The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency (As Amended August 27, 2021)

Appellate Case No. 2020-000447

ORDER

On April 3, 2020, this Court issued an order entitled "Operation of the Trial Courts During the Coronavirus Emergency." This order was subsequently amended on four occasions, with the last amended order being filed on June 15, 2021.[1] This order is currently scheduled to expire on August 31, 2021.

The risk posed by the coronavirus has decreased, and in-person trials and hearings, including jury trials and grand jury proceedings, have resumed under guidance issued by the Chief Justice. Therefore, this Court has determined that many of the provisions in the June 15, 2021, order are no longer necessary, and this order is a complete revision of the prior order. If the risk posed by the coronavirus increases, this risk may be addressed by guidance from the Chief Justice under section (b) below or, if necessary, by a modification of this order by this Court.

The pandemic has necessarily delayed the resolution of many cases, and the response to this emergency must now focus on the resolution of these cases in a safe, timely and just manner. Some of the provisions in the June 15, 2021, order have been incorporated into this order since they foster this goal. In addition, some new provisions have been added, and the order includes discussion of certain issues addressed by the June 15, 2021, order which are now addressed by other guidance, including court rules and statutory amendments. Finally, as indicated below, a determination has been made that some of the provisions in the June 15,

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[1] This amended order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2596.

2021 order will not be continued, and those provisions will expire when the June 15, 2021 order expires.

(a) Terminology. The following terminology is used in this order.

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology: technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) Trial Court: the circuit court (including master-in-equity court), family court, probate court, magistrate court and municipal court.

(4) Summary Court: a magistrate or municipal court.

(b) Authority of the Chief Justice to Impose Mitigation Measures. Throughout the coronavirus pandemic, the Chief Justice has issued administrative orders and guidance under Article V, § 4, of the South Carolina Constitution to mitigate the risk posed by the pandemic. This Court is confident that the Chief Justice will continue to issue and modify guidance as may be appropriate to reduce the risk posed by the coronavirus. Therefore, many of the restrictions and requirements in the June 15, 2021, order, which were designed to allow hearings, trials or other matters to be safely conducted during the pandemic, have not been included in this order, and these matters are now left to the Chief Justice.

(c) Discretion of the Trial Judges to Impose Mitigation Measures. In addition to the guidance the Chief Justice may issue, this Court is confident that trial judges will take appropriate mitigation measures to address any unique risk the coronavirus may pose in any individual case.

(d) Minimizing Hearings on Motions. Section (c)(4) of the June 15, 2021, order stated the following:

> While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a

judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers.

This Court continues to encourage judges to follow this guidance. As discussed above, judicial resources need to be focused on the timely and just resolution of cases, and holding unnecessary hearings is inconsistent with this goal.

(e) Service Using AIS E-mail Address.[2] A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary e-mail address listed in the Attorney Information System (AIS).[3] For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure (SCRCP), or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

(1) Documents served by e-mail must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(2) Service by e-mail is complete upon transmission of the e-mail. If the

[2] The language of this section is identical to that contained in (c)(13) of the June 15, 2021, order.

[3] The e-mail addresses for a lawyer admitted in South Carolina can be accessed utilizing the Attorney Information Search at: https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm.

serving party learns the e-mail did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by e-mail.

(3) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by e-mail under this provision.

(4) Lawyers are reminded of their obligation under Rule 410(g) of the South Carolina Appellate Court Rules (SCACR) to ensure that their AIS information is current and accurate at all times.

(f) Signatures of Lawyers on Documents.[4] A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(g) Optional Filing Methods. Section (c)(15) of the June 15, 2021, order provided as follows:

> During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and e-mail. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines.

[4] The language in this section is identical to that contained in section (c)(14) of the June 15, 2021, order.

If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

If such an optional filing system has been created prior to the date of this order, the clerk of court may continue to operate this system. By October 1, 2021, any court with an optional filing system shall provide the Office of Court Administration with information regarding this system, including a general description of the system, a copy of the procedures posted to the court's website, discussion of how successful and useful the system has been, how the system has been received by the users, and, if available, the approximate number of filings which have been made using this system.

(h) Use of Remote Communication Technology. During the coronavirus pandemic, WebEx and other remote communication technologies were successfully used by the trial courts. Based on this experience, Rule 612 was added to the South Carolina Appellate Court Rules to allow this Court to issue an order allowing remote communication technology to be used in proceedings before the courts of this state. Pursuant to Rule 612, SCACR, this Court has today issued an order regarding the use of remote communication technology in proceedings before the trial courts, including the administration of any required oath or affirmation. Therefore, the provisions in the June 15, 2021, order relating to the use of remote communication technology are not included in this order.

This Court recognizes that various trials, pleas or hearings may have already been scheduled to be conducted using remote communication technology under the guidance contained in the order of June 15, 2021. If so, the use of remote communication technology for that trial, plea or hearing may continue to be conducted under the guidance contained in the June 15, 2021 order, notwithstanding any new limitations in the order governing the use of remote communication technology referenced in the preceding paragraph.

(i) Family Court Provisions. Section (f) of the June 15, 2021, order contained provisions applicable to the family court. Many of these provisions have proven to be very beneficial during the pandemic, and can be used to conserve judicial resources which can better be used to resolve cases that have been necessarily delayed by the impact of the pandemic. This Court, however, believes that hearings on consent agreements or orders regarding divorces or other final matters can now be safely conducted either in-person or using remote communication technology, and having hearings on these matters is beneficial to the litigants and

the judicial system. Therefore, this order has significantly amended the language from the prior order.

(1) Granting of Uncontested Divorces Based on Separation for One Year Without a Hearing. The family court may grant an uncontested divorce based on separation for one year without holding a hearing, including granting any requested name change, if:

(A) The relief sought is limited to a divorce and any related change of name. If other relief is sought, including but not limited to, child support, child custody or visitation, alimony, property distribution or fees for attorneys or guardians ad litem, the divorce may not be granted without a hearing.

(B) The parties submit written testimony in the form of affidavits of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, and the impossibility of reconciliation.

(C) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(D) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied or waived by the parties.

(E) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the family court in the form of an affidavit addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Agreements and Consent Orders Regarding Temporary Relief Without a Hearing. Based on the consent of the parties, temporary orders, including but not limited to those relating to child

custody, child support, visitation, and alimony, may, in the discretion of the family court judge, be issued without a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the guardian ad litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(3) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the family court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the family court may order the child returned to the child's parent without holding a hearing.

(4) Consent Orders Regarding Procedural Matters. With the consent of the parties, a consent order relating to discovery, the appointment of counsel or a guardian ad litem (including the fees for, or the relief of, a counsel or a guardian ad litem) or any other procedural matter may, in the discretion of the family court judge, be issued without requiring a hearing.

(5) Submission of Additional Information. Nothing in this order shall be construed as preventing a family court judge from requiring additional information or documents to be submitted before making a determination that the order can be issued without a hearing or from holding a hearing where the judge finds a hearing is appropriate.

