insureds," since the parties stipulated they were resident relatives.

Moreover, the statute unmistakably conveys the legislative intent to limit UIM and excess UM coverage available to named insureds and insureds to the amount of coverage selected under the primary policy: "the policy *shall* provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident" (emphasis added). Here the primary policy, under which all of the parties *had coverage*, is Arrieta's, and it provides no UIM coverage. Under the plain reading of the statute and Rhoden's policy, the absence of UIM coverage on Arrieta's policy precluded the import of UIM coverage from Rhoden's policy.

Ruling that an insured does not have a vehicle in the accident for purposes of UIM coverage effectively alters the statute to read, "the policy shall provide that the . . . named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident [but the insured must be protected to the extent of the coverage he has on any vehicle, whether or not it is involved in the accident]."[9] This directly contradicts the statute.

The General Assembly has seen fit to require that liability coverage under an automobile insurance policy extend to all resident relatives, defining the term "insured" to embrace them in § 38-77-30, but simultaneously to limit excess UM and all UIM coverage for "insureds." Thus, by virtue of their status as resident relatives, Rhoden and Dickey are insureds under Arrieta's primary policy. By law they had "coverage . . . on the vehicle involved in the accident," on which no UIM

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portability of excess coverage. See Burgess, 373 S.C. at 41, 644 S.E.2d at 42-43. The majority's holding relies on a public policy derived from statutory provisions that do not specifically relate to excess coverage as § 38-77-160 does.

[8] In relevant part, § 38-77-30 states, "Insured means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise . . . ." S.C. Code Ann. (Supp. 2010).

[9] This is precisely the effect of the majority's ruling. Put another way, the majority's result strikes out the words "insured or" from the statute.

coverage had been purchased. By the terms of the statute and policy language, Rhoden's, Dickey's, and Arrieta's UIM coverage under Rhoden's policy was limited to the amount of UIM coverage they had under Arrieta's policy. Although the majority is concerned that, under such a rule, non-owner insureds[10] cannot ensure that they have UIM coverage, the General Assembly has mandated that they are bound by the UIM coverage choices made by their resident relatives.

Public policy as expressed in § 38-77-160 requires limitation of UIM coverage portability when an insured seeks coverage beyond that purchased on the involved vehicle. Here, the insurance policy terms track the language of the statute, and we should not override the unambiguous terms of the insurance policy to find coverage under the guise of public policy. Citizens' Bank, supra. Thus, in my view, neither Rhoden nor Dickey is entitled to UIM coverage under Rhoden's policy. I therefore respectfully dissent.

KITTREDGE, J., concurs.

[10] The majority cites language in Burgess, supra, that "raised [the] possibility" that vehicle owners might be distinguishable from non-owners for stacking purposes. In Burgess, the motorist sought to import UIM coverage from a policy on several vehicles he owned to the motorcycle he owned but insured under a separate policy with no UIM coverage. That case involved no consideration of a distinction between owners and non-owners, and the mere fact that the Court focused squarely on the question presented—i.e, the rights of an owner/named insured under another policy—did not hint that Class I insureds might be divisible into separate classes for purposes of importing coverage.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Paul Archer, Respondent.

Appellate Case No. 2012-211930

Opinion No. 27132
Submitted May 8, 2012 – Filed June 13, 2012

PUBLIC REPRIMAND

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel Sabrina C. Todd both of Columbia, for Office of Disciplinary Counsel.

Paul Archer, of Pawley's Island, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. He further agrees to return the fee he collected from the Commission on Indigent Defense and to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the imposition of a sanction. We accept the Agreement and issue a public reprimand. In addition, within one (1) year of the date of this opinion, respondent shall return the fee he collected from the Commission on Indigent Defense and complete the Legal Ethics and Practice Program Ethics School. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was appointed to represent Complainant in a post-conviction relief (PCR) action. After reviewing Complainant's file, respondent determined Complainant had a good case. Respondent wrote Complainant, advising he had a good case and good cases were rare. Respondent requested Complainant have a friend or family member contact him to pay for a prison visit which was necessary to prepare Complainant's testimony, and respondent had received notice that indigent funds were, at the time, unavailable to pay attorneys appointed in PCR cases.

Soon thereafter, respondent received a payment from Complainant's family. In total, respondent charged and received $3,500 from Complainant's family, $2,000 of which was specifically for a prison visit.

Complainant prevailed before the circuit court. By the time the circuit court ruled, indigent funding was available and respondent submitted a voucher to the Commission on Indigent Defense indicating he had performed $1,680 in services on Complainant's case. Respondent waived receipt of $680, agreeing to accept the $1,000 statutory maximum fee a court-appointed attorney can collect in a PCR action without court approval. The voucher respondent submitted requires attorneys to report any funds the attorney received on the client's behalf. Respondent failed to note funds he had received from Complainant's family and received $1,000.00 in indigent funds as payment for his work on Complainant's case.

Law

Respondent admits that by his conduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5(a) (lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses), Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and 7(a)(5) (it shall be ground for

discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law)

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. In addition, within one (1) year of the date of this opinion, respondent shall return the fee he collected from the Commission on Indigent Defense and complete the Legal Ethics and Practice Program Ethics School. Respondent shall notify the Commission on Lawyer Conduct within ten (10) days of his completion of each of these directives.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian Austin Katonak, Respondent.
Appellate Case No. 2012-211955

Opinion No. 27133
Submitted May 14, 2012 - Filed June 13, 2012

PUBLIC REPRIMAND

Disciplinary Counsel Lesley M. Coggiola and Senior Assistant Disciplinary Counsel Charlie Tex Davis, Jr. both of Columbia, for Office of Disciplinary Counsel.

Brian Austin Katonak, of Law Office of Brian Katonak, PA, of Aiken, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413 of the South Carolina Appellate Court Rules. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

In early 2004, Complainant retained respondent to represent him in connection with purchasing and obtaining clear title to a piece of property located in Aiken County, South Carolina. At the time respondent was retained, the property was owned by several of Complainant's family members. The Complainant and his

wife owned one-half the interest in the property. The other one-half interest was owned by three individuals: Mr. A., Mr. B., and Mr. C. Mr. A. died on March 11, 2002, leaving all of his property to his wife, Mrs. A. Mrs. A., Mr. B. and Mr. C. agreed to sell their interest in the property to Complainant for $4,000.00 each.

Respondent had some communication with Mrs. A. prior to April 6, 2004, and forwarded a contract of sale to her. By letter dated April 6, 2004, Mrs. A. returned the signed contract of sale to respondent. However, Mrs. A. had not properly probated her husband's estate in Florida and she could not, therefore, properly convey her share of the property to Complainant. In September 2005, Mrs. A. filed a Petition for Summary Administration of Mr. A.'s estate in Florida. In 2006, apparently after the probate of Mr. A.'s estate, Mrs. A. entered into a valid contract with Complainant to sell her husband's interest for $4,000.00.

In the meantime, both Mr. B. and Mr. C. executed contracts of sale in which they conveyed their interests in the property to Complainant. Each received the sum of $4,000.00 in June 2004 as payment for their interest in the property. In August 2005, respondent sent Mr. B. and Mr. C. deeds for execution.

On November 8, 2005, respondent's office sent another deed to Mr. B. due to the fact that the deed sent to him in August 2005 had not been properly executed by both witnesses and a notary. The second deed was not returned by Mr. B. However, respondent did not follow-up with Mr. B. until Complainant filed this grievance.

In August 2010, respondent met with Complainant and advised that he had lost Complainant's file. Thereafter, Complainant made numerous attempts to contact respondent by telephone. Respondent did not return those calls until February 2011, after he had been notified of the grievance. There is no indication that respondent did anything to consummate the purchase of the property on Complainant's behalf from November 2005 until February 2011, after he received notice of Complainant's grievance.

Respondent has entered into a new representation agreement with Complainant wherein he has agreed to represent Complainant in a quiet title action at no charge.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client) and Rule 1.4 (lawyer shall keep client reasonably informed about status of the matter and promptly comply with reasonable requests for information). Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a) (1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In re: Amendment to Rule 402, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402(d)(1)(i) and (ii), SCACR, are hereby amended to state as follows:

> **(i)** $700 for applications filed from December 1 to January 10 or from August 1 to August 31.
>
> **(ii)** $1,050 for applications filed during the remainder of the application periods.

In addition, the second paragraph of Rule 402(d)(1) , SCACR, is hereby amended to state as follows:

> If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed, the applicant shall file one (1) additional copy of the application along with an additional fee of $800. A portion of this fee will be used to obtain a character report from the National Conference of Bar Examiners.

Finally, the fifth paragraph of Rule 402(d)(1), SCACR, is hereby amended to state as follows:

> Petitions seeking permission to file a late application are strongly discouraged, and only petitions documenting extraordinary circumstances justifying the late filing will be granted. If a petition for late filing is submitted, the petition must comply with the provisions of Rule 240, SCACR, must contain facts showing that extraordinary circumstances exist, and must be accompanied by a fully completed bar application, along with all required original attachments. Under no circumstances will petitions be accepted for filing after March 15 for the July Bar Examination or November 15 for the February Bar

Examination. Unless otherwise directed by the Court, the filing fee for a late application will be $1,500, plus an additional $800 fee if the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed. The filing fee is non-refundable and may not be credited to a later examination.

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 8, 2012

The Supreme Court of South Carolina

In the Matter of J. M. Long, III, Petitioner.

Appellate Case No. 2011-194926

ORDER

On April 25, 2011, the Court accepted an Agreement for Discipline by Consent and suspended petitioner from the practice of law for nine (9) months retroactive to March 1, 2010, the date of his interim suspension. *In the Matter of Long, 392 S.C. 325, 709 S.E.2d 632 (2011).* The matter is now before the Court on petitioner's Petition for Reinstatement.

The petition is granted and petitioner is hereby reinstated to the practice of law. Within six (6) months from the date of this order, petitioner shall pay the two non-compliance judgments issued by the South Carolina Bar Resolution of Fee Disputes Board in May 2011.[1]

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

[1] The total amount owed is $4,200.00.

Columbia, South Carolina

June 11, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beau D. Cranford, Employee, Appellant,

v.

Hutchinson Construction, Employer, and Companion Property & Casualty Group, Carrier, Respondents.

Appellate Case No. 2010-157846

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Published Opinion No. 4939
Heard March 13, 2012 – Filed February 8, 2012
Withdrawn, Substituted and Refiled June 13, 2012

AFFIRMED IN PART, REVERSED IN PART, and REMANDED IN PART

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant Beau Cranford.

Michael W. Burkett, of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents Hutchinson Construction and Companion Property and Casualty Group.

WILLIAMS, J.: In this workers' compensation appeal, Beau Cranford (Cranford) challenges the Appellate Panel of the Workers' Compensation Commission's (Appellate Panel) findings that he was not entitled to temporary disability

compensation, permanent partial disability compensation, and additional medical treatment for injuries he incurred while working for his employer, Hutchinson Construction (Hutchinson). Additionally, Cranford contends the Appellate Panel erred in failing to make specific findings regarding whether he had reached maximum medical improvement (MMI) and in implicitly finding he had reached MMI. We affirm in part, reverse in part, and remand in part.

FACTS

Cranford's claim for benefits and medical treatment stems from an injury he sustained while working for Hutchinson. Hutchinson hired Cranford on June 26, 2007, as a day laborer, to assist in assembling a steel building at one of Hutchinson's project sites. On July 20, 2007, Cranford was working in a forklift basket approximately ten feet above ground. Cranford testified the basket was lowered to the ground, and his co-worker climbed out of the basket. When Cranford was raised back in the air, the basket began to tilt forcing Cranford to jump out of the basket. Cranford sustained injuries to both hands, both arms, and his back as a result of the fall.

Cranford was taken immediately to Conway Medical Center for treatment. Dr. Michael Ellis treated the lacerations on Cranford's arms and noted Cranford complained of mid-lumbar pain when he would sit upright. Dr. Ellis discharged Cranford with instructions to refrain from "heavy lifting or strenuous activity" and to return the following week. At his follow-up visit, Dr. Ellis' notes reflect he instructed Cranford to "be taking it easy" and to notify Dr. Ellis if he experienced any additional problems.

Cranford was out of work for three weeks, during which time Hutchinson paid him $265 per week in lieu of temporary disability benefits. When Cranford returned to work on August 13, 2007, Hutchinson restricted him to light-duty activities, but then Hutchinson terminated Cranford on August 31, 2007, for being unsafe on the job site. Hutchinson filed a Form 15 claiming Cranford was no longer entitled to temporary compensation because Cranford had worked a minimum of fifteen days prior to his termination.

After Hutchinson fired Cranford, he obtained employment with a greenhouse from early September until November 21, 2007. While working at the greenhouse, Cranford made deliveries, watered plants, and lifted fifty to sixty pound bags of

fertilizer two to four times per day twice a week. He earned on average $163.96 per week.

Cranford's complaints of back pain resurfaced following his brief employment with the greenhouse. In response to his complaints of back pain, Hutchinson sent him to Doctor's Care on January 11, 2008. Doctor's Care restricted him from lifting more than ten pounds and instructed him to return for a follow-up visit in one week. Cranford returned ten weeks later on March 25, 2008. Doctor's Care then referred him to an orthopedic surgeon, Dr. William Edwards.[1]

Cranford saw Dr. Edwards on May 15, 2008, with lower back complaints. Dr. Edwards' notes reflect that Cranford told him he had been out of work since his initial injury. Dr. Edwards ordered an MRI on May 21, 2008, and Cranford returned to Dr. Edwards on June 3, 2008. On June 3, 2008, Dr. Edwards concluded Cranford had reached MMI with no evidence of permanent impairment. Dr. Edwards noted Cranford could return to work with "the use of good body mechanics and careful lifting techniques."

Upon referral from Cranford's attorney, Cranford underwent a subsequent evaluation with Dr. Timothy Zgleszewski on July 22, 2008. Dr. Zgleszewski diagnosed Cranford with sacroiliitis and opined to a reasonable degree of medical certainty that Cranford was not at MMI and should remain out of work until further testing and treatment were completed. Hutchinson refused to provide the treatment recommended by Dr. Zgleszewski.

After Cranford saw Dr. Edwards and Dr. Zgleszewski, he briefly worked at a machinery plant as a machine operator from September 12, 2008 until November 7, 2008. He testified this position did not require any heavy lifting responsibilities. Cranford earned $469.98 per week as a machine operator before he was laid off by the machinery plant.

In response to Hutchinson's refusal to provide additional medical treatment, Cranford filed a Form 50 on January 15, 2009, in which he requested a hearing as well as additional medical treatment for his back and arms and temporary disability

[1] Dr. Edwards' notes reflect that Cranford's mother also requested Doctor's Care refer Cranford to Dr. Edwards for additional medical treatment.

benefits. In response, Hutchinson timely filed a Form 51, admitting laceration/disfigurement to the right and left arms and an injury to the back. Hutchinson, however, maintained Cranford reached maximum medical improvement (MMI) for all injuries and denied Cranford was entitled to temporary disability benefits.

Prior to Cranford's hearing, he again returned to Dr. Zgleszewski on April 23, 2009, with complaints of reoccurring lower back pain, occasional numbness in his hands, and problems with lifting and twisting. Dr. Zgleszewski opined Cranford suffered a 10% impairment rating to his back and a 9% whole person impairment rating based on the scars on his arms.

The single commissioner held a hearing on May 14, 2009. The commissioner subsequently issued an order on September 28, 2009, awarding Cranford four weeks of compensation to his left arm and eight weeks of compensation to his right arm for the disfigurement caused by his fall. The commissioner agreed with Dr. Edwards' conclusions that Cranford had suffered no permanent impairment to his back and consequently found a 0% disability to Cranford's back. In addition, the single commissioner found Cranford failed to demonstrate by a preponderance of the evidence that he was entitled to any temporary disability benefits or additional medical treatment. Cranford appealed the single commissioner's order, and in a form order, the Appellate Panel affirmed the single commissioner in full. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). In workers' compensation cases, the Appellate

Panel is the ultimate finder of fact. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004) (internal citation omitted). Accordingly, this court will not overturn a finding of fact by the Appellate Panel "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (internal citation omitted).

LAW/ANALYSIS

I. Temporary Disability Compensation

Cranford first claims the Appellate Panel erred in failing to order Hutchinson to pay him temporary disability benefits. We agree.

Section 42-1-120 of the South Carolina Code (1985) defines disability as the "incapacity because of injury to earn the wages which an employee was receiving at the time of the injury in the same or some other employment." During the period of disability, an employer may pay temporary total or partial compensation, or salary in lieu of compensation, to the injured employee. *See* 25A S.C. Code Ann. Regs. 67-503(B) (Supp. 2011). Whether compensation is partial or total depends on whether the employee is partially or totally incapacitated from the injury. *See* S.C. Code Ann. §§ 42-9-10, -20 (1985 & Supp. 2011), 25A S.C. Code Ann. Regs. 67-502(E), (F) (Supp. 2011).

