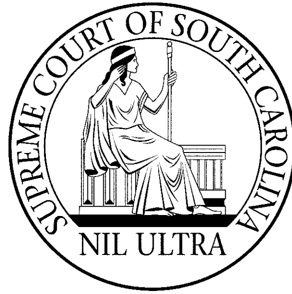

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
June 28, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

28151 – Ani Creation, Inc. v. City of Myrtle Beach 9
(Original opinion withdrawn and substituted)

28165 – State v. Tappia Deangelo Green 28

Order – In the Matter of Sidney J. Jones 39

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

28120 – State v. Angela D. Brewer Denied 6/20/2023

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

28133 – Glenn Odom v. McBee Municipal Election Commission Pending

28134 – Brad Walbeck v. The I'On Company Pending

28142 – State v. Stewart Jerome Middleton Pending

28145 – State v. Timothy Ray Jones, Jr. Pending

28149 – State v. Mary Ann German Denied 6/28/2023

28151 – Ani Creation Inc., et al. v. City of Myrtle Beach Granted 6/28/2023

28155 – Amy Garrard, et al. v. Charleston County School District, et al. Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

5994 – Desa Ballard v. Admiral Insurance Company 41

5995 – The State v. Kayla M. Cook 55

5996 – Palmetto Pointe v. Tri-County Roofing 66

UNPUBLISHED OPINIONS

2023-UP-161 – The State v. Terrell D. Knightner
(Withdrawn, Substituted, and Refiled June 28, 2023)

2023-UP-189 – SCDSS v. Caressa S. Norris
(Withdrawn, Substituted, and Refiled June 28, 2023)

2023-UP-214 – Reginald Perry v. Jennifer Olson
(Withdrawn, Substituted, and Refiled June 28, 2023)

-

2023-UP-253 – The State v. Michael A. Walcott

2023-UP-254 – In the Matter of Lauren Martel

2023-UP-255 – Shelia Hutchins v. Security Group, Inc.

2023-UP-256 – David O'Shields v. Piedmont Glass

PETITIONS FOR REHEARING

5975 – Rita Glenn v. 3M Company — Pending

5984 – In the Matter of the Estate of Chris Combis — Denied 6/22/2023

5986 – The State v. James E. Daniels, Jr. — Denied 6/22/2023

5987 – The State v. Tammy C. Moorer	Pending
5988 – The State v. Sidney S. Moorer (2)	Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

2023-UP-240 – Larry T. Chestnut v. State	Pending

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5839 – In the Matter of Thomas Griffin	Pending
5855 – SC Department of Consumer Affairs v. Cash Central	Pending
5882 – Donald Stanley v. Southern State Police	Pending
5903 – State v. Phillip W. Lowery	Pending
5906 – Isaac D. Brailey v. Michelin N.A.	Pending
5911 – Charles S. Blackmon v. SCDHEC	Pending
5912 – State v. Lance Antonio Brewton	Pending
5914 – State v. Tammy D. Brown	Pending
5916 – Amanda Huskins v. Mungo Homes, LLC	Pending
5922 – State v. Olandio R. Workman	Pending
5925 – Patricia Pate v. College of Charleston	Pending
5930 – State v. Kyle M. Robinson	Pending
5933 – State v. Michael Cliff Eubanks	Pending
5934 – Nicole Lampo v. Amedisys Holding, LLC	Pending

Case	Status
5946 – The State v. Frankie L. Davis, III	Pending
5947 – Richard W. Meier v. Mary J. Burnsed	Pending
5948 – Frankie Padgett v. Cast and Crew Entertainment	Pending
5951 – State v. Xzariera O. Gray	Pending
5953 – State v. Nyquan T. Brown	Pending
5954 – State v. Rashawn Carter	Pending
5955 – State v. Philip Guderyon	Pending
5956 – Trident Medical v. SCDHEC (Medical University)	Pending
5957 – SCDSS v. Brian Frank	Pending
5963 – Solesbee v. Fundamental Clinical	Pending
5965 – National Trust for Historic Preservation v. City of North Charleston	Pending
5969 – Wendy Grungo-Smith v. Joseph Grungo	Pending
5972 – McEntire Produce v. SCDOR	Pending
5974 – The State v. Calvin D. Ford	Pending
2021-UP-242 – G. Allen Rutter v. City of Columbia	Pending
2022-UP-095 – Samuel Paulino v. Diversified Coatings, Inc.	Pending
2022-UP-118 – State v. Donald R. Richburg	Pending
2022-UP-175 – Brown Contractors, LLC v. Andrew McMarlin	Pending
2022-UP-205 – Katkams Ventures, LLC v. No Limit, LLC	Pending

2022-UP-213 – Dr. Gregory May v. Advanced Cardiology	Pending
2022-UP-251 – Lady Beaufort, LLC v. Hird Island Investments	Pending
2022-UP-252 – Lady Beaufort, LLC v. Hird Island Investments (2)	Pending
2022-UP-253 – Mathes Auto Sales v. Dixon Automotive	Pending
2022-UP-269 – Steven M. Bernard v. 3 Chisolm Street	Pending
2022-UP-270 – Latarsha Docena-Guerrero v. Government Employees Insurance	Pending
2022-UP-298 – State v. Gregory Sanders	Pending
2022-UP-303 – Daisy Frederick v. Daniel McDowell	Pending
2022-UP-307 – Frieda H. Dortch v. City of Columbia	Pending
2022-UP-314 – Ronald L. Jones v. Rogers Townsend & Thomas, P.C.	Pending
2022-UP-319 – State v. Tyler J. Evans	Pending
2022-UP-326 – Wells Fargo Bank v. Michelle Hodges	Pending
2022-UP-380 – Adonis Williams v. State	Pending
2022-UP-382 – Mark Giles Pafford v. Robert Wayne Duncan, Jr.	Pending
2022-UP-402 – Todd Olds v. Berkeley County	Pending
2022-UP-413 – Lucas Marchant v. John Doe	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending
2022-UP-422 – Paula Russell v. Wal-Mart Stores, Inc.	Pending
2022-UP-425 – Michele Blank v. Patricia Timmons (2)	Pending

2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending
2022-UP-435 – Andrew Desilet v. S.C. Dep't of Motor Vehicles	Pending
2022-UP-437 – Nicholas Thompson v. Bluffton Township Fire District	Pending
2022-UP-444 – State v. James H. Baldwin	Pending
2022-UP-452 – In the Matter of Kevin Wright	Pending
2022-UP-462 – Karrie Gurwood & Howard Gurwood v. GCA Services Group, Inc.	Pending
2023-UP-005 – David Abdo v. City of Charleston	Pending
2023-UP-020 – Bridgett Fowler v. Fedex	Pending
2023-UP-037 – Diana Bright v. Craig Bright	Pending
2023-UP-041 –Joy Wymer v. Floyd Hiott	Pending
2023-UP-044 – Deutsche Bank National Trust Company v. Doris J. Dixon	Pending
2023-UP-051 – State v. Jason E. Stoots	Pending
2023-UP-055 – M. Baron Stanton v. Town of Pawleys Island	Pending
2023-UP-062 – Raglins Creek Farms, LLC v. Nancy D. Martin	Pending
2023-UP-064 – Karen K. Baber v. Summit Funding, Inc.	Pending
2023-UP-070 – James Kincannon v. Ashely Griffith	Pending
2023-UP-075 – Dana Dixon v. SCDMH (2)	Pending
2023-UP-087 – The State v. Seth H. Smith	Pending

2023-UP-118 – Joseph N. Grate v. Jameka Cohen	Pending
2023-UP-119 – The State v. Angelita Wright	Pending
2023-UP-121 – Mathew C. Dwyer v. State	Pending
2023-UP-132 – Monica Brown-Gantt v. Centex Real Estate	Pending
2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-164 – Randall G. Dalton v. The Muffin Mam, Inc.	Pending
2023-UP-180 – The State v. Samuel L. Burnside	Pending

The Supreme Court of South Carolina

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

ORDER

After careful consideration of Appellants' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ Kaye G. Hearn A.J.

Columbia, South Carolina
June 28, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 28151
Heard February 9, 2023 – Filed April 19, 2023
Re-filed June 28, 2023

AFFIRMED

Reese R. Boyd III, of Davis & Boyd, LLC, of Myrtle Beach, and Gene McCain Connell Jr., of Kelaher, Connell, & Connor, PC, of Surfside Beach, both for Appellants.

Michael Warner Battle, of Battle Law Firm, LLC, of Conway, for Respondents.

JUSTICE KITTREDGE: The City of Myrtle Beach (the city) is a town economically driven and funded by tourism. After receiving frequent criticism from tourists and residents alike, the city became concerned that the proliferation of smoke shops and tobacco stores were repelling families from the area due to those stores' merchandise and advertising practices. More specifically, the city was troubled with those shops' sale of sexually explicit items, cannabidiol (CBD)-infused products, and tobacco paraphernalia. Therefore, in an effort to improve the "family friendly" nature of the downtown area, the city created a zoning overlay district[1] that prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown.

Appellants are nine of the twenty-five affected stores located in the area, and each was issued a citation by the city's zoning administrator for failing to comply with the zoning overlay ordinance. Following a complicated legal battle, appellants raised a host of constitutional challenges to the zoning overlay ordinance. However, the circuit court found the ordinance survived appellants' veritable barrage. Appellants directly appealed that decision to this Court. We now hold that, under this Court's long-standing precedent, the overlay ordinance did not impermissibly spot zone the city's historic downtown area. We additionally find the overlay ordinance is a constitutional exercise of the city's police powers. We therefore affirm the decision of the circuit court and uphold the validity of the ordinance.

[1] *See* S.C. Code Ann. § 6-29-720(C)(5) (Supp. 2022) (defining an overlay zone as "a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries").

I.

A.

In 2011, the city adopted a comprehensive plan that, among other things, set forth future objectives aimed at increasing tourism and revenue. In the comprehensive plan, the city noted that tourists and residents had repeatedly expressed concern over the "noise and behavior of certain groups visiting the area," resulting in "negative perceptions about Myrtle Beach." Likewise, the city determined that "[c]rime and the perception of crime [was] a problem that need[ed] addressing." The city concluded all businesses needed to encourage and support a "family beach image" and determined that a positive "city image" would foster more tourism. To that end, the city outlined a number of specific objectives, including its desires to (1) "define and maintain Myrtle Beach as a family beach"; (2) "revitalize the downtown area of Myrtle Beach"; and (3) "create an environment[] which ensures that visitors and residents are safe."

Ultimately, the Myrtle Beach city council effectuated those objectives by enacting Ordinance 1807 (the ordinance), which created a zoning overlay district—known as the Ocean Boulevard Entertainment Overlay District (OBEOD)—that encompassed the historic downtown area of the city. Myrtle Beach, S.C., Code of Ordinances app. A § 1807 (2019). In creating the OBEOD, the ordinance extensively set forth its purpose and intent, emphasizing, among other things, the importance of fostering more family tourism and discouraging things that were "repulsive" to families, including "unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." *Id.* § 1807.A. As a result, the city council found the displacement of smoke shops and tobacco stores from the historic downtown area was "in the interests of the public health, safety, and general welfare." *Id.* Likewise, city council stated the presence of smoke shops and tobacco stores heightened the risk of "negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses." *Id.* Finally, city council noted that despite the creation of the OBEOD, there were numerous other locations throughout the city available for the continued operation of smoke shops and tobacco stores. *Id.*

Following the city council's lengthy recitation of the purpose and rationale underlying the ordinance, the ordinance prohibited certain retail businesses and offerings within the OBEOD, including (1) smoke shops and tobacco stores; (2) any merchandising of tobacco paraphernalia or products containing CBD, such as lotions, oils, and food; (3) any merchandising of tobacco products more than that of

an incidental nature (i.e., more than 10% of store's inventory); and (4) any merchandising of sexually oriented material (collectively, the prohibited retail uses). *Id.* § 1807.D.

The prohibited retail uses were declared immediately nonconforming upon passage of the ordinance on August 14, 2018. *Id.* § 1807.E. However, the ordinance provided for an amortization period that gave affected businesses until December 31, 2018, to cease the nonconforming part of their retail offerings. *Id.* The ordinance likewise stated that, should a business continue engaging in the prohibited retail uses, it would be subject to suspension or revocation of its business license. *Id.* § 1807.F.

B.

Shortly before the end of the amortization period, on December 19, 2018, appellants filed suit in federal court seeking damages, injunctive relief, and a declaration that the ordinance was unconstitutional.[2] Two days later, appellants filed a motion for a temporary restraining order, but the parties resolved the motion by consent, agreeing the city would enforce the ordinance "through use of [the city's] zoning ordinance administrative procedures."

Six months later, the city's zoning administrator issued individual citations to each of the appellants for continuing to engage in the prohibited retail uses in violation of the ordinance. The zoning administrator also requested that each of the businesses comply with the ordinance. No penalties were imposed on appellants at that time;

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[2] The federal lawsuit alleged the ordinance amounted to an unconstitutional taking and violated appellants' rights to free speech, due process, and equal protection. Eventually, the federal court dismissed appellants' due process claim, citing the *Burford* abstention doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (explaining the *Burford* abstention doctrine allows a federal court to dismiss a case "only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (citation omitted) (internal quotation marks omitted)). The federal court also dismissed the takings claim without prejudice, finding the claim was not yet ripe. The court stayed the remaining claims (free speech and equal protection) pending resolution of this state court proceeding.

rather, the letters were merely the zoning administrator's determination that appellants' businesses were nonconforming under the ordinance.

Appellants appealed the zoning administrator 's determination to the city's Board of Zoning Appeals (BZA). At the BZA hearing, the zoning administrator set forth evidence as to how each appellant was engaged in the prohibited retail uses, submitting photographs of appellants' stores and merchandise. Appellants' only witness, Tim Wilkes, conceded each of appellants' stores was engaged in one or more of the prohibited retail uses. Nonetheless, appellants requested the BZA either declare the ordinance unconstitutional or grant variances to appellants so that they could continue engaging in the prohibited retail uses. Ultimately, the BZA found (1) it did not have jurisdiction to declare the ordinance unconstitutional;[3] (2) it could not grant a use variance because it would allow the continuation of a use not otherwise allowed in the OBEOD;[4] and (3) appellants' businesses were engaged in one or more of the prohibited retail uses.

Appellants appealed the BZA's decision to the circuit court, but the circuit court affirmed the BZA's decision and found meritless appellants' twenty-five grounds for challenging the ordinance. In relevant part, the circuit court held the boundaries of the OBEOD were not arbitrary and capricious, citing to the city council's extensive recitation of the rationale for adopting the OBEOD and locating the boundaries where it did. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The circuit court also found that whether the ordinance promoted the public welfare was "fairly debatable." In support, the circuit court cited to the zoning administrator's testimony regarding a number of complaints he had received regarding the sale of

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[3] *See* S.C. Code Ann. § 6-29-800(E) (Supp. 2022) (explaining that in exercising its statutory authority, as outlined in subsection (A), the BZA "has all the powers of the officer from whom the appeal is taken"). No one contends the zoning administrator here—the "officer from whom the appeal [was] taken"—would have had the authority to declare a zoning ordinance unconstitutional.

[4] *See* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) ("The [BZA] may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.").

tobacco paraphernalia and sexually oriented merchandise in the historic downtown where there was a high level of pedestrian traffic by families with young children. The court thus concluded appellants had failed to meet their burden to show the ordinance was unconstitutional.

Appellants directly appealed to this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR, raising five issues challenging the validity of the ordinance on both procedural and constitutional grounds.[5] We address each in turn.

II.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991) (per curiam); *see also Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application . . . ."). Courts must make every presumption in favor of the constitutionality of a legislative enactment. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curiam) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional "when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55).