(6) Consent Orders or Agreements Submitted to the Family Court Prior to the Effective Date of this Order. Consent orders or agreements submitted to the family court on or prior to August 27, 2021, the effective date of this order, may continue to be processed under the guidance contained in the order of June 15, 2021.

(j) Rule 3(c) of the South Carolina Rules of Criminal Procedure (SCRCrimP). While this order remains in effect, the ninety (90) day period provided by Rule 3(c), is increased to one-hundred and twenty (120) days.[5]

[5] This section is based on section (d)(1) of the June 15, 2021, order.

(k) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible ~~as~~ due to the impact of the pandemic and the expected increased demand for these resources to resolve cases which were delayed by the pandemic. In the event such resources are not reasonably available, a trial or hearing may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(l) Amendment to Rule 3, SCRCrimP. The June 15, 2021, order contained a provision regarding the service of an arrest warrant on a defendant already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina. Since Rule 3(a), SCRCrimP, was recently amended to incorporate this language, this provision is not included in this order.

(m) Bond Hearings in Criminal Cases. Section (h)(1) of the June 21, 2021, order has not been included in this order. Judges should, of course, continue to hold bond hearings in accordance with the guidance provided by the Chief Justice.

(n) Notarizations. During the height of the pandemic, the ability to obtain notarial services was significantly impacted. To address this, the prior versions of this order contained provisions allowing a certification in lieu of affidavit. Since notarial services are now readily available, these provisions have not been included in this order. It is also noted that the General Assembly recently enacted the "South Carolina Electronic Notary Public Act" (Act No. 85 of 2021). The provisions in this Act should greatly reduce the impact any future emergency will have on the availability of notarial services.

(o) Extensions by Consent. Prior versions of this order created an exception to Rule 6(b), SCRCP, allowing extensions by the agreement of the parties. This exception is not included in this order, and Rule 6(b), SCRCP, shall govern any extension request made after August 27, 2021, the effective date of this order.

(p) Guilty Pleas by Affidavit or Certification in the Summary Court. Section (h)(3) of the June 15, 2021, order allowed a defendant to plead guilty by affidavit or certification before the summary courts. Since the order of the Chief Justice dated May 7, 2020 (available at https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-05-07-01, addresses this same issue, it is unnecessary to include the prior provision in this order.[6]

This order is effective immediately, and the prior version of this order dated June 15, 2021, is rescinded. Pursuant to Rule 611, SCACR, this order shall expire in ninety (90) days unless extended by order of this Court. A copy of this order shall be provided to the Chairs of the House and Senate Judiciary Committees.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 27, 2021

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[6] This Court does view a guilty plea by affidavit or certification as being a temporary measure in response to the coronavirus pandemic.

The Supreme Court of South Carolina

RE: Use of Remote Communication Technology by the Trial Courts

Appellate Case No. 2020-000447

ORDER

(a) Purpose. Pursuant to Rule 612 of the South Carolina Appellate Court Rules (SCACR), this Court may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. The purpose of this order is to provide guidance on the use of remote communication technology by the trial courts, including appellate proceedings before the circuit court.

Since the start of the coronavirus emergency, remote communication technology has been used extensively by the trial courts, and this use has allowed court proceedings to safely occur despite the pandemic. In addition, this recent use of remote communication technology has shown it can, if used appropriately, conserve judicial resources, reduce travel and wait times for court participants, and reduce courtroom security and safety concerns.

While this order addresses some specific types of matters, it is impossible for it to address every type of matter that can possibly come before a trial court. For matters not specifically addressed in this order, judges should consider the general guidance along with how this order deals with similar matters to determine if a particular use of remote communication technology is appropriate.

When this order indicates that a proceeding may be conducted in whole or part using remote communication technology, it means that the use of remote communication technology can range from allowing a single person, such as a witness or other participant in the proceedings, to participate by remote means, to a

proceeding in which all of the participants (judge, counsel, parties, witnesses, etc.) are participating by remote means, or anything in between.

This Court recognizes that various trials, pleas or hearings may have already been scheduled to be conducted using remote communication technology under the guidance contained in the order of June 15, 2021.[1] If so, the use of remote communication technology for that trial, plea or hearing may continue to be conducted under the guidance contained in the June 15, 2021 order, notwithstanding any new limitations in this order.

(b) Definitions. For the purpose of this order:

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology (RCT): technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time. This can range from a telephone call or conference call which provides only audio to sophisticated software products like WebEx, Zoom or Microsoft Teams which allows both audio and video to be shared. When this order refers to using RCT, Enhanced Remote Communication Technology (ERCT) may be used instead.

(**3) Enhanced Remote Communication Technology (ERCT):** a form of RCT such as WebEx, Zoom and Microsoft Teams which allows audio and video to be shared at differing locations in real time. When this order indicates ERCT is to be used, that form of RCT must be used.

(4) Trial Court: the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

(c) General Guidance Regarding Use of RCT.

(1) Discretion of Judges. In various provisions of this order, the decision to allow RCT to be used rests in the discretion of the judge. Even

[1] This amended order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2596.

when the language in this order indicates RCT may be used, the facts and circumstances in a particular case or matter may indicate that the use of this technology is inappropriate. To some extent, the exercise of this discretion will necessarily be influenced by the technical skill of the judge, attorneys, other case participants and any supporting staff who will be using this technology. Finally, for some proceedings, this order may restrict this discretion. For example, this order may indicate that certain proceedings must be conducted using ERCT. Another example is that for some types of proceedings the consent of the parties or a sufficient justification must exist before RCT of any type may be used.

(2) Constitutional Rights of Parties. In the absence of a waiver, judges should not allow RCT to be used in a manner which would violate the rights of a party under the either the State or Federal Constitution.

(3) Victims' Rights. Victims' rights under Article I, Section 24 of the South Carolina Constitution and Article 15 of Chapter 3 of Title 16 of the South Carolina Code of Laws must be honored when RCT is used to conduct court proceedings. Nothing in this order shall be construed as preventing a judge, in the exercise of discretion, from allowing a victim to hear and/or view a proceeding or trial by RCT.

(4) Public Access. When a hearing, trial or other court proceeding is of a nature that it would normally be open to the public, the judge should take reasonable measures to provide public access to the portion of the proceeding that is being conducted using RCT. When a portion of a proceeding is being conducted in a courtroom open to the public, this requirement is satisfied if the testimony presented using RCT can be heard by any observers in the courtroom. In other situations, this may be accomplished by other methods such as live streaming the proceeding over the internet, broadcasting the proceeding at a publicly accessible room at a courthouse or other facility, or utilizing a process that permits members of the public to view and/or listen to the proceedings.[2]

[2] This Court is aware of the efforts made by the trial courts to provide public access to court proceedings during the coronavirus pandemic. In many situations, this involved new and creative uses of technology. We commend these efforts and ask the trial courts to continue to explore ways to ensure public access.

(5) Use of ERCT. Even when the use of ERCT, an enhanced form of RCT, is not required by this order, judges should consider using ERCT when the ability to both see and hear the persons participating remotely will assist in reaching a resolution of the matter under consideration.

