# The Supreme Court of South Carolina

In the Matter of
David H. Crum, Respondent.

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ORDER

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Pursuant to Rule 31, RLDE, Rule 413, SCACR, the Office of Disciplinary Counsel (ODC) has filed a Petition to Appoint Attorney to Protect Clients' Interests in this matter. This request is based on the current medical condition of the respondent. The petition is granted.

IT IS ORDERED that M. Elizabeth Crum, Esquire, and John Wesley Crum, III, Esquire, are hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent maintained. Ms. Crum and Mr. Crum shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Crum and Mr. Crum may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent shall serve as notice to the bank or other financial institution that M. Elizabeth Crum, Esquire, and John Wesley Crum, III, Esquire, have been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that M. Elizabeth Crum, Esquire, and John Wesley Crum, III, Esquire, have been duly appointed by this Court and have the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Crum's and Mr. Crum's offices. This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

June 27, 2012

Columbia, South Carolina

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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## N O T I C E

**In the Matter of W. Benjamin McClain, Jr.**

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 17, 2012, beginning at 9:30 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

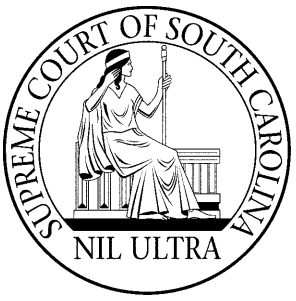
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 9, 2012

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 23**
**July 11, 2012**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

Brandon Bentley, Appellant,

v.

Spartanburg County, and S.C. Association of Counties SIF, Respondents,

---

Appeal from Richland County
Workers Compensation Commission

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Opinion No. 27140
Heard March 8, 2012 – Filed July 11, 2012

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**AFFIRMED**

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Jeremy A. Dantin, of Harrison, White, Smith & Coggins, of Spartanburg, for Appellant.

Richard B. Kale Jr., of Willson Jones Carter & Baxley, of Greenville, for Respondents.

Grady L. Beard, B. Gibbs Leaphart Jr., and Nicolas L. Haigler, all of Sowell Gray Stepp & Laffitte, of Columbia, for Amicus Curiae.

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**CHIEF JUSTICE TOAL:** Brandon Bentley (Appellant), a deputy sheriff with the Spartanburg County Sheriff's Department, alleged that he developed Post Traumatic Stress Disorder (PSTD) and depression after he shot and killed a suspect who attempted to assault him. An Appellate Panel of the Workers' Compensation Commission (Appellate Panel) unanimously found that Appellant failed to meet his burden of proof in establishing a compensable mental injury that arose out of an "unusual or extraordinary condition" of employment for a Spartanburg County deputy sheriff. We affirm.

## FACTS/ PROCEDURAL BACKGROUND

On October 21, 2009, Appellant was on road patrol when he was dispatched to a residence in Spartanburg following a call involving disturbances between neighbors. As he arrived at the scene, he saw a man in khaki shorts standing just outside the carport of the residence. He stepped out of his car and asked the man to approach him to talk. The man refused to cooperate and exchanged words with Appellant before walking toward Appellant with an umbrella raised in an "offensive posture." Appellant issued several commands for the man to drop the umbrella. In response, Appellant claimed the man threatened to take Appellant's gun and kill him. Appellant then fired one shot "center mass" at the man's chest resulting in his death.

Following this incident, Appellant began to suffer psychological symptoms including anxiety and depression and sought treatment at Post Trauma Resources in Columbia. Based on his psychological symptoms, his psychiatrist and psychologist concluded that Appellant was unable to work.

On March 10, 2010, Appellant filed a Form 50 to claim workers' compensation benefits. After a hearing, the Single Commissioner found that the October 21, 2009 event was not an unusual or extraordinary condition of Appellant's work, and Appellant had not suffered a compensable mental injury by accident arising out of his employment. The Commissioner noted

that deputies received training on the use of deadly force and that Appellant admitted he knew he would sometimes be required to use deadly force in the course and scope of his employment. Appellant then appealed to the Appellate Panel, which affirmed the Commissioner's Order and denied Appellant's claim. Appellant filed an appeal and this case is before this Court pursuant to Rule 204(b), SCACR.

## ISSUE

Whether the shooting and killing of a suspect by a deputy sheriff while on duty is an extraordinary and unusual employment condition such that mental injuries arising from that incident are compensable under the Workers' Compensation Act.

## STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp. 2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). If the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," a reviewing court may reverse or modify. *Id.* Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004).

## ANALYSIS

Appellant argues he sustained a compensable mental injury that arose from an extraordinary and unusual condition of employment. We disagree.

Workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment. S.C. Code Ann. § 42-1-310 (Supp. 2011). In determining whether a work-related injury is compensable, the Workers' Compensation Act (Act), S.C. Code Ann. §§ 42-1-10 to -19-10 (1976 & Supp. 2011), is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 535 S.E.2d 438 (2000) (citation omitted). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).

Some context regarding the evolution of mental damages in workers' compensation will illuminate the framework which necessarily binds this Court in resolving this case. As set forth by Professor Larson in his treatise on workers' compensation, work-related injuries fall into three categories: 1) mental stimulus causing physical injuries (mental-physical injuries), 2) physical stimulus causing mental injuries (physical-mental injuries), and 3) mental stimulus causing mental injuries (mental-mental injuries). Arthur Larson, *Larson's Workers' Compensation Law* § 56.06[3] (2011). Historically, given the suspicion surrounding mental injuries, courts and legislatures refused to award compensation for mental injuries, or if they did, required that covered mental injuries be accompanied by a physical manifestation. *See id.* at § 56.06[1][b]. A majority of states now recognize the compensability of purely mental-mental injuries, injuries without accompanying physical manifestation, although a large number of states, including South Carolina, place heightened restrictions on recovery by requiring that the precipitating stressor be unusual and extraordinary compared with normal working conditions.[1] *Id.* at § 56.06[3]; *Stokes v. First Nat'l Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991); *Davis v. Workmen's Comp. Appeal Bd.*, 751 A.2d 168, 170 (Pa. 2000) (denying workers' compensation to police officer suffering from PSTD because encountering traumatic events was normal for a police officer).

[1] Larson indicated that at least 29 states now recognize mental-mental injuries. Larson, *supra*, at § 56.06[3].

South Carolina's standard for recovering benefits for mental-mental injury is codified in section 42-1-160 of the South Carolina Code, which provides:

> (B) Stress, mental injuries, and mental illness arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury are not considered a personal injury unless the employee establishes, by a preponderance of the evidence:
>
> (1) that the employee's employment conditions causing the stress, mental injury, or mental illness were *extraordinary and unusual* in comparison to the normal *conditions* of the particular employment; and
>
> (2) the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence.

S.C. Code Ann. § 42-1-160 (emphasis added).[2]

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[2] The standard codified by S.C. Code Ann. § 42-1-160 (Supp. 2011) for a mental-mental injury is known as the "heart attack standard." *See Powell*, 299 S.C. at 327, 384 S.E.2d at 726 ("Mental or nervous disorders resulting from either physical or emotional stimuli are equally compensable provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment."); *Stokes v. First National Bank*, 298 S.C. 13, 377 S.E.2d 922 (Ct. App. 1988). A heart attack suffered by an employee constitutes a compensable accident if it is induced by unexpected strain or overexertion in the performance of his duties of employment, or by *unusual and extraordinary* conditions in employment. *Bridges v. Housing Auth., City of Charleston*, 278 S.C. 342, 295 S.E.2d 872 (1982). However, if a heart attack results as a consequence of ordinary exertion that is required in performance of employment duties in an ordinary and usual manner, and without any untoward event, it is not compensable as an accident. *Shealy*, 341 S.C. at 457, 535 S.E.2d at 443 (citation omitted).

Although we are constrained to decide this case according to the standard mandated by the General Assembly, we offer our opinion that this standard should be updated to account for the scientific and technological progress in medicine and psychology, which have undermined the old public policy argument used to deny mental-mental recovery.

Historically, a lack of understanding about mental-mental injuries fueled the negative reaction toward allowing recovery. The traditional justifications for imposing barriers to recovery were that claims for mental-mental injuries were easier to falsify than claims for physical injuries, and any recovery for mental anguish damages must be limited with bright line rules lest the courts be flooded with litigation. *See* Frances C. Slusarz, *Work Place Stress Claims Resulting from September 11th*, 18 Lab. Law. 137 (Fall 2002); Jon L. Gillum, Note, *Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim*, 79 Tex. L. Rev. 227 (Nov. 2000). However, those in favor of allowing broader recovery point out that advances in medical science have made it easier for medical professionals to diagnose and verify the validity of mental injuries, enabling courts to weed out fraudulent claims. *See Towns v. Anderson*, 579 P.2d 1163 (1978) (finding that "the medical profession has made tremendous advances in diagnosing and evaluating emotional and mental injuries. While psychiatry and psychology may not be exact sciences, they can now provide sufficiently reliable information concerning causation and treatment of psychic injuries, to provide a jury with an intelligent basis for evaluating a particular claim."); *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 3 (7th Cir. 1972) (citation omitted) (stating that mental anguish can be diagnosed and verified by health professionals). In addition, proponents note that claims of physical injury, especially in relation to damages for pain and suffering, can be as susceptible to fraud as mental-mental injuries, rendering it illogical to allow recovery for one while denying it for the other. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980) (noting the rule requiring mental injury be accompanied by physical injuries "encourages extravagant pleading and distorted testimony" by claimants trying to fit their emotional anguish claims into the physical injury framework). We agree with these proponents for reform.

We do not believe that removing South Carolina's heightened requirement for mental-mental recovery would result in a flood of litigation given the safeguards that the General Assembly has built into section 42-1-160.[3] S.C. Code Ann. § 42-1-160 (Supp. 2011). Even without the requirement that all compensable mental-mental injuries must arise from employment conditions that are unusual and extraordinary, under current law, claimants must pass a causation test and show that the employment condition is the proximate cause of the mental injury. *Id.* § 42-1-160(B)(2). In addition, under section 42-1-160(C), mental-mental stress are not considered compensable if they result from any event which are "incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner." S.C. Code Ann. § 42-1-160. Consequently, when one considers that a claimant must show

[3] California's experience has shown that liberalizing mental-mental recovery too broadly could indeed unintentionally unleash a flood of litigation that raises costs, burdens the courts, and unduly interferes with the hiring and firing of workers. Larson, *supra*, at § 56.06[1][a]. In *Albertson's, Inc. v. Workers' Compensation Appeals Board*, 182 Cal. Rptr. 304 (1982), the California Court of Appeals ruled that the compensability for mental-mental injuries could be judged purely on a plaintiff's subjective perception of stress at work and not objective reality. This overly broad holding dramatically increased the workers' compensation claims that were compensable so that by 1986, the number of claims increased nearly seven-fold along with the expenses to litigate those claims. Larson, *supra*, at § 56.06[1][a]. In an effort to control costs, the California legislature reversed course and enacted a series of reforms that made it tougher to recover for mental-mental damages. *Id.* South Carolina has not and should not allow recovery based on a claimant's subjective perception of stress as California did in 1982. *Id.* However, removing the requirement that the employment condition be unusual and extraordinary in order to recover is not the same as what was done in California, and would not result in a flood of litigation given the safeguards already built into section 42-1-160. S.C. Code Ann. § 42-1-160.

causation and that he is excluded from bringing claims that are "incidental to normal employer/employee relations," the framework for recovery adequately errs on the side of caution even without requiring that all mental-mental claims arise from unusual and extraordinary conditions of employment. Moreover, it has been argued that even if an observed increase in litigation results, it is the primary business of courts to redress wrongs. W. Page Keeton et al., *Posser and Keeton on the Law of Torts* § 54, at 360 (5th ed. 1984) ("It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied . . . .").

If South Carolina reforms section 42-1-160, it would not be alone. At least five states already do not require that the conditions of employment be unusual and extraordinary to be compensable.[4] Larson, *supra*, at § 56.06D[7]. We believe that in light of the safeguards already in place and the scientific progress made in our understanding and diagnosis of mental-mental injuries, the *Powell* framework as promulgated in 1989 is obsolete.[5] Removing the unduly restrictive barrier in mental-mental cases that requires employment conditions to be unusual and extraordinary would further South

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[4] Those five states are Hawaii, Michigan, New Jersey, New York, and Oregon. Larson, *supra*, at § 56.06D[7].

[5] We note that South Carolina's requirement that in mental-mental cases employment conditions causing the mental injury must be unusual and extraordinary was judicially created before being legislatively adopted. In *Powell v. Vulcan Materials Co.*, 299 S.C. 325, 327, 384 S.E.2d 725, 726 (1989), this Court applied the "heart attack standard" to mental-mental injuries and recognized that mental-mental injuries that arose from extraordinary and unusual conditions of employment are compensable. *See* n. 2, *supra*. In 1989, when the Court decided *Powell*, section 42-1-160 of the South Carolina Code did not specifically address mental-mental injuries nor require that they arise from extraordinary and unusual conditions of employment. *See* S.C. Code Ann. § 42-1-160 (1976 & Supp. 1989). Only in 1996 did the legislature amend section 42-1-160 to statutorily adopt *Powell*'s framework for determining the compensability of mental-mental injuries. *See* S.C. Code Ann. § 42-1-160 (Supp. 1996).

Carolina's public policy of favoring coverage for injuries suffered at work, while not unleashing an uncontainable flood of litigation or unduly burdening business activities.

Nevertheless, we are interpreters not legislators and are bound by the language of section 42-1-160 as written. *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly[, and] the courts assume this prerogative only in the absence of legislative declaration."). Section 42-1-160 refers to *conditions* of employment and not the frequency of an event occurring during the course of employment. S.C. Code Ann. § 42-1-160(B)(1). Furthermore, it requires those conditions to be "unusual or extraordinary." *Id*. Unusual or extraordinary conditions refer to conditions of the particular job, not to conditions of employment generally. *Shealy*, 341 S.C. at 456, 535 S.E.2d at 442.

The parties do not contest that the October 21, 2009 incident, where Appellant, while on patrol, shot and killed a suspect, is the proximate cause of Appellant's mental injury. S.C. Code Ann. § 42-1-160(B)(2); *Tennant v. Beaufort Cnty. Sch. Dist.*, 381 S.C. 617, 674 S.E.2d 488 (2009) (claimant must show that "unusual or extraordinary conditions were the proximate cause of the mental disorder"). The only issue is whether the employment condition was extraordinary and unusual with respect to Appellant's profession as a deputy sheriff.[6] *Shealy*, 341 S.C. at 456, 535 S.E.2d at 442.

In *Stokes v. First National Bank*, 306 S.C. 46, 48, 410 S.E.2d 248, 249 (1991), as a result of a merger and the resignation of one of plaintiff's managers, claimant's work hours increased from approximately 45 hours per week to 60 hours per week in January 1984; to workdays of approximately 12 to 15 hours in July 1984; and then 16 to 18 hours after November 10, 1984.

[6] Black's Law Dictionary defines "extraordinary" as "out of the ordinary, exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual, regular or of a customary kind; remarkable; uncommon; rare; employed for an exceptional purpose or a on a special occasion." Black's Law Dictionary 586 (6th ed. 1990). "Unusual" is defined as "uncommon; not usual; rare." *Id.* at 1540.

This Court found that Stokes's excessively increased workload constituted an unusual and extraordinary condition of employment which rendered his resulting nervous breakdown a compensable accident. *Id.* at 50, 410 S.E.2d at 250. It may be tempting to extrapolate that if excessive increases in work hours constitute an "extraordinary and unusual" condition of employment, then so too would killing a person in the course of duty. However, *Shealy v. Aiken County* directs us not to compare apples and oranges, but rather to examine cases involving Appellant's particular profession as a deputy sheriff or law enforcement officer. 341 S.C. 448, 456, 535 S.E.2d 438, 442 (2000) (unusual and extraordinary conditions refers to conditions to the particular job in which the injury occurs, not to conditions of employment in general).

In *Shealy*, the claimant worked as a deputy sheriff in Lexington County from 1981 to 1990. *Id.* at 452, 535 S.E.2d at 440. During this time, he developed depression and an alcohol problem, which led to his departure from his job. *Id.* In November 1990, the Aiken County Sheriff, aware of claimant's alcohol problem, nonetheless, hired him to work as a "deep cover" narcotics agent. *Id.* The Aiken County Sheriff's Department hired deep cover agents to go to known drug locations, typically bars and nightclubs, to befriend drug dealers and other criminals in order to gain information, intelligence, and to make drug buys, which were then given to the police as evidence. *Id.* Deep cover work is extremely stressful and differs from regular police undercover work because agents do not wear a wire, are not operating under police surveillance, do not have access to police back up, and do not carry police identification. *Id.* In August 1992, following an incident with a drug dealer while working undercover, claimant believed that he was in danger due to constant death threats. *Id.* at 452–53, 535 S.E.2d at 441. On December 30, 1992, the sheriff's department dismissed him from his job when a new sheriff decided to eliminate the deep cover program. *Id.* According to claimant, the dismissal caused severe stress because he still faced death threats and would lose both his permit to carry a weapon and the protection of law enforcement. *Id.* Claimant was diagnosed with major depression, PTSD, anxiety, alcoholism, and panic disorder with agoraphobia. He sought workers' compensation benefits, and the Single Commissioner awarded claimant benefits for aggravation of his preexisting alcoholism and psychological injury resulting from the extraordinary conditions of his employment. *Id.* at 454, 535 S.E.2d at 441. This Court agreed with the

Commissioner finding that substantial evidence in the record demonstrated that claimant's work conditions were unusual and extraordinary. *Id.* at 458, 535 S.E.2d at 444. We held that the "*combination* of death threats, gun incidents with violent drug dealers, high tension confrontations, fear of being uncovered, and loss of security as a police officer constitutes unusual or extraordinary conditions of employment when they occur over several months." *Id.* at 455, 535 S.E.2d at 442 (emphasis added).

*Shealy* is distinguishable from the case at hand. While it is expected that deep undercover work is dangerous and stressful, the combination of a serious death threat, claimant's layoff, and claimant's subsequent loss of police protection occurring over a period of several months elevated claimant's employment conditions to extraordinary and unusual. *Id.* No such aggravating combination is present in this case where admittedly Appellant's mental injuries result solely from the shooting of a suspect who threatened him on October 21, 2009.[7]

The use of deadly force is within the normal scope and duties of a Spartanburg County deputy sheriff. Claimant himself, upon direct questioning, confirmed that he knew that he would sometimes be required to use deadly force in his job. In addition, the Spartanburg County Sheriff's Office General Order 520.1 provides:

> Deadly force may be used by officers only when they reasonably believe the action is in defense of human life (the officer's or others) . . . . When any arrestee initiates action to cause physical harm, there should be no hesitancy in using such force as necessary to bring that person under control.

[7] As to whether the incident was an extraordinary and unusual event, Appellant presented letters from his psychiatrist and psychologist opining that it was, while Respondents presented a letter from an expert vocational consultant and certified vocational evaluator opining it was not. We note these opinions, but are ultimately persuaded by other factors in this case, which we discuss in the body of this opinion.

Deputies are also required to attend the South Carolina Criminal Justice Academy where they are instructed on the use of firearms and deadly force, and each deputy receives annual training in the same area. Moreover, Spartanburg County Sheriff Chuck Wright testified that when he became a deputy sheriff, he was aware of the possibility that he might be required to fire his weapon to shoot and kill, and that all deputies are aware of this possibility through their training.

Appellant would like this Court to reframe the issue, take it out of its particular employment context, and ask "whether killing another human being is 'unusual.'" This approach, however, contradicts *Shealy*'s command to look at conditions of the particular employment in which the injury occurs and not to conditions of employment in general. 341 S.C. at 456, 535 S.E.2d at 442. Appellant also argues that because statistics show that the killing of suspects by a Spartanburg County deputy sheriff occurred about once a year, this meant that shooting and killing was an unusual and extraordinary event.[8] However, in defining what constitutes unusual and extraordinary, the statute and our case law speak of *conditions* of employment and not the frequency of an event occurring. S.C. Code Ann. § 42-1-160; *Shealy*, 341 S.C. at 456, 535 S.E.2d at 442. Moreover, if the frequency of killing is the decisive factor,

[8] This same frequency argument has been adopted by the dissent. Furthermore, the dissent finds it "difficult to fathom, let alone countenance, a rule which would allow Deputy Sheriff Bentley to recover workers' compensation if he had tripped and fallen and injured his leg while drawing his gun on this suspect, yet does not permit him to recover for the real mental trauma he undeniably suffered by shooting and killing the man." We are deeply sympathetic to the views expressed in the learned dissent. While we certainly echo the dissent's concerns in our call for reform, we note that the hypothetical that the dissent employs involves a physical injury that would be compensable because it is not constrained by § 42-1-160, which only places barriers to recovery in cases involving mental-mental injuries. Here, however, we are dealing with a mental-mental injury and are bound by the heightened statutory restriction that the conditions of employment must be unusual and extraordinary.

then it is difficult to put a precise number on how many suspects must be killed before the killing ceases to be extraordinary and unusual. Under our case law, we cannot ignore the particular employment context and hold that killing a suspect is generally and inherently extraordinary and unusual. *Shealy*, 341 S.C. at 456, 535 S.E.2d at 442. Thus, we agree with the Appellate Panel that the issue this Court must decide is whether or not using deadly force, which may result in fatalities, is a standard or necessary condition of a deputy sheriff's job, not how frequently the use of deadly force results in fatalities.