More specifically, "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *see also Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (explaining the Court must exercise "carefully and cautiously" its power to declare a challenged ordinance invalid on the basis that the ordinance unreasonably impaired or destroyed a constitutional right). Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council's action unless the council's findings were arbitrary and capricious or had no reasonable relation to a lawful purpose. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; *Rest. Row*

[5] To be more precise, appellants' brief listed eleven issues on appeal, but because some of the issues overlapped, we have condensed them to five.

Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425 ("The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." (citation omitted)); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) ("This State's constitution provides that the powers of local governments should be liberally construed." (citing S.C. Const. art. VIII, § 17)).

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998) (citing *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425); *Rush*, 246 S.C. at 276, 143 S.E.2d at 531.

III.

Appellants first argue the ordinance is defective as a matter of law because it was not adopted following the procedure set forth in section 5-7-270 of the South Carolina Code. *See* S.C. Code Ann. § 5-7-270 (2004) (requiring generally that municipal ordinances be "read two times on two separate days with at least six days between each reading" prior to being adopted and having the force of law). Specifically, appellants contend the versions of the ordinance introduced for the first and second readings were so different from one another that the city council was required to conduct a third reading prior to enacting the ordinance. We disagree.

Because appellants failed to timely challenge the efficacy of the two readings of the ordinance, they are statutorily barred from raising this issue. Section 6-29-760(D) of the South Carolina Code (2004) requires parties to challenge the validity of an ordinance within sixty days of the decision of the governing body, provided "there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The ordinance was formally adopted and went into effect upon the second reading on August 14, 2018. Appellants did not file their federal suit or take any other formal action to challenge the validity of the ordinance until December 19, 2018—well over sixty days later. As a result, appellants can no longer challenge the validity of the ordinance under section 5-7-270. *See Quail Hill, L.L.C. v. Cnty. of Richland*, 379 S.C. 314, 320–21, 665 S.E.2d 194, 197 (Ct. App. 2008) (holding a challenge to the validity of the enactment of a county ordinance was untimely because the challenge was made long after the sixty-day window had closed), *aff'd in part on this ground and rev'd in part on other grounds*, 387 S.C. 223, 692 S.E.2d 499 (2010).

Even were we to overlook the untimeliness of appellants' challenge and address the merits of their argument, appellants' suggestion that the two readings of the ordinance were vastly different is simply untrue. While the city council expanded the "purpose and intent" section of the original version of the ordinance and added a number of definitions, the prohibited retail uses in the final version were identical to those in the original version. If anything, the amendments merely better-defined the terms used to describe actions or merchandise that qualified as a prohibited retail use. There is no basis on which to conclude the amendments to the ordinance were so drastic as to trigger the need for a new first reading. *Cf. Brown v. Cnty. of Charleston*, 303 S.C. 245, 247, 399 S.E.2d 784, 785–86 (Ct. App. 1990) (explaining the purpose of providing public notice related to zoning amendments is to satisfy the "general principles of due process that require notice which fairly and reasonably apprises those whose rights may be affected of the nature and character of the action proposed"). We therefore affirm the circuit court's decision as to this issue.

IV.

Appellants next argue the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, appellants broadly contend the creation of the OBEOD was unfair to them because they cannot sell certain merchandise that similar stores can continue selling in other areas of the city. Appellants therefore claim the creation of the OBEOD was arbitrary and capricious because it treated them differently from other, similarly situated businesses throughout the city. Appellants point to three specific concerns as evidencing the arbitrary and capricious nature of the ordinance: (1) city council reverse spot zoned the OBEOD; (2) the boundaries of the OBEOD are not drawn in straight lines or with any discernable reasoning behind them; and (3) there is no evidence that the prohibited retail uses affect public safety. We will address each of these concerns below.[6]

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[6] Amongst their eleven issues on appeal, appellants raise two takings claims. The first is a traditional takings claim arising under the Fifth Amendment to the United States Constitution, which we address further below. The second is a claim that because the ordinance violated appellants' right to equal protection, the ordinance took their business without just compensation. Appellants' Br. at 10. We find such an argument meritless and do not address it further other than to note that takings and equal protection are two distinct constitutional doctrines with wholly separate requirements and bodies of case law.

A.

Appellants first contend the ordinance constitutes impermissible reverse spot zoning—a novel issue in South Carolina. We disagree.

There are two types of spot zoning. Traditional spot zoning occurs when a small parcel of land is singled out for a use classification different from that of the surrounding area, for the benefit of the parcel's owner(s) and to the detriment of others. *Bob Jones Univ. v. City of Greenville*, 243 S.C. 351, 361, 133 S.E.2d 843, 848 (1963); *see also id.* at 362, 133 S.E.2d at 848 (noting it is "not [] considered [] spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed [new use] classification" (citing *Eckes v. Bd. of Zoning Appeals*, 121 A.2d 249 (Md. 1956))). Typically, traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person and surrounded by a much larger, uniformly zoned area, such that the small tract is relieved from restrictions to which the rest of the area is subjected. *See Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 175, 72 S.E.2d 66, 71 (1952) (citation omitted); Mark S. Dennison, Annotation, *Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning*, 73 A.L.R.5th 223 (1999) ("The zoning or rezoning of a single tract of land, usually small in size, such that it is zoned differently from surrounding property may be invalidated as illegal spot zoning.").

In contrast, reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction. 83 Am. Jur. 2d *Zoning and Planning* § 89 (2013). Oftentimes, reverse spot zoning occurs where a zoning "island" develops as the result of a municipality's failure to rezone a portion of land to bring it into conformity with similar surrounding parcels that are otherwise indistinguishable. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 731 (Pa. 2003); *Palmer Trinity Priv. Sch., Inc. v. Vill. of Palmetto Bay*, 31 So. 3d 260, 262 (Fla. Dist. Ct. App. 2010) ("The properties surrounding Parcel B were all originally zoned AU or EU-2, but they have been changed to less restrictive zoning classifications as the agricultural character of the area has changed over the years.").

Thus, spot zoning may arise in two ways: (1) by an affirmative legislative act that affects the parcel at issue (traditional spot zoning); or (2) by changes to the zoning map around the parcel at issue (reverse spot zoning). *See* 39 Am. Jur. Proof of Facts 3d 433, § 3 (West 2023) (describing types of spot zoning challenges).

Spot zoning is not impermissible per se in South Carolina. Rather, as this Court has previously explained,

> [W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

Talbot, 222 S.C. at 175, 72 S.E.2d at 71 (citation omitted); *see also id.* at 175, 72 S.E.2d at 70 (cautioning that courts should not "become city planners but [should only] correct injustices when they are clearly shown to result from the municipal action"). Thus, when the Court finds an ordinance constitutes spot zoning, "the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown." *Knowles v. City of Aiken*, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991); *see also* 39 Am. Jur. Proof of Facts 3d 433 ("Legal challenges to [spot zoning] are generally based on allegations and proof of discriminatory treatment of a single landowner, inconsistency with the comprehensive plan, incompatibility with neighboring uses, and harm to the general welfare of the community.").

Here, despite Appellants' contentions, the creation of the OBEOD does not fit within the accepted definition of reverse spot zoning. The prohibited retail uses in the OBEOD were not the result of a zoning "island" that developed as the surrounding area was rezoned while the OBEOD was left behind; rather, the OBEOD was created by an affirmative legislative act by the city. In other words, if anything, the creation of the OBEOD more closely resembles traditional spot zoning.

However, we find it equally doubtful the creation of this overlay district constituted traditional spot zoning. The OBEOD is a fairly large area: it overlays at least twenty distinct zones; it comprises an approximate rectangle measuring slightly less than two miles by one-quarter mile; and it encompasses over fifty city blocks which are, of course, further divided into a significant number of individual properties owned by separate property owners. It goes without saying that creating an overlay zoning district over such a large, diverse area is distinct from the typical, traditional spot zoning factual scenario. *See Talbot*, 222 S.C. at 175, 72 S.E.2d at 71 (noting spot zoning occurs when an ordinance affects a small area within the limits of a single zone); Dennison, *supra*, 73 A.L.R.5th at 223 (explaining spot zoning involves a

single, small tract of land); 39 Am. Jur. Proof of Facts 3d 433 (stating spot zoning challenges generally require proof the ordinance has affected a single landowner).

Even were we to accept appellants' argument that the creation of the OBEOD constituted spot zoning in some fashion, we find that argument unavailing. Specifically, applying the test outlined in *Knowles* and *Talbot*, we find any spot zoning caused by the ordinance was legally permissible. *See Knowles*, 305 S.C. at 223, 407 S.E.2d at 642; *Talbot*, 222 S.C. at 175, 72 S.E.2d at 70. First, the ordinance was consistent with the city's comprehensive plan. Second, as we discuss further below, it is "fairly debatable" that city council enacted the ordinance to promote the public welfare. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (explaining the Court will not overturn a municipality's action if the decision is "fairly debatable" because the action is presumed to be a valid exercise of power, and it is not the Court's prerogative to weigh in on the wisdom of the decision). Third, the ordinance did not result in clear injustice to appellants: even after the creation of the OBEOD, appellants retained ownership of their property—the real estate and the merchandise—and they presented no evidence that they could not pivot to another business model. *See Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P.3d 691, 699–700 (Mont. 2012) (applying the state's traditional spot zoning test under a similar factual scenario, rather than some separate reverse-spot-zoning test, and concluding that because the zoning regulation was consistent with the county's comprehensive plan, it was not impermissible spot zoning); *cf.* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (noting the BZA may not grant a variance if the effect of the variance would be to allow a use not otherwise permitted in a zoning district, and "[t]he fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance"). We therefore reject appellants' equal protection challenge on the basis of impermissible spot zoning.

B.

Second, appellants contend the OBEOD's boundaries are irrational and, to be constitutional, must ban the prohibited retail uses throughout the entire city. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where, as here, "there is no suspect or quasi-suspect class and no fundamental right is involved,

zoning ordinances should be tested under the 'rational basis' standard." *Bibco Corp.*, 332 S.C. at 52, 504 S.E.2d at 116.

Under rational basis review, the Equal Protection Clause is satisfied so long as (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."). A party challenging a legislative enactment under rational basis review "must negate every conceivable basis which might support" the enactment and, therefore, has a "steep hill to climb." *Bodman v. State*, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013) (quoting *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000)) (internal quotation marks omitted)).

Here, the ordinance explicitly states the city council enacted the ordinance to foster a more "family friendly" atmosphere in the historic downtown area and encourage more tourism by families. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The zoning administrator testified that he had received complaints from families about the prohibited retail uses. The city council found the prohibited retail uses "repelled" families from the area. We find it is, at the very least, "fairly debatable" that prohibiting the sale of sexually oriented merchandise and tobacco paraphernalia would encourage a more "family friendly" atmosphere in the historic downtown area. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (stating the Court should not overturn a municipality's decision if the action is "fairly debatable").

Moreover, the zoning administrator stated the boundaries for the OBEOD corresponded with the boundaries of the historic downtown area of the city as much as was practical. Those boundaries were set long ago based on pedestrian travel patterns, family-friendly attractions, and historical uses that preexisted the ordinance. There are two deviations from the historic downtown's boundary lines, both of which have rational explanations. First, the northwestern edge of the OBEOD is shifted half a block away from US-17 Business (the boundary for the historic downtown). Because the OBEOD was created in part to foster more pedestrian traffic in the historic downtown, and because the city council did not

believe families of pedestrians would readily walk along a busy road such as US-17 Business, the city council felt it unnecessary to include that portion of the historic downtown in the OBEOD. Second, and relatedly, the boundary line does not run in a completely straight line along the backs of *every* property that fronts US-17 Business because it cannot: two properties in the OBEOD are large enough that they comprise several city blocks, stretching from US-17 Business all the way to Ocean Boulevard.[7] In those two places, the boundary line runs on the US-17 Business side of the property rather than the ocean-side of the property. The city's decision regarding where to set the boundaries of the OBEOD is certainly not irrational or without basis.

Appellants have failed to show by clear and convincing evidence that the location of or rationale behind the boundaries of the OBEOD is arbitrary and capricious. Consequently, the boundaries of the OBEOD are valid. *See McMaster*, 395 S.C. at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55); *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. As the circuit court found, "Zones must have beginning and terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction." (Citations omitted.) The disparate treatment of similarly situated businesses on either side of the OBEOD boundary line is not a basis on which to find an equal protection violation. *Cf. Bibco Corp.*, 332 S.C. at 52–54, 504 S.E.2d at 116–17 (finding a zoning ordinance that prohibited mobile homes from some residential districts in the city—but not all—survived rational basis review).

C.

Finally, appellants argue the creation of the OBEOD was arbitrary and capricious because the city did not submit any evidence that the prohibited retail uses impacted public safety. We summarily dismiss this argument, as appellants—not the city—had the burden of proof. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531. The city did not need to submit anything affirmatively proving its policy decision was correct. *Cf. Nordlinger*, 505 U.S. at 11 (noting that the Equal Protection Clause requires only that the legislative fact on which the classification is apparently based rationally *may* have been considered to be true by the governmental decisionmaker). Rather, it was incumbent upon appellants to submit evidence that the city's policy decision was

[7] One property contains Pavilion Park, and the other contains Family Kingdom Amusement Park.

based on a faulty factual premise, and the prohibited retail uses had no impact on public safety. Appellants failed to do so.

Accordingly, we hold appellants have failed to demonstrate the ordinance violated their right to equal protection, and we affirm the circuit court's decision on this basis.

V.

Next, appellants raise two due process arguments. First, appellants argue the ordinance does not explicitly provide for a hearing in which an affected vendor could challenge the zoning administrator's finding that certain merchandise fits within the ordinance's definition of sexually oriented merchandise. Second, appellants contend the ordinance imposes an arbitrary and unreasonable amortization period. We disagree with both arguments.

We reject appellants' first argument as it is based on a faulty factual premise. Rather, section 6-29-800(A)(1) of the South Carolina Code explicitly provides the BZA has the authority to hear any appeal "where it is alleged there is error in . . . [a] determination made by an administrative official in the enforcement of the zoning ordinance." Section 6-29-800(E) additionally provides the BZA "has all the powers of the officer from whom the appeal is taken" and, therefore, may determine—just as the zoning administrator does in the first instance—whether the challenged merchandise fits within the ordinance's definition of "sexually oriented merchandise." Further, as occurred here, should an affected property owner disagree with the BZA's decision, it can appeal the decision to the circuit court and, if necessary, this Court.[8]

Turning to appellants' second due process argument, we find any contention that the amortization period was too draconian is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." (cleaned up)). Any attempts by the city to enforce the ordinance and actually impose the provided-for civil penalties were stymied by the pendency of this appeal. As a result, appellants have had nearly

[8] Of course, here, appellants conceded they were engaged in the prohibited retail uses, so there would be no need for an additional hearing challenging the determination of the zoning administrator.

five years to come into compliance with the ordinance and, apparently, have failed to do so. We cannot say an effective five-year amortization period is per se unreasonable.

We therefore reject both of appellants' due process claims.

VI.

Appellants additionally claim the ordinance effects a taking of their property without just compensation, specifically citing the three-factor test set forth by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (explaining that, in regulatory takings cases, courts should examine (1) the economic impact of the regulation on the affected property; (2) the extent to which the regulation interfered with the property owner's investment-backed expectations; and (3) the character of the government action). We disagree.

