The Supreme Court of South Carolina

RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)[1]

Appellate Case No. 2020-000447

AMENDED ORDER

(a) Purpose. The purpose of this order is to provide guidance on the continued operation of the Supreme Court of South Carolina (Supreme Court) and the South Carolina Court of Appeals (Court of Appeals) during the current coronavirus (COVID-19) emergency. As used in this order, the phrase "Appellate Court" shall refer to both the Supreme Court and the Court of Appeals. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter

[1] This order was initially filed on March 20, 2020. This amended version makes changes to sections (b), c(1), c(5), d, f, j(1), and l, and adds section c(6).

significantly, the current practices regarding the operation of the Appellate Courts. In the event of a conflict between this order and the South Carolina Appellate Court Rules (SCACR), this order shall control.

(b) Oral Arguments and Hearings Before the Appellate Courts. Currently, the Appellate Courts are conducting oral arguments and any necessary hearings by Cisco WebEx. For oral arguments that would normally be open to the public, the Supreme Court will either live stream the arguments and/or post a recording to the video portal on the South Carolina Judicial Branch Website. In an order supplementing this order (see (m) below), the Court of Appeals may issue guidance regarding what methods it will use to provide public access to oral arguments it conducts by WebEx. As the risk to participants diminishes, the Appellate Courts will return to conducting arguments and hearings in a courtroom, with appropriate limitations on the number of persons permitted to be present.

(c) Filing Methods. During this emergency, filings may be made with the Appellate Courts using the methods listed below. This includes filings made with the Office of Bar Admissions.

> **(1) Delivering Documents to the Supreme Court.** Until further notice, persons desiring to hand deliver documents to the Supreme Court pursuant to Rule 262(a)(1), SCACR, must utilize a drop box located at the rear doors of the Supreme Court Building. Since the use of a private carrier such as FedEx or United Parcel Service is not defined as mailing under Rule 262, SCACR,[2] parties are warned that deliveries sent by private carriers may not be accepted for delivery if it becomes necessary to completely close the Supreme Court Building. Documents delivered to the Court will be subject to the quarantine period specified in (h) below.
>
> **(2) Delivering Documents to the Court of Appeals.** In an order supplementing this order (see (m) below), the Court of Appeals may issue guidance regarding the delivery of documents to the Court of Appeals at the Calhoun Building under Rule 262(a)(1), SCACR.
>
> **(3) Mailing Documents by United States Mail**. This is provided for by Rule 262(a)(2), SCACR. Once received by the Appellate Court, documents

[2] *Cf. S. Bridge Props., Inc. v. Jones*, 292 S.C. 198, 355 S.E.2d 535 (1987) (delivery to a third party mailing service is not mailing).

mailed to the Appellate Court will be subject to the quarantine period specified in (h) below.

(4) Faxing Documents. Rule 262(a)(2), SCACR, allows for a document to be filed by electronically transmitted facsimile copy so long as a copy is immediately sent by U.S. Mail. While this order remains in effect, the requirement for a copy to be sent by U.S. Mail is suspended. In the event, the facsimile copy is not sufficiently legible, the clerk of the Appellate Court may require the party to provide a copy by mail. The fax number for the Supreme Court is 803-734-1499, and the fax number for the Office of Bar Admissions is 803-734-0394. The fax number of the Court of Appeals is 803-734-1839. While this method is well suited for relatively small documents or when the filer believes that expedited consideration is necessary, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents, such as a record on appeal, in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document (i.e., Brief of Appellant, Part 1 of 4). In the event the document requires a filing fee, a check or money order for the fee must be mailed to the Appellate Court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order. A document transmitted and received by the facsimile on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day.

(5) Electronic Filing by Lawyers. Lawyers who are licensed to practice law in South Carolina may utilize OneDrive for Business to electronically submit documents for filing with the Supreme Court and the Court of Appeals, and lawyers are strongly encouraged to use this method of filing. More information about this method, including registration and filing instructions, is available in the Attorney Information System (https://ais.sccourts.org/AIS) under the tab "Appellate Filings." In the event the document requires a filing fee, a check or money order for the fee must be mailed to the Appellate Court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order. A document transmitted and received in the OneDrive on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day.

(6) Filing by E-mail. During this emergency, filings may be made by e-mail. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org; for the Court of Appeals, the e-mail shall be sent to ctappfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in an Adobe Acrobat file format (.pdf). In the event the document requires a filing fee, a check or money order for the fee must be mailed to the Appellate Court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order. A document transmitted and received by e-mail on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day.

(d) Reduction of Copies to Be Filed; Covers. Effective immediately, a document filed with the Supreme Court or Court of Appeals need not be accompanied by any additional copies. If submitted in paper, the document shall be submitted unbound and unstapled. In the event the Appellate Court determines that additional copies are needed, they will be requested from the lawyer or party submitting the document. Further, as an exception to Rule 267(e), SCACR, the covers of all briefs may be white.

(e) Filing of the Appendix under Rule 242, SCACR. In cases seeking review of a decision of the Court of Appeals, Rule 242, SCACR, requires the petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals.

(f) Signatures of Lawyers and Self-Represented Litigants on Documents. While this order remains in effect, a lawyer or self-represented litigant may sign documents using "s/ [typed name of person]," a signature stamp, or a scanned or other electronic version of the person's signature. Regardless of form, the signature shall still act as a certificate under Rule 267(b), SCACR, that the person has read the document; that to the best of the person's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(g) Service of Documents. The methods of service listed below may be used to serve documents on opposing counsel or a party.

(1) Service by Delivery. While this method is permitted under Rule 262(b), SCACR, this method of service is discouraged during this emergency since it increases the potential for exposure to the virus.

(2) Service by Mail. This is provided for by Rule 262(b), SCACR.

(3) Service Using AIS E-mail Address. During this emergency, this Court authorizes a lawyer admitted to practice law in this state to serve a document on another lawyer admitted to practice law in this state using the lawyer's primary e-mail address listed in the Attorney Information System (AIS). For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

(4) Service in Actions under Rule 245, SCACR. The requirement under Rule 245(c) that the summons and complaint be served in the manner specified by Rule 4 of the South Carolina Rules of Civil Procedure is suspended. In the event a respondent fails to file a return or other response to the petition and the Supreme Court agrees to entertain the action in its original jurisdiction, the Court may require the summons and complaint to be served in the manner specified by Rule 4.

(h) Quarantine of Incoming Paper Documents. To protect the safety of the staff of the Appellate Courts, incoming paper documents, whether delivered or mailed to the Court, will be subject to a 48-hour quarantine period once they are physically received by the Court.[3] Once the quarantine period has ended, these documents will be date stamped with the date on which they were received, and court staff will then process the documents. In light of this delay, remittiturs under Rule 221, SCACR, will not be sent until it is determined that no petition for

[3] One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard. https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf.

rehearing or motion for reinstatement was actually received in the quarantined documents received on the last day of the period provided by Rule 221.

(i) Outgoing Correspondence. The Appellate Courts have greatly reduced the number of employees working in the Supreme Court Building and the Calhoun Building to lessen the potential for exposure to the virus. As a result, the Appellate Courts will not have sufficient staffing to continue the current practice of sending all outgoing correspondence (including letters, orders and opinions) by U.S. Mail. Therefore, while the Appellate Courts will continue to send paper correspondence by U.S. Mail to persons who are self-represented, correspondence to a lawyer admitted to practice in this state will only be sent to that lawyer's primary e-mail address in AIS. Correspondence will not be sent to attorneys admitted pro hac vice; instead, it will be the responsibility of the associated South Carolina lawyer to pass any correspondence on to the pro hac vice attorney.

(j) Public Access to Appellate Court Buildings.

(1) Supreme Court Building. Until further order of this Court, the public will not be allowed to enter the Supreme Court Building. If appropriate, the Chief Justice or the Clerk of the Supreme Court may authorize entry.

(2) Calhoun Building. In an order supplementing this order (see (m) below), the Court of Appeals, in coordination with the Office of Court Administration, may issue guidance regarding public access to the Calhoun Building.

(k) Closure of the Supreme Court and Court of Appeals Buildings. In the event a directive is received to close the Supreme Court and Calhoun Buildings, it is anticipated that this will result in the closure days being treated as "holidays" in the computation of time under Rule 263(a), SCACR. This is consistent with prior practice when a hurricane or other disaster has resulted in the closure of the Appellate Court Buildings. The restriction on public access in (j) above is not a closure of either building, and does not affect the computation of time under Rule 263(a), SCACR.

(l) Extensions of Time and Forgiveness of Procedural Defaults.

(1) Extensions of Time. Both the Supreme Court and Court of Appeals are aware that this crisis will increase the need for extensions to be

granted. While this order remains in effect, no filing fee will be required for a motion for an extension.

(2) Automatic Extension. The due dates for all Appellate Court filings due during the period of March 20, 2020, thru June 8, 2020, are automatically extended for twenty (20) days.[4] Lawyers and litigants are warned that this automatic extension does not extend the time to serve a notice of appeal under Rules 203, 243, and 247, SCACR. This automatic extension is inapplicable to due dates after June 8, 2020.

(3) Forgiveness of Procedural Defaults From March 13, 2020 to March 20, 2020. In the event a party to a case or other matter pending before an Appellate Court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default was forgiven, and the required action was required to be taken by April 9, 2020. If a dismissal order was issued based on this default, the clerk of the Appellate Court shall rescind that dismissal order. This forgiveness does not apply to the failure of a party to timely serve the notice of appeal under Rules 203, 243, and 247, SCACR.

(m) Supplemental Order by the Court of Appeals. The Court of Appeals may issue an order supplementing this order. This order is not effective until approved by the Chief Justice.

(n) Effective Date. This amended order is effective immediately. It shall remain in effect until modified or rescinded by this Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

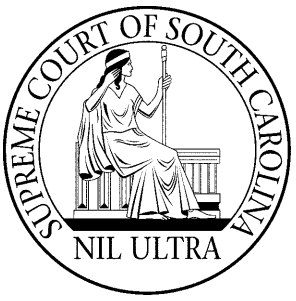
---

[4] As explained by the order of March 20, 2020, this automatic extension was intended to give "lawyers and self-represented litigants appearing before the Appellate Courts … time to take actions to protect themselves and their families." Since sufficient time has been provided for this to occur, and most lawyers and litigants have been able to adjust to working remotely, this automatic extension is no longer warranted.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 20, 2020
(As Amended May 29, 2020)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 3, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2020-UP-162-SCDSS v. Michael R. Hatchell

2020-UP-163-SCDSS v. David Mize

2020-UP-164-SCDSS v. Brenda F. Mize

2020-UP-165-SCDSS v. Tiffany Medlin

2020-UP-166-State v. Edward Davis, Sr.

2020-UP-167-State v. Bertram M. Brown

2020-UP-168-State v. Jarnelle L. Ervin

2020-UP-169-State v. James Alfonza Biggs, III

2020-UP-170-Deutsche v. Louise Legare-Gardner

2020-UP-171-State v. Johnnie L. Jones

PETITIONS FOR REHEARING

5715-Christine LeFont v. City of Myrtle Beach	Pending
5716-Glenn Gunnells v. Cathy G. Harkness	Pending
5717-State v. Justin Jamal Warner	Denied 05/28/20
5718-Robert Shirey v. Gwen Bishop	Pending
5719-State v. Patrick Oneal McGowan	Pending

5721-Books-A-Million v. SCDOR	Pending
5722-State v. Herbie V. Singleton, Jr.	Pending
5723-Shon Turner v. MUSC	Pending
5726-Chisolm Frampton v. S.C. Dep't of Natural Resources	Pending
2020-UP-072-State v. Brenda Roberts	Denied 05/28/20
2020-UP-077-Charlton Davis v. SCDPPPS	Pending
2020-UP-095-Janice Pitts v. Gerald Pitts	Denied 05/28/20
2020-UP-103-Deborah Harwell v. Robert Harwell	Pending
2020-UP-108-Shamsy Madani v. Rickey Phelps	Pending
2020-UP-118-State v. Samuel Lee Broadway	Pending
2020-UP-128-State v. David Scott Bagwell	Pending
2020-UP-129-State v. Montrell Deshawn Troutman	Pending
2020-UP-133-Veronica Rodriguez v. Peggy Evers	Pending
2020-UP-134-Melissa Jones v. Murray Jones (2)	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5614-Charleston Electrical Services, Inc. v. Wanda Rahall	Pending
5641-Robert Palmer v. State et al.	Pending
5659-State v. Fabian Lamichael R. Green	Pending
5661-Palmetto Construction Group, LLC v. Restoration Specialists, LLC	Pending
5671-SC Lottery Commission v. George Glassmeyer	Pending

5694-State v. Ricky Henley	Pending
5696-The Callawassie Island v. Ronnie Dennis	Pending
5697-State Farm v. Beverly Goyeneche	Pending
5698-Gunjit Singh v. Simran Singh	Pending
5699-PCS Nitrogen, Inc. v. Continental Casualty Co.	Pending
5700-Gene Schwiers v. SCDHEC	Pending
5703-David Lemon v. Mt. Pleasant Waterworks	Pending
5705-Chris Katina McCord v. Laurens County Health Care System	Pending
5707-Pickens County v. SCDHEC	Pending
5710-Russell Carter v. Bruce Bryant	Pending
5711-Carla D. Garrison v. Target Corporation	Pending
5714-Martha Fountain v. Fred's Inc.	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-295-State v. Anthony M. Enriquez	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-336-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-337-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart	Pending
2019-UP-386-John Willie Mack, Sr. v. State of South Carolina	Pending
2019-UP-391-State v. Brian Everett Pringle	Pending
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending

2019-UP-399-Tracy Pracht v. Gregory Pracht (2)	Pending
2019-UP-401-Stow Away Storage v. George W. Sisson (2)	Pending
2019-UP-415-David Deen v. Deborah Deen	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-001-State v. Guadalupe G. Morales	Pending
2020-UP-003-State v. Shane Alexander Washington	Pending
2020-UP-004-Emory J. Infinger and Assoc. v. N. Charleston Com. Ctr.	Pending
2020-UP-017-State v. Emory Warren Roberts	Pending
2020-UP-018-State v. Kelvin Jones	Pending
2020-UP-026-State v. Tommy McGee	Pending
2020-UP-030-Sunset Cay v. SCDHEC	Pending
2020-UP-038-State v. Vance Ross	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Georgetown County, Petitioner,

v.

Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown, Defendants,

Of whom the South Carolina Department of Transportation and the City of Georgetown are the Respondents.

Appellate Case No. 2019-000705

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27976
Heard May 21, 2020 – Filed June 3, 2020

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Louis H. Lang, Richard C. Detwiler, and Harry A. Dixon, of Callison Tighe & Robinson, LLC, all of Columbia, for Petitioner.

David Leon Morrison, of Morrison Law Firm, LLC, of Columbia, for the City of Georgetown; Lisa A. Reynolds, of Anderson Reynolds & Stephens, LLC, of Charleston, for the South Carolina Department of Transportation.

PER CURIAM: We granted Georgetown County's petition for a writ of certiorari to review the court of appeals' decision in *Georgetown County v. Davis & Floyd, Inc.*, 426 S.C. 52, 824 S.E.2d 471 (Ct. App. 2019). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Felix Kotowski, Petitioner.

Appellate Case No. 2019-001206

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 27977
Heard May 20, 2020 – Filed June 3, 2020

AFFIRMED IN PART, VACATED IN PART

Appellate Defender Lara M. Caudy, of Columbia, for Petitioner.

Attorney General Alan Wilson and Senior Assistant Attorney General David Spencer, both of Columbia; and First Circuit Solicitor David M. Pascoe Jr., of Orangeburg, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *State v. Kotowski*, 427 S.C. 119, 828 S.E.2d 605 (Ct. App. 2019). Having carefully reviewed the matter, we affirm the court of appeals in part and vacate in part. We adopt the court of appeals' well-reasoned opinion, with the exception of Section III of the opinion. We vacate Section III of the court of appeals' opinion pertaining to the admission of the NPLEx records during trial. Assuming, without deciding, that the admission of the NPLEx records during trial was erroneous, as Petitioner asserts, we find the error is harmless in light of the overwhelming evidence of guilt. Accordingly, the decision of the court of appeals is affirmed in part and vacated in part.

AFFIRMED IN PART, VACATED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Billy Phillips, Petitioner.

Appellate Case No. 2018-000977

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Jasper County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27978
Heard October 16, 2019 – Filed June 3, 2020

REVERSED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Deputy Attorney General Donald J. Zelenka, of Columbia; Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

JUSTICE FEW: Billy Phillips was convicted of murder and possession of a weapon during the commission of a violent crime. At trial, a DNA analyst testified Phillips could not be excluded as a contributor to a mixture of DNA recovered from two samples taken from the crime scene. The analyst conceded, however, the statistical probability that some other randomly selected and unrelated person also could not be excluded as the person who left the DNA was—for one of the samples—only one in two. In addition, the State failed to explain to the trial court or the jury three fundamental concepts underlying the DNA testimony the analyst gave in this particular case. Finally—in several instances—the State presented information to the trial court and the jury that was simply wrong. We hold the trial court erred in not sustaining Phillips' objections to this testimony. We reverse and remand for a new trial.

I. Facts and Procedural History

Darius Woods was a well-known drug dealer in Ridgeland, South Carolina. His customers knew him to carry large amounts of cash. On the night of May 18, 2013, two of Woods' customers—Shontay McKeithan and Davonte Freeman—found him dead in his house. He was lying on his back with his hands above his head. Someone shot him twice with his own .38 caliber revolver, once in the neck and once in the head. The shot to the head was a contact wound, meaning the muzzle of the pistol was in contact with Woods' skin when the pistol was fired. Law enforcement officers found the pistol on Woods' stomach. His jeans pockets had been pulled out as though the killer had stolen his money.

At the January 2016 trial, McKeithan testified she arrived at Woods' house around 10:30 p.m. to purchase marijuana. She remained in her car while she called Woods' cell phone, but Woods never answered. As she waited for Woods to answer, her cousin Davonte Freeman arrived to purchase marijuana from Woods. She and Freeman called Woods' cell phone again and could hear it ringing inside, but Woods did not answer. Freeman then went inside for what McKeithan described as "five to seven minutes." McKeithan testified she did not hear any gunshots. When Freeman came back outside, he was holding a gun and screaming that Woods was dead. She testified he went back inside, and later told her he put the gun where he found it.

Freeman testified he arrived at Woods' house to buy marijuana and saw McKeithan in her car. He knocked on Woods' door but no one answered, so he went in the house and found Woods dead on the floor. Woods' gun was on his stomach, and his jeans

pockets were pulled out. Freeman testified he panicked. He picked up the gun, smelled it to determine if it had been fired, and immediately put the gun back on Woods' stomach. He testified he was inside less than a minute before he went outside to tell McKeithan Woods was dead. He denied he ever took the gun outside.

Several witnesses testified they saw Phillips in the general vicinity of Woods' house within an hour or so before Freeman found the body. Donte Jenkins testified he, Woods, and Phillips were hanging out at Woods' house on the evening of the murder. Jenkins left Woods and Phillips alone at Woods' house at approximately 9:15 p.m. Taylor Cowherd testified she saw Phillips on Woods' porch between 9:25 and 9:31 p.m. Wrenshad Anderson—Freeman's brother—testified he saw Phillips walking to a nearby BP gas station at approximately 9:40 p.m. Reginald Green testified Phillips called Green shortly after 10:00 p.m. to ask Green to come pick him up. Green testified he picked up Phillips at Phillips' brother's house and then drove to the BP station where Phillips went inside to purchase cigars and beer for himself, and $5 worth of gas for Green. Phillips hung out with Green for a few hours until Green dropped Phillips off at a house in the same neighborhood as Woods' house. Each of these witnesses testified to circumstances—in addition to seeing Phillips near Woods' house—that supported the State's claim that Phillips killed Woods.

In the early hours of the morning after the murder, a Ridgeland Police Department officer approached Phillips on the street and asked him to come to the police department to speak with officers about Woods' murder. Two South Carolina Law Enforcement Division (SLED) agents interviewed Phillips around 3:00 a.m. The State played a video of this interview for the jury. In the interview, Phillips denied shooting Woods. Phillips said he visited Woods several times the day of the murder, and during these visits, he and Woods smoked marijuana and drank alcohol. Phillips explained he held and pointed Woods' gun to imitate law enforcement officers. Phillips claimed Woods was alive when Phillips left between 9:30 and 10:00 p.m., and he denied being present at the time Woods was murdered. After the interview, an investigator collected a DNA sample from Phillips.

Six days later, SLED conducted a second interview in which Phillips gave a different account of what happened. The agent who conducted this interview testified to some of the things Phillips said, but the State did not play the video of it for the jury. The agent testified Phillips told him he was sitting in Woods' car when three men approached Woods' house. One of the men entered the house while the other two men remained on the porch. Phillips heard gunshots, and as the three men were

leaving, they made eye contact with Phillips. One of the men called Phillips by his nickname, "Dee." Phillips told the agent that because he was in fear of his life, he got out of the car and ran to his mother's house. The route there required him to pass the BP station. Phillips told the agent he gave a different story during his first interview because he was afraid something would happen to him or his family.

During the State's investigation, SLED collected DNA "standards" from six people in addition to Phillips. They were Freeman, McKeithan, three officers, and another person later determined not to be involved. SLED forensic analyst Lilly Gallman compared the DNA standards to "touch DNA"[1] samples collected from the scene of the crime and during Woods' autopsy. Of the touch DNA samples Gallman analyzed, she excluded Phillips as a contributor to all of the samples except two. The first sample—already mentioned—came from Woods' right front jeans pocket. The second was taken from the grip of Woods' gun.

In a written pre-trial motion, Phillips objected to the admissibility of Gallman's DNA testimony. The trial court conducted a hearing on the motion before trial, but did not take testimony. The court ruled Gallman's testimony was admissible. Phillips renewed his objections when Gallman testified during trial. The jury convicted Phillips of murder and possession of a weapon during the commission of a violent crime. The trial court sentenced Phillips to concurrent prison terms of forty years for murder and five years for the weapon charge. The court of appeals affirmed. *State v. Phillips*, Op. No. 2018-UP-081 (S.C. Ct. App. filed Feb. 14, 2018). We granted Phillips' petition for a writ of certiorari.

II. Admission of DNA Expert Testimony

In *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)—this Court's first opportunity to study the admissibility of expert opinion on DNA evidence under our new Rules of Evidence—we upheld the trial court's decision to admit DNA evidence that (1) implicated the defendant in a heinous murder and sexual assault and (2) exonerated the person the defendant blamed for the crimes. 335 S.C. at 17, 515 S.E.2d at 516. Our focus in *Council* was on the scientific methodology used by the FBI expert to

[1] "Touch DNA" is one of the three fundamental concepts we mentioned in the introduction to this opinion. As we will explain in detail in Section II.C.—in which we address all three concepts—touch DNA is taken from skin or other cells left on a surface after it was touched.

analyze the DNA evidence. Concluding that the expert's method—mitochondrial DNA analysis of pubic hair found at the crime scene—was sufficiently reliable, we set forth what has become the standard South Carolina formulation of the elements of the foundation for scientific evidence under Rule 702. "When admitting scientific evidence under Rule 702," we held, "the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." 335 S.C. at 20, 515 S.E.2d at 518. We also held that—"if the evidence is admissible under Rule 702"—the trial court must determine whether the probative value is substantially outweighed by the dangers listed in Rule 403. *Id.*

The "assist the trier of fact" element of the Rule 702 foundation was not specifically litigated in *Council*, nor was Rule 403. In particular, because the expert testified the DNA evidence established the other person "could not have been the donor" of the pubic hair, 335 S.C. at 17, 515 S.E.2d at 516, and "most probably the hair . . . belonged to [the defendant]," 335 S.C. at 18-19, 515 S.E.2d at 517, there could not have been any doubt the evidence would "assist the trier of fact." Presumably for the same reasons, the defendant did not challenge the probative value.

In this case, however, Gallman testified the statistical probability that another person—not Phillips—could have been the contributor to the touch DNA sample taken from the gun was one in two hundred, and the probability another person was the contributor to the jeans pocket sample was one in two. Phillips argues these probabilities substantially undermine the probative value of Gallman's testimony, which in turn raises the question of whether Gallman's testimony satisfied the "assist the trier of fact" element. Phillips also argues Gallman's testimony was unfairly prejudicial, confusing, and likely to mislead the jury, and these dangers substantially outweighed the low probative value of her testimony under Rule 403.

A. Gallman's Testimony

Gallman analyzed at least thirteen touch DNA samples collected in connection with Woods' murder: two samples from the grip of the gun; eight samples from Woods' blue jeans; and three other samples from socks and a piece of jewelry found at the crime scene. Two of the thirteen samples could not be reliably tested. Of the eleven remaining touch DNA samples, Gallman compared each one to the standards from the seven people who submitted DNA for testing. She concluded Phillips' DNA was not present in nine of the samples. In the words Gallman used to describe this

conclusion to the jury, she "excluded" Phillips as a contributor to the DNA in each of these nine samples.

As to the other two samples—one from the gun and one from inside Woods' jeans pocket—Gallman testified each contained a mixture of DNA from at least three people. She testified Woods and Phillips "cannot be excluded as contributors" to the mixtures in either sample. The other people who submitted standards for testing—including Freeman—were excluded, except that one of the officers could not be excluded as a contributor to the sample from the gun.

Gallman testified DNA experts "are required" to determine the probability of an error in matching the suspect to a particular DNA sample.[2] Gallman then explained the likelihood it was another person who left his DNA on the gun or in the jeans pocket. As to the sample from the gun, she testified "the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two hundred." As to the jeans, she testified the probability was "one in two." Gallman did not explain how she calculated the probabilities.

B. Probative Value

The primary basis for Phillips' objection to Gallman's testimony was Rule 403. We begin our analysis of a Rule 403 objection with probative value. To understand the probative value of any evidence, we must consider what was practically in dispute at trial. *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). Woods was clearly murdered; the only significant issue—as a practical matter—was who murdered him. We must then consider how important the challenged evidence is to resolving the practically disputed questions. *See State v. James*, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003) (stating "the probative worth of any particular bit of

[2] Gallman testified, "We are required to tell you how often you would see this mixture in a population." Academic sources are more precise. *See, e.g.*, National Research Council, DNA TECHNOLOGY IN FORENSIC SCIENCE 9 (1992) ("Interpreting a DNA typing analysis requires a valid scientific method for estimating the probability that a random person by chance matches the forensic sample at the sites of DNA variation examined. To say that two patterns match, without providing any scientifically valid estimate . . . of the frequency with which such matches might occur by chance, is meaningless.").

evidence is obviously affected by the scarcity or abundance of other evidence on the same point" (quoting *Old Chief v. United States*, 519 U.S. 172, 185, 117 S. Ct. 644, 652, 136 L. Ed. 2d 574, 590 (1997))); *Gray*, 408 S.C. at 610, 759 S.E.2d at 165.

In most murder cases, who touched the murder weapon would be extremely important to the question of who committed the murder. In this case, however, Phillips admitted he spent several hours at Woods' house that day, and he held Woods' gun to imitate law enforcement officers. Phillips' own admissions placed him at the scene of the crime, holding the gun. Thus, the probative value of Gallman's testimony connecting Phillips to the DNA on the gun is minimal.

Evidence that Phillips had his hand in Woods' pocket, on the other hand, could have far more probative value. The State's theory of the case was that Phillips was mad at Woods for tricking him out of a PlayStation, and Phillips murdered and robbed Woods in retaliation, knowing Woods carried a lot of cash. DNA evidence placing Phillips' hand inside Woods' jeans pocket—where he presumably kept his cash—would be pivotal to the State's ability to convince the jury its theory was correct, and thus prove the primary disputed fact: who murdered Woods. Contrary to the evidence Phillips handled Woods' gun, there is no known "innocent" reason for Phillips to have his hand in Woods' pocket. At first glance, therefore, the probative value of the evidence appears high.