We hold that Appellant's testimony that he "might be in a situation where he might have to shoot someone," similar testimonies by Sheriff Wright that officers were aware of the possibility that they might be required to shoot and kill, Appellant's training in the use of deadly force, and the department's policy addressing when deadly force should be used constitutes substantial evidence supporting the Appellate Panel's conclusion that the October 21, 2009 incident was not extraordinary and unusual, but was a standard and necessary condition of a deputy sheriff's job.

## CONCLUSION

For the foregoing reasons, we affirm the Appellate Panel's holding.

**AFFIRMED.**

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

**JUSTICE HEARN:** I unequivocally join in the majority's call for the General Assembly to revisit Section 42-1-160(B) of the South Carolina Code (Supp. 2010). As the majority thoroughly explains, our present "mental-mental" statute is an anachronism and the time has come for it to be updated based on the current understanding of mental injuries. However, I part company with the majority's conclusion that Deputy Sheriff Brandon Bentley has failed to prove that shooting and killing another human being in the line of duty is not an unusual or extraordinary circumstance for a law enforcement officer, which is the standard we must apply. I believe that it is and would reverse, holding the Appellate Panel committed an error of law in ruling otherwise. I therefore respectfully dissent.

As noted by the majority, beginning with the court of appeals' decision in *Stokes v. First National Bank*, 298 S.C. 13, 377 S.E.2d 922 (Ct. App 1988), the compensability of a mental injury caused solely by emotional distress has been analyzed consistent with the standard of compensability for heart attack injury cases. This Court, in *Powell v. Vulcan Materials Co*., 299 S.C. 325, 384 S.E.2d 725 (1989), specifically approved the court of appeals' decision to adopt the heart attack standard—unusual or extraordinary conditions of employment—to determine compensability in cases of mental-mental injuries, and quoted this from the *Stokes* opinion: "'[M]ental or nervous disorders resulting from either physical or emotional stimuli are equally compensable provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment.'" *Id.* at 327, 384 S.E.2d at 726 (quoting *Stokes*, 298 S.C. at 22, 377 S.E.2d at 927). In 1996, the General Assembly, in response to this developing case law, amended section 42-1-160 to limit recovery for purely mental injuries to situations where "it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment." 1996 Act No. 424 § 2.

Applying the statute to this case requires us to discern the meaning of unusual and extraordinary in the context of the responsibilities of a law enforcement officer. The majority correctly defines "extraordinary" as "out of the ordinary, exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual, regular or of a customary kind; remarkable; uncommon; rare; employed for an exceptional

purpose or on a special occasion." Black's Law Dictionary 586 (6th ed. 1990). Additionally, it defines "unusual" as "uncommon; not usual; rare." *Id.* at 1540. Therefore, under the plain language of section 42-1-160, Deputy Sheriff Bentley should be able to recover if shooting and killing another human being in the line of duty is not a common occurrence or if it is beyond what is ordinary. The majority finds, on the other hand, primarily because all officers are trained for this very eventuality, that it cannot be unusual or extraordinary. Thus, the majority equates a mere *possibility* of an event occurring with it being usual and ordinary. With that analysis, I cannot agree, because I believe it is contrary to the plain language of the statute and it improperly conflates the standard of compensability for mental-mental injuries with the concept of foreseeability.

This record is replete with evidence that Deputy Sheriff Bentley, like all law enforcement officers, was trained to kill a suspect in the line of duty, if his own life or the life of another was in jeopardy. However, it is also undisputed that despite this preparation, the vast majority of law enforcement officers fortunately never have to take this grave step; indeed, many never even draw their gun to fire in the course of their professional lives. In this regard, the testimony of Deputy Sheriff Bentley's boss, Sheriff Chuck Wright, is particularly compelling. Sheriff Wright testified that in his twenty-two years in law enforcement—seventeen as a patrol officer and five as sheriff—he never shot someone in the line of duty. He also testified that during the prior six years in Spartanburg County, a suspect had been shot and killed by a deputy six times, or once per year, on average. Moreover, when an officer shoots a suspect, an in-house and a SLED investigation are triggered, and significantly, the officer is required to take administrative leave and to see the department's psychologist. In response to the question as to whether his deputies rarely have to use deadly force, Sheriff Wright responded: "It's not an everyday occurrence, thank God." It is difficult to imagine clearer testimony on whether an event is a common occurrence or is out of the ordinary, consistent with the definitions noted above.

While I do not suggest that we define what is unusual and extraordinary only by what is rare, I do believe that the sheer rarity of this situation is a factor to consider in determining whether it is unusual and unexpected. Indeed, this is even borne out by the definitions of extraordinary and unusual

employed by the majority, both of which contemplate an event being a possibility yet still extraordinary and unusual. *See* Black's Law Dictionary 586 (6th ed. 1990) (defining "extraordinary" as "out of the ordinary, exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual, regular or of a customary kind; remarkable; uncommon; rare; employed for an exceptional purpose or on a special occasion"); *id.* at 1540 (defining "unusual" as "uncommon; not usual; rare"). Because the Appellate Panel did not take these ordinary definitions into consideration, it committed an error of law. Under the proper standard, the evidence unquestionably reveals that shooting and killing a suspect is both unusual in terms of the frequency of such an event and extraordinary in that it is not a common occurrence in the professional life of a police officer. I therefore believe the heightened burden has been satisfied. To the extent that section 42-1-160(B) would preclude Deputy Sheriff Bentley from recovering, this case perfectly illustrates the problem with the present standard. I find it difficult to fathom, let alone countenance, a rule which would allow Deputy Sheriff Bentley to recover workers' compensation if he had tripped and fallen and injured his leg while drawing his gun on this suspect, yet does not permit him to recover for the very real mental trauma he undeniably suffered by shooting and killing the man.

In *Shealy v. Aiken County*, 341 S.C. 448, 455-6, 535 S.E.2d 438, 442, (2000), which involved the compensability of injuries for mental distress for a "deep cover" narcotics officer, we stated: "In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed." The majority, however, loses sight of this lodestar of workers' compensation law and interprets the phrase "extraordinary and unusual" in a manner which is not only contrary to the plain meaning of the words used, but also defeats coverage. Cast against the proper legal canvas, I would hold that Deputy Sheriff Bentley's mental injuries—injuries which are admitted and indisputably resulted from this necessary yet regrettable event—are compensable because while shooting and killing a suspect in the line of duty may have been something he was trained to do, it was clearly an unusual and extraordinary part of his job as a law enforcement officer.

**BEATTY, J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Mark Fountain, Appellant,
v.
First Reliance Bank, Thomas C. Ewart, and Ernest Pennell, Defendants, Of Whom First Reliance Bank and Thomas C. Ewart are, Respondents.

Appellate Case No. 2011-193546

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Appeal From Florence County
D. Craig Brown, Circuit Court Judge

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Opinion No. 27141
Heard May 3, 2012 – Filed July 11, 2012

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**AFFIRMED**

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Robert Norris Hill, of Newberry, and William P. Hatfield, of Hyman Law Firm, of Florence, for Appellant.

Jeffrey L. Payne, of Turner Padget Graham & Laney, of Florence, for Respondents.

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**JUSTICE HEARN:** Mark Fountain brought this action for defamation based on a statement by Thomas C. Ewart, chief banking officer for First Reliance Bank, as to why the bank would not make a loan on a business venture between Fountain and Ernest Pennell. The circuit court granted summary judgment in favor of Ewart and First Reliance (collectively, Respondents), finding that the statement

was not defamatory, and even if it was, Respondents were protected by a qualified privilege. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In late 2008, Pennell, with encouragement and assistance from Fountain, sought to refinance or obtain a new loan in order to satisfy a $1.2 million delinquent mortgage held by Carolina First Bank on a convenience store owned by Pennell. The purpose of the loan was also to buy out Pennell's existing corporate partner, and to pay off a delinquent fuel supply charge. Fountain and Pennell also entered into an employment agreement whereby Fountain would be the store's manager.

This was not Fountain's first experience with a convenience store, as he previously had been a member of a failed business venture involving a combination convenience store and fast food restaurant (BoJo Tim venture). Although he was not the on-site manager, Fountain went to the store on a daily basis to supervise its operation. The BoJo Tim venture had given Carolina First a mortgage on some of its property, and Ewart, a Carolina First employee, was involved closely with Fountain in the venture. The BoJo Tim venture eventually had difficulty repaying the loan, and Fountain was sued, resulting in one judgment against him in favor of Tokyo Leasing for a debit card machine.[1]

With at least some of Fountain's financial background known to Pennell,[2] Fountain and Pennell approached First Reliance to request funds after two other lending institutions denied their loan requests. At this point in time, Ewart was the chief banking officer at First Reliance, and he called Pennell in for a meeting to discuss the matter. Fountain was not present. At that meeting, Ewart stated that First Reliance would not be making the loan if Fountain was involved in the

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[1] Fountain also had at least four judgments against him unrelated to the BoJo Tim venture, including: (1) First Reliance for a motorcycle and a tractor; (2) Carolina First involving a boat; (3) First Federal for a line of credit business loan on a mobile home park; and (4) BB&T for a credit card.

[2] When asked if he had told Pennell about his debts which did not relate to the BoJo Tim venture, Fountain responded, "Well, that's a Mark Fountain problem."

business.[3] Pennell subsequently relayed Ewart's statement to Fountain, and told him to "tear up" the agreement between the two of them. Fountain later requested Pennell to meet him at his lawyer's office, where Pennell repeated the statement in front of Fountain's attorney.

Fountain filed a complaint against First Reliance, Ewart, and Pennell for defamation and intentional infliction of emotional distress. All three defendants filed motions for summary judgment.[4] The circuit court granted the motions, finding the statement was not defamatory, the publication of the statement was privileged, and no intentional infliction of emotional distress claim was established. Fountain appeals only the grant of summary judgment in favor of First Reliance and Ewart on his defamation claim.

## ISSUES PRESENTED

I. Was Ewart's statement to Pennell defamatory?

II. Are Respondents entitled to a qualified privilege?

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[3] The record contains three different versions of this statement. Fountain describes the statement as being "that as long as [Fountain] was involved in the transaction that First Reliance Bank would never make a loan to [Pennell] in order to refinance the Carolina First note and mortgage." Pennell recalls Ewart telling him First Reliance could not make him the loan "under the present status." Although Pennell does not remember Ewart referencing Fountain specifically, Pennell believed Ewart was referring to Fountain's involvement. And, finally, Ewart's recollection was he told Pennell, "[I]f Mark [Fountain] was going to be managing the operation, [First Reliance] would not be making the loan." Based on our standard of review on summary judgment, we use Fountain's version of the statement in our analysis. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002) (viewing evidence and inferences in the light most favorable to the non-moving party on summary judgment).

[4] Fountain also sued Pennell for breach of contract, and Pennell did not move for summary judgment on that claim.

## STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860 (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* In order to withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

## LAW/ANALYSIS

### I. DEFAMATION

Fountain first argues the circuit court erred in holding Ewart's statement was not defamatory. We disagree.

"A person makes a defamatory statement if the statement "tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860. The tort of defamation therefore permits "a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006). We therefore require a plaintiff to prove the following four elements to state a claim for defamation: "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id.* at 465, 629 S.E.2d at 664.

"'To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.'" *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634

(1980) (quoting *Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)). Statements therefore may be either defamatory on their face, or defamatory by way of innuendo. "Innuendo is extrinsic evidence used to prove a statement's defamatory nature. It includes the aid of inducements, colloquialisms, and explanatory circumstances." *Parrish v. Allison*, 376 S.C. 308, 325 n.1, 656 S.E.2d 382, 391 n.1 (Ct. App. 2007) (internal citations omitted).

Moreover, defamation is classified as either actionable per se or not actionable per se. Slander, which is involved here, "is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001). Whether the statement is actionable per se is a matter of law for the court to resolve. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). If the statement is actionable per se, then the defendant "is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages." *Id.* If the statement is not actionable per se, then "the plaintiff must plead and prove both common law malice and special damages." *Id.*

We turn first to the import of the statement on its face, which is that First Reliance would not make the loan so long as Fountain was involved in the venture. This is a true statement; First Reliance did refuse to make the loan to Pennell because of Fountain's involvement, and there is no evidence to the contrary. Thus, Respondents have a complete defense to defamation based on the statement's literal meaning. *See Parrish*, 376 S.C. at 326, 656 S.E.2d at 392 ("Truth is an affirmative defense . . . ."). Nevertheless, Fountain also argues the statement insinuated that he was an unfit businessman, which would be actionable per se if it did so. However, we do not believe the statement is capable of any reasonable defamatory construction.

In support of his argument, Fountain relies primarily on *Adams v. Daily Telegraph Co.*, 292 S.C. 273, 356 S.E.2d 118 (Ct. App. 1986). In *Adams*, the court of appeals reversed the circuit court's grant of summary judgment in favor of two TV stations after broadcasting a press conference where the family of two murdered stepbrothers invited other members of the family to come forward and take "truth serum" or undergo "truth testing" regarding the unsolved murders. *Id.*

at 275, 279-80, 356 S.E.2d at 119-20, 122. The family further encouraged the public to "draw their own conclusion" from the other family member's alleged refusal to cooperate. *Id.* at 276, 356 S.E.2d at 120. The father of one of the murdered boys sued for defamation, alleging the broadcasts implied he murdered the boys or was guilty of a misprision of a felony. *Id.* The circuit court granted summary judgment by disregarding the alleged innuendo and finding the facts stated in the two broadcasts were true. *Id.* at 278, 356 S.E.2d at 121. The court of appeals reversed, holding that a motion for summary judgment "will only be sustained where the court can affirmatively say that the publication is incapable of **any reasonable construction** which will render the words defamatory." *Id.* at 279, 356 S.E.2d at 122 (emphasis added).

Fountain reads *Adams* broadly to hold that words with any defamatory meaning are sufficient to avoid summary judgment, ignoring that part of the decision which states the construction must be "reasonable." *Adams* therefore does not extend to purely conjectural interpretations. Under the proper standard, we believe Fountain failed to adduce facts sufficient to withstand summary judgment that Ewart's statement was defamatory by innuendo. During his deposition, Fountain claimed the statement was "inappropriate" and "he just wouldn't say it being a banker," but this falls far short of establishing an implied defamatory meaning. Moreover, even assuming that Fountain did present sufficient evidence to establish a defamatory meaning through innuendo, the alleged defamation—that Fountain had a checkered business and financial history and was therefore a poor lending risk—was indisputably true. Without contradiction, the record reveals Fountain participated in a failed business venture and has a history of neglecting to repay his obligations. Thus, even assuming Fountain adduced sufficient evidence that the statement implied through innuendo that he was a poor lending risk, it could not be deemed defamatory because it was unquestionably true.

Therefore, we hold there is no evidence Ewart's statement was defamatory and summary judgment was proper.

## II. QUALIFIED PRIVILEGE

Even if we were to find the statement defamatory, we hold Respondents are entitled to a qualified privilege as a matter of law. Fountain, relying on *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999), argues that evidence exists to show Respondents abused their privilege and thus

this issue should go to the jury. We believe Fountain misinterprets our holding in *Swinton Creek*.

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. *Id.* at 484, 514 S.E.2d at 134. "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987) (quoting *Conwell v. Spur Oil Co. of W. S.C.*, 240 S.C. 170, 178, 125 S.E.2d 270, 274-75 (1962)). An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights. *Swinton Creek*, 334 S.C. at 486, 514 S.E.2d at 135. "While abuse of privilege is ordinarily an issue for the jury, . . . **in the absence of a controversy as to the facts** . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981) (internal citations omitted) (emphasis added).

Fountain acknowledges the privilege exists in this case, but he argues there is evidence Respondents abused the privilege under *Swinton Creek*. There, James Futch owned and operated Swinton Creek Nursery, a business for which he borrowed $30,000 from the South Atlantic Production Credit Association. *Swinton Creek*, 334 S.C. at 473, 514 S.E.2d at 128. That credit association eventually merged with other credit associations to become Edisto Farm Credit. *Id.* at 473, 514 S.E.2d at 128. Futch became delinquent on his note with Edisto and agreed to work on a plan to liquidate the assets of the nursery to pay off his debt, eventually deciding to sell some of Swinton Creek's assets and equipment to Durwood Collins. *Id.* Collins approached Edisto about a loan for the acquisition. *Id.* at 474, 514 S.E.2d at 128. Lawton Huggins, the senior loan officer handling Collins' loan application, had a conversation with Futch during a visit to the nursery in which Futch indicated "time was of the essence because he had other pressing financial obligations including a past due loan." *Id.* Huggins subsequently wrote Collins a letter regarding the loan application, which included the following: "[T]he projected income for the nursery is not supported by a successful earnings trend. In fact, the operation you are purchasing has been under financial duress." *Id.* at

474, 514 S.E.2d at 129. Collins eventually bought the assets for less than the original amount from Futch. *Id.* at 476, 514 S.E.2d at 129. He also showed Futch Huggins' letter, who thereafter filed numerous causes of action, including defamation, against Edisto and Huggins. *Id.* at 475, 514 S.E.2d at 129. Edisto moved for a directed verdict on the defamation claim arguing it had a qualified privilege, and the circuit court granted the motion. *Id.* at 484, 514 S.E.2d at 133.

The court of appeals affirmed the circuit court, and on certiorari we reversed because evidence existed that Huggins' statement went beyond the scope of the qualified privilege, holding:

> It is questionable whether a specific comment about Swinton Creek's financial status was required to protect any interest or duty covered by the privilege. EFC contends it wrote the letter for the sole purpose of guiding Buyer into a successful loan application. **Yet, Buyer was only seeking to buy some of Owner's assets, not the entire Swinton Creek operation.** Moreover, if EFC wanted to convey to Buyer the difficulties of running a nursery in a small town, it could have simply made a general statement without specifically referring to Owner.

*Id.* at 486, 514 S.E.2d at 135 (emphasis added). Thus, our concern in *Swinton Creek* was that evidence existed tending to show that the scope of Huggins' statement went beyond the circumstances surrounding Collins' involvement in Swinton Creek Nursery. The same is not true in this case. The store's management was an essential part of the analysis for the loan request, and Fountain's role as manager therefore was a valid consideration for First Reliance. Unlike *Swinton Creek*, there is nothing here indicating that Ewart informing Pennell of his concern about Fountain being involved in the business went beyond the scope of the privilege. In fact, this statement went straight to the heart of the loan request. While abuse of the privilege ordinarily is a question of fact for the jury, it is for the court to determine in the first instance whether there are facts demonstrating abuse. Here, the circuit court properly found there is no evidence the privilege was abused by going beyond its scope.

Even though we find Respondents did not abuse the privilege by making a statement outside of its scope, this does not end our inquiry. The privilege also can be abused if the statement is made in reckless disregard of the victim's rights. *See id.* at 486, 314 S.E.2d at 135. As proof of abuse, Fountain points to an affidavit by

another bank official who claims that First Reliance did not follow banking policies and regulations in turning down the instant loan request. Negligent banking practices have never been claimed in this case, and regardless, negligence in reviewing a loan application does not bear on whether Respondents acted in reckless disregard of Fountain's rights by expressing a valid concern about his involvement in the convenience store. Accordingly, Fountain cannot rely on this affidavit to bootstrap his defamation claim. Therefore, there is no evidence the privilege was abused in this situation.

Banks are in the business of lending money, and to that end, they necessarily make business judgments on the financial viability of prospective borrowers, including their credit history. In this case, Respondents had prior knowledge of Fountain's previous failed business venture, as well as the other numerous judgments rendered against him. Based on this information, Respondents made a valid business judgment to deny the loan to Pennell and Fountain, and Ewart's statement in that regard is protected by a qualified privilege. Moreover, while Ewart ostensibly could have declined to provide a reason for refusing the loan, that approach could damage the bank's reputation and thereby negatively impact its business. Because Fountain has not shown a scintilla of evidence that Respondents abused their qualified privilege, the circuit court did not err in granting summary judgment. *See Woodward*, 277 S.C. at 32-33, 282 S.E.2d at 601.

## CONCLUSION

We find Ewart's statement was not defamatory, and even if it was, a qualified privilege exists in this case. As there was no evidence that this privilege was abused by Respondents, summary judgment was proper.

**TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice E. C. Burnett, III, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Samuel Whitner, Appellant.

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Appeal from Greenville County
John C. Few, Circuit Court Judge

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Opinion No. 27142
Heard October 18, 2011 – Filed July 11, 2012

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**AFFIRMED**

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Chief Appellate Defender Robert M. Dudek, of Columbia, and Christopher D. Scalzo, of Greenville, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, and W. Walter Wilkins, III, of Greenville, for Respondent.

