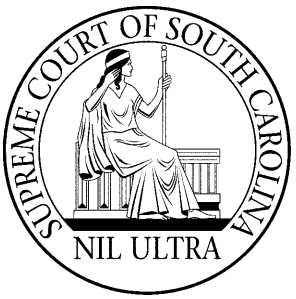

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 3, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta), LLC; TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants,

and

Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210888

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27280
Heard May 2, 2013 – Filed July 3, 2013

REVERSED AND REMANDED

Steven Edward Buckingham and W. Howard Boyd Jr., both of Gallivan, White & Boyd, P.A., of Greenville, for Appellants.

Stephen R.H. Lewis and Douglas F. Patrick, both of Covington Patrick Hagins Stern & Lewis, P.A., of Greenville, for Respondents.

JUSTICE PLEICONES: This is a direct appeal from the trial court's denial of a motion for entry of a ruling on a motion for reconsideration and from the trial court's underlying order denying a motion for rule to show cause, for sanctions, and for modification of a protective order. We reverse.

FACTS

In 1999 and 2001, John Hollman underwent three laser-assisted in situ keratomileusis (LASIK) eye surgeries performed by physician employees of TLC Laser Eye Centers (Piedmont/Atlanta), LLC, and TLC The Laser Center (Institute), Inc. (appellants). In the next several years, his vision deteriorated. In 2007, he filed an action against appellants as well as Dr. Jonathan Woolfson, Dr. Michael A. Campbell, and others, alleging medical malpractice. His wife, Danielle Hollman, filed an action for loss of consortium (both actions hereinafter "*Hollman*," since they have been treated as if consolidated).

In the course of discovery, the Hollmans (respondents) became aware that appellants had compiled a "Complex Case" and "Patient Advocacy" database. They requested that appellants produce the database as well as the medical records of some nonparty patients. Appellants opposed the request. The trial court ordered appellants to produce the requested items subject to a protective order designed to protect the private health information of nonparty patients from unnecessary exposure.

The protective order defined "Confidential Health Information" by reference to HIPAA definitions of protected information. In addition, it defined as Confidential Health Information materials that contained, were based on, or were derived from such Confidential Health Information. The protective order limited use of

Confidential Health Information to *Hollman*[1] and limited disclosure to necessary personnel in that litigation. It required that, within sixty days after the termination of the action, all materials designated as Confidential Health Information be returned to the producing party or destroyed and all work product materials containing or referring to Confidential Health Information be destroyed. Appellants thereupon produced the database.

Subsequently, respondents filed a motion to modify the protective order to permit respondents' counsel to contact and interview patients whose confidential health information was contained in the database. The motion was granted. Appellants filed a petition for writ of certiorari to this Court, asking the Court to exercise its original jurisdiction on the basis of exceptional circumstances in order to review that order. This Court granted the petition, reversed the trial court's order, and remanded for further proceedings to determine whether the information to be gained by contacting and interviewing the nonparty patients was both relevant and necessary to respondents' claims. On remand, the trial court concluded it was. This Court granted appellants' petition for writ of certiorari to review this ruling and vacated the trial court's order. *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).

In March 2010, six months after this Court's opinion and while *Hollman* was still pending in circuit court, respondent John Hollman filed a class action complaint against appellants and many of their employees in United States District Court. In June 2010, appellants and respondents entered into a settlement agreement under which they settled all claims in both the state and federal actions. Appellants were dismissed from *Hollman*. Respondents' claims against the individual physicians had not been settled, so *Hollman* proceeded without appellants. As a result of the settlement, John Hollman withdrew from the federal class action, but a new lead plaintiff, Dickerson, was substituted, an action contemplated in the settlement.

In July 2010, Dickerson moved in the federal class action for precertification discovery to compel production of the database. Contemporaneously, appellants filed a notice of motion and motion for rule to show cause, motion to modify the protective order, and motion for sanctions in *Hollman*, although they were no longer parties in that action. Appellants cited what they alleged to be persistent, ongoing violations of the protective order by respondents and their counsel.

---

[1] In addition to the two *Hollman* actions, the order applied to *Carter et ux. v. Nimmons et al*. The latter case is not at issue.

In August 2010, the *Hollman* trial court issued an order denying the motion. Appellants moved for reconsideration. In November 2010, the trial court held a hearing on that motion and indicated orally it would be denied. The trial court instructed respondents' counsel to draft the order.

In April 2011, respondents settled their claims against the remaining state court defendants in *Hollman*. Respondents' counsel wrote a letter to appellants' counsel on April 20, 2011, informing them of the settlement and impending dismissal of *Hollman*. The letter also indicated that respondents' counsel had not drafted an order denying appellants' Rule 59(e) motion but were prepared to do so. Appellants' counsel did not reply. In May 2011, the trial court dismissed *Hollman*.

In September 2011, appellants moved the court to order respondents' counsel to prepare an order denying appellants' Rule 59(e) motion or, in the alternative, that the court prepare such an order. The trial court held a hearing on the motion in November 2011 and, by order of January 2012, denied the motion in part and granted it in part. It denied appellants' motion for reconsideration, finding it lacked subject matter jurisdiction over appellants' request as a result of the dismissal of the case. Notwithstanding this finding, it also held that settlement and dismissal of the case operated as a final adjudication, barring further litigation of pre-settlement violations of the protective order. It held appellants waived their right to a written order denying the Rule 59(e) motion by failing to respond to respondents' counsel's letter advising of the impending dismissal of the case without an order on appellants' Rule 59(e) motion. Turning to the protective order itself, the trial court held it retained jurisdiction to hear appellants' request for return of the database and granted their motion to compel observance of the protective order and return of the database, but subject to conditions it found had been consented to by the parties. Specifically, it ordered appellants' counsel to retain all returned database materials in its office and ordered that all work product materials governed by the protective order be filed under seal with the trial court until further order. The trial court denied appellants' motion for sanctions. This appeal followed.

ISSUES

I. Do procedural bars prevent this Court from reviewing the August 2010 order?

II. Did the trial court err as a matter of law when it interpreted the protective order?

DISCUSSION

I. Procedural bars

Appellants argue the trial court erred when it ruled that, because *Hollman* was dismissed before an order ruling on appellants' motion for reconsideration was entered, it lacked jurisdiction to enter such an order. We agree.

Despite finding it lacked jurisdiction to enter an order ruling on appellants' motion for reconsideration, the trial court held it retained jurisdiction to enforce the protective order and ruled on the merits of appellants' allegations. This was obviously correct, since a court that issues a protective order retains jurisdiction to enforce it notwithstanding the conclusion of the suit in which it was issued. *See Ex parte Bland*, 380 S.C. 1, 667 S.E.2d 540 (2008) (finding attorneys willfully violated protective order issued in litigation where underlying case had been settled); *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991) (finding a newspaper entitled to intervene where Rule 24, SCRCP, motion was filed one month after case was dismissed with prejudice and record was sealed). This is true whether the motion for enforcement of the protective order was made before or after the dismissal of the underlying case. Where a timely post-trial motion is made seeking issuance of the merits order, the court has jurisdiction to rule on that motion as well. Thus, the trial court erred when it ruled it lacked jurisdiction to enter an order ruling on appellants' motion for reconsideration.

Appellants also argue many of the findings in the August 2010 order should be vacated because they deal with matters not raised in the hearing below. Appellants raised these issues in their Rule 59(e) motion, but the trial court erroneously ruled it lacked jurisdiction to address them. On remand, the trial court will address the merits of the Rule 59(e) motion.

Appellants also argue that the trial court erred when it held that appellants' failure to respond to respondents' counsel's letter notifying them of the impending dismissal of *Hollman* and five-month delay before they moved for preparation of an order ruling on their motion for summary judgment in *Hollman* extinguished their right to seek a written order on their motion for reconsideration. We agree. Appellants' failure to respond to the letter from respondents' counsel did not affect their right to obtain a written order from the trial court from which they could appeal. The drafting of the order was under the trial court's supervision. Assuming a party can waive the right to a written order from which he can appeal

by failing to move the court to draft it after a significant lapse of time, the facts of this case do not imply such a waiver.

Finally, appellants argue the trial court erred when it ruled the parties' settlement agreement and resulting dismissal of the action constituted a final adjudication on the merits of appellants' contention that respondents were violating the protective order, barring appellants' motion for rule to show cause. We agree. The trial court's determination that no violations of the protective order took place after the parties' settlement depends on its construction of the protective order. As discussed below, we conclude that construction was erroneous as a matter of law.

II. Construction of the protective order

Appellants argue the circuit court erred when, in its order denying appellants' motion for rule to show cause, it held that "Confidential Health Information" as defined in the protective order refers only to health information coupled with the identity of a patient. We agree.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012). A protective order is analogous to a judgment. The interpretation of the terms of a clear and unambiguous written instrument is a question of law. *See Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). Questions of law are reviewed de novo. *Catawba Indian Tribe of South Carolina, supra*.

In relevant part, the protective order defines "Confidential Health Information" as

> any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to such individual or subscriber. The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable Health Information,

> 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. sections 164.501 ("protected health information") and 160.103 ("individually identifiable health information"). "Confidential Health Information" includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information.

The definition of "individually identifiable health information" in 45 C.F.R. § 160.103 provides that

> "Individually identifiable health information" is information that is a sub-set of health information, including demographic information collected from an individual, and:
>
> (1) Is created or received by a healthcare provider, health plan, employer or healthcare clearing house; and
>
> (2) Relates to the past, present or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present or future payment for the provision of healthcare to an individual; and
>
> > (i) That identifies the individual; or
> >
> > (ii) *With respect to which there is a reasonable basis to believe the information can be used to identify the individual*.

(Emphasis added.) The relevant portion of 45 C.F.R. § 164.501 provides a similar framework. That section defines "health information" as

> any information, including genetic information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

It further defines "individually identifiable health information" as

> information that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) Is created by or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or
>
> (ii) *With respect to which there is a reasonable basis to believe the information can be used to identify the individual*.

(Emphasis added.) The plain language of both regulations indicates that protected information includes any combination of health information collected from an individual with respect to which there is a *reasonable basis* to believe it could be used to identify the individual. §§ 160.103; 164.501. This definition certainly includes compilations of data containing the dates of treatment, diagnosis, type of surgery, and treatment providers of appellants' individual patients, for example. It includes names of service providers, dates of visits, and diagnostic information obtained from patients' medical records, even when the patient's name is redacted.

Moreover, the order's limitations on use and distribution extend to "all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information." Under this definition, the contents of the database as a whole must be "Confidential Health Information" since it is at least a compilation that contains Confidential Health Information.

Because the trial court's construction of the protective order was improper, its finding that the only acts that constituted violations of the protective order occurred before the 2010 settlement must also be reversed and remanded for consideration under the proper construction of the protective order.

CONCLUSION

The trial court erred when it held it lacked jurisdiction to enter an order ruling on appellants' motion for reconsideration after the action had been dismissed when a protective order governed disclosure of certain materials discovered in that action. The trial court also erred when it held that "Confidential Health Information" embraced only information containing both the name and personal health information of a patient. "Confidential Health Information" includes any combination of personal health information derived from appellants' records regarding which there is a reasonable basis to believe it could be used to identify the individual, as well as all summaries, compilations, and extracts derived from such Confidential Health Information. We reverse and remand for further proceedings consistent with this opinion.

REVERSED and **REMANDED**.

TOAL, C.J., KITTREDGE, J., and Acting Justice James E. Moore, concur. BEATTY, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thalma Barton, Appellant,

v.

South Carolina Department of Probation Parole and Pardon Services, Respondent.

Appellate Case No. 2012-213234

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 27281
Heard May 1, 2013 – Filed July 3, 2013

REVERSED

Travis Dayhuff and Gary Lee Capps, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Matthew C. Buchanan, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Thalma Barton (Appellant) challenges the Administrative Law Court's (ALC) order affirming the South Carolina Department of Probation, Parole, and Pardon Services' (DPPPS) decision denying her parole. We reverse.

FACTUAL/PROCEDURAL HISTORY

On May 10, 1982, the Abbeville County Grand Jury indicted Appellant for murder.[1] Appellant pled guilty on May 11, 1982. The circuit court sentenced Appellant to life imprisonment. At the time of Appellant's conviction, South Carolina law provided that an individual serving a life sentence for murder would become eligible for parole following completion of twenty years of her sentence. Appellant initially appeared before the Board of Probation, Parole, and Pardon Services (the Parole Board) on July 6, 1997, after completing twenty years of her sentence through the award of good time credits. The Parole Board denied Appellant parole following that hearing, and on twelve subsequent occasions. Appellant's most recent appearance, on January 18, 2012, is at issue here.

The Parole Board is comprised of seven members.[2] Six of those seven members participated in Appellant's hearing. Four members voted in favor of granting Appellant parole, while two members voted against granting parole. According to section 24-21-645 of the South Carolina Code, the Parole Board may issue an order authorizing parole signed either by a majority of its members or by all three members meeting as a parole panel; however, at least two-thirds of the members of the Parole Board must authorize and sign orders approving parole for persons convicted of a violent crime as defined in section 16-1-60 of the South Carolina Code. S.C. Code Ann. § 24-21-645(A) (Supp. 2012). Prior to 1987, section 24-21-645 provided that the Parole Board may authorize parole when authorized by a *majority* of its members. *See id.* § 24-21-645 (Supp. 1984) (emphasis added).

Although two-thirds of the members of the Parole Board participating in Appellant's hearing voted in favor of parole, the Parole Board ultimately denied parole. As explained in detail, *infra*, the Parole Board interprets section 24-21-645 to require an inmate receive a two-thirds majority vote of the Parole Board's seven members, thus meaning Appellant needed five votes, rather than four, to receive

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[1] The grand jury's indictment alleged that Appellant killed a minor by means of "beating, choking, strangling, and drowning."

[2] *See* S.C. Code Ann. § 24-21-10 (2007) (explaining that "The [Parole Board] is composed of seven members. The terms of office of the members are for six years. Six of the seven members must be appointed from each of the congressional districts and one member must be appointed at large.").

parole. In denying Appellant's parole, the Parole Board cited the nature, seriousness, and indication of violence of her offense.

Appellant filed a notice of appeal with the ALC, claiming that the Parole Board erred by applying the current version of section 24-21-645 instead of the version of that statute in effect at the time Appellant committed her crime. Appellant argued that the version of section 24-21-645 in effect at the time of her conviction required only a majority of the Parole Board vote in favor of parole, and that application of the current version of section 24-21-645, and its two-thirds requirement, constituted an *ex post facto* violation. In the alternative, Appellant also asserted that she should receive parole under the current version of section 24-21-645. According to Appellant, the six members of the Parole Board who participated in her hearing represented a quorum, and she received two-thirds of that quorum, satisfying the statutory conditions for parole.

The ALC rejected Appellant's claims, holding that retroactive application of section 24-21-645's two-thirds requirement did not constitute an *ex post facto* violation, and that the General Assembly intended the term "members of the board" to indicate members of the full Parole Board, and not members of the Parole Board attending or voting at a parole hearing. Appellant appealed the ALC's order to the court of appeals, and this Court certified the case for review pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the ALC erred in failing to find the Parole Board's retroactive application of section 24-21-645 of the South Carolina Code constituted an *ex post facto* violation.