This brings us to the heart of Phillips' objection. While evidence Phillips had his hand in Woods' pocket could be important to the State in proving its theory of the case, Gallman did not testify the DNA evidence showed Phillips had his hand in Woods' pocket. Rather, Gallman testified her analysis of the touch DNA sample from Woods' pocket revealed a mixture of DNA from at least three people. Importantly, Gallman did not testify Phillips was one of those people. In her words, "Phillips cannot be excluded as [a] contributor[] to this mixture." She testified that one in two people—half of the population—could have been the person who left the DNA in Woods' pocket. In other words, even if Gallman's testimony were clear and readily understood, the best she could do with her DNA analysis was to narrow the identity of the person who had his hand in Woods' pocket—the murderer according to the State's theory—to half of the population. The probative value of Gallman's testimony connecting Phillips to the DNA in Woods' jeans pocket is minimal.

C. Unfair Prejudice, Confusion, Misleading the Jury

The minimal probative value of Gallman's testimony must be balanced against "the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. Phillips argues all three are applicable here.

Most of our Rule 403 cases involve only unfair prejudice. Unfair prejudice is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence. *Gray*, 408 S.C. at 616, 759 S.E.2d at 168. Phillips argues Gallman's DNA testimony was unfairly prejudicial because it confused and misled the jury. However, Phillips offers no legal authority to support his argument that confusion of issues or misleading the jury can itself be unfair prejudice.[3] We believe the danger of unfair prejudice is a separate analysis from the danger of confusion of the issues or misleading the jury.

We turn, therefore, to the danger that Gallman's testimony would confuse the issues or mislead the jury. DNA evidence is well known as a powerful and accurate evidentiary tool for the State to solve crimes and obtain convictions. Nevertheless, DNA evidence has also come to be known for its potential to confuse and mislead jurors. This potential has been widely discussed by courts and in academic writing. In *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993), for example, the Sixth Circuit recognized, "The aura of reliability surrounding DNA evidence does present the prospect of a decision based on the perceived infallibility of such evidence . . . ." 12 F.3d at 567-68. More recently, the New York Court of Appeals recognized, "The persuasiveness of DNA evidence is so great that as one commentator noted, 'when DNA evidence is introduced against an accused at trial, the prosecutor's case can take on an aura of invincibility.'" *People v. Wright*, 37 N.E.3d 1127, 1137 (N.Y. 2015) (quoting Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1469 (2007)). The *Wright* court also stated "the potential danger posed to defendant when DNA evidence is presented as dispositive of guilt is by now obvious." *Id.* The Maryland Court of Appeals wrote "jurors place a great deal of

[3] *But see* 29 Am. Jur. 2d *Evidence* § 326 (2019) ("Unfair prejudice may arise from evidence that . . . confuses or misleads the trier of fact . . . ." (citing *State v. Franks*, 335 P.3d 725, 729 (Mont. 2014))).

trust in the accuracy and reliability of DNA evidence. But this evidence has the potential to be highly technical and confusing in a way that could unduly affect the outcome of a trial." *Whack v. State*, 73 A.3d 186, 188 (Md. 2013).[4]

In most cases, the risk of confusing or misleading the jury with DNA evidence is low because—in most cases—the DNA evidence is straightforward and reliable, and its legitimate probative force is highly persuasive—if not dispositive—of guilt. In *Council*, for example, the DNA expert performed mitochondrial DNA analysis on pubic hair found at the crime scene. He testified the hair "most probably" belonged to the defendant, and the hair certainly did not belong to the person the defendant blamed. 335 S.C. at 18-19, 515 S.E.2d at 517. As long as the jury believed the

---

[4] In 2008, the American Psychological Association published an article summarizing the results of three studies concerning the impact of DNA evidence on jurors. Joel D. Lieberman et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27 (2008). Researchers found, "Public jurors, on average, rated DNA evidence as 95% accurate, and it was rated as 94% persuasive of a suspect's guilt." *Id.* at 52-53. Researchers also found DNA evidence was viewed by the public as more accurate than other evidence, including eyewitness testimony and suspect confessions. *Id.* at 37. The article warned, "The strong and largely invariant impact of DNA evidence across experimental conditions suggests that this type of scientific evidence may be so persuasive that its mere introduction in a criminal case is sufficient to seriously impede defense challenges." *Id.* at 58; *see also State v. Pappas*, 776 A.2d 1091, 1113 (Conn. 2001) (noting the concern "jurors will overvalue DNA evidence and ignore other types of evidence" (citing National Research Council, THE EVALUATION OF FORENSIC DNA EVIDENCE 196-97 (1996); Jason Schklar & Shari Seidman Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, 23 Law & Hum. Behav. 159 (1999)); *Commonwealth v. Curnin*, 565 N.E.2d 440, 441 (Mass. 1991) (stating DNA evidence has "an aura of infallibility"); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, 769 (2007) (discussing the "air of 'mystic infallibility'" surrounding DNA evidence in a courtroom); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1068-73 (2006) (hypothesizing juror overbelief in scientific evidence by affording more probative value than deserved).

expert's testimony, there was no confusion over what it meant, and there was no danger the jury would be misled. Similarly, in *State v. Ramsey*, 345 S.C. 607, 550 S.E.2d 294 (2001), the DNA expert testified his testing showed the victim's blood on the defendant's boot, and "the chance the DNA on the boot did not come from [the victim] was one in 4,601—a percentage greater than 99.9." 345 S.C. at 611, 550 S.E.2d at 296. As in *Council*, if the jury believed the expert, the defendant's guilt followed logically from the expert's testimony.

In this case, however, Gallman's testimony—unlike the straightforward DNA evidence from hair or bodily fluids in *Council* or *Ramsey*—involved three fundamental concepts that are not at all straightforward: "touch DNA," "non-exclusion DNA," and "random match probability." Though these DNA concepts carry with them the same aura of reliability or invincibility, as we will explain, each of them has significant potential to confuse and mislead that was not a factor in the DNA evidence we addressed in *Council* or *Ramsey*.

"Touch DNA" developed from advances in DNA technology that now permit analysts to obtain fragments of DNA profiles from skin or other cells collected from surfaces at crime scenes. One very important thing to understand about touch DNA is that in many cases—this case included—the DNA analyst is not able to obtain a full DNA profile from the "touch" sample. When the profile identifiable from the sample is only a fragment of a full DNA profile, the case becomes less like *Council* or *Ramsey*, and the analyst will be less able to identify the perpetrator or exclude any given suspect. *See Commonwealth v. Clark*, 34 N.E.3d 1, 13 n.13 (Mass. 2015) (stating "'touch DNA' or 'trace DNA'" emerged in 1997 after scientists "reported that DNA profiles could be generated from touched objects," which "opened up possibilities and led to the collection of DNA from a wider range of exhibits") (quoting Roland AH van Oorschot, et al., *Forensic Trace DNA: A Review*, *in* 1:14 INVESTIGATIVE GENETICS 1, 2 (2010)); *Bean v. State*, 373 P.3d 372, 377 (Wyo. 2016) (describing touch DNA in general terms).

Courts and legal commentators have recognized problems with the admission of touch DNA evidence in criminal trials. The Texas Court of Criminal Appeals recently wrote, "Touch DNA poses special problems because 'epithelial cells are ubiquitous on handled materials,' because 'there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them,' and because 'touch DNA analysis cannot determine when an epithelial cell was deposited.'" *Hall v. State*, 569 S.W.3d 646, 658 (Tex. Crim. App. 2019)

(quoting *Reed v. State*, 541 S.W.3d 759, 777 (Tex. Crim. App. 2017)). Touch DNA is sometimes referred to as "trace DNA." One commentator recently wrote, "These trace samples lack the clarity of the more straightforward DNA evidence that can lead to a clear match to a specific individual." Bess Stiffelman, *No Longer the Gold Standard: Probabilistic Genotyping Is Changing the Nature of DNA Evidence in Criminal Trials*, 24 Berkeley J. Crim. L. 110, 115 (2019); *see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82, 129 S. Ct. 2308, 2327, 174 L. Ed. 2d 38, 60 (2009) (Alito, J., concurring) (stating as to touch DNA that "modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence").

Gallman's testimony also included "non-exclusion" DNA evidence. Gallman stated,

> I take this person's DNA profile and I compare it to the information that was taken from the evidence. I check to see if their information is within this mixture and if their information is within this mixture, that means that I cannot exclude it, exclude them.

As with touch DNA, courts have identified problems with non-exclusion DNA. As the Kentucky Supreme Court recently stated,

> [S]everal courts have held that DNA "match" or "non-exclusion" evidence is inadmissible without reliable accompanying evidence as to the likelihood that the test could or could not exclude other individuals in a given population. Without the accompanying evidence, these courts note "the jury have no way to evaluate the meaning of the result."

Duncan v. Commonwealth, 322 S.W.3d 81, 92 (Ky. 2010) (quoting *Commonwealth v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010) (collecting cases)).

Gallman also testified to the related concept "random match probability." Of the DNA concepts we have just discussed, random match probability has perhaps the most potential for confusion. *See State v. Bloom*, 516 N.W.2d 159, 162 (Minn. 1994) (recognizing that the "admission of the random match probability figure will confuse jurors"). Random match probability is the likelihood that another randomly chosen

person—unrelated to the suspect—will have a DNA fragment identical to the fragment the analyst found in the touch sample. The probability of a random match in any given case depends on the size of the fragment the analyst can obtain from the touch sample. Thus, the more complete the fragment, the less likely another person could randomly match it. The smaller the fragment, on the other hand, the more likely some other person will also have the identical fragment, and would then be a "random match."

The Kentucky Supreme Court addressed random match probability in *Duncan*, stating, "For smaller profiles, . . . those based on partial matches, . . . the odds of a random match can be much higher and the inference that the source of the known sample was also the source of the unknown sample much weaker." 322 S.W.3d at 90; *see Bloom*, 516 N.W.2d at 162 (describing the difficult chain of inferences a juror must follow to get from the probability of a random match to an accurate understanding of the likelihood of guilt (citing Jonathan J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 Jurimetrics J. 21, 35 (1993))).[5] The Supreme Court of the United States addressed how random match probability creates risk that jurors will confuse it with a statistical probability of guilt, referring to the risk as the "prosecutor's fallacy." *McDaniel v. Brown*, 558 U.S. 120, 128, 130 S. Ct. 665, 670, 175 L. Ed. 2d 582, 588 (2010) (citation omitted); *see also* Ming W. Chin et al., FORENSIC DNA EVIDENCE: SCIENCE AND THE LAW § 5:2

[5] *See also* 7 Clifford S. Fishman & Anne T. McKenna, JONES ON EVIDENCE § 60:27 (7th ed. 2019) (cautioning "Care should be exercised as to how the statistic probabilities are expressed in the courtroom," and stating "it is easy and unfortunately only too frequent for both the prosecution and the defense to make errors in presenting the information to the court"); Lieberman *supra*, at 32 (explaining that when a DNA expert "provides statistics on the frequency of the matching profile . . . [,] [t]he complexity of mathematical computations used to determine the probability of a match may leave jurors with some degree of confusion and uncertainty"); Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always A "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 Tex. Wesleyan L. Rev. 403, 417 (2011) ("The formulas used to determine statistical probability of a match produce a result that is difficult for a layperson to understand.").

(2019) (stating "the prosecutor's fallacy . . . confuses random match probability with a source (or guilt) probability statement").[6]

Thus, even when the concepts of touch DNA, non-exclusion DNA, and random match probability are completely and accurately presented to a jury, there is significant potential the testimony will be confusing and misleading.

III. Analysis of Error

We have repeatedly discussed the trial court's "gatekeeping" role regarding the admission of expert testimony. In *Council*, for example, we framed our discussion around the trial court's responsibility to ensure the expert testimony meets the requirements of Rules 702 and 403. We emphasized "the trial judge must find" the Rule 702 elements are satisfied. 335 S.C. at 20, 515 S.E.2d at 518. We held, "The trial judge should . . . determine reliability," and "the trial judge should determine if its probative value is [substantially] outweighed by" the dangers listed in Rule 403. *Id.* We have repeatedly enforced the requirement that trial courts exercise their gatekeeping responsibility in admitting expert testimony. *See, e.g.*, *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (affirming the trial court's exclusion of the plaintiff's experts' opinions and stating "the court must . . . exercise its role as gatekeeper"); *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (reversing the trial court's failure to exercise its role as gatekeeper and stating "the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law").

The proponent of scientific evidence has a corresponding responsibility to provide the trial court the factual and scientific information the court needs to carry out its gatekeeping duty. In *Council*, *Graves*, and *Watson*, the proponent went to great lengths in a hearing outside of the jury's presence to provide a sufficient factual and

---

[6] This writer has been an Associate Justice on the Supreme Court of California since 1996. Justice Chin—"[a] nationally renowned expert on DNA evidence"—is set to retire later this year. Merrill Balassone, *Justice Ming Chin to Retire from California Supreme Court*, CAL. CTS. NEWSROOM (Jan. 15, 2020), https://newsroom.courts.ca.gov/news/justice-ming-chin-to-retire-from-california-supreme-court.

scientific basis for the court to consider as gatekeeper. In *Council*, the State presented live, detailed testimony from the FBI expert explaining the history of the mitochondrial DNA analysis method, his training in the method, and precisely how the method is used. 335 S.C. at 17-18, 515 S.E.2d at 516-17. Similarly, in *Graves* and *Watson*, the civil plaintiffs who sought to introduce the opinion testimony presented deposition testimony of their experts and/or live testimony outside the presence of a jury,[7] and each expert explained in detail the factual and scientific basis for their opinions. *Graves*, 401 S.C. at 70-72, 735 S.E.2d at 653-54; *Watson*, 389 S.C. at 447-48, 699 S.E.2d at 176.

In this case, the State did basically nothing to give the trial court a sufficient factual and scientific basis upon which to carry out its gatekeeping responsibility. First, the State did not call Gallman—or any witness with any knowledge of Gallman's testimony or its factual or scientific basis—to testify at the hearing on Phillips' motion to exclude her testimony. Under that circumstance alone, it was impossible for the trial court to meaningfully determine whether Gallman's testimony satisfied the Rule 702 elements, or should be excluded under Rule 403.