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**JUSTICE KITTREDGE:** Appellant Samuel Whitner was convicted and sentenced for the offense of criminal sexual conduct (CSC) with a minor in the first degree. The victim of the sexual abuse was Appellant's then five- or six-year-old daughter. Appellant assigns error to two evidentiary rulings. The first ruling was the denial of Appellant's motion to suppress a tape recording of his telephone conversation with the victim wherein he admitted the abuse. The second ruling was the denial of Appellant's motion to exclude evidence in connection with a forensic interview of the minor victim. We find no error in the admission of the challenged evidence and affirm.

## I.

Appellant is the victim's biological father. According to the victim's testimony, when she was five or six years old, Appellant exposed his penis to victim and forced her to perform oral sex on him twice.

In 2007, when the victim was eleven years old, the victim disclosed the abuse to her mother (Mother). According to Mother, she encouraged the victim to confront Appellant. The victim telephoned Appellant to confront him, and he denied the incident. Mother subsequently informed her husband (Stepfather) about the abuse. The couple decided to record telephone calls between Appellant and the victim. Several days later, Mother consented to Stepfather recording a telephone conversation between the victim and Appellant without the victim's knowledge or consent. During the thirty-one-minute conversation, Appellant admitted the sexual abuse and stated that the incident was a mistake he deeply regretted.

Mother supplied the recording to law enforcement, and Appellant was arrested and charged with CSC with a minor in the first degree. As part of the investigation, a forensic interview of the victim was conducted.

Appellant filed a motion to suppress the recorded telephone conversation, claiming the recording, intercepted without the prior consent of either party, violated the South Carolina Homeland Security Act (Wiretap Act), S.C. Code Ann. § 17-30-10 *et. seq.* (Supp. 2010), which generally

prohibits the interception of communications. A circuit court judge granted the motion to suppress.[1]

The State filed an interlocutory appeal with the court of appeals and sought to vacate the trial court's suppression order pursuant to the Wiretap Act. The court of appeals correctly granted the State's motion to vacate and found that the trial court lacked subject matter jurisdiction because the Wiretap Act requires that a motion to suppress be made before a panel of judges of the court of appeals.

Thereafter, the court of appeals held a suppression hearing, including the taking of testimony and oral arguments. Stepfather testified that he believed recording the conversation would aid the parents in deciding the best course of action for the victim, including determining whether she needed sexual abuse counseling. Likewise, Mother testified she believed recording the conversations would be useful because she did not know what the conversations between the victim and Appellant entailed, the victim was crying often, and she needed to determine if it was appropriate to permit Appellant to have contact with the victim.

On the legal issue of consent, the court of appeals held that the Legislature, in enacting the Wiretap Act, intended to adopt the vicarious consent doctrine. Mother could, therefore, lawfully vicariously consent to the recording on behalf of the victim. On the factual matter, the court of appeals found that Mother had a good faith and objectively reasonable basis for believing the recording was necessary and in the victim's best interest, and it therefore denied Appellant's motion to suppress. The court of appeals sent the case back to the trial court.

At trial, the recording of the phone conversation between Appellant and the victim was admitted, over Appellant's continuing objection. The State also introduced a videotape of the victim's forensic interview. The contents of the interview were similar to the underlying allegations the victim first

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[1] The judge who granted the motion to suppress was not the judge who presided over the trial.

disclosed to Mother and the testimony given by the victim at trial. The videotape was admitted over Appellant's objections of improper bolstering and hearsay. The jury convicted Appellant of CSC with a minor in the first degree, and he was sentenced to prison. This appeal follows.

**II.**

Appellant claims the Wiretap Act was violated because neither he nor the victim, the parties to the communication, consented to the recording. Conversely, the State claims the Wiretap Act was not violated because the recording fell within the consent provision. Specifically, the State contends the statute allows Mother, as a guardian to the minor victim, to vicariously consent on behalf of the victim to record the telephone conversation between the victim and Appellant.

The South Carolina Wiretap Act is patterned after the Omnibus Crime Control and Safe Streets Act of 1968 (Federal Act). This Court must determine whether the Wiretap Act allows or bars the admission of the recording.

Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below. Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect.

City of Rock Hill v. Harris, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011). "Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

The Wiretap Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17-30-30. Evidence intercepted in violation of the Wiretap Act must be suppressed. See S.C. Code Ann. § 17-30-110. However, when a party to a communication gives consent for the communication to be intercepted, such recording does not violate the law. The full text of the consent provision states:

> It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication *where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.*

S.C. Code Ann. § 17-30-30(C) (emphasis added).

Appellant argues that because there is no explicit provision permitting vicarious consent, parental consent on behalf of a minor was not intended to be an exception to the Wiretap Act. We disagree.

Our Wiretap Act parallels the Federal Act passed by Congress in 1968, which similarly permits lawful interception where one party to the communication consents.[2] Because no South Carolina cases have addressed

[2] "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any

a parent's ability to vicariously consent to the recording of a child's telephone conversations and because the Federal Act is substantively the same as South Carolina's Wiretap Act, we look to the federal courts' interpretations regarding vicarious consent. See Orr, 277 S.C. at 540, 290 S.E.2d at 806 ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation.").

The leading federal case is Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998). In Pollock, the Sixth Circuit Court of Appeals held that a mother did not violate the Federal Act when she recorded conversations between her daughter and the daughter's stepmother. The Pollock court, adopting the rule first enumerated in Thompson v. Dulaney, 838 F.Supp. 1535, 1544 (D. Utah 1993), articulated the doctrine of vicarious consent as follows:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

154 F.3d at 610; see also Wagner v. Wagner, 64 F.Supp.2d 895, 896 (D. Minn. 1999) (holding a guardian may consent on behalf of a minor to the interception of a communication); Campbell v. Price, 2 F.Supp.2d 1186, 1191 (E.D. Ark. 1998) (holding a parent's good faith concern for his minor child's best interest may empower the parent to legally intercept the child's conversations); Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (D. Utah 1993) (finding the vicarious consent doctrine permissible under the federal wiretap statute because of a parent's duty to act in the best interest of their child).

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criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C.A. § 2511 (2006).

South Carolina's Wiretap Act, modeled after the Federal Act, was enacted in 2002. As the above federal jurisprudence indicates, when our Legislature enacted the Wiretap Act, it was well aware of the majority rule concerning construction of the Federal Act in allowing for vicarious consent.[3] We are persuaded that the consent provision in the Wiretap Act encompasses vicarious consent. In reaching this conclusion, we join the majority of state courts that have confronted the same question of statutory construction and have followed the federal interpretation. Accord Silas v. Silas, 680 So.2d 368 (Ala. Civ. App. 1996); G.J.G. v. L.K.A., No. CN93-09835, 2006 WL 2389340 (Del. Fam. Ct. 2006); State v. Spencer, 737 N.W.2d 124 (Iowa 2007); Smith v. Smith, 923 So.2d 732 (La. App. 1 Cir. 9/28/05); Kroh v. Kroh, 567 S.E.2d 760 (N.C. App. 2002); State v. Diaz, 706 A.2d 264 (N.J. 1998); People v. Clark, 19 Misc.3d 6 (N.Y. Sup. Ct. 2008); Lawrence v. Lawrence, No. E2010-00395COA-R3-CV, 2010 WL 4865516 (Tenn. Ct. App. 2010); Alameda v. State, 235 S.W.3d 218 (Tex. 2007).

We further find that Appellant misconstrues the scope of the term "consent." "Consent" is a broad term and is defined as "agreement, approval, or permission as to some act or purpose." Black's Law Dictionary 346 (9th Ed. 2009). The law recognizes different kinds of consent, including express, implied, informed, voluntary, and parental. Parental consent is defined as "[c]onsent given on a minor's behalf by at least one parent, or a legal guardian, or by another person properly authorized to act for the minor, for the minor to engage in or submit to a specific activity." Id. We believe the

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[3] In fact, prior to the adoption of the Wiretap Act, this Court's jurisprudence relied on federal courts' interpretations of the Federal Act in permitting the recording of a telephone conversation where only one party to the conversation consented. See Mays v. Mays, 267 S.C. 490, 229 S.E.2d 725 (1976) (holding that one party to a telephone conversation may lawfully record the conversation without the other party's knowledge or consent, and subsequently disclose it); State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996) (where one party consents to a recording, it does not violate a person's right to privacy).

various types of consent recognized in the law support the result we reach today in discerning legislative intent to include vicarious consent.[4]

In sum, we believe the court of appeals correctly determined that the consent provision in the Wiretap Act includes vicarious consent.

## III.

Appellant contends that even if the Wiretap Act encompasses vicarious consent, that doctrine is not applicable in the instant case. Initially, Appellant asserts that before the vicarious consent doctrine may be applied, a court must find the minor lacked capacity to consent. Additionally, Appellant argues Mother and Stepfather did not have a good faith and objectively reasonable basis for believing it was necessary and in the best interest of the victim to record the telephone conversation.

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[4] Appellant's argument rests in part on various federal courts' rejection of the inter-spousal consent doctrine, which permits one spouse to intercept an electronic communication of the other spouse. See e.g., Pritchard v. Pritchard, 732 F.2d 372, 373 (4th Cir. 1984) (finding no exception exists under the federal wiretapping statute for instances of willful, unconsented to electronic surveillance between spouses). However, the fact that there is no inter-spousal consent exception does not preclude an adoption of a parent-child vicarious consent exception. Moreover, we view the vicarious consent doctrine as a natural consequence of the unique relationship of parent and child. The doctrine's adoption is far more compelling and justifiable than the inter-spousal consent, as fundamentally different considerations are implicated. The United States Supreme Court and this Court have held it is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 65 (2000); Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003) (citing Troxel and stating "[i]t is well-settled that parents have a protected liberty interest in the care, custody, and control of their children"). Furthermore, parents have a duty to protect their child because children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Belloti v. Baird, 443 U.S. 622, 635 (1979).

**A.**

Appellant argues that the victim was capable of consenting because she was eleven years old at the time of the recording. But a minor's actual ability to consent does not preclude a parent's ability to vicariously consent on her behalf. See Pollock, 154 F.3d 601 (applying the vicarious consent doctrine to a fourteen-year-old); State v. Spencer, 737 N.W.2d 124 (Iowa 2007) (applying the vicarious consent doctrine to a thirteen-year-old); Alameda v. State, 235 S.W.3d 218 (Tex. 2007) (applying the vicarious consent doctrine to a thirteen-year-old). Further, we believe it inadvisable to create a bright-line age limit for the application of vicarious consent because "not all children develop emotionally and intellectually on the same timetable." Pollock, 154 F.3d at 610. Thus, the ability to invoke the vicarious consent doctrine prior to the age of majority does not turn on an age-mandated bright-line rule, nor does it require a minor's lack of capacity.

**B.**

Appellant next contends that the court of appeals erred in finding Mother had a good faith and objectively reasonable basis for intercepting the telephone conversation between the victim and Appellant. Pursuant to the procedure prescribed by the Wiretap Act,[5] the court of appeals acted as the trial court in the motion to suppress hearing. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

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[5] S.C. Code Ann. § 17-30-110 states: "The motion [to suppress] must be made before the reviewing authority and must be decided on an expedited basis." The "reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

The parents' motivation in recording the telephone conversation is a question of fact. Given our standard of review, the issue before us is limited to a determination of whether there was any evidence supporting the court of appeals' finding that the parents had a good faith basis for intercepting and recording the phone conversation.

Mother and Stepfather testified they believed the recordings would assist them in deciding the best course of action and in determining whether the victim needed counseling. Likewise, Mother testified it was necessary to determine if it was in the victim's best interest to have continued visitation with Appellant. We believe the evidence supports the court of appeals' finding that Mother had a good faith and objectively reasonable belief that intercepting the telephone conversation was necessary and in the victim's best interest.[6] Thus, we conclude the court of appeals did not abuse its discretion in denying the motion to suppress.

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[6] Although we recognize the fundamental right of parents to make decisions concerning the care, custody, and control of their children, we also recognize, as does the concurrence, that such right is not without limits. As the concurrence states, "constitutional protection does not confer on parents an unlimited right to control their children." While we agree, in the abstract, with the concurrence's sweeping recognition of parents' fundamental right to make decisions concerning the welfare of their children, we must confront the issue in the context presented and not venture into areas never raised, argued or briefed by any party. Appellant argues only that the Wiretap Act does not provide for vicarious consent; we have not been presented with a challenge or discussion of the viability of Pollock post-Troxel. Assuming that issue were squarely before us, we would adhere to the Pollock doctrine in this case. In this criminal case against the Appellant father, we are presented with one parent, Mother, vicariously consenting to recording her child's telephone conversation with the other parent, Appellant. In the context where one parent vicariously consents to record a child's electronic communication with the other parent, we believe the Pollock doctrine, by imposing a good faith standard linked to the child's best interest, sets forth a

## IV.

Appellant also contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protections afforded by our state's constitution. See S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."). We disagree. Appellant's argument is dependent upon a rejection of the vicarious consent doctrine. Because the Wiretap Act provides for vicarious consent of a minor child, Appellant's constitutional argument must be rejected.

## V.

Appellant's final issue on appeal addresses the admissibility of the forensic interview videotape, contending it was cumulative repetition of the minor victim's testimony at trial and improper bolstering. We disagree. As with any issue regarding the admissibility of evidence, we review the trial court's ruling for abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias. Rule 801(d)(1)(B), SCRE. However, in CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under the proper circumstances. See S.C. Code Ann. § 17-23-175 (Supp. 2010) (prescribing the requirements that must be met for a child victim's out-of-court statement to be admitted). Moreover, the South Carolina Rules of Evidence explicitly recognize the authority of the Legislature to enact evidentiary rules. See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina . . . ."). Unless a legislative enactment

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proper and reasonable limitation on a parent's right to make decisions concerning the child.

concerning a matter of evidence violates the constitution, the legislative enactment is valid. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (holding that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions).

Section 17-23-175 is a valid legislative enactment. Admittedly, we have confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim. However, this is not such a case. In fact, the forensic interview of the child and mere foundational trial testimony of the interviewer serve as a model of how the statute is designed to work. Specifically, the forensic interviewer did not improperly lead or influence the victim in any way, and the victim answered the questions on her own accord. Moreover, the forensic interviewer's testimony was for the limited purpose of laying the proper foundation for the admission of the videotape.[7] It offered no improper testimony, and included no bolstering testimony that would invade the province of the jury. Compare State v. Jennings, --- S.C. ---, 716 S.E.2d 91 (2011) (finding the trial court erred in admitting portions of forensic interviewer's written reports that went to the victims' veracity for truth regarding the allegations of abuse) with State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that trial court's admission of testimony from a forensic interviewer did not prejudice defendant as interviewer testified as to her personal observations and did not vouch for the victim's veracity). Thus, there was no error in the admission of the forensic interview into evidence.

## VI.

In sum, we believe the Legislature intended the consent provision in the Wiretap Act to encompass the vicarious consent of a parent on behalf of a

[7] We recognize that the State sought on direct examination to venture into the forbidden area of improper bolstering, but Appellant's objections were promptly sustained.

minor child. Moreover, there was evidence from which the court of appeals could conclude the parents had a good faith and objectively reasonable basis for recording the phone conversation and, accordingly, the court of appeals did not abuse its discretion in denying the motion to suppress. Additionally, we find no error in the trial court's admission of the forensic interview videotape.

**AFFIRMED.**

**TOAL, C.J., and BEATTY, J., concur. PLEICONES, J., concurring in a separate opinion in which Acting Justice Eugene C. Griffith, concurs.**

**JUSTICE PLEICONES:** I concur with the result reached by the majority but write separately to express my concerns regarding the majority's adoption of the Pollock test, which I believe places an undue burden on a parent to justify his vicarious consent on behalf of his child under South Carolina's Wiretap Act. I also write separately regarding the admission of bolstering testimony under S.C. Code Ann. § 17-23-175 (Supp. 2010).

**I.**

I agree with the majority that the Wiretap Act permits the substitution of a parent's consent for that of a minor who is a party to the communication. However, the Pollock test, articulated in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998), and adopted by the majority without alteration, fails to fully account for the scope of parental rights under the United States Constitution.[8]

Under the Pollock test, "a clear emphasis is put on the need for the 'consenting' parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." 154 F.3d at 610. The test is said to "create[] *important limitations* on the ability of a parent or guardian to vicariously consent to the recording of his or her child's conversations." State v. Spencer, 737 N.W.2d 124, 131 (Iowa 2007) (emphasis added). The "good faith, objectively reasonable basis" limitation in the Pollock test was adopted from Thompson v. Dulaney, the first case to consider the question whether the federal Wiretap Act should be interpreted to include a vicarious consent exception. 838 F.Supp. 1535 (D. Utah 1993).

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[8] The majority believes that consideration of the Pollock test's viability post-Troxel is not appropriate because this issue has not been raised by any party. I do not believe we can avoid considering the implications of Troxel on this basis while also explicitly adopting and applying a particular test without qualification. Avoiding Constitutional issues not raised and argued could be dealt with by holding that even if the Pollock test is unconstitutionally restrictive, its demands would be met in this case. Moreover, I would respectfully urge that the majority's conclusion that it would adhere to the Pollock test after consideration of Troxel based on its view that the good faith standard is "a proper and reasonable limitation" under these circumstances is an interest-balancing test of the sort inappropriate for treatment of fundamental rights.

In Thompson, the parent argued that she had a constitutional right to direct the upbringing of her children. However, in finding that a vicarious consent exception was implied in the Wiretap Act, the court based its reasoning on the parent's statutory duty. The court found that in order for the parent to fulfill her duty under a Utah statute to protect her children, she must be able to supervise their communication with third parties, at least when the children are very young, as they were in the case it was considering. Id. at 1544. The Thompson court did not explain what interests created a need for a limitation on parents' authority to vicariously consent for their children under the federal Wiretap Act. Other courts that have adopted the vicarious consent doctrine have noted in passing that a parent has a constitutional right to guide the upbringing of her children, but they have not directly addressed the constitutionality of the "good faith, objectively reasonable basis" limitation or explained why it is important.

Some commentators have criticized the Pollock test for failing to adequately account for a minor's right to privacy. Spencer, 737 N.W.2d at 131-32 (citing commentators who raise this concern). Presumably it is a minor's right to privacy that concerned the Thompson, Pollock, and other courts and that they sought to protect through the good faith limitation, even though the result does not provide as much privacy to minors as some commentators would desire.

Minors do have some legally recognized right to privacy, most notably the "privacy" of being able to make some choices that are essential to a person's most basic autonomy. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992). In Casey, the United States Supreme Court found that under certain narrow circumstances a minor's fundamental right to privacy would be violated by a government-enforced parental veto of the minor's choice. Aside from the right of a mature minor to make some irreversible and life-altering decisions, however, a minor's interest in privacy has barely been accorded legal recognition. It has been accorded least recognition vis-à-vis parents.[9] Moreover, Casey

[9] See, e.g., Benjamin Shmueli and Ayelet Blecher-Prigat, Privacy for Children, 42 COLUM. HUM. RTS. L. REV. 759, 763, 793, 794 (Spring 2011)

involved state action operating to override the choice of a minor with the capacity to make the choice at issue. That is, insofar as the Constitution protects the privacy interests of minors, it protects them from governmental intrusion, not from parental intrusion unaided by government.

On the other hand, a parent has a right under the Constitution to guide the upbringing of her child. In Troxel v. Granville,[10] decided after both Thompson and Pollock, the Court identified as "*fundamental* [the] right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000) (plurality opinion) (emphasis added). Seven justices agreed that the constitutional right of a parent to direct the upbringing of her child is violated when her judgment regarding the child's associations is not accorded deference by the courts. 530 U.S. at 67 (plurality), 78-79 (Souter, J., concurring), 80 (Thomas, J., concurring), 94 (Kennedy, J., dissenting). Of course, as with other constitutional rights, the constitutional protection does not confer on parents an unlimited right to control their children, but it limits the extent of governmental involvement in a particular area and places a heavy burden on the state to justify any governmental restriction of parental rights. The Wiretap Act, read without an exception, would substantially restrict parental rights in favor of an interest

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(surveying American jurisprudence and concluding that privacy rights "do[] not exist for children vis-à-vis their parents"; noting that even the U.N. Convention for the Rights of the Child, "which is the most comprehensive legal document ever written on children's rights, and which brought more than twenty countries around the world to adopt a ban on parental corporal punishment and to grant a plethora of children's rights, has not clarified this children's right"; and acknowledging that legal intervention in this area poses a significant risk of damaging families and "must be very delicate").

[10] In Troxel v. Granville, a Washington state statute permitted any party to petition for visitation rights and permitted the court to award visitation rights if it concluded that they were in the child's best interest without according any deference to the parent's judgment. The Court found that a mother's substantive due process rights were violated when the state court awarded visitation to the children's paternal grandparents based on its disagreement with the mother regarding the appropriate amount of visitation.

that has received little if any legal protection in any other context. Read with a limited exception, the Wiretap Act subjects the exercise of parental constitutional rights to substantial state supervision, again in favor of a barely recognized interest. In my view, either of those readings fails to withstand the strict scrutiny ordinarily applied to governmental restrictions on fundamental rights.