(6) Consent of the Parties. Except as restricted by the guidance in this order, including the limits on the use of RCT in jury trials under section (d)(11) below, a judge may use RCT to the extent consented to by the parties. Even when the parties have consented, the judge may find it is inappropriate to use RCT based on the specific facts and circumstance of the case, including, but not limited to, the number of parties in the case, the number of witnesses expected to testify or the complexity of the legal issues involved.

(7) COVID-19 and Other Communicable Diseases; Disasters. While the number of COVID-19 infections has decreased significantly from its peak, the virus continues to pose a risk to those participating in court proceedings. Further, in the future, other communicable diseases may pose similar risks. Since the use of RCT can reduce the risk of infection to participants, judges should consider this factor in determining if the use of RCT is appropriate. In the event of a natural or man-made disaster, such as a hurricane, earthquake, flood, war or other armed conflict, or riot, the effects of the disaster may require a greater use of RCT. Finally, nothing in this order should be construed as preventing the Chief Justice from issuing guidance requiring the use of RCT by the trial courts in response to a public health emergency or other disaster.

(8) Attorney-Client Communications. If the use of RCT results in the attorney and the client being at different locations, a means must be available for the attorney and client to communicate confidentially while RCT is being used. This could be done outside of the RCT software using telephonic or text communication, and judges should allow persons to possess cell phones or other electronic devices in the courtroom when necessary for this purpose. Further, this private communication may be possible using the features of the RCT software, such as virtual breakout rooms. In any event, it is the responsibility of the attorney to ensure that an adequate method of communication is available.

(9) Recording Remote Proceedings. Other than the judge or court staff assisting the judge, no person shall record any court proceedings which are

conducted using RCT except when the recording is authorized by the judge under Rule 605, SCACR.

(10) Conducting Remote Proceedings to Facilitate Transcript Preparation in Courts of Record. Where a court reporter or court monitor is unavailable, the judge shall conduct the RCT proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted by RCT, any oath necessary during that hearing, trial or other matter may be administered using RCT. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing RCT in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order. For the purpose of this provision, the term "oath" includes an affirmation.

(12) Effect of Remote Proceedings; Direct Contempt. Proceedings conducted using RCT shall have the same effect as if all of the participants had been physically present in the courtroom. For the purpose of any direct contempt, a person participating by RCT shall be deemed to be in the presence of the judge.

(13) Exhibits. In the event an exhibit is to be introduced during the course of a proceeding conducted using RCT, the party introducing the exhibit must ensure that the judge, the other parties and counsel, and any court reporter all have a copy of the exhibit prior to the time it is introduced. This copy may be provided in paper or electronically. Nothing in this order shall be construed as preventing a judge from requiring the original of an exhibit to be presented to the court.

(d) Guidance as to Specific Proceedings and Other Matters.

(1) County Grand Jury Proceedings. The Solicitor or the Attorney General is authorized to present an indictment to the grand jury using RCT, and any necessary oath may be administered using RCT (see section (c)(11) above). Consistent with the law regarding the secrecy of county grand jury proceedings,[3] any recording feature in the RCT must not be used, and the person presenting testimony by RCT must be warned that no recording of any of the proceedings before the grand jury can be made.

(2) South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR). RCT and ERCT may be used for Online Dispute Resolution under Rule 5(h), SCADR.

(3) Discovery in Civil Cases. The parties in a civil case may agree to use RCT to conduct any discovery under the South Carolina Rules of Civil Procedure. Further, in the exercise of discretion, a judge may require discovery in a case to be conducted using RCT, and may direct that ERCT be used.

(4) Arrest and Search Warrants. An officer seeking the issuance of an arrest warrant or search warrant may appear before a judge using RCT. During this appearance, the judge may administer the oath to the officer (see section (c)(11) above) and, if appropriate, may take sworn testimony to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search warrant" shall also include applications under the

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[3] *Ex parte McLeod*, 272 S.C. 373, 377-78, 252 S.E.2d 126, 128 (1979) (In a case involving a county grand jury, the Court stated "the investigation and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes all its proceedings are legally sealed against divulgence" and "the presence or use of a court stenographer in proceedings before the grand jury is likewise not permissible.").

South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

(5) Determination of Probable Cause Following Warrantless Arrest. If after considering the affidavit submitted to support a warrantless arrest, a judge determines it is appropriate to supplement the affidavit with sworn testimony, a judge may take the testimony using RCT and administer the oath (see section (c)(11) above).

(6) Bail Hearings in Criminal Cases. At the discretion of the judge, a hearing to set bail, modify the terms of bail or to revoke bail for a criminal defendant may be conducted in whole or part using RCT.

(7) Preliminary Hearings. With the consent of the defendant and the representative of the State, a preliminary hearing may be conducted using RCT. Further, even without consent, a judge may allow a witness to testify at a preliminary hearing using RCT if the judge finds there is sufficient justification to do so.

(8) Defense of Persons and Property Act. A hearing under the Defense of Persons and Property Act (S.C. Code Ann. §§ 16-11-410, 16-11-440(C), and 16-11-450) can have far reaching consequences not only on the criminal case itself, but also on the civil remedies available to the victim. In light of this, any use of RCT in these hearings shall be limited to that provided by section (d)(12) below for non-jury trials.

(9) Guilty Pleas. The judge, the defendant, any counsel for the defendant, and the prosecutor must be physically present in the courtroom during a guilty plea.[4] A judge may allow another person, including but not limited to a victim, interpreter, or law enforcement officer, to participate in the guilty plea by RCT. Once the plea has been accepted, the use of RCT in sentencing is governed by section (d)(13) below.

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[4] This represents a significant change from the prior order. While it was necessary to allow the more extensive use of RCT in guilty pleas during the height of the coronavirus pandemic, the admission of guilt by a criminal defendant in a courtroom is an important aspect of a guilty plea, and this Court no longer finds it necessary or appropriate to dispense with an in-person admission of guilt by a defendant when pleading guilty.

(10) Trials in General. As a general rule, trials, whether jury or non-jury, should be conducted with all the necessary participants (i.e., judge, jury (if applicable), criminal defendant, counsel, self-represented litigant, etc.) being present in the courtroom, with witnesses appearing in the courtroom to testify. In addition to being consistent with our longstanding practice and tradition in this State, this Court continues to believe there is great value in conducting trials live and in-person. In light of this, the following provisions relating to jury and non-jury trials restrict the use of RCT in these trials.

(11) Use of RCT in Jury Trials.

(A) With the consent of all parties, the judge may allow a witness to testify using ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

(B) Without the consent of the parties, a judge may allow a witness to testify using ERCT if the judge finds there is sufficient justification to do so. In a criminal case, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990).[5]

(12) Use of RCT in Non-Jury Trials.

(A) If all the parties consent, the judge may allow a non-jury trial to be conducted in whole or part using RCT or ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

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[5] "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy* [*v. Iowa,* 487 U.S. 1012, at 1021 (1988)], our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U.S. at 850.

(B) Without the consent of the parties, a judge may allow a witness to appear by ERCT if the Court finds there is an adequate justification for allowing the witness to testify by ERCT. In criminal cases, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990) (see footnote 5).