Takings claims are "essentially ad hoc, factual inquiries" that "depend[] largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 336 (2002) (cleaned up); *see also Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (explaining the question of whether a taking has occurred is a question of law that this Court must review de novo (citations omitted)). Appellants, however, have not developed any of the facts necessary to support a takings claim. For example, they do not quantify the economic impact of the ordinance on their properties—the first *Penn Central* factor. *See Penn Cent.*, 438 U.S. at 124. Rather, appellants merely claim the impact is a "significant amount" that is "dire" and "severe."[9]

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[9] This lack of specificity stands in stark contrast to other takings cases, where parties typically quibble over the appropriate numbers to enter into the takings fraction, as well as the exact percentage necessary to amount to an unconstitutional taking. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017) (explaining the parties submitted competing appraisals for the value of the affected properties, including figures corresponding to the values of the properties with and without the challenged regulation); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 534 (2005) (discussing the exact figures corresponding to the impact of the challenged regulation on each of sixty-four affected properties owned by the claimant); *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, 316 n.12 (involving a dispute over how to define and calculate the denominator of the takings fraction, and detailing the average values of the over-400 affected properties); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001)

We are left to speculate about the facts necessary to support appellants' takings claim.[10] We therefore reject appellants' claim that the ordinance took their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

VII.

Finally, appellants claim the ordinance criminalizes the sale of consumer products that are otherwise legal under state law, and it therefore conflicts with—and must be preempted by—the State's criminal laws. This argument, too, rests on a faulty factual premise.

The ordinance does not impose any criminal penalties for continuing to engage in the prohibited retail uses after the amortization period; rather, the penalty provided for in the ordinance is the suspension or revocation of the nonconforming business's business license. Myrtle Beach, S.C., Code of Ordinances app. A § 1807.F. Thus, the ordinance does not criminalize the sale of legal products in contravention of the State's criminal laws. *Compare, e.g.*, *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008) (upholding the validity of a municipal ordinance banning smoking in bars and restaurants despite the fact that smoking was legal throughout the State, and finding significant the fact that the no-smoking ordinance imposed only civil penalties), *with Beachfront Ent., Inc. v. Town of Sullivan's Island*, 379 S.C. 602, 666 S.E.2d 912 (2008) (striking down a municipal ordinance banning smoking in the workplace because it imposed significant criminal penalties for violations and, therefore, conflicted with State law that otherwise allowed smoking in the workplace). We therefore reject this argument as a basis on which to find the ordinance invalid.

(explaining the plaintiff in a takings action submitted an appraiser's report to quantify the amount of damages sought).

[10] In fact, appellants make no argument at all regarding the second and third *Penn Central* factors, i.e., the extent to which the ordinance impacted their investment-backed expectations or the character of the government action. We therefore find appellants have abandoned any argument regarding those two factors. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 646 n.7 (2000) (stating an issue is deemed abandoned if a party fails to make an argument as to the merits of the issue).

VIII.

After examining the host of appellants' constitutional and procedural challenges to the ordinance, we hold the ordinance was a valid exercise of the city's police powers. *See Rush*, 246 S.C. at 276, 143 S.E.2d at 530–31 ("The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property[,] is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish [their] desired end unless there is [a] plain violation of the constitutional rights of [the] citizens."). We therefore affirm the decisions of the circuit court and BZA.[11]

AFFIRMED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

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[11] As a final matter, appellants contend that our decision today overrules three of our prior decisions: *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970); *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958); and *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955). We find those cases manifestly distinguishable from the present case. *See, e.g.*, *Pure Oil*, 254 S.C. at 34, 173 S.E.2d at 143 ("We have recognized the rule that, when a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested properly right therein of which he cannot be deprived without cause *or in the absence of public necessity*. . . . *There are no intervening considerations of public necessity involved under the facts of this case*." (emphasis added)). Here, of course, the city believed the creation of the OBEOD was a matter of public necessity, as it explained in detail in the purpose and intent section of the ordinance. *See generally* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. Thus, our decision today in no way overrules *Pure Oil*, *James*, or *Kerr*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tappia Deangelo Green, Petitioner.

Appellate Case No. 2021-000313

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 28165
Heard October 25, 2022 – Filed June 28, 2023

AFFIRMED AS MODIFIED AND VACATED IN PART

Appellate Defender Joanna Katherine Delany, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to the court of appeals' decision in *State v. Green*, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021). The court of appeals affirmed Petitioner Tappia Green's convictions for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime. We affirm as modified.

At trial, Green testified on his own behalf and offered an exculpatory story that he had not previously told to the police or the solicitor. During cross-examination, the State questioned Green as to why he failed to tell law enforcement his side of the story at the time of his arrest, implying his exculpatory story was a recent fabrication. Counsel for Green objected to the State questioning Green about his post-arrest silence. The trial court sustained the objection.

Subsequently, Green moved for a mistrial, arguing the State improperly commented on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610, 611 (1976) (holding the Due Process Clause of the Fourteenth Amendment to the United States Constitution forbids the government from impeaching a defendant with his post-arrest silence if the defendant was given his *Miranda*[1] warnings). In evaluating the mistrial motion, the trial court revisited its evidentiary ruling in favor of Green, as the focus became whether Green was given his *Miranda* warnings.

During an *in camera* hearing, the parties offered competing evidence as to whether Green was given his *Miranda* warnings, with law enforcement officers claiming they did not Mirandize Green at the time of his arrest and Green asserting they did. The trial court found the State's evidence more credible, determining Green was not Mirandized and, therefore, a *Doyle* violation did not occur. As a result, the trial court denied Green's motion for a mistrial. Nevertheless, the State did not further pursue Green's post-arrest silence. The court of appeals affirmed, focusing on the novel question of whether the State or the defendant has the burden of proof in a *Doyle* hearing and, ultimately, concluding the defendant has the burden to prove *Miranda* warnings were given and a *Doyle* violation occurred.

Because there is evidence to support the trial court's finding that Green did not receive *Miranda* warnings, we affirm the trial court's denial of Green's motion for a mistrial based on the standard of review. We take the opportunity, however, to

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

clarify the proper procedure when a potential *Doyle* violation arises and vacate the portion of the court of appeals' opinion dealing with this issue. We affirm the court of appeals as modified.

I.

Green was tried for his role in the alleged kidnapping and armed robbery of the victim, Keith Lee. According to the State's presentation of evidence at trial, Green and two other individuals kidnapped Lee by forcing him into the backseat of a car at gunpoint, drove Lee to his place of employment to collect his paycheck, and then stole Lee's wages before releasing him from the car.

The defense presented a vastly different account of the incident. Green testified and, for the first time, offered an exculpatory story. According to Green, Lee owed the men money for drugs he had purchased and, therefore, voluntarily accompanied them to cash his check and repay the money. Green suggested Lee fabricated the criminal accusations so Lee could avoid telling his girlfriend that he spent his entire paycheck on drugs.

On cross-examination, the solicitor challenged Green's version of events, asking Green why he failed to offer this exculpatory story during the almost two-year period between his arrest and trial. Defense counsel objected and argued the State improperly commented on Green's exercise of his Fifth Amendment right to remain silent. The trial court sustained the objection, and the State moved on to a new line of questioning. During a recess, the trial court expressed its concern that the State's line of questioning violated *Doyle*. The trial court noted it discussed the matter in chambers with trial counsel, during which the solicitor advised there was no record of Green receiving *Miranda* warnings at the time of his arrest. Defense counsel protested, insisting Green was prepared to testify that he was Mirandized and requesting to proffer the testimony.

Because the giving of *Miranda* warnings is a prerequisite of a *Doyle* violation, the trial court allowed the parties to proffer testimony on the matter. Green testified he was apprehended after a high-speed chase and that a male law enforcement officer handcuffed him and advised him of numerous pending warrants. Green claimed the same officer advised him of the *Miranda* warnings before putting him in a police car for transport to the county jail. Green did not know the name of the officer that Mirandized him but described the officer as an approximately thirty-year-old, white male dressed in green with a bald head and stocky build.

The State thereafter proffered the testimony of two law enforcement officers involved in Green's arrest: Officer Danielle Smoak and Officer Brandon VanAusdal. Officer Smoak testified that on the date of the arrest, she took Green into custody, put him in handcuffs, and placed him in the back of her patrol car to wait for the transport unit to arrive. Officer Smoak denied reading Green his *Miranda* rights and stated no one in her presence Mirandized Green or attempted to interrogate him. According to Officer Smoak, the only other officers that had any contact with Green were the K-9 officer and the transport officer, the latter of whom would not have given *Miranda* warnings based on protocol. When asked if any person present at the scene fit the description of a bald, stocky man clad in all green, Officer Smoak testified that K-9 Officer Brandon VanAusdal was the only individual who matched the description. Officer VanAusdal confirmed he was present when Officer Smoak took Green into custody and specifically denied giving *Miranda* warnings to Green. Officer VanAusdal also testified he did not hear anyone else read Green his *Miranda* rights.

Following the proffer, defense counsel moved for a mistrial, arguing the State failed to prove that Green was not given *Miranda* warnings. Defense counsel also noted the incident report from the night of Green's arrest indicated the event was recorded on body cameras. The trial court stated it would watch the body camera footage if the footage was immediately available, but it was not, as neither party produced the footage for review. The hearing was concluded, and the trial court found Green was not Mirandized at the time of his arrest.

In support of its ruling, the trial court noted Officers Smoak and VanAusdal were present at the time Green claimed to have been advised of his *Miranda* rights, and both officers testified they did not administer the rights. The trial court further noted the incident report completed at the time of Green's arrest contained a box to be checked if *Miranda* rights were given and required the "advisement of rights form" be attached to the report, but the box was not checked and no form was attached. In light of the evidence and testimony before it, the trial court found the solicitor's questioning did not violate *Doyle* and denied Green's motion for a mistrial.[2] Ultimately, the jury found Green guilty as charged, and the trial court sentenced him

[2] Despite the trial court's ruling that the State's questioning was allowed, the State did not elicit further testimony concerning Green's post-arrest silence, and the last the jury heard on the matter was the trial court sustaining Green's objection to the line of questioning.

to concurrent prison terms of fifteen years each for armed robbery and kidnapping, as well as five years concurrent time for possession of a weapon during the commission of a violent crime.

The court of appeals affirmed Green's convictions. In upholding the trial court's determination that Green did not receive *Miranda* warnings, the court of appeals considered *sua sponte* whether the burden was on the defendant to show a *Doyle* violation occurred—the defendant was Mirandized—or whether the burden was on the State to prove *Doyle* was inapplicable—the defendant was not Mirandized. The court of appeals concluded the burden was upon the defendant to show he received *Miranda* warnings and thus prove a *Doyle* violation occurred. We granted Green's petition for a writ of certiorari to review the court of appeals' decision.

II.

In criminal cases, this Court sits to review errors of law only and is "bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). A trial court's ruling on a motion for a mistrial lies within its sound discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000). Likewise, the proper scope of cross-examination is left to the sound discretion of the trial court. *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998). A trial court's ruling on such matters will not be disturbed on appeal unless the trial court has not acted within its discretion, meaning the conclusions of the trail court either lack evidentiary support or are controlled by an error of law. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

III.

In *Doyle*, the United States Supreme Court held "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. The Court reasoned that because *Miranda* warnings convey an implicit assurance that silence will carry no penalty, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618.

Subsequently, in *Fletcher v. Weir*, the Supreme Court considered whether *Doyle* should be extended to a situation where the defendant was arrested but did not receive any *Miranda* warnings. 455 U.S. 603, 605–06 (1982) (per curiam). There,

the Court declined to broaden *Doyle* and held, "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post[-]arrest silence when a defendant chooses to take the stand." *Id.* at 607. The Court made clear that "[a] State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post[-]arrest silence may be deemed to impeach a criminal defendant's own testimony." *Id.*

Later, in *Brecht v. Abrahamson*, the Supreme Court further explained, "The 'implicit assurance' upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*." 507 U.S. 619, 628 (1993). Therefore, "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest or after arrest if no *Miranda* warnings are given." *Id.* (first citing *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); and then citing *Fletcher*, 455 U.S. at 606–07)). "Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Id.*

South Carolina courts have consistently applied *Doyle* to hold that "the Due Process Clause prohibits the government from commenting on an accused's post-*Miranda* silence." *State v. Simmons*, 360 S.C. 33, 39, 599 S.E.2d 448, 450 (2004); *accord, e.g.*, *State v. McIntosh*, 358 S.C. 432, 442–43, 595 S.E.2d 484, 489–90 (2004); *Edmond v. State*, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000); *State v. Smith*, 290 S.C. 393, 394–95, 350 S.E.2d 923, 924 (1986). This Court analyzed the *Doyle* line of cases and further clarified: "The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of the *Miranda* warnings, in order to impeach the defendant's testimony at trial." *McIntosh*, 358 S.C. at 443, 595 S.E.2d at 490. Thus, in the post-arrest context, the giving of *Miranda* warnings is a prerequisite of a *Doyle* violation. *See Greer v. Miller*, 483 U.S. 756, 763 (1987) (stating where there is no question the defendant received *Miranda* warnings, "this prerequisite of a *Doyle* violation was met"); *see also Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (explaining that *Miranda* warnings "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation").

IV.

Green argues the court of appeals erred in affirming the denial of his mistrial motion by improperly holding that the accused has the burden of proving he received *Miranda* warnings to establish a *Doyle* violation. According to Green, the State—

as the proponent of the impeachment evidence—should have the burden of showing Green did not receive *Miranda* warnings. Conversely, the State posits that Green—as the movant seeking a mistrial—should bear the burden of establishing a *Doyle* violation occurred before he could be entitled to the requested relief. Based on our state's rules of evidence, we agree with Green that the court of appeals erred in placing the burden on the defendant, and we thus vacate that portion of the court of appeals' opinion.

Nonetheless, even when the burden is placed on the State, there is sufficient evidence to support the trial court's finding that Green was not read his *Miranda* rights, and we therefore affirm the denial of Green's motion for a mistrial.

A.

In impeaching an accused with his post-arrest silence, the State seeks to discredit a defendant's trial testimony as a fabrication. *See Doyle*, 426 U.S. at 616. In such a case, the prosecution essentially seeks to use the defendant's silence as a prior inconsistent statement. *See id.* at 622 (Stevens, J. dissenting) ("[T]heir silence is tantamount to a prior inconsistent statement."); *cf. Brecht*, 507 U.S. at 628 (finding it proper and probative in a murder trial for the State to impeach the defendant's testimony by pointing out that his silence after the shooting was inconsistent with his claim at trial that the shooting was an accident).

The relevance of a defendant's post-arrest silence in the absence of *Miranda* warnings "is a question of state evidentiary law." *Jenkins*, 447 U.S. at 239 n.5. Under the South Carolina Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. However, "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Rule 104(b), SCRE. Implicit in Rule 104(b) is an understanding that the proponent of the evidence has the burden of proving the existence of such a preliminary fact.

The relevancy of a defendant's post-arrest silence is conditioned upon whether the defendant was advised of his *Miranda* rights. Not only does the use of a defendant's post-*Miranda* silence for impeachment purposes run afoul of due process, but evidence of a defendant's silence in such situations is also "likely to be ambiguous

and thus of dubious probative value." *Doyle*, 426 U.S. at 617 n.8 (discussing *United States v. Hale*, 422 U.S. 171 (1975)). After all, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617.

Conversely, a defendant's silence prior to the giving of *Miranda* warnings "is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *McIntosh*, 358 S.C. at 443, 595 S.E.2d at 490 (quoting *Brecht*, 507 U.S. at 628). Thus, the absence of *Miranda* warnings is a condition of fact upon which the relevancy of a defendant's post-arrest silence depends. *See* Rule 104(b), SCRE. In order for the State to use a defendant's silence for impeachment purposes, it must introduce evidence sufficient to support a finding of the existence of the preliminary fact upon which the relevancy of the silence depends—that preliminary fact being the absence of *Miranda* warnings.