Second, the State made almost no effort to educate the trial court on the factual and scientific basis of Gallman's opinions. Before any expert opinion may be admitted into evidence, the proponent of the opinion must convince the trial court that each element of the Rule 702 foundation has been established. *See State v. Von Dohlen*, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996) ("The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony."), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *see also United States v. Williams*, 865 F.3d 1328, 1338 (11th Cir. 2017) (stating "the proponent of expert testimony bears the burden of demonstrating the expert's qualifications and competence to give his proposed testimony"). In addition, when the opponent makes a Rule 403 objection, the proponent must demonstrate the probative value of the evidence. In the pre-trial hearing in this case, the only person who spoke on behalf of the State was the assistant solicitor. She spoke only briefly, and to the extent she said anything about the concepts of touch DNA, non-exclusion DNA, or random

[7] In *Graves*, the testimony was presented in a pre-trial *Daubert*/*Council* hearing. *See* 401 S.C. at 73, 735 S.E.2d at 655 (describing the trial court's analysis of the expert's depositions before excluding the expert opinion and granting summary judgment).

match probability, the statements she made were mostly wrong. We will address her incorrect statements below.

Gallman did address each concept in her testimony before the jury, but the assistant solicitor never asked Gallman any questions that allowed her to explain the concepts in detail. As to touch DNA, Gallman described it generally as follows,

> But when you talk about touch DNA, it's based on whether -- like I say, touch DNA, whether I touch an item or I didn't. You can touch an item and still you will not get a full DNA profile from that touch. So touch DNA is basically like a luck of the draw, whether you leave your cells or you didn't or you left a couple of cells, but it wasn't enough information to detect that you were there.

Shortly after this testimony, the assistant solicitor asked Gallman if she obtained a full DNA profile for the standards, asking, "Were you able to develop a full profile and get all sixteen numbers for the defendant, Billy Phillips?" Gallman answered, "Yes." Immediately thereafter, however, "Turning your attention to the items of evidence that you tested," as she directed Gallman, the assistant solicitor did not ask Gallman whether she got a full DNA profile from the touch samples. Gallman then proceeded to make three statements that incorrectly indicated she did get a full DNA profile from the gun. She testified with respect to the gun, "With this particular sample, when I developed the DNA profile of the DNA obtained from it," and "it's basically a genetic footprint or fingerprint of who had potentially touched the gun," and "I was developing a DNA profile from whatever skin cells were left there." At no other point did the assistant solicitor ask Gallman to give any explanation of the nature of touch DNA, particularly the significant fact that the touch DNA samples in this case revealed only fragments, not full DNA profiles.

In subsequent testimony, Gallman hardly explained that the touch DNA samples revealed only a fragment of a full DNA profile. Gallman referred to the samples not as fragments, but as "the swab from the gun" and "the swab from the right front pocket." Finally, she testified,

> [W]e're able to develop a DNA profile from evidence and then also develop a DNA profile from a standard. It could be from a person's blood or what we call a buccal swab,

> when they swab inside someone's, within your mouth, and compare that to the evidence to see whether it matches or it does not match.

The striking omission of a meaningful explanation that the touch samples Gallman obtained in this case revealed only fragments of a full DNA profile left the jury with the incorrect impression Gallman matched Phillips' DNA standard with a full DNA profile he left behind on the gun and in the pocket.

In similar fashion, the State elicited from Gallman only general descriptions of non-exclusion DNA and random match probability. Of the concerns recited by the courts and academic authorities discussed above, the State addressed none of them. We are particularly troubled by the State's failure to elicit from Gallman any explanation of the method she used to calculate the probability that some other person—not Phillips—contributed the DNA on the gun or in the jeans pocket. As Gallman testified, she is "required to tell you how often you would see this mixture in a population." There must, however, be some method she followed in arriving at this probability. She explained no method, stating only, "So based on the information that I could use to generate a statistic, the value is one in two hundred." As to the jeans pocket, she stated only, "I compared the DNA [standards] to the evidence . . . and the next step is to give a statistical value to that mixture, and the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two."

The method of making these calculations is undoubtedly complicated. As some of the academic writers referred to above stated, "The formulas used to determine statistical probability of a match produce a result that is difficult for a layperson to understand," Boies, *supra*, at 417, and, "The complexity of mathematical computations used to determine the probability of a match may leave jurors with some degree of confusion and uncertainty," Lieberman, *supra*, at 32. The difficulty of making or explaining the calculation does not mean, however, the method for doing so may be ignored. Rather, the method by which a DNA analyst calculates random match probability must be explained. "To say that two patterns match, without providing any *scientifically valid* estimate . . . of the frequency with which such matches might occur by chance, is meaningless." National Research Council, *supra* note 2, at 9 (emphasis added).

In addition, much of the information the State did provide the trial court and jury was simply wrong. We begin with the assistant solicitor's presentation to the trial court in the pre-trial hearing. Following up on her answer to the court's question in which she stated three people—including Phillips—could not be excluded from the mixture of DNA found on the gun, the assistant solicitor said, "That means their DNA is there, and if [defense counsel] had spoken to Ms. Gallman, . . . she would have been able to explain that to him." The court then asked her, "Well, are you saying that Billy Phillips' DNA is on the weapon," to which she responded, "It is."

The assistant solicitor's statements are wrong. She appeared to recognize her error moments later when she stated, "Your Honor, I mis-spoke." She then proceeded, however, to make another series of incorrect statements. She said, "It does not say that it is 100% Billy Phillips' DNA in that mixture of contributors, but it says that he cannot be excluded as a contributor to the three. It also lists two other names. 'Cannot be excluded' means the same thing as can be included." She then stated, "The DNA itself, it stands for itself."

Actually, if defense counsel had talked to Gallman, Gallman would certainly have told him she did not know whether Phillips' DNA was on the gun, or in the jeans pocket. She would also have told him "cannot be excluded" most certainly does not mean "can be included,"[8] and she would have taken pains to be clear the DNA does not "stand for itself." Rather, DNA—particularly touch DNA—is a complicated scientific field of study that requires detailed explanation given by a trained scientist like Gallman, elicited by an experienced trial lawyer who has taken the time to prepare herself for trial.

In Gallman's testimony, there were more incorrect statements. Responding to confusing questions from the assistant solicitor, Gallman conflated (1) a finding that an individual can be excluded as a contributor to a DNA mixture with a finding that

---

[8] The State's casual use of scientific terms is striking. When Gallman testified she could not exclude Phillips as a contributor, she meant that whatever fragment of a DNA profile she found on the evidence matched a fragment of Phillips' full DNA profile. The corollary to her "cannot be excluded" testimony as to Phillips is that a DNA fragment identical to Phillips' fragment is included. That is not the same as saying Phillips' full DNA profile is included. In fact, Gallman does not know whose DNA is in the mixture; she knows only that she found a DNA fragment that could have been left by quite a few people.

the excluded individual never touched the item, and (2) a finding that a fragment of a person's DNA is on an item with a finding the person touched the item.

> SOLICITOR: Okay. So, using again, I guess an example of, say, these scissors. If I had never touched the scissors and did not leave any cells on it, would the language be, could not be excluded, or would it be outright excluded?
>
> GALLMAN: It would be excluded.
>
> SOLICITOR: Okay. So, if multiple people have handled the scissors, and you're able to get numbers, DNA numbers off of the scissors and you find that there's at least three, that just means that I have left part of my DNA on there. Correct?
>
> GALLMAN: It means that you left cells, skin cells on that item.

We do not fully understand the assistant solicitor's questions, so Gallman probably did not understand them either. The answers, however, are wrong. As to the first answer, if the assistant solicitor never touched the scissors, but another person who did touch them left a DNA fragment behind that is identical to a fragment in the assistant solicitor's DNA profile, Gallman could not have excluded the assistant solicitor because Gallman would not know which of the two left the fragment. The incorrect answer suggests that if Phillips had not touched the gun or had his hand in the jeans pocket, he would have been excluded. To the contrary, it is entirely possible that Phillips did not put his hand in Woods' pocket, but someone with an identical DNA fragment did, and still Gallman could not exclude Phillips as a contributor. As to the jeans pocket, the assistant solicitor's confusing question and Gallman's incorrect answer wrongly suggest we know Phillips had his hand in Woods' pocket. We do not know that.

As to the second answer, if multiple people touched the scissors, and one of them left behind a DNA fragment identical to a fragment in the assistant solicitor's DNA profile, that does not mean the assistant solicitor left cells there. This is in fact the concept of random match probability the State failed to explain. There is always some chance another person left those cells, but the person has an identical DNA

fragment. So, only one of the two touched the item, but neither can be excluded. The answer suggests—wrongly—Gallman was giving her opinion that Phillips had his hand in the pocket. She was not.

Also as to the second answer, there are other plausible ways a fragment of a person's DNA might be found on the scissors when the person did not themselves touch them. "Touch DNA is . . . subject to what is known as secondary transfer. This refers to the 'possibility that an individual or an object may serve as a conduit between a source and a final destination without any direct encounter.'" *Bean*, 373 P.3d at 377-78 (quoting 4 David L. Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 30:13 (2015–2016 ed.)); *see also* 7 Clifford S. Fishman & Anne T. McKenna, JONES ON EVIDENCE § 60:10 (7th ed. 2019) (explaining "'Secondary transfer' occurs when DNA left on one surface is inadvertently transferred to another surface" and noting "the risk is greatest with regard to touch DNA"). In other words, it is quite possible the assistant solicitor never touched the scissors, but cells she left on another surface were transferred there and tested as part of the touch DNA sample. In that event—contrary to Gallman's second answer—the assistant solicitor's DNA was on the scissors, but she had not left DNA there.

We review a trial court's decision to admit or exclude evidence under a deferential standard for an abuse of discretion. *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). In this case, however, the State did not give the trial court the factual and scientific basis the court needed to meaningfully exercise that discretion. The trial court was essentially left in the dark as to the difficult concepts of touch DNA, non-exclusion DNA, and random match probability. As to the misstatements made by the assistant solicitor and Gallman, the trial court was kept out of the position of even suspecting the statements might be incorrect.

We are aware that our "analysis of error" reads as if we are second-guessing the trial court. However, because the trial court did not require the State to present the factual and scientific foundation for Gallman's testimony in a *Daubert*/*Council* hearing before she testified to the jury, we are actually conducting the analysis for the first time. The trial court should have required the State to present the factual and scientific information necessary to establish the foundation required by Rule 702. The trial court also should have conducted an on-the-record balancing of probative value and the danger of confusion of the issues and misleading the jury required by

Rule 403. In that event, instead of conducting our own analysis, we could review the trial court's analysis under the proper standard of deference.

The root of the trial court's error, however, is a series of failures by the State. First, the State failed to present the testimony of its expert witness at the hearing at which the trial court was to consider the admissibility of the expert's opinion. Second, the State presented an incomplete factual and scientific basis for the admission of the expert's opinion. Third, the State did not explain to the jury the complicated DNA concepts involved in this case. Fourth, the State presented incorrect information about its DNA evidence. Finally—as we will explain—the assistant solicitor misstated to the trial court and the jury that Phillips' DNA was on the gun and in the jeans pocket.

IV. Harmless Error

The State argues that even if the trial court erred in admitting Gallman's DNA testimony, the error was harmless. We disagree. While the State presented considerable circumstantial evidence supporting Phillips' guilt, it did not offer any evidence that conclusively proved Phillips' guilt. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (stating "an insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven . . . such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))).

As part of our harmless error analysis, we review "the materiality and prejudicial character of the error" in the context of the entire trial. *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011). To evaluate this context, we must consider the assistant solicitor's misstatements. In addition to those already discussed, she told the trial court in response to Phillips' directed verdict motion, "I believe with his DNA being on the murder weapon, along with other things, along with the eyewitness testimony, there is absolutely substantial evidence." The trial court then asked, "Is his DNA actually on there?" She responded, "His DNA is on the gun in the form that he cannot be excluded." Both statements are wrong.

More importantly, however, the assistant solicitor made misstatements in her closing argument to the jury. On several occasions she repeated the false statement that if a person does not touch an item he will be excluded. She stated, for example, "If you don't touch it, you are automatically excluded. One hundred percent excluded." She

also told the jury Gallman found Phillips' DNA on the gun and in the jeans pocket. She stated, "Well, we have his DNA on that gun," and "We also know that defendant's DNA is on the murder weapon and inside [Woods'] pocket," and "Had he not touched the gun or the pocket, his DNA would not be there."

The "prosecutor's fallacy" the Supreme Court and Justice Chin warn about involves risk the jury might unknowingly or accidentally confuse the complicated concepts underlying DNA evidence. Such innocent confusion was certainly a risk in this case. We need not determine whether the risk of innocent confusion materialized in this case, however, because the incorrect statements in closing argument all but guaranteed the jury was confused and misled. If there were any possibility we might find the error of admitting the evidence harmless, the assistant solicitor extinguished that possibility with her incorrect statements in her closing argument. *See Duncan*, 322 S.W.3d at 91-93 (finding it was improper for prosecutor to state in closing argument that "not excluded" was the same as "included," and holding "given the immense weight jurors are apt to accord DNA evidence," the prosecutor's statements "rendered [the defendant's] trial manifestly unfair"); *Whack*, 73 A.3d at 189 (finding trial court erred in denying mistrial because prosecutor in closing argument "told jurors that [defendant's] DNA was present" when expert actually testified "she could not exclude [defendant] as being the source of DNA"); *Bloom*, 516 N.W.2d at 169 (stating "we will not hesitate to award a new trial . . . if . . . DNA identification evidence was presented in a misleading or improper way").

V. Conclusion

DNA evidence is a complicated scientific subject. In *Council*, we held "the trial judge was well within his discretion in finding the results of the [mitochondrial] DNA analysis admissible." 335 S.C. at 21, 515 S.E.2d at 518. That does not mean that every time a party offers DNA evidence it is admissible. Rather, if an objection is made, the trial court must hold a *Daubert*/*Council* hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702, and the trial court must conduct an on-the-record balancing of probative value against the applicable Rule 403 dangers. The trial court should make specific findings as to each contested element or issue.

By not conducting a *Daubert*/*Council* hearing, the trial court left itself without a meaningful opportunity to exercise its discretion. The State failed to establish the "assist the trier of fact" element, and the probative value of the DNA evidence is

substantially outweighed by danger the evidence would confuse the issues and mislead the jury. We reverse Phillips' convictions and remand for a new trial.

REVERSED.

KITTREDGE and JAMES, JJ., concur. BEATTY, C.J., concurring in result only in a separate opinion in which HEARN, J., concurs.