Troxel concerned the appropriate treatment of parental constitutional rights when a court was reviewing a fit parent's decision regarding the social activities of her child, much as the Pollock test involves a court in reviewing a presumptively fit parent's decision regarding the social activities of her child. The plurality opinion in Troxel states that the fundamental constitutional right of parents to guide the upbringing of their children mandates "a presumption that fit parents act in the best interests of their children." Id. at 68. The Pollock test reverses this presumption by placing the burden of proof on the parent to demonstrate that his motives for recording his child's conversation were proper and based on objectively reasonable concerns. Thus, the Pollock test is not viable after Troxel, at least as to its allocation of the burden of proof.

Moreover, I am concerned with the import of the majority's discussion of a child's age and capacity to consent as being relevant to a determination whether a parent's vicarious consent was valid. The majority eschews any bright-line rule based on the minor's age and capacity to consent. Presumably this means that a court reviewing a parent's decision to invade the minor's privacy should deem that decision less objectively reasonable the more mature the minor is. But a sliding-scale test provides such little constraint on courts as to transfer nearly limitless discretion to them to override the judgment of a fit parent, in direct contravention of Troxel.

Further militating against the adoption of the Pollock test, at question here is a statute that, in the absence of an exception, *criminalizes* a parent's

recording of his child's conversation with a third party.[11] Thus, under the Wiretap Act the primary adversarial parties are the government and the parent, not the parent and child or the parent and a third party.[12] Under the Pollock test, a parent cannot exercise her fundamental constitutional right to guide the upbringing of her child without risking criminal penalty should a court disbelieve her stated motives, disagree with her assessment of the threat posed by the particular circumstances, or find that the child's age or capacity to consent sufficiently negates the parent's otherwise valid concerns. Such treatment of fundamental rights protected by the Constitution is impermissible. See, e.g., Casey, 505 U.S. at 893-95. The majority's rejection of a bright-line rule exacerbates the constitutional problem with the good faith test by creating greater uncertainty for parents of maturing but unemancipated minors in discerning the line between protected and criminalized conduct.

In light of the fact that the Wiretap Act criminalizes violations and that the parental right is fundamental under the Constitution, I do not believe there is room for any qualification of the vicarious consent exception. At the very least, the majority's test must be recast in order to place the burden on the party asserting that the parent's consent was invalid to prove that the parent did not act in good faith or in reliance on objectively reasonable concerns.

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[11] A person who violates the provisions of the South Carolina Wiretap Act must be imprisoned not more than five years or fined not more than five thousand dollars, or both. S.C. Code Ann. § 17-30-50 (Supp. 2010).

[12] The issue typically arises in cases that do not involve the state attempting to prosecute a parent, such as in the present case, in which a third party seeks to have evidence excluded as obtained in violation of the Wiretap Act. The fact that the issue may be raised by a third party does not alter my analysis for two reasons. First, our interpretation of the consent exception will apply in all contexts. Second, one party to a protected communication has no expectation of privacy under the Wiretap Act if the other party consents to recording or disclosure. Thus, the third party's interest in nondisclosure has no bearing on the question whether a parent may vicariously consent on behalf of his child.

## II.

With regard to Appellant's argument regarding impermissible bolstering, I would note that Appellant has not raised a challenge to the statute on constitutional grounds or challenged the admission of the interviewer's testimony or opinions. Rather, Appellant challenges as improper bolstering the admission of duplicative testimony from the child herself via the videotape. I agree with the majority that the Rules of Evidence recognize the authority of the General Assembly to enact statutes that create exceptions to the evidentiary rules. Rule 101, SCRE. Section 17-23-175 by its terms permits the duplication of a child's testimony through the admission of a video recorded interview in addition to the child's testimony in court. Thus, there is no basis for an improper bolstering argument when prior testimony is admitted pursuant to § 17-23-175, and I agree with the majority that the trial judge did not abuse his discretion when he admitted the videotaped interview.

For the reasons set forth above, I would hold that parental vicarious consent satisfies the Wiretap Act's consent exception for all fit parents of unemancipated minors regardless of the minor's age or capacity to consent. I would also modify the discussion of admissibility under § 17-23-175. Because I agree with the result reached by the majority on each issue, I concur in the judgment.

**Acting Justice Eugene C. Griffith, Jr., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Fred Bradley, Respondent,

v.

Brentwood Homes, Inc., Brentwood Homes-Limehouse, LLC, Brentwood Homes-The Retreat at Johns Island, LLC, Brentwood Homes of South Carolina, Inc., Brentwood Homes of North Carolina, Inc., Brentwood Homes of Myrtle Beach, Inc., Brentwood Homes of Low Country, Inc., Brentwood Homes of Fort Mill, Inc., Brentwood Homes of Beaufort-Bluffton, Inc., Harris Street, LLC, Crescent Homes of SC, Inc., Brentwood Homes Incorporated, a Georgia Corporation, Appellants.

Appellate Case No. 2010-163350

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

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Opinion No. 27143
Heard May 22, 2012 – Filed July 11, 2012

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**AFFIRMED**

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Robert T. Lyles, Jr. of Charleston, for Appellants.

W. W. DesChamps, Jr. and William Wayne DesChamps, III, both of Myrtle Beach, SC, for Respondent.

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**JUSTICE BEATTY:** Brentwood Homes, Inc. and the other appellants (collectively "Brentwood Homes") appeal the circuit court's order denying a motion to stay the proceedings and compel arbitration in a lawsuit filed by Fred Bradley that arose out of his purchase of a home in South Carolina. Although Brentwood Homes concedes the Home Purchase Agreement does not meet the technical requirements of the South Carolina Uniform Arbitration Act (the "UAA"),[1] it claims the court erred in denying the motion because the transaction involved interstate commerce and, thus, was subject to the Federal Arbitration Act ("FAA").[2] We affirm.

## I. Factual/Procedural History

On January 31, 2007, Bradley and Brentwood Homes entered into a Home Purchase Agreement (the "Agreement") for the purchase of a home located in North Myrtle Beach, South Carolina. In the Agreement, Bradley and his wife were designated as the purchasers and Brentwood Homes was designated as the seller. Pursuant to the Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling.[3] The closing of the home took place on March 2, 2007.

On July 31, 2009, Bradley initiated a lawsuit against Brentwood Homes in which he alleged numerous construction defects in the dwelling. In his Complaint, Bradley identified causes of action for fraud, negligence, and breach of implied warranty.

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[1] S.C. Code Ann. §§ 15-48-10 to -240 (2005 & Supp. 2011).

[2] 9 U.S.C.A. §§ 1-16 (2009 & Supp. 2012).

[3] Section 22H states:

> It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon the completion of the dwelling.

After six months of discovery requests by Bradley, Brentwood Homes filed an Amended Answer and Counterclaim on February 5, 2010. In this responsive pleading, Brentwood Homes claimed the circuit court did not have jurisdiction to rule on Bradley's lawsuit as the Agreement provided for arbitration. Brentwood Homes concurrently filed a motion to stay the proceedings and compel arbitration.

In support of this motion, Brentwood Homes referenced subsection 14G in the Agreement, which provides in relevant part:

> **Mandatory Binding Arbitration.**[4] Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home, (2) Seller's performance under any Punch List or Inspection Agreement, (3) Seller's performance under any warranty contained in this Agreement or otherwise, and (4) any matters as to which Purchaser and Seller agree to arbitrate.

Alternatively, Brentwood Homes claimed that even if the arbitration provision in the Agreement did not comply with the requirements of the UAA,[5] it was subject to the FAA as the transaction involved interstate commerce. Specifically, Brentwood Homes claimed the Agreement "on its face involves interstate commerce" as it provides that the Seller will purchase a warranty from 2-

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[4] The second page of the Agreement also contained the following statement: "THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA or NORTH CAROLINA UNIFORM ARBITRATION ACT, WHICHEVER IS APPLICABLE."

[5] See S.C. Code Ann. § 15-48-10(a) (2005) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.").

10 HBW Warranty,[6] or such other national warranty, and that claims would be submitted to the East Region of 2-10 HBW, which is located in Tucker, Georgia. Additionally, Brentwood Homes supplemented its motion with affidavits from Bradley and Edward M. Terry, who was the Vice-President of Brentwood Homes on January 31, 2007.[7] Bradley's affidavit established that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank & Co. In his affidavit, Terry attested that Brentwood Homes "used subcontractors, materials and suppliers from outside of the State of South Carolina" in the construction of Bradley's home.

At the hearing before the circuit court, Bradley initially opposed the motion to compel arbitration on the ground Brentwood Homes waived the right to assert the affirmative defense due to its delay in responding to discovery requests. Regarding the merits, Bradley claimed the arbitration clause in the Agreement did not satisfy the statutory requirements of the UAA as it was not on the first page of the Agreement and was not identified by capital letters and underlining. Alternatively, Bradley asserted the Agreement was not subject to the FAA because it was "just a general contract to purchase and sell the home" and, thus, did not involve interstate commerce. Bradley objected to Brentwood Homes' reliance on Terry's affidavit to support its claim that the transaction involved interstate commerce as Terry had no direct involvement with the home purchase. At the conclusion of the hearing, the court orally denied the motion to stay the proceedings and compel arbitration.

By written order, the court found the Agreement did not comply with the statutory requirements of the UAA. In turn, the court assessed whether the Agreement was subject to the FAA. In making this determination, the court considered the terms of the Agreement, the pleadings and motions, the affidavits and accompanying documents, and the arguments of counsel. The court found the Agreement "does not refer to equipment and materials to be furnished from outside the state of South Carolina, nor does it list any subcontractors which were outside the confines of this state." The court also discounted Terry's affidavit based on

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[6] Section 14C of the Agreement provides that the "2-10 HBW Warranty includes a provision requiring all disputes that arise under the 2-10 HBW Warranty to be submitted to binding arbitration."

[7] Terry later became President of Brentwood Homes, but resigned from this position in May 2009.

discovery responses, which indicated that Terry did not deal directly with Bradley. Ultimately, the court held the Agreement was not subject to the FAA as Brentwood Homes had "not submitted sufficient evidence to demonstrate that the transaction between [Bradley and Brentwood Homes] involved interstate commerce."

Brentwood Homes appealed the order to the Court of Appeals. This Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

## II. Discussion

### A.

We begin our analysis with a general discussion of our appellate courts' interpretation and application of the FAA.

"Arbitrability determinations are subject to *de novo* review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

Brentwood Homes concedes the Agreement does not meet the technical requirements of section 15-48-10(a) of the UAA as the arbitration provision is not underlined and does not appear on the first page of the contract. This concession, however, is not dispositive. Because an application of the South Carolina law would have rendered the parties' arbitration agreement completely unenforceable, consideration of the applicability of the FAA is required. The FAA is intended to ensure that arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) ("[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (quoting AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011))); Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (stating that "the federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate").

Thus, although the parties were free to agree that our state arbitration act would apply, the FAA would preempt an application of our state law to the extent it invalidated the arbitration agreement, if interstate commerce is involved. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539 n. 2, 542 S.E.2d 360, 363 n. 2 (2001) ("State law was therefore preempted *to the extent it would have invalidated the arbitration agreement.* The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved." (second emphasis added)); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that FAA displaced South Carolina notice-requirement statute, which would have precluded arbitration, where parties agreed to arbitration and the transaction involved interstate commerce).

The FAA provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Therefore, in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign. 2 S.C. Jur. Arbitration § 6 (Supp. 2012) ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated must be governed by state law. To activate application of the federal act, the commerce involved in the contract must be interstate or foreign.").

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003) (quoting Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219,

236 (1948)). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." Zabinski, 346 S.C. at 591, 553 S.E.2d at 115-16 (citing Volt, 489 U.S. at 478).

"To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Id. at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved"). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999).

**B.**

As an initial matter, Brentwood Homes takes issue with the circuit court's decision regarding Terry's affidavit. Specifically, Brentwood Homes contends that the court did not consider Terry's affidavit. We find this contention to be without merit as the court did in fact consider Terry's affidavit as it noted in the order that it reviewed "the affidavits submitted at [the] hearing and attachments thereto."

**C.**

Turning to our assessment of whether the transaction involved interstate commerce, we must examine the terms of the Agreement, the Complaint, and the surrounding facts, which includes the affidavits of Terry and Bradley as well as accompanying financial documentation.

Based on this evidence, Brentwood Homes claims it established that the arbitration provision in the Agreement is enforceable under the FAA as the transaction involved interstate commerce. In support of this claim, Brentwood Homes relies on the following: (1) the terms of the Agreement, which specify that a national warranty company will be used to provide a structural warranty for Bradley's home and that any claims under the warranty will be submitted to an office in Georgia; (2) Terry's affidavit, which establishes that Bradley's residence was constructed using materials, subcontractors, and suppliers from outside of

South Carolina; and (3) Bradley's affidavit, which indicates that he received financing for the home purchase from a North Carolina lender.

The analysis of this issue necessarily involves a discussion of the historical intrastate character of real estate transactions. Beginning in 1994, this Court recognized the unique nature of real estate transactions when it issued its decision in Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), overruled on other grounds by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001) (overruling Mathews "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied"). In Mathews, this Court held that interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender. Id. at 407, 440 S.E.2d at 881. In so ruling, the Court found the transaction was outside the scope of the FAA because it was "unable to discern from the evidence presented whether the contract *required* respondent to administer anything related to interstate commerce." Id. at 407, 440 S.E.2d at 882.

This Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction. See Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18 ("The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.").

Because the precise question presented in the instant case has not yet been addressed by our appellate courts, we have looked to other jurisdictions for guidance. We find the case of Saneii v. Robards, 289 F. Supp. 2d 855 (W.D. Ky. 2003) to be instructive. In Saneii, the purchasers of a home in Kentucky brought a claim alleging the home vendors fraudulently induced them into the contract to purchase the home by misrepresenting and concealing defects. Id. at 857. The sales and purchase agreement contained a binding arbitration clause generally used by the Kentucky Real Estate Commission. Id. The purchasers argued that the arbitration clause was not enforceable under Kentucky law, which excludes from arbitration issues involving a determination of whether the making of the agreement itself involved fraud. Id. at 858. The district court was left to determine whether the FAA preempted this state law. Id. Specifically, the court considered whether the contract for the sale of residential real estate is '"a transaction involving interstate commerce' within the meaning of § 2 of the FAA." Id.

Ultimately, the court concluded that "a residential real estate sales contract does not evidence or involve interstate commerce." Id. at 860. In reaching this conclusion, the court explained:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity--the land--which is firmly planted in one particular state. The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. All of the legal relationships concerning the land are bound by state law principles. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.
>
> To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.

Id. at 858-59 (footnote omitted); see also Garrison v. Palmas Del Mar Homeowners Ass'n, 538 F. Supp. 2d 468, 473 (D. P.R. 2008) (discussing Mathews and Saneii and stating, "The FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers.").

Applying the above-outlined principles to the facts of the instant case, we find the circuit court correctly determined that the Agreement was not subject to the FAA. We agree with the circuit court's conclusion that Brentwood Homes failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate.

Initially, as its title reflects, the Home Purchase Agreement specifically provides that Bradley agreed to purchase a completed dwelling rather than contract for the construction of a dwelling. Notably, the provisions of the Agreement providing for "New Construction," "House Plan," "Options," and "Color Selection," are eliminated as "N/A" and were not signed by Bradley. Therefore, we find Terry's affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling.[8]

Furthermore, neither the inclusion of the national warranty nor Bradley's use of out-of-state financing converted the intrastate transaction into one involving interstate commerce. Significantly, Bradley did not name the national warranty company as a defendant in his lawsuit as his claims involved fraud, negligence, and breach of an implied warranty and not a claim under the 2-10 HBW Warranty. Bradley's use of a North Carolina branch of JPMorgan Chase Bank & Co., a national financial institution, also did not bring the sale of the home within interstate commerce as the use of this lender was tangential to the performance of the Agreement. See Saneii, 289 F. Supp. 2d at 859 n.3 (noting that the "tangential effect" of a home buyer obtaining financing from a bank, which happened to participate interstate commerce, was not enough to bring the sale of a home within interstate commerce and the FAA).

Finally, if the utilization of out-of-state financing or a national warranty was sufficient to constitute interstate commerce, then every transaction that involved

[8] We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA. See, e.g., Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

these ancillary factors would be subject to the FAA. We believe a decision to this effect would eviscerate the well-established real estate exception to the FAA.

Based on the foregoing, we conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.[9]

## III. Conclusion

Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve intrastate commerce. Furthermore, the existence of the national warranty and Bradley's use of out-of-state financing did not negate the intrastate nature of the transaction. Accordingly, we affirm the circuit court's order denying Brentwood Homes' motion to stay the proceedings and compel arbitration as Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.

**AFFIRMED.**

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

[9] In light of our holding, we need not address Bradley's argument that Brentwood Homes waived its right to assert its claim for arbitration. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Allegro, Inc., Respondent,

v.

Emmett J. Scully, Synergetic, Inc., George C. Corbin and Yvonne Yarborough, Appellants.

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

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Opinion No. 4997
Heard December 15, 2011 – Filed July 11, 2012

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**REVERSED AND REMANDED**

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Amy L. Gaffney, C. Mitchell Brown, William C. Wood, Jr., Brian P. Crotty, and A. Mattison Bogan, all of Columbia, for Appellants.

Robert L. Widener and Richard J. Morgan, both of Columbia, for Respondent.

**LOCKEMY, J.:** In this civil action, Emmett Scully, Synergetic, Inc. (Synergetic), George Corbin, and Yvonne Yarborough (collectively, Appellants) contend the trial court erred in (1) reforming the jury's damages verdicts without providing the option of a new trial; (2) failing to require an election of remedies; (3) admitting into evidence the order granting a temporary injunction; (4) admitting into evidence Allegro, Inc.'s (Allegro) expert report; (5) certifying Daniel McHenry as an expert; (6) excluding evidence relating to the issue of Allegro's damages; and (7) failing to grant motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation. We reverse and remand.

## FACTS

Allegro is a professional employer organization ("PEO") that was formed in the late 1990s by its initial owner, Mary Etta McCarthy. A PEO provides human resource services for companies wanting to outsource that function. Scully joined Allegro in August of 1998 as president and a member of its board of directors. He was also given thirty percent of Allegro's stock. The remaining directors consisted of Allegro's majority owner, McCarthy, and one of Allegro's clients, Frank Brown. Between 1998 and 2001, Scully's ownership interest in Allegro increased to forty-nine percent, with McCarthy owning the remaining fifty-one percent.

There was no written employment contract or non-compete agreement between Allegro and Scully. Furthermore, Allegro did not have an employee handbook that was issued to or utilized by Allegro's employees. However, there was a Partnership/Buy-Sell Agreement negotiated by Scully and McCarthy at the time Scully joined Allegro which governed the percentage and change in ownership of Allegro.[1]

McCarthy was actively involved in Allegro's management until Scully joined and took over the day-to-day operations. Scully testified that as president, he was entrusted with managing the operations in the best interest

[1] Brown was not a party to this agreement.

of Allegro along with financial oversight of the company. Beginning in late 2002 or early 2003, Scully expressed his frustration about the business to his friend, Corbin, who was also a certified public accountant (CPA). In addition to being Scully's personal friend, Corbin's company, Merritt, was a client of Allegro. Corbin advised Scully of three ways to deal with the situation: (1) Scully could buy out McCarthy; (2) McCarthy could buy out Scully; or (3) Scully could start his own business. Scully then consulted with Corbin about how to make an offer to purchase McCarthy's interest in Allegro. In March of 2003, Corbin issued a letter to Scully outlining three approaches for determining a fair purchase price for McCarthy's shares in Allegro. In closing, Corbin stated:

> The overall issue here is that something needs to happen. The ongoing tension between you and Mary Etta is obvious. That has to be tiring for both of you. It is also probably obvious to employees. Either way, it is not healthy for the business. The business has a better chance of success without that tension. If one of you has to sell out to relieve it, then that is what needs to happen.

In the spring of 2003, Scully informed McCarthy that he wanted to purchase her ownership interest in Allegro. Scully also discussed his proposal with Allegro's third director, Brown. During his conversation with Brown, Scully informed Brown that if he could not purchase McCarthy's shares, he would set up his own PEO business. Over the course of a series of discussions with McCarthy in 2003, Scully told her that if they could not agree upon a price at which she would sell her ownership interest in Allegro, he would leave the company and form a competing company, taking employees and clients with him. In response to these conversations, McCarthy suggested they have Allegro valued to determine the price of her interest. After McCarthy hired the Geneva Corporation (Geneva) to conduct a valuation study, Corbin reviewed the study and provided feedback to Scully at Scully's request.