The United States Court of Appeals for the Third Circuit has adopted the same approach under the Federal Rules of Evidence:

> The relevance of post-arrest silence depends entirely upon its impeaching character as an arguably prior inconsistent assertion by the action of remaining silent. *Doyle v. Ohio* holds that when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion. Thus, the absence of *Miranda* warnings is a typical instance of a condition of fact on the fulfillment of which relevancy of other evidence, in this case post-arrest silence, depends. [Fed. R. Evid.] 104(b). Because it is the prosecutor who is attempting to establish the relevancy, for impeachment or any other purpose, of post-arrest silence, the government bears the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition. Rule 104(b) provides that when the relevancy of evidence depends upon the fulfillment of such a condition of fact, "the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." [*Id.*] The Rule plainly contemplates that the moving party bears the burden of introducing such supporting evidence.

United States v. Cummiskey, 728 F.2d 200, 205–06 (3rd Cir. 1984); *see also United States v. Foster*, 995 F.2d 882, 883 (9th Cir. 1993) (agreeing with the Third Circuit's

reasoning and holding the government has the burden of demonstrating that *Miranda* warnings were not given).

We find the reasoning in *Cummiskey* persuasive and fully consistent with Rule 104(b) of the South Carolina Rules of Evidence. We therefore hold that when a defendant objects to the State's use of post-arrest silence for impeachment purposes and asserts that *Miranda* warnings were given, the burden is on the State to prove by a preponderance of the evidence that the defendant did not receive *Miranda* warnings prior to his silence.

B.

In this case, the trial court conducted a lengthy *in camera* hearing on the issue of Green's *Miranda* warnings. After considering the proffered testimony, the trial court issued its ruling, cited evidence to support the ruling—namely, the incident report and various law enforcement officers' testimony—and ultimately made a factual finding. *See Mitchell*, 330 S.C. at 196, 498 S.E.2d at 645; *Harris*, 340 S.C. at 63, 530 S.E.2d at 627. The record is replete with evidence to support the trial court's finding that Green did not receive *Miranda* warnings at the time of his arrest.[3]

We therefore affirm the court of appeals' holding that the trial court correctly found the State's questioning did not violate *Doyle*. Necessarily then, we affirm the trial court's decision to deny Green's motion for a mistrial.

V.

While the procedure employed by the trial court in this case was thoughtful and appropriate, we provide additional guidance for the Bench and Bar in hopes of ensuring any future *Doyle* challenge is as well-handled as it was here.

We begin by recognizing the fluid and unpredictable nature of trials, especially noting the procedurally unique manner in which a *Doyle* violation arises. Unlike

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[3] Notably, the trial court implicitly placed the burden on the State, finding the State proved beyond a reasonable doubt that Green was not Mirandized—a far higher burden than the preponderance standard adopted today. Moreover, even though the court of appeals placed the burden on the wrong party, its analysis in effect cited all of the evidence in support of the trial court's ruling.

most constitutional issues which can be handled pretrial (e.g., *Neil v. Biggers*,[4] *Jackson v. Denno*,[5] and Fourth Amendment suppression motions), a *Doyle* issue may arise without warning during trial. After all, it is not until the defendant takes the stand and gives testimony warranting impeachment by post-arrest silence that a potential *Doyle* issue arises. Such an issue generally cannot be handled pretrial, as the defendant retains the right to elect whether to testify until the defense rests its presentation of evidence.

However, because such evidence has a significant potential for prejudice, the subject of commenting on a defendant's post-arrest silence is fraught with peril. *See Edmond*, 341 S.C. at 347 n.3, 534 S.E.2d at 686 n.3 ("[T]he proper practice in a typical case . . . is for the prosecutor to avoid any mention of the defendant's exercise of constitutional rights."); *State v. Holiday*, 333 S.C. 332, 340, 509 S.E.2d 280, 284 (Ct. App. 1998) (noting that our appellate courts have repeatedly warned solicitors against *Doyle* violations and collecting cases to that effect). Here, the State at oral argument, to its credit, recognized the significant risk for prejudice and acknowledged the better practice is to have a hearing outside of the jury's presence before attempting to impeach the defendant with this type of evidence.

Accordingly, when a defendant's testimony is such that the solicitor wishes to impeach the defendant using his post-arrest silence, great care and caution must be undertaken. The preferred course of action is for the State to alert the trial court when the issue arises and, outside the presence of the jury, inform the court of its intent to impeach the defendant with his post-arrest silence. At that point, the defendant may either (1) concede *Miranda* warnings were not given, and the State can proceed to cross-examine the defendant without violating *Doyle*; or (2) object and invoke the *Doyle* doctrine.

If the defendant objects, the defendant, through counsel or individually, must affirmatively represent to the court that *Miranda* warnings were given. Formal testimony is not necessary to satisfy this burden of production. Once the defendant has made this representation, the trial court should conduct a brief hearing outside of the jury's presence during which the State has the burden of proving by a preponderance of the evidence that *Miranda* warnings were not given. While the

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[4] 409 U.S. 188 (1972).

[5] 378 U.S. 368 (1964).

burden of proof remains on the State,[6] the defendant shall be entitled to present evidence.[7]

VI.

Care must be taken when the State seeks to impeach a defendant with his post-arrest silence. As the proponent of such impeachment evidence, the State bears the burden of proving the evidence is admissible and will not violate the defendant's right to due process as articulated in *Doyle* and its progeny. *See also* Rule 104(b), SCRE. In its role as the gatekeeper of admissibility, the trial court must evaluate the evidence and determine whether the State has shown by a preponderance of the evidence that the defendant was not given his *Miranda* warnings. Here, the trial court properly fulfilled its role and issued a detailed ruling supported by a number of facts in evidence. We therefore hold the trial court did not commit error in denying Green's motion for a mistrial. The decision of the court of appeals is

AFFIRMED AS MODIFIED AND VACATED IN PART.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

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[6] It is incumbent on the State and the defendant to act in good faith. A representation by the defendant or his counsel must be made in a reasonable, good faith belief that *Miranda* warnings were given. Conversely, the solicitor must have a reasonable, good faith belief that *Miranda* warnings were not given.

[7] We see the close of the State's case-in-chief as an opportunity to address the *Doyle* issue. Trial judges typically advise a defendant of his right to testify or not to testify after the State has concluded its case-in-chief. At this juncture, judges also often provide an *in limine* ruling of whether any prior convictions of the accused will be admissible pursuant to Rule 609, SCRE. This may be an appropriate time for the parties to alert the trial court of a possible *Doyle* issue, thereby allowing an opportunity to vet and resolve a potential *Doyle* issue.

The Supreme Court of South Carolina

In the Matter of Sidney J. Jones, Petitioner.

Appellate Case No. 2022-000259

ORDER

In September 2013, this Court disbarred Petitioner as reciprocal discipline following his disbarment in Georgia. *See In re Jones*, 405 S.C. 617, 749 S.E.2d 305 (2013). Petitioner first sought readmission in November 2018; however, after a hearing before the Committee on Character and Fitness, the Court denied the petition for readmission on January 15, 2020. On March 7, 2022, Respondent filed a second petition for reinstatement, which was referred to the Committee. *In re Jones*, S.C. Sup. Ct. order dated Apr. 5, 2022. The Office of Disciplinary Counsel did not oppose the petition. Petitioner appeared before the Committee a second time on August 25, 2022, and on February 16, 2023, the Committee issued a report recommending that Petitioner be readmitted to practice law. No exceptions have been filed by either Petitioner or the Office of Disciplinary Counsel.

We find Petitioner has met the requirements of rule 33(f), RLDE, Rule 413, SCACR. Therefore, we grant the petition for readmission. Petitioner is hereby readmitted as a regular member of the South Carolina Bar.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

I respectfully dissent. Because I find Petitioner has not demonstrated by clear and convincing evidence that he meets the criteria for readmission under Rule 33(f), RLDE, Rule 413, SCACR, I would deny the petition for readmission.

s/ John Cannon Few J.

Columbia, South Carolina
June 26, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Desa Ballard and Desa Ballard P.A., d/b/a Ballard & Watson, Appellants,

v.

Admiral Insurance Company and Adele J. Pope, individually and as Special Administrator of the Estate of Gloria Corley, Respondents.

Appellate Case No. 2019-000367

Appeal From Lexington County
Walton J. McLeod, IV, Circuit Court Judge

Opinion No. 5994
Heard March 15, 2022 – Filed June 28, 2023

AFFIRMED

Eric Steven Bland, of Bland Richter, LLP, of Lexington; and Scott Michael Mongillo and Ronald L. Richter, Jr., both of Bland Richter, LLP, of Charleston, all for Appellants.

Adele Jeffords Pope, of Law Office of Adele J. Pope, PC, of Newberry, pro se.

Wesley Brian Sawyer, of Murphy & Grantland, PA, of Columbia, for Respondent Admiral Insurance Company.

Adam Tremaine Silvernail, of Law Ofc. of Adam T. Silvernail, of Columbia, for Respondent Adele J. Pope, as Special Administrator of the Estate of Gloria Corley.

MCDONALD, J.: In this action for declaratory judgment, Desa Ballard and Desa Ballard, P.A. (collectively, Ballard) appeal an order granting Admiral Insurance Company's (Admiral) motion for judgment on the pleadings, arguing the circuit court erred in considering the language of the "hammer clause"[1] found in Admiral's professional liability insurance policy (the Policy). Ballard further contends the record lacks the factual development necessary to properly determine whether the refusal to consent to Admiral's proposed settlement was reasonable. We affirm the well-reasoned order of the circuit court.

Facts and Procedural History[2]

In March 2011, Aundra Williams, Gloria Corley's daughter and attorney-in-fact (Daughter), hired Ballard to defend Corley in a lawsuit filed by attorney Adele Pope. Pope had previously represented Corley in a matter involving Corley's annual distributions from the Martin L. Corley Trust (the Trust).[3] Although Pope collected approximately $18,333.33 each year from 1999 through 2010 when Corley received her annual distributions from the Trust, she filed suit to recover additional attorney's fees allegedly owed for legal services. Ballard asserted numerous defenses to Pope's action against Corley, including claims that Pope's fee agreement took advantage of an elderly and frail client and was void as violative of public policy.

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[1] A hammer clause "puts pressure on the insured's right to refuse consent to settle and thereby increases an insurer's ability to effectuate a settlement." *Rawan v. Cont'l Cas. Co.*, 136 N.E.3d 327, 330 (Mass. 2019).

[2] We recite the facts here as alleged in Ballard's complaint but recognize Admiral, Pope, and the Estate of Gloria Corley (the Estate) dispute many of these statements.

[3] Corley's late husband established the Trust for her benefit.

While defending Pope's claim, Ballard also represented Corley in negotiating a buy-out of her interests in the Trust. The buy-out included a lump sum payment to Corley but terminated her future annual payments of $55,000 as well as Pope's ongoing yearly attorney's fees of $18,333.33.[4] The Lexington County Probate Court approved the buy-out (the Trust Settlement).

Ballard's complaint in the matter before us alleges the Trust Settlement "was structured so that the lump sum payment to Mrs. Corley was calculated on the basis of monthly payments provided for Mrs. Corley in Mr. Corley's Last Will and Testament for the remainder of Mrs. Corley's life based on statutory life expectancy tables." The Trust Settlement did not include any present or future payments related to Pope's prior legal representation of Corley.

In structuring the Trust Settlement, Ballard met with Daughter and Corley's certified public accountant (CPA) to discuss appropriate steps for preserving the funds for Corley's care and financial needs. Although Ballard alleges reasonable steps were taken to insulate these funds from Pope's fee claim, Ballard advised the CPA that Pope might attempt to recover some portion of the Trust Settlement under a theory consistent with her claim for ongoing yearly attorney's fees.

The Trust—separately represented by its own counsel in conjunction with the Trust Settlement—argued to the probate court that the modification of the distributions to Corley was in the best interest of the Trust. Despite the express language of the Trust Settlement, which sought to nullify Corley's fee agreement with Pope, Pope moved for and obtained an order granting her one-third of the gross amount of the Trust Settlement (the Pope Judgment).[5] The Pope Judgment provided attorney's fees that Pope would not have realized had Corley's interest in the Trust not been liquidated because Corley did not live as long as the statutory life expectancy tables on which the original Trust Settlement was projected.[6] Ballard appealed the Pope Judgment; however, this court dismissed the appeal as untimely.

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[4] Pope was not a party to the Trust buy-out proceeding.

[5] One of Ballard's filings in a prior matter notes that in August 2013, Pope was awarded "$248,673.87, plus daily interest and costs of collection."

[6] Corley died approximately four years after the execution of the Trust Settlement.

Ballard timely notified Admiral that Corley could potentially make a claim against her as a result of the untimely appeal of the Pope Judgment. On May 9, 2014, Admiral notified Ballard that it had assigned the defense of any claim to Mendes & Mount, LLP (Mendes).

While not admitting the failure to timely file the appeal caused harm to Corley, Ballard properly notified Daughter of the potential claim against Ballard. Despite advising Daughter to consult with separate counsel given the potential for a conflict, Daughter asked Ballard to continue representing Corley. During this time, Ballard kept Admiral informed of significant developments related to Pope's claim and in August 2014, Admiral accepted notice of the matter as a circumstance that would fall within Ballard's coverage under its 2013–14 Policy. Admiral renewed the Policy each year until 2017–18, when it declined to renew, claiming Ballard had breached the terms and conditions of the Policy by refusing to consent to Admiral's request to engage in settlement discussions with Pope.

Following execution of the Trust Settlement, Ballard suggested Daughter, as attorney-in-fact, obtain counsel for the purpose of establishing a conservatorship and/or guardianship to further protect the Trust Settlement proceeds; Ballard subsequently made an appointment for Daughter with a lawyer for this purpose. Although Ballard believed Daughter met with the recommended lawyer, Daughter cancelled the meeting before it concluded and never returned. In the meantime, Pope continued her efforts to collect the Pope Judgment and amended her complaint for attorney's fees to assert additional claims against third parties.

Ballard began to suspect Daughter had mismanaged or perhaps even misappropriated some or all of the money recovered for Corley through the Trust Settlement. Thus, Ballard advised Daughter she might be a witness in further proceedings relating to Pope's claim and recommended Daughter and Corley obtain separate counsel. Ballard was subsequently relieved as counsel, Corley obtained new counsel, and Daughter obtained separate counsel.

On August 6, 2015, Ballard notified Admiral of a potential new claim, and Admiral engaged Monitor Liability Managers (Monitor) and Mendes to review it.

Corley died on March 31, 2016, and the probate court appointed Pope, a judgment creditor, as special administrator of Corley's estate. Ballard alleges Pope obtained

Daughter's consent to serve as special administrator by agreeing the Estate would not attempt to recover any of the funds Daughter mismanaged or misappropriated. Daughter also agreed to assist Pope in pursuing a civil suit against Ballard.

After her appointment as special administrator, Pope asserted Ballard committed legal malpractice by advising Corley to enter into the disadvantageous Trust Settlement. As specified in Corley's estate planning documents, any excess funds recovered in the legal malpractice action that are not paid to Pope will be paid to Daughter as Corley's beneficiary.

In accordance with her rights under the Policy, Ballard notified Admiral of her preference not to extend any settlement offers or enter any settlement in the legal malpractice claim Pope brought in her capacity as special administrator of the Estate. However, Mendes's agents notified Ballard that Admiral wished to engage in pre-suit mediation with Pope in an effort to settle. Ballard repeated that no settlement discussions or mediation were to be initiated by Admiral or any attorney retained to represent Ballard and asserted that doing so would violate Ballard's rights under the Policy. Admiral then notified Ballard that if it could reach a settlement figure and Ballard refused to agree, Admiral would withdraw its defense coverage under the Policy. Ballard "reiterated that no settlement discussions should occur in any context."