CHIEF JUSTICE BEATTY: Respectfully, I concur in result. While I agree with the conclusion reached by the majority, I disagree with the majority's reference to a "*Daubert/Council*" hearing. Because this Court has expressly declined to adopt *Daubert*,[9] I believe the majority's instruction regarding a "*Daubert/Council*" hearing is confusing and constitutes an implicit adoption of *Daubert*.

As the majority correctly recognizes, in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), this Court was presented with an opportunity to analyze the admissibility of expert opinion on DNA evidence under the new South Carolina Rules of Evidence. In *Council*, this Court identified the procedure trial judges should use in deciding whether to admit scientific evidence. Specifically, the Court stated:

> *While this Court does not adopt Daubert, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE*. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones*[10] factors to determine reliability. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate.

Id. at 20–21, 515 S.E.2d at 518 (emphasis added).

Since 1999, *Council* has remained the standard by which trial judges have decided whether to admit scientific evidence. Although our appellate courts have referenced *Daubert* in at least ten cases since 1999, our courts have consistently adhered to *Council* and repeatedly declined to adopt *Daubert*. *See, e.g.*, *State v. Jones*, 383 S.C. 535, 548 n.5, 681 S.E.2d 580, 587 n.5 (2009) (citing *Council* and reiterating that the Court declined to adopt *Daubert*); *State v. Warner*, No. 5717,

---

[9] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (adopting new standard for determining the admissibility of scientific evidence under Rule 702 of the Federal Rules of Evidence).

[10] *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

2020 WL 1696716, at * 3 (Ct. App. Apr. 8, 2020) ("South Carolina has not adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework. Nevertheless, our approach is 'extraordinarily similar' to the federal test." (citation omitted)).

Without explanation, the majority departs from more than twenty years of precedent and appears to implicitly adopt *Daubert* by creating a hybrid *Daubert/Council* test. I believe this departure is unwarranted and will create confusion. Although our appellate courts have recognized the similarities between *Daubert* and *Council*, there is a distinction that caused this Court to decline to adopt the *Daubert* test. The majority has neither addressed this distinction nor outlined the procedure in the new test.

As the majority aptly points out, trial judges are the gatekeepers regarding the admission of scientific evidence and expert testimony. In order to fulfill this significant role, our judges must have a clear understanding of the correct test for admissibility. I believe *Council* remains the correct test.

Having addressed my substantive concerns with the majority's opinion, I now turn to an observation that is equally concerning. As part of its analysis, the majority castigates the prosecutor in this case. To some extent, this rebuke is warranted. The prosecutor was at times evasive, if not misleading, when responding to some of the trial judge's questions and arguing before the jury. Yet, it is questionable whether this was intentional. Further, the prosecutor does not bear sole responsibility of ensuring that only admissible evidence is put before the judge and jury. Rather, the primary responsibility lies with the judge, who is the gatekeeper regarding the admission of all evidence.

Based on the foregoing, I concur in the majority's decision to reverse Phillips's convictions and remand for a new trial. On remand, if an objection is raised regarding the DNA evidence, I believe the trial judge must hold a hearing in accordance with *Council*.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dannitte Mays Dickey, Respondent.

Appellate Case No. 2020-000466

Opinion No. 27979
Submitted May 7, 2020 – Filed June 3, 2020

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

James Steedley Bogan, of Bogan Law Firm, of Columbia for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of one, two, or three years. Respondent requests his suspension be applied retroactively to February 11, 2015, the date of his interim suspension. *In re Dickey*, S.C. Sup. Ct. Order dated Feb. 11, 2015. As a condition of discipline, Respondent agrees to complete the Legal Ethics and Practice Program Ethics School prior to reinstatement. Respondent further agrees that, prior to seeking reinstatement, he will enter into a two-year monitoring contract with Lawyers' Helping Lawyers (LHL) that includes the provision of quarterly reports to the Commission on Lawyer Conduct (the Commission).

We accept the Agreement and suspend Respondent from the practice of law in this state for one year, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

ODC found no evidence of misconduct in the underlying matter; however, Respondent failed to timely respond to ODC's notice of investigation regarding the matter.

Matter II

Client B retained Respondent to handle a name change for the client's child. Respondent did not deal promptly with the matter and made excuses to Client B to explain the delay. At the time of his interim suspension, Respondent had not completed the work. The Lawyers' Fund for Client Protection refunded Client B's fees.[1] Respondent also failed to timely respond to ODC's notice of investigation regarding the matter.

Matter III

Client C retained Respondent to represent Client C in a domestic matter. Respondent alleges Client C was often difficult to reach but acknowledges he (Respondent) did not always answer Client C's inquiries in a timely manner. Respondent submits there were delays in the case due to service issues and Client C's frequent failure to respond to Respondent's requests for information promptly. However, Respondent acknowledges he did not deal with the matter in a timely fashion. Respondent also failed to timely respond to ODC's notice of investigation regarding the matter.

[1] Respondent is in the process of reimbursing the Lawyers' Fund for Client Protection pursuant to a separate agreement with the Commission.

Matter IV

Client D, who lived in Hawaii, hired Respondent to help him with a child support issue. Respondent states he did a good amount of work on the matter but admits he was not diligent in his handling of the issue and did not adequately communicate with Client D. Respondent also failed to timely respond to ODC's notice of investigation regarding the matter.

Matter V

Client E alleged Respondent failed to adequately communicate with her about her case. Respondent states he frequently communicated with Client E by cell phone but admits that, when he changed offices, he was hard to reach on his landline for a period. While Respondent competently represented Client E, he admits notifying the client of a hearing on short notice and making scrivener's errors in the final order. Respondent also failed to timely respond to ODC's notice of investigation regarding the matter.

Law

Respondent admits that by his conduct he violated Rules 1.1 (competence); 1.3 (diligence); 1.4 (communication); and 8.1(b) (knowingly failing to respond to a lawful demand for information from a disciplinary authority), RPC, Rule 407, SCACR. Respondent also admits the above allegations constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for one (1) year. Accordingly, we accept the Agreement and suspend Respondent for a period of one year, retroactive to the date of his interim suspension.

Additionally, we remind Respondent that, pursuant to the Agreement, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months

or more), including completion of the Legal Ethics and Practice Program Ethics School within one year prior to filing a petition for reinstatement. Further, prior to seeking reinstatement, Respondent shall enter into a two-year monitoring contract with LHL that includes filing quarterly reports with the Commission.

Finally, within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC, Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, ZOi Films, LLC, and Carolina Custom Converting, LLC, Defendants,

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third Party Defendant and Counterclaim Plaintiff,

v.

Dave Wilson, Steve Norvell, Neologic Distribution, Inc. and Fresh Water Systems, Inc.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Petitioners.

Appellate Case No. 2018-001140

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27980
Heard June 12, 2019 – Filed June 3, 2020

AFFIRMED AS MODIFIED AND REMANDED

D. Randle Moody III and John William Sulau, of Jackson Lewis P.C., of Greenville, both for Petitioners Andrea Comeau-Shirley and John Gandis.

Burl F. Williams and Konstantine Peter Diamaduros, of Nexsen Pruet, LLC, of Greenville, both for Petitioner Carolina Custom Converting, LLC.

Bruce Bellinger Campbell, of Horton Law Firm, P.A., of Greenville, for Respondents Fresh Water Systems, Inc. and Neologic Distribution, Inc.

W. Andrew Arnold, of Horton Law Firm, P.A., of Greenville, for Respondent David Wilson.

JUSTICE JAMES: We granted a writ of certiorari to review the court of appeals' decision in *Wilson v. Gandis*, Op. No. 2018-UP-078 (S.C. Ct. App. filed Feb. 7, 2018). We affirm as modified the court of appeals' decision as to David Wilson's claim for oppression, we affirm the court of appeals' decision as to John Gandis' and Andrea Comeau-Shirley's claim for breach of fiduciary duty, and we affirm the court of appeals' decision as to Carolina Custom Converting, LLC's claim for misappropriation of trade secrets.

I.

David Wilson, John Gandis, and Andrea Comeau-Shirley (Shirley) are members of Carolina Custom Converting, LLC (CCC). Wilson, a 45% member, brought an action against Gandis (also a 45% member), Shirley (a 10% member), and CCC alleging they engaged in oppressive conduct against him. Wilson also brought a derivative action against CCC. Relief sought by Wilson included a forced buyout of his membership interest by Gandis, Shirley, and CCC. CCC counterclaimed against Wilson, alleging Wilson misappropriated its trade secrets and communicated these secrets to Neologic Distribution, Inc. and to Fresh Water Systems, Inc.

During a five-day bench trial, the trial court received over three hundred exhibits and heard testimony from ten witnesses. The trial court found Gandis and Shirley engaged in oppressive conduct and ordered them to individually purchase Wilson's distributional interest in CCC for $347,863.23. The trial court found in favor of Wilson on CCC's, Gandis', and Shirley's counterclaim for breach of fiduciary duty.[1] The trial court also found in favor of Wilson, Neologic, and Fresh Water on CCC's trade secrets claim. CCC, Gandis, and Shirley appealed. In an unpublished opinion, the court of appeals affirmed the trial court and adopted the trial court's order in its entirety. *Wilson v. Gandis*, Op. No. 2018-UP-078 (S.C. Ct. App. filed Feb. 7, 2018). CCC, Gandis, and Shirley filed petitions for writs of certiorari to review the court of appeals' decision. We granted their petitions.

II. STANDARDS OF REVIEW

We must apply different standards of review to the cases before us. CCC is not a corporation but rather is a limited liability company. In the corporate setting, a minority shareholder's action for shareholder oppression is one in equity. *See Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 648, 817 S.E.2d 273, 277 (2018) ("An action for stockholder oppression is one in equity."). We conclude a minority LLC member's action for oppression is likewise an action in equity. This Court reviews "factual findings and legal conclusions in an equitable action de novo." *See Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). "Therefore, we may find facts according to our own view of the preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d

[1] CCC appealed from this ruling to the court of appeals; however, CCC did not argue the issue of breach of fiduciary duty in its brief to this Court.

107, 109 (2012). "However, this broad scope of review does not require [this Court] to disregard the findings below or ignore the fact that the trial judge [was] in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). In addition, a petitioner is not relieved of its burden of convincing this Court that the trial court committed error in its findings. *Id.* at 387-88, 544 S.E.2d at 623.

CCC seeks money damages from Wilson, Neologic, and Fresh Water under the South Carolina Trade Secrets Act.[2] Under subsection 39-8-40(A) of the Trade Secrets Act, a complainant is entitled to recover actual damages for misappropriation of its trade secrets. Under subsection 39-8-50(A), the complainant may also obtain injunctive relief for actual or threatened misappropriation of its trade secrets. Whether a trade secret misappropriation action is an action at law or an action in equity depends in part on the relief sought by the complainant. *See LinkCo, Inc. v. Fujitsu Ltd.*, 232 F. Supp. 2d 182, 192 (S.D.N.Y. 2002) (internal citation omitted) ("Where a plaintiff seeks damages for trade secret misappropriation, rather than equitable relief, the claim is essentially legal in nature. Because [plaintiff] is seeking damages, its misappropriation claim is an action at law. . . ."); *see also Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006) ("The character of an action as legal or equitable depends on the relief sought.").

CCC's action for misappropriation of trade secrets is an action at law. "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.* at 600, 675 S.E.2d at 415. Of course, we review de novo the trial court's legal conclusions in an action at law. *See id.* at 599-600, 675 S.E.2d at 415.

As to Gandis' and Shirley's petition, we affirm the court of appeals as modified. We find Wilson has proven that Gandis and Shirley engaged in oppressive conduct against him. We find Wilson is entitled to a buyout of his interest in CCC, and we agree with the trial court's valuation of Wilson's distributional interest. However, we modify the trial court's order to make CCC liable for the purchase of Wilson's interest in the first instance, with Gandis and Shirley being secondarily

[2] S.C. Code Ann. §§ 39-8-10 to -130 (Supp. 2019) (hereinafter, the Trade Secrets Act).

liable for the purchase, in proportion to their respective membership interests in CCC. We remand this issue to the trial court for further proceedings consistent with this opinion. We also affirm the court of appeals as to Gandis' and Shirley's counterclaim for breach of fiduciary duty.

As to CCC's petition, we hold the evidence in the record supports the trial court's conclusion that CCC failed to prove its trade secret misappropriation claim against Wilson, Neologic, and Fresh Water. Therefore, we affirm the court of appeals' holding in the trade secrets case.

III. FACTS

Gandis, Shirley, and CCC maintain the evidence supports none of the trial court's dispositive factual findings, and they likewise contend the trial court's dispositive conclusions of law are entirely erroneous. Wilson, Neologic, and Fresh Water maintain the trial court's factual and legal findings are unassailable. In the following recitation of our factual findings relative to the oppression claim, we will not undertake to set forth every point of disagreement asserted by Gandis, Shirley, and CCC.

In November 2007, Wilson and Gandis formed CCC, a manager-managed limited liability company, with each man owning a 50% membership interest. Gandis served as president and manager, and Wilson served as vice-president. Wilson and Gandis never executed a formal operating agreement for CCC, but many of their oral agreements were memorialized through email correspondence and on a questionnaire they completed with the intent to create an operating agreement. Wilson and Gandis signed no noncompete, nondisclosure, or non-solicitation of employee(s) agreements.

When CCC was formed, Wilson owned and operated Eastern Film Solutions (EFS), which bought and sold polyester, plastic, and metalized films. Gandis owned and operated DecoTex, which bought and sold decorative designs for vinyl film. Wilson and Gandis initially agreed that CCC would perforate and slit film. Wilson agreed to run some of EFS's slitting business through CCC.

In 2008, Wilson and Gandis discussed expanding CCC's scope of operations and winding down their individual businesses. They discussed EFS buying film from CCC and selling it as an additional source of income to CCC. Wilson also

agreed to make CCC the buyer and seller of film for one of EFS's major accounts, Minova, resulting in significant additional revenues for CCC. The Minova account prompted additional discussions between Gandis and Wilson about EFS winding down and running all new film business through CCC. However, Wilson advised Gandis he intended to keep three import accounts separate from CCC, namely Modular Metal, West Carrollton, and a portion of J.P. Lamborn. After CCC's expansion, Wilson led CCC's sales efforts, and Gandis managed its operations. By July 2009, Wilson completed the year-long process of winding down EFS.