II. Whether the ALC erred in failing to reject the Parole Board's interpretation of the two-thirds majority requirement of section 24-21-645 of the South Carolina Code.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. § 1–23–610(B) (Supp. 2012).

This Court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. "The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* (alterations added). In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010)).

LAW/ANALYSIS

1. Applicable Law

Section 24-21-645 of the South Carolina Code provides in pertinent part:

(A) The board may issue an order authorizing the parole which must be signed either by a majority of its members or by all three members meeting as a parole panel on the case ninety days prior to the effective date of the parole; *however, at least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60.* A provisional parole order shall include the terms and conditions, if any,

> to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole.

S.C. Code Ann. § 24-21-645 (Supp. 2012) (emphasis added).[3] However, prior to section 24-21-645's amendment as part of Act No. 462, the Omnibus Criminal

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[3] Section 16-1-60 of the South Carolina Code provides that, "for purposes of definition under South Carolina law, a violent crime" includes:

> murder; attempted murder; assault and battery by mob, first degree, resulting in death; criminal sexual conduct in the first and second degree and; criminal sexual conduct with minors, first, second, and third degree; assault with intent to commit criminal sexual conduct, first and second degree; assault and battery with intent to kill; assault and battery of a high and aggravated nature; kidnapping; trafficking in persons; voluntary manslaughter; armed robbery; attempted armed robbery; carjacking; drug trafficking . . . or trafficking cocaine base . . . manufacturing or trafficking methamphetamine . . . arson in the first degree; arson in the second degree; burglary in the first degree; burglary in the second degree; engaging a child for a sexual performance; homicide by child abuse; aiding and abetting homicide by child abuse; inflicting great bodily injury upon a child; allowing great bodily injury to be inflicted upon a child; criminal domestic violence of a high and aggravated nature; abuse or neglect of a vulnerable adult resulting in death; abuse or neglect of a vulnerable adult resulting in great bodily injury; taking of a hostage by an inmate; detonating a destructive device upon the capitol grounds resulting in death with malice; spousal sexual battery; producing, directing, or promoting sexual performance by a child; sexual exploitation of a minor first degree; sexual exploitation of a minor second degree; promoting prostitution of a minor; participating in prostitution of a minor; aggravated voyeurism; detonating a destructive device resulting in death with malice; detonating a destructive device resulting in death without malice; boating under the influence resulting in death; vessel operator's failure to render assistance resulting in death; damaging an airport facility or removing equipment resulting in death; failure to stop when signaled by a law enforcement vehicle resulting in death; interference with traffic-control devices, railroad signs, or signals resulting in death; hit and run resulting in death; felony driving under the influence or felony driving with an

Justice Improvement Act of 1986, the statute did not contain the two-thirds provision emphasized above, and provided:

> The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole.

Id. § 24-21-645 (Supp. 1984).

The gravamen of Appellant's complaint is that the pre-amendment version of section 24-21-645 should apply to her case because she committed her crime prior to the amendment. Alternatively, Appellant asserts that she should have been granted parole even under the amended statute, as both the Parole Board and the ALC interpreted that statute erroneously.

2. *Ex Post Facto* Violation

Appellant argues that the Parole Board's retroactive application of section 24-21-645 constitutes an *ex post facto* violation, and that the ALC performed a flawed *ex post facto* analysis. We agree.

The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws. U.S. Const. art. I, §§ 9, 10; S.C. Const. art. 1, § 4. A measure is an *ex post facto* law when it retroactively alters the definition of a crime or increases the punishment for a crime. *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). The relevant inquiry regarding an increase in punishment is whether a legislative amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)). If the amendment produces only a "speculative and attenuated possibility" of increasing an inmate's punishment, then there is no *ex post facto* violation. *Id.* Furthermore, a change in law that merely affects a mode of procedure, but does not alter

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> unlawful alcohol concentration resulting in death; putting destructive or injurious materials on a highway resulting in death; obstruction of a railroad resulting in death; accessory before the fact to commit any of the above offenses; and attempt to commit any of the above offenses.

S.C. Code Ann. § 16-1-60 (Supp. 2012).

substantial personal rights is not *ex post facto*. *State v. Huiett*, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990) (citing *Miller v. Florida*, 482 U.S. 423 (1987)). A court should look to the effect of the statute on the "quantum of punishment" to determine whether an amendment offends the *ex post facto* prohibition. *Id.*

The ALC rejected Appellant's claim as speculative, and characterized the two-thirds rule change as "purely procedural," based primarily on a line of cases previously analyzed, or decided, by this Court: *Morales*, *supra*, *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997), and *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

In *Morales*, the United States Supreme Court analyzed the California State Legislature's amendment of a parole statute. A jury convicted Morales of first degree murder in 1971. 514 U.S. at 502. While serving his sentence, Morales met and later married Lois Washabaugh. *Id.* In April 1980, the state released Morales to a Los Angeles halfway house. *Id.* Shortly thereafter, in July 1980, police recovered a human hand on a Los Angeles freeway, and fingerprint identification matched the hand to Washabaugh. *Id.* Police never located Washabaugh's body, but discovered her car, purse, and credit cards in Morales's possession. *Id.* Morales pleaded *nolo contendere* to second degree murder, and received a sentence of fifteen years' imprisonment to life. *Id.* Morales qualified for parole beginning in 1990. *Id.*

The Board of Prison Terms (the Board) held a hearing to determine Morales's suitability for parole. *Id.* at 502–03. California law required the Board to set a release date for Morales unless it found public safety required a "more lengthy period of incarceration." *Id.* at 503. The Board found Morales unsuitable for parole based on numerous reasons including his history of violence and heinous nature of his offense. *Id.* The law in place at the time Morales murdered Washabaugh entitled him to subsequent annual suitability hearings. *Id.* However, in 1981, the California legislature authorized the Board to defer subsequent suitability hearings for up to three years if the prisoner's previous convictions included more than one offense which involved the taking of a life and if the Board found it unreasonable to expect that parole would be granted during the following years and stated a basis for that finding. *Id.* In consideration of the reasons that led the Board to find Morales unsuitable for parole, the Board determined it unreasonable to expect Morales would be found suitable for parole in 1990 or 1991, and scheduled Morales's next hearing for 1992. *Id.*

Morales filed a habeas corpus petition asserting that the 1981 amendment, as applied to him, constituted an *ex post facto* law. *Id.* at 504. The United States Court of Appeals for the Ninth Circuit agreed, holding that because, "a prisoner cannot be paroled without first having a parole hearing . . . any retrospective law making parole hearings less accessible would effectively increase the [prisoner's] sentence and violate the *ex post facto* clause." *Id.* Accordingly, the Ninth Circuit held that the constitution required the Board to provide Morales with annual parole suitability hearings, as required by the law in effect at the time he committed his crime. *Id.*

The Supreme Court reversed, rejecting Morales's view that the *ex post facto* clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment. *Id.* at 508–9 (holding that some "speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for *ex post facto* purposes"). According to the Supreme Court, the proper evaluation of the 1981 amendment centered on whether the amendment produced a sufficient risk of increasing the measure of punishment attached to the covered crime. *Id.* at 509. The Supreme Court noted that the 1981 amendment applied only to offenders for whom the likelihood of release on parole was quite remote, and that the legislature intended the amendment to relieve the Board from the costly responsibility of scheduling parole hearings for prisoners with little to no chance of being released. *Id.* at 510–11 (citing *In re Jackson*, 703 P.2d 100, 105 (Cal. 1985), relying on California legislative history). Additionally, the amendment did not address initial hearings, only subsequent hearings. *Id.* at 511. Therefore, the amendment had no effect on any prisoner unless the Board found the prisoner unsuitable for parole, and that it was unreasonable to expect that parole would be granted at a hearing in the following years. *Id.* Finally, the Supreme Court noted that the Board retained the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner, and therefore, "the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings." *Id.* at 511–12. In sum, the Supreme Court held the 1981 amendment created only the "most speculative and attenuated risk of increasing the measure of punishment attached to the covered crime," and thus, did not constitute an *ex post facto* law. *Id.* at 514.

The *Morales* decision played a critical role in the United States Court of Appeals for the Fourth Circuit's disposition of the defendant's arguments in *Roller*

v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993) (*Roller I*), and *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (*Roller II*).

In 1983, Gary Lee Roller was convicted of voluntary manslaughter and grand larceny and sentenced to consecutive terms of thirty years' imprisonment and five years' imprisonment. *Roller I*, 984 F.2d at 121. In December 1990, Roller filed a complaint under 42 U.S.C. § 1983 challenging application of the South Carolina General Assembly's amendments to section 24-21-645 on *ex post facto* grounds. *Id.* The amendments mandate that a prisoner convicted of committing a violent crime may only have her case reviewed biannually after an initial denial, rather than annually. *Id.* Additionally, as discussed *supra*, the amendments require a two-thirds majority of the parole board to authorize parole for violent offenders rather than a simple majority. *Id.* The district court found for DPPPS, but the Fourth Circuit reversed. *See Roller I*, 984 F.2d at 124 ("South Carolina has undoubtedly applied its new statute to 'alter the conditions of . . . [Roller's] preexisting parole eligibility.' Indeed, it has effectively 'revoked' eligibility for an extra year following a denial." (alteration in original) (remanding with instructions to grant declaratory relief in Roller's favor)).

However, in April 1995, in light of the Supreme Court's *Morales* decision, DPPPS moved for modification of the court order declaring the retrospective application of the section 24-21-645 amendments unconstitutional. *Roller II*, 107 F.3d at 230. In June 1996, based on *Morales*, the district court concluded that application of section 24-21-645 of the South Carolina Code to Roller did not violate the *Ex Post Facto* Clause. *Id.* (citing *Roller v. Gunn*, 932 F. Supp. 729, 730 (D.S.C. 1996)). The Fourth Circuit affirmed, holding that South Carolina's amendments bore a "strong resemblance" to the California statute sustained in *Morales*. *Id.* at 235. The court noted the similarities between the South Carolina and California laws, including that neither law increased the actual sentence of imprisonment and that both laws applied only to prisoners convicted of violent crimes, "prisoners which the South Carolina legislature determined were unlikely to receive release on parole." *Id.* Additionally, neither law affected the date of any prisoner's initial parole suitability hearing, only the timing of subsequent hearings, and did not alter the substantive parole qualification standards. *Id.* at 235–36. Therefore, the Fourth Circuit concluded:

> Roller's claim, however, boils down to mere speculation about his release. Such conjecture is insufficient under *Morales* to establish a violation of the *Ex Post Facto* Clause. In South Carolina, the determination of parole is subject to the broad discretion of the

> [Parole Board]. Forecasts on how the board might decide to exercise its discretion in any given case are merely in the nature of conjecture. Roller simply fails "to provide support for his speculation that . . . prisoners subject to [24-21-645] might experience an unanticipated change that is sufficiently monumental to alter their suitability for release on parole." Furthermore, as the district court noted, there is nothing on the face of section 24-21-645 that limits the [Parole Board's] authority to schedule expedited hearings if presented with suitable circumstances. In *Morales*, this same consideration led the Supreme Court to conclude that even if a prisoner's circumstances drastically changed during the period that his parole hearing had been delayed, "there is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement."

Id. at 236 (alterations in original).

The Fourth Circuit also addressed the pertinent issue in the instant case, the two-thirds requirement. *Id.* The Fourth Circuit analogized that provision to the statute examined by the Supreme Court in *Dobbert v. Florida*, 432 U.S. 282 (1977). In *Dobbert*, the trial judge overruled the jury's recommendation of life imprisonment and imposed a death sentence. *Id.* at 286–87. The defendant claimed that the statute which permitted this decision violated the *Ex Post Facto* Clause because under the pre-amendment statute the jury made the final death penalty determination. *Id.* at 287–88, 292. The Supreme Court rejected his claim as speculative, holding "it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." *Id.* at 294. In *Roller II*, the Fourth Circuit viewed the defendant's challenge of the two-thirds requirement speculative as well, holding:

> Like the claim of the petitioner in *Dobbert*, Roller's claim is speculative. There is no way of knowing whether a particular board member's vote would be the same under the new two-thirds majority rule as it would have been under the old rule. As the Supreme Court noted in *Dobbert*, "[The jurors] may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final." Similarly, parole board members might be more likely to vote for granting parole under the two-thirds rule, knowing that any favorable decision must be concurred in by a greater number of their colleagues.

Roller II, 107 F.3d at 236–37 (alteration in original).

The dissent in *Roller* concluded that South Carolina's amendments differed significantly from the California statute analyzed in *Morales*. *Id.* at 238–39 (Hall, J., dissenting). For one, the California statute applied only to prisoners "convicted of more than one offense involving the taking of a life." *Id.* at 238. However, the South Carolina statute applied to all inmates convicted of a violent crime, including crimes for which only one to ten years' imprisonment is prescribed. *Id.* Furthermore, the default requirement under the California statute is annual review, but under the South Carolina statute the default requirement is two years, with no provision requiring the Parole Board to find that deferral is warranted. *Id.* at 239.

The dissent assessed the two-thirds requirement in conjunction with the other changes to South Carolina's parole statute. *Id.* at 239–40 ("The majority considers this change apart from the other retrospective changes in the statute and declares that any *ex post facto* challenge is foreclosed . . . As a preliminary matter, I believe the two-thirds requirement must be considered together with other changes to the parole statute."). According to the dissent, if the two-thirds requirement made parole tougher to attain, the factor must be examined in conjunction with the amendment's decrease in the frequency of hearings to determine whether the overall changes to the statute violated the *Ex Post Facto* Clause. *Id.* at 240. The dissent's ultimate conclusion regarding South Carolina's amended parole statute bears repeating:

> The majority also notes that *Morales* compels upholding the two-thirds requirement because to do otherwise would amount to the judicial "micromanagement" that the Court cautioned against. *Morales* does no such thing. The California statute involved an exceedingly speculative possibility that the punishment of the affected inmates would be increased: The statute applies only to multiple murderers, presumably a small fraction of the inmate population; the Board has to affirmatively decide that a hearing should be deferred and to explain why; the inmate might be able to appeal the deferral decision, and the Board could, of its own volition, advance a hearing date where a change in circumstances warranted; and, significantly, under California's system, the determination of parole suitability often precedes the actual release date by several years. South Carolina's amendments, on the other hand, affect persons convicted of relatively minor crimes; mandate automatic deferrals, with no provision for an administrative appeal; increase the percentage of the Board that must

> vote to grant parole. In addition, there is no indication that a grant of parole is not ordinarily followed promptly by actual release. If *Morales* is our guide, the South Carolina statute increases the punishment by decreasing the likelihood of release on parole to a degree that offends the *Ex Post Facto* Clause.

Id.

This Court found the dissent's reasoning persuasive in its analysis of the petitioner's claim in *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000). In that case, the petitioner filed a post-conviction relief (PCR) action challenging the change in his parole review from annually to biannually. *Id.* at 260, 531 S.E.2d at 509. The Court previously analyzed this parole review change in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989). In that case, the Court held that "the standards governing petitioner's parole eligibility have not been changed," but instead, "only the frequency with which petitioner can be reconsidered for parole has been altered." *Id.* at 115–16, 378 S.E.2d at 444.