In February 2017, Pope filed a legal malpractice claim against Ballard on behalf of the Estate.[7] Admiral again advised Ballard of its plan to initiate settlement discussions. If the negotiations succeeded, Admiral intended to settle the matter and terminate Ballard's coverage. Ballard objected to Admiral's plan to offer in excess of $100,000 to settle, noting such a settlement would convey the impression that the claims were meritorious, reflect negatively on her reputation and standing in the legal community, and harm the firm's future insurability with other

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[7] The Estate alleged Ballard was negligent in: (1) failing to recognize termination of the trust was not in Corley's best interests; (2) failing to have a guardian ad litem appointed for Corley; (3) representing both Corley and Daughter despite the inherent conflict of interest; (4) failing to recognize Pope's fee agreement entitled Pope to a percentage of the lump sum buyout payment; and (5) undertaking a frivolous defense of the Pope Judgment and then failing to timely appeal.

professional liability carriers. Ballard further asserted a settlement offer would constitute a breach of Admiral's obligations under the Policy.

Three months after Pope filed the Estate's legal malpractice claim, Monitor notified Ballard that the Policy, as it then existed, would not be renewed due to Ballard's "failure to comply with policy terms and conditions." Upon Ballard's inquiry as to how she failed to comply, Monitor advised Ballard by email that "[t]he basis for the non-renewal [was] the insured's refusal to consent to settle." Ballard challenges this—arguing the Policy does not contain terms requiring her to "consent to settle" upon the carrier's request. To the contrary, Ballard asserts the Policy provides a bargained-for contractual right to refuse to settle and Admiral's purported basis for non-renewal was merely anticipatory because the parties had not yet agreed on a settlement figure. Ballard claims the non-renewal was "invidious, retaliatory and against public policy and constituted a denial of first party insurance coverage."

Ballard subsequently retained counsel and brought this action for declaratory, injunctive, and related relief against Admiral regarding the parties' respective rights and obligations under the Policy. Admiral answered and counterclaimed, seeking declaratory relief to enforce the Policy as written. Admiral further sought declarations that: (1) Admiral had the right to participate in settlement negotiations in the underlying legal malpractice action; (2) Ballard owed a duty to cooperate in the defense and settlement of the claim and could not prevent Admiral from participating in settlement negotiations; and (3) the Policy's hammer clause would be enforced as written.

Admiral moved for judgment on the pleadings, and the circuit court held a hearing to address several matters.[8] Through counsel, Ballard asserted the Policy gave her the right to prevent settlement negotiations if it appeared Pope would benefit from the settlement.

The circuit court granted Admiral's motion for judgment on the pleadings and dismissed Ballard's accompanying bad faith claim without prejudice, finding the

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[8] Pope and the Estate filed motions to dismiss or, in the alternative, to strike. The circuit court granted these motions to dismiss, and Ballard did not appeal the dismissals.

Policy section titled "Defense, Cooperation and Settlement" controlling. Section VI of the Policy provides in pertinent part:

> B. The **Insurer** shall have the sole right and the duty to defend any covered **Claim,** and has the sole right to select defense counsel. . . .
>
> C. Each **Insured** shall cooperate with the **Insurer** in the defense and settlement of any **Claim** . . . . Upon the request of the **Insurer,** the **Insured** shall . . . attend hearings, depositions and trials, assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses . . . and meeting with such representatives for the purposes of investigation or defense, all without charge to the **Insurer.**

Reading these provisions, the circuit court determined that by the plain terms of the Policy, Admiral had the right to control the defense of the case, which included the right to participate in settlement negotiations.

Regarding the hammer clause, the circuit court found the Policy language unambiguous and enforceable according to its plain terms. This clause, found in section VI, paragraph D, provides:

> The **Insurer** shall not settle any **Claim** without the **Named Insured's** consent. If, however, the **Named Insured** shall refuse to consent to any settlement recommended by the **Insurer**, which is acceptable to the claimant, and shall elect to contest the **Claim**, or continue any legal, administrative or arbitration proceedings in connection with such **Claim**, then the Insurer's liability for the **Claim** shall not exceed the amount for which the **Claim** could have been settled, including **Claims Expense** incurred up to the date of such refusal. Such amounts are subject to the provisions of section V. In the event that the **Named Insured** refuses to consent to any settlement as set forth in section VI. D., the **Insurer's**

> right and duty to defend such **Claim** shall end upon the date of such refusal.[9]

Although Ballard argued the clause could not be enforced unless the named insured *unreasonably* refuses a settlement proposal recommended by the insurer and acceptable to the claimant, the circuit court declined to insert the word "unreasonably" into the Policy.

Ballard has appealed the circuit court's findings that:

> a. Admiral has the right to negotiate a potential settlement as part of its defense of the Underlying Malpractice Action;
>
> b. Admiral has a right to participate in settlement negotiations at mediation in the Underlying Malpractice Action;
>
> c. Plaintiffs owe a duty to cooperate in the defense and settlement of the case and do not have a right to prevent Admiral from participating in settlement negotiations with [the Estate];
>
> d. If Admiral recommends a settlement to the Named Insured which is acceptable to [the Estate], and the Named Insured rejects the settlement and chooses to contest the Underlying Malpractice Action, then Admiral's liability for the Claim shall not exceed the amount for which the Claim could have been settled,

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[9] Policy section III, paragraph B defines "Claims Expense" as "reasonable and necessary fees, costs and expenses . . . resulting solely from the investigation, adjustment, defense and appeal of a covered or potentially covered **Claim** against the **Insureds**." However, the definition specifically excludes "salaries, wages, overhead or benefit expenses associated with any **Insured**, or any amount covered by the duty to defend obligation of any other insurer." Section V addresses the Policy's limits of liability and deductible.

> including Claim Expenses incurred up to the date of such refusal; and
>
> e. If Admiral recommends a settlement to the Named Insured which is acceptable to [the Estate], and the Named Insured rejects the settlement and chooses to contest the Underlying Malpractice Action, then Admiral's right and duty to defend the Underlying Malpractice Action shall end upon the date of such rejection.

Standard of Review

The circuit court incorporated the provisions of the Policy into its consideration of Admiral's motion for judgment on the pleadings. For that reason, and also because Admiral attached a copy of the Policy to its motion for judgment on the pleadings, Ballard asserts the proper standard of review is that for a motion for summary judgment; however, Admiral asserts the Policy was part of the pleadings, both through its attachment of the Policy to its answer and counterclaim and due to Ballard's specific references to the Policy throughout her complaint. Thus, Admiral argues and we agree that (1) the circuit court properly considered the Policy when it evaluated Admiral's motion for judgment on the pleadings; and (2) the proper standard of review is that for a motion for judgment on the pleadings.

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). In analyzing a Rule 12(c) motion, the court must liberally construe the complaint "so that substantial justice is done between the parties." *Id.* at 287, 533 S.E.2d at 353. Under Rule 12(c),

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In any event, "[w]hether reviewing a grant of summary judgment or a judgment on the pleadings, we apply the same legal standards as the trial court." *Ziegler v. Dorchester Cnty.*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019). "We review questions of law de novo." *Id.*

Law and Analysis

I. Policy Language

Ballard argues the circuit court's consideration of the hammer clause was premature because "this lawsuit does not seek to prevent a settlement from occurring. Instead, it seeks to prevent Admiral [from] 'pursu[ing] a settlement' or 'seek[ing] to settle' the claim so as to put Ballard in a position of having to invoke the 'consent' provision of the policy." We disagree.

"Insurance policies are subject to the general rules of contract construction." *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* (quoting *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628).

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628). "Whether the language of a contract is ambiguous is a question of law for the court." *Id.* at 143–44, 781 S.E.2d at 141. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" *Id.* at 144, 781 S.E.2d at 141 (quoting *Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011)). "However, this court must construe '[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer.'" *Id.* (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628).

Here, section VI, paragraph B of the Policy gives Admiral the "sole right and the duty to defend any covered **Claim**. . . ." Moreover, the clear and unambiguous language of the Policy states Admiral, as the insurer, has the right to control the defense of the case. Likewise, Section VI, paragraph C, provides each "**Insured** shall cooperate with the **Insurer** in the defense and settlement of any **Claim**. . . ."

Section VI, paragraph D, does initially seem to prohibit Admiral from settling any claim without Ballard's consent:

> The **Insurer** shall not settle any **Claim** without the **Named Insured's** consent.

Yet, paragraph D goes on to state:

> If, however, the **Named Insured** shall refuse to consent to any settlement recommended by the **Insurer**, which is acceptable to the claimant, and shall elect to contest the **Claim**, or continue any legal, administrative or arbitration proceedings in connection with such **Claim**, then the Insurer's liability for the **Claim** shall not exceed the amount for which the **Claim** could have been settled, including **Claims Expense** incurred up to the date of such refusal. . . . In the event that the **Named Insured** refuses to consent to any settlement as set forth in section VI. D., the **Insurer's** right and duty to defend such **Claim** shall end upon the date of such refusal.

Thus, if Admiral recommends a settlement to Ballard that is acceptable to the Estate, Ballard has the right to reject it and continue defending the case. However, such a rejection ends Admiral's duty to defend and caps its liability at the proposed settlement amount. Although the consent clause, found in the same paragraph as the hammer clause, gives Ballard the option to reject a settlement proposed by Admiral, we find nothing in the Policy gives Ballard the ability to prevent Admiral from participating in settlement negotiations. Otherwise, there would be no way to determine an amount "for which the **Claim** could have been settled" for purposes of this provision in the Policy.

Ballard further argues Admiral failed to allege Ballard refused to cooperate in "the handling" of the claim. However, this is exactly what Admiral alleged—Ballard's repeated refusal to allow Admiral to initiate settlement or mediation discussions constituted a failure "to cooperate with the **Insurer** in the defense and settlement of any **Claim**." Ballard further contends Admiral has neither offered nor accepted a settlement. But, in her pleadings, Ballard stated Admiral informed her of its intent to offer the Estate in excess of $100,000. Admiral attempted to initiate settlement discussions both before and after Pope filed suit in 2017; nevertheless, Ballard stated again and again that neither Admiral nor any attorney retained to represent Ballard was to initiate settlement or mediation discussions.

We find the circuit court correctly analyzed the clear and unambiguous language of the Policy in finding Ballard could not prevent Admiral from negotiating with the Estate to settle the Pope claim. The Policy requires Ballard to cooperate with Admiral in the defense and settlement of Pope's action; Ballard is free to choose not to consent to a settlement, but such refusal triggers the consequences of the hammer clause.

II. "Reasonableness"

Ballard next argues the record reflects no facts upon which the circuit court could properly determine whether her refusal to permit settlement was reasonable. In so arguing, Ballard attempts to insert a "reasonableness" term into the Policy's consent to settle clause. Acceptance of this argument would essentially require us to rewrite the Policy, which South Carolina law forbids. *See, e.g.*, *Benjamin*, 415 S.C. at 143, 781 S.E.2d at 141 ("Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.") (quoting *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628)).

Ballard cites *Clauson v. New England Insurance Co.*, 254 F.3d 331 (1st Cir. 2001) for the proposition that a hammer clause cannot be enforced unless the insured "unreasonably" rejects a proposed settlement. However, contrary to Ballard's claim, the *Clauson* court merely applied the language of the consent to settle clause in the policy at issue—which included language addressing "unreasonably withheld" consent. *See id.* at 336–35 ("The Company shall have the right to make any investigation it deems necessary and with the written consent of the insured, said consent not to be unreasonably withheld, any settlement of any claim covered

by the terms of this policy."). This case is easily distinguishable because Ballard's Admiral Policy contains no such language.

By contrast, courts interpreting polices that—like Ballard's—lack the phrase "unreasonably withheld" in the context of a consent to settle clause have applied the policy language regardless of whether the insured "unreasonably" withheld consent. For example, in *Security National Insurance Co. v. City of Montebello*, Montebello argued "it acted reasonably in refusing a settlement offer conditioned on [an] employee's continuing employment." 680 F. App'x 525, 527 (9th Cir. 2017). Rejecting Montebello's "reasonableness" argument, the Ninth Circuit noted the clause at issue did "not limit the insurer's right to invoke the clause to instances where the insured was unreasonable in rejecting an offer. To hold otherwise would impermissibly rewrite the hammer clause to the policyholder's benefit." *Id.*

Likewise, in *Cowan v. Codelia*, 50 F. App'x 36, 38 (2d Cir. 2002), the Second Circuit explained, "[T]he district court conducted an evidentiary hearing regarding the parties' settlement discussions and found that Codelia's 'phantom objections' and 'illusory' complaints about the settlement were the equivalent of a rejection." Thus, the court rejected the insured's argument "that its right to choose its own counsel supplanted the effect of the consent-to-settle clause, particularly where Chicago Insurance pursued a settlement in good faith."[10] *Id.*

We find the circuit court correctly applied the reasoning of *City of Montebello* in rejecting Ballard's argument seeking to rewrite the clear and unambiguous

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[10] Ballard argues there is no need for an "unreasonably withheld" qualifier for the Policy's consent consideration because the requirement of good faith and fair dealing on the part of the insurer supplants the need for such Policy language. We disagree. While Ballard correctly argues courts must balance a malpractice carrier's interest in efficiently resolving claims against its insured's right to protect her reputation and challenge claims reasonably believed to be of little or no merit, this is not such a bad faith action. Because the circumstances alleged in Ballard's Complaint do not implicate such balancing concerns, we focus—as we must—on the plain language of the Policy. *Cf. Sentry Select Ins. Co. v. Maybank L. Firm, LLC*, 426 S.C. 154, 157–58, 826 S.E.2d 270, 271–72 (2019) (noting an "insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits").

language of the Policy. The Policy's hammer clause sets out the consequences of an insured's rejection of a recommended settlement such as that proposed by Admiral here. Because the clause does not include a "reasonableness" modifier, development of the factual record in this case was unnecessary; the circuit court properly considered the Policy language as written.

Conclusion

For the foregoing reasons, the circuit court's order granting Admiral's motion for judgment on the pleadings is

AFFIRMED.

THOMAS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kayla Marie Cook, Appellant.

Appellate Case No. 2019-001417

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

Opinion No. 5995
Heard December 6, 2022 – Filed June 28, 2023

AFFIRMED

Appellate Defender Kathrine H. Hudgins; and Daniel J. Westbrook and Amber Modestine Steele Hendrick, both of Nelson Mullins Riley & Scarborough, LLP, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr. and Senior Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, all for Respondent.

WILLIAMS, C.J.: Kayla Marie Cook appeals her conviction for homicide by child abuse, arguing the trial court erred in (1) refusing to grant a mistrial and (2) allowing the introduction of evidence that the minor victim suffered an arm injury two- to four-weeks prior to her death. We affirm.

FACTS/PROCEDURAL HISTORY

The victim in this case is a three-year-old girl (Minor). Minor lived with her father (Father), Cook, and Cook's eighteen-month-old son and five-year-old daughter. Cook is not Minor's mother. Cook's neighbor, Miriam Myers, testified at trial that Cook came to her house on the morning of December 18, 2017, and asked for help because Minor was not breathing. Myers and Cook ran to Cook's house where Minor was lying unresponsive on the couch. Myers recalled that Minor was very blue, "ice cold," and had no signs of breathing. Other neighbors came to the house and Myers and Earlene Cochran began performing CPR. Law enforcement was called at 12:04 p.m. and immediately transported Minor to the hospital.

Dr. Alexander Vinuya testified that when Minor arrived at the hospital, she was very cold with no heartbeat and he was told she drowned in the bathtub. Dr. Vinuya tried to resuscitate Minor for more than an hour and a half, and eventually pronounced Minor dead at 1:32 p.m. Dr. Vinuya stated he found it suspect that Minor was fully clothed even though he was told Minor had slipped and fallen in the bathtub. He testified that based on how cold Minor's body was when she came to the hospital, she would have been dead for at least thirty minutes. Dr. Vinuya noted an obvious, severe, "palm sized" bruise on Minor's abdomen that Cook explained occurred when Minor had an accident with a dog.