Temporary disability benefits are triggered "[w]hen an employee has been out of work due to a reported work-related injury . . . for eight days[.]" S.C. Code Ann. § 42-9-260(A) (Supp. 2011). Once temporary disability payments have commenced, these benefits "may be terminated or suspended immediately at any time within the one hundred fifty days if . . . the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately[.]" S.C. Code Ann. § 42-9-260(B)(1) (Supp. 2011).

When Hutchinson terminated Cranford's benefits, it claimed in its Form 15 that Cranford was no longer entitled to compensation because he had been at work for

"at least 15 days and no temporary partial compensation was due." While Cranford was at work for fifteen days prior to his termination, we disagree with Hutchinson's claim that Cranford was no longer entitled to temporary compensation.

We find the case of *Grayson v. Carter Rhoad Furniture*, 312 S.C. 250, 439 S.E.2d 859 (Ct. App. 1993), *aff'd as modified by Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1996), is instructive. Grayson was employed with Carter Rhoad to lift and move furniture. *Grayson*, 312 S.C. at 252, 439 S.E.2d at 860. In August 1990, he injured his back while working. *Id.* In December 1990, the treating physician, Dr. Graziano, released him to return to work, although he advised Grayson to be "somewhat careful with lifting." *Id.* at 252-53, 439 S.E.2d at 860. Grayson returned to his job on December 17, 1990. *Id.* He testified that he did his job the best he could, but was not able to do it as well as before his injury, and that the work was causing him a lot of pain. *Id.* Three weeks later, Carter Rhoad terminated Grayson's employment. *Id.* Grayson claimed he was still disabled and entitled to additional benefits. *Id.*

The single commissioner found Grayson was in need of further medical treatment but had not proven he was entitled to any additional temporary total disability benefits. *Id.* The commissioner ordered Carter Rhoad to have Grayson evaluated by a neurologist and to provide any treatment the neurologist believed necessary. *Id.* The commissioner also held that if Dr. Graziano or the neurologist excused Grayson from work, Carter Rhoad would have to pay temporary total disability benefits during that time. *Id.*

The full commission affirmed the single commissioner's decision. *Id.* Grayson petitioned for judicial review. *Id.* Finding the decision was not supported by substantial evidence, the circuit court reversed and remanded for entry of an order commencing temporary total benefits as of the date that Carter Rhoad fired Grayson, to run until further order of the commission. *Id.* Carter Rhoad appealed. *Id.*

On appeal, the court of appeals held the single commissioner's administrative findings were "clearly erroneous" because they were based on a "mistaken view of evidence." On writ of certoriari, the supreme court modified this court's opinion. *See Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1996). The supreme court held that because Grayson was released with work restrictions, there was in reality *no* evidence that Grayson's period of temporary total disability

ever ended prior to his firing. *Id.* at 310, 454 S.E.2d at 322. Because Grayson's benefits were never properly terminated in accordance with Regulation 67-504,[2] Grayson was entitled to have his temporary benefits reinstated. *Id.*

Like Grayson, Cranford was injured while working for his employer and was paid temporary compensation while out of work. Grayson was released to work with the instructions to "be somewhat careful with lifting." Similarly, Cranford's discharge report from Conway Medical Center instructed Cranford to refrain from "heavy lifting" and "strenuous activity." In addition, Dr. Ellis, the attending surgeon at Conway Medical Center, instructed Cranford to "take it easy." No other physician treated Cranford prior to him returning to work; thus, as in *Grayson*, there is no other evidence in the record Cranford was released to work without restriction.

Both employers terminated their employees shortly after the employees returned to work while the employees were still under work restrictions. Grayson was fired for not having a driver's license and Cranford was fired for being unsafe on the job site.[3] Both terminations occurred approximately three weeks after returning to work. Prior to the firing, Grayson signed a Form 17, agreeing he was able to return to work. Cranford, on the other hand, never signed a Form 17, but instead had his benefits unilaterally terminated on the grounds that he had "returned to work at least 15 days and no temporary partial compensation [wa]s due."

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[2] The relevant portion of Regs. 67-504 in effect at that time stated: "When the claimant reaches maximum medical improvement and the authorized health care provider reports the claimant is able to return to work without restriction to the same job or other suitable job, and such a job is provided by the employer, or the claimant agrees he or she is able to return to work without restriction, the employer's representative may suspend compensation benefits by complying with section D below."

[3] Hutchinson terminated Cranford on August 31, 2007, seventeen days after returning to work, for being unsafe on the job site. Cranford testified Hutchinson fired him because "he was getting worried [about] me getting hurt in another accident, getting killed or dying of a heart attack." While Cranford argues in his brief that Hutchinson's motivation for firing him was pretextual, the propriety of his firing is not before this court.

While Regulation 67-504 was amended in 1997, under the prior and amended version, Hutchinson's firing of Cranford after the fifteen-day window would still require Hutchinson to pay temporary disability unless: (1) a physician determines Cranford is able to "return to work without restriction";[4] or (2) a physician determines Cranford has reached maximum medical improvement such that permanent disability benefits, as opposed to temporary benefits, should be awarded if warranted. *See Smith v. S.C. Dep't. of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 695-96 (1999) ("Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon a finding of MMI.").

Under both scenarios, Cranford was not released to "return to work without restriction" until June 3, 2008, the date on which Dr. Edwards opined Cranford had reached MMI and concluded Cranford could return to work "with the use of good body mechanics and careful lifting techniques." Despite Cranford's argument that the latter caveat was tantamount to continued work restrictions, we find Dr. Edwards' express approval of returning to work and finding of no permanent impairment equates to "returning to work without restriction." Accordingly, we conclude Hutchinson was required to pay Cranford temporary disability benefits from the day after his termination, September 1, 2007, until he achieved MMI and was authorized to return to work without restriction on June 3, 2008. We remand

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[4] Pursuant to 25A S.C. Code Ann. Regs. 67-502(D) (Supp. 2011), "return to work without restriction" is defined as follows:

> A statement of the authorized health care provider about the capacity of the claimant to meet the demands of a job and the conditions of employment. The determination must be made when the claimant's physical condition is static or is stabilized with or without medical treatment. The determination is appropriate when there are no physical limitations on the claimant's ability to perform the same or other suitable job as the claimant performed before the injury.

Cranford's entitlement to partial and/or total temporary disability as well as the corresponding compensation to the Appellate Panel for computation.[5]

II. Maximum Medical Improvement

Next, Cranford claims the Appellate Panel erred in affirming the single commissioner's finding that he had reached MMI for his back and arms, particularly when the single commissioner failed to explicitly find Cranford reached MMI. We agree in part.

"Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). "MMI is a factual determination left to the discretion of the [Appellate] [P]anel." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

Regarding Cranford's back, the single commissioner did not make any explicit findings about whether Cranford achieved MMI. However, the single commissioner agreed with Dr. Edwards' 0% impairment rating and concluded that Cranford had a 0% disability to his back. Additionally, the single commissioner concluded as a matter of law that based on Dr. Edwards' testimony, "no further medical treatment will lessen [Cranford's] period of disability." In making these conclusions, the single commissioner, and ultimately the Appellate Panel, implicitly held that Cranford had achieved MMI for his back. *See O'Banner*, 319 S.C. at 28, 459 S.E.2d at 327 ("Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion *there is no further medical care or treatment which will lessen the degree of impairment*.") (emphasis added).

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[5] Cranford also argues the Appellate Panel erred in failing to award him temporary benefits because Hutchinson failed to properly commence and terminate Cranford's benefits. Because we reverse and remand his entitlement to temporary compensation based on the foregoing, we decline to address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

Additionally, there is substantial evidence in the record to conclude Cranford attained MMI no later than June 3, 2008. Specifically, Cranford was able to maintain two jobs after his injury, the first of which involved routine stooping, bending over, and lifting. Despite Cranford's testimony that he was limited in the tasks he could undertake, he also testified on the date of the hearing he was physically capable of working "full time at medium to light duty." In addition, Cranford did not seek medical treatment for almost six months after his injury. When Cranford eventually sought medical treatment, he was instructed by Doctor's Care to follow up in one week, yet Cranford failed to return for another ten weeks. When Cranford did return, the X-Rays of his back were normal.

Because Cranford claimed continued back pain, Doctor's Care referred him to Dr. Edwards. After an MRI scan, Dr. Edwards noted a minimal disc protrusion at his L5-S1 disc, but he noted it did not likely have any clinical significance. Dr. Edwards also concluded Cranford had attained MMI and stated returning to work was acceptable with "the use of good body mechanics and careful lifting techniques." Cranford claims Dr. Edwards' caveat and prescription of Flexeril for his muscle spasms is evidence that Cranford has not reached MMI. To the contrary, Dr. Edwards' report coupled with the thirty-day prescription of Flexeril constitutes evidence from which the single commissioner could conclude the medication would help to temporarily alleviate Cranford's remaining symptoms, but his medical condition would not further improve. *See O'Banner*, 319 S.C. at 28, 459 S.E.2d at 327 (disagreeing with claimant's assertion that doctor's prescription of medication after discharge was evidence claimant had not reached MMI because substantial evidence in record existed to show that medication helped to temporarily alleviate claimant's remaining symptoms despite the fact that his medical condition would not further improve).

As to Cranford's arms, the single commissioner never made a finding of MMI to his arms. The single commissioner's only finding pertaining to Cranford's arms was an award for disfigurement for his keloid scars in the amount of four weeks of compensation for his left arm and eight weeks of compensation for his right arm. We note a disfigurement award is generally not proper prior to a finding of MMI. *See Halks*, 208 S.C. at 48, 36 S.E.2d at 855-56 (reversing award for disfigurement when claimant was receiving temporary total disability benefits because receipt of temporary disability established he had not attained MMI, which was a prerequisite for permanent disfigurement award). However, both parties stipulated to this award, and Cranford does not appeal the propriety of the disfigurement award.

Regardless, the issue of disfigurement is separate from the issue of permanent disability in the instant case.[6] As such, an explicit finding for MMI is still necessary because it is also relevant to Cranford's entitlement to permanent disability. Thus, we remand for specific findings on this issue.

III. Permanent Disability Benefits

Next, Cranford contends the Appellate Panel erred in failing to award him permanent partial disability benefits based on the injuries to his back, arms, and skin. We agree in part.

In the single commissioner's order, he concluded Cranford did not sustain any permanent partial disability to his back under section 42-9-30. In making this conclusion, the single commissioner considered Cranford's six-month delay in seeking medical treatment from Doctor's Care in addition to his failure to follow-up with Doctor's Care for ten weeks, despite instructions to return within one week of his initial visit.

Further, Dr. Edwards' medical opinion supports the single commissioner's and the Appellate Panel's conclusion. After being referred to Dr. Edwards, Cranford underwent an MRI, which revealed no evidence of a fracture. Dr. Edwards found a minimal disc protrusion at L5-S1, but he concluded it was likely of no clinical significance. Dr. Edwards noted Cranford sustained a lumbar sprain and accordingly prescribed him one month of Flexeril to temporarily alleviate his

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[6] An employee may be entitled to both a disability and a disfigurement award when an injury is in the form of a keloid scar. *See* S.C. Code Ann. § 42-9-30(23) (Supp. 2011) ("[P]roper and equitable benefits must be paid for serious permanent disfigurement of the face, head, neck, or other area normally exposed in employment, not to exceed fifty weeks. Where benefits are paid or payable for injury to or loss of a particular member or organ under other provisions of this title, additional benefits must not be paid under this item, *except that disfigurement also includes compensation for serious burn scars or keloid scars on the body resulting from injuries, in addition to any other compensation*.") (emphasis added); *see generally Mason v. Woodside Mills*, 225 S.C. 15, 21, 80 S.E.2d 344, 347-48 (1954) (finding employee was entitled to disability and disfigurement for work-related accident that caused not only loss of use to his arm but significant atrophy to his arm resulting in disfigurement).

discomfort. In approving the occasional use of Flexeril for a limited period of time, he concluded Cranford was capable of returning to work with "the use of good body mechanics and careful lifting techniques." The single commissioner acknowledged Cranford's visit to Dr. Zgleszewski. Hutchinson claims the Appellate Panel afforded less weight to Dr. Zgleszewski's medical reports based on the timing of Cranford's visits and the fact that his visits were at the behest of Cranford's attorney. The nature and timing of Cranford's visits do not discredit Dr. Zgleszewski's medical opinion. We find both parties presented credible conflicting medical evidence. The single commissioner, and ultimately the Appellate Panel, had the discretion to weigh the conflicting evidence in rendering its decision. Thus, we defer to its findings on this issue. *See Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The single commissioner, however, failed to make any conclusions on whether Cranford sustained permanent disabilities to his skin or arms. Without specific findings regarding whether Cranford suffered a permanent impairment to his arms and skin, we remand this issue to the Appellate Panel to make specific findings on Cranford's impairment to his arms and skin based on the evidence, and consequently, his entitlement to permanent partial disability benefits. *See Baldwin v. James River Corp.*, 304 S.C. 485, 486, 405 S.E.2d 421, 422 (Ct. App. 1991) (finding that without specific and definite findings upon the evidence, this court could not review the Appellate Panel's decision that a claimant sustained neither an injury to his back nor a permanent disability to his right arm, particularly when those were material facts in issue).

IV. Additional Medical Treatment

Finally, Cranford contends the Appellate Panel erred in affirming the single commissioner's finding that he was not entitled to additional medical treatment for his back. We disagree.

Section 42-15-60 of the South Carolina Code (Supp. 2011) provides for "[m]edical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from the date of an injury to effect a cure or give relief and for such additional time as in the judgment of the Appellate Panel will tend to lessen the period of disability . . . ." Pursuant to this section, an employer may be liable for a claimant's future

medical treatment if it tends to lessen the claimant's period of disability even if the claimant has returned to work and has reached maximum medical improvement. *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583, 514 S.E.2d 593, 598 (Ct. App. 1999); *see also Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (holding substantial evidence supported a finding of maximum medical improvement despite the claimant continuing to receive physical therapy); *O'Banner*, 319 S.C. at 28, 459 S.E.2d at 327 (finding claimant's receipt of prescriptive medicines after he had reached maximum medical improvement constituted substantial evidence from which the single commissioner could conclude the medication helped to temporarily alleviate the claimant's remaining symptoms, but his medical condition would not further improve).

The relevant inquiry is not whether Cranford attained MMI for his back, but whether additional medical treatment and medication will tend to lessen his period of disability. *See generally Dodge*, 334 S.C. at 581, 514 S.E.2d at 596 (finding whether employee reached MMI was irrelevant to entitlement to permanent disability benefits because "'[m]aximum medical improvement' is a distinctly different concept from 'disability.'"). Again, because the medical evidence is conflicting on this issue, we must defer to the Appellate Panel. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) ("Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive."). In Dr. Edwards' June 3, 2008 report, he diagnosed Cranford with a lumbar strain/sprain, but he concluded it was acceptable for Cranford to take an occasional Flexeril for muscle spasms and wrote Cranford a thirty-day prescription for Flexeril. Because Dr. Edwards opined Cranford suffered no permanent impairment, the single commissioner concluded Cranford sustained a 0% disability to his back. Although Dr. Zgleszewski documented muscle spasms on July 22, 2008 and on April 23, 2009, and opined that additional treatment would alleviate Cranford's pain, numbness, and spasms in his back, the Appellate Panel afforded more weight to Dr. Edwards' testimony in determining further medical treatment would not lessen Cranford's period of disability. *See id.* at 340, 513 S.E.2d at 846. ("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."). Accordingly, we affirm the Appellate Panel on this issue.

CONCLUSION

Based on the foregoing, we reverse the Appellate Panel's decision to deny Cranford temporary disability benefits and remand for a determination of the amount of temporary compensation due to Cranford from the day after his termination, September 1, 2007, until he achieved MMI and was authorized to return to work without restriction on June 3, 2008. We affirm the finding of MMI to Cranford's back but remand the issue of MMI for Cranford's arms to the Appellate Panel based on its failure to rule on this issue. We affirm the Appellate Panel's conclusion that Cranford is not entitled to permanent partial disability benefits for his back but remand the issue of permanent disability for his arms and skin to the Appellate Panel based on the single commissioner's and Appellate Panel's failure to rule on these issues. Lastly, we affirm the Appellate Panel's conclusion that Cranford was not entitled to additional medical treatment.

Accordingly, the Appellate Panel's decision is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED IN PART.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hal H. Boyd, Appellant,

v.