However, the Court overruled *Gunter* in *Griffin v. State*, 315 S.C. 285, 433 S.E.2d 862 (1993), *cert. denied*, 510 U.S. 1093 (1994). The *Griffin* court adopted the Fourth Circuit's decision in *Roller I*, finding that the change in biannual review was not merely procedural. *Griffin*, 315 S.C. at 288, 433 S.E.2d at 864 ("The Fourth Circuit's analysis is compelling. It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the *ex post facto* analysis between a change in the standards for review and a procedural change in timing.").

In *Jernigan*, this Court found the *Roller II* dissent's analysis more persuasive than that of the *Roller II* majority, stating:

> The South Carolina statute which calls for biannual parole review hearings for all violent offenders is clearly distinguishable from the very specific statute at issue in *Morales*. Under South Carolina law, there is [sic] a variety of crimes defined as violent, and the possible sentences for these crimes range from one year to life imprisonment. In *Morales*, the statute applied to a very well-defined set of inmates—multiple killers—while the South Carolina statute applies equally to a variety of inmates—from murderers to marijuana traffickers—and many of these inmates will likely be paroled at some point. Moreover, the South Carolina statute does not require any specific

> findings in order to defer parole review for two years; instead, the two-year interval is automatic after an initial denial of parole.

Jernigan, 340 S.C. at 263–64, 531 S.E.2d at 511. Thus, the Court determined that the change from annual parole eligibility review to biannual review produced a sufficient risk of increasing the measure of punishment attached to covered crimes, and any retroactive application of section 24-21-645 constituted an *ex post facto* violation. *Id.* at 264–65, 531 S.E.2d at 512 ("Accordingly this Court's holding in *Griffin v. State, supra*, that retroactive application of the statute increasing parole review to every two years constitutes an *ex post facto* violation, remains the law in South Carolina.").

The *Jernigan* Court did not address section 24-21-645's two-thirds requirement. In the instant case, the ALC acknowledged that the *Jernigan* Court agreed with the dissent in *Roller II* regarding biannual review, but held this fact is not dispositive of whether the retroactive application of the two-thirds requirement is also a violation of the *Ex Post Facto* Clause. According to the ALC, this Court's *Jernigan* decision concerned the Parole Board's lack of discretion in reviewing parole for inmates convicted of violent crimes and to whom the Parole Board previously denied parole, noting "[t]here was an automatic increase in review from one year to two, regardless of the nature of the crime for which the inmate was convicted, and regardless of the sentence the inmate was serving." The ALC found that in the instant case, the statutory change in the number of votes to approve parole has no bearing on how often the Parole Board members voted, and has no impact on the discretion of the Parole Board or its decision-making process.[4]

[4] The ALC also concluded that Appellant's argument required the court to speculate how the Parole Board might have voted had section 24-21-645's previous majority requirement applied. The apparent root of the ALC's reasoning on this point is that there is no way to determine whether Appellant would have received four votes from the Parole Board under the prior version of section 24-21-645. Therefore, Appellant cannot demonstrate that the Parole Board members would have voted the same way had they applied the prior version of section 24-21-645 to Appellant's case. However, the ALC engaged in an expansive speculation adventure antithetic to the speculation reasoning the United States Supreme Court expressed in the *Morales* and *Dobbert* decisions. For example, the ALC concluded, the Parole Board members may have *sensed* that the less than two-thirds of the Parole Board was going to vote for parole, and voted for Appellant to encourage her to continue her efforts to rehabilitate. However, in *Dobbert*, the Supreme Court merely reasoned that the defendant could not show that his

We disagree with the ALC's conclusions and hold that this Court's decision in *Jernigan* is controlling. The *Jernigan* Court's rejection of the "speculation" argument regarding biannual review applies with equal force to the two-thirds requirement.[5] The distinctions between the California statute analyzed in *Morales* and the biannual review amendment of section 24-21-645 are evident in the two-thirds requirement, as well. The two-thirds requirement applies to a wide-variety of crimes, rather than a well-defined set of inmates, the two-thirds requirement is the default provision for all violent crimes regardless of the crime's nature, and the requirement compels an offender to convince an additional member of the Parole Board. This certainly "produces a sufficient risk of increasing the measure of punishment," attached to a violent crime. *See Jernigan*, 340 S.C. at 264–65, 531 S.E.2d at 511–12 (relying on *Lynce v. Mathis*, 519 U.S. 433, 444–45 (1997), for the proposition that if a statute effectively increases the "quantum of punishment," then retroactive application is unconstitutional).

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punishment would have been different under a previous version of the statute. *Dobbert*, 432 U.S. at 294 n.7. In *Morales*, the Supreme Court discussed simply that it was speculative to reason that annual parole hearings would enhance the possibility of parole by the narrow class of prisoners covered by the statute analyzed in that case. *Morales*, 514 U.S. at 511–12. The ALC's argument does not resemble the speculation reasoning of *Dobbert* or *Morales*.

But, perhaps most troubling about the ALC's speculation is its lack of support in the Record. The rejection letter the Parole Board issued Appellant makes no mention of the number of votes she received at her hearing. Moreover, Appellant's counsel noted at oral argument that inmates are not informed of the vote outcome from their hearings unless they request a recording of their hearing. DPPPS did not contradict this assertion.

[5] *Jernigan*, 340 S.C. at 264 n.5, 531 S.E.2d at 511 n.5 ("In any event, more expansive rights may be afforded under state constitutional provisions than those conferred by the federal constitution. Accordingly we find the change in parole consideration under § 24-21-645 offends S.C. Const. art. I, § 4, even if the federal constitution is not offended." (citing *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997)).

Moreover, section 24-21-645 contains none of the restraints and safeguards critical to the analysis by the majority in *Morales*, or the dissent in *Roller II*.[6]

Simply put, prior to the amendment, Appellant merely needed to obtain favorable votes from a majority of the Parole Board. Following the amendment, Appellant must obtain favorable votes from two-thirds of the Parole Board. This amendment is not procedural, but poses a sufficient risk of increasing the measure of punishment attached to Appellant's crime and other similarly situated individuals. Additionally, this risk is compounded by the Parole Board's position

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[6] The ALC found the United States District Court for the District of Maryland's decision in *Alston v. Robinson*, 791 F. Supp. 569 (D.Md. 1992), persuasive. In that case, the plaintiffs contended that retrospective application of the requirement that seven out of nine members of a parole review board approve leave, work release, and parole, constituted an *ex post facto* violation where previously the statute only required a simple majority of a five-member quorum. *Id.* at 590. The court held that although the seven member requirement did appear to make it "more difficult" for the plaintiffs to achieve parole, the change did not alter the criteria which the parole review board applied to determine parole eligibility, and this fact rendered the change "very much" procedural in nature. *Id.*

The ALC's reliance on *Alston* is misplaced due to that case's primary dependence on authority evaluating whether a change in the number of jurors required for conviction constitutes an *ex post facto* violation. The analysis of the two-thirds requirement and a reduction in jury size are not sufficiently similar. As the Supreme Court expressed in *Williams v. Florida*, 399 U.S. 78, 100 (1970), the primary concern in evaluating a jury's appropriate composition is to preserve a size large enough to promote group deliberation free from outside intimidation, and provide a fair possibility for obtaining a cross-section of the community. These are clearly not the principal concerns regarding retroactive application of the amendment to section 24-21-645. Instead, as the Court observed in *Jernigan*, the critical question is whether the change creates a reliable risk of increasing the punishment attached to the inmate's crime. *See Jernigan*, 340 S.C. at 264–65, 531 S.E.2d at 512 (preventing retroactive application of the change from annual parole eligibility review to biannual review). The *Williams* Court held that "neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members." *See Williams*, 399 U.S. at 100. It is error to conflate this jury-specific reasoning with an analysis of section 24-21-645 and its two-thirds requirement.

that Appellant must convince two-thirds of the entire Parole Board, and not merely those members who participate in her hearing.[7] Moreover, this change affects an inmate's substantial personal right to statutorily correct parole review. *See Cooper v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111–12 (2008) ("Parole is a privilege and Cooper has no right to be paroled; however, Cooper does have a right to require the [Parole Board] to adhere to statutory requirements in rendering a decision." (alteration added)).

It is clearly more difficult to convince a two-thirds majority of the Parole Board to grant parole, than a simple majority, and the identical issues posed by retroactive application of the biannual review procedure apply similarly to the two-thirds requirement. [8]

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[7] *Cf. Garner v. Jones*, 529 U.S. 244, 255 (2000) ("When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. The litigation in *Morales* concerned a statute covering inmates convicted of more than one homicide and proceeded on the assumption that there were no relevant differences between inmates for purposes of discerning whether retroactive application of the amended California law violated the *Ex Post Facto* Clause. In the case before us, respondent must show that *as applied to his own sentence* the law created a significant risk of increasing his punishment." (emphasis added)).

[8] DPPPS also argues that because Appellant pled guilty and received a sentence of life imprisonment, retroactive application of section 24-21-645 could not increase her punishment because, "the extent of her punishment is that she would spend the rest of her life in prison." This argument is without merit. At the time of Appellant's sentencing a person imprisoned for life would become eligible for parole after serving twenty years of her sentence. Moreover, the nature of parole is early release from imprisonment. The rationale asserted by DPPPS would foreclose all *ex post facto* claims by potential parolees given that the true extent of their "punishment," or imprisonment, has not yet been completed. This view of parole and *ex post facto* law is untenable and more importantly, legally insufficient.

3. The Meaning of "Two-Thirds"

Appellant argues that the ALC's construction of section 24-21-645 is erroneous and should be rejected. We agree.

Statutory interpretation is a question of law subject to de novo review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147–48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). "If the statute is ambiguous . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted). The statutory language must be construed in light of the intended purpose of the statute. *Id.* This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the legislature."). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted).

The Parole Board is comprised of seven members. S.C. Code Ann. § 24-21-10(B) (Supp. 2012). Section 24-21-645 of the South Carolina Code provides that the Parole Board may issue an order authorizing parole signed by either a majority of its members or by all three members meeting as a panel. *Id.* § 24-21-645 (Supp. 2012). However, "at least two-thirds of the members of the [Parole Board] must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in section 16-1-60 of the South Carolina Code." *Id.* Section 24-21-645 does not specify a quorum for Parole Board meetings but "in the absence of any statutory or other controlling provision, the common-law rule that a *majority* of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum." *Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (emphasis added); *see*

also James v. S.C. Dep't of Prob., Parole, and Pardon Servs., 377 S.C. 564, 569, 660 S.E.2d 288, 291 (Ct. App. 2008) ("Here, five members of the [Parole Board] were present, and each voted to deny . . . parole. A unanimous and majority decision was reached by a quorum in this hearing." (alterations added)).

Appellant interprets "members of the board" in section 24-21-645 to mean those members of the Parole Board present and voting at a parole hearing. Appellant argues that conversely, her interpretation does not include members who did not attend the hearing. DPPPS counters that, even though a quorum of the Parole Board is all that is required to conduct business, the statute's "members of the board" language means that an inmate convicted of a crime must get at least two-thirds of the seven members of the Parole Board.

The ALC agreed with DPPPS, and held that "members of the board" connotes the entire seven members of the Parole Board. According to the ALC, because section 24-21-10(B) of the South Carolina code defines the Parole Board as composed of seven members, section 24-21-645(A)'s two-thirds requirement pertaining to "members of the board," means that an inmate convicted of a violent crime must obtain favorable votes from at least two-thirds of the seven Parole Board members. The ALC reasoned that the portion of section 24-21-645(A) permitting the Parole Board to authorize parole for non-violent offenses by simple majority when read in conjunction with the two-thirds requirement demonstrates that the General Assembly "meant for the term 'members of the board' to mean members of the full Parole Board, and not members of the [Parole Board] attending or voting at a parole hearing." The ALC's interpretation is wrong.

Section 24-21-645 is ambiguous, and thus susceptible to more than one interpretation. Obviously, the statute can be read to mean that an offender must receive votes from two-thirds of the members of the entire Parole Board, regardless of how many members actually attend a hearing. However, as Appellant notes, the terms "majority" and "two-thirds" as utilized by section 24-21-645 are not static terms, and their meaning changes depending on their application. Thus, the fact that the General Assembly used such terms does not evince intent to require inmates convicted of violent offense to obtain favorable votes from five members of the Parole Board regardless of the actual composition of the Parole Board at the inmates hearing.[9]

[9] Comparison with section 24-21-30 of the South Carolina Code is instructive. Section 24-21-30 provides in pertinent part:

> (B) The board may grant parole to an offender who commits a violent crime as defined in Section 16-1-60 which is not included as a "no parole offense" as defined in Section 24-13-100 on or after the effective date of this section by a two-thirds majority vote of the *full* board. The board may grant parole to an offender convicted of an offense which is not a violent crime as defined in Section 16-1-60 or a "no parole offense" as defined in Section 24-13-100 by a unanimous vote of a three-member panel or by a majority vote of the *full* board.

S.C. Code Ann. § 24-21-30 (2007) (emphasis added).

The parties agree that although section 24-21-30 and section 24-21-645 are similar, the latter statute controls the instant case. Section 24-21-645 speaks directly to "Parole and provisional orders," within the context of a review schedule following "parole denial of prisoners confined for violent crimes." S.C. Code Ann. § 24-21-645 (Supp. 2012). Section 24-21-30 does not contain this language, and is entitled "Meetings; parole and pardon panels." S.C. Code Ann. § 24-21-30 (Supp. 2012). It is conceivable that the General Assembly included the "full board" language to address parole orders under section 24-21-30, but expressly did not include this language in section 24-21-645 in providing direction to the Parole Board in addressing those inmates convicted of a violent crime that had previously been denied parole by the "full board." Regardless, it is clear that the General Assembly did not include the term "full board" in section 24-21-645 or 24-21-650, but included the term in section 24-21-30. *See id.* § 24-21-650 (explaining the issuance of an order of parole). Furthermore, the General Assembly amended section 24-21-30 in 1995, ten years following section 24-21-645's amendment. *See id.* § 24-21-30 (Supp. 1995) ("From and after January 1, 1996, this section reads as follows."). These facts weigh in favor of construing section 24-21-645 as not requiring an inmate convicted of a violent crime to obtain favorable votes from two-thirds of the seven-member Parole Board, but instead to obtain only two-thirds of those members of the Parole Board participating in a particular hearing. *See State v. Dingle*, 376 S.C. 643, 650, 659 S.E.2d 101, 105 (2008) ("As with any statute that is penal in nature, the Court must construe it strictly in favor of the defendant and against the State."); *Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary).

Requiring Appellant to only obtain votes from Parole Board members actually present at her hearing comports with the common meaning and understanding of the term "quorum." In the absence of a controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies. *Garris*, 333 S.C. at 453, 511 S.E.2d at 59. Section 24-21-645 does not specify the number of Parole Board members that must review the parole suitability of an inmate convicted of a violent crime, but also does not expressly exclude the common-law quorum principle. *See, e.g.*, *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), *aff'd*, 373 S.C. 90, 645 S.E.2d 245 (2007) ("[A] statute is not to be construed in derogation of common law rights if another interpretation is reasonable." (alteration added)). Thus, the statute does not demonstrate the General Assembly's intent to frustrate the ability of a valid DPPPS quorum to execute the statutory duties of the department.