During her six-hour police interview on the day of Minor's death, Cook described the events of the evening of December 17 and the morning of December 18. Cook changed portions of her account several times throughout the interview. Generally, Cook stated that the night before her death, Minor had a potty-training accident in her pants and Cook cleaned her, dressed her, and put her to bed. Cook then left the house with her younger child for a couple of hours and came back. When she returned, Cook and Father watched a movie and went to bed in the same bed with Minor and the other two children around 10 or 11 p.m. Cook woke up around 6:30 a.m. Father left for work before she and the children were awake. While Cook tidied up the house, Minor had another potty-training accident. Cook told her to go into the bathroom and Cook began running a lukewarm bath for Minor. She left Minor in the bathtub with water up to her belly button.

Cook continued to tidy the house and became frustrated because her younger child was screaming and pulling on her. She realized Minor had been very quiet in the tub. She also stated she thought Minor had fallen in the tub. Cook went into the bathroom where Minor was lying in the bathtub face-up with the water at her ears and was looking at her. She was breathing but very still, and Cook thought she

was joking. Cook picked her up out of the tub and dried her off. A neighbor knocked on the door and Cook answered the door but said to come back later because Minor had fallen in the tub. Cook described Minor as cold but "fine." Minor was looking at her, moving her eyes, and breathing. She was not talking. Cook wrapped her in blankets and put her on the couch. Minor started making gurgling noises and her eyes were not focused. Cook stated she ran out of the house to find help. Later in the interview, Cook spontaneously questioned why an autopsy was being performed on Minor and said maybe it was because she had "pushed" on Minor on the couch. Upon further questioning, she amended her story to say she had pushed on Minor's chest and breathed into her mouth when Minor gurgled on the couch. Cook said she did not think anything was wrong when she got Minor out of the tub. Later in the interrogation, Cook stated she accidentally stepped on Minor with a boot a few days before. She claimed Father saw a large abdominal bruise when he cleaned Minor's bathroom accident. Cook claimed Minor had multiple unexplained bruises and injuries that happened when Cook was not around. Cook also claimed that Minor fell off the bed and was knocked down by the dogs.

Cook testified at trial that everything was "completely normal" with Minor on the morning of her death. She said that she saw an abdominal bruise on Minor when Minor was in the bathroom but it did not cause her concern. When Cook got Minor out of the bathtub, she still did not think anything was wrong. She noticed minor was cold. She also acknowledged that if anything had happened to Minor that morning before getting out of bed, she would have known about it because they were all in the same bed. Cook also testified at trial that she saw Father whip Minor with a belt the night before her death. In contravention of her previous statements, Cook denied accidentally stepping on Minor with a boot, claiming she lied to protect Father. She denied seeing bruises on Minor's head the morning of her death.

Father testified at trial that he ate dinner with Cook, his other children, and Minor, the night before Minor's death. Cook left the house with her two children to drop the older child off with the grandparents. Before Cook left the house, Minor had a potty-training accident, and Father undressed her, cleaned her, and put her in clean clothes. Father testified he did not see any bruising on Minor's abdomen, legs, or the back of her head as he was cleaning her. Minor had bruising on her face that he had seen before. Father testified that Cook spanked Minor twice as punishment for the potty-training accident. After dinner and the diaper change, Father put Minor in bed and the household went to sleep. Minor was asleep when Father left

for work the next morning. After lunch, Father was called to the hospital and he was in the room when his daughter was pronounced dead.

Dr. Janice Ross performed the autopsy on Minor. She observed bruising on Minor's forehead, eyeball, chin, and right ear. There were seven bruises on her chest along with bruises on her groin/abdomen, elbows, hands, arms, and legs. Minor also had bruising on the back of her head. There was hemorrhaging throughout her torso and blood-tinged fluid in her abdominal and chest cavities. Dr. Ross concluded Minor suffered a blunt force injury to her head that could not have been caused by a fall as her whole brain was swollen. Dr. Ross stated that Minor's injuries would have caused her death within two hours.

Dr. Susan Lamb testified as an expert in child abuse pediatrics. Dr. Lamb noted the bruising around Minor's ears and eyes were caused by Minor being hit upside the head and suffering blunt force trauma. She stated that the major contributors to Minor's death, the abdominal hemorrhage and the brain injury, were inflicted upon her no more than two hours before her death. She stated that the injuries inflicted on Minor would have caused her to be in "agony" for those two hours.

Dr. Amy Durso testified as an expert in forensic pathology. She explained that the multiple bruises on Minor were not consistent with normal bruising for an active three-year-old and showed intentional infliction of trauma on the child. She stated that the bruise on Minor's abdomen was dark and indicated a strong blow, and the internal examination showed significant bleeding which led to her death. Minor's liver was lacerated, and there was significant hemorrhage around her intestines. Dr. Durso examined sectioned slides of all of the injured areas on Minor's body and organs, and stated "you can't outright date a bruise." Dr. Durso testified that Minor's injuries would have been very painful and led to her death in one hour or less. Dr. Durso concluded Minor's injuries could not have been caused by a dog, other children, or a fall.

Sergeant Jodi Sims testified that the police investigation showed that Cook was the only one in the house with Minor on the morning of her death, and was "the only one that could have caused her death."

Cook presented the expert testimony of Dr. Nicholas Batalis, a forensic pathologist. Dr. Batalis opined that Minor's death was not caused by her head injury but was caused by the abdominal injury. Dr. Batalis testified it was unlikely the abdominal injury happened the morning of Minor's death, and could have been inflicted one to three days prior. Dr. Batalis stated the abdominal injury was the

type that would have come from a high-speed car wreck, falling off a balcony, or being kicked, stomped or punched. Dr. Batalis stated "the color of the bruise gives us the best information of the dating of the injury."

Cook made a pre-trial motion to suppress evidence relating to an injury to Minor's arm, arguing there was no evidence Cook caused the injury. The State argued "the aspect of it that we think is relevant to this case is a pattern of abuse in the days coming before Minor's death." The trial court denied the motion and ruled the "failure in light of the injury to get medical care meets the intent aspect of the statute under extreme indifference and that's the reason it's being introduced." There was both medical testimony and testimony from witnesses, including Cook, that Minor suffered a broken arm from a possible fall off the bed in the weeks before her death. However, Myers testified that Minor said "[Cook] did it" and pointed at Cook. Minor's grandmother testified Cook told her the injury was being treated. The trial court instructed the jury twice during witness testimony that the evidence relating to Minor's arm injury was only to be considered for extreme indifference, and the injury did not cause Minor's death.

During the State's direct-examination of the lead investigator on the case, Agent Baird, the solicitor asked whether Baird had viewed Cook's five-year-old daughter's forensic interview. The following occurred:

> **Q:** Was she able- you can't say what she said at all, okay? But was she able to give you information?
>
> **A:** Yes. The forensic interview, along with all the other evidence in the case, reinforced the fact that [Cook] did cause Minor's death.

Cook moved for a mistrial, stating "[t]he objection is, she said that it indicated that [Cook] did it. . .. I don't think we can come back from that." The trial court denied the motion and asked if Cook requested an additional curative instruction besides the jury not considering the statement. Cook argued the instruction was insufficient and did not propose an additional instruction. The trial court gave the following instruction to the jury:

> [T]he witness's last response to the question posed to her is stricken from the record. You may not and shall not consider it at all in your deliberations, when you're told

> to begin deliberations. And that's your job to make sure that's not part of the jury's deliberation, okay, sir?

The jury found Cook guilty of homicide by child abuse, and the trial court sentenced her to life in prison.

ISSUES ON APPEAL

I. Did the trial court err in refusing to grant a mistrial when the witness testified the information obtained from the forensic interview of Cook's five-year-old daughter "reinforced the fact" of Cook's guilt?

II. Did the trial court err in refusing to grant Cook's motion to suppress evidence of an injury to Minor's arm that did not contribute to her death?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Martucci*, 380 S.C. 232, 246, 669 S.E.2d 598, 605 (Ct. App. 2008). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *Id.*

"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." *Martucci*, 380 S.C. at 247, 669 S.E.2d at 606 (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.* (quoting *State v. Irick*, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001)).

LAW/ANALYSIS

I. Motion for Mistrial

Cook argues the trial court erred in denying her motion for a mistrial after Agent Baird testified that the forensic interview of Cook's five-year-old daughter, "along with all the other evidence in the case, reinforced the fact that [Cook] did cause Minor's death." Cook argues Baird's statement was inadmissible hearsay and no instruction could have cured the error. We disagree.

> The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court. A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.

State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citations omitted). "A curative instruction is generally deemed to have cured any alleged error." *Id.* at 258, 746 S.E.2d at 501. "If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996).

Here, we find the trial court's instruction sufficiently cured the error of Agent Baird's testimony. The trial court sternly instructed jurors not to consider the testimony and reinforced this admonition during its final instructions to the jury, stating, "[A]ny evidence that has been stricken from the record . . . may not be considered by you in this case. You must treat it as if it was not presented at all." Agent Baird's testimony inferred that Cook's five-year-old daughter gave investigators reason to believe Cook harmed Minor, but the testimony was not specific and was not alluded to again during trial. Coupled with the curative instruction, we find the testimony does not rise to the extreme, urgent, and grievous level necessitating a mistrial. *See State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (noting that to cure error, "the jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations"); *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

The dissent characterizes this case as a classic "Whodunnit?" However, overwhelming evidence shows that Cook was the only person who could have "done it." There was testimony that Father left before Cook woke up at 6:30 a.m. Cook testified that Minor was "completely normal" that morning when Cook woke her up. Minor died at the hospital at 1:32 p.m. Dr. Janice Ross testified Minor's injuries would have caused her death within two hours. Dr. Susan Lamb

testified the major contributors to Minor's death, the abdominal hemorrhage and the brain injury, were inflicted upon her no more than two hours before her death. Dr. Amy Durso testified Minor's injuries would have led to her death in one hour or less. Moreover, Sergeant Jodi Sims testified the police investigation showed that Cook was the only one in the house with Minor on the morning of her death and was "the only one that could have caused her death."

Cook argues Dr. Batalis "was unable to say to a reasonable degree of medical certainty that Minor's abdominal injuries, which caused her death, were inflicted, rather than accidental. Therefore, the jury was confronted with the additional question of whether Minor's fatal injuries were inflicted by someone or the result of a terrible accident." While Dr. Batalis stated the abdominal injury, if accidental, was the type that would have come from a high-speed car wreck or falling off a balcony, there was no evidence presented nor was there any allegation that Minor was in a high-speed car accident or fell off a balcony in the days before her death. Experts testified the injuries that caused Minor's death were not accidental. Dr. Ross testified Minor suffered a blunt force injury to her head that could not have been caused by a fall. Dr. Lamb testified the bruising around Minor's ears and eyes were caused by Minor being hit "upside the head." Dr. Durso stated Minor's injuries could not have been caused by a dog, other children, or a fall.

Accordingly, the trial court did not err in refusing to grant a mistrial.

II. Evidence of Prior Arm Injury

Cook contends the trial court erred in admitting evidence of Minor's prior arm injury, arguing it was not relevant and "there was no evidence that it was the result of an inflicted blow by [Cook] or anyone else." Cook further argues there was no logical connection between Minor's injured arm or Cook's alleged failure to obtain treatment for the injury. We disagree.

"A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2015).

This court has held that a defendant's alleged prior acts of abuse toward a minor victim were admissible under the "common scheme or plan" exception in a

homicide by child abuse case. *See Martucci*, 380 S.C. at 256, 669 S.E.2d at 611.[1] "Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect." *Id.* at 255, 669 S.E.2d at 610. The *Martucci* court noted when "the perpetrator is the parent or a person with exclusive custody and control over the victim, proving the abuse becomes extremely difficult." *Id.* at 256, 669 S.E.2d at 610–11. "As a result of the difficulties in proving child abuse, 'evidence which shows a pattern of abuse becomes even more probative than it might otherwise be.'" *Id.* (quoting *State v. Pierce*, 326 S.C. 176, 182, 485 S.E.2d 913, 916 (1997)).

Evidence of prior bad acts that are not the subject of a conviction must be established by clear and convincing evidence. *State v. Holder*, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The evidence admitted 'must logically relate to the crime with which the defendant has been charged.'" *Id.* (quoting *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Here, as in *Martucci*,

> [T]he evidence of prior abuse against the same victim was not remotely disconnected in time from the conduct giving rise to the homicide by child abuse and was part of the same pattern of abuse showing extreme indifference to human life. It was logically relevant to proving [Minor] died of multiple, non-accidental blunt force injuries and that [her] death was the result of child abuse.

Id. at 256, 669 S.E.2d at 611.[2] The evidence showed that Cook hid her failure to obtain medical treatment for Minor's arm injury. Further, there was clear and convincing testimony from Cook's neighbor that Minor identified Cook as having inflicted the arm injury. Therefore, we hold the trial court did not err in admitting the arm injury testimony.

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[1] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

[2] The alleged abuse in *Martucci* occurred in the month and a half to several weeks before the child's death. *Id.* Here, the injury occurred two- to four- weeks before Minor's death.

CONCLUSION

Based on the foregoing, Cook's conviction is

AFFIRMED.

THOMAS, J., concurs.

LOCKEMY, A.J., concurring in part and dissenting in part, in a separate opinion.

LOCKEMY, A.J., concurring in part and dissenting in part:

I respectfully dissent. I concur with the analysis and holding of the majority that the evidence of the arm injury was admissible.

Regarding the motion for a mistrial, the trial court and the majority agree that the statement by the lead investigator in this case that Cook's daughter's "forensic interview, along with all the other evidence in the case, reinforced the fact that [Cook] did cause Minor's death," was inadmissible hearsay. Where I part company with my colleagues is whether the instruction given by the trial court was sufficient to remove any prejudice to the appellant.

I acknowledge that curative instructions are presumed to remove the prejudice and that mistrials should only be granted in very rare instances. *See State v. Wilson*, 389 S.C. 579, 585-86, 698 S.E.2d 862, 865 (Ct. App. 2010) ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial."). The hotly contested evidence in this case between experts and the inference that either Cook or Father caused this child's death, made the airing of this accusatory hearsay statement by the appellant's daughter one of those rare instances. I would find the instruction was not sufficient to remove the prejudice Cook suffered and would hold the trial court erred in not granting her motion for a mistrial.

As highlighted in Cook's appellate brief, this is a classic case of "Whodunnit?". The facts presented showed Minor passed away as a result of blunt force trauma. One expert testified the injury occurred while Minor was in Cook's care, while another expert expanded the timeframe to include when Minor was with Father. Additionally, one of the experts was unable to say to a reasonable degree of

medical certainty whether Minor's injuries were intentionally inflicted by someone or accidentally incurred. Therefore, the jury was confronted with the question as to whether Minor's injuries were inflicted by Cook, Father, or were accidental. To add to this question, the lead investigator interjected a statement from Cook's own daughter that she believed Cook committed this crime. Once it was clear the prosecution was attempting to produce information from the forensic interview that would be inadmissible hearsay, Cook objected. Though the prosecution ensured it was not delving into this territory, as too often happens in criminal cases, the prosecution's next question directly resulted in the inadmissible response. The trial court admonished the prosecution for seeking to "back-door" the daughter's interview. The lead investigator's statement was clearly inadmissible by all legal standards because it was blatant hearsay. To add even more prejudice to Cook, her daughter did not testify at trial and was not subject to cross-examination.

Regardless of how the majority chooses to characterize it, this case contained conflicting testimony. Determining what the testimonies revealed or did not reveal was within the sole province of the jury to weigh and then reach a decision. The conclusory comment by the lead investigator, however, invaded that province. To then add a blatant hearsay statement that Cook's own daughter thought her mother caused Minor's death pushed that invasion across the Rubicon. As Roman chronicler Suetonius observed, "Alea iacta est,"[3] and the instruction by the trial court, no matter how sincere, could not uncross that river. In this case a mistrial, even though an extreme measure, was the only way to achieve due process. *See State v. Herring,* 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way."); *see also State v. Nelson*, 431 S.C. 287, 312-13, 847 S.E.2d 480, 494-95 (Ct. App. 2020) (standing for the proposition that a trial court should grant a mistrial motion when a defendant is prejudiced and his due process rights are violated). Accordingly, I would reverse and remand for a new trial.