Liberty Life Insurance Company and SelectQuote Insurance Services, Respondents.

Appellate Case No. 2010-166866

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Published Opinion No. 4985
Heard May 7, 2012 – Filed June 13, 2012

AFFIRMED

George J. Kefalos, PA, of Charleston, and Michelle N. Endemann, of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Robert F. Goings, of Columbia, for Respondents.

GEATHERS, J.: Appellant Hal Boyd appeals from an order of the circuit court granting Liberty Life Insurance Company's (Liberty Life) and SelectQuote Insurance Service's (SelectQuote) joint motion for summary judgment on the ground that no valuable consideration existed to form a contract for life insurance between Boyd and Liberty Life. We affirm.

FACTS/PROCEDURAL HISTORY

SelectQuote is an insurance broker that offers consumer quotes and comparison information from more than a dozen insurance carriers.[1] On August 19, 2007, SelectQuote sent Boyd a solicitation to replace his existing Mutual of Omaha life insurance policy. Thereafter, Boyd learned his monthly premium with Mutual of Omaha would increase from $336.42 to $1,301.63 on November 18, 2007.

On November 14, 2007, Boyd contacted SelectQuote to inquire about the insurance rates listed in its solicitation. Boyd spoke with SelectQuote Account Manager Elizabeth Grissom, who conducted a phone interview, wherein she obtained Boyd's medical history. During the phone interview, Boyd told Grissom that he was in excellent health; however, he admitted he was a smoker, and Boyd acknowledged he would be getting the smoker's rate. Based on the information Boyd provided, Grissom compared premium quotes from multiple insurance companies; Liberty Life offered the lowest premium quote at a rate of $406.17 a month. Boyd verbally accepted the Liberty Life premium rate, subject to a medical examination and underwriting approval.

In a letter dated November 15, 2007, SelectQuote confirmed the $406.17 monthly premium quoted by Grissom. The letter identified Boyd's underwriting classification as "Preferred Tobacco."[2] Further, the letter explained "[i]f [the] monthly plan is selected [Liberty Life] will set up an automatic payment plan." Additionally, SelectQuote emailed Boyd a checklist to help him complete Liberty Life's insurance application, which instructed him (1) to select automatic bank draft as the form of payment; (2) to complete the premium authorization card; and (3) to provide a voided check imprinted with his name and address.

On November 30, 2007, Boyd submitted to a medical exam. He gave the completed life insurance application to the nurse performing the medical exam on behalf of Liberty Life. The completed application included Boyd's authorization to draft his checking account and a copy of a blank, voided check.

Due to blood pressure problems revealed in Boyd's medical records, Liberty Life approved Boyd's application for the underwriting classification, "Smoker Non-

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[1] SelectQuote is not an insurance company or licensed to issue contracts of insurance in South Carolina or elsewhere.

[2] "Preferred Tobacco" refers to a smoker in excellent health.

Preferred." On January 11, 2008, Grissom informed Boyd that Liberty Life had approved his application at an adjusted premium rate of $417.73. Boyd verbally accepted the adjusted quote. He then asked Grissom if the policy with Liberty Life was effective as of that day. She responded: "[O]nce I hit the offer button, it goes into issue status. You are issued, you are done . . . ." After this representation, Boyd asked Grissom to fax him a letter "indicating that this policy with Liberty is effective upon my acceptance."

On January 11, 2008, Grissom sent a fax to Boyd stating his application for life insurance had been "approved" by Liberty Life and the policy "will be issued and forwarded to you soon." On January 15, 2008, Boyd called Grissom and explained that the language in the fax did not give him the satisfaction necessary for him to cancel his existing policy. Thereafter, Grissom assured Boyd he had "double coverage" until he cancelled his policy with Mutual of Omaha. However, Grissom advised him to wait to cancel the Mutual of Omaha policy until he had physically received the Liberty Life policy.

During the January 15, 2008 phone call, Boyd asked Grissom when the first premium would be drafted from his bank account. Grissom replied: "[O]nce we've submitted it, it really is dependent upon the bank." Boyd expressed his hesitancy to cancel the Mutual of Omaha policy explaining, "I know that no insurance is in effect until [the] premium has been paid[.]" Boyd further noted: "[I]t's not a binding contract until money is exchanged . . . but once they receive a check in their hands and it's credited, then - - then it's in force, not before."

On the morning of January 30, 2008, Boyd informed SelectQuote that he had not yet received the policy from Liberty Life. Subsequently, SelectQuote investigated the matter and determined that Grissom, through a clerical error, had quoted Boyd the incorrect premium amount. When calculating Boyd's adjusted premium in the computer system, Grissom inadvertently had selected "Non-Tobacco" from the pull-down menu instead of "Tobacco." As a result, she had calculated the monthly premium based on the underwriting class "*Non-Smoker*/Non-Preferred Table B" in the amount of $417.73, instead of "*Smoker*/Non-Preferred Table B" in the amount of $1,037.90.[3]

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[3] The quote history can be summarized as follows:

	Date	Amount/Month	Risk/Classification/Table
1.	Nov. 14, 2007	$ 406.17	Smoker/Preferred (excellent health)

That afternoon, Sales Supervisor Chris Smith of SelectQuote called Boyd and informed him of the clerical error. Smith quoted Boyd the correct monthly premium rate of $1,037.90. Boyd responded, "this is absolutely totally unacceptable." He further stated: "I am not going to pay 13 or $1,400 a month with Liberty Mutual." Boyd informed Smith that he would take this issue to his lawyer and instructed Smith, "you are not going to do anything without me talking to my lawyer." On May 16, 2008, Boyd accepted a ten-year, $500,000 term-life insurance policy from Genworth Life and Annuity Insurance Company with a monthly premium of $916.13.

Boyd commenced this action on November 26, 2008, alleging breach of contract, bad faith refusal to pay benefits, and negligent misrepresentation. Boyd sought damages and attorney's fees. Liberty Life and SelectQuote filed a counterclaim seeking a declaratory judgment to determine whether a contractual relationship existed between Boyd and Liberty Life. All parties filed cross-motions for summary judgment. The parties agreed that no genuine issue of material fact was in dispute and asked the judge to decide the issue as a matter of law. Both cross-motions for summary judgment were heard on June 3, 2010. On June 17, 2010, the circuit court granted summary judgment in favor of Liberty Life and SelectQuote, finding that no valuable consideration existed between Boyd and Liberty Life because Boyd had not paid the insurance premium. This appeal followed.

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 332 (2003). When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003); *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *Boynton*, 355 S.C. at 301-02, 584 S.E.2d at 155; *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

2.	Jan. 11, 2008	$	417.73	Non-Smoker/Non-Preferred/Table 2
3.	Jan. 30, 2008	$	1,037.90	Smoker/Non-Preferred/Table 2

LAW/ANALYSIS

The sole issue Boyd raises on appeal is whether the circuit court erred in finding no valuable consideration existed to form a contract for life insurance because he had not paid the insurance premium. Boyd contends the tender of a voided check and written authorization to draft his checking account constituted sufficient consideration to form a contract for life insurance. We disagree.

"Valuable consideration for a contract may consist of some forbearance given or detriment suffered." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) (citation omitted). A "premium" is defined as "*payment* given in consideration of a contract of insurance." S.C. Code Ann. § 38-1-20(46) (Supp. 2011) (emphasis added). "Laypersons who pay their premium at the time an application for insurance is filed are justified in assuming that payment will bring immediate protection." *Poston v. Nat'l Fid. Life Ins. Co.*, 303 S.C. 182, 186, 399 S.E.2d 770, 772 (1990); *see also Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 357, 415 S.E.2d 393, 396 (1992).

"As a general rule, in the absence of an express or implied agreement to the contrary, a check does not constitute payment unless it produces payment in cash, the presumption being that the check is accepted on condition that it be paid." *Burns v. Prudence Life Ins. Co.*, 243 S.C. 515, 520, 134 S.E.2d 769, 771 (1964) (citations omitted); *see also Elliott v. Snyder*, 246 S.C. 186, 190, 143 S.E.2d 374, 375 (1965) (stating when a check is an accepted method of payment, "the giving of a check is not, in the absence of an express or implied agreement to that effect, a payment in discharge of the debt"); *Holladay v. S.C. Power Co.*, 169 S.C. 241, 243, 168 S.E. 691, 691 (1933) ("This court has repeatedly, and recently, held that a check does not constitute payment, unless it produces payment in cash."). "The foregoing principles are equally applicable to the payment of insurance premiums, and ordinarily the taking of a check for an insurance premium is conditional upon payment of the check upon presentation." *Burns*, 243 S.C. at 520, 134 S.E.2d at 771; *see also McCormick v. State Capital Life Ins. Co.*, 253 S.C. 544, 550, 172 S.E.2d 308, 311 (1970) (holding insurance policy was "never of any force or effect and afforded the applicant no coverage" because check given for payment of first monthly premium was never paid). "In the usual instance, acceptance of a check by the insurer is considered to be conditional only, and the burden rests on the

insured to see that the check is honored when presented." *Burns*, 243 S.C at 520-21, 134 S.E.2d at 771.

> The effect of this rule is that if the check is paid when presented, the payment generally relates back to the time when the check was delivered to the payee, thereby benefitting the drawer, by preventing the payee (here the insurer) from being able to hold the check without depositing or cashing it for an unreasonable time-beyond the due date for the payment of the premium, for instance-and then asserting that the payment was late and that, therefore, the policy lapsed.

16 Williston on Contracts § 49:76 (4th ed. 2010).

Boyd selected to pay the insurance premium on a monthly basis; therefore, he was required to pay by automatic bank draft. Boyd submitted a voided check and authorization to draft his checking account in compliance with the insurance application's instructions. Thereafter, Liberty Life approved Boyd's insurance application. However, the record contains no evidence that Liberty Life's approval of Boyd's insurance application constituted an agreement by Liberty Life to accept the tender of the voided check and authorization to draft his checking account as absolute payment of the premium. *See Burns*, 243 S.C. at 520, 134 S.E.2d at 771 ("[I]n the absence of an express or implied agreement to the contrary, a check does not constitute payment unless it produces payment in cash.").

Moreover, Boyd submitted the voided check and bank draft authorization as a part of the application process two months before the premium amount was finalized. As a result, neither the voided check nor the authorization to draft Boyd's checking account specified the amount of the premium. *See Going v. Mutual Benefit Life Ins. Co.*, 58 S.C. 201, 209, 36 S.E. 556, 558 (1900) (holding an insurance policy requiring payment of the first premium during the lifetime of the insured was effective upon tender of the *amount of the premium*); *see also Burns*, 243 S.C. at 520, 134 S.E.2d at 771 ("The mere giving or sending of a worthless check to the insurer does not effect the payment of a premium." (citation and quotation marks omitted)). Furthermore, when SelectQuote informed Boyd of the correct adjusted

premium quote of $1,037.90, Boyd refused to pay that amount.[4] Accordingly, we find Boyd's submission of a blank, voided check and authorization to draft his checking account pursuant to the application instructions merely established a method of payment, i.e., automatic bank draft, but was not the actual payment itself.

Significantly, Liberty Life neither accepted nor drafted any funds from Boyd's checking account as payment of the premium. Even though Boyd authorized Liberty Life to draft the premium amounts from his checking account, he was still obligated to pay the premium to establish sufficient consideration for an insurance contract. *See Burns*, 243 S.C. at 520, 134 S.E.2d at 771. "The fact that the insured authorizes his or her bank to deduct the amount of the premium from his or her account does not satisfy the insured's obligations where no payment was actually made by the bank to the insurer." 5 Holmes' Appleman on Insurance § 24.2 (2d ed. 1998); *see also Haupt v. Midland Nat'l Life Ins. Co.*, 567 So. 2d 319, 1321 (Ala. 1990) (holding appellant's choice of the automatic withdrawal method of payment did not relieve him of his duty to pay the premium). Because Boyd did not actually pay the premium, we hold there was not sufficient consideration to form a contract for life insurance between Boyd and Liberty Life.

CONCLUSION

For the foregoing reasons, the circuit court's order is

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[4] Boyd also argues Grissom's misquote of $417.73 is binding on Liberty Life because SelectQuote acted as an agent for Liberty Life by communicating the amount of the premium. We find this argument is without merit. Communicating a premium amount to the prospective insured does not convert an insurance broker into an insurance agent. *See* S.C. Code Ann. § 38-43-10(5) (Supp. 2011) (defining an insurance agent as a person who "receives, collects, or transmits any premium of insurance"). Additionally, Liberty Life did not approve Boyd for the "Non-Smoker" rate of $417.73 mistakenly quoted by Grissom. *See Hiott v. Guaranty Nat'l Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 422 (Ct. App. 1997) (stating an insurance broker cannot be converted into an agent of the insurer "without evidence creating an inference that he was acting at the 'instance or request' of the company" (citing *Allstate Ins. Co. v. Smoak*, 256 S.C. 382, 393, 182 S.E.2d 749, 754 (1971))).

AFFIRMED.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cason Companies, Inc., Respondent,

v.

Joseph Gorrin and Sharon Gorrin, Appellants.

Appellate Case No. 2010-175306

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion 4986
Heard April 11, 2012 – Filed June 13, 2012

AFFIRMED

Kimila L. Wooten, of Elmore Goldsmith, P.A., of Greenville, for Appellants.

David Alan Wilson, of Horton, Drawdy, Ward, Mullinax, & Farry, P.A., of Greenville, for Respondent.

GEATHERS, J.: Appellants Joseph and Sharon Gorrin (Purchasers) contend the circuit court erred in denying their motion for a directed verdict, pursuant to section 37-2-413 of the South Carolina Code (2002), and, thereafter, in awarding attorney's fees, costs, and expenses of $59,855.31 to Respondent Cason Companies, Inc. (Seller). We affirm.

FACTS

Purchasers ordered 35,000 bricks from Seller to use in the construction of their new home. Thereafter, Seller denied credit to Purchasers' general contractor. As a result, Purchasers executed a Personal Credit Application Form and requested credit of $5,000 for the purpose of buying bricks, mortar, and sand from Seller.

Seller's Personal Credit Application Form stated that if Seller approved Purchasers' Credit Application, Seller retained "the right not to extend credit to Purchaser at any time, particularly if the account is not paid in full each month." Regarding Purchasers' payment obligations and Seller's collection rights upon Purchasers' default, the Credit Application specified that [1] payment was due in full within thirty days of Seller's invoice; [2] should payment in full not be made within thirty days, the account would be in default and would accrue finance charges; and [3] if Seller was required to exercise collection efforts, Purchasers were responsible for paying all of Seller's attorney's fees, costs, and expenses. The Credit Application stated:

> [1] Purchaser hereby agrees and promises to pay [Seller] for all services and materials purchased from [Seller], now or in the future, on this account. Purchaser understands that payments are due in full within thirty (30) days of the date of [Seller's] invoice. [2] Should payments not be made within thirty (30) days, the account will be considered past-due and in default, and shall accrue finance charges of 18% per annum from the first day the account is past due, until payment is made in full. Purchaser agrees to pay these finance charges. [3] Purchaser also agrees to pay all [Seller's] attorney[']s fees, costs[,] and expenses. Each of the undersigned [Purchasers] agrees to pay court costs, and all other costs of collection allowed by law.

Purchasers also signed a "Guaranty Agreement," in which they agreed: "In the event this account is placed in the hands of an attorney or attorneys for collection or suit instituted to collect some or any portion thereof, I, and/or we agree and promise to pay all [Seller's] attorneys' fees, costs[,] and expenses."

Seller approved Purchasers' Credit Application and extended a $5,000 "line of credit" to Purchasers. From August 2005 through February 2006, Seller delivered bricks, sand, and mortar to Purchasers' construction site. Seller sent Purchasers an invoice following each delivery; however, Purchasers failed to make payment. On February 25, 2006, Seller sent Purchasers an invoice showing a balance due of $23,780.80, of which $13,685.09 was more than ninety days past due. Purchasers told Seller that they would pay their account in full at closing**.**

On March 20, 2006, Purchasers closed on the loan for their new home; however, they made no payment to Seller. Moreover, Purchasers attested on their title insurance application: "There are no unpaid bills or claims for labor or services performed or material furnished or delivered during the last twelve months for alterations, repair work, or new construction on the above-described property."