We agree with Appellant's contention that the interpretation advanced by DPPPS invites absurd results. For example, if the Parole Board reviewing the parole suitability of an inmate convicted of a violent crime consisted of only four members, a unanimous decision to grant parole would nonetheless result in a parole denial.[10] Essentially, the current DPPPS interpretation treats non-

[10] The ALC observed that "there is no evidence that the [Parole Board] has ever even met with fewer than five members when considering the parole of an inmate convicted of a violent crime." However, the ALC observed that the Parole Board *could* meet with only four of the seven members. Regarding this hearing configuration the ALC determined:

> If a vote of only four members present ever took place in the case of an inmate convicted of a violent crime, the result would presumably be a denial of parole for that inmate, as the court in *James* [*v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 377 S.C. 564, 569, 660 S.E.2d 288, 291 (Ct. App. 2008)] points out that though a two thirds majority of the full [Parole Board] is required to grant parole of a violent crime falling under section 16-1-60, there is no statutory requirement "that a certain number of board members . . . be present in order to deny parole for someone convicted of a violent crime."

(alterations added). Thus, under the ALC's own interpretation of section 24-21-645, any hearing convened by a quorum of the Parole Board is an automatic denial of parole for an inmate convicted of a violent crime. The ALC erred in failing to recognize the legal infirmity of a statutory interpretation that even allowed the

participating members of the Parole Board as "no" votes. DPPPS fails to present any authority for what is the illogical position that the General Assembly intended for non-participating Parole Board members to arbitrarily count against inmates convicted of a violent crime, or that the General Assembly intended for a meeting of the Parole Board convened with only a quorum to result in a continuous denial of parole to inmates convicted of a violent crime. Put another way, DPPPS fails to bring forward any rationale as to why absent Parole Board members could not just as well be treated as "yes," votes.[11]

The ALC erred in interpreting section 24-21-645's two-thirds provision to require Appellant to obtain five votes instead of four. The ALC's interpretation automatically views non-participating Parole Board members as "no" votes, and ignores the fact that Appellant obtained favorable votes from two-thirds of the Parole Board members participating in her hearing. This interpretation of section 24-21-645 is out of step with this Court's rules of statutory construction. Moreover, if the General Assembly intended for section 24-21-645 to require inmates convicted of a violent crime to obtain approval from two-thirds of the "full" Parole Board, the statute would contain language to that effect. Appellant obtained favorable votes from two-thirds of the Parole Board and should have been granted parole *even if* section 24-21-645 is applied retroactively.

CONCLUSION

We hold that retroactive application of section 24-21-645 constitutes an *ex post facto* violation, and inmates convicted of a violent crime must only convince two-thirds of the Parole Board members participating in their hearing. Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion. The ALC's decision is therefore,

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possibility that a simple meeting of a valid quorum of the Parole Board resulted in the automatic denial of an inmate's parole.

[11] A hypothetical application of the Parole Board's interpretation to a wider context truly demonstrates its absurdity. For example, the South Carolina Constitution provides that "a majority of each house shall constitute a quorum to do business." S.C. Const. art. III, § 11. The Parole Board's view of a quorum would treat those members of each house who are not present as "no" votes, effectively frustrating the ability of the quorum to act.

REVERSED.

BEATTY and HEARN, JJ., concur. PLEICONES, J., concurring in result in a separate opinion. KITTREDGE, J., concurring in result in a separate opinion.

JUSTICE PLEICONES: I concur in result. I agree that "two-thirds of the members of the board" in § 24-21-645 means two-thirds of the members participating in the hearing. This interpretation of § 24-21-645 resolves the case before us. It has long been this Court's policy to decline to rule on constitutional issues unless they are essential to the disposition of the case. *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 387, 563 S.E.2d 651, 656 (2002); *see also Sanders v. Anderson County*, 195 S.C. 171, 172, 10 S.E.2d 364, 364 (1940) ("The Court will avoid, when possible, passing upon the constitutionality of an Act of the Legislature . . . ."). As a matter of judicial restraint, I would not reach the constitutional question, which is unnecessary to the decision. I therefore concur in result only.

JUSTICE KITTREDGE: I concur in result. I join the majority's construction of section 24-21-645 of the South Carolina Code, specifically as to the meaning of "two-thirds." Appellant received the requisite two-thirds approval and should be paroled.

I disagree, however, that the statutory change from a majority to two-thirds constitutes an *ex post facto* violation. I view the statutory amendment as merely a procedural change. *See, e.g., Alston v. Robinson*, 791 F. Supp. 569 (D. Md. 1992) (finding statutory revision requiring a larger percentage of members of the parole board to approve prisoner leave, work release and parole was a procedural change that did not substantially alter prisoners' quantum of punishment, and therefore, its retroactive application did not violate the *Ex Post Facto* Clause); *Arizona ex rel. Gonzalez v. Superior Court*, 907 P.2d 72, 74 (Ariz. 1995) (holding that the legislature's alteration of the vote requirement for parole does not violate *ex post facto* constitutional principles, for although it "may diminish [a prisoner's] ability to achieve parole," the amended statute does not affect the quantum of punishment and "has not newly criminalized his acts, enhanced his punishment, or altered the legal rules of evidence").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Effie Sandra L. Turpin, C. E. Lowther Jr., Clayton Clark Lowther, and Mitchell Saxton Lowther, individually and representing as a class of beneficiaries of the Estate of C.E. Lowther, Sr., Respondents,

v.

E. LeGrand Lowther, individually and as Personal Representative of the Estate of C.E. Lowther, Sr., and Mark Allen Lowther, as Personal Representative of the Estate of C.E. Lowther, Sr., Defendants,

Of whom E. LeGrand Lowther is Appellant.

Appellate Case No. 2012-211007

Appeal From Beaufort County
Marvin H. Dukes III, Special Circuit Court Judge

Opinion No. 5152
Heard April 10, 2013 – Filed July 3, 2013

AFFIRMED

H. Fred Kuhn, Jr., Moss Kuhn & Fleming, PA, of Beaufort, for Appellant.

Harley Delleney Ruff and Carol Clayton Ruff, Ruff & Ruff, LLC, of Beaufort, and R. Thayer Rivers, Jr., of Ridgeland, for Respondents.

FEW, C.J.: This is an action by three beneficiaries of the estate of C.E. Lowther, Sr. against a personal representative of the estate, E. LeGrand Lowther.[1] They allege LeGrand breached a fiduciary duty to the beneficiaries when he did not disclose to them that he was negotiating with third parties to sell properties belonging to the estate while he was simultaneously negotiating with the beneficiaries to purchase from them those same properties. The probate court found LeGrand breached his fiduciary duty and awarded the beneficiaries $69,051 in damages. On appeal, the circuit court agreed but modified the judgment to $289,924. We affirm the circuit court.

I. Facts and Procedural History

Mr. Lowther died in 2004 and was survived by his eight children. At the time of his death, Mr. Lowther owned (1) a 40.81 acre parcel of real property and (2) an undivided one-fourth interest in a 226.35 acre parcel of real property located in the Wellington Plantation area of Jasper County.[2] LeGrand owned an undivided one-half interest in the Wellington tract, and his brother Mitchell owned an undivided one-fourth interest in the property. The probate court appointed LeGrand and Mark personal representatives of the estate.

Mr. Lowther's will, which excluded LeGrand at LeGrand's own request, devised the 40-acre parcel and his undivided one-fourth interest in the Wellington tract to his other seven children in equal shares. Additionally, the will devised a one-half interest in a vacant subdivision located in Beaufort County known as Echo Tango that consisted of six lots, two of which had previously sold for $110,000 and $700,000, respectively. Although the Echo Tango property was titled solely in LeGrand's name, LeGrand agreed to share profits generated from Echo Tango with

[1] There are seven beneficiaries of the estate. Three beneficiaries—Effie Sandra Turpin, C.E. Lowther, Jr., and Mitchell Saxon Lowther—brought suit against the personal representatives, LeGrand and Mark Allen Lowther, who are also children of Mr. Lowther. The probate court dismissed Mark as a defendant in its final order.

[2] We refer to these properties as the "40-acre parcel" and the "Wellington tract," respectively.

Mr. Lowther while he was still living. Even though LeGrand and Mr. Lowther had previously discussed jointly owning the Echo Tango property, LeGrand testified no agreement was finalized before Mr. Lowther's death.

The beneficiaries of the estate wanted to sell the land they inherited because some were in financial need. In early 2005, International Society of Investors, LLC ("ISI") contacted LeGrand about purchasing the Wellington tract. LeGrand showed the property to two of ISI's principals, Michael Jones and Monte Perry. During negotiations with ISI, LeGrand told Jones that if ISI wanted to purchase the Wellington tract, the company would also have to buy the 40-acre parcel as a "package deal."

During the summer of 2005, LeGrand discussed with the beneficiaries his plan to purchase their interests in the 40-acre parcel and the Wellington tract. LeGrand separately discussed with Mitchell the possibility of purchasing his one-fourth interest in the Wellington tract. LeGrand told the beneficiaries he would not buy their interests unless each decided to sell. Following these discussions, LeGrand made an initial offer of $275,000 to each beneficiary, but not all accepted. LeGrand testified that by August, all the beneficiaries had agreed on a price, so he asked his attorney to begin preparing individual contracts for the purchase of their interests.

In October 2005, LeGrand prepared and delivered to each beneficiary a proposed contract for the purchase of their interests in the 40-acre parcel and the Wellington tract. All the contracts, excluding Mitchell's contract, contained a proposed purchase price of $325,000. The contracts also provided that each beneficiary must quitclaim to LeGrand any right they may have in the Echo Tango lots. Each beneficiary signed his or her respective contract and returned it to LeGrand in October. LeGrand delivered to Mitchell a similar contract to purchase his one-seventh interest in the 40-acre parcel and one-fourth interest in the Wellington tract. Mitchell's contract, however, did not provide a purchase price. Mitchell filled in a purchase of $1,025,000, signed the contract, and returned it to LeGrand in October.

Also in October, ISI sent LeGrand two proposed contracts for the purchase of the 40-acre parcel and the Wellington tract. The contracts were dated October 12, 2005, but LeGrand claims he did not receive them until October 18 or 19, 2005. ISI offered to buy the 40-acre parcel for $810,000. The contract for the Wellington

tract, however, did not provide a purchase price. LeGrand filled in a purchase price of $5,450,000 for the Wellington tract. The contracts also identified the seller as "LeGrand Lowther, Mitchell Lowther, *et al.*," but LeGrand crossed out "Mitchell Lowther, *et al*.," making LeGrand the only named seller on the contracts. He signed both contracts on October 24, 2005 and returned them to ISI.

Three beneficiaries testified that when they signed their contracts in mid-October, they were unaware of LeGrand's efforts to sell the 40-acre parcel and the Wellington tract to ISI. Two of the beneficiaries claimed they asked LeGrand several times if he had "a sale" or "a contract" for the property, to which LeGrand responded, "I don't but I think I can sell it, people [are] interested in it, I believe I can sell it." LeGrand testified he did not disclose the negotiations and contracts with ISI to the beneficiaries because he "didn't have a sale; [he] had an agreement." Moreover, he "already had an agreement with [the beneficiaries] to buy everything from them, individually" so he contended it was none of their business.

On December 8, 2005, LeGrand and Mark, as personal representatives, executed a deed of distribution releasing the 40-acre parcel and the Wellington tract to the beneficiaries. The same day, each beneficiary executed a deed conveying the 40-acre parcel to LeGrand. Subsequently, LeGrand closed on a loan—borrowing $585,000 and securing the loan with a mortgage on the 40-acre parcel—and paid each beneficiary $73,000 from the loan proceeds, for a total purchase price of $511,000.[3] The beneficiaries were aware LeGrand needed to borrow money to pay the purchase price. At the closing, LeGrand denied the existence of a potential buyer for the property and did not disclose that he had signed and sent ISI a proposed contract for the 40-acre parcel.

On December 20, 2005, the beneficiaries executed deeds conveying their interests in the Wellington tract to LeGrand. At the closing, LeGrand denied the existence of a potential buyer for the property and did not disclose that he had received both contracts back from ISI in mid-December, both having been executed by ISI on November 21. Three beneficiaries testified they relied on LeGrand's denials at the closings when they sold their interests.

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[3] Contrary to the written contracts, the parties agreed to a purchase price of $511,000 for the 40-acre parcel, with each beneficiary receiving $73,000 in cash at closing.

To finance the purchase of the Wellington tract, LeGrand executed seven promissory notes to the beneficiaries—six notes for $252,000 and one to Mitchell for $952,000—for a total purchase price of $2,464,000. All notes were payable in full, without interest, on December 31, 2006. The sum of the notes was secured by a mortgage on the Wellington tract and, in the event of default, the beneficiaries were entitled to a reconveyance of their interests in the Wellington tract and a share of the net proceeds from the sale of any Echo Tango lots.
On February 17, 2006, LeGrand sold the 40-acre parcel to Amberwinds, LLC for $810,000. The probate court found Amberwinds was the assignee of the purchase contract from ISI, and the circuit court found Amberwinds was "virtually the same entity" as ISI and was owned by the same two men with whom LeGrand negotiated—Jones and Perry. In March 2006, the beneficiaries learned of the sale to Amberwinds. Two of the beneficiaries testified they would not have sold their interests had they known about the contracts between LeGrand and ISI.

ISI never closed under its contract for the purchase of the Wellington tract. LeGrand could not find another buyer before the promissory notes to the beneficiaries became due on December 31, 2006. As a result, LeGrand defaulted on the notes and was forced to reconvey the beneficiaries' interests in the Wellington tract and distribute to them $138,000 in profits from the sale of two Echo Tango lots—one in 2006 and one in 2008.

Three beneficiaries of the estate brought suit, both individually and "as a class of beneficiaries," against LeGrand for breach of fiduciary duty. The probate court found LeGrand breached his fiduciary duty and awarded $69,051 in damages to all the beneficiaries of the estate. In arriving at this award, the court stated it would not measure damages by the difference between what LeGrand paid the beneficiaries for the 40-acre parcel—$511,000—and the amount Amberwinds paid for it—$810,000. Instead, the court began with the amount LeGrand cleared from the sale to Amberwinds after he made closing and title clearance payments—$207,051.[4] The court then subtracted from this amount the distributions LeGrand

[4] At the Amberwinds closing, LeGrand received $810,000 but paid $602,955, which included: (1) $593,872 to pay off the mortgage on the 40-acre parcel; (2) $6,576 to pay a judgment against Clark Lowther; (3) $1,257 to pay a creditor's claim against the estate; and (4) $1,250 in attorney's fees. After LeGrand was

subsequently paid to the beneficiaries from the sale of the two Echo Tango lots—$138,000. These reductions left a final award of $69,051.