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[3] Gaius Suetonius Tranquillus, *De Vita Caesarum, Book I: Divus Iulius*, Para. 32, *available at* https://penelope.uchicago.edu/Thayer/L/Roman/Texts/Suetonius/12Caesars/Julius*.html (last accessed June 23, 2023).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc., n/k/a Atlantic Construction Services, Inc.; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc., f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; WC Services, Inc.; CRG Engineering, Inc.; CertainTeed Corporation; Kelly Flooring Products, Inc, d/b/a Carpet Baggers; Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; Chris a/k/a John Doe 61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall Company, Inc.; Mosely Concrete; H and A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A Construction, and Hand A Construction; JMC Construction, Inc., JMC Construction, LLC, John Doe 1-15, Defendants,

of which Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc. is the Appellant.

Appellate Case No. 2019-001790

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 5996
Heard February 14, 2023 – Filed June 28, 2023

AFFIRMED IN PART AND REVERSED IN PART

Christian Stegmaier and James Lloyd Williams, both of Collins & Lacy, PC, of Columbia, for Appellant.

Stephanie D. Drawdy and Joshua Fletcher Evans, both of Justin O'Toole Lucey, P.A., of Summerville; Edward D. Buckley, Jr., of Clement Rivers, LLP, of Charleston; and Anna Scarborough McCann and Justin O'Toole Lucey, both of Justin O'Toole Lucey, P.A, of Mount Pleasant, all for Respondents.

KONDUROS, J.: In this condominium construction defect case, subcontractor defendant Tri-County Roofing, Inc. (TCR) appeals the trial court's decision regarding setoff. TCR contends the trial court erred in not setting off the entirety of a posttrial settlement between the plaintiffs and codefendant general contractor Complete Building Corporation (CBC). TCR further contends the trial court erred in denying its motion for a complete setoff of pretrial settlements between the plaintiffs and several other defendants involved in the project. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

In 2005, Island Pointe, LLC, as developer, entered into a contract with CBC for the construction of forty duplex condominium units[1] as a project called Palmetto Pointe at Peas Island, located near Folly Beach. CBC subcontracted with TCR to install the siding and roofing. Later, the installation of waterproof membranes on decks was added by change order. TCR's general scope of work included the roofing, siding, trim, and waterproofing the decks, and their bid included fascia, soffits, gutters, and downspouts. TCR hired subcontractors to complete its obligations to CBC,[2] including Eloy Alonzo Vazquez and Miracle Siding, LLC (Miracle). Vazquez was responsible for roofs and waterproof membranes, and Miracle was responsible for siding on seventeen of the twenty buildings. The units were built during 2006 and 2007.

In late 2014 to early 2015, the Palmetto Pointe Condominium Property Owners Association (the Association) noticed ongoing leaking issues related to the roofing. The Association hired a company to investigate. Later, an engineer was hired and discovered building code violations and other construction deficiencies.

On February 13, 2015, the Association and a homeowner, as class representative,[3] (collectively, Plaintiffs) filed a complaint. The complaint alleged negligence, gross negligence, and breach of implied warranty against CBC, TCR, and other subcontractors. The complaint requested actual and punitive damages. TCR answered and cross-claimed against its subcontractors. Plaintiffs amended their complaint twice and added TCR's subcontractors as defendants. CBC, the developer, and Novus Architects filed cross-claims against other defendants.

Prior to trial, numerous defendants reached settlement agreements with Plaintiffs totaling in aggregate between $4,725,000 and $5,012,500. The parties agree some of the settlements were for damages that were removed from the trial of the case.

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[1] Eventually, two more duplex buildings were built. Those were built at a later time by different entities and were not at issue in these proceedings.
[2] TCR did not do any actual work on the construction of the units; it was a middleman between CBC and TCR's subcontractors and also supervised those subcontractors' work.
[3] That representative was later replaced by another homeowner, Jack Love, who is a respondent in addition to the Association in this appeal. The class was never certified.

Those settlements total $1,407,500 and have been referred to as issue release settlements.[4]

In addition to the issue release settlements, Plaintiffs entered into several other settlement agreements. Plaintiffs settled with Novus Architects, Inc. f/k/a SGM Architects, Inc. for $650,000,[5] and with Cohen's Drywall Company, Inc. (Cohen's) for $125,000 for work related to installing insulation and drywall. Plaintiffs settled with framing subcontractor, Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. for $700,000 and with a subcontractor to Atlantic, H and A Framing Construction, LLC, (H and A) for $500,000.[6]

Trial began on May 6, 2019, with eight remaining defendants: Stanley's Vinyl Fence Designs; JMC Construction, Inc. (JMC); Island Pointe; CBC; TCR; Miracle; Vasquez; and W.C. Services, Inc. Prior to the verdict, three defendants left the case. Stanley's settled on the second day of trial for $295,000. The trial court dismissed JMC at the directed verdict stage, and Plaintiffs released their claims against Island Pointe prior to closing arguments.

During trial, Plaintiffs presented testimony from various experts demonstrating numerous code violations and faulty workmanship. Plaintiffs' expert, Russell

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[4] Most of these settlement agreements are included in the record. For a few, the record only contains emails agreeing to settlement terms. The following settlements are referred to as issue release settlements: (1) American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston, HVAC, $795,000; (2) Andersen Windows, Inc.; window product manufacturer, $200,000; (3) Tallent and Sons, Inc., grading & paving, $195,000; (4) Kelly Flooring Products, Inc. d/b/a Carpet Baggers, carpet and wood flooring installer, $25,000; (5) Alderman Construction, interior trim & railings, $75,000; and (6) Mosley Concrete, concrete, $95,000. Plaintiffs also settled with Builder Services Group, Inc. d/b/a Gale Contractor Service, which had supplied and installed fireplaces, for $22,500.

[5] The trial court's posttrial order states that the settlement amount was $600,000, but this appears to be incorrect.

[6] Plaintiffs entered into a few more pretrial settlements that were not issue releases but are not at dispute on appeal: Creekside, Inc., $150,000, painting and caulking; Certainteed, Corp., $35,000, manufacturer of roofing shingles, siding, and trim; and Cornerstone Construction, $150,000, siding and flashing. In the settlement agreement with Cornerstone, Plaintiffs agreed to grant TCR a setoff for the amount paid by Cornerstone for TCR's release of its claims against Cornerstone.

Mease, testified as to the scope of work that would be required to remedy the defects at Palmetto Pointe. Much of the work he described required significant demolition and reconstruction in order to rectify the buildings' defects. Plaintiffs' damages expert, Jerry Handegan, testified regarding an estimate he prepared after being provided with Mease's scope of work evaluation. Handegan's original estimate, prepared in December of 2017, totaled $15,257,512. A hand-revised estimate, removing certain elements of damage and other revisions, totaled $13,428,826 and was completed in May of 2019.

CBC hired Alan Schweickhardt[7] to investigate the alleged defects at Palmetto Pointe. Schweickhardt's testimony focused on deficiencies in the areas covered by TCR and its subcontractors, namely roofing, decking, and siding as a water intrusion investigation. Steven Watkins prepared an estimate for the scope of work investigated by Schweickhardt using more targeted repairs and arrived at a cost of $1,898,163.27.

Mark Poyner testified as the operations manager for TCR. He stated the contract between TCR and CBC for was roofing, siding, and deck waterproofing and totaled $1,382,558.24. He also testified the amount of the contract between CBC and Palmetto Pointe was $11,578,454. His testimony addressed, among other things, the liability of CBC and the designers of the project for the resultant defects.

James Lawrence "Larry" Elkin was the damages expert who evaluated the damages as to Miracle Siding and Vasquez. Elkin testified the work on the issues causing the water intrusion, including flashing and waterproofing, should have been coordinated, supervised, and tested—shifting ultimate responsibility back up the contracting chain to TCR and CBC.

In closing, Plaintiffs requested $12.8 million in damages comprised of $12.4 million in repair costs and $800,000 in lost use. CBC questioned Handegan's damages estimate and encouraged the jury to go line by line to see which items should be included and which items should be reduced based on the timeline of the

[7] Schweickhardt, Watkins, and Poyner are all listed as a plaintiff's witness presumably because of the cross-claims between CBC and TCR.

revised estimate.[8] After reviewing some of these items with the jury, CBC suggested $6.5 million would be the remaining amount of damages.

The jury returned a verdict in W.C. Services' favor. As to the remaining defendants, the jury found actual damages in the amount of $6.5 million. The jury also found CBC was grossly negligent and awarded punitive damages in the amount of $500,000. It likewise found TCR grossly negligent and awarded $500,000 in punitive damages. After the verdict form was received, the trial court, pursuant to section 15-38-15 of the South Carolina Code (Supp. 2022), crafted a special verdict form for the jury in which it would apportion the percentage of responsibility for the $6.5 million among the remaining defendants. However, because CBC and TCR had been found grossly negligent, their liability could not be apportioned pursuant to subsection 15-38-15(F).[9] The jury found Miracle and Vasquez each responsible for 5% of the actual damages, or $325,000 each. CBC and TCR were therefore jointly and severally liable for the remaining 90% of actual damages—$5,850,000. The trial court gave the parties ten days to file posttrial motions.

Prior to the hearing on posttrial motions and twenty-one days after the conclusion of the trial, Plaintiffs entered into a settlement with CBC for $2,137,500. The parties allocated $1 million of the settlement proceeds to items not discussed at trial and $637,500 to items that were considered by the jury at trial. $500,000 of the settlement proceeds were earmarked for CBC's punitive damages.

TCR filed multiple posttrial motions, including ones for new trial nisi remittitur, new trial absolute, judgment notwithstanding the verdict, elimination of punitive damages, and setoff. Both parties prepared setoff recommendation charts. The trial court issued a Form 4 Order denying all of TCR's motions except the motion for setoff, which it granted in the amount conceded to by Plaintiffs—$1.67 million. TCR filed a motion for reconsideration that was primarily devoted to the issue of setoff. The trial court did not alter the amount of setoff but offered a somewhat more detailed explanation for its rulings. The trial court held a plaintiff is entitled

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[8] Plaintiffs argued some costs should be reduced because they were based on renting equipment etc. for a shorter period of time than originally anticipated.
[9] § 15-38-15(F) ("This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.").

to allocate settlement funds in the most advantageous way to it even if that may disadvantage a nonsettling tortfeasor like TCR. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). Additionally, the trial court concluded TCR had not met its burden of establishing a dollar-for-dollar setoff by establishing the settlements with other defendants were for the same injury. This appeal followed.

GENERAL LAW REGARDING SETOFF

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000). "[S]uch a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him. In other words, there can be only one satisfaction for an injury or wrong." *Id*. (citation omitted). "Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is 'almost universally held that there can be only one satisfaction for an injury or wrong.'" *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (quoting *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)).

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. "In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act (the Act), [sections] 15-38-10 to -70 [of the South Carolina Code] (2005 and Supp. 2014)." *Id*. "[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)).

Section 15-38-50 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Id.

> [A] critical feature of the [Act] is the codification of the empty chair defense—a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages'—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being 'empty').

Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (quoting § 15-38-15(D)).

"Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (quoting *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non[]settling defendant may be entitled to offset." *Id.*

"When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off.'" *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (alterations in original) (citation omitted) (quoting *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999)). Nevertheless, the trial court has discretion in

determining the amount of setoff when the settlement involves more than one claim. *See Glenn v. 3M Co.*, Op. No. 5975 (S.C. Ct. App. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 102, 143) ("*Riley* [,414 S.C. at 196, 777 S.E.2d at 830] indicates that the circuit court has discretion as to merely the amount to be setoff against the verdict when the settlement involves multiple claims.").

As to allocation of settlement funds by and between settling parties, our supreme court has agreed with the following approach taken by the Illinois Court of Appeals:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley, 414 S.C. at 197, 777 S.E.2d at 831 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. Ct. 2009)).

When a plaintiff removes certain elements of damages from its case because of a pretrial settlement, the court may find the defendant tortfeasor has received the benefit of a setoff based on the plaintiff's lowered request for damages. *See Oaks at Rivers Edge Prop. Owners Ass'n. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 442, 803 S.E.2d 475, 484 (Ct. App. 2017) (affirming the trial court's denial of setoff, reasoning "Appellants already received the benefit of the settlements" totaling $4,260,497.93 when the plaintiffs reduced their damages request by that amount).

ANALYSIS

I. Setoff For Posttrial Settlement With CBC

To examine the setoff of the posttrial settlement between CBC and Plaintiffs, the $2,137,500 at issue must be broken down into separate components. First, the $1 million in insurance proceeds from a July 2018 agreement between Plaintiffs, CBC, and an insurer of CBC's was allocated by those parties as follows:[10]

- $900,000 - HVAC and electrical
- $100,000 - concrete, flooring, interior handrails, fireplaces, and drainage[11]

Second, an additional $1,137,500 was allocated as follows:

- $137,500 - exterior railings[12]
- $100,000 - fire separation penetrations other than those caused by the location of the fire sprinkler distribution system within the fire rated wall separating the units within each building
- $400,000 - framing work to provide code-compliant access to HVAC equipment
- $500,000 - punitive damages

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[10] This agreement was denominated a "Mediated Partial Payment" and incorporated a "Covenant-Not-to-Execute." The insurer paid $1 million, which "constitute[ed] a credit in the same amount against any judgement obtained against CBC." The agreement released the insurer from any further obligation to CBC under the policy, primarily a duty to defend, and provided Plaintiffs would not execute against CBC's assets or its officers' personal assets in collecting any judgment. The agreement did not release CBC as a defendant and specifically reserved Plaintiffs' right to pursue its claims against CBC and all other parties. All necessary signatures—Plaintiffs', CBC's, and the insurer's—were obtained at that time; the document, according to its terms, became irrevocable at that time, and the $1 million was paid to Plaintiffs at that time.

[11] The settlement denotes these were "items not included at trial."

[12] Plaintiffs conceded and the trial court allowed this portion of the CBC settlement as a setoff to TCR.

In declining to grant TCR a setoff for the entirety of the settlement, the trial court relied on *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015), for the proposition that a plaintiff is entitled to allocate settlement funds in the most advantageous way to it, even if that may disadvantage a nonsettling tortfeasor like TCR.[13] The trial court also stated TCR was not entitled to a setoff for the portion of the settlement allocated to punitive damages. We will address each component of the CBC postverdict settlement in turn.

A. The $1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute

TCR contends the $1 million insurance payment allocated to HVAC, electrical, drainage, and fireplaces—matters for which damages were not sought at trial—was a settlement for the same injury represented by the verdict in the case. Therefore, it was entitled to a setoff. *See* § 15-38-50 (explaining right to setoff arises when two parties are liable in tort for the same injury). Plaintiffs claim these damages did not represent the same injury and because they did not seek damages for HVAC, electrical, drainage, and fireplaces at trial, TCR is not entitled to a setoff. We agree with Plaintiffs.