On December 24, 2003, McCarthy received a letter from Scully offering to purchase her shares, setting forth two options as to the purchase

price, and asking for her response by January 23, 2004. Prior to sending McCarthy the offer, Scully had asked Corbin to review it and Corbin advised that it was a fair offer. McCarthy received a subsequent letter from Scully on January 23, 2004, restating his offer. On January 29, 2004, McCarthy responded with a written counteroffer. Scully replied in a February 2, 2004 letter, stating, "if we are unable to come to terms the result is a lose, lose, lose for everyone involved. If I leave Allegro and start a new PEO we will be in competition for the same customers and employees."

Having failed to reach an agreement regarding the purchase of Allegro, Scully gave his letter of resignation to McCarthy on February 16, 2004. McCarthy then told Scully she would accept his last offer to purchase her ownership interest in Allegro. They agreed her lawyers would draw up the necessary paperwork by the end of that week. After that conversation, Scully left town on a business trip for Allegro. While Scully was out of town, McCarthy decided she did not want to sell her ownership interest after all and focused her efforts on retaining Allegro. During Scully's absence, McCarthy met with Jim Everly, whom she hired to replace Scully as Allegro's president. McCarthy met with Scully on February 23, 2004, and presented Scully with a letter accepting his resignation. Immediately following Scully's departure from the company, McCarthy and Everly held a meeting with all Allegro employees during which time they were told they must sign non-compete contracts. Yarborough was an employee of Allegro from 2000 until 2004. At the meeting with McCarthy and Everly, Yarborough and another employee, Lisa Milliken, refused to sign the non-compete contracts.

McCarthy and Everly contacted all of Allegro's clients to inform them Scully was no longer employed by Allegro and made arrangements to meet with each client. They first met with Corbin of Merritt, who told them that due to his personal friendship with Scully, Merritt's business would likely go to Scully's new company, Synergetic. Pursuant to Merritt's contract with Allegro, Corbin sent a thirty day notice in the form of a letter on February 27, 2004, announcing its termination of their contract as of March 31, 2004. Letters from other clients terminating their contracts with Allegro shortly followed.

After his departure from Allegro, Scully formed his new company, Synergetic. On March 1, 2004, Yarborough resigned as an employee of Allegro and began working for Synergetic on March 2, 2004. Millikin also resigned from her position with Allegro on March 1, 2004, and subsequently became an employee of Synergetic.

On April 15, 2004, Allegro initiated this action by filing a complaint against Scully, Yarborough, Corbin, and Synergetic. On that same date, Allegro filed a motion for a temporary injunction, seeking to enjoin Scully, Yarborough, and Synergetic from soliciting business from Allegro's clients. That motion was granted in an eleven page order after a hearing on October 14, 2004.

At the close of Allegro's case, as well as at the close of all evidence, both sides moved for directed verdicts. These motions were denied. The trial court then submitted to the jury eleven of the claims asserted by Allegro.[2] Nine of the claims applied to Scully alone,[3] one claim applied to Yarborough alone,[4] and one claim applied jointly to Scully, Yarborough, and Corbin.[5] The jury's special verdict form listed each of the eleven causes of action and asked two questions for each charge: (1) whether the plaintiff had proven that claim; and (2) if the claim had been proven, the amount of actual damages and punitive damages (where appropriate) the jury awarded as to each claim.

During deliberations, the jury sent a question to the trial court asking whether they should list the damages specific to each cause of action

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[2] Allegro acknowledges no claims against Synergetic, Inc. were submitted to the jury; Synergetic joins this appeal because the issue was not addressed in the trial court's orders denying the Appellants' post-trial motions.

[3] Scully was the sole defendant on charges of breach of contract, breach of contract with fraudulent intent, fraud, negligent misrepresentation, breach of fiduciary duty, breach of duty of loyalty, gross negligence, violation of section 33-8-310 of the South Carolina Code, and violation of section 33-8-420(a) of the South Carolina Code.

[4] Yarborough was the sole defendant on one breach of loyalty charge.

[5] Scully, Yarborough, and Corbin were jointly charged with civil conspiracy.

individually, or place the overall total amount the jury decided to award. In discussing the verdict with the foreperson, using apples as the hypothetical award, the trial court stated, "You give a certain number of apples for each cause of action. And that's all you are worried about. And there are some law related matters that I will take care of as a Judge . . . ." The foreperson stated she understood the concept, and the trial court continued:

> So, for each cause of action depends on the breach of duty or [contract or] whatever you may find give a number, assign a value that you have been -- if the [p]laintiff's have [proven] to you by the greater weight of preponderance of evidence they are entitled to two apples on this one or three on that one or four on that one, that's the way you do it and don't worry about the total.[6]

The jury returned a verdict for Allegro on all eleven causes of action. The jury awarded actual damages in the amount of $160,000 for each of the causes of action. Furthermore, the jury awarded $75,000 in punitive damages on the breach of loyalty claim against Yarborough, and $175,000 in punitive damages on the civil conspiracy claim against Scully, Yarborough, and Corbin jointly. The jury's verdict form shows that an award of $1,760,000 had initially been entered in the designated space for actual damages for the first cause of action, but it was struck through and replaced with $160,000.

Once the jury verdict was announced, the foreperson was questioned as to the total number of "apples" they intended to award Allegro, and their response was $1,760,000. The court then asked "What about punitive damages in terms of the total number of apples you wanted to give to [Allegro]?" The foreperson said the jury wanted to give $250,000 total to Allegro. The court finally stated, "We can add it up but your mathematician says it was the intent of this jury to award [Allegro] $2,010,000," to which

[6] It is unclear whether the trial court addressed the issue of the jury's verdict solely with the foreperson, or in the presence of the entire jury. This court strongly warns the trial bench of the danger of interacting with only the foreperson on substantive matters.

the foreperson agreed. As a final review, the trial court said, "Actual damage 1.7 million and the remainder of that sum is punitive damages totaling in the amount of $2,010,000." Subsequently, no change was made to the verdict form by either the jury or the judge and no change was requested by Allegro.

The trial court completed a Form 4 order, which stated the total amount of actual and punitive damages and their grand total of $2,010,000. The Form 4 order did not state that these amounts applied to all, or any, of the individual Appellants, but the special verdict form was attached showing the specific damages awards. Further, the Form 4 order gave no indication that the jury's verdict, as stated on the special verdict form, had been changed, altered, or modified in any way.

In their post-trial motions, Appellants moved for an election of remedies and asserted grounds for JNOV and a new trial. On July 14, 2008, the trial court denied all of Appellants' post-trial motions.[7] In denying the motion for an election of remedies, the trial court stated:

> Based upon the verdict form and the conversations with the jury before and after its verdict, I am convinced the jury intended to award $1.76 Million Dollars in actual damages for each cause of action, and that it intended to award $250,000 in punitive damages on the two causes of action. I am further convinced that the jury's apportionment of the verdict amongst the various causes of action does not reflect a finding that the Plaintiff suffered only $160,000.00 in actual damages. Thus, entering judgment for the Plaintiff in the total amount of $1.76 Million Dollars in actual damages and $250,000.00 in punitive damages does not give rise to a double recovery.

On July 23, 2008, Appellants filed a motion to amend and/or set aside the July 14, 2008 order. This motion was also denied in an order by the trial

[7] Prior to this order, Appellants submitted their objections to the proposed order.

court on April 5, 2010.[8] The trial court stated that in its May 5, 2006 Form 4 order, it reformed the jury's verdict, changing it from eleven separate actual damages awards of $160,000 and two punitive damages awards of $75,000 and $175,000, which resulted in different totals against different defendants, to one total verdict of $2,010,000 against all the defendants. The trial court further stated any issue regarding this "reformation" of the jury's verdict not being coupled with the option of a new trial was waived because the issue "was not raised in Defendants' post-trial motions."

## ISSUES ON APPEAL

1. Did the trial court err in admitting the order granting a preliminary injunction to Allegro into evidence?

2. Did the trial court err in admitting McHenry's report into evidence?

3. Did the trial court err in qualifying McHenry as an expert in the field of "damages"?

4. Did the trial court err in excluding evidence that Appellants allege was relevant to the issue of Allegro's damages as well as Allegro's failure to mitigate those damages?

5. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to civil conspiracy?

6. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the contract claims?

7. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the fraud and negligent misrepresentation claims?

8. Did the trial court err in reforming the jury verdict?

9. Did the trial court err in not requiring an election of remedies?

[8] The Appellants objected to the 2010 order prior to its entry as well.

## LAW/ANALYSIS

### I. Evidentiary Errors

"'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.'" State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011) (quoting State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law.'" Id. at 444, 710 S.E.2d at 58 (quoting State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id.

#### a. Preliminary Injunction Order

Appellants argue the trial court erred in admitting the temporary injunction order into evidence. We agree.

First, we will address the threshold issue of preservation. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved. Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993) (holding a request that a voir dire question regarding insurance coverage "not be charged" was sufficient to preserve the issue, because even though specific grounds were not stated, the grounds were patent because the voir dire question was so inherently prejudicial).

We will examine whether a preliminary injunction order is inherently prejudicial, thus making the grounds of the objection to its admittance patent. An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. Cnty. of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); see Transcontinental Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and "when other issues are brought to trial, they are determined without reference to the temporary injunction." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing Alston v. Limehouse, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders")). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. Powell v. Immanuel Baptist Church, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

In the case at bar, the order included approximately four and a half pages of "Findings of Fact" by the trial court, as well as this statement by the trial court:

> The Court carefully considered the pleadings, documents, and argument of counsel at a hearing . . . and finds that despite Defendants' denials of wrongdoing, there is sufficient evidence to indicate

> that the Defendants were engaged in the activities alleged by the Plaintiff.

After Appellants' objection to the admission of the preliminary injunction order, the trial court stated, "I think subject to your earlier objection, is that fair enough, that I've already ruled upon?" The Appellants concurred with the trial court, and the trial court continued, stating, "Very well. We might go into a little more detail later but it is over your objection."

It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. While Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction was inherently prejudicial, and thus, the grounds for the objection were patent. See Dunn, 311 S.C. at 43-47, 426 S.E.2d at 757-58. We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the charges. The trial court abused its discretion in admitting the order into evidence. Thus, we reverse and remand in accordance with this decision.

**b. McHenry's Expert Report**

Appellants argue McHenry's written report and its attachments were cumulative of his subsequent testimony and contained impermissible and highly prejudicial hearsay, making its admission into evidence reversible error. We agree to the extent that the written report included the preliminary injunction order, but find the remainder of the testimony did not prejudice Appellants.

"Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence." Wright v. Hiester Const. Co., 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing Jones v. Doe, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006). However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence. Jones, 372 S.C. at 62-63, 640 S.E.2d at 519.

As stated previously, for an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

At trial, Appellants objected to McHenry's report after Allegro moved to put it into evidence. The Appellants stated, "Same objection," purportedly in reference to a previous objection on the record that was based on matters discussed in camera. While the in camera discussion was either not placed on the record or not given to us in the record on appeal, the trial court's 2008 order states,

> I overruled this general objection which was insufficient as a matter of law to present any objection, upon the ground that experts are permitted to base their opinion on hearsay if it is the type generally relied upon by experts. The Defendants never objected that the hearsay, to the extent there was any, was not this permissible type of hearsay.

In light of the trial court's 2008 order, it is apparent the objection was a general hearsay objection. In their 2006 post-trial motion, the Appellants objected again to the admission of McHenry's report "because this report was cumulative of his testimony, contained impermissible hearsay, and contained matters that were irrelevant and which served only to unfairly prejudice Defendants, confuse the issues, and mislead the jury." They further stated the report contained a document that gave "a purported timeline replete with multiple layers of impermissible hearsay, self-serving statements, conclusions of fact and law, Plaintiff's own opinions, and references to impermissible damages such as Plaintiff's litigation costs and attorneys' fees in this action."

We believe the specific issue of impermissible hearsay in the expert's report is preserved for appellate review, as the issue was raised with sufficient specificity, and ruled upon by the trial court. See S.C. Dep't of

Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity). There is nothing in the record on appeal that indicates the trial objection included arguments that the report was cumulative and contained matters that were irrelevant; thus, we find those issues are not preserved for our review. See McCall v. IKON, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (holding that the appellant has the burden of providing a record sufficient for appellate review).

Here, McHenry was allowed to rely on hearsay in his report when giving his expert opinion. However, the admission of the report itself simply because McHenry used it in forming his expert opinion was in error. The report contained many instances of hearsay, including numerous statements by Scully. However, "the admission in evidence of inadmissible hearsay affords no basis for reversal where the out-of-court declarant later testifies at trial and is available for cross-examination." Clark v. Ross, 284 S.C. 543, 551, 328 S.E.2d 91, 97 (Ct. App. 1985), abrogated by Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, we do not find any of the remaining impermissible hearsay to be reversible error.

We address the fact that a copy of the temporary injunction order was attached to the report, which we find highly prejudicial to the Appellants. We found admission of the temporary injunction order was improper, and it was error to admit it with the expert's report as well. We find that portion of the expert's report to be highly prejudicial; thus, we reverse the decision of the trial court to the extent it allowed the temporary injunction order into the record.

**c. Exclusion of Damages Evidence and McHenry's Qualification**

Because we reverse and remand based upon the above evidentiary issues, we need not reach Appellants' remaining evidentiary arguments regarding the trial court's exclusion of damages evidence and McHenry's qualification as an expert. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court

need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## II. Remaining Arguments

Appellants contend the trial court should have granted their motions for directed verdict and JNOV on their civil conspiracy claim, their contract claims, and their misrepresentation claims. Further, they contend the trial court erred in reforming the jury's verdict when the trial court should have either required an election of remedies based upon the jury's verdict or granted a new trial nisi additur.[9] Again, because we reverse the trial court on the issues noted above, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## CONCLUSION

Based on the foregoing reasons, the trial court's decision is

**REVERSED AND REMANDED.**

**HUFF and PIEPER, JJ., concur.**

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[9] We reiterate that we do not approve the practice of asking a question or responding only to the foreperson regarding a substantive issue about the law or the verdict. When a question arises regarding the law or the verdict form, the better practice is to confer with counsel outside the presence of the jury to discuss the proper response, and then instruct the entire jury in court or in writing and return them to the jury room to act in accordance with the court's instructions. See Keeter v. Alpine Towers Int'l, Inc., Op. No. 4995 (S.C. Ct. App. filed June 27, 2012) (Shearouse Adv. Sh. No. 22 at 73, 90-91) (Thomas, J., concurring) (providing the best practice to ensure a valid verdict is for the court to address any questions that arise in front of the entire jury). If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused. Id.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

D. R. Horton, Inc., Plaintiff,

v.

Wescott Land Company, LLC, Defendant,

_____

Thomas R. Hawkins and
Wescott Land Company, LLC, Appellants,

v.

D. R. Horton, Inc., Respondent.

_____

Appeal From Dorchester County
James C. Williams, Jr., Circuit Court Judge

_____

Opinion No. 4998
Heard December 8, 2011 – Filed July 11, 2012

## AFFIRMED

M. Dawes Cooke, Jr., and K. Michael Barfield, of Charleston, for Appellants.

Charles E. Carpenter, Jr., and Carmen Vaughn Ganjehsani, of Columbia, and Neil S. Haldrup, of Charleston, for Respondent.

**HUFF, J.:** D.R. Horton, Inc. (Horton) brought this action against Wescott Land Company, LLC (Wescott) for breach of contract. Wescott counterclaimed against Horton asserting claims of breach of contract, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, tortious interference with prospective economic advantage, and slander of title. Wescott's primary owner, Thomas R. Hawkins (Hawkins), was added as a counterclaimant, asserting the same claims against Horton. With the exception of the claim for breach of contract, the trial court granted Horton summary judgment on all of Wescott's counterclaims, and granted Horton summary judgment on all of Hawkins' counterclaims, including that of breach of contract. On appeal, Wescott and Hawkins (collectively hereinafter referred to as Appellants) assert error in the grant of summary judgment in favor of Horton on the claims for slander of title, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective contractual relations. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

This appeal arises out of a contract for the conveyance of real property. In the early 1980's, Hawkins purchased approximately 400 acres of realty in

Dorchester County. Hawkins sold around twenty-six acres of the property to another individual, and thereafter entered into a series of contracts with Horton for the sale of most, if not all, of the remaining acres. Horton purchased all but the last forty-plus acres in "individual chunks" from Hawkins. Thereafter, Hawkins, along with Tim Fraylick and Cliff Rickard, formed Wescott to develop and sell this remaining acreage to Horton.

In November 2004, Horton and Wescott entered into a contract whereby Horton agreed to buy, and Wescott agreed to sell, the property, consisting of 83 single family lots and 110 townhouse lots. The purchase and sale of the property was to be accomplished pursuant to a "Takedown Schedule," wherein set numbers of lots would be purchased over a period of sixteen quarters, with the single family lots being purchased quarter one through eight, and the townhouse lots to be purchased from quarter seven through sixteen.[1] Under the agreement, Wescott was required to meet certain conditions precedent pertaining to development of the lots and to provide documentation and certification of these conditions precedent prior to closing on the lots. The contract further provided that Horton was not obligated to purchase any lots which had not achieved "Substantial Completion," and stated "'Substantial Completion' shall be achieved upon the date [Horton] receives [Wescott's] notice [regarding the meeting of the conditions precedent] accompanied by evidence satisfactory to [Horton], in [Horton's] reasonable discretion that said requirements have been met." Additionally, the contract stated that if "Substantial Completion" had not been achieved by six months past the estimated date in the "Takedown Schedule" with regard to any lot to be purchased, Horton had the right, in its sole discretion, to either terminate the contract or extend the date for achievement of "Substantial Completion." Horton could also, in its sole discretion, elect to purchase lots prior to the achievement of "Substantial Completion," but Wescott would still be obligated to achieve "Substantial Completion" and Horton's election to purchase prior to "Substantial Completion" did not constitute a waiver of that obligation.

[1]The contract also recognized that lots could be purchased in excess of the required number per the schedule, but those lots purchased in excess would be credited in successive time frames.

Subsequently, in July 2005, Wescott and Horton executed an amendment to the November 2004 contract, further specifying the duties and responsibilities of the parties to the development of the property and the time period for the purchase and sale of the property. Pursuant to the amendment, a new takedown schedule provided for the sale of the lots as follows:

a. Phase 3A (45 lots) on or before the later of July 1, 2005 or upon final plat approval and recordation. 45 lots @ $32,000/lot = $1,440,000.00
b. Phase 3D (38 lots) on or before the later of October 1, 2005 or upon final plat approval and recordation. 38 lots @ $32,000/lot = $1,216,000.00
c. Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation. 37 lots @ $25,500/lot = $943,500.00
d. Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation. 23 lots @ $25,500/lot = $586,500.00 and 14 lots @ $24,500/lot = $343,000.00
e. Phase 3E-3 (36 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation. 36 lots @ $24,500/lot = $882,000.00

The amendment further added a stipulation that Wescott agreed to provide the conditions precedent documents and certifications set forth in the parties' contract twenty days prior to the closing date, in order to give Horton sufficient time to verify the documentation, inspect the property, and conduct final examinations to prepare for closing.

Horton closed on the lots in Phase 3A and Phase 3D, which apparently encompassed the 83 single family lots, and those matters are not in issue. However, a dispute arose in regard to the 110 townhouse lots in Phase 3E-1, 3E-2 and 3E-3. On July 19, 2006, Wescott sent Horton a letter in regard to Phase 3E indicating the conditions precedent required by the contract had been completed so that the twenty day period under the contract had begun

running, and requesting to schedule a closing for the entire phase as soon as possible. On August 2, 2006, Wescott's attorney, Steven Smith, sent Horton a letter stating the conditions precedent had been satisfied and proof was provided to Horton on July 19, 2006, and therefore requested that closing on the properties take place no later than August 9, 2006. The letter further warned that failure to close by that date would constitute a default under the contract and amendment. On August 10, 2006, Smith again wrote Horton on behalf of Wescott stating that the conditions precedent documents and certification were delivered to Horton on July 19, 2006, a notice of completion was hand delivered to Horton on August 2, 2006 stating all lots must be closed no later than August 9, 2006, and notifying Horton it was in default for failure to close pursuant to the terms of the contract and amendment.

Horton responded to this letter on August 11, 2006 maintaining the conditions precedent to closing were not satisfied as to the townhouse lots until August 9, 2006, that the last of the documentation and certification for those lots was not received until August 10, 2006, and therefore, given the twenty days Horton was allowed under the contract, Horton could not be in default "until August 31, 2006 at the earliest." Horton further asserted the contract, as amended, contemplated the purchase and sale of the townhouse lots in three, separate, quarterly takedowns. Horton therefore indicated it would close on thirty-seven townhouse lots on August 31, 2006, would purchase a like number of them on November 30, 2006, and would close on the remaining lots on February 28, 2007. Horton proposed the parties execute a second amended contract, which would establish the new takedown schedule.