Both LeGrand and the beneficiaries appealed to the circuit court. The beneficiaries argued the probate court erred because it measured damages by what LeGrand cleared from the sale to Amberwinds, and it deducted $138,000 in Echo Tango proceeds from the award. The circuit court agreed and increased the award to $289,924 because (1) the measure of damages should have been what the beneficiaries would have earned but for LeGrand's actions—$299,000—and (2) the Echo Tango distributions should not have been considered in calculating the award because Mr. Lowther equitably owned a fifty-percent interest in Echo Tango, which entitled the beneficiaries to any proceeds after his death. However, the circuit court affirmed the probate court's subtraction of $9,076 for payments made at the closing.[5] In his cross-appeal, LeGrand argued the probate court erred in finding he breached a fiduciary duty to the beneficiaries. The circuit court disagreed and affirmed the probate court's ruling.

II. Breach of Fiduciary Duty

LeGrand contends the circuit court erred in affirming the probate court's holding that he breached a fiduciary duty to the beneficiaries. LeGrand makes three arguments as to why he should not be liable to the beneficiaries: (1) he had no fiduciary duty to them because the transactions took place outside the estate administration process; (2) he did not breach a fiduciary duty to the beneficiaries; and (3) any duty he breached did not proximately cause the beneficiaries' damages.

To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages

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credited $6.24 for paying the prorated real estate tax in advance, LeGrand cleared $207,051 from the sale.

[5] Except for the $593,872 mortgage payment, the court subtracted the payments and the credit listed in the above footnote from the award—$9,076 in total. The court did not consider the mortgage payment when determining the award because (1) LeGrand voluntarily mortgaged the 40-acre parcel instead of purchasing with cash, and (2) the $585,000 mortgage loan exceeded the purchase price by $74,000, and the beneficiaries received none of the excess funds.

proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). The existence of a fiduciary duty is a question of law for the court. *See Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008) (citing *Clearwater Trust v. Bunting*, 367 S.C. 340, 346, 626 S.E.2d 334, 337 (2006)). Pursuant to the probate code, a personal representative owes a fiduciary duty to all beneficiaries of the estate. S.C. Code Ann. § 62-3-703(a) (2009) (stating "[a] personal representative is a fiduciary" and must "use the authority conferred upon him . . . for the best interests of successors to the estate"); *see also Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 555, 673 S.E.2d 836, 840 (Ct. App. 2009) ("A personal representative is a fiduciary under this state's probate code."); *Witherspoon v. Stogner*, 182 S.C. 413, 415, 189 S.E. 758, 759 (1937) ("That a fiduciary relationship exists between each heir or beneficiary of an estate and the administratrix thereof is fundamental."). Subsection 62-3-703(a) states a personal representative has the "duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests of the estate" and the "successors to the estate." If the personal representative improperly exercises his power in connection with the estate, he is "liable to interested persons for damage or loss resulting from breach of his fiduciary duty." S.C. Code Ann. § 62-3-712 (2009).

A. Acting in Capacity as Fiduciary

LeGrand first contends the fiduciary duty he had to the beneficiaries did not apply when he purchased their interests because he distributed the properties to them in his fiduciary capacity, and then purchased the individually-owned properties from them in a personal capacity. Thus, LeGrand argues the transactions occurred outside of the administration of the estate and thus were not subject to a fiduciary duty.

LeGrand's argument focuses on whether he had a fiduciary duty to the beneficiaries when he closed his purchase of the 40-acre parcel from them in December 2005. We believe LeGrand defines the issue too narrowly. LeGrand concedes he had a fiduciary duty to the beneficiaries when he was negotiating to purchase their interests in the summer of 2005 and when the beneficiaries signed their contracts to sell their interests in October 2005. This duty required him to disclose information affecting the value of the beneficiaries' interests in the estate before he could negotiate to purchase those interests. *See Pitts v. Jackson Nat'l*

Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Ct. App. 2002) (noting a duty to disclose arises from a preexisting, definite fiduciary relationship between the parties); *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (stating "[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute" a breach of that duty (citation omitted)).

LeGrand and ISI began negotiating the sale of the 40-acre parcel and the Wellington tract in early 2005. Through these negotiations, LeGrand acquired information concerning the value of the properties that he could not have known except by virtue of his position as personal representative. On the other hand, the beneficiaries could not have learned this information unless LeGrand disclosed it to them. The beneficiaries' ability to accurately assess the value of the properties, and thus determine the price they were willing to accept, depended on the information available to them at that time. Nevertheless, LeGrand began negotiations with the beneficiaries in the summer of 2005, and they agreed on a purchase price and signed the contracts to sell their interests to LeGrand in October 2005. Because his negotiations and contracts with ISI affected the value of the beneficiaries' interests, LeGrand's fiduciary duty required him to disclose this information to them when he negotiated to purchase their interests and when the beneficiaries signed the contracts to sell their interests to him.

B. Breach of Fiduciary Duty

LeGrand also argues that even if he had a fiduciary duty at the relevant time, he did not breach this duty because (1) there was no contract with ISI when the beneficiaries signed their contracts and when LeGrand closed on his purchase of the 40-acre parcel, (2) ISI walked away from the contracts, and Amberwinds—who he argues is not an assignee or the same entity as ISI—purchased the 40-acre parcel, and (3) he did not profit from the transaction with Amberwinds. These three arguments challenge the factual findings of the circuit court. We reject these arguments and affirm because evidence in the record supports these findings and the finding that LeGrand breached his fiduciary duty of disclosure. *See Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (stating the trial court's findings in a breach of fiduciary duty action will be upheld unless they are "without evidentiary support").

C. Proximate Cause

LeGrand argues any breach of his fiduciary duty did not proximately cause the beneficiaries' damages. We find, however, there is evidence to support the circuit court's finding of proximate cause. *See Jordan*, 362 S.C. at 205, 608 S.E.2d at 131. Three of the beneficiaries testified they relied on LeGrand's denial of existing contracts when they decided to sell their interests, and two testified they would not have gone through with the sale had they known about the contracts.

LeGrand also contends the beneficiaries, with full knowledge of the sale to Amberwinds in March 2006, ratified the transaction by electing to receive proceeds from Echo Tango sales under the terms of the notes, instead of rescinding the transaction and suing for damages. This issue, however, is not preserved for our review because LeGrand never made this argument to the probate court. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 860 (2006) ("In reviewing an appeal from the probate court, the circuit court must apply the same rules of law as an appellate court would apply."); *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 482, 609 S.E.2d 286, 299 (2005) (finding issue not preserved because it was not raised to and ruled upon by the trial court).

III. Calculation of Damages

LeGrand argues the circuit court erred in modifying the probate court's award of damages. First, he contends the probate court correctly based damages on the amount LeGrand cleared from the sale to Amberwinds, instead of the difference between what LeGrand paid the beneficiaries for the 40-acre parcel—$511,000—and the amount Amberwinds paid for it—$810,000. We disagree. Generally, the measure of damages in a tort case is "the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004); *see also Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) ("The goal [of compensatory damages] is to restore the injured party . . . to the same position he or she was in before the wrongful injury occurred."); *Haselden v. Davis*, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2003) (Burnett, J., dissenting) (explaining the "central tenet of compensatory damages" is "to make an injured person whole by placing him in the position enjoyed prior to the injury"). Thus, the correct measure of damages in this case is the amount that

will compensate the beneficiaries for the loss proximately caused by LeGrand's failure to disclose. *See* S.C. Code Ann. § 62-3-712 (2009) (stating damages for a personal representative's breach of fiduciary duty are calculated pursuant to subsection 62-7-1002(a) of the South Carolina Code (2009), which provides recovery for (1) the amount needed to restore the asset's value to what it would have been but for the breach, or (2) "the profit the [fiduciary] made by reason of the breach," whichever is greater); Restatement (Third) of Trusts § 100 (2012) (stating one of the objectives in awarding damages for breach of fiduciary duty is to make the beneficiaries whole by restoring what they would have had if the breach had not occurred). Here, the evidence supports the circuit court's finding that LeGrand purchased the 40-acre parcel from the beneficiaries for $511,000 when he knew its value was $810,000. Thus, we affirm the circuit court because but for LeGrand's breach, the beneficiaries would have earned an additional $299,000.

Second, LeGrand argues the probate court correctly subtracted from the damages award $138,000 in Echo Tango proceeds previously paid to the beneficiaries because the payments were made pursuant to the overall deal negotiated between LeGrand and the beneficiaries. The circuit court found the Echo Tango proceeds should not be considered in calculating the award because Mr. Lowther owned an equitable one-half interest in Echo Tango prior to his death, which entitled the beneficiaries to any proceeds after his death. LeGrand argues, however, Mr. Lowther held no interest in Echo Tango upon his death because it was titled solely in LeGrand's name and they never reached an agreement regarding joint ownership of the property. Therefore, LeGrand claims the beneficiaries were not entitled to the profits except under the terms of the notes, and the circuit court erroneously overruled the probate court's determination of damages.

There is evidence in the record, however, to support the circuit court's finding that Echo Tango was part of Mr. Lowther's estate. First, the provision in the beneficiaries' contracts that they must quitclaim their rights in Echo Tango supports the contention that the beneficiaries were entitled to an equitable interest in Echo Tango; otherwise, the provision would be useless. When asked in a deposition why the contracts contained this provision, LeGrand responded, "I was buying them out of Echo Tango . . . . There never was any question that they were going to get fifty percent of the proceeds out of Echo Tango." When asked why he thought this, LeGrand admitted the beneficiaries were entitled to the proceeds

before he defaulted on the notes, and stated, "I was going to give it to them. I felt like I owed it to them."

Second, in a pretrial hearing, LeGrand testified that "while the title to Echo Tango was in [his] name, it's undisputed that [he] and [his] dad owned it together 50/50." This is also consistent with a 2002 agreement signed by LeGrand, stating, in relevant part:

> This is to acknowledge that the following individuals are the equitable and true owners of the below-described interest in Echo Tango property located in the Chechessee Community in Beaufort County. Acknowledging this ownership interest, title, however, shall be in the name of E. LeGrand Lowther for business purposes.
>
> | | |
> |---|---|
> | E. LeGrand Lowther | 50% ownership |
> | C.E. Lowther | 50% ownership |
>
> All net proceeds from any sales shall be divided according to the above interests.[6]

Third, LeGrand's counsel admitted at trial there was "some legitimacy to the [beneficiaries'] contention" that they had a one-half interest in Echo Tango because LeGrand "had reached this agreement with his father before he passed." And later at trial, when asked what would have happened to Echo Tango proceeds had none of the transactions taken place, LeGrand answered as follows:

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[6] LeGrand contends evidence from the deposition, pretrial hearing, and agreement is not a legitimate part of the record, and the circuit court erred in relying on it. However, LeGrand never raised this issue to the circuit court, even though the parties extensively discussed the evidence during pretrial hearings. Accordingly, we find the issue is not preserved for this court's review. *See Ulmer*, 369 S.C. at 490, 632 S.E.2d at 860 ("In reviewing an appeal from the probate court, the circuit court must apply the same rules of law as an appellate court would apply."); *Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (stating issues may not be raised for the first time on appeal).

A. I would've given them 50 percent of the proceeds out of the sale of it.

Q. Why would you have done that?

A. Because it was my dad's wishes.

Q. Would you characterize [it] as an understanding and agreement that you had with your father?

A. Agreement, understanding. That's what he wanted . . . .

Finally, Mr. Lowther's will devised a fifty-percent interest in Echo Tango to the beneficiaries, which shows he believed he owned an interest in the property.

Based on the evidence discussed above, we affirm the circuit court's award of damages and agree the probate court erred in reducing the award by $138,000 because the beneficiaries were entitled to a fifty-percent equitable interest in Echo Tango.[7]

IV. Award of Damages

Finally, LeGrand claims the circuit court erred in affirming the probate court's award of damages in favor of all the beneficiaries, when only three were parties in this case. However, when the probate court granted judgment in favor of all seven beneficiaries, LeGrand never raised this issue to the probate court through a Rule 59(e), SCRCP, motion. Therefore, this argument is not preserved. *See In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (holding

[7] Additionally, LeGrand argues the probate court erred in allocating equal damages to each of the beneficiaries when they previously received proceeds of Echo Tango sales in unequal amounts. Because we find the circuit court correctly disregarded the proceeds in calculating damages, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues on appeal when disposition of a prior issue is dispositive).

when an order grants certain relief not previously contemplated or presented to the probate court, the aggrieved party must file a Rule 59(e), SCRCP, motion to alter or amend the judgment to preserve the issue for appeal).

V. Conclusion

For the reasons set forth above, the decision of the circuit court is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Cherry, Personal Representative of the Estate of Nicholas Wayne Cherry, Appellant,

v.

Myers Timber Company, Inc., Respondent.

Taylor C., a minor under the age of 14 years, by and through mother and natural guardian, Jane Cherry, Appellant,

v.

Myers Timber Company, Inc., Respondent.

Carlton Quinton as Personal Representative of the Estate of Hannah Nicole Quinton, Deceased, Appellant,

v.

Myers Timber Company, Inc., Respondent.

Alice Quinton and Carlton Quinton, Appellants,

v.

Myers Timber Company, Inc., Respondent.

Carlton Quinton as Guardian for Timothy Q., a Minor under the Age of Eighteen, Appellant,

v.

Myers Timber Company, Inc., Respondent.

Appellate Case No. 2012-207686

Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5153
Heard May 8, 2013 – Filed July 3, 2013

AFFIRMED

Larry Dale Dove and David Lamar Little, both of Dove & Barton, LLC, of Rock Hill, for Appellant Jane Cherry; David Bradley Jordan, of Jordan & Dunn, LLC, of Rock Hill, for Appellants Carlton Quinton and Alice Quinton.

Forrest C. Wilkerson, IV, of Rock Hill, for Respondent.

KONDUROS, J.: In this appeal arising out of wrongful death, survival, and negligence actions, Appellants[1] challenge the circuit court's grant of Myers Timber Company's summary judgment motion. They argue they presented sufficient evidence to raise a jury question as to whether Levister Logging was an employee of Myers and not an independent contractor. We affirm.

[1] Appellants are Jane Cherry, as personal representative of the Estate of Nicholas Wayne Cherry; Taylor C., by and through her guardian, Jane Cherry; Carlton Quinton as personal representative of the Estate of Hannah Nicole Quinton; Alice Quinton and Carlton Quinton; and Carlton Quinton as guardian for Timothy Q.

FACTS

Myers entered into timber harvesting contracts with landowners under which it would arrange for a third party to cut timber from the landowner's property and haul it to mills that purchased the timber. Myers did not own any log trucks or equipment and hired logging companies to fulfill its duties. After being hired for a job on thirteen acres of land in Lancaster County, Myers hired Levister to cut and remove timber from the land. The agreement between Myers and Levister was oral. The terms of the agreement were the rates[2] Myers would pay Levister for harvesting and hauling the lumber to the mills Myers identified. Levister decided what equipment to use and how to set up its equipment at the site. The agreement was terminable at will by either party.[3]

Myers would send one of its employees to a site at times to make sure the crew had not cut any trees on other property and was keeping the property neat, but the employee would not remain on site. On March 26, 2007, an employee of Myers was on site while one of Levister's trucks, a tractor-trailer rig, was being loaded with cut logs. Myers and Levister learned the mill where they had planned to send the logs was shut down. One of Levister's employees, George Rogers, was to drive the log truck and wanted to take the logs to Bowater Mill. Instead, one of Myers's employees instructed him to take the logs to Chester Wood Mill in Chester County. However, the logs that had already been loaded onto the truck had to be cut to conform to the log size requirements at Chester Wood Mill.