In *Oaks at Rivers Edge*, 420 S.C. at 432, 803 S.E.2d at 479, the developer and the construction manager of condominiums sought a setoff for a pretrial settlement with other tortfeasors in the construction defect case. The settlement contemplated

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[13] We caution the trial bench that allocations in settlements are not simply to be accepted but are to be examined to ensure a measure of fairness to all parties. As the trial court and Plaintiffs have pointed out, our courts have generally recognized Plaintiffs are permitted to allocate settlement proceeds as they determine, even if that might be detrimental to a nonsettling defendant. *Riley*, and the Illinois case on which it relies, contemplate the possibility that agreed-upon settlement allocations, largely driven by plaintiffs, may not always be appropriate. *See Riley*, 414 S.C. at 197, 777 S.E.2d at 831 ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not *per se* bad faith to engage in the advantageous apportioning of a settlement." (quoting *Lard*, 901 N.E.2d at 1018)). *See also Rutland*, 400 S.C. at 220, 734 S.E.2d at 147 (Pleicones, J., dissenting) (suggesting the court's reallocation of settlement proceeds is inappropriate when "*there is no suggestion of fraud or other wrongdoing by the plaintiff*" (emphasis added)).

damages resulting from the "design, manufacture, sale, and installation of the windows, window units, exterior doors, exterior door units, railings, balustrades, framing, and caulking." *Id*. at 434, 803 S.E.2d at 480. "However, [because the plaintiffs] removed from their claim the repairs necessitated by the damage caused by the window installation," the court determined the developer and construction manager "have already received a reduction in claims as contemplated by section 15-38-50 . . . ." *Id*. at 441, 803 S.E.2d at 484.

As in *Oaks at Rivers Edge*, by eliminating repair costs for HVAC, electrical, drainage, and fireplaces from its damages estimate, Plaintiffs effectively gave TCR (and all the defendants at trial) a setoff and thus the trial court did not err in declining to give a second reduction by setting off this amount from the verdict. Therefore, we find the trial court did not err in denying the $1 million payment as a setoff.[14]

B. $637,500 of CBC Settlement Allocated for HVAC access, fire separation penetration, and exterior railings

Here, unlike the $1 million payment allocation, the $637,500 allocation was for issues that Plaintiffs put before the jury.[15] In discussing pretrial matters, Plaintiffs indicated the issue regarding lack of access to the HVAC units due to framing mistakes was "still in the case." Furthermore, during trial, Plaintiffs questioned their expert, Mease, about the lack of access to the HVAC units due to improper framing and introduced photographs documenting the issue, noting it was a code violation. Likewise, Plaintiffs questioned Mease regarding fire separation penetrations. Mease testified numerous firewall penetrations were visible in the attics of the condominium units due to sprinkler installation, framing, ducting, and plumbing. Plaintiffs introduced photographs documenting instances of these errors. Because these issues were raised and discussed at trial, Plaintiffs cannot

[14] TCR does not maintain the $1 million payment was actually unallocated based on the fact this document was executed and the sum paid to Plaintiffs in July 2018—well before the full posttrial settlement between Plaintiffs and CBC. Likewise, TCR does not allege apportioning this part of the funds to matters not discussed at trial was in bad faith. Regardless, TCR was not found liable for damages related to HVAC, electrical, flooring, concrete, drainage, or interior railings as those were not included in Plaintiff's request for damages at trial.
[15] Plaintiffs concede a setoff of the full $137,500 allocated to exterior railings.

make the same pretrial damages reduction argument they persuasively made in section IA.

TCR contends the entirety of Plaintiffs' settlement with CBC should be set off from the verdict against it because the settlement is in reality a satisfaction of a judgment, as opposed to an allocated settlement. We agree. Responding to this contention, Plaintiffs maintain that by settling prior to the entry of judgment, CBC was never subject to a judgment and therefore TCR's argument fails. Plaintiffs misconstrue the crux of TCR's argument. While CBC was not technically subject to a judgment, that is not what is required for TCR to be entitled to setoff. Setoff is premised on a settlement corresponding to the same injury. *See Widener*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."). In this case, TCR and CBC were found jointly and severally liable for *all* the injuries put before the jury including damages related to framing for HVAC access and fire separation penetrations not related to sprinkler installation. The injuries addressed by the jury's verdict cannot now be parsed out and separated simply because Plaintiffs settled their claim against CBC prior to the entry of judgment. *See Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) (declining to "speculate as to how the jury allocated damages resulting from a general verdict"). Therefore, Plaintiffs would receive a double recovery if both TCR were to pay for these injuries and CBC's settlement compensated them for the same injuries. Accordingly, we conclude the trial court erred in denying a setoff to TCR for the remaining $500,000 of the CBC settlement allocated to framing for HVAC access and fire separation penetrations not related to sprinkler installation.

C. Punitive Damages

Finally, TCR argues it should receive a $500,000 setoff for the punitive damages portion of the CBC settlement because, pursuant to *Widener*, punitive damages are part of the same injury as actual damages in the context of setoff. Plaintiffs contend the punitive damages award against CBC and TCR constitute two separate injuries so that the trial court properly denied TCR's setoff request. We agree with Plaintiffs.

In *Widener*, the plaintiff sued several defendants under several theories, all seeking $35,410.38 in damages for wrongfully denying her access to funds from her late husband's retirement account. 397 S.C. at 471, 724 S.E.2d at 190. The plaintiff settled with one defendant for $35,410.38 and proceeded to trial against two other defendants. *Id*. The jury returned a verdict of $35,410.38, and the two nonsettling defendants asked for a setoff. *Id*. The plaintiff claimed her settlement had been solely for punitive damages. *Id*. at 472, 724 S.E.2d at 190-91. In reversing the denial of the setoff request, this court, in a 2-1 opinion stated: "[W]e hold that when a plaintiff seeks actual and punitive damages arising out of the same injury, the two types of damages are part of the same claim for purposes of determining whether a nonsettling defendant is entitled to a setoff to account for funds paid to the plaintiff by a settling defendant." *Id*. at 470, 724 S.E.2d at 189. The court further found the plaintiff's position the settlement was solely for punitive damages was not credible. *Id*. at 474, 724 S.E.2d at 191-92.

In this case, if the jury's verdict evidenced a single punitive damages award against TCR and CBC jointly and severally, *Widener* might dictate TCR is entitled to a setoff and the funds would not be insulated by the fact that the punitive damages award against CBC was not carried to final judgment. However, the form of the jury's verdict indicates it found TCR and CBC each individually liable for a punitive damages award. Although section 15-32-520(G) of the South Carolina Code (Supp. 2022) addresses a bifurcated damages trial, it is still relevant: "In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant." Furthermore, in *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001), the court addressed the situation in which two joint tortfeasors face punitive damages.

> While "it is almost universally held that there can be only one satisfaction for an injury or wrong," allowing petitioner to seek punitive damages against respondent will not result in petitioner having a double recovery. Although [one co-defendant] has paid the punitive damages levied against him, those punitive damages do not reflect the amount of punitive damages for which a jury may find that respondent is responsible.

Id. at 471-72, 545 S.E.2d at 288-89 (footnote omitted).

The facts of this case call for application of the principles set forth in section 15-32-520(G) and *McGee* because both TCR and CBC proceeded to a verdict on the punitive damages issue *and* the verdict indicated separate exemplary damages for each tortfeasor's conduct. Accordingly, we agree with the trial court's refusal to set off the punitive damages award.

II. Setoff For Pretrial Settlements

Next, we turn our attention to setoff involving pretrial settlements. TCR maintains the trial court erred in failing to set off the jury verdict with the full amount of the settlements for damages not specifically removed from the trial of the case as issue release items. It asserts whatever damages were not explicitly removed from trial by the issue releases were presented to the jury through testimony and exhibits. It contends because a general contractor is responsible for the entire construction project and CBC was a defendant throughout the entire trial, any area not covered by an issue release was necessarily included.[16] We disagree. The trial court awarded the following setoffs:

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[16] Plaintiffs contend any argument TCR asserts suggesting it is entitled to setoff as a matter of equity or pursuant to the common law is unpreserved. We disagree. At the posttrial hearing, near the beginning of TCR's setoff argument, TCR stated, "back to setoff. As Your Honor is aware, for over 180 years from the common law and at least since the [19]80's according to statutory law, setoff is a required by the law." Even though the trial court did not explicitly refer to common law setoff in its order, the point was sufficiently addressed so as to preserve it for appellate review. *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("It cannot be said that Appellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, 'where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'" (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part))).

Party	Settlement	Plaintiffs Concede for Setoff
Atlantic Building (framing)	$700,000	$75,000
Novus (architect)	$650,000	$65,000
Cohen's (drywall)	$125,000	$62,500
H and A (framing)	$500,000	$50,000

Plaintiffs assert TCR cannot prove the verdict overlaps with the same damages or claims compensated by these settlements. They argue TCR is not entitled to any further setoff for pretrial settlements than was already awarded and that TCR has already benefited from three damage reductions, to wit: (1) Plaintiffs reduced their damages at trial and only asked the jury for compensation related to defects and damages resulting from work performed by the defendants who remained in the case at the time of trial (to the exclusion of settled issues), and further reduced their damages by an additional $1 million during closing arguments to account for untried issues; (2) the defendants asserted the empty chair defense to the jury, which awarded Plaintiffs a further reduced amount; and (3) TCR received a $1.67 million setoff from the trial court to account for any overlap between pretrial and posttrial settlements and the jury's verdict. Plaintiffs also assert they have not received a double recovery because their expert attributed $8.375 million in damages to TCR and the trial court entered the judgment against TCR for $4.83 million.

As an initial point, the trial court's order alludes to caselaw involving the *settling parties'* allocation of settlement funds, and suggests that the allocation by those parties is entitled to a certain amount of deference. The trial court's order, quoting *Riley* concluded it could not "disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 831. However, in this case, no allocations appeared in the pretrial settlement agreements. Rather, these amounts were concessions Plaintiffs made in response to TCR's setoff motion. In spite of this potential conflation, we do not believe the trial court abused its discretion in awarding the setoffs for the pretrial settlements as it did.

Defendants mentioned the work of the architect, Novus, a number of times at trial, ostensibly as part of the empty-chair defense.[17] There were references to the way the roof was designed as being one cause of leaking.[18] Also, testimony was given that the subcontractors made requests for information to the architect that were never answered. Additionally, there was testimony about the complicated intersections of the posts and roofs and decks.[19] The testimony presented supports a finding that some measure of negligence by Novus in its planning impacted TCR's performance resulting in leaking in the condominiums. However, in the absence of further testimony or evidence as to the extent of Novus's responsibility for injuries encompassed in the jury's verdict, we find the trial court did not abuse its discretion in granting a 10% setoff.

Regarding the Atlantic and H and A settlements, framing was mentioned briefly at trial although the parties disagree as to how much that issue was actually before the jury.[20] Plaintiffs argue the framing settlements covered two principle issues—

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[17] In particular, Plaintiffs maintain TCR pointed the finger at the architect repeatedly during closing arguments and referenced the original damages estimate to assert certain parts of the damages should be ignored.

[18] The record contains testimony that the amount of slope of the roofs was an architectural design and was unusual. This is a separate issue from the slope of the decks, which is discussed in regards to the framers next.

[19] Elkin testified "my initial takeaway was that some of these were some pretty challenging intersections. . . . [A]ny time you have two different materials interface it gets to be -- it is a hard -- it can be a hard transition to make to keep it watertight. In this instance when you have three different materials coming together in different planes it becomes that much harder to make sure it is constructed in a watertight manner."

[20] Poyner, of TCR, testified as follows:

> Q. Do you recall what it looked like out there at this time period with some of the siding coming off?
> A. Well, the -- when this came out, obviously some of the buildings were -- the exteriors were fairly far along, even having been painted, and the siding had to be -- they asked me to remove a section of the siding.
> Q. Now, was the siding being removed for your installation issues?

A. It was not.
Q. Was it a framing issue?
A. Yes, sir, it was.
Q. Okay, and you weren't involved in the framing issue, right?
A. No, sir.
Q. And so you don't -- you're not going to offer any testimony as to what they were looking at with the framing?
A. No, sir.

He also testified:

> A piece of plywood does not do weather -- does not do well when it's weathered. So, very early on when they would frame up those decks, we would come in and actually put the base coat on and get the product up the post.
>
> Now, in, in going back and looking, I know that there were some posts that were structural and some that were just ornamental. You couldn't tell the difference, but the difference was the structural posts were put in at the beginning when the building was framed. The ornamental posts weren't always put in at the same time that they built the deck. Were, you know, framing up the house and even when the waterproofing on -- some, some instances they came back and put those posts after we had already waterproofed the deck.
> Q. And you were not a framer who installed those posts?
> A. No, sir.
> Q. The lumber that is out there on the decks, is that pressure treated?
> A. I do not believe it was. I think the first one they did -- once again on the River Birch -- I think they had tried to

shear walls and window installation—and that these issues were not presented to the jury at all. According to Plaintiffs, the record shows the only possible framing scope litigated that might relate to TCR's "siding work" was the installation of the windows' caulk joint. Plaintiffs conceded and the trial court accepted a 10% setoff of the verdict for the Atlantic and H and A settlements, respectively, to allow for any potential overlap; accordingly, the jury verdict was set off by $75,000 for Atlantic and $50,000 for H and A. While TCR asserts some testimony was presented that framing contributed to the faulty waterproofing of the decks, we cannot conclude the trial court abused its discretion in declining to award TCR a setoff for the full amounts of the Atlantic and H and A settlements.[21]

> install treated lumber, but the manufacturer's instructions say, I believe, not to use treated lumber.
> Q. You're talking about the sheathing on the ---
> A. That's correct.
> Q. --- the posts? Are those treated?
> A. They are.
> Q. Okay, and the, the, the actual framing parts of the, the joists, those are treated?
> A. As far as I know.

[21] Poyner testified on cross-examination by one of the codefendants:

> Q. So, this is simply if any work that's found not to in conformance with the plans and specifications is discovered, it is to be redone and done correctly, correct?
> A. That's correct.
> Q. All right, and, in fact, you witnessed such a situation with regard to the slope of the decks on this project, did you not?
> A. That is correct.
> Q. Is it true that a gentleman named Gary Stanley was the superintendent for [CBC]?
> A. Yes, he was.
> Q. And he was the one that was on-site most of the time for [CBC]?
> A. That and later they had brought Joe Brown as well.

Finally, regarding the Cohen's settlement, Plaintiffs assert it involved drywall and insulation issues. Plaintiffs contend drywall issues were litigated at trial but insulation issues were not and thus they proposed the $125,000 settlement be divided equally between the drywall and insulation so that each was attributed $62,500. The court reduced the final judgment by $62,500 due to the potential of drywall overlap. The testimony included in the record only contains a few references to insulation.[22] Accordingly, we conclude the trial court did not abuse its discretion in awarding a setoff in this amount for this settlement.

CONCLUSION

In sum, we conclude the trial court did not abuse its discretion in refusing to set off the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's. Further, we find the trial court did not err in denying TCR's request for setoff as to the $1 million of the CBC settlement allocated to matters not raised at trial or for the $500,000 allocated for punitive damages. We reverse the portion of the trial court's order denying TCR a setoff for the $500,000 of the

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> Q. Okay, and Mr. Stanley, at least as part of his duties, would also spot check and come behind each of the subcontractors to look at their work, did he not?
> A. Yes, sir.
> Q. Okay, and isn't it true that Mr. Stanley, before the waterproofing was put down, he would check the slope of the decks? Isn't that, correct?
> A. I believe so, yes, sir.
> Q. And, in fact, you saw him use a level to look at the decks to make sure they had proper slope?
> A. I did.
> Q. And, in fact, there was -- if a deck was discovered not to have a proper slope, Mr. Stanley would make the framer redo it before you put your waterproofing on the deck, correct?
> A. That's correct.

[22] Elkin's testimony refers to insulation but it does not appear to be referencing any problem with insulation. Schweickhardt mentioned damaged insulation in his testimony but he appears to have attributed the damage to the leaking from flashing, not due to any issue with the insulation.

$637,500 portion of the CBC settlement not already setoff for exterior railings. Accordingly, the trial court's order is

AFFIRMED IN PART AND REVERSED IN PART.

HEWITT and VINSON, JJ., concur.