On August 18, 2006, Horton sent Smith a draft of the proposed "Second Amendment," setting forth a new schedule with Phase 3E-1 to close on or before September 5, 2006, 3E-2 to close on or before December 5. 2006, and 3E-3 to close on or before March 6, 2007. On September 13, 2006, Mitchell Flannery, from Horton, sent Tim Fraylick, with Wescott, an e-mail attaching the proposed "Second Amendment," and indicating it had "36 units funded for takedown 1" and agreeing to "take 40 units down the 2nd

phase and 36 the last." Horton also discussed the possibility of shrinking the takedown to "2 months apart rather than 3 months apart with the first closing immediately." On September 18, 2006, Flannery sent Fraylick another e-mail, stating the parties needed to close on the funded units in the next few weeks, or he would have to "send the money back to corporate." Flannery indicated "[t]o give a little," he proposed they "shrink the takedown over 2 months rather than 3," and stated, "If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." Another proposed "Second Amendment" was attached to the e-mail, this one setting forth closing dates for the three phases of October 5, 2006, December 5, 2006, and February 6, 2007.

On October 16, 2006, Horton's attorney, Michael Shetterly, wrote Wescott's attorney, Smith, referencing their conversation of October 11, 2006, and stating Wescott had not complied with the conditions precedent requirements set forth in the parties' contract as amended. In particular, Shetterly indicated that subparts (i) and (j) of paragraph 15 had not been met inasmuch as there was no evidence under subpart (i) of erosion control in place, and Horton had not seen any "sign-off" from a governmental entity showing erosion control had been erected, and no street lights had been installed pursuant to subpart (j). Shetterly stated Horton offered to forgive the remaining conditions precedent and assume the conditions precedent as Horton's obligations in exchange for a reasonable takedown schedule in three phases, beginning in October and concluding in February.

On November 6, 2006, Wescott received an offer from a third party, KB Homes, to purchase the property in question, proposing KB Homes buy the lots for $30,000 a piece with closings to occur on a quarterly basis. On November 29, 2006, KB Homes made another offer, proposing a price of $30,000 for the first 37 lots, $32,500 for the second takedown of 37 lots, and $33,500 for the third takedown of 36 lots, with the lots to be purchased over a six month period.[2] Wescott declined the offers from KB Homes because of

[2] Both proposed purchase prices from KB Homes exceeded the amounts Horton was to pay for the lots under the amendment to the contract.

concern over the contract with Horton and the fear that it would confuse the matter.

On December 4, 2006, Horton filed a lis pendens on the property in Phase 3E, naming Wescott as the defendant; however, this lis pendens expired prior to Horton filing any action to perfect the lis pendens. On December 21, 2006, Wescott conveyed the property in question to Hawkins.[3]

Negotiations continued between the parties. On December 27, 2006, Flannery sent Fraylick an e-mail referencing a meeting between the parties on the 21st, and providing a list of matters Horton required Wescott to rectify onsite within a few weeks of closing, in exchange for which Horton agreed to pay $30,000 per unit and close as soon as possible. Included within the list of requirements was "the pads to be shaped back into their original condition and make sure that the pads are 95% compacted at 2,000 psf," and that Wescott provide Horton with "compaction letters." On January 12, 2007, Horton's attorney sent Wescott's attorney another proposed "Second Amendment" for Wescott's consideration. This amendment contained many provisions the earlier proposed amendments had not, including the requirement mentioned in the December 27 e-mail that Wescott, within two weeks after closing, make each of the 110 lots graded flat and constructed at ninety-five percent compaction with compaction of 2000 psf. Under this amendment, Horton agreed to waive any right to have a phased takedown, and agreed to purchase the property in its entirety on or before February 2, 2006. On January 16, 2007, Wescott's attorney sent Horton's attorney an amended version of Horton's latest proposal. Wescott's amendment made some changes to the purchase price and escrow amounts, and completely deleted Horton's proposal concerning grading and compaction. On January 26, 2007, Horton's attorney sent Wescott's attorney yet another proposed amendment, adding back the provision regarding grading and compaction. Wescott's attorney responded to this e-mail on January 30, 2007, proclaiming, "This is not at all what we agreed to," and asking to be

[3] There is no indication Hawkins or Wescott ever informed Horton of this transfer, and Horton continued negotiations with Wescott until it filed this action against Wescott in February 2007.

contacted. Horton's attorney replied, indicating he would call to discuss Wescott's complaints with the proposed amendment. On January 31, 2007, Horton's attorney sent Wescott's attorney an e-mail stating Horton was adamant that the compaction matter remain in the proposed amendment.

Wescott's attorney testified he thought the reason Wescott did not agree to Horton's latest amendment was because of the compaction issue, as Wescott believed "compaction [had] already been done." Wescott's attorney appeared for closing on February 2, 2007, but no representatives from Horton appeared. Wescott's attorney then contacted Horton's attorney, who informed Wescott they were not closing because they had not worked out all the details, and the compaction matter was still an issue. Wescott's attorney acknowledged that Horton's attorney made it clear in this conversation that, all along, Horton required new compaction testing to show the pads met the conditions precedent to the contract, and that this requirement was not being raised for the first time, but they had discussed it for thirty days.[4]

Following this latest breakdown in negotiations, on February 13, 2007, Horton filed another lis pendens on the property, again naming Wescott as the defendant. This time, Horton followed up with the filing of a breach of contract action against Wescott on February 26, 2007. Around March 5, 2007, KB Homes made another offer to purchase the 110 townhouse lots for an amount even greater than its two previous offers in November 2006. Hawkins testified that the filed lis pendens prevented him from accepting KB Homes' offer. Hawkins further stated that a similar situation occurred with an

[4] In support of its contention that compaction requirements had not been met, Horton submitted an affidavit for the engineer on this project, who stated his company "did not do compaction tests on these lots," but based on his experience and knowledge deterioration of the soils involved could occur due to weather and length of time between the testing reported on May 1, 2006 and the July 19, 2006 date. He further opined that the "upper 1 foot of soils depicted in the evaluations and certifications would not be valid as of July 19, 2006," and the "upper 1 foot of soils would deteriorate and not be valid on July 1, 2006 nor any date thereafter" without additional work effort.

offer from Jessco Homes. This offer likewise included a higher purchase price for the lots.

In April 2009, Horton filed an amended complaint for breach of contract against Wescott, asserting the parties had established a course of performance whereby the property would be developed and conveyed in phases, but in contravention of the course of performance, Wescott developed all the remaining property and demanded simultaneous closing on the property. Horton further alleged that Wescott failed to convey the property within the time required by the contract. Additionally, Horton maintained that Wescott failed to fulfill certain conditions precedent in a timely manner. Horton therefore asserted Wescott breached the contract by demanding performance by Horton prior to the time Wescott met all conditions precedent and after the time allowed in the contract. On April 30, 2009, Wescott filed its answer, and counterclaimed for breach of contract, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, tortious interference with prospective economic advantage, and slander of title. The counterclaim further added Hawkins as a counterclaimant, "as an owner" of the property, asserting that Hawkins conveyed the property to Wescott in June 2005, but the land was to revert back to Hawkins, per the terms of the transfer, should the sale to Horton not occur.

In May 2009, Horton filed a motion for summary judgment on Appellants' counterclaims for slander of title, breach of contract, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective economic advantage. Following a hearing on the matter, the trial court granted summary judgment to Horton on Appellants' counterclaims for slander of title, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective contractual relations. Additionally, the trial court granted summary judgment to Horton on Hawkins' breach of contract counterclaim. This appeal follows.

## ISSUES

1. Whether the trial court erred in entering summary judgment as to Appellants' slander of title claim.

2. Whether the trial court erred in entering summary judgment as to Appellants' unfair trade practices claim.

3. Whether the trial court erred in entering summary judgment as to Appellants' abuse of process claim.

4. Whether the trial court erred in entering summary judgment as to Appellants' malicious prosecution claim.

5. Whether the trial court erred in entering summary judgment as to Appellants' breach of contract accompanied by fraudulent act claim.

6. Whether the trial court erred in entering summary judgment as to Appellants' tortious interference with prospective contractual relations claim.

## STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP when reviewing a grant of summary judgment. Turner v. Milliman, 392 S.C. 116,121-22, 708 S.E.2d 766, 769 (2011). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Id. at 122,

708 S.E.2d at 769. When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. Id. Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. Id.; Rule 56(e), SCRCP.

## LAW/ANALYSIS

### I. Slander of Title

The trial court found Horton was entitled to summary judgment on appellants' slander of title claim noting that, instead of putting forth any facts to establish slander of title, appellants relied on the fact that Horton filed two lis pendens. The trial court determined the filing of these lis pendens, which related to the property dispute giving rise to this action, were absolutely

privileged under South Carolina law, and therefore could not be a basis for establishing a claim for slander of title, citing Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (cert. denied).

Appellants first contend the trial court erred as a matter of law in finding the filing of the lis pendens was absolutely privileged such that a claim for slander of title fails as a matter of law. They argue the trial court gave "far too broad a reading" of the Pond Place decision, and that Pond Place only stands for the proposition that, assuming a lis pendens is properly filed in accordance with the statutory requirements by one who has a colorable claim to the property to which it attaches, and the filing party completes the statutory process by the timely filing of an associated complaint, then the filing of the lis pendens is privileged. Appellants assert Pond Place did not extend a blanket privilege that would encompass an improper lis pendens, and argue that strict compliance with the statutory provisions is required. Thus, Appellants maintain Horton's filing of the lis pendens, the first of which was not timely followed with a complaint, did not comply with the statutory scheme.

In Pond Place, this court addressed the issue of whether the filing of a lis pendens was entitled to absolute privilege. There, Poole, along with others who owned property in a development, filed a declaratory judgment action against Pond Place and others, challenging an amendment to restrictive covenants on the subject property. Id. at 7, 567 S.E.2d at 884. Poole also filed a lis pendens on the property in question. Id. By way of counterclaim, Pond Place filed a cause of action for slander of title against Poole. Id. The trial court granted Pond Place's motion for summary judgment on Poole's declaratory judgment action, finding modification to the restrictive covenants was valid. Id. Thereafter, Pond Place prosecuted its slander of title action. Id. At the close of Pond Place's case, Poole moved for a directed verdict on the slander of title claim arguing the lis pendens was authorized by law, was properly filed, and was absolutely privileged. Id. at 14, 567 S.E.2d at 887. The trial court denied the motion, finding a lis pendens is not absolutely privileged, but is only qualifiedly privileged. Id. The jury returned a verdict against Poole, and Poole appealed, asserting he was entitled to a directed

verdict on the slander of title claim. Id. at 14, 567 S.E.2d at 888. This court reversed, finding the trial court should have granted Poole's motion for directed verdict on the slander of title claim because the filing of a lis pendens is absolutely privileged in South Carolina. Id. at 32, 567 S.E.2d at 897.

This court issued a lengthy opinion discussing the law regarding the filing of a lis pendens, the nature of a slander of title action, and other jurisdictions' treatment of the filing of a lis pendens and whether such an act enjoys a qualified or an absolute privilege. Id. at 16-29, 567 S.E.2d at 889-896. As to the filing of a lis pendens, this court stated as follows:

> The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. A properly filed lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation. Generally, the filing of a lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved.

Id. at 16-17, 567 S.E.2d at 889 (quotations and citations omitted). We further noted section 15-11-10 of our code allows for the filing of a lis pendens not more than twenty days before filing the complaint in an action affecting the title to real property. Id. at 17, 567 S.E.2d 889; S.C. Code Ann. § 15-11-10 (2005). We therefore determined that an action "'affecting the title to real property' clearly allow[ed] the filing of a lis pendens by an interested party in order to protect [the person's] ownership interest in the property subject to the litigation." Id.

In regard to slander of title, we observed that our courts have adopted the following six point test a plaintiff must establish to prove such an action: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Id. at 21-22, 567 S.E.2d at 892. We also noted that "[w]rongfully recording an unfounded

claim against the property of another generally is actionable as slander of title." Id. at 22, 567 S.E.2d at 892 (quoting Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995)).

Finally, as to whether the filing of a lis pendens is privileged, this court noted that "[p]rivileged communications are either absolute or qualified," and that "South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged." Id. at 22 and 23, 567 S.E.2d at 892 and 893. We further stated that the majority of cases from other jurisdictions that have dealt with the question have held that the filing of a lis pendens enjoys the absolute privilege that is accorded to judicial proceedings. Id. at 25, 567 S.E.2d at 893. The rationale set forth by these other jurisdictions is as follows:

> (1) With few exceptions, any publication made in a judicial proceeding enjoys absolute privilege from later charges of defamation.
>
> (2) The sole purpose of recording a notice of lis pendens is to give to prospective buyers constructive notice of the pendency of the proceedings.
>
> (3) The notice of lis pendens is purely incidental to the action wherein it is filed, and refers specifically to such action and has no existence apart from that action.
>
> (4) The recording of a notice of lis pendens is in effect a republication of the proceedings in the action and therefore, it is accorded the same absolute privilege as any other publication incident to the action.

Id. at 25, 567 S.E.2d at 894. In particular, we note this court cited two cases from other jurisdictions that applied the absolute privilege and held (1) since the filing of a lis pendens is incident to the filing of the complaint, if the plaintiff had probable cause to bring the action, then neither of the actions

could be considered slander of title and (2) because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a notice of lis pendens is a part of a judicial proceeding and thus cannot form the basis for an action for libel or slander. Id. at 25-26, 567 S.E.2d at 894 (citing Brough v. Foley, 572 A.2d 63 (R.I. 1990) and Kropp v. Prather, 526 S.W.2d 283, 287 (Tex. Civ. App.1975)). In addressing the reasons behind finding the filing of a lis pendens to be privileged, the court in Pond Place emphasized another jurisdiction's conclusion that the notice of a lis pendens is, in effect, a republication of some of the essential information contained in the complaint filed in the action. Id. at 27-28, 567 S.E.2d at 895 (citing Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of New Jersey, 170 N.J. Super. 491, 406 A.2d 1337, 1339 (Ch. Div. 1979)). Additionally, this court noted the Supreme Court of California held an absolute privilege attaches to a lis pendens "[i]f the publication has a reasonable relation to the action and is permitted by law." Id. at 29, 567 S.E.2d at 896 (citing Albertson v. Raboff, 46 Cal.2d 375, 295 P.2d 405, 409 (Ca. 1956)).

Based upon its thorough analysis, this court held a lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading. Id. at 30, 567 S.E.2d at 896. We also determined, however, that "[a lis pendens] is premised upon and must be filed in time in conjunction with an underlying complaint involving an issue of property." Id. (emphasis added). Ultimately, we concluded as follows:

> We find the filing of a lis pendens is **ABSOLUTELY** privileged in South Carolina. The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens **CANNOT** form the basis of an action for slander of title.

Id. at 32, 567 S.E.2d at 897 (emphasis in original).

Appellants essentially argue that, because Horton did not follow through with the filing of a complaint within twenty days of the filing of the first lis pendens, the first lis pendens was not properly filed in accordance with the statutory requirements and, therefore, was not entitled to absolute privilege pursuant to Pond Place, as it was an improper lis pendens.[5] We disagree.

Although this court noted in Pond Place that a lis pendens is premised upon and "must be filed in time in conjunction with an underlying complaint" involving that property, we do not believe that Horton's failure to file a complaint within twenty days of the initial lis pendens necessarily invalidates the absolute privilege accorded the filing of a lis pendens as provided in Pond Place. Here, it is undisputed that Horton subsequently filed an identical lis pendens and followed that filing with the filing of a complaint involving the same real estate within a twenty day period pursuant to section 15-11-10. As noted, part of the rationale behind allowing absolute privilege to attach to the filing of lis pendens is that the notice of lis pendens is purely incidental to a filed action, and the recording of a notice of lis pendens is, in effect, "a republication of the proceedings in the action," and is therefore afforded the same privilege as any other publication incident to the action. It is simply a republication of some of the essential information contained in the complaint ultimately filed in the action. Although the initial lis pendens was allowed to expire before the twenty day period ran for filing a complaint on the matter, this simply rendered the initial lis pendens invalid. See South Carolina Nat'l

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[5] Section 15-11-10, governing the time of filing notice of lis pendens, provides in part as follows:

> In an action affecting the title to real property the plaintiff (a) not more than twenty days before filing the complaint or at any time afterwards . . . , may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby

S.C. Code Ann. § 15-11-10 (2005).

Bank v. Cook, 291 S.C. 530, 532-33, 354 S.E.2d 562, 563 (1987) (finding a complaint filed more than twenty days after the filing of the lis pendens renders the lis pendens invalid). Because Horton thereafter filed a second lis pendens in compliance with the statute, we discern no reason why the identical lis pendens initially filed should not be afforded the same absolute privilege. As argued by Horton, and supported by the record before us, Horton allowed the first lis pendens to expire when the parties continued to negotiate, which thereby potentially obviated the need for the lis pendens. After negotiations between the parties finally broke down, Horton immediately filed a second lis pendens in conjunction with an action involving the same real property. It is also indisputable that the first lis pendens involved the same real property as that of the second lis pendens, and as that involved in the subsequent breach of contract action. To give the court's admonishment in Pond Place concerning strict compliance with the statutory provisions surrounding the filing of a lis pendens such a stringent interpretation as advanced by Appellants would require this court to ignore one of the primary tenets behind affording the absolute privilege, i.e. that the recording of the notice of lis pendens is in effect a republication of the proceedings in the action, providing the essential information contained in the complaint. Although the initial lis pendens was not perfected within twenty days, it still provided the essential information contained in the complaint and amounted to a republication of the complaint. Accordingly, we hold that in a situation such as this, where a party allows a filed lis pendens to expire before the filing of an action, but subsequently files another lis pendens on the same property and thereafter timely files a complaint involving the same property, the filing of the lis pendens is afforded absolute privilege and may not be the basis for a slander of title action.[6]

[6] We intimate no opinion on whether the filing of a lis pendens that is allowed to expire and is not thereafter subsequently followed with the filing of a valid lis pendens and complaint on the same real property would also be entitled to absolute privilege.

## II. Unfair Trade Practices

Appellants next contend the trial court erred in granting Horton summary judgment as to their unfair trade practices claim. While they acknowledge a claim of breach of contract, standing alone, cannot state a claim under the unfair trade practices act, they contend the unfair trade practice here is not limited to a breach of the contract the parties entered, but that Horton "has engaged in a pattern and procedure of engaging in the same acts complained of herein." Specifically, they argue Horton is a national builder of residential developments that routinely enters into similar contracts throughout the country, and Horton "has used myriad reasons for delaying the closing without adequate presales, including changing the reasons for not closing." Appellants argue Horton uses various pretexts to string out the transactions until it is able to presell enough units to abide by the contract. They maintain this behavior is capable of repetition and that, carried out across the country, would amount to a clear violation of the unfair trade practices act. Appellants summarily argue the evidence is sufficient to form the basis for an unfair trade practices claim, and the court erred in holding they rested their claim solely on failure to fulfill contractual obligations. We find no error.

First, we find Appellants have abandoned this issue. In Appellants' brief, they fail to cite any law or authority in support of their argument, and make only conclusory arguments. While Appellants do cite to one federal district court case in their reply brief in regard to their unfair trade practices claim, their argument in this regard is also largely conclusory. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned where appellant fails to provide arguments or supporting authority for his assertion); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

At any rate, we would affirm this issue on the basis that, assuming as Appellants contend that Horton used myriad reasons for delaying the closing, changed the reasons for not closing, and used various pretexts to string out the transactions, these actions, even if subsequently found to be in breach of the parties' contract, amount to nothing more than an intentional breach of contract. This finding is supported by Fraylick's deposition. When asked if there was anything, other than not purchasing the 110 town home lots, that Wescott was complaining Horton did not do, Fraylick responded, "No." Further, when specifically questioned regarding the allegation of unfair trade practices and what Horton did that was "unfair," Fraylick stated that Horton failed to close on the phases in a timely fashion and Horton "never performed on anything they said they were going to do." When asked what Horton did, other than not closing on time, Fraylick replied, "I guess it all relates back to not closing on time." Fraylick could not think of any other ways they were treated unfairly by Horton. When questioned about how Horton acted deceptively, Fraylick stated Horton "said they were going to close and they didn't close," and again agreed he could think of nothing else, but that it "all related to timeliness of closing or not closing." A mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done intentionally. Key Co. v. Fameco Distribs., Inc., 292 S.C. 524, 526, 357 S.E.2d 476, 478 (Ct. App. 1987). Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages. Id. at 527, 357 S.E.2d at 478. This evidence supports the trial court's determination that Appellants' claim rested solely on the assertion that Horton failed to fulfill its contractual obligations, and that a mere breach of contract is insufficient to constitute a violation of the UTPA.

## III. Abuse of Process

Appellants contend the trial court erred in finding Horton was entitled to summary judgment as to their abuse of process claim based upon its finding Appellants failed to set forth a genuine issue of material fact as to ulterior motive. Citing Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), they argue our courts have found the filing of

a lis pendens to prevent the sale of property to a third party can constitute ulterior motive. Appellants argue that despite their valid rescission of the contract, Horton filed a lis pendens against the property, and though Appellants "had every right to walk away from the parties' contract," Horton misused a lis pendens to tie up the property and attempt to browbeat Wescott into accepting Horton's new terms. In support of this argument, Appellants point to Flannery's September 18, 2006 e-mail to Fraylick, wherein Flannery states, "If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." They argue, pursuant to Broadmoor, a lis pendens may constitute an abuse of process when done without justification and for the purpose of preventing third parties from purchasing the subject property. Appellants contend Horton's lack of specific knowledge of KB Homes' offer does not excuse Horton's conduct.