On January 25, 2007, Seller filed an action seeking payment of Purchasers' account, plus interest, attorney's fees, costs, and expenses. In June 2010, following a four-day trial, the jury awarded Seller actual damages of $49,856.46, which included the balance due on Purchasers' account and finance charges. Seller then moved for attorney's fees, costs, and expenses, pursuant to the terms of Purchasers' Credit Application. Seller additionally filed an affidavit of attorney's fees, expenses, and costs. Purchasers moved for a directed verdict on the issue of attorney's fees, claiming their agreement with Seller established a consumer credit sale, pursuant to section 37-2-104 of the South Carolina Code (2002). As a result, Purchasers contended the attorney's fees provisions of the Credit Application and Guaranty Agreement were void *ab initio,* pursuant to section 37-2-413(1) of the South Carolina Code (2002), which limits attorney's fees with respect to consumer credit sales and consumer leases.

On September 15, 2010, the circuit court issued an order denying Purchasers' motion for a directed verdict and awarded Seller attorney's fees of $51,560, and expenses and costs of $8,295.31, for a total award of $59,855.31. This appeal followed.

LAW/ANALYSIS

First, Purchasers contend that each of their transactions is properly classified as a "consumer credit sale," as defined in section 37-2-104 of the South Carolina Code (2002). Next, because section 37-2-413(1) of the South Carolina Code (2002) limits attorney's fees related to consumer credit sales and consumer leases,

Purchasers maintain the provisions regarding attorney's fees in the Credit Application and Guaranty Agreement were "void *ab initio*." The circuit court concluded that the Credit Application did not establish a consumer credit sale, and, therefore, section 37-2-413 did not apply. We agree.

A "consumer credit sale" is defined as:

> [A] sale of goods, services, or an interest in land in which
>
> (a) Credit is granted by a person who regularly engages as a seller in credit transactions of the same kind,
>
> (b) The buyer is a person other than an organization,
>
> (c) The goods, services, or interest in land are purchased primarily for a personal, family or household purpose,
>
> (d) Either the debt is payable in installments or a credit service charge is made, and
>
> (e) With respect to a sale of goods or services, the amount financed does not exceed twenty-five thousand dollars.

S.C. Code Ann. § 37-2-104(1) (2002).

"The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). Purchasers' argument for establishing a consumer credit sale transaction fails with the analysis of § 37-2-104(1)(d) — payment of debt. In a consumer credit sale, "either the debt is payable [1] in installments or [2] a credit service charge is made." S.C. Code Ann. § 37-2-104(1)(d) (2002). Seller asserts that its Credit Application authorized neither method of debt payment. The circuit court found that the "credit service charge," as defined in section 37-2-104(1)(d), was not equivalent to the payment of finance charges precipitated by default, as required by the Credit Application. Furthermore, because the outstanding debt was required to be paid *in full* within thirty days of Seller's invoice, the circuit court found the debt was not eligible to be paid "in installments."

We compared the definition of a "credit service charge," under the South Carolina Consumer Protection Code, with the express terms of the Credit Application. We agree with the circuit court's determination that the parties' transactions cannot be classified as consumer credit sales, as contemplated by section 37-2-104 of the South Carolina Code (2002). The Consumer Protection Code defines a "credit service charge" as follows:

> "Credit service charge" means the sum of (1) *all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to the extension of credit*, including any of the following types of charges which are applicable: time price differential, service, carrying or other charge, however denominated, premium or other charge for any guarantee or insurance protecting the seller against the buyer's default or other credit loss; and, except as otherwise provided in this section, (2) charges incurred for investigating the collateral or creditworthiness of the buyer or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the seller had no notice of the charges when the credit was granted. *The term does not include charges as a result of default, additional charges (§ 37-2-202), delinquency charges (§ 37-2-203)*, deferral charges (§ 37-2-204), or in a consumer credit sale which is secured in whole or in part by a first or junior lien or real estate, charges incurred for appraising the real estate that is collateral for the credit sale, if not paid to the creditor or a person related to the creditor.

S.C. Ann. Code § 37-2-109 (2002) (emphases added).

The applicable provision of the Credit Application states:

> Purchaser hereby agrees and promises to pay [Seller] for all services and materials purchased from [Seller], now or in the future, on this account. *Purchaser understands that payments are due in full within thirty (30) days of the date of [Seller's] invoice*. Should payments not be made

> within thirty (30) days, *the account shall be considered past due and in default*, and shall accrue finance charges of 18% per annum from the first day the account is past due until payment is made in full.

(emphases added).

Based upon the comparison between the language of section 37-2-109, defining a credit service charge, and the Credit Application, which provides for additional charges *upon Purchasers' default*, we find that the finance charges imposed by the Credit Application do not constitute a credit service charge. In conclusion, the Credit Application did not establish a method of payment of debt that involved either installment payments or credit service charges; rather, upon Purchasers' default, the Credit Application provided for the accrual of finance charges. *See Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) (citation omitted) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."). Here, the plain language of the Credit Application and Guaranty Agreement requires Purchasers to pay Seller's attorney's fees, costs, and expenses. Accordingly, we affirm the circuit court's determination that the parties' agreement did not meet the test of a consumer credit sale, and Purchasers are bound by the terms of the agreements they executed.[1]

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[1] On appeal, Purchasers contend "there was no evidence that the [attorney's] fees were incurred." Seller contends this issue was raised for the first time in Purchasers' brief to the Court of Appeals, and, therefore, it is not preserved for appellate review. We agree. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citation omitted) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

CONCLUSION

For the foregoing reasons, the circuit court's order is

AFFIRMED.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolinas Recycling Group and Employers Insurance Company of Wausau, Carrier, Appellants,

v.

South Carolina Second Injury Fund, Respondent.

Appellate Case No. 2010-166906

Appeal From Richland County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4987
Heard February 29, 2012 – Filed June 13, 2012

REVERSED

Michael E. Chase and Carmelo B. Sammataro, of Turner Padget Graham & Laney, PA, of Columbia, for Appellants.

Latonya D. Edwards, of Dilligard Edwards, LLC, of Columbia, for Respondent.

WILLIAMS, J.: In this workers' compensation action, the Carolinas Recycling Group and Employers Insurance Company of Wausau (collectively, Carrier) appeal from the circuit court's order affirming the appellate panel of the Workers' Compensation Commission's (Appellate Panel) order finding Carrier was not entitled to partial reimbursement from the South Carolina Second Injury Fund (the

Fund) for substantially increased medical expenses paid to Willie Sligh (Claimant). We reverse.

FACTS/PROCEDURAL HISTORY

On January 12, 2001, Claimant sustained a work-related injury while attempting to remove recyclable materials from a truck and was subsequently diagnosed with a lumbar contusion and sprain (the January 2001 injury). Claimant was released to full-time work with no restrictions, effective May 5, 2001, but he still continued to experience pain. In May 2002, Claimant was assigned a 9% lumbar spine impairment rating by Dr. Ross Lynch of Midlands Orthopaedics. On September 25, 2002, at the request of the previous insurance carrier, Claimant went to Dr. William Felmly of the Moore Orthopaedic Clinic for a second opinion. Dr. Felmly's medical report indicated Claimant's pain did not occur daily, lasted for approximately ten to fifteen minutes when it did occur, did not restrict him on the job, and did not pose any other limitations. Dr. Felmly opined there was no "evidence [] to suggest anything that would support an impairment of 8 to 10% of the lumbar spine in this gentleman's function" and noted Claimant reached maximum medical improvement (MMI) from the January 2001 injury. Dr. Felmly cleared Claimant to return to regular duty work and noted he did not observe "any gross clinical evidence" to suggest difficulties or to require an impairment rating.

Claimant sustained another, non-work related lumbar strain in October 2002 after he stood up from a bent position (the October 2002 injury). After the October 2002 injury, Claimant's lumbar spine MRI showed "mild anterior spondylitic changes" at L2-3. On December 30, 2003, Dr. Leonard Forrest of the Southeastern Spine Institute performed an independent medical evaluation and assigned a minimum 15% permanent lumbar spine impairment. Dr. Forrest opined the disc bulges at L4-5 and L5-S1 were likely caused by the January 2001 injury.

On June 28, 2004, Claimant sustained a second work-related injury when the truck he was driving overturned (the June 2004 injury). Following the accident, Claimant was admitted to the Regional Medical Center where he was diagnosed with an anterior compression fracture at L-4. As a follow-up, Claimant visited Southeastern Spine Institute where he was treated by Dr. Steven Poletti. Dr. Poletti determined that as a result of the January 2001 accident, Claimant sustained ruptured and/or bulging discs at L4-5 and L5-S1. Dr. Poletti subsequently assigned Claimant a 10% impairment rating.

The orders of the single commissioner and the Appellate Panel both found Claimant's June 2004 injury to his back was caused by the truck accident alone, and his preexisting condition was not aggravated by or combined with the June 2004 injury to create substantially greater medical costs and disability. In a form order, the circuit court affirmed the Appellate Panel in full. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009); *see Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2010); *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark*, 276 S.C. at 135, 276 S.E.2d at 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

LAW/ANALYSIS

On appeal, Carrier argues the circuit court erred in affirming the Appellate Panel's findings of fact and conclusions of law by holding it is not entitled to reimbursement from the Fund. Specifically, Carrier contends the Appellate Panel's decision is not supported by substantial evidence. We agree.

The legislative purpose of the Fund is to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the

employee is injured because of his preexisting condition." *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995). Reimbursement from the Fund is controlled by section 42-9-400 of the South Carolina Code (1985 & Supp. 2005), which provides in pertinent part:

> (a) If an employee who has a permanent physical impairment . . . incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, *by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment*, than that which would have resulted from the subsequent injury alone, . . . such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by [S.C. Code Ann. §] 42-7-310 for compensation and medical benefits . . . .
>
> . . . .
>
> (d) As used in this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.[1]

S.C. Code Ann. § 42-9-400 (1985 & Supp. 2005) (emphasis added).

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[1] Section 42-9-400(a) was later amended to refer to a "disability that is substantially greater *and* is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone," and it has omitted the "combined effects" language. Act No. 111, Pt. II, § 3, 2007 S.C. Acts 599 (emphasis added). However, this change is applicable only to injuries that occur on or after July 1, 2007, and the parties do not argue the new version applies here.

The Appellate Panel found, *inter alia*, (1) Claimant had a back injury and arthritis prior to his June 2004 injury, (2) Claimant's preexisting condition was a hindrance to employment, (3) the June 2004 injury did not combine with or aggravate the preexisting condition so as to increase the disability or medical costs, and (4) the Carrier failed to meet its burden of establishing all necessary elements for partial reimbursement pursuant to section 42-9-400.

The central issue is whether substantial evidence supports the Appellate Panel's finding that Claimant's June 2004 injury did not combine with or aggravate his preexisting condition. We conclude the only reasonable inference to be drawn from the substantial evidence in the record is that Claimant's preexisting condition was a hindrance to his employment and that he sustained a subsequent work-related injury that combined with or aggravated the preexisting condition to cause "substantially greater" disability and medical costs than would have been caused by the subsequent injury alone. Accordingly, we find the Appellate Panel's findings of fact and conclusions of law are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

In deciding that the June 2004 injury did not combine with or aggravate the preexisting condition from his January 2001 injury, the Appellate Panel relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion. Dr. Felmly's September 2002 evaluation opined Claimant has a normal functioning lumbar spine and that there was no "clinical evidence" to support an impairment rating following Claimant's January 2001 injury. However, it is important to note Dr. Felmly never treated Claimant following his October 2002 or June 2004 injury to assess his condition or opine whether either of his two preexisting conditions combined with or exacerbated the June 2004 injury. Moreover, the Fund failed to present any expert testimony from a physician who evaluated the Claimant after his October 2002 or June 2004 injuries to discredit the overwhelming medical testimony and evidence Carrier presented to the Appellate Panel. Therefore, we find the Appellate Panel's decision is not supported by substantial evidence. *See Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) ("Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached.").

The record is, however, replete with expert medical testimony concluding Claimant's preexisting condition combined with or aggravated his subsequent injury to cause "substantially greater" disability than would have been caused by the June 2004 injury alone.

Carrier presented the evaluations of several physicians who treated Claimant after the January 2001, October 2002, and June 2004 injuries. Moreover, these evaluations were accompanied by diagnostic imaging supporting their respective medical opinions. Carrier submitted Dr. Lynch's evaluation, which assigned a 9% impairment rating to Claimant's back in May 2002 as a result of Claimant's January 2001 injury. In addition, Carrier presented the report of Dr. Forrest who assigned a minimum 15% permanent impairment rating to Claimant's lumbar spine following his October 2002 injury and stated Claimant's disc bulges were "likely caused" by the January 2001 injury. Dr. Forrest's assessment was confirmed by a subsequent MRI, which revealed "degenerative changes at L2-3 which, at a minimum, was aggravated by that [January 21, 2001] incident." Finally, Carrier highlights Dr. Poletti's medical reports linking the injuries from the two work-related accidents and concluded "that [the] compression fracture c*ombined with the degenerative pre-existing changes* at the L4, L5 level *made the impairment and disability from the compression fracture worse than they would have been if he didn't have his degenerative changes from his pre-existing back injury*." (emphasis added). Additionally, Dr. Poletti noted the impairment and medical costs related to the June 2004 accident were substantially higher because of Claimant's preexisting condition. In sum, the only reasonable conclusion to be drawn from the substantial evidence in the record is that Carrier is entitled to partial reimbursement from the Fund. *See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005) (holding an appellate court can reverse or modify the Appellate Panel's decision if the decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record").

CONCLUSION

When the entire record is reviewed and considered, we hold the circuit court's order affirming the Appellate Panel's order finding Carrier was not entitled to partial reimbursement from the Fund was not based upon reliable, probative, and substantial evidence and was, therefore, clearly erroneous. Accordingly, the order of the circuit court is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, NA, Respondent,

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services, Defendants, of whom Michael Smith is the Appellant.

Appellate Case No. 2009-125666

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4988
Submitted March 1, 2011 – Filed June 13, 2012

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant Michael Smith.

Sean Matthew Foerster, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent Wells Fargo Bank.

WILLIAMS, J.: Michael Smith ("Smith") appeals the Master-in-Equity's ("Master") grant of Wells Fargo Home Mortgage, Inc.'s[1] ("Wells Fargo") motion to strike the jury demand. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo in the amount of $83,000. To secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Wells Fargo filed this action for foreclosure, alleging Smith defaulted on his loan payments under the Note and Mortgage and owed $77,460.63 on the debt. After the Greenville County Clerk of Court filed an order of reference, Smith filed a motion to allow late filing of responsive pleadings, and Wells Fargo consented to an extension of time. Smith filed an answer and counterclaim with a jury trial request and asserted, along with other various defenses, the following counterclaims: 1) accounting; 2) unconscionability; and 3) violation of section 37-10-102 of the South Carolina Code (Supp. 2010).[2] Wells Fargo filed a motion to strike the jury demand ("motion to strike"). The Master heard the motion to strike and asked Smith to submit additional authority to support his position.

On March 12, 2009, the Master issued an order granting Wells Fargo's motion to strike and confirming the order of reference. Smith timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order, and by order entered April 15, 2009, the Master denied Smith's Rule 59(e) motion. This appeal followed.

STANDARD OF REVIEW

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). "The granting or refusal of a [m]otion to strike . . . will not be reversed except for an abuse of discretion or

[1] Wells Fargo, NA is the successor by merger to Wells Fargo Home Mortgage, Inc.
[2] Section 37-10-102 of the South Carolina Code (Supp. 2010) is also referred to as the Attorney Preference statute.

unless the action of the trial judge was controlled by an error of law." *Id.* at 194-95, 213 S.E.2d at 728 (internal citation omitted); *see also Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (holding absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Additionally, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the trial court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

A. Subject Matter Jurisdiction

On appeal, Smith asserts the Master exceeded his jurisdiction in ruling on Wells Fargo's motion to strike. As a result, Smith contends the matter should have been transferred to the circuit court when he initially filed the jury demand as part of the answer and counterclaim. We disagree.

Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by an order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Specifically, Rule 53(c), SCRCP, states "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit court judge sitting without a jury would have in a similar matter."

As a basis for this claim, Smith cites the Reporter's Note appended to the 2002 Amendment to Rule 53, SCRCP. This note states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." However, the order of reference in this case authorized the Master "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action . . . ." Thus, once the case is referred to the Master, he has subject matter jurisdiction to resolve the action to the extent the order of reference provides, and with the authority a circuit court judge

would have in a similar matter. *See* Rule 53(c), SCRCP; *Hayes*, 311 S.C. at 360, 428 S.E.2d at 902. Accordingly, we find the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand as the matter was properly before the Master pursuant to the order of reference and our rules of civil procedure.

B. Smith's Counterclaims

Smith contends the Master erred in determining Smith's counterclaims for unconscionability and a violation of the Attorney Preference statute were not entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

> Any party may demand a trial by jury of any issue *triable of right by a jury* by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Smith demanded a jury trial in his answer and counterclaim when he asserted counterclaims of accounting[3], unconscionability, and a violation of the Attorney Preference statute against Wells Fargo.