(13) Criminal Sentencing.

(A) Non-Capital Cases. Consistent with the broad discretion given to judges in sentencing,[6] a judge may allow testimony or other information to be presented using RCT during sentencing in a non-capital case.

(B) Capital Cases. In capital sentencing proceedings, the use of RCT shall be limited to that provided by section (d)(11) above if sentencing involves a jury, or by section (d)(12) above if sentencing is by a judge without a jury.

(14) Other Pretrial and Post-Trial Proceedings. Except for those pretrial proceedings addressed in other sections of this order, judges may, in their discretion, use RCT, either in whole or part, for pretrial proceedings. This includes, but is not limited to, hearings on motions, proceedings on procedural matters such as rights advisements or waivers of those rights, and status conferences. Further, in the discretion of the judge, post-trial proceedings, including hearings on post-trial motions under Rule 29, SCRCrimP, or Rules 50, 52, 59 or 60, SCRCP, may be conducted in whole or part using RCT. Without the consent of the parties to use RCT, judges should be cautious in using RCT for complex motions or where it appears the resolution of a motion may be dispositive of the case or a cause of action.

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[6] *State v. Gulledge*, 326 S.C. 220, 229, 487 S.E.2d. 590, 594 (1997) ("A court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy."); *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (in sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he [or she] may consider or the source from which it may come."); Rule 1101(d)(3), SCRE ("rules of evidence are inapplicable to sentencing except in the penalty phase of capital trials").

(15) Family Court Proceedings.

(A) Juvenile Delinquency Cases. During the adjudicatory hearing in a juvenile delinquency case, ERCT may be used to the same extent as permitted in a non-jury criminal case under section (d)(12) above. In the dispositional hearing, RTC may be used to the same extent permitted for non-capital sentencing under section (d)(13)(A) above.

(B) Other Hearings or Proceedings. In many situations, a provision of this order will be directly applicable, and the family court should follow the guidance given in that provision. Due to the wide ranging and diverse matters which come before the family court, it is simply impossible to provide specific guidance that can be made applicable to every situation that may come before the family court, and this order does not attempt to do so. Instead, for matters not specifically covered by this order, this Court is confident the family court judges will consider the general guidance and make analogies to the specific guidance given for similar proceedings to determine the extent to which RCT should be used.

(16) Appellate Proceedings Before the Circuit Court. In appeals to the circuit court, the circuit court may, in its discretion, conduct any necessary hearings either in whole or part using RCT.

This order is effective immediately, and shall remain in effect until modified or rescinded by this Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 27, 2021

The Supreme Court of South Carolina

RE: Recission of Order Relating to the Operation of the Appellate Courts During the Coronavirus Emergency

Appellate Case No. 2020-000447

ORDER

On March 20, 2020, the Court issued an order entitled "Operation of the Appellate Courts During the Coronavirus Emergency" (hereinafter referred to as "Appellate Coronavirus Order"). This order was subsequently amended on May 29, 2020.

Based on the discussion that appears below, the Appellate Coronavirus Order is hereby rescinded, effective immediately.

As to motions for extensions, the clerks of the Supreme Court of South Carolina and the South Carolina Court of Appeals[1] may continue to process motions for extensions without the filing fee required by Rule 240(d) of the South Carolina Appellate Court Rules (SCACR) until September 9, 2021.

In deciding to rescind the Appellate Coronavirus Order in its entirety, this Court has taken into consideration the following:

(a) Authority of the Chief Justice to Impose Mitigation Measures. As the Chief Justice has done throughout the coronavirus pandemic, this Court is confident that the Chief Justice will continue to issue administrative orders or other guidance relating to the operation of the Appellate Courts as may be appropriate to minimize the risk posed by the coronavirus. This includes

[1] These Courts will be referred to as "Appellate Courts" in this order.

placing restrictions or conditions on the entry or use of the Supreme Court and Calhoun Buildings.

(b) Use of Remote Communication Technology. During the coronavirus pandemic, the Appellate Courts used WebEx to conduct oral arguments and hearings. Based on this experience, Rules 218 and 240(h), SCACR, have been amended to allow oral arguments and hearings to be conducted using remote communication technology, including the remote administration of any necessary oath or affirmation.

(c) Methods of Electronic Service and Filing. The Appellate Coronavirus Order included methods for the electronic service and filing of documents. These methods have proved very beneficial to both the litigants and the Appellate Courts, and Rule 262, SCACR, has been amended to allow this Court to establish electronic methods of service and filing. By separate order issued today, this Court has specified the permissible methods of electronic service and filing under Rule 262, SCACR.

(d) Outgoing Correspondence to Persons Admitted to Practice Law in South Carolina. The Appellate Coronavirus Order allowed the Appellate Courts to send correspondence (including letters, orders and opinions) to lawyers admitted to practice law in South Carolina using their primary e-mail addresses in the Attorney Information System. The order referenced in (c) above will allow this practice to continue.

(e) Signatures on Documents Filed With the Appellate Courts. Rule 267(b), SCACR, has been amended to allow a lawyer or self-represented litigant to sign a document using "s/ [typed name of person]," a signature stamp, or a scanned or other electronic version of the person's signature.

(f) Reduction of Copies to Be Filed. Pursuant to Rule 267(f), SCACR, this Court has today issued an order reducing the number of paper copies required to be filed with the Appellate Courts.

This Court is extremely grateful for the patience and cooperation exhibited by the litigants appearing before this Court and the South Carolina Court of Appeals during the coronavirus pandemic. Further, this Court specifically commends the members of the South Carolina Bar and the staffs of both Appellate Courts for their professionalism and dedication in rapidly adjusting to new appellate practices

and procedures necessitated by the pandemic, including electronic filing and service, WebEx oral arguments and working remotely.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 25, 2021

The Supreme Court of South Carolina

RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules

Appellate Case No. 2020-000447

ORDER

(a) Purpose. Pursuant to Rule 262(a)(3) and (c)(3) of the South Carolina Appellate Court Rules (SCACR), this Court may by order establish methods for the electronic filing and service of documents. Since the Order Relating to the Operation of the Appellate Courts during the Coronavirus Emergency has been rescinded, including the electronic methods of filing and service provided for by that order, the purpose of this order is to specify the permissible methods of electronic filing and service under Rule 262, SCACR. For the purpose of this order, "Appellate Court" means the Supreme Court of South Carolina or the South Carolina Court of Appeals.

(b) Electronic Methods of Filing. Filings with an appellate court may be made electronically using the methods listed below.

(1) Electronic Filing by Lawyers. Lawyers who are licensed to practice law in South Carolina may utilize OneDrive for Business to electronically submit documents for filing with the Supreme Court and the Court of Appeals, and *lawyers are strongly encouraged to use this method of filing*. More information about this method, including registration and filing instructions, is available in the Attorney Information System (https://ais.sccourts.org/AIS) under the tab "Appellate Filings."

(2) Filing by E-mail. Filings may be made by e-mail. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org; for the Court of Appeals, the e-mail shall be sent to ctappfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent

(i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in an Adobe Acrobat file format (.pdf).