We find the trial court properly granted summary judgment on this claim because Appellants failed to present evidence meeting the essential elements of an abuse of process claim. The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Id.

"An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). "[T]here is no liability when the process has been carried to its authorized conclusion," even if done with bad intentions. Id. at 74-75, 451 S.E.2d at 914. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." Id. The essence of the tort

of abuse of process centers on events occurring outside the process, and our courts have noted that "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." Swicegood v. Lott, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) (quoting Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967)). "There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Id. (quoting Huggins, 249 S.C. at 209, 153 S.E.2d at 694).

Our courts have noted that an abuse of process action may lie if a party prosecutes an entire lawsuit for collateral purposes. Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 73, 567 S.E.2d 251, 255 (Ct. App. 2002). Nonetheless, "[a]n allegation of an ulterior purpose or 'bad motive,' standing alone, is insufficient to assert a claim for abuse of process." Id. at 74, 567 S.E.2d at 255. An ulterior purpose, to satisfy that element for abuse of process, exists if the process is used to gain an objective not legitimate in the use of the process. Id. at 71, 567 S.E.2d at 253. However, even assuming there is some evidence a party has an ulterior motive for bringing an action, that party is entitled to summary judgment in its favor on an abuse of process claim if there is no evidence the party engaged in a "willful act," an element essential to the abuse of process cause of action which is characterized as a "definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process." Southern Glass & Plastics Co. v. Duke, 367 S.C. 421, 430-31, 626 S.E.2d 19, 24 (Ct. App. 2005) (quoting Hanier, 328 S.C. at 136, 492 S.E.2d at 107).

In Food Lion, our court stated as follows:

> The distinction between the two requirements is evident in the language of the Restatement of Torts: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to

> liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977) (emphasis added). As noted in the Restatement comment, "[t]he significance of ['primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Restatement (Second) of Torts § 682 cmt. b. at 475 (1977). Accordingly, liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting. See id. . . . It therefore follows that when a claim for abuse of process is predicated on an alleged act "aimed at an object not legitimate in the use of the process," the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim.

Id. at 75, 567 S.E.2d at 255-56 (some citations omitted) (emphasis in original).

Here, Appellants have asserted Horton filed the lis pendens to prevent the sale of property to a third party and misused the lis pendens to tie up the property and attempt to browbeat Wescott into accepting Horton's new terms to the contract. Even assuming for the sake of argument that Appellants' allegation might qualify as an "ulterior motive," we find such an allegation is insufficient to overcome Horton's summary judgment motion, as Appellants have presented no evidence of any willful acts "not authorized in the use of the process." Clearly, Horton had the right to negotiate with Appellants when the parties came to a disagreement regarding their obligations under the contract. The fact that the September e-mail states that the property could be tied up for a longer period of time if the parties do not come to some resolution does not evince an act that is not authorized by the process. Horton merely recognized that Appellants desired to close on all of the property right away, and the parties' inability to agree on terms would

prolong any closing. Accordingly, Appellants failed to submit even a scintilla of evidence that Horton engaged in a willful act in the use of the process not proper in the conduct of the proceeding, and the trial court properly granted Horton's motion for summary judgment on Appellants' abuse of process claim. See also CEL Products, LLC v. Rozelle, 357 S.C. 125, 129-30, 591 S.E.2d 643, 645 (Ct. App. 2004) (holding former employer was entitled to summary judgment as to former employee's claim of abuse of process where former employee's response to the summary judgment motion merely relied on former employee's pleadings, and former employee did not prepare a summary judgment affidavit creating a genuine issue of material fact).[7]

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[7] We find the Broadmoor case, cited by Appellants, is distinguishable from the case at hand. In Broadmoor, our supreme court found sufficient evidence from which the jury could infer that defendant corporation and its president willfully abused the process by filing a lis pendens for the ulterior purpose of preventing a sale to third parties in hopes of obtaining financial backing to purchase the property at an advantageous price. Broadmoor, 306 S.C. at 487, 413 S.E.2d at 12. Notably, the court did not specifically delve into what constitutes the elements of "an ulterior purpose, and "a willful act in the use of the process not proper in the regular conduct of the proceedings." Rather, the court determined the trial court properly denied appellants' motion for directed verdict on Broadmoor's abuse of process claim where the facts showed as follows: appellant Schlopy, who initially contracted to purchase the property, "assigned" the contract to appellant Berkeley Square Realty, notwithstanding Broadmoor's rejection of the assignment, then advised appellant Horwitz, Berkley's President, that he thought filing a lis pendens was a good idea; and, during the pendency of the lawsuit Schlopy, who had the right to assign his interest without Broadmoor's consent only if a corporation known as Marc Equity was a partner of the assignee, filed an affidavit on Berkeley's behalf, erroneously listing Marc Equity in the assignment, and stating "the information was satisfactory and the parties would proceed to fulfill the terms of the contract," but there was nothing in the record to support the affidavit and, to the contrary, Broadmoor had explicitly rejected Schlopy's request that the required deposit be reduced from $50,000 to $25,000. Id. Thus, there was an abundance of evidence Schlopy

Finally, we note the trial court properly determined, because Horton did not employ any legal procedure or process against Hawkins, Hawkins cannot maintain an action against Horton for abuse of process.

## IV. Malicious Prosecution

Appellants next contend the trial court erred in granting summary judgment on their malicious prosecution claim. They argue the trial court granted Horton summary judgment on this claim because the claim was not ripe, but the court's finding in this respect did not refer to the initial lis pendens that expired under its own terms, which was the civil proceeding that underpinned Appellants' malicious prosecution claim. They contend that Pond Place specifically recognizes that a proper action against a maliciously filed lis pendens includes a malicious prosecution action, and the fact that Appellants had yet to prevail against Horton in the present action had no bearing on the ripeness of its claim for malicious prosecution based on the first lis pendens.

We find this argument is abandoned on appeal. Appellants merely summarily argue that the trial court erred in finding their claim was not ripe, but fail to cite any law or authority in support of their argument that the fact they have yet to prevail has no bearing on the matter. Their reference to Pond Place addresses only whether a maliciously filed lis pendens will support a malicious prosecution cause of action, and does not address whether a party is required to prevail in a matter before bringing such an action. See McLean, 314 S.C. at 363, 444 S.E.2d at 514 (noting an issue is deemed abandoned where appellant fails to provide arguments or supporting authority for his assertion); Eaddy, 355 S.C. at 164, 584 S.E.2d at 396 (Ct.

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and the others knew they had not complied with the contractual terms, but filed a lis pendens for an ulterior purpose, i.e. to tie up the property until it could obtain financial backing at a favorable price. Further, the court did not address the elements of an abuse of process claim in Broadmoor, and made no specific findings whatsoever applicable to the second necessary element, i.e. a willful act in the use of the process not proper in the conduct of the proceeding.

App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

## V. Breach of Contract Accompanied by Fraudulent Act

Appellants contend the trial court erred in granting summary judgment to Horton on their breach of contract accompanied by a fraudulent act claim. They contend they put forth sufficient facts to support recovery for this cause of action, ranging from Horton's shifting reasons for refusing to close on Phase 3E, reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contract, and Horton's written threat to tie up the property if Horton did not get its way. They further argue, whether Appellants provided sufficient evidence they relied on misrepresentations by Horton is a genuine issue of fact to be determined by the trier of fact. Appellants also contend the filing of successive lis pendens for the purpose of preventing third parties from acquiring the property and forcing them to bend to Horton's will is, in itself, a fraudulent act accompanying Horton's breach. They maintain the lis pendens was designed for no other purpose than to cloud their title to the property and to interfere with their right to freely alienate the property, and that genuine issues of material fact exist as to whether Horton's intent was fraudulent. We disagree.

To establish a claim for breach of contract accompanied by a fraudulent act, a party must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. Conner v. City of Forest Acres, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." Id. at 466, 560 S.E.2d at 612. "'Fraud,' in this sense, 'assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.'" Id.

(quoting Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)). Breach of contract accompanied by a fraudulent act requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making, and such proof may or may not involve false representations. Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). "Fraudulent intent is normally proved by circumstances surrounding the breach." Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." Id. at 54, 336 S.E.2d at 504.

Here, Appellants have failed to present any evidence Horton committed a fraudulent act accompanying its alleged breach of contract. Appellants maintain Horton's shifting reasons for refusing to close on Phase 3E, reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contract, and Horton's written threat to tie up the property if Horton did not get its way support this cause of action. Even if we were to assume these qualify as evidence of Horton's fraudulent intent in breaching the contract, they are not evidence of an independent fraudulent act which accompanied the breach. See Minter v. GOCT, Inc., 322 S.C. 525, 530, 473 S.E.2d 67, 70-71 (Ct. App. 1996) (holding evidence corporation opened quick oil-change facility without offering real estate developer contractual right of first refusal despite being put on notice by developer that such conduct would be regarded as breach, while possibly evidence of corporation's fraudulent intent in breaching the contract, was not evidence of an independent fraudulent act which accompanied the breach). Further, Appellants submitted no evidence that Horton had any fraudulent intent in filing the lis pendens, nor any evidence the act of filing the lis pendens was dishonest or amounted to unfair dealing. Even when viewing the evidence in the light most favorable to Appellants, more is required than mere speculation to withstand Horton's motion for summary judgment on this claim. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004). Accordingly,

we find no error in the trial court's grant of summary judgment to Horton on this counterclaim.

Additionally, we again note the trial court properly determined, because Hawkins did not have a contract with Horton, Hawkins' claim for breach of contract accompanied by a fraudulent act must fail.

## VI. Interference with Prospective Contractual Relations

Lastly, Appellants contend the trial court erred in granting Horton summary judgment on their intentional interference with prospective contractual relations claim.[8] They contend the evidence presented established that they declined to ratify the numerous offers from others to purchase the property out of concern the lis pendens filed by Horton would prevent the deals from going forward, and if Horton acted in bad faith by filing the lis pendens to tie up the property, as evidenced by Flannery's threat to do so, it was with full knowledge such action would prevent Appellants from selling the property to third parties. Thus, Appellants assert genuine issues of material fact exist as to this claim.

While our courts previously refused to recognize a common law action for intentional interference with prospective contractual relations, in Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990), our supreme court abandoned our prior law and recognized such a cause of action in South Carolina. Id. at 266, 395 S.E.2d at 180. To establish a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove: (1) that the defendant intentionally interfered with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) that the interference caused injury to the plaintiff. Id. While it is not necessary that the interfering party intend harm, it is necessary that he intend to interfere with a prospective contract. Eldeco,

[8]Although the Appellants referred to this cause of action as tortious interference with prospective economic advantage in their counterclaim, the trial court and the parties acknowledge this action is recognized in South Carolina as intentional interference with prospective contractual relations.

Inc. v. Charleston Cnty. Sch. Dist., 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007).

We affirm this issue based on Appellants' inability to show Horton intentionally interfered with Appellants' prospective contractual relations. It is undisputed Appellants were unable to show Horton was ever aware of any offers, or even negotiations, between Appellants and third parties in regard to the sale of the property. Thus, Appellants cannot show the most basic element of the cause of action, i.e. that Horton intentionally interfered. Because there is no evidence Horton was aware of any prospective third party relations, there is no evidence Horton intentionally interfered with them.

## CONCLUSION

Based on the foregoing, we affirm the trial courts' granting of summary judgment to Horton on Appellants' counterclaims for slander of title, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective economic advantage.

**AFFIRMED.**

**LOCKEMY, J., concurs.**

**PIEPER, J., concurring:**

I agree that we should affirm the order of the trial court granting summary judgment, but I write separately as I do not believe the filing of the December 4, 2006 lis pendens is entitled to absolute privilege on Appellants' slander of title cause of action. Nonetheless, I would affirm because Appellants failed to set forth a genuine issue of material fact as to the elements essential to the slander of title cause of action.

The statute providing the procedure for filing a lis pendens states:

> In an action affecting the title to real property the plaintiff (a) not more than twenty days before filing the complaint or at any time afterwards or (b) whenever a warrant of attachment under §§ 15-19-10 to 15-19-560 shall be issued or at any time afterwards or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer or at any time afterwards if such answer be intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby. If the action be for the foreclosure of a mortgage such notice must be filed twenty days before judgment and must contain the date of the mortgage, the parties thereto and the time and place of recording such mortgage.

S.C. Code Ann. §15-11-10 (2005). A lis pendens "is premised upon and must be filed in time in conjunction with an underlying complaint involving an issue of property." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 30, 567 S.E.2d 881, 896 (Ct. App. 2002). A complaint filed more than twenty days after the filing of the lis pendens renders the lis pendens invalid. South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 532-33, 354 S.E.2d 562, 563 (1987). "Since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required." Pond Place, 351 S.C. at 17, 567 S.E.2d at 889. "[T]he filing of a lis pendens is absolutely privileged in South Carolina." Id. at 32, 567 S.E.2d at 897.

Here, it is undisputed that Horton filed a lis pendens on December 4, 2006, and did not file a complaint within twenty days. Therefore, Horton did not meet the statutory requirements for filing a lis pendens. Because strict

compliance with the statutory requirements for filing a lis pendens is required, the December 4, 2006 lis pendens is invalid, and thus, is not entitled to absolute privilege.

However, instead of putting forth facts to establish a genuine issue of material fact on Appellants' slander of title cause of action, Appellants relied solely on the fact that Horton filed two lis pendens. "[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995) (citing TXO Prod. Corp. v. Alliance Res. Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443 (1993)). "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "Special damages recoverable in a slander of title action are the pecuniary losses that result 'directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation.'" Huff, 319 S.C. at 150-51, 459 S.E.2d at 892 (quoting 50 Am. Jur. 2d Libel & Slander § 560).

Viewing the evidence in the light most favorable to Appellants, the pleadings, depositions, answers to interrogatories, and affidavits submitted to the court failed to set forth facts creating a genuine issue of material fact as to all elements of the slander of title cause of action. See Rule 56(c), SCRCP (stating summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Specifically, Appellants failed to set forth a genuine issue of material fact on the elements of malice and special damages. See Baughman v. Amer. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) ("The plain language of Rule 56(c) mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial."). Based on the foregoing, the trial court did not err in granting summary judgment on Appellants' slander of title cause of action.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Sheran Proctor, Respondent,

v.

Ola Mae Steedley, Appellant.

Appellate Case No. 2010-172286

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Appeal from Edgefield County
William H. Tucker, Special Referee

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Opinion No. 4999
Heard April 12, 2012 – Filed July 11, 2012

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**AFFIRMED**

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Sonja Renee Tate, of Fulcher Hagler LLP, of Augusta, Georgia, for Appellant.

Thomas P. Murphy, of North Augusta, for Respondent.

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**GEATHERS, J.:** In this declaratory judgment action, Ola Mae Steedley appeals the special referee's order, which concluded that her predecessor in title, Claude Smith, granted an appurtenant easement across her property to the prior owner of an adjoining parcel. We affirm.

## FACTS/PROCEDURAL HISTORY

Appellant Ola Mae Steedley is the owner of a parcel of land located on Sweetwater Road in Edgefield County, South Carolina.[1] To the west of Steedley's parcel is an adjoining parcel owned by Respondent Sheran Proctor (Parcel 1). To the southwest of this adjoining parcel is a smaller parcel also owned by Proctor (Parcel 2). Proctor's two parcels, which are located on an unpaved road, Country Manor Lane, and Steedley's parcel originated from a common grantor, Claude Smith.[2] Hereinafter, Parcel 1 and Parcel 2 will be referenced together as one tract (Proctor's property).

The dispute in this case arises over the nature of an easement granted in 1973 by Smith to Proctor's parents and predecessors in title, Karl and Mary Louise Burger. The easement allowed the Burgers to access the northern part of their property from Sweetwater Road by use of an unpaved road crossing Smith's adjoining parcel to the east, which is now owned by Steedley. Smith and the owner of neighboring property to the north, Emerson Odom, had created this access road for their own use a few years before Smith granted the easement allowing the Burgers to use the road as well. In 1981, after Smith died, his widow conveyed the parcel abutting Sweetwater Road to David Steedley.

Proctor's property lies directly north of Country Manor Lane, which forks off from Randall Road; thus, Proctor can access the southern part of her property from Country Manor Lane. However, a creek bisects Proctor's property;[3] hence, she

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[1] Sweetwater Road was previously named Five Notch Road. Throughout the record, witnesses and the special referee refer to the road by both names.

[2] Smith conveyed the parcels on Country Manor Lane to Proctor's parents, Karl and Mary Louise Burger, in 1973. In 1979, after Smith's death, his widow and sole devisee executed a "correction deed" that corrected the description of the south and southwest boundaries of Parcel 1 and Parcel 2. In 1981, Smith's widow conveyed the parcel on Sweetwater Road to David Steedley. Ola Mae Steedley is David Steedley's widow. After the 1980 death of Proctor's father, Proctor's mother conveyed Parcel 1 to Proctor in 1994. In 2001, Proctor's mother conveyed Parcel 2 to Proctor.

[3] According to testimony, the creek runs *from* a pond on Steedley's property.

cannot access the part of her property to the north of the creek from Country Manor Lane. While it is possible to access the northern part of Proctor's property from the unpaved access road that crosses Steedley's property, Steedley erected a locked gate preventing Proctor from using the access road. Therefore, Proctor brought this action seeking a judgment declaring that the right to use this access road, granted by Smith to her parents in 1973, was transferrable to her, i.e., an appurtenant easement.

The following language appears in the 1973 deed from Smith to the Burgers:

> It is understood and agreed by and between the Grantor and the Grantees that an access road shall be maintained between the property of Temples and the Smith property which leads from the Five Notch Road to the lands herein conveyed and an access road from the Five Notch Road on the South and Southwestern part of the said property hereinabove conveyed.[4]

The first access road described in the deed relates to the easement at issue.[5] Although the deed states that this access road "leads from" Five Notch (now Sweetwater) Road, it is actually separated from Sweetwater Road by an area described by Steedley's son as approximately forty to fifty feet long and "ditch-like." Thus, anyone desiring to drive a vehicle on this access road must cross a parcel to the north of the access road to get to and from Sweetwater Road.

The access road runs along the property line between the Steedley (formerly Smith) parcel and the Odom parcel, then it reaches a fork; to the left (south), it runs to a pond on the Smith property, and to the right, it runs onto the northern part of Proctor's property and terminates at a cul-de-sac. Depending on the precise location, the width of the access road is between eight and twenty feet; it is wide enough for a truck or a tractor to traverse.

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[4] The Temples' property was later purchased by Emerson Odom, a portion of which he deeded to his daughter, who subsequently deeded this portion to her daughter.

[5] The second access road referenced in the deed is Country Manor Lane.

Proctor and her family have used their property for activities such as picnicking and gathering firewood. They cut a path from the southernmost part of the property to the creek. Proctor's mother and step-father put a trailer on the southern part of the property abutting Country Manor Lane. Additionally, Proctor's mother had timber cut from the property on at least one occasion. The timber company did not use the access road to the northern part of the property. Instead, the loggers pushed the timber across the creek by building a temporary bridge and took all the timber to the southern part of the property and out via Country Manor Lane.

After Steedley's husband passed away, her family became concerned about trespassers using the access road to get to the pond on her property. Consequently, the family installed an unlocked chain across the road. They later replaced the chain with a gate, which initially remained unlocked. Once the gate was locked, Steedley's family offered keys to neighbors who might use the access road. However, the family did not offer a key to Proctor.

Several months after the chain and then the gate were installed, Proctor contacted Steedley, requesting use of the access road and indicating that she was going to send her a copy of the deeds creating the easement.[6] Proctor called Steedley a second time to determine if she had received the copies of the deeds. Steedley indicated she had received them and "had turned it over to her son." Steedley's son later telephoned Proctor and told her not to call his mother again.

On December 17, 2008, Proctor filed an action seeking: (1) a declaratory judgment establishing (a) the grant of an appurtenant easement; and (b) the easement's width; (2) injunctive relief prohibiting Steedley from denying Proctor the use of the easement; and (3) economic damages. The complaint cited the language in the deed between their respective predecessors-in-interest. Steedley asserted that any grant of a right to use the access road was an easement in gross that was personal to the original contracting parties.

A special referee conducted a hearing on July 21, 2010. At that time, Proctor abandoned her claim for damages and pursued only her claims for equitable relief. Immediately prior to the hearing before the special referee, Steedley moved to exclude the testimony of Proctor's expert witness, Keith Taylor, an attorney who

[6] The original deed from Smith to the Burgers was executed in 1973. In 1979, Smith's widow executed a "correction deed."

had practiced in the area of real property law for over twenty-seven years. Taylor performs his own title examinations and writes title insurance. Steedley objected to the admission of Taylor's testimony on the ground that it would be improper for an attorney to give an expert opinion as to what would be the "ultimate question of law" in the case, i.e., whether the easement in question was an easement in gross or an appurtenant easement. The special referee ruled that he would allow Taylor's testimony. Steedley noted a continuing objection to Taylor's testimony.