[3] Smith conceded at the non-evidentiary hearing he was not entitled to a jury trial on his counterclaim for accounting and subsequently abandoned this argument on appeal. *See* Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). As Wells Fargo's foreclosure allegation is equitable in nature, Smith has the right to a jury trial only if his counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193.

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).[4] "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

For Smith's counterclaims to be entitled to a jury trial, each counterclaim must be both legal and compulsory.

1. Unconscionability

Smith argues the Master erred in finding he was not entitled to a jury trial on his unconscionability counterclaim. We disagree.

[4] "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

a) Common Law Unconscionability[5]

Although Smith's counterclaim for common law unconscionability is compulsory, he is not entitled to a jury trial because this is an equitable claim that does not create a cause of action for damages.

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRCP. The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Even though Smith's common law unconscionability counterclaim is compulsory, because common law unconscionability only provides an equitable relief, Smith is not entitled to a jury trial on his counterclaim. Jurisdictions throughout the country

[5] Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under section 37-5-108 of the South Carolina Code (Supp. 2010). We analyze this issue under both and hold the Master was correct in finding Smith was not entitled to a jury trial under either version of the counterclaim.

agree that common law unconscionability is an equitable cause of action with corresponding relief that is only equitable in nature. *See Doe v. SexSearch.com*, 551 F.3d 414, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see, e.g.*, Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). Despite Smith's request for actual and punitive damages for unconscionability in the body of his pleadings, the primary relief sought is to have the mortgage declared void. Accordingly, Smith seeks relief from a jury that cannot be granted. *See Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' *courts* should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.") (emphasis added); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed."); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) ("If the claim is equitable, there is no right to a jury trial."). Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. *See Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution."). Accordingly, Smith's common law unconscionability counterclaim is not entitled to a jury trial.

b) Statutory Unconscionability

Applying the same "logical relationship" test, we find Smith's counterclaim for statutory unconscionability is also compulsory. In addition to arising out of the same transaction or occurrence as Wells Fargo's foreclosure action, Smith's counterclaim bears a "logical relationship" to the enforceability of the Note and Mortgage. Accordingly, Smith's statutory unconscionability counterclaim is compulsory under the "logical relationship" test.

Although the statutory unconscionability counterclaim is compulsory, section 37-5-108 of the South Carolina Code (Supp. 2010) requires the determination of whether an agreement is unconscionable to be a matter of law for the court. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). In section 37-5-108, the General Assembly explicitly chose the use of the term "court" to unequivocally demonstrate that the matter is not to be resolved by a jury, but by the court. *See* § 37-5-108(1) ("[I]f the *court* as a matter of law finds . . . the agreement or transaction to have been unconscionable . . . the *court* may refuse to enforce the agreement.") (emphasis added); *see also* § 37-5-108(3) ("If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable . . . the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the *court* in making the determination.") (emphasis added). Therefore, section 37-5-108 does not provide a right to a jury trial for a statutory unconscionability cause of action. Accordingly, we affirm the Master's decision to strike Smith's unconscionability counterclaim.

2. Violation of the Attorney Preference Statute

To determine whether Smith is entitled to a jury trial on his allegation that Wells Fargo violated the Attorney Preference statute, we again must determine if this counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193. We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.

Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .

To secure payment of his Note, Smith gave Wells Fargo a real estate Mortgage covering his real property as well as a mobile home. As a result, Smith was entitled to choose an attorney of his preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

> If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010). A review of this statute demonstrates Smith's counterclaim has no "logical relationship" to the enforceability of the Note and Mortgage. Moreover, even if a violation of the statute occurred, Smith would only be entitled to actual damages and a possible penalty between $1,500 to $7,500. The statute, however, does not permit rescission of the Note and Mortgage for its violation. *See* § 37-10-105(A). As Smith's counterclaim bears no "logical relationship" to the enforceability of the Note and Mortgage, we conclude Smith's counterclaim is permissive. Therefore, Smith waived his right to a jury trial by asserting it in the foreclosure action. *See N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Accordingly, we affirm the Master's decision to strike Smith's counterclaim for a violation of the Attorney Preference statute.

C. Scope of Motion to Strike Jury Demand

Smith contends the Master exceeded the scope of Wells Fargo's motion to strike by making findings of fact and conclusions of law based on documents and information not in evidence. We agree.

A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972).

After a brief non-evidentiary motion hearing, the Master requested Smith submit authority to support his assertion he was entitled to a jury trial. A review of the Master's order demonstrates his ruling went beyond the permissible scope of Wells Fargo's motion. The order granting Wells Fargo's motion to strike had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order on the motion to strike the jury demand makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion.[6] *See Edwards v. Edwards*, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). We conclude these impermissible findings of fact and conclusions of law are prejudicial to Smith, thus warranting reversal. *See Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (holding a trial court will only be reversed when the record shows not only error but also prejudice).

CONCLUSION

In summary, the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand. Additionally, the Master's ruling on Smith's unconscionability and attorney preference statute counterclaims is affirmed. The Master's order, to the extent that it details specific findings of fact and conclusions of law, is reversed and the case remanded to the Master for a bench trial on the merits of all causes of action alleged.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

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[6] The Master made certain findings of fact that go to the substance and merits of Smith's claims and well beyond the scope of the motion to strike, including: "Smith's counterclaim has no merit," and "[b]ecause Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dennis N. Lambries, Appellant,

v.

Saluda County Council; T. Hardee Horne, Chairman; William "Billie" Pugh, Councilman; Steve Teer, Councilman; Jacob Schumpert, Councilman; and James Frank Daniel, Sr., Councilman, Respondents.

Appeal From Saluda County
William P. Keesley, Circuit Court Judge

Opinion No. 4989
Heard March 15, 2012 – Filed June 13, 2012

REVERSED

Richard R. Gleissner, of Columbia, for Appellant.

Christian Giresi Spradley, of Saluda, for Respondents.

KONDUROS, J.: Dennis Lambries appeals the circuit court's ruling that the amendment of the agenda by the Saluda County Council (the Council) during its meetings does not violate the Freedom of Information Act (FOIA). We reverse.

FACTS

Lambries filed suit against the Council contending its practice of amending its agenda during regularly scheduled meetings violated FOIA. The circuit court concluded specific language in section 30-4-80 of the South Carolina Code (2007) indicated no agenda was required for regularly scheduled meetings and the amendments to the agenda were made in open public sessions in accordance with the Council's procedures so the action did not violate FOIA.[1] This appeal followed.

STANDARD OF REVIEW

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court may decide matters of law with no particular deference to the circuit court. Pressley v. REA Constr. Co., 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007).

LAW/ANALYSIS

Lambries argues the circuit court's interpretation of section 30-4-80 of the South Carolina Code (2007) was erroneous because it undercuts the

[1] Lambries initially requested that certain acts of the Council be declared null and void, but he abandoned those claims and seeks only an interpretation of FOIA that will prevent the Council from amending its agenda during meetings in the future.

purpose of FOIA to inform the public about business to be addressed at meetings of public bodies. We agree.

Section 30-4-80 provides:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.
>
> . . . .
>
> (d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.
>
> (e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts

> made to comply with this requirement must be noted in the minutes of the meetings.

Section 30-4-15 of the South Carolina Code (2007) discusses the purpose of FOIA.

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Id. (emphasis added).

The circuit court determined the "if any" language in section 30-40-80(a) means that nothing requires Council to have an agenda for a regularly scheduled meeting. However, this interpretation is inconsistent with the requirement that agendas be posted twenty-four hours prior to a meeting. Applying such a construction, Council could circumvent the notice requirement by simply not preparing a formal agenda and then discussing matters on an ad hoc basis at the meeting. Such conduct would not be in keeping with the purpose of FOIA, and we will not construe a statute in a way that defeats the legislative intent. See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006) ("A statute as a whole must receive [a] practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (stating courts will reject the ordinary meaning of words if accepting such an interpretation of a statute leads to an absurd result that would defeat

the plain legislative intention.); id. ("If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect."). Additionally, if as Council argues no agenda is required because regularly scheduled meetings are open to the public, then the publication requirement when there is an agenda is superfluous. Meetings with or without an agenda are equally open to the public.

However, if "agenda"[2] is not viewed narrowly as only a formally prepared piece of paper but instead represents the impactful actions and business the paper memorializes, the statute can be read harmoniously. Then, the "if any" language simply recognizes that regularly scheduled meetings of public bodies may occur during which no formal action or discussion is to take place. If so, there is no agenda and no requirement for publication of a blank piece of paper.

The remainder of subsection (a) requires publication of the agenda for any called or special meeting. By implication, a called or special meeting would only occur if an item required formal discussion or action. This interpretation of the statute gives logical effect and meaning to each part of the statute and is in accord with the purpose of FOIA to notify the public of the activities of public bodies.

The remaining question is whether a published agenda for a regularly scheduled meeting can be amended during the meeting without violating FOIA. This is a close question, because no provision appears to prohibit such action. However, to allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement in section 30-4-80. A narrow construction of FOIA may support the position that so long as regularly scheduled meetings are open to the public, they are conducted in compliance with FOIA. However, such a construction would be inconsonant with the agenda notice requirement for regularly scheduled meetings and would go against the instruction that FOIA is to be liberally construed. See N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) (stating FOIA is a statute remedial in nature and

[2] Agenda is not defined in FOIA.

must be liberally construed to carry out the purpose mandated by the legislature); Evening Post Publ'g Co. v. City of N. Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (holding FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

While Lambries does not argue Council's deeds have been done with ill intent, permitting the amendments to the agenda during a regularly scheduled meeting is a practice that could be abused and violates the spirit of FOIA. A South Carolina Attorney General opinion, while not authoritative, eloquently describes the ideal conduct for meeting the obligations set forth under FOIA.

> Public bodies are encouraged to take all steps necessary to comply with both the letter and the spirit of the Act, to carry out the express purpose of keeping the public informed about the performance of their public officials and the conduct of public business. If any doubt exists as to action to be taken, the doubt should be resolved in a manner designed to promote openness and greater notice to the public.

1989 S.C. Op. Att'y Gen. 89-111, 1989 WL 406201 (October 11, 1989).

We recognize our decision may be inconvenient in some instances, but the purpose of FOIA is best served by prohibiting public bodies governed by FOIA from amending their agendas during meetings. Therefore, the ruling of the circuit court is

REVERSED.

GEATHERS, J., concurs.

PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting:

I respectfully dissent. The majority opinion is well-reasoned and compelling. However, I am reluctant to reverse the denial of temporary injunctive relief by the trial court because the statute is completely silent as to whether a public body can amend an agenda that is not required for a regularly scheduled meeting. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). "[I]t is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity . . . ." S.C. Code Ann. § 30-4-15 (2007). FOIA must be construed to make it possible for citizens to learn and report fully the activities of public officials. Id. Section 30-4-80 of the South Carolina Code provides the following:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

S.C. Code Ann. § 30-4-80 (2007).

Section 30-4-80 is completely silent as to whether an amendment to a published agenda for a regularly scheduled meeting is permitted. What is clear is that an agenda is not required for a regularly scheduled meeting, as indicated by the "if any" language in the statute. See S.C. Code Ann. § 30-4-80 (2007) ("Agenda, if any, for regularly scheduled meetings . . . ."). Because an agenda is not required for a regularly scheduled meeting, it is difficult to conclude that the statute's silence clearly demonstrates legislative intent to prohibit a public body from amending a discretionary agenda. Additionally, Council's amendment of the agenda did not violate FOIA's purpose of providing the public access to a public body's actions behind closed doors. Council's amendment of the agenda did not infringe on Lambries' ability to learn and report fully on the activities of the public officials. While the public was not informed of the amendment to the agenda, the meeting was performed in an open and public manner, and the public was advised of both the meeting and the decisions reached at the meeting.

Moreover, because a FOIA violation can be criminal in nature, the law should be clear as to what is proscribed; otherwise, unintended prosecutions could be threatened. See S.C. Code Ann. § 30-4-110 (2007) ("Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense . . . ."). Until the legislature resolves this issue, I would not judicially impose requirements that would have the effect of creating new and potentially unintended criminal liability. Furthermore, in light of the admitted lack of legislative clarity on this issue, I would alternatively affirm the trial court's denial of Lambries' temporary injunction, as the decision to grant or deny an injunction is within the discretion of the trial court. See Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) ("An order granting or denying an injunction is reviewed for abuse of discretion."). Based on the foregoing reasons, I would affirm the order of the trial court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Heller, Appellant.

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

Opinion No. 4990
Heard March 13, 2012 – Filed June 13, 2012

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor Warren B. Giese, of Columbia, for Respondent.

HUFF, J.: Following a jury trial, Christopher Heller was convicted of murder and assault and battery with intent to kill (ABWIK). Heller appeals, asserting the trial court erred in (1) allowing him to be impeached with his prior drug convictions pursuant to Rule 609(a)(1), SCRE, because the probative value of his drug

convictions substantially outweighed their unduly prejudicial effect, (2) refusing to declare a mistrial where a witness made reference to Heller being on parole, and (3) refusing to grant an in camera hearing on the admissibility of a witness's voice identification of Heller. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of August 25, 2006, a paramedic, responding to an unknown medical complaint at a trailer park, found Gustavo Guzman-Hernandez, known as "Chino," lying in the roadway.[1] As the paramedic approached, he encountered another man, who could not communicate in English. This person pointed to a trailer with an open door. The paramedic pronounced Chino dead and left the scene to wait on law enforcement to advise that the scene was secure. After Officer Clark arrived and entered the trailer, he heard moaning and then found Mary Deanna Chavis (Mary) inside the trailer.

Mary was grievously wounded, with multiple lacerations and evisceration of her bowel. The attack on Mary was so brutal, medical personnel did not expect her to live. She had multiple stab wounds to her face, chest, neck, head and hands, with a laceration to her left lower quadrant in which the muscle had been completely transected and her intestines were protruding from her abdomen. However, after multiple surgeries, Mary did survive her wounds. An autopsy on Chino likewise revealed he suffered from numerous stab wounds, including four to his face, defensive wounds to his hand, a deep wound to his left shoulder, and a fatal, slashing stab wound to the right side of his chest which penetrated his heart. The pathologist opined a single-edged weapon, such as a knife, caused Chino's injuries, and stated that a pocketknife is usually used in cases such as this. He determined the blade would likely have been three to four inches long but could have been longer.

The State presented the testimony of Billie Joe Risinger, known as "Tracy," who was present at Mary's trailer on the night of the stabbings. Tracy, who admitted she was addicted to crack cocaine, stated that on August 25, 2006, she saw Mary sitting with some other friends in Mary's front yard. Tracy testified that they all had the same addiction, and she called one of their drug suppliers, Kevin Nails,

[1] Gustavo also had nicknames of "Mechanic" and "Mechanico," but was primarily referred to throughout the testimony as "Chino."

who came over and "served them." Tracy said she then left in a car with Kevin, along with a man named Devon and the defendant, Christopher Heller, who she had never seen before that night. Kevin "serve[d] somebody else some drugs" and the group returned to Mary's trailer, where they found Mary and Chino. After Tracy engaged in sexual intercourse with Devon, Kevin and Devon left the trailer, leaving Heller with Tracy, Mary, and Chino at the trailer. The entire group smoked some crack, and Heller began acting strangely, removing and then putting back on his shoes and shirt. Heller also attempted to follow Tracy when she tried to leave, making Tracy feel uncomfortable. Because of his behavior, Mary politely told Heller he had to leave. Heller initially left the trailer, but then knocked on the door three to five minutes later. At this point, Chino left to get a phone so they could contact Kevin to come get Heller. With only Mary and Tracy left in the house, they heard a knock at the door. Over trial counsel's objection, Tracy identified the voice she heard at the time of the knocking as belonging to Heller. When she heard his voice, she told Mary not to open the door, but Mary told Tracy to just shut the bedroom door, as Tracy was in the bedroom at the time. Tracy heard a lot of banging and screaming, and heard Mary screaming for her life, so she locked the door and hid under the bed. Eventually, Tracy heard Mary say that she was dying and her "guts [were] hanging out." After Tracy asked where the man was, and Mary responded that she did not know, Tracy opened the door and fled from the trailer. When she got outside, she saw Chino, face down in the street. Tracy began knocking on trailer doors to obtain a phone to call for help, but then saw Kevin ride by in his car. She flagged down Kevin and told him his "cousin had went crazy, and he was trying to kill everybody." Kevin took Tracy to another location, where she called her mother, who then picked up Tracy and took Tracy back to her house. The next day, law enforcement contacted Tracy about the matter, and Tracy told them what occurred, with the exception of naming Kevin. The following day, however, she told law enforcement about Kevin and helped identify him. Thereafter, on August 29, Tracy helped develop a composite picture of a man's face, as well as of tattoos she observed on his body.[2] On August 30, she identified Heller in a photographic line-up.