In exchange for transferring EFS's accounts to CCC, Wilson received $8,000 per month. Wilson and Gandis later agreed to increase this to $12,000 per month. Gandis continued to own and operate DecoTex, and he agreed to fund CCC through credit lines from DecoTex and his other business, M-Tech. In addition, Gandis and Wilson both received distributions from CCC. CCC operated out of a building owned by M-Tech; since Gandis owned M-Tech, he received the benefit of rent payments made by CCC to M-Tech.

In 2008, Gandis engaged Shirley, a certified public accountant licensed in Georgia, to provide CCC with accounting and formation advice. In 2009, Gandis and Wilson each transferred a 5% interest in CCC to Shirley in exchange for her services. Shirley did not have a formal voting interest; however, she took an active role in managing CCC. Shirley provided extensive personal counsel to Gandis about his operation of CCC. Gandis and Shirley largely excluded Wilson from their discussions about CCC's business operations. As we will discuss, Gandis and Shirley exchanged a myriad of emails about the operation of CCC, and these emails provide evidence of their oppressive conduct against Wilson.

CCC's business grew, and with the help of a film shortage in the industry, CCC posted a profit of over one million dollars in 2010. Since CCC is a limited liability company, its members have income tax liability proportionate to their membership interests. From the time CCC was formed in 2007 and through 2010, CCC reserved funds for the members to cover their individual tax liabilities. However, CCC had an operating loss in 2011. The high profits from 2010 combined with excess inventory created phantom income for the members, and the leaner revenue from 2011 resulted in a shortfall for the planned 2010 tax distributions.

Gandis had previously procured a line of credit for M-Tech, one of his other businesses. CCC typically relied upon the line to help even out cash flow and to

purchase inventory. In private emails to Gandis in early 2011, Shirley urged Gandis to use funds set aside by CCC for its members' 2010 tax liability to pay off CCC's obligation on the M-Tech line of credit. These reserved tax funds were typically kept on hand by CCC and distributed to members to cover their income tax liability. In one early 2011 email to Gandis, Shirley stated, "What I want to do is to keep the cash balance [of CCC] relatively low . . . so we don't get a request around tax time [from Wilson] to 'distribute' any extra money . . . instead . . . it will already have been used to repay debt. Which is a better use!" (ellipses in original). She then advised Gandis to use the M-Tech line of credit to pay his own taxes, which Gandis did. On April 15, 2011, Shirley told Wilson by email that no distributions would be made to CCC members to cover tax liability.

Trial testimony and emails between Shirley and Gandis from early 2011 reveal their plan to use CCC's employees to perform tasks for Gandis' other businesses, M-Tech and DecoTex. Also, Shirley and Gandis began secretly monitoring Wilson's emails. Shirley sent an email to Gandis in March 2011 telling Gandis that she contacted a CCC employee "to get the name of the software . . . the more we act like nothing special is going on . . . the less likely they are to think that something unusual is going on . . . . The same stuff that protects the business ALSO helps protect the other goals." (ellipses in original). Gandis testified he and Shirley were not secretly monitoring Wilson's emails but were simply collecting all of CCC's incoming emails into an archive so customer quotes and other information would be available for future reference. We agree with the trial court that this testimony was not credible.

Gandis also testified Wilson received notice from CCC's employee handbook that emails were subject to review. However, an employee handbook had never been issued. The record contains an affidavit signed by Gandis with a draft copy of the never-issued handbook attached; the draft provides in pertinent part, "There is no personal privacy in any matter created, received, or sent from the E-mail system. [CCC], in its discretion, reserves the right to monitor and to access any matter created, received, or sent from the E-mail system." Since the handbook was never issued to Wilson or anyone else employed by CCC, Gandis' contention that CCC had the right to monitor Wilson's emails is completely without evidentiary support.

On September 19, 2011, Gandis retrieved a September 12, 2011 email sent to Wilson by Wilson's wife. We agree with the trial court's conclusion that, "[f]rom this point forward, the emails between Gandis and Shirley evidence an effort to

exclude Wilson from the benefits of ownership and to cease paying [Wilson] his monthly income as part of an effort to 'squeeze' [Wilson] to relinquish his ownership interest." In the September 12 email to Wilson from his wife, Wilson's wife referenced Wilson hanging up on her during a telephone conversation and also expressed her frustration about Shirley's and Gandis' operation of CCC.

Adding to Gandis' credibility problems was his initial testimony that he did not recall reading any emails between Wilson and Wilson's wife. When confronted with the September 12 email during trial, Gandis testified Wilson's wife should not have emailed her husband at his company email address if she considered the email to be private. Gandis admitted he forwarded the indisputably private email to Shirley with the comment, "I just want you to know what I know so that when the time comes . . . ?" (ellipsis in original). Shirley responded to Gandis that the email demonstrated marital discord, and she advised Gandis of a possible way to take advantage of the situation:

> This is probably your opportunity to make a RESTRUCTURING offer to [Wilson] under which you restructure your relationship with him so that he gives up his equity ownership and converts to a structure where he is only [ ] taxed on what he receives!
>
> . . . .
>
> Now is the time to see if he wants to be in a different structure . . . we can restructure so that he is not an owner as of 1/1/[2012] . . . and you can put him into a different deal that compensates him for his time and energy – maybe more like a regional sales manager is paid – so he gets paid on his sales and also on the sales of the team.

(most ellipses in the original).

The next morning, Shirley sent Gandis an even more detailed email expanding on her previous advice to restructure Wilson's position with CCC. In that email, Shirley referenced Wilson's wife and directed Gandis on the tactics he should employ in getting Wilson to agree to restructure his relationship with CCC, with the obvious goal of Wilson divesting his membership in CCC and becoming an

employee with a noncompete agreement. She then presented a framework that reflected the ultimate goal of Wilson becoming a salaried employee on terms that would allow CCC to terminate him for the smallest of reasons and with a noncompete agreement standing in his way to other employment. Even though Wilson held a 45% interest in CCC, Shirley admonished Gandis that Wilson "cannot continue to have access to the financial records" of CCC.

On September 21, 2011, Wilson sent Gandis an email asking for a meeting with Gandis and Shirley. Wilson expressed his interest in knowing what "the game plan is for cash flow and taxes." Gandis forwarded the email to Shirley with the comment, "Now maybe the panic[] is setting in." Shirley responded to Gandis with, among other things, her recommendation that Gandis continue to push Wilson toward relinquishing his membership interest and becoming an employee.

In the spring of 2011, Gandis and Shirley began to defer their member distributions, and CCC began to classify Wilson's monthly member distributions as loans from CCC. Wilson testified Gandis had foregone his distributions in the past, and that at the end of the year, CCC would write Gandis a check to "catch things up." Wilson testified he assumed the same would happen for 2011. In early October 2011, on the advice of Shirley, Gandis presented Wilson with two options: (1) surrender his membership interest in CCC in exchange for the satisfaction of his $123,000 loan balance or (2) become an employee of CCC paid on commission. Wilson responded that he believed the value of his membership interest in CCC was over four times more than $123,000, and he countered with three options for Gandis and Shirley to consider: (1) CCC makes regular distributions to the members to cover each of their tax liabilities; (2) Wilson resigns from CCC while maintaining his 45% interest in CCC and competing with CCC; or (3) Wilson resigns and dissociates from CCC, and CCC either purchases his distributional interest or dissolves. In late October 2011, Gandis responded to Wilson with three options: (1) Wilson remains a member but foregoes the agreed-upon monthly compensation; (2) Wilson retires his membership interest, becoming a salaried at-will employee of CCC with a five-year noncompete agreement; or (3) CCC buys out Wilson's interest; however, the buyout would not eliminate Wilson's tax liability for 2010 or 2011. Wilson was required to choose an option by November 21. In November 2011, Shirley extended Wilson's deadline to January 7, 2012. Unbeknownst to Wilson, around this time, Shirley revoked Wilson's authority to make wire transfers. Also, Wilson was removed as a signatory on CCC's bank account, and Gandis remained the only signatory on the account.

As the January 7 deadline approached, Shirley prepared a "Pro-Forma Balance Sheet" to accompany an offer to Wilson to buy his membership interest. However, the balance sheet contained questionable accruals and removed assets that had been listed on previous CCC balance sheets. The balance sheet also devalued Wilson's interest in CCC. Gandis and Shirley indicated they would sell their membership interests at a price based upon this balance sheet; however, their actual offer to Wilson had materially different terms, including a requirement that Shirley be paid a $100,000 "preference on units" and the requirement that Wilson purchase M-Tech's building, which Shirley previously deemed a "burden."

The parties did not reach an agreement, and Wilson did not receive his $12,000 monthly compensation in January 2012. With Gandis' consent, Wilson approached potential buyers of CCC and provided them with information about CCC's financial status, absent customer names, and subject to a non-disclosure agreement. During this time, Shirley counseled Gandis to be patient and to allow the pressure to build on Wilson. Specifically, in a January 5 email from Shirley to Gandis, with the subject "[Wilson's] Offer Expires? Patience, grasshopper, patience . . .," Shirley advised Gandis to "PLEASE JUST LET THIS SLEEPING DOG LIE." In the same email, Shirley made other statements, such as:

> We need to remember that we don't care if he is a partner or not . . . only he cares, and even then, he really only cares about getting his cash in front of vendors and employees – and we have told him [ ] NO MORE!
>
> . . . .
>
> My first preference is he buys us out at the price we offered him – there is no deadline on that ability. He can make that offer anytime over the next month or so.
>
> My second preference is that we keep him as a partner – but we have to recapitalized [sic] and reorganize the company to continue. I hope he stays as partner . . . . Then we need to increase my equity for my additional participation and then we will increase your equity for the funding you are providing to the company . . . and I can

> see us ending up in a structure where you are 50% – [Wilson] is 25% and I am 25%. Your new LLC shares have super-voting rights [and] have a PRIORITY at liquidation. My new shares will also have a priority. . . . We get the additional money from you we need to buy this film – we give you the new super-voting shares and we get on with getting on!
>
> The last thing I want is [Wilson] as an employee. First he will never agree to an all commission deal that is right for our company. He will want a base that is so SAFE he knows he can earn in his sleep; I worry that we will never get a contract with him that is *good for us*! . . .
>
> Once we restructure our partnership – then if [Wilson] wants to make a million bucks – then he is going to have to make you 2 million bucks (as you will own twice the equity that he owns). ALSO – if he is going to make a million – then I will as well. From my perspective – at least as I am working hard to make our company money and to get positioned for growth – I won't be in the position of making [Wilson] rich while I just barely earn my hourly rate for services!
>
> He has already gone 5 days longer than normal without asking for a check! Let's just keep on focus for our operating plan for 2012 and try not to let him be the giant distraction that he was in 2011.

(most ellipses in original) (emphasis added).

In addition to approaching potential buyers of CCC, Wilson discussed potential employment with FILMtech, a competing company, and indicated he was not bound by a noncompete or a non-disclosure agreement. In a January 16 email to FILMtech, Wilson promised to "move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on or qualifying over the past 3 to 6 months." However, Wilson did not secure employment with FILMtech.

January 17 emails between Gandis and Shirley reveal their decision to terminate Wilson and physically lock him out of his office but at the same time maintain the narrative that Wilson resigned. Gandis emailed Shirley regarding "[p]ossible legal ramifications for firing [Wilson]" and asking "[w]hat words should I use in the termination?" and "[w]hat steps would I have to go through to get the law on site for the termination?" Shirley gave Gandis what she termed a "small pep talk," with the following instructions: (1) to "remember you have already fired other people and that SC has fairly lax employment laws. So you really cannot botch this as long as you keep a professional attitude and you don't say anything that is not necessary"; (2) to tell Wilson that Wilson's attorney contacted their attorney to inform them he intended to leave CCC; and (3) to not accept an oral offer Wilson previously made.

On January 18, Gandis arrived at CCC's Greenville office with a law enforcement officer and a locksmith and advised Wilson his resignation was accepted. Wilson protested that he had not resigned. The officer did not force Wilson from the premises because Wilson was a co-owner of CCC; however, Wilson eventually left with two laptops, a Blackberry, files, his personal tax returns, and bank statements. The locksmith completed the lock replacement, and the next day, CCC's attorney sent Wilson's attorney a letter demanding that Wilson return CCC's property and instructing that Wilson "not destroy, copy, sell, or use any of this property, including the computer data." In a January 21 email to Gandis, Shirley advised Gandis to "ignore what I said about '[Wilson] resigned'" and to instead take the position that Wilson was locked out because Shirley and Gandis believed him to be competing against CCC.

Immediately after locking Wilson out, Gandis and Shirley terminated Wilson's and his family's health insurance coverage and cell phone service. Gandis and Shirley increased CCC's monthly rent payments to M-Tech (wholly owned by Gandis) from $2,500 to $6,000. They also increased the interest rate on the M-Tech line of credit used by CCC, thereby increasing the return to Gandis.

In July 2012, unbeknownst to Wilson, Gandis and Shirley formed ZOi Films, LLC, in Georgia. ZOi was organized with two members: M-Tech (owned by Gandis) and Major Brain Storms, Inc., a Georgia corporation owned by Shirley. Gandis and Shirley initially claimed ZOi was formed to "rebrand" CCC because, in their judgment, "CCC didn't have the best reputation for quality." Shirley advised

Gandis "to consider another Company name to use [other than CCC]. . . . In this manner – we don't need to haggle with [Wilson] about how much of this new stuff is 'his.'" (ellipsis in original). After Wilson discovered Gandis and Shirley had formed ZOi, Gandis and Shirley maintained ZOi was intended to be a wholly-owned subsidiary of CCC; however, they did not explain why they did not let Wilson, their fellow member in CCC, know about ZOi's formation.

Once Wilson was locked out of CCC premises, he began working and selling for Neologic, a competitor of CCC owned by the wife of Steve Norvell, Wilson's brother-in-law. Norvell's wife also partly owns Fresh Water, and Norvell is president of Neologic and Fresh Water. Fresh Water is not in the film industry. Neologic began selling film in 2012, mostly to CCC's customers with whom Wilson had long-term relationships that predated CCC's existence. In 2013 and 2014, Wilson continued to sell film for Neologic to CCC's customers.