Taylor testified that whether the easement was appurtenant or in gross depended on the intent of the parties at the time the deed was executed. He gave his opinion as to the plain meaning of the phrase "access road" as used in the deed:

> An access road just means . . . a road to access your property. It would mean a right to transfer the access of that road. I mean, I think a plain meaning of an access road is a way to access the property. You don't buy landlocked property thinking, well, I'll never be able to transfer or sell this property because I don't have access to it. So, an access road would mean, I think, an easement in perpetuity and appurtenant to the property.

Taylor also gave his opinion as to the nature of the easement in the present case: "[T]he access road granted is an easement appurtenant to the property, because the plain meaning of an access road is a way of accessing your property, and would be one that could be conveyed to subsequent purchasers."

The special referee issued a written order concluding that the easement created by the language of the deed from Smith to the Burgers established an appurtenant easement for pedestrian and vehicular traffic. The special referee also ruled "henceforth the easement shall be twenty (20) feet in width throughout its current path across [Steedley's] property."

The order further required steps to be taken to continue the access road from its current termination point on Steedley's property to Sweetwater Road so that users of the road will not have to cross the neighboring property to the north. Finally, the order stated "nothing contained in this Order shall be interpreted as allowing [Proctor] the right to materially increase the volume of traffic over the access road

beyond her personal use and that of members of her family and invitees." This appeal followed.

## ISSUES ON APPEAL

1. Did the special referee err in concluding that the easement across Steedley's property was an appurtenant easement?

2. Did the special referee improperly expand the scope of the easement?

3. May this court affirm the special referee's order on the ground that Proctor has an easement by necessity?

4. Did the special referee err in admitting an attorney's testimony as to the issue of the grantor's intent as expressed in the deed?

## STANDARD OF REVIEW

The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement. *See Windham v. Riddle*, 370 S.C. 415, 418, 635 S.E.2d 558, 559 (Ct. App. 2006) (characterizing the determination of whether an easement was appurtenant or in gross as a determination of the extent of a grant of an easement), *aff'd*, 381 S.C. 192, 672 S.E.2d 578 (2009).[7] The determination of the extent of a grant of an easement is an action in equity. *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Therefore, on appeal of such a determination, this court may take its own view of the preponderance of the evidence. *Id.* "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is 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) (citations omitted). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.* at 387-88, 544 S.E.2d at 623.

[7] Further, the interpretation of a deed is an equitable matter. *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condos.*, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct. App. 1995).

## LAW/ANALYSIS

### I. Appurtenant Easement

Steedley first argues the special referee erred in concluding that the easement in question was appurtenant because Proctor failed to show either the grantor's intent to convey an appurtenant easement or the necessity of the easement. We will address these arguments in turn.

> An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed. An easement is therefore not an estate in lands in the usual sense. An easement may be created by reservation in a deed.

*Windham*, 381 S.C. at 201, 672 S.E.2d at 582 (citations and quotation marks omitted).

> The character of an express easement is determined by the nature of the right and *the intention of the parties creating it*. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is *essentially necessary to the enjoyment thereof*. It also passes with the dominant estate upon conveyance. *Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross*. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted.

*Id.* at 201-02, 672 S.E.2d at 583 (quoting *Tupper*, 326 S.C. at 325–26, 487 S.E.2d at 191) (emphases added) (citations omitted). Here, the only two elements in dispute are intent and necessity.

### A. Grantor's Intent

Because the language creating the easement is found in the deed from Smith to the Burgers and in the subsequent corrective deed, both parties acknowledge the application of case law governing the interpretation of deeds in support of their respective positions. *See K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (holding that the grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments).

> In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, *the deed must be construed as a whole and effect given to every part if it can be done consistently with the law*. The intention of the grantor must be found within the four corners of the deed.

*Windham*, 381 S.C. at 201, 672 S.E.2d at 582-83 (emphasis added) (citations and quotation marks omitted).

The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004). This court reviews questions of law de novo. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court.[8] *Hunt*, 358 S.C. at 569, 595 S.E.2d at 848-49.

[8] Likewise, the determination of whether language in a deed is ambiguous is a question of law. *Cf. S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (applying rules of contract construction to a restrictive covenant in a deed and stating that whether a contract is ambiguous

Here, the language in Smith's deed describing the access road in issue is as follows:

> It is understood and agreed by and between the Grantor and the Grantees that the access road shall be maintained between the property of the Temples and the Smith property which leads from the Five Notch Road to the lands herein conveyed and an access road from the Five Notch Road on the South and Southwestern part of the said property hereinabove conveyed.

When viewing the clear and unambiguous language of the deed as a whole, the grant of an "access road" describes a way to access the property that all current and future owners of the property may enjoy. In support of her argument that Smith intended to grant an appurtenant easement, Proctor highlights the deed's words of inheritance, i.e., "their heirs and assigns forever," which both precede and follow the description of the property with the accompanying easement language. Proctor also highlights the phrase, "[t]ogether with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining[,]" which follows the property description and easement language.

Generally, the phrase "heirs and assigns" will not convert an easement in gross to an appurtenant easement when the elements of an appurtenant easement are not otherwise present. *Douglas v. Medi. Investors, Inc.*, 256 S.C. 440, 447-48, 182 S.E.2d 720, 723 (1971); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 423, 143 S.E.2d 803, 808 (1965); *Ballington v. Paxton*, 327 S.C. 372, 381, 488 S.E.2d 882,

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is a question of law for the court). The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation. *Id.* at 623, 550 S.E.2d at 302 (stating that a contract is ambiguous when its terms are reasonably susceptible to more than one interpretation). We conclude there is no ambiguity in the language of Smith's deed creating the easement at issue in this case. Therefore, it was unnecessary for the special referee to evaluate evidence outside the deed's four corners on the issue of Smith's intent. *Id.* at 623, 550 S.E.2d at 303 (stating that once the court decides the language of the instrument is ambiguous, evidence may be admitted to show the parties' intent, the determination of which is then a question of fact).

887 (Ct. App. 1997). However, such language is relevant to the determination of the grantor's intent. *Douglas*, 256 S.C. at 448, 182 S.E.2d at 724; *Sandy Island*, 246 S.C. at 423, 143 S.E.2d at 808; *see also Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct. App. 1994) (stating that the phrase "all and singular, the rights, members, hereditament and appurtenances to the said premises belonging, or in anywise incident or appertaining[,]" which followed a deed's property description, showed an intent to grant all rights essential to the enjoyment of the premises conveyed).

In conclusion, the phrases highlighted by Proctor, combined with the easement language, show Smith's intent that the easement run with the land. Notably, nothing in the deed suggests the grantor intended the easement to be merely personal to the Burgers. Based on the foregoing, the deed as a whole shows the grantor's intent to convey an appurtenant easement.

**B. Necessity**

Steedley asserts that the access road is not necessary to the enjoyment of Proctor's property. We disagree.

The record shows that Proctor's property is bisected by a creek emanating from the pond on Steedley's property. On either side of the creek is a ravine preventing vehicular access to the north side of the property, absent use of the access road through Steedley's property. Tom Proctor described the creek and ravine as follows:

> [W]here it comes out of the pond, it's kind of flat and swampy up in there for a good ways, and then it gets pretty deep. It's deep pretty much all the way down until it exits our property . . . The ditch is . . . six or seven feet deep and probably seven or eight feet wide.

This evidence supports the special referee's conclusion that the access road was necessary for the enjoyment of the dominant estate.

Steedley contends Tom Proctor essentially admitted that the access road was not necessary when he testified that a bridge could be built over the creek. We disagree with the contention that this testimony is equivalent to an admission that

the access road is unnecessary. Tom Proctor did not testify that such an option was reasonable or affordable. Further, Steedley has not pointed to any evidence in the record showing that the option of building a bridge to support heavy-duty vehicles is reasonable or affordable. Therefore, she has failed to carry her burden of convincing this court that the special referee erred in finding the access road necessary to Proctor's enjoyment of her property. *See Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011) (holding that the burden is upon the appellant to convince this court that the trial court erred in its findings).

## II. Burden on the Servient Estate

As stated previously, the special referee required the access road to be maintained at "twenty (20) feet in width throughout its current path across [Steedley's] property." The special referee further required steps to be taken to continue the access road from its current termination point on Steedley's property to Sweetwater Road, so that users of the access road will not have to cross the neighboring property to the north to avoid the ditch-like area separating the access road from Sweetwater Road. Steedley maintains that these rulings unreasonably burden her property. We disagree.

In determining the proper scope of an easement, this court's opinion in *Smith v. Commissioners of Public Works of City of Charleston* is instructive. 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994). In *Smith*, this court interpreted the language of an easement agreement negotiated between the plaintiffs' predecessor in interest, Benjamin Kittredge, and the defendants' predecessor in interest, Bushy Park Authority.[9] 312 S.C. at 462, 441 S.E.2d at 333. The easement agreement stated:

> "Kittredge and all future owners of Dean Hall Plantation and Cypress Gardens shall have the right, and the same is hereby granted to them, of ingress, egress and regress to the banks of and across the canal about to be constructed, leading from the Cooper River to Back River, *at any point* contiguous to the lands being conveyed by Kittredge to the Authority."

[9] Kittredge had agreed to sell land to Bushy Park Authority so that the Authority could construct a canal from the Cooper River to the Back River. 312 S.C. at 463, 441 S.E.2d at 333.

*Id.* at 463, 441 S.E.2d at 333 (emphasis added).

The court concluded it was unreasonable to interpret the agreement to mean Kittredge and Bushy Park intended that each owner of any portion of the Plantation, "no matter how small his portion, would have his own private unlimited access to the canal as long as his land was contiguous to [the defendant's] land." *Id.* at 468-69, 441 S.E.2d at 337. In reaching this conclusion, the court reasoned as follows:

> The subject unlocated easement must be interpreted, however, in light of good faith, reasonableness and what was necessarily the intent of the parties to the 1955 agreement. *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (194[3]) (an easement in general terms is limited to a use which is *reasonably necessary* and convenient and *as little burdensome to the servient estate as possible for the use contemplated*). In determining the extent of the easement (number of access points or routes), *consideration must be given to what is essentially necessary to the enjoyment of the [plaintiffs'] property*.

*Smith*, 312 S.C. at 468, 441 S.E.2d at 336 (emphases added).

Here, the evidence shows that without extending the access road from Steedley's gate to the roadway of Sweetwater Road, a vehicle would have to either drive through a "ditch-like area" or travel over the adjacent property to the north of Steedley's property. The special referee believed that extending the length of the access road was the most reasonable implementation of the easement Smith intended to grant to the Burgers and their successors in title. We agree with the special referee's assessment. Moreover, the special referee required Proctor to bear the cost of making this short extension.

As to the width requirement, Steedley's own witness, Emerson Odom, testified that the access road would not accommodate log trucks. Further, Steedley has failed to specify precisely how the extra width in those places not already twenty-feet-wide would burden her property other than requiring the removal of some "established"

trees. Moreover, Steedley has not pointed to any evidence in the record showing that these trees are unique or have any special significance that would render their removal unreasonable. Therefore, she has failed to carry her burden of convincing this court that the challenged requirements impose an unreasonable burden on her property. *See Pinckney*, 344 S.C. at 387-88, 544 S.E.2d at 623 (recognizing the appellant has the burden of convincing the appellate court that the trial judge erred).

Based on the foregoing, we hold the challenged requirements fall within the original intent of Smith's grant of access to the Burgers and do not impose an unreasonable burden on Steedley's property.

## III. Easement by Necessity

Proctor argues that pursuant to Rule 220(c), SCACR,[10] this court may affirm the special referee's order on the ground that Proctor has an easement by necessity. We agree.

The elements of a claim for easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. *Boyd v. Bellsouth Tel.Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136, 140-41 (2006). "The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." *Id.* at 420, 633 S.E.2d at 141. "The necessity element of easement by necessity must exist at the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist." *Id.* (citations omitted).

"To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person." *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). Severance of title means that title to a larger tract was severed "by conveyance of a part to the predecessor in title of the plaintiff and of a part to the predecessor in title to the defendant; they both claim, from a common source, different parts of the integral tract, which necessarily assumes a severance." *Brasington v. Williams*, 143 S.C. 223, 246, 141 S.E. 375, 382 (1927). In the present case, no party disputes that the

[10] Rule 220(c), SCACR, provides that this court may affirm an order upon any ground appearing in the Record on Appeal.

elements of unity of title and severance of title are present, and these elements clearly appear in the record.

Steedley argues that because Proctor did not assert the claim of easement by necessity before the special referee, she did not preserve the claim for appellate review. However, "it is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). "[W]hen the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal." *Id.* at 423, 526 S.E.2d at 725.

Here, although Proctor did not include the claim of "easement by necessity" in her complaint, she presented evidence on all of the elements of this claim as this evidence was relevant to her claim for an appurtenant easement.[11] Therefore, the grounds for establishing an easement by necessity appear in the record and allow this court to affirm the special referee's order.

## IV. Expert Testimony

Steedley maintains that the special referee erred in admitting attorney Keith Taylor's expert testimony as to the issue of the grantor's intent.[12] Assuming arguendo that this testimony was improper, its admission into evidence was harmless because the deed itself supports the special referee's finding that Smith intended to grant an appurtenant easement. *See Judy v. Judy*, 384 S.C. 634, 646,

[11] Proctor argues that a second ground for necessity existed at the time of Smith's conveyance to the Burgers, i.e., Smith had already conveyed his interest in the other access road, now known as Country Manor Lane, to a third party. However, this ground for necessity was later extinguished when the parties' rights to use the road were clarified. *See Boyd*, 369 S.C. at 420, 633 S.E.2d at 141 (holding that an easement by necessity will be extinguished once the necessity ends).

[12] Taylor also testified regarding the objective results of his title examination. This particular testimony is not in dispute.

682 S.E.2d 836, 842 (Ct. App. 2009) (holding that appellate courts will not set aside judgments due to insubstantial errors not affecting the result).

## CONCLUSION

Accordingly, the special referee's order is

**AFFIRMED.**

**PIEPER and KONDUROS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Mary K. Walden, Appellant,

v.

Harrelson Nissan, Inc., Respondent.

Appellate Case No. 2011-182767

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Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

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Opinion No. 5000
Heard March 13, 2012 – Filed July 11, 2012

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**AFFIRMED**

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Mario A. Pacella, of Strom Law Firm, LLC, of Columbia, for Appellant.

W. Keith Martens, of Hamilton, Martens, & Ballou, LLC, of Rock Hill, for Respondent.

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**WILLIAMS, J.:** On appeal, Mary K. Walden (Mary) argues the circuit court erred in compelling arbitration of a dispute involving an alleged breach of contract resulting from Harrelson Nissan, Inc.'s (Harrelson) failure to obtain credit life insurance in connection with the lease of an automobile from Harrelson. We affirm.

## FACTS/PROCEDURAL HISTORY

On March 3, 2007, Mary and her late husband, James Walden (James), executed a motor vehicle lease agreement (Lease) with Harrelson for a 2007 Nissan Murano. The Lease contained an arbitration agreement, which states in pertinent part:

> [A]ny claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arise out of or relate to your credit application, this lease or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Lease) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The Lease provided an option for Mary to purchase credit life insurance coverage with Life Investors Insurance Company (Life Investors) upon both lessees initialing the coverage on page two of the Lease. Both Mary and James initialed the relevant coverage portion of the Lease. The entire premium for the optional credit life insurance coverage amounted to $602.27 and was financed into the Lease. Mary began making regular monthly payments in the amount of $594.94 to Harrelson, which included a pro rata amount for the credit life insurance.

On January 24, 2009, James passed away. When Mary sought the proceeds of her credit life insurance policy, Life Investors denied her claim. Mary subsequently learned Harrelson allegedly failed to pay the premiums for her credit life insurance coverage to Life Investors. On February 25, 2009, Mary filed suit against Harrelson, asserting breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, and a violation of the South Carolina Unfair Trade Practices Act. After filing an answer, Harrelson filed a motion to compel arbitration, attempting to force Mary to arbitrate her claims under the terms of the arbitration agreement that was a part of the Lease. Following the hearing, the

circuit court granted the motion to compel arbitration. After an arbitration award in Mary's favor, this timely appeal followed.[1]

## STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

## LAW/ANALYSIS

Mary argues the circuit court erred in determining her claims were subject to arbitration. We disagree.

Generally, if the contract providing for arbitration involves interstate commerce, the Federal Arbitration Act (FAA) displaces the state arbitration statute.[2] *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) ("If the arbitration agreement in the instant controversy is covered by the FAA, then . . . the FAA preempts S.C. Code Ann. § 15-48-10(a) . . . . For the Federal Act to apply, the commerce involved in the contact must be interstate or foreign."). The FAA requires the enforcement of an arbitration agreement upon proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving "commerce." 9 U.S.C.A. § 2 (1947). However, Mary argues the FAA does not apply to insurance contracts in South Carolina.

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[1] At oral argument before this court, counsel for Mary acknowledged his client traded in the Nissan Murano. Mary subsequently leased a second vehicle and selected credit life insurance coverage. When James passed away, the proceeds of the credit life insurance policy from the second vehicle were paid to Mary.

[2] There is no dispute the transaction here included a written agreement to arbitrate and involved interstate commerce as Mary is a South Carolina resident, Harrelson is a North Carolina corporation, the vehicle was manufactured in Tennessee, and financing was provided by Nissan-Infiniti LT of California.

Section 15-48-10(b)(4) of the South Carolina Code (Supp. 2012) provides that a written agreement to arbitrate shall not apply to "any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." Mary correctly states the FAA's mandate conflicts with section 15-48-10(b)(4). *See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding section 15-48-10(b)(4)'s prohibition on arbitration "reverse preempts" the FAA through application of the McCarran-Ferguson Act and "prohibits the enforcement of arbitration clauses in insurance policies governed by South Carolina law"); *see also Cox v. Woodmen of The World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 402 (Ct. App. 2001) (concluding section 15-48-10(b)(4) "reverse preempts" the FAA through the application of the McCarran-Ferguson Act). The contract in dispute here is not an insurance contract, and the provision in the lease did not create an insurance policy or a duty to insure. Therefore, Mary's causes of action against Harrelson are not the claims of "any insured or beneficiary under any insurance policy" that would exempt this action from arbitration. Mary urges an expansive reading of section 15-48-10(b)(4), contending the statute precludes arbitration of any claim related to a contract for insurance. We find this assertion without merit.

"In interpreting a statute, this [c]ourt's primary function is to ascertain the intent of the legislature." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992).

In *Cox v. Woodmen of World Insurance Company*, this court found section "15-48-10(b)(4) was enacted for the purpose of regulating the business of insurance," but also concluded the statute is a "specific exemption *limited to entities within the insurance industry*." *Cox*, 347 S.C. at 468, 556 S.E.2d at 402 (emphasis added). Moreover, although not binding upon this court, a federal district court applied section 15-48-10(b)(4) and concluded "the McCarran-Ferguson Act precludes the application of the FAA to arbitration clauses contained *in insurance policies* governed by South Carolina law." *Am. Health*, 272 F. Supp. 2d at 582 (emphasis added). Accordingly, we reject Mary's expansive interpretation of the statute and conclude the General Assembly did not intend for the arbitration exception of section 15-48-10(b)(4) to apply to automobile lease agreements that only have a

tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract.

The FAA and section 15-48-10(b)(4) conflict with one another only when a litigant seeks to enforce an arbitration agreement contained in an insurance policy governed by South Carolina law. Here, the parties' arbitration agreement was part of an automobile lease by Harrelson, not an insurance contract. As part of the Lease, Mary selected optional credit life insurance and chose to pay premiums up front through its inclusion in the financing agreement between the parties. The terms of the Lease included the offer to secure credit life insurance from Life Investors in exchange for the payment of the premium. Mary paid the premiums to Harrelson and the dealership accepted and retained those payments while failing to procure an insurance policy from Life Investors. As a result, Mary's selection of optional insurance did not create a separate, binding insurance contract, but instead arose out of the original Lease. Moreover, Mary did not allege in her complaint that she was an "insured or beneficiary under any insurance policy" as stated in section 15-48-10(b)(4). Instead, Mary's complaint alleged Harrelson breached its fiduciary duty and breached the parties' contract by failing to procure the credit life insurance from Life Investors. Because Mary's asserted causes of action arise out of an automobile lease agreement and not an insurance contract, the circuit court properly held Mary was required to submit her claims against Harrelson to binding arbitration. *See Cox*, 347 S.C. at 468, 556 S.E.2d at 402 (holding section 15-48-10(b)(4) is a specific exemption limited only to entities within the insurance industry).

**CONCLUSION**

We conclude the Lease between Mary and Harrelson did not create a duty to insure. Therefore, the FAA governs the Lease in this case and compels arbitration. Accordingly, the order of the special circuit court judge is

**AFFIRMED.**

**THOMAS and LOCKEMY, JJ., concur.**