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[2] Tracy testified she could not remember exactly where on his body she had seen the tattoos, but she was sure there was one that said "made man," and a tattoo that had dollar signs, and she thought there may be one of an eye. One of the investigators testified that he viewed tattoos on Heller's body, that Heller had "made man" under his chest area, and on his arms he had around "three money signs" and underneath that "my eyes only," with the word "eyes" being depicted by

The State additionally presented the testimony of Kevin. Kevin stated that in August 2006, his cousin, Heller, was staying with Kevin's family in Lexington because Heller was supposed to go with Kevin's mother and grandmother to Cherokee, North Carolina for the weekend. On August 25, at around 3:00 a.m., Kevin, Heller, and Devon went to Mary's trailer, where they saw Mary, Tracy, and "the Mechanic" (Chino). Kevin, Devon, Tracy, Mary, and "the Mechanic" started smoking drugs. Devon and Tracy went into a bedroom to engage in sexual intercourse, and after they came out, Heller and Tracy went into the bedroom. At that time, Kevin received a phone call and needed to leave Mary's house. Devon went with Kevin, and when Kevin called Heller to go with them, Heller became upset because he wanted to have sex with Tracy. Kevin then told Heller to just stay with Tracy, and he would return to pick up Heller. Kevin and Devon then left. Sometime later, after dropping Devon off somewhere, Kevin drove back to Mary's trailer to get Heller. When he honked his horn but got no response, he left Mary's home, and then saw Tracy at the top of the hill. Tracy then jumped in his car stating, "Your boy, your boy snapped." When Kevin asked Tracy where Heller was, she told him that she did not know, and that Heller had left. Kevin dropped Tracy off at another trailer park and then phoned his mother, who joined him to drive around looking for Heller. When they reached Tracy's trailer and observed the blue lights, Kevin panicked and continued driving. They tried to find Heller, but to no avail. Later that same day, around 9:30 p.m., Kevin received a call from Heller. Kevin drove to pick up Heller, and they then met Kevin's mother at a Burger King. Kevin's mother took Heller to Lexington, and then she drove him to Baxley, Georgia the next day.

Mary Chavis also took the stand and testified to the circumstances surrounding the stabbings that night. According to Mary, in the early morning hours of August 25, 2006, she and Chino saw Tracy riding in a car with Kevin, who Mary knew, and two other men, who Mary did not know. Tracy asked to go in Mary's house, so Mary gave her the key. Mary told Tracy she and Chino were going to the store, and instructed her to put the key back in a flower pot. When Mary and Chino returned to her home, the people were still in her home, which made Mary uncomfortable, so she and Chino left. When Mary and Chino returned to her home the second time, the car the men had been riding in was no longer there, so they

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the drawing of an eye and an apostrophe "s." Heller also acknowledged that he had tattoos of two dollar signs on his left arm and "made man" across his chest.

walked inside and went to Mary's room and started playing cards. Mary stated they did not see or hear anyone in the house at that time, but then heard someone arguing. When Mary opened her door, she found Tracy and Heller arguing in her living room. Mary asked what the problem was, and Heller claimed Tracy stole $7 from him, and that "he had put all of his stuff on the crack pipe and [Tracy] wouldn't let him have any." Mary asked Tracy to give Heller the pipe, but she refused. Mary then gave Heller $20 and smoked a piece of crack with him and told Heller to leave Tracy alone, explaining she had paid Heller an extra $13 so there would not be any trouble. While sitting in Mary's bedroom, Heller began taking off his shirt and shoes. When Mary asked him what he was doing and Heller did not answer, Mary told him he needed to put his clothes on and that he would have to leave her house. Heller got dressed, but told Mary he had nowhere to go. Mary told him to walk across the street and talk to someone over there, as the man across the street had a phone. She then watched Heller from her window as he walked to the home and knocked on the door. When no one answered, she observed Heller walk back to her home. Heller knocked on her door and stated that he had nowhere to go and did not know anyone around there. At this point, Mary asked Chino to let Heller use his phone to call Kevin for a ride, and Chino and Heller then left Mary's trailer. Mary and Tracy were in Mary's bedroom, waiting for Chino to return, when there was another knock at the door. Because she thought it was Chino, Mary opened the door without looking to see who it was. Heller was standing at the door, and when he tried to come inside, Mary put her hand on his chest and asked him, "What is the problem? What's up?" By the time she got these words out, Heller said something and started stabbing her. Mary stated she fought Heller as long as she could with her hands, but then could fight no longer. She yelled for Tracy to help her, but Tracy wanted to know who was out there, to which Mary responded that it was "the same man from before." Mary decided to back up so she could try to kick Heller, but as she did so, he stabbed her in her stomach with the knife. The more she kicked Heller, the more her intestines would come out, so she eventually curled up into a ball on the couch, where Heller continued to stab her. Eventually, Heller stopped stabbing her and ran out the door. Mary then got up from the couch and went to her bedroom door, begging Tracy to pack her wounds before she bled to death, but Tracy would not open the door. Mary slid down the wall and yelled for help, but had to stop when she saw that this action increased her bleeding. Tracy finally opened the door, and jumped over Mary and ran out the front door. At some point, both Chino and Heller came back inside the trailer. Mary testified that Heller had taken off his shirt, and he sat on the couch where he had been stabbing Mary. Chino ran in the trailer and "bent

over to get the guy and something happened." Mary saw a movement, saw arms move, and then saw Chino run out the door with Heller running behind him. Mary then drifted in and out of consciousness, but remembered the police and EMS arriving, whereupon she was transported to the hospital. A sketch artist visited Mary in the hospital on August 28, 2006, and drew a composite of the person Mary described as her attacker. On August 30, investigators also visited her in the hospital and showed her a photographic line-up, from which Mary identified Heller. Mary also made an in-court identification of Heller as the person who attacked her in her home. She testified "beyond a shadow of a doubt" that Heller was her attacker.

After Heller was developed as a suspect, investigators from South Carolina traveled to Baxley, Georgia, where a search warrant was executed on the residence where Heller resided. Heller later turned himself in at the Appling County Sheriff's Department, where he gave the South Carolina authorities a statement implicating himself in the matter. Specifically, when asked what had occurred in Columbia, South Carolina around 4:00 a.m. on August 25, 2006, Heller stated as follows:

> My cousin Kevin Nails and another black male left the Oasis club. My cousin stopped in the roadway to pick up and (sic) little white girl that was walking. Kevin dropped the girl and I off at (sic) trailer. Inside the trailer was a white lady and a Mexican man. The lady let us in. Once inside the white girl that Kevin picked up and I went into a bedroom and started smoking crack. I went outside for a few minutes and when I came back inside the lady that lived there told me I had to go. I told her I was waiting on Kevin to come back and pick me up. I just started stabbing the people.

Asked where he had obtained the knife, Heller replied, "It was mine; it was a fold up knife. It had a brown handle. The blade was about 2 or 3 inches long." When asked who he started stabbing first, Heller stated, "The lady, the man jumped on my back inside the trailer." Heller further indicated, after stabbing the lady and man, he ran and found an old empty trailer and hid there until around dark. He asked a lady if he could use her phone to call someone to pick him up, and he called Kevin. He stayed at the lady's house until Kevin arrived, and Kevin called "mother, Carolyn Robinson," who met them on the interstate. Kevin's mother took Heller to his mother's home in Georgia. Heller stated he threw the knife

somewhere after leaving the girls' trailer. He also indicated he was in Columbia for the purpose of going to the casino in Cherokee, North Carolina with Kevin and his aunt, Carolyn Robinson. The investigators testified they did not make any promises or threaten, coerce, or force Heller to give his statement, nor did they make any sort of threats or promises concerning Heller's family members.

Once the investigators returned to Richland County with Heller, they drove to the area of Mary's trailer park, where Heller pointed out a small, abandoned trailer he claimed to have stayed in between the time of the incident and going to call Kevin. Heller was also asked to show them the area where he threw the knife. The investigators then drove Heller to the Sheriff's Department. A few days later, one of the investigators took Heller back to the trailer park area, where Heller gave more information to narrow down where he threw the knife. However, the authorities were never able to locate the knife.

Heller presented the testimony of his mother, Loranda, and himself in his defense. Loranda testified to the circumstances surrounding the execution of the search warrant in Baxley, Georgia, and the officers taking her and Heller's friend, Jena, to the sheriff's department. Specifically, Loranda stated that the officers pointed a gun at her; she had a heart condition that included a heart attack; they transported her and Jena to headquarters; the Appling County Sheriff read her rights to her; she informed him she desired an attorney; she was then put inside a holding cell; and the Sheriff told her both Georgia and South Carolina were going to charge her with aiding and abetting. Loranda testified she was released after seeing her son in the courtroom, and no one ever said anything else to her about any charges related to this incident.

Heller testified in his own defense. He acknowledged he was with Kevin and Devon on August 25, when Kevin picked up a white girl who had called him. They then went to Mary's, where Devon went into a back room with Tracy. After that, Heller stated he went back there with Tracy and smoked crack. Tracy started arguing with him about drugs, and though Heller was not mad or hostile, "the lady" told him he should leave and informed him he should go across the street to use a man's phone. Heller claims he then left without argument, but the man across the street would not allow him to use the phone. According to Heller, he then walked to a store and used a pay phone to call his cousin, but the call was dropped. Heller then went to an abandoned trailer and stayed there "until [his] high went down." Heller acknowledged he was drinking, smoking crack, and smoking weed that

night. Once he "calmed down," some twelve to thirteen hours later, he borrowed a phone from a lady and called Kevin again. Kevin picked him up and took him to a store where they met up with Heller's aunt. He stayed at his aunt's house that night, and the next day she took him home to Baxley, Georgia. While in Georgia, Heller found out his mother had been taken downtown. Concerned about his mother's heart condition, he went to the local Sheriff's Department, where he was told he was a suspect. Heller claimed the South Carolina investigators told him they were charging his mother with aiding and abetting, and the only way they would release her and his girlfriend was if Heller "[took] these charges." Heller claimed he signed a paper they presented to him, and the investigators then read him his rights. One of the investigators then pulled out a laptop and started typing a statement.

Heller denied stabbing or killing anyone on the night in question. He admitted going to Mary's trailer with Kevin and Devon after picking up Tracy and smoking crack with Tracy, but denied smoking crack with Mary. He acknowledged that Kevin received a call and Kevin and Devon left, but he wanted to stay to have sex with Tracy. Heller agreed that he was there at the trailer with Mary, Tracy and Chino; he went into the back bedroom and smoked crack with Tracy; he argued with Tracy; Mary told him to leave because she did not like the arguing; he went across the street to use a phone, but the person would not let him; and he ended up staying in an abandoned trailer all night and through the daylight hours until about 9:30 p.m., when he finally saw Kevin.

Heller disavowed parts of the statement he signed. Specifically, he acknowledged the parts of the statement indicating he went to a trailer, they picked up a girl, and he and the girl got into a little argument whereupon he was asked to leave. He also testified he indicated in his statement that he went into a bedroom with the white girl Kevin had picked up and they started smoking crack, and when the lady that lived there told him he had to leave, he told her he was waiting for Kevin "to come back and pick him up." However, he claimed he told the investigators he did not know anything about a knife, acknowledging only that he had a little key-chain pocketknife. Heller denied stating that "a white lady and a Mexican man" were inside the trailer," that the lady let him inside, and that he "just started stabbing people." He further denied ever saying anything regarding who he stabbed first, what he did after stabbing the lady and the man, and what happened to the knife. Heller also testified, when they got back to South Carolina, he showed the investigators the abandoned trailer in which he stayed, but claimed when they

asked where he threw the knife, he told them he did not know anything about a knife. He further testified that he was not given the statement to read over it until he was back in South Carolina, and though he was read and he signed his waiver of rights, he did so because he did not have a choice.

Following submission of the case to the jury, Heller was convicted of the murder of Chino, as well as ABWIK in regard to Mary. This appeal follows.

ISSUES

1. Whether the court erred by allowing impeachment of Heller with his prior drug convictions pursuant to rule 609(a)(1), SCRE, because the probative value of these drug and drug dealing convictions was substantially outweighed by their unduly prejudicial effect, particularly where the solicitor admitted the nature of the convictions made them relevant to whether the jury believed Heller that the police were lying and coerced his statement, since this impermissibly invited the jury to find Heller was acting in character in this case with his past drug convictions.

2. Whether the court erred by refusing to declare a mistrial where witness Kevin Nails testified, in response to the solicitor's question about where Heller was going after he left South Carolina, that Heller had to get back to Georgia because he was on "parole leave," since defense counsel made a pretrial motion to exclude this evidence, and he correctly argued a curative instruction was not going to solve the prejudice.

3. Whether the court erred by refusing to grant defense counsel an in camera hearing on the proper foundation being laid for witness Tracy Risinger's voice identification of Heller as the man who knocked on the door and spoke immediately before the murder because a proper foundation for Risinger's voice identification evidence was never established for this extraordinarily prejudicial claim.

LAW/ANALYSIS

A. Impeachment with prior drug convictions

Prior to Heller taking the stand, the solicitor argued she should be allowed to impeach Heller with five previous convictions, should Heller decide to testify. She

stated Heller had a 1999 conviction for possession with intent to distribute (PWID) marijuana, and he pled guilty to four other drug charges on the same date in 2001, including another PWID marijuana, two counts of "manufacture, sell, dispense distribute with intent to distribute" charges, and one count of drug trafficking within 1,000 feet of a park, recreation facility or public housing. Trial counsel objected, arguing under Rule 609(a)(1), SCRE, these convictions were subject to a Rule 403, SCRE, analysis, and because evidence showing Heller was a drug dealer was very prejudicial and there was no probative value to the charges, the prejudice outweighed the probative value, and the State was offering these convictions strictly as propensity evidence. The trial court denied the motion, finding the convictions admissible.

When Heller took the stand, he acknowledged in direct examination that he had been convicted of marijuana and cocaine charges and drug dealing. On cross-examination, Heller agreed he was convicted of PWID marijuana on April 8, 1999, and the other specific drug charges of PWID marijuana, two counts of manufacturing, selling, dispensing, and distributing with intent to distribute, and one count of drug trafficking within 1,000 feet of a park, recreation facility, or public housing on August 3, 2001.

On appeal, Heller argues Rule 609(a)(1), SCRE, allows a defendant to be impeached with a crime punishable by a sentence in excess of one year if the court, subject to a Rule 403, SCRE, determination,[3] finds the probative value outweighs its prejudicial effect, and only if the convictions are for crimes of dishonesty or false statements are such prior convictions automatically admissible under Rule 609(a)(2), SCRE. Heller contends the solicitor desired to impeach him with drug crimes so the jury would believe he was acting consistently with his past character

[3] The State points out that a Rule 403 balancing test is applied when a conviction is offered to impeach a witness who is not the defendant, and Rule 609(a)(1), SCRE provides its own balancing test in the case of impeaching a defendant, which is simply that the probative value of admitting such evidence outweighs its prejudicial effect to the accused. Thus, the State contends Heller has, both at trial and on appeal, objected "under the wrong rule." At any rate, the State contends the trial court committed no error in denying Heller's motion, whether applying the Rule 403, SCRE analysis, which requires evidence to be excluded if its probative value is *substantially outweighed* by the danger of undue prejudice, or the appropriate standard under Rule 609(a)(1).

at the time of the incident. He argues violations of narcotic drug laws are generally not probative of truthfulness, and it is improper to admit prior criminal convictions as impeachment evidence to show a defendant acted in conformity with his prior record.

Rule 609(a), SCRE, provides as follows:

> For the purpose of attacking the credibility of a witness,
>
> > (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
> >
> > (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Our supreme court has approved consideration of the following five factors, along with any other relevant factors, when weighing the probative value for impeachment of prior convictions against the prejudice to the accused: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000); *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009). This court has noted a preference for an on-the-record *Colf* balancing test by the trial court under Rule 609(a)(1), SCRE. *See State v. Martin*, 347 S.C. 522, 530, 556 S.E.2d 706, 710 (Ct. App. 2001) ("While *Colf* involved the admission of prior convictions more than ten years old under Rule 609(b), SCRE, this court has implicitly recognized the value of these factors in making such a determination under Rule 609(a)(1), and urged the trial bench to not only articulate its ruling, but also provide the basis for it, thereby clearly and easily informing the appellate

courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1).") (internal quotation marks omitted). Meaningful appellate review is best achieved when the trial court articulates its ruling and the basis for it, when balancing the probative value of a prior conviction under Rule 609(a)(1), SCRE, against the prejudicial effect. *State v. Elmore*, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct. App. 2006).