Wilson filed suit against Gandis and Shirley in 2012 and set forth several causes of action. Wilson sued CCC at a later time, and at some point, Neologic, Fresh Water, and Wilson were sued by CCC. Pertinent to this appeal are (1) Wilson's claim against Gandis and Shirley for minority member oppression, (2) Gandis' and Shirley's counterclaim against Wilson for breach of fiduciary duty, and (3) CCC's claim against Wilson, Neologic, and Fresh Water for misappropriation of trade secrets.

IV. TRIAL COURT'S RULING

Following a five-day bench trial in 2014, the trial court found Gandis and Shirley engaged in oppressive conduct against Wilson and ordered them to individually purchase Wilson's interest in CCC. Specifically, the court found, "This is a classic squeeze-out, and Wilson established by clear and convincing evidence that 'the managers [and] members in control of [CCC] have acted, are acting [and] will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to [Wilson].'" (most alterations in original) (quoting S.C. Code Ann. § 33-44-801(4)(e)).

The trial court also found "[t]he record—particularly the remarkable emails between Gandis and Shirley—abounds with evidence of calculated oppression," providing "multiple examples of oppressive and prejudicial actions by Gandis, CCC's manager, and Shirley, who exercised control delegated to her by Gandis,

including the management of CCC's financial affairs." The trial court summarized Gandis' and Shirley's following acts as oppressive and unfairly prejudicial: (1) initiating an "Exit Strategy from [Wilson]"; (2) threatening to stop Wilson's agreed-upon and guaranteed monthly payments unless he relinquished his membership interest and became an at-will employee with a noncompete agreement; (3) refusing to make a tax distribution to Wilson while using the money set aside for the distribution to pay off a line of credit so Gandis could borrow against that line to pay his own taxes; (4) monitoring all of Wilson's private emails, including those with his wife, his attorney, and his accountant; (5) withholding Wilson's agreed-upon and guaranteed monthly distributions in January 2012; (6) making representations that Wilson may not receive distributions for two years; (7) managing the money supply to make it appear as if cash was more limited than it was in actuality; (8) continually making unilateral changes, including secretly back-paying rent at a higher rate than agreed upon and transferring assets, e.g., an air conditioner, to Gandis' entities by expensing such items as rent; (9) limiting Wilson's access to CCC's financial information; (10) removing Wilson from signatory authority on CCC's operating account; (11) removing Wilson's ability to make wire transfers for CCC; (12) excluding Wilson from discussions about CCC's business operations; (13) manipulating the December 2011 "Pro-Forma Balance Sheet" to devalue Wilson's interest in CCC; (14) physically locking Wilson out of his company and refusing to allow him to return; (15) demanding possession of Wilson's laptops and Blackberry; (16) terminating the cell phone plans for Wilson and his family while maintaining coverage for the other members; (17) terminating health insurance coverage for Wilson and his family; and (18) forming ZOi to compete with CCC in order to siphon profits until Wilson caught them.

The trial court found against CCC, Gandis, and Shirley on their breach of fiduciary duty claim against Wilson. The trial court found against CCC on its trade secrets claim against Wilson, Neologic, and Fresh Water. CCC, Gandis, and Shirley filed a joint motion for a new trial or reconsideration under Rule 59(e) of the South Carolina Rules of Civil Procedure. The trial court denied the motion, reaffirming its previous factual findings "based as they were on the court's finding that [Wilson's] testimony was credible on the key issues. [Gandis'] and [Shirley's] testimony lacked credibility in most important respects." The trial court also found "[t]he evidence revealed that [ ] Gandis and [Shirley] deliberately collaborated to oppress [ ] Wilson. Their conduct was unconscionable. They purposely created a toxic business environment with the goal of driving [ ] Wilson out." CCC, Gandis, and Shirley appealed. The court of appeals affirmed the trial court in an unpublished decision

and adopted the trial court's order in its entirety. *Wilson v. Gandis*, Op. No. 2018-UP-078 (S.C. Ct. App. filed Feb. 7, 2018). CCC, Gandis, and Shirley filed petitions for writs of certiorari to review the court of appeals' decision. We granted their petitions.

V. GANDIS' AND SHIRLEY'S PETITION

A. Issues

1. Did the trial court err in finding Gandis and Shirley oppressed Wilson; if not, did the trial court err in ordering Gandis and Shirley to personally buy Wilson's distributional interest?

2. Did the trial court err in finding Gandis and Shirley failed to prove Wilson breached a fiduciary duty to them?

3. Did the trial court err in determining the value of Wilson's distributional interest in CCC?

B. Discussion

1. Member Oppression

"A member or manager may maintain an action against a limited liability company or another member or manager for legal or equitable relief" to enforce his statutory rights under the Uniform Limited Liability Company Act of 1996 (the LLC Act),[3] his rights under an operating agreement, and "the rights that otherwise protect the interests of the member." S.C. Code Ann. § 33-44-410(a). The comment to section 33-44-410 provides there is "broad judicial discretion to fashion appropriate legal remedies." If a member establishes that "the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial" to the member, a court may dissolve the limited liability company. S.C. Code Ann. § 33-44-801(4)(e). The comment to this section provides "the court has the discretion to order relief other than the dissolution of the company. Examples include . . . the purchase of the distributional interest of the applicant." S.C. Code Ann. § 33-44-801 cmt.

[3] S.C. Code Ann. §§ 33-44-101 to -1208 (2006 & Supp. 2019).

In establishing the proper considerations for evaluating a claim for oppression in the context of a closely held corporation, we have observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." *Ballard*, 399 S.C. at 594, 733 S.E.2d at 110 (quoting *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 602, 541 S.E.2d 257, 266 (2001)). Determining if oppression exists requires "a fact-sensitive review and should therefore be determined through a 'case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior.'" *Id.* (quoting *Kiriakides*, 343 S.C. at 603, 541 S.E.2d at 266). In order to prove minority oppression, the plaintiff is not required to prove illegal or fraudulent conduct by the majority shareholders. *Id.* at 595, 733 S.E.2d at 110. "The concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" *Id.* (alteration in original) (quoting *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267). We hold these considerations also apply to a claim for oppression made by a minority member of a limited liability company.

The phrases "freeze out" or "squeeze out" are often used interchangeably and denote "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants." *Kiriakides*, 343 S.C. at 604 n.26, 541 S.E.2d at 267 n.26.

In *Kiriakides*, we held a majority shareholder's conduct in a family-owned close corporation constituted "a classic situation of minority 'freeze out.'" 343 S.C. at 605, 541 S.E.2d at 267. The Kiriakides family owned Atlas Food Systems & Services, Inc. (Atlas), and Alex was the majority shareholder, owning 57.68% of the corporation. His siblings, John and Louise, owned 37.7% and 3% of the corporation, respectively. John and Louise sued Alex and the corporation seeking, *inter alia*, a buyout of their shares because of minority oppression and fraud. We considered the following actions taken by Alex and Atlas and concluded Alex oppressed John and Louise, the minority shareholders: Alex paid Louise based on 271 shares of Atlas stock when she in fact owned 301 shares of stock; Alex transferred 21% of a wholly owned subsidiary to his children instead of to a partnership which included John and Louise; Alex and his family received substantial benefits from their ownership in Atlas, through employment, while Louise and John had no such expectations of benefit; Atlas declared it would not declare dividends in the foreseeable future, even

though it had substantial cash and assets and carried little debt; and Atlas's extremely low buyout offers to John and Louise. *Id.* at 605-07, 541 S.E.2d at 267-68.

In *Ballard*, we held the majority shareholders' conduct oppressed the minority shareholder Ballard. 399 S.C. at 597-98, 733 S.E.2d at 112. Ballard incorporated Warpath Development, Inc., to develop a marina. He owned 40,000 shares of Warpath's authorized 100,000 shares of stock. After several years of working with Duke Energy Carolinas, LLC, which owned lakefront property, Warpath entered into a lease with Duke to use its lakefront property. Subsequently, three men paid Ballard $1,000,000 in exchange for 20,000 of Ballard's shares and Warpath's outstanding 60,000 shares. Following this exchange, Ballard held 20% of the stock, and the three men held 80% of the stock.

Incorporated into the lease with Duke was a plan for the marina, which included a projected number of 100 to 200 boat slips. However, it was later determined the marina could only accommodate 102 slips. Upset over the decrease in their projected income because of fewer boat slips, the three men collaborated with each other and sent an email to Ballard in an effort to convince him to return some or all of the $1,000,000, or to return his 20,000 shares to Warpath and cease involvement with the development. They sent Ballard another email asking that he return the $1,000,000 in full or at least return a portion of the money if he wanted to move forward. Emails between these three shareholders (who constituted the majority) evinced their hope that Ballard "[would] take his [$1,000,000] and run [ ] after a little threatening, posturing and whining." *Id.* at 595, 733 S.E.2d at 111 (alterations in original). One majority shareholder emailed the others and asked, "Don't we want to get him out of the deal?" *Id.*

Ballard declined both options, and the three majority shareholders removed him from Warpath's board of directors. The majority shareholders did not hire Ballard as an employee, and the majority shareholders issued 900,000 new shares of stock in violation of the articles of incorporation, which decreased Ballard's ownership interest from 20% to 2%.

We held the evidence established a clear intent by the majority shareholders to freeze out Ballard and exclude him from involvement with Warpath and from the benefits of ownership. *Id.* at 597, 733 S.E.2d at 112. We reasoned the majority shareholders did not afford Ballard an opportunity to benefit through salary or stock incentives or to participate, meaningfully, in the development because the majority shareholders failed to communicate with him to provide him with updates. We also

found email communications between the majority shareholders "clearly indicate their desire to oust Ballard." *Id.* at 595, 733 S.E.2d at 110. We noted, "Although at trial the individual [majority shareholders] sought to downplay the implications of these electronic exchanges, [the] enunciation of their intent to force out Ballard simply contextualizes their subsequent actions." *Id.* at 595, 733 S.E.2d at 111.

The essence of the de novo standard of review is that the appellate court must not simply accept the factual findings of the trial court but instead must diligently review the record to make findings of fact based upon its own review of the preponderance of the evidence. However, the appellate court cannot ignore the crucial reality that the trial court was in a better position to evaluate the credibility of the witnesses who testified during the trial. The logic of this premise, especially in a case such as the one before us, is self-evident. The credibility of witnesses who testified during this five-day trial was especially vital to the trial court's evaluation of all the evidence. As previously noted, the trial court stated its factual findings were based on its conclusion that "[Wilson's] testimony was credible on the key issues. [Gandis'] and [Shirley's] testimony lacked credibility in most important respects." These findings are not a death blow to Gandis' and Shirley's ability to convince this Court to partially or even completely disagree with the trial court's credibility findings. In this case, however, we agree with the trial court's succinct credibility conclusions.

Further, under the de novo standard of review, the aggrieved party bears the burden of establishing the trial court's factual findings are against the weight of the evidence. Here, the trial court's credibility findings necessarily bled into its evaluation of the preponderance of all the evidence. Based on our review of the record, we are compelled to conclude that Gandis and Shirley—and by extension, CCC—have failed to carry their burden of convincing this Court that the trial court committed error in its factual findings relative to Wilson's oppression cause of action.

The trial court characterized Gandis' and Shirley's efforts as a "tightly controlled cabal to oust Mr. Wilson [that] could serve as a script for minority [ ] oppression." We must agree. The record in this case is replete with evidence of "freeze out" machinations on the part of Gandis and Shirley. The emails between Gandis and Shirley reveal their explicit scheme to oust Wilson, and we agree with the trial court that the emails unveil their step-by-step efforts to convert Wilson from a significant owner, with a promised $12,000 monthly compensation, to either a former owner or an employee bound by a noncompete agreement. The emails

between Gandis and Shirley prove they calculated each move against Wilson. As the trial court observed, Shirley even posited to Gandis "we will freeze his capital account and provide that he will be paid out ONLY when the LLC has made distributions to you in excess of your guaranteed payment (and your tax liability)," and that "might mean that [Wilson] sits with a frozen capital account until the LLC liquidates (and he will still have a 2010 tax bill that he has to pay)."

Gandis and Shirley surreptitiously reviewed Wilson's email communications with his wife and used information gathered from this review to develop pressure tactics to squeeze out Wilson. They also deprived Wilson of the benefits of ownership when they withheld Wilson's distribution for his tax liability, while indirectly providing for Gandis to meet his tax liability, and when they withheld Wilson's promised monthly compensation beginning in January 2012. The accounts Wilson transferred from EFS to CCC were Wilson's investment in CCC. Wilson made clear to Gandis that he would transfer those accounts to CCC in exchange for monthly compensation because he was forfeiting income he would have received through EFS. By withholding Wilson's compensation, Gandis and Shirley trapped Wilson's investment in CCC.

Gandis and Shirley also prevented Wilson from meaningfully participating in CCC operations by excluding him from many of their communications regarding CCC. Many times, Shirley advised Gandis to withhold important business information, such as financial and LLC formation information from Wilson, despite Wilson being a co-founder and a 45% owner of CCC. Gandis willingly followed along, as he did Shirley's other orchestrations. When they knew they had Wilson trapped, Gandis and Shirley presented Wilson with unfavorable alternatives for his future with CCC: (1) become an employee with an onerous noncompete, (2) remain an LLC member but forego the monthly compensation he relied upon, (3) accept a low buyout offer, or (4) buy Gandis and Shirley out on undesirable terms.

Also, Shirley and Gandis collaborated to physically lock Wilson out of CCC's premises and denied him access to CCC's financial information until they were compelled by the trial court to produce such information. After ousting Wilson, Gandis and Shirley routed CCC earnings to Gandis through higher rent and higher interests rates on the M-Tech line of credit. We also agree with the trial court's finding that Gandis and Shirley formed ZOi to compete with CCC in order to siphon profits from CCC.

Gandis and Shirley maintain the trial court erred in awarding equitable relief to Wilson despite his unclean hands. The doctrine of unclean hands "precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000). Gandis and Shirley contend Wilson orchestrated a steady stream of side deals that he concealed from them, shared CCC's trade secrets and confidential information with competitors, and destroyed evidence before and during this litigation. We hold Wilson's conduct did not rise to the level complained of by Gandis and Shirley. Therefore, the doctrine of unclean hands does not preclude Wilson's recovery in this case.