Once the logs were loaded, Rogers began driving the truck towards the Chester Wood Mill. The truck approached an intersection with a traffic light. At the same time, Alice Quinton, who had just picked up her two children and their two friends from elementary school, was stopped at the intersection in her van. Quinton drove her van into the intersection, where Roger's truck ran into the driver's side of it.

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[2] Myers paid Levister an agreed amount per ton of wood it cut and loaded onto its truck as well as mileage to and from the mill. The drivers were allowed to take any route they chose, but the rate was calculated based on the shortest route.

[3] Myers disputes this in its respondent's brief. However, the circuit court made this finding, and Myers did not file an appeal challenging it. Accordingly, it is the law of the case. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006).

Tragically, two of the children were killed and the other occupants of the van were seriously injured.[4]

Appellants brought wrongful death, survival, and negligence actions against Myers alleging it was vicariously liable for Rogers's and Levister's negligence. Myers answered, asserting Levister was an independent contractor and thus denying it was vicariously liable. Myers filed a motion for summary judgment. Following a hearing, the circuit court granted the motion for summary judgment, finding Levister was an independent contractor of Myers and thus Myers was not liable for the acts of Levister's employees. The circuit court found (1) Myers had no right to exercise control over Levister; Levister could harvest the timber and transport it in any manner it saw fit; (2) Levister was not paid a wage or salary but instead was paid based on the end result, the amount of timber delivered; (3) Levister furnished all of its own equipment; and (4) Myers had no right to hire or fire Levister's employees. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Myers's motion for summary judgment by finding Levister was an independent contractor and not an employee. Specifically, Appellants contend the circuit court erred in (1) finding Myers had no right or power to control or direct the manner or performance of Levister's work;

[4] Rogers was acquitted on charges of reckless homicide following a trial in 2009.

(2) finding Myers had no right to fire Levister's personnel; (3) failing to find Myers's right to exercise control over material elements of payments to Levister created a genuine issue of material fact; and (4) failing to find Myers's right to use and exercise control over Levister's use of equipment created a genuine issue of material fact. We disagree.

"Generally, an employer is not liable for the torts of an independent contractor. No concrete rule has been established to determine whether the relationship of independent contractor has been established, but the general test is the degree of control exercised by the employer." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998) (citations omitted). The distinction between employees and independent contractors is not the actual control exercised, but whether there is the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. *Id.* at 116, 512 S.E.2d at 520-21. "An independent contractor . . . contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work." *Id.* at 116, 512 S.E.2d at 521 (internal quotation marks omitted).

> The Courts have encountered much difficulty in determining whether under various circumstances a person doing work for another was an employee or an independent contractor. It is generally recognized that it is impossible to formulate a fixed or absolute rule applicable to all cases and that each must be determined on its own facts. However, there are many well recognized and fairly typical indicia of the status of independent contractor, even though the presence of one or more of them in a case is not necessarily conclusive.

Norris v. Bryant, 217 S.C. 389, 398, 60 S.E.2d 844, 847 (1950). Courts have recognized four factors bearing on the right of control: (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971).

In *Creighton*, Partnership hired D & M to do landscaping at a shopping center, Coligny Plaza, it owned. 334 S.C. at 107, 512 S.E.2d at 516. A shopper fell on the

entrance steps to one of the stores, which had two large palm trees with limbs overhanging the handrails on each side. *Id.* at 106-07, 512 S.E.2d at 515. Additionally, a vine "was growing along the outer edge of some of the steps and was intertwined with portions of the handrails." *Id.* at 107, 512 S.E.2d at 516. This court found:

> The Partnership had no direct control over how or when D & M did its work and no control over its daily work activities. . . . [C]o-owner of D & M[] supervised and directed the employees of D & M. The Partnership paid D & M $4,000.00 a month, and did not withhold social security or FICA. D & M had job sites other than Coligny Plaza. The Partnership did not furnish any equipment to D & M to perform the maintenance at the Plaza. The Partnership had no authority to hire or fire D & M employees. [Co-owner] testified he never received instructions from the Partnership regarding maintenance of the area around [where the shopper fell], and that the contract gave him discretion as to how to maintain the grounds. Periodically, the partners walked the grounds with [co-owner] and showed him specific things that needed to be done such as repairing potholes and replacing or moving shrubbery. [One of the partners] would also communicate his satisfaction or dissatisfaction with D & M to [co-owner]. Nothing in the record indicates the Partnership controlled the manner or means that D & M used to accomplish the requested work. The trial court correctly ruled the Partnership was not liable for any negligence on the part of D & M in maintaining the palms and jasmine at the entrance steps . . . because D & M was an independent contractor.

Id. at 117, 512 S.E.2d at 521.

In *Norris*, 217 S.C. at 395, 398, 60 S.E.2d at 846, 847, our supreme court found a logging contract somewhat similar to one in this case created the relationship of independent contractor between Poinsett Lumber and Manufacturing Company, a company that owned timber land in different locations, and S.C. Grant, who cut the

timber on one area of Poinsett's land and hauled it to a mill.[5] The court found Grant owned logging equipment and engaged in that business. *Id.* at 398, 60 S.E.2d at 847.

> He contracted to cut and haul a large quantity of logs at a fixed price. The operation was to cover a period of over two years. Poinsett had no right to terminate the contract as long as Grant fulfilled the conditions and requirements set forth therein. Grant was to furnish his own equipment and to pay all employees and subcontractors engaged by him. He had the right to control and direct the manner in which the details of the work were to be executed. Poinsett reserved no control over Grant's employees. Grant was to produce a given result and was to determine the means by which such result was to be accomplished.

Id. The court also noted, "Hauling contracts of a similar nature have also been held to create the relation of employer and independent contractor in other jurisdictions." *Id.* at 399, 60 S.E.2d at 847. The court found "it is clear from a consideration of the entire contract that the general direction and supervision reserved to Poinsett related only to the result to be attained and not to the details of the operation." *Id.* at 399, 60 S.E.2d at 848.

In this case, the circuit court correctly granted summary judgment. Appellants did not present evidence Myers had control over Levister. Levister could harvest the timber how it wanted, owned all of the equipment, and was paid based on the end result. Myers could not directly fire Levister's employees, and Levister paid its own employees, including withholding taxes. Myers's being able to tell Levister it was leaving too much stump or leaving ruts in the ground is similar to *Creighton* in which the partnership would give D & M specific instructions of what needed attention. The arrangement here is also like the one in *Norris* between Poinsett and Grant. Accordingly, the circuit court did not err in granting Myers summary judgment by finding the only evidence was that Levister was an independent contractor. Therefore, the circuit court's decision is

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[5] The court found it was for the jury to determine whether the relationship between Grant and *his* employee was that of an independent contractor. *Id.* at 405, 60 S.E.2d at 850.

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward Trimmier, DMD, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation, State Board of Dentistry, Respondent.

Appellate Case No. 2012-212267

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5154
Heard April 11, 2013 - Filed July 3, 2013

AFFIRMED

Paul Dezso de Holczer, deHolczer Law PC, of Columbia, for Appellant.

Sheridon Hunter Spoon, South Carolina Department of Labor, Licensing and Registration, of Columbia, for Respondent.

KONDUROS, J.: Edward P. Trimmier appeals the order of the Administrative Law Court (ALC) affirming the South Carolina State Board of Dentistry's (the Board's) order granting his request for relicensure conditioned upon his provision of written evidence regarding the status of his Georgia license. We affirm.

FACTS/PROCEDURAL HISTORY

Trimmier has been licensed in Georgia, New York,[1] and South Carolina during his career as a dentist. He has been the subject of disciplinary action in South Carolina and New York arising out of his conviction in 2002 for filing false claims with the South Carolina Medicaid program.[2] The Board and Trimmier entered into a disciplinary consent agreement dated December 7, 2002. Trimmier's license was suspended for six years, which was stayed to probation provided he paid a civil penalty of $25,000 and completed eight hours of Board-approved ethical training and education. Trimmier complied with the consent agreement but discontinued practicing in South Carolina and moved to Georgia.

In 2003, the Georgia Board of Dentistry (the Georgia Board) suspended Trimmier's license for six years with it being actively suspended for the first ninety days, and the remainder of the time he would be on probation. This sanction was the result of a consent agreement with the Georgia Board[3] after it discovered Trimmier submitted an application for a sedation permit that falsely indicated he had never been convicted of a crime. The Georgia Board issued a probationary sedation permit when it had no knowledge of these misleading responses.

In 2004, the Georgia Board again reprimanded Trimmier for performing a procedure on a patient while sedated after the probationary sedation permit he had received lapsed. Although there were no accusations of patient endangerment, the Georgia Board revoked his license. Trimmier appealed the revocation and won. The circuit court ordered the Georgia Board to dispense less severe sanctions. Therefore, beginning October 2009, Trimmier was on indefinite suspension but could go before the Georgia Board for reinstatement after two years. Instead of

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[1] The status of Trimmier's New York license is not at issue in this appeal.

[2] Trimmier was also reprimanded for publishing a misleading advertisement suggesting he was a specialist in pediatric dentistry and failing to properly supervise auxiliary personnel.

[3] The 2003 Georgia Consent Order also required Trimmier to complete sixteen hours of coursework in professional ethics, twelve hours of coursework in risk management, and the course on Law, Ethics, and Professionalism at the Medical College of Georgia. Additionally, he was fined $20,000.

waiting the two years and reapplying, or simply doing nothing, Trimmier voluntarily surrendered his Georgia license in April 2010.

Trimmier moved to South Carolina and decided to practice here. He petitioned to have his South Carolina license reinstated.[4] His greater than six-year absence from practice in South Carolina meant his license here was inactive and he had to seek relicensure. At that hearing, conducted in July 2010, the Board inquired into the status of Trimmier's Georgia and New York licenses.

> Q. You voluntarily surrendered your license in Georgia?
>
> A. That's correct.
>
> Q. Let me ask you, what was the status of your license in Georgia prior to that surrender?
>
> A. That was the suspension pending - - which I could've appealed. But you know, rather than keep going on and rehashing the same thing, I just said, you know, forgiveness is better.
>
> Q. Are you saying that your license - -
>
> A. Put that to bed.
>
> Q. - - are you saying that your license was suspended just -- when you surrendered it?
>
> A. Yes

Because the Board had concerns about the facts underlying Trimmier's apparently ongoing issues with the Georgia Board, the Board members requested transcripts and information regarding those proceedings. The record is unclear if Trimmier provided any additional information, but the Board issued an order later that month granting his South Carolina license upon the condition that he "provide documentary evidence satisfactory to the Board that his license and/or certificates

[4] Trimmier was pardoned for his misdemeanor convictions in 2007.

from Georgia, New York [,] and any other states of licensure are in good standing, whether active or inactive."[5]

Trimmier subsequently filed a motion for the Board to reconsider its order and another hearing was held. The issue of the Georgia license was again a subject of much discussion.

> Q. So you would submit that your license - - I just want to be clear. I know this is probably asking the same question over. You submit that your license to practice in Georgia is in good standing but inactive?
>
> A. Yes

Trimmier's attorney tried to clarify the issue.

> Q. In other words, there were no charges against him in Georgia when he took this inactive status?
>
> A. [Attorney] When he took the status in Georgia I believe everything had been resolved in front of the court. He had taken an appeal at some point. It had been resolved to the extent that he was now back at square one to reapply in Georgia and rather than go through all the rigmarole and effort and expenditure, he just said I'm done with Georgia.
>
> A. [Trimmier] See you later[.] Says I owe no fees[.] I'm fine. Everything's good with them.

Again, the Board granted Trimmier's license conditional upon proof of "written evidence to the Board which is satisfactory, in the Board's discretion, that shows his Georgia license either was in good standing at the time of his voluntary

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[5] Trimmier provided a letter from New York, which the Board found satisfactory, that indicated he completed the period of probation he was on in that state and his filed was closed.

surrender and/or that there were no disciplinary or other impediments, pending or otherwise, against his license at that time." Trimmier appealed this order to the ALC, which affirmed the Board's order. This appeal followed.

STANDARD OF REVIEW

The review of decisions from the ALC is governed by section 1-23-380(5) of the South Carolina Code (Supp. 2012), which states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

LAW/ANALYSIS

I. Violation of Section 40-1-110(1)

Trimmier argues the Board exceeded its statutory authority by conditioning his relicensure upon action by the Georgia Board and because such a requirement was not a part of the 2002 consent agreement. We disagree.

Section 40-1-110 of the South Carolina Code (2011) states: "In addition to other grounds contained in this article and the respective board's chapter: (1) A board may cancel, fine, suspend, revoke, or restrict the authorization to practice . . . ."

Because Trimmier elected to let his license lapse in South Carolina, his application for licensure in 2010 was not a continuation of the 2002 proceedings but a new request to be licensed in the State. Consequently, the authority granted to the Board under section 40-1-110(1), which relates to disciplinary action by the Board, is irrelevant to this appeal and cannot serve as a basis for reversing the ALC's decision.

II. Unlawful Procedure

Trimmier also argues the Board's decision was made upon unlawful procedure because it delegated the Board's decision making authority to Georgia. We disagree.

Section 40-15-170 of the South Carolina Code (2011) provides:

> If an individual's license to practice dentistry or dental hygiene is revoked by another state for cause this shall, in the discretion of the board, constitute grounds for revocation of his South Carolina license. The license of a dentist or dental hygienist who does not either reside or practice in South Carolina for a period of six successive years is considered inactive. . . . Relicensing after an absence of over six years may be made at the discretion of the board upon proof of high professional fitness and moral character.

Section 40-15-140 of the South Carolina Code (2011) states, "An applicant who holds a license or certificate from any jurisdiction shall certify that he has not violated any of the provisions of the Dental Practice Act governing his prior license or practice or operation." Under section 40-15-170, the Board may revoke a license based solely on the revocation of a dentist's license in another State.

The Board is permitted discretion in determining whether to issue a license and may require the candidate to demonstrate "high professional fitness and moral character." S.C. Code Ann. § 40-15-170. Requiring Trimmier to provide documentation he was not currently facing any new or additional charges before the Georgia Board was well within the Board's discretion in light of Trimmier's past failures to comply with various requirements of the practice of dentistry.

Furthermore, sections 40-15-140 and -170 specifically contemplate the Board's consideration of a license applicant's standing in other states. Any argument the Board should disregard Trimmier's license in Georgia because he voluntarily surrendered it is completely without merit. Ignoring the status of a professional license in another State could permit a dentist or other professional to forum shop to a new location in order to avoid admonition in another State. Consequently, we find the ALC did not abuse its discretion in affirming the Board's decision.

III. Substantial Evidence

Next, Trimmier argues the Board erred because substantial evidence in the record demonstrates he cannot comply with the condition imposed. We disagree.

"Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). "Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding." *Id.* at 21, 507 S.E.2d at 332.

Trimmier's own testimony provides substantial evidence supporting the Board's decision to condition his relicensure on proof of good standing in Georgia. According to him "everything was good" with the Georgia Board when he surrendered his license. Trimmier asserted, and his counsel agreed, the only impediment in being reinstated in Georgia was administrative, not disciplinary. The surrender of Trimmier's license indicates his license is "terminated" but only "unless and until such time as [his] license may be reinstated, in the sole discretion of the [Georgia] Board."

This evidence substantially supports that Trimmier can obtain documentation evidencing he has complied with the sanctions imposed against him in Georgia and is eligible to apply for reinstatement, or Trimmier can actually apply for reinstatement in Georgia. Consequently, substantial evidence supports the condition imposed by the Board can be achieved even if it is, in Trimmier's opinion, burdensome.

IV. Arbitrary and Capricious

Finally, Trimmier argues the Board's decision was arbitrary and capricious. We disagree.

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985).

The determination by the Board to condition Trimmier's licensure upon sufficient proof of good standing in Georgia rationally relates to a protection of the public's interest. Trimmier has, on more than one occasion, been reprimanded by the boards governing his chosen field. The requirements placed upon dentists are in place to protect the citizenry and ensure the public has access to safe and trustworthy dental care. Requiring further explanation and demonstration of good standing with the Georgia Board is rationally related to fulfilling this purpose. Therefore, we conclude the Board's decision was neither arbitrary nor capricious, and the ALC did not abuse its discretion in affirming it.

CONCLUSION

Based on all of the foregoing, the decision of the ALC is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kristin A. Busillo, Respondent,

v.

City of North Charleston, Appellant.

Appellate Case No. 2012-206986

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5155
Heard January 17, 2013 – Filed July 3, 2013

AFFIRMED

Christopher Thomas Dorsel, Senn Legal, LLC, of Charleston, for Appellant.

Keith Edward Robinson, Law Offices of William A. Green, of North Charleston, for Respondent.

FEW, C.J.: Kristin Busillo won a jury verdict of $16,500.00 for damages arising out of an automobile accident with a City of North Charleston police officer. The city argues on appeal that the trial court erred in making two evidentiary rulings and in not using a special verdict form. We affirm.

I. Facts and Procedural History

Officer Ryan Terrell attempted a U-turn after a traffic stop and collided with a vehicle driven by Busillo. Busillo filed a claim for property damage with the city's insurance company. An arbitration panel ruled the city was responsible for $4,184.70 in repairs to Busillo's vehicle and for the cost of a rental car.

Busillo also filed this action in circuit court. At trial, she submitted evidence of bodily injuries and medical costs. She also submitted evidence of property damage to her car. This evidence included a summary of expenses showing $6,034.70 in property damage, and the testimony of an expert witness, Frank Troy, who testified to the extent of the depreciation to Busillo's vehicle caused by the wreck. Following the charge to the jury but before the jury began deliberations, the city asked the trial court to consider using a special verdict form. The court denied this request. After the jury returned a verdict for Busillo, the trial court applied the arbitration award as a setoff against the verdict, but denied the city's motions for a new trial and judgment notwithstanding the verdict.

II. The Expert on Depreciation—Issue Preservation

The city argues on appeal that the trial court erred in admitting the testimony of Frank Troy. Specifically, the city argues the trial court abused its discretion by (1) not "consider[ing] that the type of witness and content of the witness's testimony were not disclosed until the day of trial," (2) not "inquir[ing] into [Busillo's] excuse for [her] Rule 33(b) [SCRCP] violation," and (3) not "consider[ing] the surprise and prejudice to [the city]." The first of these arguments was not adequately presented to the trial court, and the second and third were not presented to the trial court at all. Therefore, we find the city's arguments are not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct. App. 2005) (stating "[b]ecause this argument was not presented to the trial court . . . . the matter is not preserved and we decline to address it").

During a pretrial hearing, the city's lawyer stated, "The … last thing we have is our second motion in limine . . . to exclude any testimony of Frank Troy." The trial

court responded, "Who is that?" and the city's lawyer stated, "He was never listed in discovery." The court said, "Oh, this is the depreciation guy," and the city responded, "Yeah, a fact witness or an expert witness." The trial court stated it would "probably" let Busillo introduce Troy's testimony. The court then stated, "Let's just see how nimble you are on your feet." The city responded, "Very good, your Honor," and asked if the trial court intended to apply the arbitration award as a setoff. The court indicated it would, "somehow or another," but that it would think about the issue during trial. Nothing further was mentioned regarding Troy before the trial began.

When Busillo called Troy to testify, the trial court acknowledged the city's pretrial objection by stating, "Now, this is over your objection." During Troy's testimony, he was asked "what was your determination regarding the depreciation on Ms. Busillo's vehicle due to this automobile collision?" At that point, the city's lawyer stated only, "Objection," but offered no grounds for the objection and did not reference his pretrial motion. The trial court overruled the objection without reference to any basis on which the objection was made. The city made no other objections during Troy's testimony.

The mere statement "objection" during a witness's testimony does not preserve any argument for appeal because such a general statement does not bring the specific grounds for the objection to the attention of the trial court. *See* Rule 103(a)(1), SCRE ("Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record, stating the *specific* ground of objection . . . ." (emphasis added)); *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made . . . with sufficient specificity to inform the circuit court judge of the point being urged by the objector."); *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("[A]n objection must be sufficiently specific to inform the trial court of the point . . . .").

It is possible, however, that the context of the proceeding may make the specific ground for the objection sufficiently apparent to the trial court so that a general statement such as "objection" is enough to preserve an argument for appeal. *See* Rule 103(a)(1) (stating the requirement of "stating the specific ground of objection" applies "if the specific ground was not apparent from the context"); *Byers*, 392 S.C. at 446, 710 S.E.2d at 59 (stating "to be preserved, the objection must include a specific ground 'if the specific ground was not apparent from the

context'" (quoting Rule 103(a)(1))). Because the trial court acknowledged the city's pretrial objection, we look back to that discussion as part of the context from which the trial court could have understood any specific ground for the city's objection.[1]

We find the grounds the city now argues on appeal were not apparent to the trial court from the context of the proceedings, including the pretrial hearing. Not only was the statement "objection" insufficient to preserve any issue, the city's statements in the pretrial hearing also were not sufficiently specific. Of the three arguments the city makes on appeal, the only one even remotely presented to the trial court in the pretrial hearing was the first—that Troy "was never listed in discovery." However, the city (1) never indicated it served discovery on Busillo, (2) never identified which interrogatory Busillo supposedly did not answer, (3) never argued Busillo's failure to respond was intentional or willful, (4) never provided the court any basis for finding a Rule 33(b) violation,[2] (5) never addressed any of the factors our courts have set out for considering the admissibility of testimony of a witness not named in discovery,[3] and (6) never explained any basis on which the trial court could conclude the city was prejudiced by the late disclosure. Nor were any of these points apparent to the trial court during the pretrial hearing. Thus, the city did not provide the trial court any basis

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[1] There is no written motion in the record.

[2] Standard interrogatory 6 in Rule 33(b) would have required Busillo to list Troy as a witness. However, the standard interrogatories must be served before any obligation arises to answer them. *See* Rule 33(b), SCRCP (stating "the following standard interrogatories may be served by one party upon another"). The city's brief also does not cite any discovery questions served on Busillo or any circumstances of her alleged failure to answer. Even if the city did serve standard interrogatory 6 or some similar discovery question, the important fact here is that the city did not inform the trial court that it did, or of any circumstances of a failure to answer. Thus, the city did not give the trial court in the pretrial hearing a basis for finding that Busillo's alleged failure to answer required Troy's testimony to be excluded.

[3] *See Jenkins v. Few*, 391 S.C. 209, 219, 705 S.E.2d 457, 462 (Ct. App. 2010) (discussing factors a trial court should consider before excluding a witness not named in discovery).

in the pretrial hearing on which the court could have excluded Troy's testimony for a discovery violation. Under these circumstances, even the pretrial objection was not "made . . . with sufficient specificity to inform the circuit court judge of the point." *Byers*, 392 S.C. at 444, 710 S.E.2d at 58.

Because none of the city's arguments on appeal as to the admissibility of Troy's testimony were properly raised to the trial court, the arguments are not preserved for appellate review.

III. Evidence of Property Damage

The city also argues the trial court erred in admitting "evidence about [Busillo's] property damage" because "[t]hese damages had been resolved prior to trial." During Busillo's testimony, she offered into evidence an exhibit entitled "Expenses for Kristin Busillo." The exhibit summarized the damages Busillo claimed, breaking out "Property Damage" and "Medical Damages" in separate categories. Under the category of property damage, the exhibit read:

Property Damage

Depreciation	$1,850.00
Repairs	$3,677.89
Rental Vehicle	$506.81
Total PD Expenses	**$6,034.70**

The city objected under Rules 402 and 403, SCRE, arguing the city's previous payment of the repair and rental car bills made property damages "not a proper element of damages."

Like the objection to Troy's testimony, this objection was stated generally and imprecisely. We find, however, that it is preserved for appeal because the transcript reveals the trial court understood the nature of the objection and thus "the specific ground was . . . apparent from the context" under Rule 103(a)(1).

The admission of evidence is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion. *Weaver v. Lentz*, 348 S.C. 672, 683, 561 S.E.2d 360, 366 (Ct. App. 2002). "The trial court . . . has wide discretion in determining the relevancy of evidence . . . ." *Davis v.*

Traylor, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000). Similarly, a trial court has particularly wide discretion in ruling on Rule 403 objections. *See State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We . . . are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). We agree with the city that the pretrial resolution of the property damages claim rendered the evidence less probative. The trial judge nevertheless determined the evidence was relevant and had probative value because the evidence assisted the jury in understanding the severity of the collision. We find that determination to be within the discretion of the trial court.

We also find the evidence created no danger of unfair prejudice or confusion of the issues. *See State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (stating unfair prejudice "refers to evidence which tends to suggest decision on an improper basis" (citation and quotation marks omitted)). The city's only argument of unfair prejudice was that admitting evidence of property damage allowed a double recovery. The trial court eliminated that concern when it applied the arbitrator's award against the verdict as a setoff. The city also argued admitting the evidence "would lead to jury confusion." The trial court engaged in a lengthy discussion with counsel to understand the potential for jury confusion. Ultimately, the court decided that allowing the jury to consider the evidence and then applying the arbitration award as a setoff against any verdict would simplify, rather than confuse, the issues. We find the trial court properly exercised its discretion and acted within it to admit the evidence.

IV. Special Verdict Form

When the city requested a special verdict form, the trial court stated, "I think mine covers it along with my instructions," and denied the request. We affirm the trial court's decision not to use the special verdict form pursuant to Rule 220(b)(1), SCACR, and the following authority: *S.C. Dep't. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007) ("The determination of whether a special verdict should be submitted to the jury is within the sound discretion of the trial judge, and an appellate court will only reverse upon a finding of an abuse of that discretion.").

AFFIRMED.

GEATHERS, J., concurs.

WILLIAMS, J., dissenting: I respectfully dissent. I believe the city's argument regarding the admission of testimony of Frank Troy, an undisclosed witness, was properly preserved for appeal. Further, I would find that the trial court erred in failing to inquire into the necessary factors before admitting the undisclosed witness's testimony. *See Callen v. Callen*, 365 S.C. 618, 627, 620 S.E.2d 59, 63-64 (2005) (finding the trial court is under a duty, when the situation arises, to delay the trial for the purpose of ascertaining information relating to the factors used to determine whether an undisclosed witness should be excluded).

In *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), this court enunciated five factors that a trial court must consider before imposing the sanction of excluding a witness not disclosed in discovery. The *Jumper* factors are "(1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party." *Id.* at 152, 558 S.E.2d at 916. "[T]he trial court is under a duty, when the situation arises, to delay the trial for the purpose of ascertaining [information relating to the *Jumper* factors]." *Laney v. Hefley*, 262 S.C. 54, 59, 202 S.E.2d 12, 14 (1974) (quoting with approval *Wright v. Royse*, 43 Ill.App.2d 267, 288, 193 N.E.2d 340, 350 (1963)). "After inquiring, the [trial] court has discretion whether to admit or exclude the testimony." *Callen*, 365 S.C. at 627, 620 S.E.2d at 64. Failing to inquire into the *Jumper* factors before admitting the testimony of an undisclosed witness amounts to a failure to exercise discretion and requires reversal and a new trial. *Id.* (reversing and requiring a new hearing when the "family court failed to make the inquiry required under *Laney* and *Jumper* and [thereby] failed to exercise its discretion"); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial [court] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

In the instant action, the city argues the trial court erred in failing to consider the *Jumper* factors before allowing Troy to testify.[4] At the pretrial hearing, the city began its argument to exclude Troy's testimony, but was immediately interrupted by the trial court asking, "Who is that?" The city continued to state that Troy "was never listed in discovery." Again, the trial court interrupted and stated, "Oh, this is the depreciation guy?" The city replied, "Yeah, a fact witness or an expert witness . . ."[5] The trial court interrupted for a third time and stated twice that it would "probably let him do that," indicating that Troy would be allowed to testify and the city's motion to exclude was being denied. When Troy was called to testify during trial, the court stated to the city, "Now, this is over your objection. Over your objection."

I believe the city's actions at trial are sufficient to preserve this issue for appeal. The conversation during the pre-trial conference, while brief, conveyed the necessary information to sufficiently preserve the city's objection. Based upon its responses to the city's argument, the trial court exhibited familiarity with Troy and the nature of his testimony. While the city's argument to exclude Troy was very limited, it conveyed the crucial point that Troy was "never listed in discovery." Upon learning of an undisclosed witness, the trial court is "under a duty . . . to delay the trial for the purpose of ascertaining [information relating to the *Jumper* factors]." *Callen*, 365 S.C. at 627, 620 S.E.2d at 63-64 (quoting *Laney*, 262 S.C. at 59-60, 202 S.E.2d at 14).

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[4] The majority frames the city's argument regarding the testimony of the undisclosed witness as three separate arguments on appeal: (1) not "consider[ing] that the type of witness and content of the witness's testimony were not disclosed until the day of trial," (2) not "inquir[ing] into [Busillo's] excuse for [her] Rule 33(b) [SCRCP] violation," and (3) not "consider[ing] the surprise and prejudice to [the city]." In its brief, the city specifically highlights these three factors, which it contends the trial court failed to consider before making its decision. However, reading the argument section as a whole, including the city's numerous citations to and discussion of *Jumper*, it is clear the city is arguing the trial court failed to address the *Jumper* factors before allowing Busillo's undisclosed witness to testify.

[5] The first of the five *Jumper* factors is "the type of witness involved" and concerns whether the undisclosed witness is a fact witness or an expert witness.