Here, the trial court simply denied Heller's motion to exclude the prior convictions without performing an on-the-record *Colf* analysis. However, any error in a trial court's failure to conduct the proper balancing test under Rule 609, SCRE, may be considered harmless. *State v. Williams*, 380 S.C. 336, 344, 669 S.E.2d 640, 644 (Ct. App. 2008). In order for an appellate court to reverse a case based on erroneous admission of prior convictions, prejudice must be shown. *State v. Young*, 378 S.C. 101, 107, 661 S.E.2d 387, 390 (2008). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

> A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial."

State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)). Further, "[i]t is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983).

Here, Mary positively identified Heller in a photographic line-up and thereafter made an in-court identification of Heller as the man she evicted from her home and who then returned and stabbed both her and Chino. Additionally, Tracy picked Heller from a photographic line-up and also identified Heller in court as the man Mary evicted from her home, who thereafter returned and whose voice she heard during a knock on the door, immediately after which she heard Mary being brutally attacked. Heller's cousin, Kevin, also identified Heller as the individual he left at

Mary's trailer with Mary, Tracy, and Chino prior to the attack, as the person who Tracy indicated to him had "snapped" and as the person who called him the next evening needing a ride from the area near the crime scene. Finally, Heller admitted in his statement that he and "a white girl" were dropped off at a trailer by Kevin, there was "a white lady and a Mexican man" inside the trailer, that the lady who lived there told him he had to leave the trailer, and he started stabbing people upon his return. Thus, there was overwhelming evidence presented of Heller's guilt. Further, an abundance of evidence was presented concerning Heller's participation in illegal drug activity such that the admission of Heller's prior drug convictions was cumulative to the other evidence. Tracy testified that Heller accompanied Kevin when Kevin "served" them drugs on the night in question, and that Heller smoked crack with them that night. Mary also confirmed that Heller participated in smoking crack that night and further indicated that she paid Heller for the drugs after Heller and Tracy argued over drugs and money. Accordingly, even if we assumed error in the admission of Heller's prior drug convictions, any such error was insubstantial and could not reasonably have affected the result of the trial. Thus, Heller can show no prejudice, and any error in admission of the drug convictions was harmless. *See State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005) (finding the introduction of prior convictions was not prejudicial where other evidence was admitted concerning defendant's possible guilt relating to other crimes, and because there was overwhelming evidence of defendant's guilt in the matter, the introduction of his prior convictions could not have reasonably affected the outcome of the trial such that any error was harmless).

B. Mention of "parole leave"

During Kevin's direct examination concerning Heller's whereabouts that night, Kevin explained that he called his mother after he picked up Heller, they met his mother at a Burger King, and Heller got in the van with Kevin's mother to go to Lexington for the night. The following colloquy then occurred:

> A: I think they left like either a day - - I think a day after she picked him up from me.
> Q: Okay. They leave to go where?
> A: To Baxley.
> Q: Back to Baxley - -
> A: Yes.
> Q: - - Georgia?

> A: Because he was here on like a parole leave. He had a certain amount of time until he had to be back.

At this point, trial counsel objected and moved to strike. The trial court sustained the objection and instructed the jury to "[d]isregard his comment about the parole." The solicitor finished examining Kevin, at which point the trial court decided to take a fifteen minute break. After the jury left the courtroom, trial counsel asked to put a matter on the record and moved for a mistrial based upon Kevin's mention that Heller was on parole. Counsel argued he had filed a pretrial motion so witnesses would be instructed not to bring up Heller's parole.[4] He further argued the court's curative instruction, striking the matter from the record, was an insufficient remedy. The court noted that the statement was "just spontaneous" and Kevin had "just blurted it out." The solicitor agreed, asserting the statement was nonresponsive to her question. The solicitor further argued "it was a small comment" and the court had instructed the jury to disregard it. The trial court denied Heller's motion for mistrial.

Heller argues the mention of him being on parole clearly showed he had a prior criminal record. He asserts that admission of evidence implying a defendant has a prior criminal record is reversible error, and the trial court's instruction to the jury to disregard the reference to parole was insufficient to cure the prejudice. Heller further contends this situation should not be considered one where there is a vague reference to a defendant's prior criminal record such that it would not justify a mistrial because, here, the solicitor knew she was going to attempt to impeach him with his prior drug convictions at the time she argued against the mistrial motion. Consequently, it was not a vague and isolated reference. Accordingly, Heller contends the trial court erred by refusing to declare a mistrial.

Where a defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide. *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010). "No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not *contemporaneously* make an additional objection to the sufficiency of the curative charge or move for a mistrial." *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (emphasis added). Although Heller subsequently moved for a mistrial, he initially

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[4] No such motion is included in the record, nor does the transcript show such a motion was ever addressed by the trial court.

accepted the trial court's ruling wherein the trial court sustained his objection and granted his requested relief of striking the offending testimony. Because he accepted the ruling and did not contemporaneously move for a mistrial or object to the sufficiency of the court's curative instruction, this issue is not preserved for our review. Further, though Heller did move for a mistrial and argue the curative instruction was insufficient immediately following conclusion of the State's direct examination of Kevin, this is insufficient to qualify for a contemporaneous objection. *See State v. Simmons*, 384 S.C. 145, 171-72, 682 S.E.2d 19, 32-33 (Ct. App. 2009) (wherein this court found unpreserved Simmons' appellate argument that the trial court erred in denying his motion for a mistrial in response to testimony of a witness referencing the robber as "the defendant," where Simmons failed to make a timely objection in response to the witness's statement, instead waiting until after the witness finished testifying before he objected and requested a mistrial).

C. In camera hearing on voice identification

During direct examination, Tracy testified concerning the events leading up to the stabbing of Mary. Specifically, in regard to what occurred after Kevin and Devon departed, leaving Tracy, Mary, Chino, and Heller at the trailer, Tracy stated that the remaining group smoked crack. According to Tracy, Heller was acting strangely, prompting Mary to ask him to leave. Tracy stated that Heller "gave [her] the creeps," and "he tried to follow [her] out." Heller initially complied with Mary's request and left the trailer, but returned three to five minutes later. Thereafter, Chino left to get a phone, as Mary and Tracy wanted Kevin to come pick up Heller. Only Tracy and Mary remained at the trailer at that time. When asked what she and Mary were doing, Tracy testified, "Well, we were trying to sit down and have a conversation, but somebody knocked on the door. It was him. I heard his voice." Trial counsel objected to Tracy's identification of the voice and moved to strike the testimony, arguing her identification based on the voice had never been addressed before and was not brought up in pretrial hearings. At this point, a bench conference was held off the record, and the trial court thereafter sustained trial counsel's objection. When Tracy's testimony resumed before the jury, the solicitor questioned her concerning her opportunity to talk with Heller and hear his voice on the night of the incident. Tracy testified that she talked with Heller "a little" that night; heard his voice; described it as raspy and deep; and stated she could recognize his voice if she heard it again. The following colloquy then occurred:

Q: So that night when someone came and knocked on the door, did the person say anything.
A: I don't know what exactly he said. I just heard - - I just heard her saying, "No, no," and I heard him say something, and then I heard a whole lot of noise - -
Q: Like - -
A: - - like banging, like (indicating).
Q: Did the voice belong to a man or a woman?
A: A man.
Q: And could you identify that voice?
A: Yes.
Q: And who was that voice belonging to?
[Defense Counsel]: Objection, Your Honor.
[The Court]: Overruled. Go ahead.
A: I would say him.
Q: The defendant?
A: Uh-huh, without a doubt.

When Tracy heard that voice, she told Mary not to open the door, but Mary told her to just shut the bedroom door. When Tracy heard banging and screaming, she then locked the door and hid under the bed. Tracy thereafter made an in-court identification of Heller as the man she heard come into the trailer while she was in the bedroom. During cross-examination, trial counsel questioned Tracy extensively regarding her failure to mention anything about hearing a voice at the front door that night in either her statement to police or in her pretrial testimony. Tracy acknowledged she did not see the attack, but stated she heard it. She also noted Mary had kicked Heller out only three minutes before the knock on the door, and questioned, "Who else would it have been?"

Sometime thereafter, trial counsel stated he wanted to place on the record that, during the bench conference, he had requested an in camera hearing, in the vein of a *Neil v. Biggers* hearing, to cross-examine Tracy on her voice identification outside the presence of the jury. The trial court acknowledged that a request had been made for an in camera hearing, which the court denied. The court noted it had initially sustained the objection to the testimony, but allowed the prosecution the opportunity to lay the foundation for Tracy's voice identification. Once the foundation was properly laid and an objection was made, the court overruled the

objection. At the close of the State's case, trial counsel renewed his previous objections and motions, specifically noting he had requested an in camera hearing regarding Tracy's voice identification "[a]ccording to *Neil v. Biggers*."

On appeal, Heller argues the trial court erred in refusing to grant his motion for an in camera hearing on the admissibility of Tracy's voice identification testimony. He asserts Tracy was improperly allowed to give this testimony because there was insufficient foundation for it, and because South Carolina law concerning the admission of voice identification evidence indicates a trial judge should establish some foundation for the admissibility of such evidence. He contends Tracy's voice identification was "very suspect," noting Tracy first met Heller on the night of the incident, and she "was in another room." Thus, Heller maintains the trial court should have allowed an in camera hearing to determine if there was a proper foundation for Tracy's voice identification. Heller additionally cites the California case of *People v. Clark*, 833 P.2d 561 (1992), for the proposition that the trial court erred in failing to hold an in camera hearing on the voice identification evidence.

We find no merit to this issue. In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court addressed whether a show-up identification was so suggestive that it violated the defendant's right to due process. *Id.* at 196-201. In *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004), our supreme court noted "[t]he United States Supreme Court has developed a two-prong inquiry[5] to determine the admissibility of an *out-of-court identification*." *Id.* at 81, 600 S.E.2d at 526 (citing *Biggers*) (emphasis added). Our courts now consistently recognize the general rule that a trial court must, when identification of a defendant is an issue, hold an in camera hearing "when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, *and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.*" *State v. Miller*, 359 S.C. 589, 596, 598 S.E.2d

[5] Under this inquiry, the court must first determine whether the identification process was unduly suggestive and, next, must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). Only if the procedure was suggestive need the court consider whether there was a substantial likelihood of irreparable misidentification. *Id.* at 287, 540 S.E.2d at 447-48.

297, 301 (Ct. App. 2004) (emphasis added), *aff'd*, 367 S.C. 329, 626 S.E.2d 328 (2006). Our courts have refused, however, to extend the requirements of a *Biggers* hearing to protect criminal defendants against identifications that occur for the first time in court, without a pretrial identification. *State v. Lewis*, 363 S.C. 37, 42-43, 609 S.E.2d 515, 517-18 (2005).

In the case at hand, it is undisputed that Tracy's voice identification occurred for the first time in court. Heller did not challenge the voice identification by Tracy as being suggestive or in any way tainted by a previous, illegal identification or confrontation. Thus, a *Biggers* hearing was not warranted in this case.[6] Further, Heller fails to point to any authority that requires an in camera hearing to address whether a proper foundation exists for testimony concerning an in-court, first time, voice identification.[7] Additionally, the record clearly shows the trial court initially sustained Heller's objection to Tracy's in-court voice identification, and only after the solicitor laid a proper foundation did the trial court allow the voice identification into evidence.[8] Accordingly, we find no error.

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[6] Heller's reliance on the California Supreme Court case of *People v. Clark*, for the proposition that the trial court erred in failing to hold an in camera hearing on the voice identification evidence, is equally misplaced, as that case involved an in camera hearing wherein a voice identification was challenged as impermissibly suggestive based upon an inherently suggestive single-voice lineup in an out of court proceeding.

[7] Rule 104(c), SCRE, provides that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury," and "[h]earings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." However, Heller has not cited this rule, either at trial or on appeal, and additionally has presented no argument whatsoever that "the interests of justice require" an in camera hearing on the matter.

[8] We note that Heller did not specifically challenge the foundation for the voice identification as inadequate at trial, but simply argued that he was entitled to an in camera hearing to cross-examine Tracy on the voice identification. At any rate, we believe a sufficient foundation was laid, as Tracy testified concerning her opportunity to hear Heller's voice earlier that night, she gave a description of his

CONCLUSION

Based on the foregoing, we find, although the trial court failed to make an on-the-record *Colf* analysis, any possible error in the admission of Heller's prior convictions was harmless nonetheless. Additionally, the issue concerning the mention of Heller being on "parole leave" by the witness is not preserved for our review. Finally, we hold a *Biggers* hearing was not required on the voice identification because Heller did not challenge the voice identification as being based upon an inherently suggestive out of court proceeding, and a proper foundation was laid for the admission of the testimony.

AFFIRMED.

FEW, C.J., and SHORT, J., concur.

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voice as being raspy and deep, and she confirmed she could recognize his voice if she heard it again.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey S. Clary & Tug Properties, LLC, Plaintiffs,

Of whom Jeffrey S. Clary is Appellant,

v.

Clifton David Borrell, Respondent.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4991
Heard February 14, 2012 – Filed June 13, 2012

AFFIRMED

Kenneth C. Hanson and Walter M. Riggs, Hanson Law Firm, of Columbia, for Appellant.

Page M. Kalish, of Columbia, for Respondent.

HUFF, J.: Jeffrey S. Clary and TUG Properties, LLC (TUG) instituted this action against Clifton David Borrell for breach of contract and quantum meruit, wherein Clary and TUG asserted Borrell breached the TUG operating agreement entered into by Clary and Borrell. From an order of the trial court granting Borrell summary judgment on both claims, Clary appeals the grant of summary judgment on the breach of contract cause of action. Specifically, Clary contends the court erred in (1) finding there was no genuine issue of material fact in controversy, as Clary provided evidence Borrell signed a statement promising to pay TUG's debts and personally guaranteed TUG loans and (2) determining Borrell's personal guarantee for TUG's loans did not constitute additional capital contributions. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On February 2, 2004, Clary and Borrell entered into an operating agreement to form a limited liability company, TUG, with Clary and Borrell each initially contributing around $70,000 for a fifty percent ownership in TUG.[1] Clary and Borrell agree that the operating agreement controls the rights and obligations of Clary and Borrell as the members of TUG, and is a valid contract between the two. The operating agreement provided the stated purpose of the company was to buy and sell residential real estate. Article IV of the operating agreement includes the following pertinent provisions:

> **4.1 Initial contributions.**
>
> Each initial member shall make the Capital Contribution described for that Member on Exhibit A at the time and on the terms specified on Exhibit A and shall make such additional capital contributions as may be required of Members from time to time . . . .

[1]Clary's affidavit states each party initially invested $70,000, while Borrell maintains in his brief that he made an initial contribution of $71,000, pointing to a general journal account ledger from TUG indicating a balance forward of $71,000 in Borrell's capital account as of September 30, 2004.

4.2 Subsequent contributions.

Without creating any rights in favor of any third parties, each member shall contribute to the Company, in cash, on or before the date specified as hereinafter described that Member's pro rata share of all monies that in the judgment of a Required Interest, is necessary to enable the Company to cause the assets of the Company to be properly operated and maintained and to discharge its costs, expenses, obligations, and liabilities. A Required Interest shall determine and notify each Member of the need for Capital Contributions pursuant to this Section 4.2 when appropriate, which notice must include a statement in reasonable detail of the proposed uses of the Capital Contributions and a date . . . before which the Capital Contributions must be made.

4.3 Failure to contribute.

A. If a Member does not contribute by the time required all or any portion of a Capital Contribution that Member is required to make as provided by this Operating Agreement, the Company may exercise, on notice to that Member (the "Delinquent Member"), one or more of the following remedies:

(2) permitting the other Members on a pro rata basis or in such other percentages as they may agree (the "Lending Member," whether one or more), to advance the portion of the Delinquent Members Capital Contribution that is in default, with the following results:

(a) the sum advanced constitutes a loan from the Lending Member to the Delinquent Member and a Capital Contribution of that sum to the Company by the Delinquent Member pursuant to the applicable provisions of this operating agreement.

4.5 Advanced by Members.

If the Company does not have sufficient cash to pay its obligations, any Member(s) that may agree to do so may advance all

or part of the needed funds to or on behalf of the Company. An advance described in this section constitutes a loan from the Member to the Company, . . . and is not a Capital Contribution.

Article I of the operating agreement includes the following pertinent definitions:

> **"Capital Contribution"** means any contribution by a Member to the capital of the Company.
>
> **"Company"** means TUG PROPERTIES, LLC, a South Carolina Limited Liability Company.
>
> **"Delinquent Member"** means a Member who does not contribute by the time required all or any portion of a Capital Contribution that Member is required to make as provided in this Operating Agreement.
>
> **"Lending Member"** means those Members, whether one or more, who advance the portion of the Delinquent Member's Capital Contribution that is in default.
>
> **"Required Interest"** means One Hundred Percent (100%) percent (sic) of all Members.