(3) Faxing Documents. A document may be filed by an electronically transmitted facsimile copy. The fax number for the Supreme Court is 803-734-1499. The fax number of the Court of Appeals is 803-734-1839. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents, such as a record on appeal, in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document (i.e., Brief of Appellant, Part 1 of 4). In the event, the facsimile copy is not sufficiently legible, the clerk of the appellate court may require the party to provide a copy by mail.

(c) Filing Date and Payment of Fees for Documents Filed Electronically. When filed using one of the methods specified in (b) above, a document transmitted and received by 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. If a filing fee is required for the document, a check or money order for the fee must be mailed or delivered to the appellate court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order.

(d) Electronic Service Using AIS E-mail Address.

(1) Service on Another Lawyer. A lawyer admitted to practice law in South Carolina may serve a document on another lawyer admitted to practice law in South Carolina using the lawyer's primary e-mail address listed in the Attorney Information System (AIS). For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.[1]

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[1] The primary AIS e-mail address for lawyers admitted to practice in South Carolina may be obtained using the search function at https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm. Lawyers may update their AIS information at https://ais.sccourts.org/AIS.

(2) Service by an Appellate Court. An appellate court may send an order, opinion or other correspondence to a person admitted to practice law in South Carolina using that lawyer's primary e-mail address in AIS.

(3) Service on Persons Admitted Pro Hac Vice. For attorneys admitted pro hac vice under Rule 404, SCACR, service on the associated South Carolina lawyer using an electronic method permitted by this order shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney.

This order is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 25, 2021

The Supreme Court of South Carolina

Re: Reduced Number of Copies Required in Appellate Matters

Appellate Case No. 2020-000447

ORDER

(a) Purpose. Rule 267(f) of the South Carolina Appellate Court Rules (SCACR) allows this Court by order to reduce the number of copies to be filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals (hereinafter "Appellate Courts"). This order implements this provision.

(b) Reduction of Copies to Be Filed; Covers. Unless otherwise ordered or requested by the Appellate Court, a document filed with an Appellate Court need not be accompanied by any additional copies. If submitted in paper, the document shall be submitted unbound and unstapled. Further, as an exception to Rule 267(e), SCACR, the covers of all briefs, whether submitted in paper or electronically, may be white unless additional copies are requested under (d) below.

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

(d) Request for Additional Copies. In the event the Appellate Court determines that additional copies are needed, they will be requested from the

lawyer or party submitting the document. These additional copies must comply with any binding or cover color requirements specified by Rule 267, SCACR.

s/ Donald W. Beatty C.J.

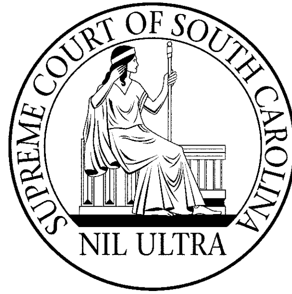
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 25, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
September 1, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP, II, LLC, and KRA Development, LP, Respondents.

Appellate Case No. 2019-000074

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. However, the attached opinion revises footnote eight and is substituted for the previous opinion, which is withdrawn.

s/ Donald W. Beatty C.J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

I stand by my original writing, but I do not believe my differences with the majority warrant the granting of rehearing. I vote with the majority, therefore, to substitute the revised majority opinion and refile.

s/ John W. Kittredge J.

Columbia, South Carolina

September 1, 2021

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP, II, LLC, and KRA Development, LP, Respondents.

Appellate Case No. 2019-000074

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 28031
Heard March 23, 2021 – Filed June 2, 2021
Re-Filed September 1, 2021

REVERSED

Amy Elizabeth Armstrong, of S.C. Environmental Law Project, of Pawleys Island, for Appellant South Carolina Coastal Conservation League.

George Trenholm Walker and Thomas P. Gressette, Jr., both of Walker Gressette Freeman & Linton, of Charleston, for Respondents KDP II, LLC and KRA Development, LP, and Bradley David Churdar, of Charleston, for Respondent South Carolina Department of Health and Environmental Control.

JUSTICE HEARN: The preservation of one of only three remaining pristine sandy beaches accessible to the general public—Captain Sam's Spit on Kiawah Island—is before the Court for a third time.[1] Twice before, the administrative law court (ALC), over the initial objection of the South Carolina Department of Health and Environmental Control (DHEC), has granted permits for the construction of an extremely large erosion control device in the critical area.[2] Twice before, this Court has found the ALC erred. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control,* 411 S.C. 16, 766 S.E.2d 707 (2014) (*KDP I*); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 422 S.C. 632, 813 S.E.2d 691 (2018) (*KDP II*).

The current appeal stems from the ALC's third approval of another gargantuan structure—a 2,380-foot steel sheet pile wall—designed to combat the erosive forces carving into the sandy river shoreline, especially along its narrowest point called the "neck," in order to allow a developer to construct a road to facilitate development of fifty houses. DHEC, reversing its prior stance, issued four permits to construct the steel wall, which the ALC upheld. While the Coastal Conservation League (League) raises numerous issues on appeal, we hold the ALC erred in three respects: in accepting DHEC's narrow, formulaic interpretation of whether a permit that indisputably impacts a critical area warrants the more stringent review normally accorded to such structures; in relying on the protection of Beachwalker Park to justify the construction of the entire wall; and, in determining the public will benefit from the wall based on purely economic reasons. Accordingly, we reverse.

FACTS/PROCEDURAL BACKGROUND

Captain Sam's Spit encompasses approximately 170 acres of land above the mean high water mark along the southwestern tip of Kiawah Island and is surrounded by water on three sides. Although the Spit is over a mile long and 1,600 feet at its widest point, the focal point of this appeal concerns the land along the narrowest point—the neck—which is the isthmus of land connecting it to the rest of

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[1] While there are other coastal areas with undeveloped beachfronts, according to DHEC, Captain Sam's Spit, Hunting Island State Park, and Huntington Beach State Park are the only three pristine beaches readily accessible to the general public.

[2] At oral argument before the Court, counsel for DHEC stated he did not believe "there has ever been anything like this before" permitted in South Carolina.

Kiawah Island. The neck occurs at a deep bend in the Kiawah River where it changes direction before eventually emptying into the Atlantic Ocean via Captain Sam's Inlet. The neck has been migrating eastward due to the formidable erosive forces of the Kiawah River, although the depletion of the river bank has historically been outpaced by the accretion of sand on the oceanside. Nevertheless, the "access corridor"—the buildable land between the critical area and the ocean-side setback line—has narrowed significantly in the last decade to less than thirty feet.[3] The width of the neck is particularly relevant as KDP needs enough space to build a road in order to connect to its proposed development, which is planned for further down the Spit.[4] At the base of the neck located along the Kiawah River is Beachwalker Park, operated by the Charleston County Parks and Recreation Commission.

At the time KDP acquired the Spit in 1988, it was seaward of the baseline set by the Office of Coastal Resource Management and was not authorized for development. In 1999, DHEC relocated the baseline along the coast and extended it to include portions of the Spit, making KDP's property landward of the setback line that paralleled the ocean side available for development. In 2005, KDP entered into a development agreement with the Town of Kiawah Island whereby KDP relinquished its right to build a hotel on the island in favor of the right to develop up to fifty residential lots on the Spit. The fifty lots would occupy roughly twenty acres on the Spit, and development would occur in two phases.