Further, any inadequacy that the majority finds with the sufficiency of the city's objection is a direct result of the trial court's repeated interruption of the city's argument. Thus, the city's failure to elaborate or explain its position or the relevant South Carolina law should not preclude this court from considering the underlying issue. *See State v. Ross*, 272 S.C. 56, 60, 249 S.E.2d 159, 161 (1978) (declining to hold that counsel "must try to speak over [a judge]" in order to preserve an objection when the judge interrupts the attempted explanation of that objection); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

Additionally, I do not believe the city's failure to make a contemporaneous objection renders this issue unpreserved. As Troy was called to testify at trial, the trial court stated to the city, "Now, this is over your objection." With this statement, the trial court renewed its holding from the pretrial hearing. Accordingly, the city did not need to renew its motion to exclude Troy's testimony. *See Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review."); Rule 43(i), SCRCP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.").

On the merits of this issue, I believe the trial court erred in failing to inquire into the five *Jumper* factors before allowing Troy to testify. The record is void of inquiry into any these factors. Accordingly, I would reverse and remand for a new trial. *See Callen*, 365 S.C. at 627, 620 S.E.2d at 64 (reversing and requiring a new hearing when the "family court failed to make the inquiry required under . . . *Jumper* and [thereby] failed to exercise its discretion").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Manuel Marin, Appellant.

Appellate Case No. 2010-177349

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5156
Heard February 5, 2013 – Filed July 3, 2013

AFFIRMED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; Solicitor Barry J. Barnette and Assistant Solicitor Russell D. Ghent, both of Spartanburg, for Respondent.

FEW, C.J.: Manuel Marin appeals his convictions for murder and possession of a weapon during the commission of a violent crime. He argues the trial court erred

in (1) refusing to instruct the jury that a person acting in self-defense has the right to continue shooting until the threat has ended and (2) refusing to charge the jury on South Carolina Code subsection 16-11-450(A) (Supp. 2012), which provides immunity from prosecution for persons "justified in using deadly force." We affirm.

I. Facts and Procedural History

On July 20, 2008, Marin attended a Colombian Independence Day party at a nightclub in Greenville. His acquaintance Nelson Tabares was also present, and after several hours Tabares became so intoxicated he was unable to drive. Marin claimed to know where Tabares lived and offered to drive him home. The bouncer at the club testified that Tabares, although still able to converse, was stumbling around the club and needed help getting to Marin's vehicle.[1] The bouncer and Alfredo Jimenez helped Tabares into the backseat. Marin drove, with Jimenez in the passenger seat, towards Tabares's home in Greer.

Marin testified he and Jimenez were discussing politics when "all of a sudden Mr. Tabares says 'I'm sorry but he's got to go.' And he jumps up and he grabs me in a headlock." This caused the vehicle to swerve into the oncoming lane and head toward a telephone pole. After the initial attack, Marin was "very scared" and decided not to take Tabares home. He testified, "I was just trying to find a public place . . . where I could . . . possibly jump out of the car and get some help."

[1] At the time of his death, Tabares's blood alcohol level was .323. The pathologist testified that "at a .300 level everybody is drunk." Perhaps the pathologist was engaged in understatement, as medical literature generally rates the consequences of such a high level of blood alcohol to be much more severe than "drunk." *See, e.g.*, Vincent J. DiMaio & Dominick DiMaio, Forensic Pathology 519 (2d ed. 2001) (listing symptoms of blood alcohol levels above 0.300 as "impaired consciousness, stupor, unconsciousness"); James C. Garriott & Joseph E. Manno, *Pharmacology and Toxicology of Ethyl Alcohol*, in Garriott's Medicolegal Aspects of Alcohol 25, 28 (James C. Garriott ed., 5th ed. 2008) (listing symptoms of blood alcohol levels above 0.350 as "complete unconsciousness, coma, anesthesia, depressed or abolished reflexes . . . and possible death").

Marin apparently drove for some time after the initial incident, eventually reaching downtown Spartanburg. He testified, "Everything was dark and everything was closed. I mean, I was looking for a public place with people somewhere stopped, but everything, I mean, it was dark. Nothing seemed to be open." He explained Tabares repeatedly tried to grab the steering wheel and Marin repeatedly pushed him into the backseat.[2] After Tabares again tried to run the car off the road, Marin pulled his loaded gun out of the glove compartment and shot him. Tabares died from two gunshot wounds to the back of his head.

The trial court charged the jury on murder, voluntary manslaughter, and self-defense. After the charge, the court asked, "Are there any [objections] to the instruction or requests for additions to the instruction?" Marin renewed his earlier request that the court charge immunity under subsection 16-11-450(A). Marin also stated, quoting language from the dissenting opinion in *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), "I would like . . . , 'If the defendant is justified in defending himself or others and in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended.'" 375 S.C. at 134, 651 S.E.2d at 328 (Moore, J., dissenting) (quoting the jury charge from the trial of that case). The trial court denied both requests. The jury found Marin guilty of murder and the trial court sentenced him to life in prison.[3]

II. The "Continuing to Shoot" Charge

This court will not reverse a trial court's decision to refuse a specific request to charge unless the trial court committed an error of law. *See State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion."); *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007) ("An

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[2] Jimenez, the passenger and only other eyewitness in this case, did not testify at trial. Multiple witnesses testified that Jimenez's statements to law enforcement immediately after the incident and while assisting investigators with recreating the events leading up to Tabares's death corroborated Marin's trial testimony.

[3] Pursuant to subsection 16-23-490(A) of the South Carolina Code (2003), the trial court did not impose a sentence for possession of a weapon during the commission of a violent crime.

abuse of discretion occurs when the trial court's ruling is based on an error of law . . . ."). The trial court is required to charge the correct law applicable to the case. *State v. Mattison*, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010); *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). However, the court is not required to use any particular language in explaining the principle. *Id.*; *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583; *Burkhart*, 350 S.C. at 261, 565 S.E.2d at 303. When reviewing a challenge to a trial court's refusal to use the specific language in a request to charge, an appellate court must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603; *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). Therefore, there is no error of law in refusing to give a specific request to charge where (1) the charge requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly. As we will explain, we find no error.

We are concerned the charge Marin requested is not a correct statement of law.[4] Self-defense is premised on a person's right to use deadly force when, under the circumstances, he reasonably believes such force is necessary to prevent death or serious bodily injury. *See State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (describing the third element of self-defense—"a reasonably prudent man of ordinary firmness and courage would have . . . belie[ved he was in imminent danger]" and requiring for "actual[] . . . imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself"). Therefore, if the State has not proven the absence of any other element, *see id.*, a person may use deadly force in firing the

[4] We do not mean to imply Justice Moore made an incorrect statement of law. In fact, the quote from *Rye* is not Justice Moore's statement at all, but a portion of the trial court's jury charge in that case, from which Justice Moore quoted extensively in his dissent. Justice Moore did not quote the jury charge to say it was correct, but to support his argument that it adequately covered the law on the subject of a proposed charge the trial court refused to give. *See* 375 S.C. at 134, 651 S.E.2d at 328 (Moore, J., dissenting) (stating "[i]t was unnecessary for the trial court to use the proposed charge when his charge to the jury adequately covered the contents of the proposed charge.").

first shot when he reasonably believes it is necessary to prevent death or serious bodily injury. Under the language requested by Marin, however, a defendant could continue to shoot even if the first shot changed the circumstances to make the use of deadly force no longer reasonable, so long as the initial danger has not "*completely* ended." Thus, according to Marin's requested charge, the jury could determine that the danger almost completely ended after the first shot, and that no reasonable person would believe it was necessary to continue to shoot; however, the jury would nevertheless be required to find the defendant not guilty because a minimal danger to him remained—that is, the danger had not *completely* ended. Because the requested charge required the State to prove the danger had completely ended before it could defeat self-defense, and thus the charge allowed the use of deadly force when it was no longer reasonably necessary to prevent death or serious bodily injury, we question whether the charge contained a correct statement of law.

Even to the extent Marin requested that the trial court give the "continuing to shoot" charge using correct language—that a defendant may continue to shoot as long as he reasonably believes it is necessary to use deadly force—we find the trial court did not err in refusing to give the charge.

Our supreme court used language similar to the charge Marin requested in opinions in addition to the dissenting opinion in *Rye*. In *Douglas v. State*, 332 S.C. 67, 504 S.E.2d 307 (1998), the court quoted the trial court's charge to the jury, "[I]f the defendant was justified in using force and firing the first shot, he is justified in continuing to shoot until it appears that any danger to his life and body has ceased." 332 S.C. at 72, 504 S.E.2d at 309. The supreme court approved the charge as a proper way to deal with a different issue than the one we face in this case.[5] In *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978), the court faced the question of whether the trial court erred in refusing to direct a verdict for the defendant. 270 S.C. at 654, 244 S.E.2d at 504. In the course of discussing its

[5] The issue in *Douglas* was whether the trial court erred in refusing to charge the jury "the defendant . . . has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force." *Id.* The supreme court found that the "continuing to shoot" language was "consistent" with the requested charge and thus "the trial court's refusal to give Douglas's requested charge was not error." 332 S.C. at 73, 504 S.E.2d at 310.

holding that self-defense existed as a matter of law, 270 S.C. at 661-62, 244 S.E.2d at 507, the supreme court stated "the rule is also that 'when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.'" 270 S.C. at 661, 244 S.E.2d at 507 (quoting 40 C.J.S. *Homicide* § 131(b) (1944)).

From *Douglas*, we may infer that it is permissible for a trial court to instruct the jury that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force. However, neither *Rye*, *Douglas*, nor *Hendrix* answers the question before us in this case—whether the trial court was required to charge this point to the jury.

Marin's request to charge derives from the correct principle of law that, if no other element has been disproven, any particular act of deadly force done in self-defense is justified if the act was reasonably necessary to prevent death or serious bodily injury, under the circumstances as they existed at the time of the act. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (stating one "is justified in using deadly force in self-defense when . . . a reasonab[ly] prudent man of ordinary firmness and courage would have entertained the same belief"); s*ee also* S.C. Code Ann. § 16-11-440(C) (Supp. 2012) (codifying the right to use deadly force under certain circumstances if one "reasonably believes it is necessary to prevent death or great bodily injury"). Considered as a whole, the trial court's charge explained this principle of law. Therefore, we find there is no error, even though the trial court did not charge the "continuing to shoot" language Marin requested. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("The substance of the law is what must be charged to the jury, not any particular verbiage." (citation and quotation marks omitted)).

In this case, the trial court charged the jury:

> Th[e] law recognizes the right of every person to protect himself or herself . . . from intruders and attackers and from death or sustaining great bodily injury while in his home, business, or vehicle. And to do this a person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury to himself or to another person.

This excerpt from the trial court's charge includes the legal principle underlying Marin's request—in its correct formulation—that a person may use deadly force when it is reasonably necessary to prevent death or serious bodily injury. Under this correct formulation, a person who is justified in firing a first shot may lawfully shoot again if the second shot is reasonably necessary under the circumstances as they exist at the time of the second shot. Under the specific language of the trial court's charge in this case, Marin "may use such force as is reasonably necessary [i.e., fire the second shot] . . . if such is reasonable to prevent death or great bodily injury."

The role of the trial court is to charge the jury correctly based on the evidence presented at trial. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603. The lawyers bear the responsibility to argue how a point of law affects the jury's interpretation of the evidence. When Marin made his request for the charge, quoting *Rye*, the trial court stated, "And that was an instruction? That sounds like a comment on the facts to me." It then stated, "Well, I certainly think that is proper argument." The trial court correctly observed it was the task of Marin's trial counsel to argue that the second shot was reasonably necessary under the circumstances, either because the initial danger of Marin losing control of the car persisted, or for some other reason. The charge the trial court gave enabled that argument by informing the jury that "a person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury." We find the trial court's refusal to charge the "continuing to shoot" language requested by Marin was not error.

Marin argues, however, that this case is controlled by the supreme court's decision in *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989), in which the supreme court "instruct[ed] the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate [self-defense] charge." 297 S.C. at 443, 377 S.E.2d at 330. Fuller argued on appeal the trial court erred in refusing to give three charges he requested: (1) "a defendant . . . has the right to act on appearances," 297 S.C. at 443, 377 S.E.2d at 331; (2) "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense," 297 S.C. at 444, 377 S.E.2d at 331 (quotation marks omitted); and (3) "an individual ha[s] no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury." *Id.* The supreme court began its analysis by stating that the trial court correctly charged the elements of self-defense by taking "language . . .

directly from the *Davis* case." 297 S.C. at 443, 377 S.E.2d at 330. As to each of the three charges requested, however, the supreme court found the request contained a substantive principle of law the supreme court had previously approved, which was not contained in the charge the trial court gave, and that facts in the record supported the charge.[6] On this basis, the supreme court reversed. 297 S.C. at 445, 377 S.E.2d at 331.

We find this case distinguishable from *Fuller* because the trial court here covered in its charge the substantive principle of law Marin requested—that a person may use deadly force when he reasonably believes it is necessary to do so under the circumstances. The trial court having correctly and adequately charged the jury, it was the trial lawyer's responsibility to argue how the principle of law affected the facts of the case.

III. Immunity Under Subsection 16-11-450(A)

Marin also argues the trial court erred in refusing to charge the immunity from prosecution provision contained in South Carolina Code subsection 16-11-450(A). We find the trial court correctly refused to charge this subsection because it does

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[6] As to the "act on appearances" charge, the court stated it "articulated" that rule in *State v. Jackson*, 227 S.C. 271, 277, 87 S.E.2d 681, 684-85 (1955), and it cited *State v. Rivers*, 186 S.C. 221, 229, 196 S.E. 6, 10 (1938). *Fuller*, 297 S.C. at 443-44, 377 S.E.2d at 331. The court stated Fuller was "entitled" to the charge "because he testified that he saw [the victims] open the trunk of their car and also thought he saw a shiny object in [one victim]'s hand." 297 S.C. at 444, 377 S.E.2d at 331. As to the "words accompanied by hostile acts" charge, the court cited as authority for the charge *State v. Harvey*, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951), and *State v. Mason*, 115 S.C. 214, 216, 105 S.E. 286, 287 (1920). *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. The court stated Fuller was "entitled" to the charge because one victim "stated 'he was going to take care' of Fuller" and both victims threatened him with a racial slur. *Id.* As to the "no duty to retreat" charge, the court stated it had "approved such a charge in *State v. Jackson*, 227 S.C. 271, 87 S.E. (2d) 681 (1955) and *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920)." *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. The court explained the charge was required because the victims "rammed Fuller's car door when he tried to leave his car" and "Fuller . . . testified that he did not believe it was safe to leave his car and run from the scene." *Id.*

not contain any substantive provisions of law. Rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense. *See id.* (providing "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action"); *see also State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (stating subsection 16-11-450(A) was not intended as an affirmative defense but rather as a procedure for determining immunity prior to trial).

In this case, the trial court fully charged self-defense—the substantive point of law upon which subsection 16-11-450(A) depends. Subsection 16-11-450(A) is a procedural provision that is not relevant to the work of a jury. In fact, if a defendant is entitled to the relief set forth in the subsection, the defendant is "shielded from trial" and no jury will ever hear the case. 392 S.C. at 410, 709 S.E.2d at 665. Thus, the trial court correctly refused the requested charge.

IV. Conclusion

The trial court did not err in refusing to give Marin's requested jury instructions, and Marin's conviction for murder is **AFFIRMED.**

GEATHERS and LOCKEMY, JJ., concur.