Gandis and Shirley also argue their actions were not oppressive because their actions were not motivated by a desire to shut Wilson out of the business, but were rather an attempt to provide Wilson with options that would allow him to remain a member of CCC while satisfying his tax liability. They contend Wilson was not oppressed or frozen out and he did not find himself in a "trapped investment" or suffering "indefinite exclusion from participation in business returns," which are consequences of oppression. Similarly, Gandis and Shirley claim their locking Wilson out of CCC's premises, demanding Wilson return CCC-owned laptops and Blackberry, and terminating Wilson's cell phone service were "efforts to secure CCC's proprietary information against Wilson's attempts to steal it." We disagree.

We reject Gandis' and Shirley's argument that their actions are protected by the business judgment rule, as the rule only applies "absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct." *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). We completely agree with the trial court's conclusion that "[t]he record—particularly the remarkable emails between Gandis and Shirley—abounds with evidence of calculated oppression." We find Wilson has proven Gandis and Shirley engaged in oppressive conduct against him.

2. Buyout of Wilson's Interest

Gandis and Shirley argue the trial court "took the extreme and legally unsupported step of holding [them] personally liable for alleged oppression of another member." Gandis and Shirley argue they acted in good faith and in the ordinary course of their responsibility to protect CCC from Wilson's malfeasance, and they contend subsection 33-44-303(c) of the LLC Act protects LLC members from personal liability for actions taken in the ordinary course of business of the

LLC. We agree in general with the latter statement, but we repeat our conclusion that Gandis and Shirley committed acts of "calculated oppression" against Wilson. We note—and agree with—the trial court's description of Gandis' and Shirley's conduct in other quite pointed language: "unconscionable," "brazen but clumsy," "unfairly prejudicial," "deliberately collaborated to oppress," "created a toxic business environment," and "overt scheme." We reject the argument that an LLC member who commits acts of "calculated oppression" against another member has acted in the ordinary course of business of the LLC.

We have recognized "the LLC Act grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009) (citing S.C. Code Ann. §§ 33-44-410 cmt., -801 cmt.). Importantly, subsection 33-44-410(a) specifically provides that an LLC member may maintain an action against the LLC or another member for legal or equitable relief "to enforce: (1) the member's rights under the operating agreement; (2) the member's rights under [the LLC Act]; and (3) the rights that otherwise protect the interests of the member. . . ." Courts do indeed have the authority under the LLC Act to order either the LLC or the oppressing member(s) to purchase the oppressed member's interest in the LLC.

Even though the trial court ordered Gandis and Shirley to purchase Wilson's interest, in the exercise of our de novo review, we may order the relief we conclude is most equitable under the relevant circumstances. While we conclude Gandis and Shirley personally engaged in the requisite unconscionable and oppressive conduct to entitle Wilson to a buyout of his interest in CCC, we modify the trial court's order requiring Gandis and Shirley to individually purchase Wilson's interest, and we remand this case to the trial court for proceedings consistent with the following instructions. We first order CCC to purchase Wilson's interest in CCC, and Gandis and Shirley shall be obligated to purchase Wilson's interest only if CCC does not comply with our order that it do so. On remand, the trial court shall conduct a potentially two-step process for the buyout to take place. In the first (and perhaps only) step, CCC will first be responsible for purchasing Wilson's interest. In this case, the trial court issued a post-judgment order requiring CCC, Gandis, and Shirley to post bond or other surety to fund the purchase of Wilson's interest. The trial court noted CCC was required to post the bond "should an appellate court decide that the obligation to pay [Wilson] for his membership interest properly rests with CCC, and the company . . . becomes insolvent or otherwise unable to pay the judgment should

it be affirmed." At oral argument, it was confirmed this bond was purchased and remains in place.[4] The bond should ensure compliance with our order that CCC purchase Wilson's interest. If CCC complies with our order that it purchase Wilson's interest, the trial court need not reach the second step of requiring Gandis and Shirley to purchase Wilson's interest.

With the aid of the bond or otherwise, if CCC's purchase of Wilson's interest does not take place within a reasonable time after the remittitur is issued, the trial court shall take the second step and require Gandis and Shirley to complete the buyout in proportion to their respective membership interests in CCC. Even though Shirley owns a 10% interest in CCC and Gandis owns a 45% interest in CCC, the trial court concluded Gandis and Shirley were jointly and severally liable for the entire purchase price. Shirley argues, and Gandis agrees, that her responsibility to purchase any portion of Wilson's interest should be limited to the proportion her interest in CCC bears to the entire obligation to purchase. We agree.[5]

3. Breach of Fiduciary Duty

Gandis and Shirley argue the trial court erred in finding for Wilson on their breach of fiduciary duty claim. They allege in their counterclaim that Wilson breached fiduciary duties owed to CCC and to them by (1) usurping CCC's business opportunities with customers from EFS and engaging in secretive side deals; (2) misappropriating CCC's alleged trade secrets and confidential information; and (3) destroying evidence on CCC's laptops and Blackberry. Wilson argues Gandis and Shirley lack standing to bring the breach of fiduciary claim against him. We agree with Wilson.

Because CCC would have sustained any financial loss caused by Wilson's purported actions, Gandis and Shirley lack standing to bring a breach of fiduciary

---

[4] After the trial court entered its initial order ordering Gandis and Shirley to purchase Wilson's interest, CCC, Gandis and Shirley filed a joint Rule 59(e) motion (authored by counsel for CCC) and argued CCC, not Gandis and Shirley, should be required to purchase Wilson's interest.

[5] We do not foreclose the possibility that an LLC member who acts to oppress another member can be held liable for an amount greater than his or her proportional interest in the LLC.

duty claim in their individual capacities.[6] Any loss suffered by Gandis and Shirley would be derivative of the loss suffered by CCC and not separate and distinct from losses suffered by CCC. *See Hite v. Thomas & Howard Co.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995) (internal citations omitted) ("A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder."). Gandis and Shirley were required to bring a fiduciary duty claim derivatively, on behalf of CCC. On the merits, we find the trial court correctly concluded Wilson did not breach any fiduciary duties owed to Gandis and Shirley.

4. Valuation of Wilson's Distributional Interest in CCC and Date of Valuation

Gandis and Shirley claim the trial court erred by valuing Wilson's distributional interest at the time of his departure from CCC and not taking into account that Wilson's subsequent actions negatively impacted CCC's financial situation. They argue this error resulted in a windfall for Wilson.

Section 33-44-702 outlines the procedure for a court to use when determining the fair value of a member's distributional interest when that interest is to be purchased by the company. *See* S.C. Code Ann. § 33-44-701(e). We conclude, as did the trial court, that the same approach should be employed when individual members are ordered to buy the distributional interest. However, "there is little [ ] authority setting the proper date of valuing a company in a buy out situation." *Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987). "In cases of minority stockholder oppression, the date of ouster seems appropriately used." *Id.*

The parties presented expert testimony on CCC's value and the value of Wilson's distributional interest. Wilson's expert, Catherine Stoddard, valued CCC's total equity at $1,018,753 and Wilson's interest at $408,335 as of December 31, 2011. She valued Wilson's interest at $233,776 as of December 31, 2013. Del Bradshaw (the trial court's appointed expert), Stoddard, and Charles Alford (the

[6] As noted above, CCC did not argue the issue of breach of fiduciary duty in its brief to this Court.

defense's expert) testified of possible adjustments to the value of CCC due to equipment moving costs, excess inventory, and advances.

The trial court noted CCC, Gandis, and Shirley failed to present evidence of CCC's then-current financial condition. The court found Stoddard's December 31, 2011 valuation credible but applied Alford's three downward adjustments to calculate the value of Wilson's interest as of that date. First, the trial court reduced CCC's $1,018,753 total value by $50,625, which was half the value of CCC's excess inventory. Second, the trial court reduced the value of CCC's equipment by 25% of its fair market value to account for moving costs. These two downward adjustments reduced the company's total value to $884,140.50, with Wilson's 45% interest valued at $397,863.23. The trial court then applied Alford's third adjustment by reducing the value of Wilson's interest by $50,000 for advances he previously received from CCC. Therefore, the trial court determined the fair value of Wilson's distributional interest in CCC was $347,863.23. We agree with the trial court's valuation of Wilson's interest.

Under the facts of this case, we find the most equitable valuation date is December 31, 2011. *See Hendley*, 676 F. Supp. at 1327 ("[T]he ultimate issue [in establishing a proper valuation date] is what is fair between the parties in each case."). First, as noted by the trial court, CCC, Gandis, and Shirley failed to present evidence of CCC's then-current financial condition during the 2014 trial, partly because CCC failed to file tax returns for the 2012 and 2013 tax years. Second, Gandis and Shirley initiated an exit strategy and ousted Wilson in January 2012; therefore, valuing CCC and Wilson's interest in CCC as of December 31, 2011, provides an accurate value of CCC when Wilson was an active member of CCC with an opportunity to impact CCC's financial condition. Conversely, December 31, 2013, is an inappropriate valuation date because from January 2012, when Gandis and Shirley ousted Wilson, until present, Gandis and Shirley have prevented Wilson from participating in any CCC business decisions or operations that impact CCC's value.

VI. CCC'S PETITION

A. Issue

Did the trial court err in finding CCC failed to prove its trade secret misappropriation claim against Wilson, Neologic, and Fresh Water?

B. Discussion

CCC's trade secrets cause of action is based on its contention that it spent significant time, effort, and resources developing its customer and supplier contact lists, electronic vendor reference program, and inventory reference program, all of which CCC claims are its trade secrets. CCC contends Wilson misappropriated these trade secrets when he began working for Neologic. Neologic is CCC's competitor and is owned by the wife of Wilson's brother-in-law and CCC's defendant, Steve Norvell. Norvell's wife also partly owns Fresh Water, and Norvell is president of Neologic and Fresh Water. Fresh Water is not in the film industry; however, CCC claims Wilson, Norvell, and Fresh Water formed Neologic about two months after Wilson left CCC and claims Neologic and Fresh Water have common employees, operate out of the same location, and operate with the same funds—funds CCC claims at least partially derive from CCC's trade secrets.

When Wilson left CCC premises on the day of his ouster, he took with him two CCC-owned laptops and a Blackberry. The laptops contained CCC files and CCC emails that Wilson testified he wanted to have "to prove what happened" to him. The Blackberry contained Wilson's personal information such as bank account numbers, passwords, and his children's social security numbers. He testified he copied CCC files and emails that were on the laptops to his own computer and erased the laptops. He testified he then put the CCC files and emails back on the laptops and returned them to CCC's attorney. Wilson testified he reformatted the Blackberry to erase his and his family's personal information and returned the device to CCC. Wilson testified he used the information he copied from the laptops not to compete with CCC, but solely as evidence in this litigation.

"The first issue to be determined in every trade secret case is . . . whether, in fact, there was a trade secret to be misappropriated." *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 327, 191 S.E.2d 761, 764 (1972). Though *Lowndes* was decided before the passage of the Trade Secrets Act, that proposition remains fundamental. The Trade Secrets Act defines a "trade secret" as information, including a compilation, program, system, process, or procedure that:

> [(a)](i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> (b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code Ann. § 39-8-20(5) (Supp. 2019).

In order to decide "whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others." *Carolina Chem. Equip., Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). In the instant case, the trial court found the information pertaining to pricing, customers, and vendors/suppliers was "publicly accessible" and therefore did not rise to the level of being a trade secret.

There is evidence in the record to support the trial court's finding, as there was evidence presented at trial that the information lacked "independent economic value," as the information was readily ascertainable by proper means by the public or was ascertainable by other persons who could obtain economic value from the use of the information. Mike Myers and Bruce Hotmer, both experienced film brokers, testified vendor/supplier information, pricing information, manufacturer information, and customer information were ascertainable from trade associations, through trade journals, at trade shows, or from other publicly available sources. Hotmer testified customers of film distributors typically do not sign nondisclosure agreements and are free to share with him what product they are buying, from whom they are buying it, and at what price they are buying it. Hotmer also testified his customers are his primary source of what they are paying other film distributors. He clarified that information as to how manufacturers price their film "[is] not only widely available, it's part of the expectation of your organization of the sales force.

It's what you expect." He explained he had been a sales representative, a regional sales representative, and a national sales representative and that "[w]e were expected to know all that information about our customers, and our competitors, and their competitors."

We hold the trial court's finding that the information did not have the required independent economic value is supported by evidence in the record. Therefore, we need not address CCC's remaining arguments pertinent to its trade secrets claim.[7]

VII. CONCLUSION

As to Wilson's claim for oppression, we hold: (1) Gandis and Shirley engaged in oppressive and unconscionable conduct against Wilson; (2) the trial court properly valued Wilson's 45% distributional interest in CCC at $347,863.23; and (3) Wilson is entitled to a buyout of his distributional interest, and this equitable remedy is not barred by the doctrine of unclean hands. We modify the court of appeals' oppression holding and hold CCC is first obligated to purchase Wilson's interest in CCC. If CCC does not complete the purchase within a reasonable time after the remittitur is sent to the lower court, Gandis and Shirley shall be required to purchase Wilson's interest in proportion to their respective membership interests in CCC.

We affirm the court of appeals as to Gandis' and Shirley's action against Wilson for breach of fiduciary duty.

We also affirm the court of appeals as to CCC's trade secrets claim.

AFFIRMED AS MODIFIED AND REMANDED.

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

---

[7] For information to be considered a trade secret, the owner of the information must exercise "efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a)(ii). The owner must also prove its damages were proximately caused by misappropriation. The trial court concluded CCC had proven neither of these elements.

The Supreme Court of South Carolina

In the Matter of Gwendolyn Robinson, Petitioner.

Appellate Case No. 2019-000582

ORDER

By opinion dated July 11, 2018, this Court suspended Petitioner from the practice of law for a period of nine months. *In re Robinson*, 424 S.C. 9, 817 S.E.2d 288 (2018). Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR.

We find Petitioner has met the requirements of Rule 33(f), RLDE, Rule 413, SCACR. Accordingly, we grant the petition for reinstatement.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
June 1, 2020