In February of 2008, KDP sought a permit to build a 2,783-foot vertical bulkhead and revetment within the critical area along the Kiawah River shoreline. DHEC denied most of the permit, with the exception of a 270-foot segment to protect Beachwalker Park. Both the League and KDP appealed, and the ALC ultimately granted approval for the entire structure. Both parties appealed, and after three oral arguments and two prior opinions on rehearing, we found the ALC erred in: relying on the benefits to the private developer and the Town of Kiawah instead of the public as a whole; declining to consider the extent of the effects to the upland property; and determining the structure would have no adverse impact on public access to the area. *KDP I*, 411 S.C. at 44, 766 S.E.2d at 723. On remand, the ALC again approved the bulkhead but without the revetment except for the first 270 feet, which would utilize

[3] That distance was about 60 feet in 2010, 39 feet in 2014, and 29.25 feet in 2016.

[4] The record demonstrates the proposed road will be 20 feet wide, but an additional 8.5 feet will be needed to install the guardrail, the steel wall, and sufficient space during construction to avoid the critical area. That leaves less than a foot at the neck's narrowest place based on calculations from 2016.

both structures. On appeal, we affirmed the approval of the 270-foot portion but reversed the remaining segment which would only contain the bulkhead because there was no evidence in the record to support bifurcating the structures. *KDP II*, 422 S.C. at 637, 813 S.E.2d at 694.

Following our remand in *KDP I*, KDP filed a permit application in 2015 taking a new approach to protect its upland private property—the construction of an erosion control device outside of the critical area in order to encompass DHEC's less stringent review policy for non-critical area permits.[5] This structure, the steel sheet pile wall at issue before us, consists of drilling into the ground approximately sixty, forty-foot long steel sheet piles double-coated with coal tar epoxy so that only six and a half feet of the wall is above the mean sea level. Accordingly, the wall is considered an in-ground structure. The sections would be connected with a galvanized channel wall horizontally anchored approximately every six feet. Construction of the steel wall would occur in two phases, beginning with a portion from the neck and down the riverside to the southwest portion of the Spit. The second phase would extend from Beachwalker Park to the neck.

Unlike the revetment and bulkhead, the wall is permitted for the highland side of the critical area, meaning KDP would only build outside the critical area. However, the proposed building area has consistently narrowed, and the expert testimony established it is not a matter of *if* but *when* the critical area will encompass the wall as the critical line continues its march towards the ocean setback line. Despite this uncontroverted fact, DHEC declined to utilize the more stringent analysis applicable to a critical area permit, instead determining the permits complied with the Coastal Zone Management Plan (CMP). After DHEC granted the

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[5] KDP sought three permits and approval through a Coastal Zone Consistency Certification. The certification is not as detailed a review as a critical area component, but is instead part of DHEC's review that the project complies with the Coastal Zone Management Plan, which is mandated by the South Carolina Coastal Zone Management Act. *See* The Coastal Zone Management Act, Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2020); The Coastal Zone Management Program, South Carolina Department of Health and Environmental Control, https://scdhec.gov/environment/your-water-coast/ocean-coastal-management/coastal-zone-management/south-carolina. The permits and certification enable KDP to construct a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, and water lines.

permits and certification, the League requested that the Board conduct a final review, but it declined to do so.

The League then sought a contested case hearing before the ALC, which occurred over the course of seven days in August of 2017. Numerous expert witnesses testified, as well as several lay persons who frequented the Spit. Alan Wood, one of the League's experts, testified he conducted surveys in 2017 which demonstrated the critical line had shifted markedly towards the setback line since KDP filed its permit application two years earlier. As a result, Wood identified six locations where construction of the steel wall would encroach into the critical area. Conversely, KDP's expert, John Byrnes, testified only two of the locations Wood specified were actually in the critical area.

The hearing also contained the testimony of DHEC staff who had denied the majority of the 2008 permit, specifically, Bill Eiser, the project manager at that time, and Curtis Joyner, the Manager of the Coastal Zone Consistency Section. Joyner reviewed the certification of the permits in question. On cross, Joyner admitted the steel wall would prevent shoreline movement and become exposed, both of which would be considered a cumulative impact that changed the character of the area. Joyner also testified that he received letters from the South Carolina Department of Natural Resources and the United States Department of Interior as required during the review process and that both agencies opined the area was too unstable for development. Significantly, the access corridor where the proposed road will be constructed has narrowed by more than half—from sixty to less than thirty feet—since Joyner received those recommendations.

The ALC ultimately upheld DHEC's approval of the permits and certification, determining that because the permits were for development outside of the critical area, it did not have to consider Section 48-39-30(D) of the South Carolina Code (2008) (mandating that "critical areas shall be used" to ensure "the maximum benefit to the people"). The ALC found the proposed project would not violate III.C.3.I(7) of the CMP which required a consideration of the "long range, cumulative effects" in the context of potential development of the property and the "general character of the area." The court acknowledged that authorizing the wall would facilitate development, so the inquiry focused on the character of the area and the resulting long-range, cumulative effects. The ALC accepted DHEC's interpretation that the general character of the area was residential development after comparing the Spit to other portions of Kiawah Island and neighboring Seabrook Island. Concerning the long-range effects of permitting the wall, the ALC stated:

> It is reasonably certain that the Kiawah River's erosive forces will eventually cause the [wall] to be exposed to some degree, resulting in a loss of riverbank where the [wall] is exposed. This is a long-range effect. However, when the loss of riverbank will occur and the percentage of the [wall] that will eventually be exposed is speculative.

The court found the public primarily used the oceanside of the Spit while the riverside was used only occasionally. Despite an existing permit to build a 270-foot bulkhead and revetment adjacent to Beachwalker Park, the court again relied on protecting the park as justification for erecting the entire structure. The court also noted public access to the riverbank would remain because it is speculative as to how much of the wall will be exposed in the future.

Additionally, the court determined the project would not be inconsistent with state policy set forth in section 48-39-30 because the economic, social, and environmental concerns must be balanced when determining whether to grant these permits. In doing so, the court relied on increased tax revenues, creation of jobs, and "[other] contribut[ions] to the economic and social improvement of citizens of this state." Further, the ALC found the Spit will be improved with "due consideration for the environment," and that "[n]o portion of the proposed project falls within the critical area."

Finally, the court determined DHEC's decision to grant the permit was not legally inconsistent with its prior decision denying the full bulkhead and revetment in 2008 or with our prior opinions in *KPD I & II*. In doing so, the court stated that an agency is permitted to change its mind, and while the permit outcome was different, the decision was not made through any arbitrary or capricious exercise of authority. Thereafter, the League filed an appeal, and we certified the case pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the ALC err in upholding DHEC's determination that the more rigorous permitting process under section 48-39-30 did not apply because the steel wall would be constructed outside the critical area?

II. Did the ALC err in its public benefit analysis by considering the protection of Beachwalker Park and in relying on projected tax revenue that the project would produce?