Article V, dealing with allocations and distributions, includes a provision as follows:

> **5.1 Allocations of net profits and losses from operations.**
>
> Except as may be required by § 704(c) of the Code, and Sections 5.2, 5.3, and 5.4 of this Article V, Net Profits, Net Losses, items of loss of deduction and tax credit and items of income and gain shall be apportioned among the Members as follows:
>
> | | |
> |---|---|
> | Clifton David Borrell | 50% |
> | Jeffrey S. Clary | 50% |

Additionally, the operating agreement provides under Section 3.7 of Article III that, in regard to liability to third parties, "Except as otherwise expressly agreed in writing, no Member shall be liable for the debts, obligations or liabilities of the Company, including under a judgment decree or order of a court."

By agreement of the parties, Clary managed the day-to-day operations of TUG, while Borrell had no control over such matters and acted more as a "silent partner." According to Clary, in early 2006, he and Borrell mutually agreed to suspend operations due to the unprofitable nature and lack of capital to continue operations.

In December 2008, Clary and TUG filed this action against Borrell for breach of contract and quantum meruit, citing Article IV, Section 5.1 of the operating agreement, and alleging that Borrell and Clary contributed equally to TUG for a time, but Borrell thereafter refused to provide a fifty percent contribution as required by the operating agreement, causing Clary to expend his own financial resources in a greater percentage to make up for Borrell's shortfall in contributions. Clary further alleged that TUG had certain outstanding obligations, that Clary and Borrell were to share equally in the profits and losses of TUG under the agreement, and though Clary made demands of Borrell to pay his equitable share of expenses and losses, Borrell refused. In addition to the net sum difference between the amount Clary had contributed and the amount Borrell had contributed, as well as a fifty percent contribution for the current obligations of TUG, Clary and TUG sought punitive damages from Borrell as a deterrence of similar conduct in the future. Borrell answered, generally denying the allegations of the complaint and raising various counterclaims.

Thereafter, Borrell filed a motion for summary judgment, basing his motion on the ground that Article V of the operating agreement, relied upon by Clary and TUG, only determined how gains and losses would be apportioned between the members for tax purposes and did not require Borrell to maintain 50% contributions to TUG to match that made by Borrell. Additionally, Borrell maintained he complied with Article IV, Section 4.1 of the operating agreement by making the required initial contribution to TUG and that any subsequent contributions to TUG were governed by Article IV, Section 4.2, which would have required Borrell's vote and agreement as a prerequisite to mandatory contributions of the members, which never occurred. Thus, any additional contributions Clary made to TUG would be loans to and liabilities of TUG and would be owed by TUG, not Borrell, to Clary. Further, Borrell noted Section 3.7 of the operating agreement provided that no

member was liable for the debts, obligations, or liabilities of TUG, so the obligations of TUG remained with TUG, and were not obligations of the individual members. Borrell therefore maintained he was entitled to summary judgment, as Clary and TUG could present no evidence that he breached the operating agreement. Borrell also argued TUG was not a proper party to litigate this matter against Borrell, because Borrell and Clary are each fifty percent owners, and a vote from them regarding TUG's litigation against Borrell would be deadlocked. Borrell also asserted the action for quantum meruit was not proper, as the parties agreed they were governed by the operating agreement, and quantum meruit is an equitable remedy available only when there is no contract. Lastly, Borrell contended the demand for punitive damages should be struck, because punitive damages are not available in a breach of contract cause of action, or in the alternative under contract theory of quantum meruit. Borrell supported his motion with his affidavit, wherein he stated he complied with Article IV, Section 4.1 of the operating agreement by making his initial required capital contribution, and he "never voted, authorized, consented or agreed to subsequent contributions, which is required by the express terms of Article IV, Section 4.2" of the operating agreement, nor did he waive his right to such.

In response, Clary asserted that, after he and Borrell determined they needed to close down the business, Borrell agreed to make a "final subsequent contribution to zero out the company." However, when Clary and the accountants attempted to send Borrell records to show the need for subsequent capital contributions to make this happen, Borrell did not want to pay anymore. Clary maintained that both he and Borrell had made subsequent contributions to TUG after their initial capital contributions, but once the decision was made to close the business, Borrell failed to make any subsequent contributions. Contrary to Borrell's assertion, Clary argued he could show Borrell did in fact make contributions to TUG beyond his initial contribution during the course of the business, and submitted his affidavit, averring the same. Clary maintained that in May 2005, Borrell contributed $10,000 for the purchase of certain property on Ramsgate Drive in Augusta, Georgia. He further asserted Borrell loaned his creditworthiness on behalf of TUG to several loans for purchases of property, ostensibly presenting copies of notes referencing Borrell's personal guarantee of loans for the Ramsgate Drive property, as well as for Calvary Drive and Wrightsboro Drive in Augusta, Georgia. Additionally, Clary submitted a handwritten statement, allegedly signed by Borrell on September 22, 2006, which Clary asserted constituted Borrell's "vote or blanket acquiescence in and for payment of debts so as to comply with Section 4.2 of

Article IV" of the operating agreement. Clary noted that Section 4.3 of the operating agreement provided that if a member did not contribute his capital contribution within the required time, and another member advanced the delinquent member's portion, the sum advanced constituted a loan from the lending member to the delinquent member. Clary reasoned, because he averred in his affidavit that Borrell was given notice of all meetings but failed to attend the same, Borrell's September 22 handwritten statement gave Clary authority to wind-down the affairs of TUG and amounted to Borrell's promise to pay Clary for his share of monies advanced by Clary toward the winding down cost.

Borrell countered that Clary and TUG produced nothing through discovery that would indicate Borrell voted to approve subsequent capital contributions, waived his right to do the same, or actually made subsequent capital contributions. Borrell argued the only specific subsequent capital contribution Clary alleged was that Borrell contributed $10,000 for the purchase of the Ramsgate property, but the only documentation Clary submitted to support this claim did not show Borrell contributed this money as a capital contribution, and the document attached by Clary showed, to the contrary, that it was classified as a loan. As to the documents submitted by Clary concerning Borrell acting as a personal guarantor of loans, Borrell argued a personal guaranty does not qualify as capital contributed to TUG, as it added no value to TUG and there was no accounting for the personal guarantee in the TUG capital account for Borrell. Additionally, any personal guaranty would be a liability of Borrell, not TUG, and therefore could not constitute capital contributions as defined by the operating agreement. Finally, in regard to the handwritten document relied upon by Clary, which appeared to be signed by Borrell and stated, "Jeff, when the accounts are settled if I owe you I will pay you," Borrell maintained no reasonable interpretation of the document indicated Borrell would pay any debts of TUG, and any money Clary paid to settle the debts of TUG would constitute a loan, as there was no vote or agreement by Borrell to make a subsequent capital contribution to TUG. Borrell additionally noted that the purported handwritten statement from him included a condition precedent, such that performance was expressly conditioned upon him owing money to Clary. In summary, Borrell maintained Clary produced no evidence to disavow Borrell's position that no consensus was ever reached regarding additional capital contributions as required by Section 4.2 of Article IV of the operating agreement, and any money allegedly advanced by Clary to TUG was nothing more than a loan to TUG by Clary.

The trial court issued an order granting Borrell's motion for summary judgment. The court found Clary and TUG (1) provided no evidence any decision was made by one hundred percent of the members regarding the need for additional capital as required by Article IV, Section 4.2 of the operating agreement, (2) provided no evidence to refute the language of Article IV, Section 4.5 of the operating agreement that would entitle a member who advanced funds to recover those funds as a loan, (3) provided no evidence to refute language in the operating agreement that members are not entitled to recover capital contributions, and (4) provided no evidence that Borrell's personal guaranties for properties purchased by TUG constituted subsequent capital contributions. The trial court, therefore, determined that Borrell was entitled to summary judgment on this issue. Additionally, the trial court found Borrell was entitled to summary judgment as a matter of law on the punitive damages claim, that quantum meruit was not available to Clary and TUG, and there was no evidence TUG was a proper plaintiff, as there was no legal basis for joining the company. The trial court, therefore, found there were no genuine issues of material fact, that Clary and TUG raised no issues to contravene the language of the TUG operating agreement, and Borrell was entitled to summary judgment. Clary, alone, now appeals the trial court's grant of summary judgment to Borrell on Clary's breach of contract action.

ISSUES

1. Whether the trial court erred in finding there was no genuine issue of material fact in this controversy where evidence was presented that Borrell signed a statement promising to pay TUG's debts and had personally guaranteed TUG's loans.

2. Whether the trial court erred in determining Borrell's personal guarantee for TUG's loans did not constitute additional capital contributions.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

LAW/ANALYSIS

Clary contends the trial court erred in finding there was no genuine issue of material fact where evidence was presented that Borrell signed a statement promising to pay TUG's debts and Borrell had personally guaranteed TUG's loans. He argues the September 22, 2006 handwritten note by Borrell was a promise to pay his share of the debts, which constituted his vote for additional capital contributions so as to comply with Article IV, Section 4.2 of the operating agreement. In the alternative, Clary contends this statement "is a blanket acquiescence in and for payment of the debts," and is Borrell's promise to pay, which is a contract in and of itself that has been breached. Clary additionally asserts he showed Borrell contributed more than the initial capital contribution to TUG through his affidavit, wherein he stated additional capital was contributed by both parties and debt was secured in the name of both parties to purchase properties and fund TUG's operations along with documents he presented showing Borrell personally guaranteed loans on behalf of TUG, obtained personal loans, and assumed a debt of TUG. Finally, Clary contends because limited discovery occurred at the time Borrell sought summary judgment, and Clary's present counsel had only been involved in the matter for several days, his counsel did not have an opportunity to undertake adequate discovery to "ferret out further information necessary" to properly represent his client.

The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company. *See* S.C. Code Ann. § 33-44-103(a) (2006) (stipulating, except as otherwise provided, "all members of a limited liability company may enter into an operating agreement . . . to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company"). Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply. *See id.* ("To the extent the

operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.")

Article IV, Section 4.2 of the TUG operating agreement, concerning subsequent contributions beyond the required initial contributions, expressly provides that each member shall contribute to TUG, in cash, on or before a specified date that member's pro rata share of all monies that in the judgment of a "Required Interest," is necessary for the proper operation and maintenance of TUG, and for discharge of costs, expenses, obligations, and liabilities of TUG. This section further mandates that a "Required Interest" determine and notify each member of the need for a capital contribution, and that the notice given include a statement in reasonable detail of the proposed uses of the capital contributions and a date before which the Capital Contributions must be made. The operating agreement further defines "Required Interest" as one hundred percent of all members. Thus, in order for Borrell to be required to make a subsequent contribution pursuant to the operating agreement, he, along with Clary, as one hundred percent of the members of TUG, must have made a determination that a cash contribution was necessary, and Borrell, as a member, must have been notified of the need for the subsequent capital contribution, with such notice including "a statement in reasonable detail of the proposed uses of the Capital Contributions and a date . . . before which the Capital Contributions must be made."

We find no merit to Clary's argument that the September 22, 2006 handwritten statement by Borrell constituted his vote for additional capital contributions so as to comply with Article IV, Section 4.2 of the operating agreement. This note, purportedly signed by Borrell, is addressed to "Jeff" and states, "When the accounts are settled if I owe you money I will pay you." This handwritten note fails to comply with the requirements of section 4.2 of the operating agreement, as (1) there is no indication that Borrell and Clary agreed that it was necessary to make a subsequent capital contribution, (2) there is nothing to show that Borrell was notified of the need for a subsequent capital contribution or the date by which it must be made, and (3) there is no statement whatsoever detailing the proposed uses of any necessary capital contribution. As to Clary's alternative assertion that this note constitutes "a blanket acquiescence in and for payment of the debts," thereby qualifying as a contract in and of itself that has been breached, this argument was never raised to nor ruled on by the trial court and therefore is not preserved for review. *See Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) ("A matter may not be presented for the first time on

appeal; rather, it must have been both raised to and ruled upon by the court below."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

We likewise assign no importance to Clary's contention that his affidavit, along with certain documents he presented, showed Borrell personally guaranteed loans on behalf of TUG, obtained personal loans, and assumed a debt of TUG, thereby showing Borrell contributed more than the initial capital contribution to TUG, as we find they have no effect on this matter. Even if we were to assume the documents submitted by Clary in this regard were sufficient to enable the court to determine they represent the claimed actions by Borrell, such would not qualify as mandatory subsequent capital contributions pursuant to section 4.2 of the operating agreement. First, there is no evidence to suggest that any loans obtained or assumptions of debt by Borrell on behalf of TUG met the specifications of section 4.2 regarding the necessary determination by one hundred percent of the members, notice, and a detailed statement of proposed use. More importantly, however, we fail to discern how previous contributions by Borrell have any effect on Clary's allegation that Borrell failed to make subsequent capital contributions in compliance with Article IV, Section 4.2 of the operating agreement. As noted, summary judgment is appropriate where there is no genuine issue of material fact. Clary's entire case rests upon his assertion that Borrell failed to make equal contributions to TUG as Clary made and failed to make additional contributions to cover TUG's debts, thereby breaching the operating agreement. Thus, it is only those contributions beyond what Borrell has already made that Clary seeks from Borrell. Further, whether Borrell may have made some voluntary contributions to TUG beyond what was required pursuant to the operating agreement is of no concern in determining whether Borrell was thereafter required to make subsequent capital contributions pursuant to section 4.2 of Article IV.[2] *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (noting our appellate courts recognize an overriding rule which says: "whatever doesn't make

[2] Indeed, Article IV, Section 4.5 of the operating agreement expressly provides that a member may advance funds on behalf of TUG when TUG does not have sufficient funds to pay its obligations, and such advance would then constitute a loan from the member to TUG, and "not a Capital Contribution."

any difference, doesn't matter"). Here, there is simply no evidence whatsoever that (1) Borrell and Clary ever agreed it was necessary to require the members to make a subsequent capital contribution, (2) that Borrell, as a member, was ever notified of the necessity of a subsequent capital contribution, or (3) that any statement detailing the proposed use of a subsequent capital contribution and the date before which such contribution should be made was ever provided to Borrell as a member, so as to meet the requirements of section 4.2 such that Borrell could be held responsible for subsequent capital contributions.

As to Clary's contention that his attorney did not have an opportunity to undertake adequate discovery, this argument is not preserved for our review. *Pikaart*, 393 S.C. at 324, 713 S.E.2d at 273 (noting a matter must have been both raised to and ruled upon by the trial court to be preserved for appellate review).[3]

Clary next contends the trial court erred in determining that Borrell's personal guarantee for TUG's loans did not constitute additional capital contributions. He argues Borrell was "clearly providing additional capital to [TUG] by taking on an obligation or promissory note for the organization" and providing such a service qualifies as a capital contribution pursuant to S.C. Code Ann. § 33-42-810. As noted above, we fail to see how evidence of any past voluntary contributions by Borrell are of any importance in determining this matter. Even assuming arguendo that Borrell's personal guarantees on behalf of TUG could qualify as "capital contributions," Clary has failed to present any evidence that the contributions for which he seeks reimbursement were required pursuant to the terms of the operating agreement, i.e. section 4.2. Because our analysis under the first issue is dispositive, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

[3] Counsel for Clary noted at the outset of the hearing that he had filed a motion for continuance "to get up to speed," but stated he did not "think the facts [were] going to change from today until a later date," and did not object to the trial court going forward with the hearing. The trial court specifically recognized Clary's attorney had only been hired in the week before the summary judgment hearing, and allowed counsel additional time to review documents and supplement the record with written memorandum. Clary's counsel interposed no objection to this.

For the foregoing reasons, the order granting Borrell summary judgment is

AFFIRMED.

SHORT, J., concurs.

FEW, C.J., concurring: I concur in the result reached by the majority. However, I would resolve this appeal summarily under Rule 220(b)(1), SCACR. *See In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 55, 471 S.E.2d 456, 457 (1993) (finding this court may resolve appeals using memorandum opinions that give the court's reasons for deciding each issue raised on appeal). The first issue on appeal is whether the handwritten September 22, 2006 note signed by Borrell obligated him to make additional capital contributions. There is no evidence in the record to support a conclusion that it did, and no further analysis is required. First, the note is written to "Jeff," not to the LLC. Second, the note does not mention the LLC or any obligation to the LLC. Finally, there is no evidence in the record the LLC voted as provided in its operating agreement to require any capital contribution from its members after the initial contribution. As the majority points out, we need not address the second issue on appeal.