STANDARD OF REVIEW

This Court will affirm a decision by the administrative law court unless the findings or conclusions 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.

S.C. Code Ann. § 1-23-610(B)(a)-(f) (Supp. 2019). The ALC is the finder of fact in contested case hearings related to DHEC certifications and permits. *See Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) ("The proceeding before the ALJ was a de novo hearing, which included the presentation of evidence and testimony."). In determining whether substantial evidence supports the ALC's decision, the Court must find "looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." *Id.* at 9–10, 698 S.E.2d at 617.

DISCUSSION

At the outset, we reiterate that "the basic premise undergirding our analysis must be the public trust doctrine which provides that those lands below the high water line are owned by the State and held in trust for the benefit of the public." *KDP I*, 411 S.C. at 29, 766 S.E.2d at 715. Further, "the public's interest must be the lodestar" of our analysis. This is because the General Assembly has set forth its policy of protecting "the quality of the coastal environment and [promoting] the economic and social improvement of the coastal zone and of all the people of the State." S.C. Code Ann. § 48-39-30(A) (2008). While section 48-39-30 demonstrates that development is not prohibited in sensitive areas, artificially modifying the tidelands remains the "exception." *KDP I*, 411 S.C. at 29, 766 S.E.2d at 715. Accordingly, it is through this lens that we review the ALC's decision.

I. Critical Area and Section 48-39-30

The League asserts the ALC erred as a matter of law by failing to apply section 48-39-30(D), which pertains to critical areas, because the river shoreline is within a critical area notwithstanding the fact that the permit for the wall requires the structure to be built on the upland side. While the League rejects the conclusion that the project actually can be accomplished without intruding into the critical area, it also argues that even if that is initially the case, all the experts agreed the erosion would continue until the river exposed the wall, thus eliminating the sandy shoreline and shifting the critical line further inland beyond the structure. Therefore, the League asserts the ALC should have explicitly addressed the policies specific to critical area permits because it is certain the steel wall will ultimately encroach upon the critical area.

Conversely, KDP and DHEC contend the ALC did not err because the steel wall is required to be constructed outside the critical area. As a result, KDP and DHEC assert the more intensive scrutiny that governs critical area permits—such as those at issue in *KDP I & II*—does not apply here. In other words, the permit was reviewed under DHEC's indirect authority to certify the structure's compliance with the CMP rather than under DHEC's direct authority to ensure the construction adheres to the policies pertaining to critical area permits.

The critical area is defined as "any of the following: (1) coastal waters; (2) tidelands; (3) beaches; (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280." S.C. Code Ann. § 48-39-10(J)(1)-(4) (2008). The General Assembly has declared the state policy pertaining to critical areas in section 48-39-30(D), which provides,

> Critical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

At first blush, KDP's and DHEC's position seems plausible. Because the certification requires construction of the steel wall to occur upland of the critical area, it was ostensibly not necessary for KDP to seek a special permit or for its application to undergo rigorous analysis. However, this interpretation is misleading, and is actually similar to the steel wall itself—initially it may be obscured, but once the sand shifts, it will become visible and ultimately replace the sandy beach. All the expert testimony confirmed the erosion would continue until the wall became exposed—otherwise there would be no need for an erosion control device. As Robert Young, an expert for the League, testified,

> Eventually and probably very quickly, the wall is going to become a part of the Kiawah River shoreline and, in fact, if the wall were not going to become a part of the Kiawah River shoreline, you would probably never build it because if the wall was just going to remain buried in the interior of the island forever, there would be not much point in having the wall.

Even DHEC acknowledged in its brief the "admittedly realistic concern" that the critical area will overtake the steel wall.[6] Nevertheless, the agency felt constrained by a formulaic approach even when expert testimony demonstrated a virtual certainty that the critical area would be impacted.

We acknowledge the existence of conflicting opinions as to when and to what extent this proposed structure will impact the critical area; however, all the expert witnesses agreed that the sandy shoreline—indisputably a critical area—will ultimately be subsumed by the steel structure and at least part of it will be eliminated. Therefore, we find there is no evidence to support a finding that the steel wall will not have an *impact* on the critical area. Certainly there may be cases where the expert testimony diverges or where DHEC justifiably believes an upland structure will remain outside the critical area and not impact it, but that is simply not the case here. Therefore, the ALC erred in declining to apply section 48-39-30(D).[7]

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[6] At oral argument, counsel for DHEC candidly agreed with Justice Few's observation that "this structure serves no purpose whatsoever until the critical line hits it . . . . The wall serves no purpose whatsoever until the river pushes up against it and it stops the river from moving into the road or into the development."

[7] Because the inquiry as to whether to apply the more rigorous critical area permitting analysis for a structure designed to be constructed outside the critical area depends

II. Public Benefit

A. Reliance on Beachwalker Park

The League contends the ALC erred in yet again emphasizing the protection of Beachwalker Park as a sufficient public benefit to justify the entire structure. Specifically, the League asserts the ALC committed an error of law in concluding without evidence that the public trust lands will be enhanced by protecting the park. Conversely, KDP asserts the ALC properly balanced the competing interests, and substantial evidence supports its decision that the steel wall would outweigh the benefit to the public to a greater degree than any harm of the loss of the shoreline. We agree with the League that the ALC committed an error of law because it focused on the protection of the park to bootstrap its public benefit analysis of the rest of the lengthy steel wall.

Section 48-39-150(A)(5) requires DHEC to consider "[t]he extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources." S.C. Code Ann. § 48-39-150(A)(5) (2008). Further, III.C3.XII.D. of the CMP mandates that DHEC review permits that affect public open space under the following considerations:

> 1) Project proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist.
> 2) Efforts to increase the amounts and distribution of public open space and recreational areas in the coastal zone are supported and encouraged by the Coastal Council.

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on the facts of the case, we decline to adopt a bright line rule as to when DHEC must analyze section 48-39-30(D) for a non-critical area permit. However, we trust that in future cases DHEC will exercise its discretion appropriately in a manner consistent with upholding the basic premise that altering the tidelands remains the "exception to the rule." *KDP I*, 411 S.C. at 29, 766 S.E.2d at 715.

The ALC acknowledged "the riverbank is both a recreational and a natural open space area." However, the court determined the League did not raise any alternatives, and the choice of doing nothing failed to protect the public's interest. Therefore, the court weighed the loss of the riverbank against the protection of the park. Ultimately, the court concluded the project would "greatly assist in preserving" an important benefit: the parking lot at Beachwalker Park. The public would further benefit from a conservation easement, and the public's use and enjoyment would not be disrupted to a degree sufficient to deny the permits. While the court recognized that KDP would also benefit, it stated, curiously and with little explication, that the outcome was a "compromise."

We find the ALC's analysis is fatally flawed because the court once again focused on the public benefit of protecting the park as a justification for the entire 2,380-foot steel wall. While the ALC relied on the 270-foot portion that would protect Beachwalker Park for its public benefit analysis—which represents approximately 10% of the entire wall—it did not find *any* public benefit to the remaining 90%. In essence, KDP seeks to hold the protection of the park hostage until it is permitted to construct the entire wall. This is so even though the Charleston County Parks and Recreation Commission originally applied for a permit to build a structure to protect the park *fifteen years ago* and only agreed to withdraw that request at the behest of KDP. The park also remains unprotected despite this Court's approval of a permit to do just that. *See KDP II*, 422 S.C. at 639–40, 813 S.E.2d at 695. Therefore, the ALC relies on a largely illusory benefit to support its public interest analysis.[8]

[8] Indeed, the ALC acknowledged KDP would not protect the park unless it could construct the entire structure, thus effectively conceding the specious nature of justifying construction of the entire wall to benefit Beachwalker Park. At oral argument, counsel for KDP asserted the 270-foot portion could not be constructed because it would ultimately fail as the river eroded around and behind the end of the structure. While we acknowledged in *KDP II* that a bulkhead without a revetment would actually exacerbate erosion because the toe would become exposed, that conclusion was based on "all of the evidence in the record . . . ." 422 S.C. at 637, 813 S.E.2d at 694. Here, the record in this case does not support the assertion that an erosion control device protecting only the park would be futile. Further, even though KDP disputes the efficacy of a device that only protects Beachwalker Park, over the course of fifteen years, the Charleston County Parks Commission, DHEC, and this Court have either sought or approved a permit for 270 feet. Accordingly,

Further, because the shoreline will erode until the riverbank reaches the steel wall, the public is essentially left in the same situation as we described in *KDP I*—the complete loss of area held in trust for the benefit of the people. Despite this inescapable conclusion, the ALC disregarded that paramount concern for a third time. Accordingly, the ALC erred in relying on the protection of the park as a reason to uphold the entire structure.

B. Balancing of Economic, Social, and Environmental Interests

The League contends the ALC erred in solely relying on the economic benefit of the overall project. Specifically, the League argues the ALC improperly focused on the expected tax revenue and increased jobs as part of its public benefit analysis. Conversely, KDP asserts the ALC properly balanced the economic, social, and environmental interests. We agree with the League.

Section 48-39-150 requires DHEC to base its decision to approve or deny a permit on the "merits of each application, the policies specified in sections 48-39-20 and 48-39-30 and be guided by [ten] general considerations." S.C. Code Ann. § 48-39-150(A). Together, these three provisions require a balancing of competing interests when development is contemplated along our precious coastal resources. While economic interests are relevant, relying on tax revenue or increased employment opportunities is not sufficient justification for eliminating the public's use of protected tidelands. We have previously rejected the certification of a project that sought to dredge a canal through wetlands in order to facilitate waterfront development near the Waccamaw River. *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 188, 371 S.E.2d 521, 522 (1988). The Court noted,

> To support certification, Litchfield submitted an expert report that projects speculative economic benefit to the public in the form of new jobs and tax revenue if the project is completed. Respondents rely on this evidence to show an overriding public interest. This evidence of purely economic benefit, however, does not support the stated purpose of the Coastal Management Program to protect, restore, or enhance the

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we reject the assertion that a 2,380-foot structure must be built to protect the limited area adjoining the park.

> resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the goal of economic improvement. *See* S.C. Code Ann. § 48-39-30(B)(1) and (2) (1987). *We hold evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.*

Id. at 190, 371 S.E.2d at 522–23 (emphasis added). Further, we stated "the record is devoid of any evidence of an overriding public interest in the permanent alteration of these wetlands." *Id.* at 190, 371 S.E.2d at 522.

While the ALC acknowledged this decision, the court ultimately determined that "the proposed project will increase tax revenues in the area, create jobs, and otherwise contribute to the economic and social improvement of citizens of this state." The court noted the development is planned in an otherwise environmentally friendly manner and that no portion of the project is within the critical area. The ALC determined the steel wall will stabilize the neck, thus enabling a road to be constructed through the narrow passage.[9]

Because we find the ALC erred in using protection of the park as a reason for approving the entire wall, the only remaining justification is its conclusion that the economic benefits outweigh the social and environmental interests in keeping the area undeveloped. In other words, once the fallacy of protecting the park as a reason for constructing the remaining 90% of the wall is brought to light, all that remains to justify the entire structure are the purely economic benefits of tax revenue and temporary job creation, which cannot, as a matter of law, supplant the permanent elimination of the critical area. Thus, the ALC erred in upholding the permits and certification. *Id.* at 190, 371 S.E.2d at 523 ("[E]vidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.").

CONCLUSION

We conclude the ALC erred in declining to apply section 48-39-30(D)'s more stringent review based on the record before us. We also find the ALC erred as a

[9] The ALC ostensibly discounted the League's expert, Robert Young, who testified building a road along the narrow neck is "kind of like trying to shove a hippo through a mouse hole."

matter of law in relying on protecting Beachwalker Park as a reason to uphold the entire structure and in citing purely economic interests in its public benefit analysis.[10]

REVERSED.

BEATTY, C.J., FEW and JAMES, JJ., concur. KITTREDGE, J., concurring in a separate opinion.

[10] The League also contended the ALC erred in determining: the project physically could be constructed as permitted; the character of the area was residential; collateral estoppel applied; and substantial evidence did not support the ALC's conclusion concerning the minor impact to marine wildlife. We decline to address these issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address other arguments after reaching one that is dispositive).

JUSTICE KITTREDGE: The Court reverses the Administrative Law Court in multiple respects. I join only Section II of the majority opinion and concur in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In re Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates, Appellant.

Appellate Case No. 2020-001283

Appeal from the Public Service Commission

Opinion No. 28055
Heard June 15, 2021 – Filed September 1, 2021

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Frank R. Ellerbe III and Samuel J. Wellborn, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Appellant Blue Granite Water Company.

Andrew M. Bateman, Alexander W. Knowles, Christopher M. Huber, and Steven W. Hamm, all of Columbia, for Respondent South Carolina Office of Regulatory Staff; Carri Grube Lybarker, Roger P. Hall, and Connor J. Parker, all of Columbia, and Richard L. Whitt, of Whitt Law Firm, LLC, of Irmo, all for Respondent South Carolina Department of Consumer Affairs; Michael K. Kendree Sr., of York, for Respondent York County; S. Jahue Moore, of Moore Taylor Law Firm, P.A., of West Columbia, for Respondent Town of Irmo; John Julius Pringle Jr., of Columbia, for Respondent Building Industry Association

of South Carolina; and Laura P. Valtorta, of Valtorta Law Office, of Columbia, for Respondent Forty Love Point Homeowners' Association.

JUSTICE KITTREDGE: This is an appeal from the South Carolina Public Service Commission (PSC). The PSC is a quasi-judicial body established by the South Carolina General Assembly. The legislature has delegated to the PSC the "power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A) (2015). Part of this power includes the authority "to create incentives for utilities to improve their business practices." *Utils. Servs. of S.C., Inc. v. S.C. Office of Regul. Staff*, 392 S.C. 96, 105, 708 S.E.2d 755, 760 (2011) ("The PSC [has the] power[] . . . to fix just and reasonable standards, classifications, regulations, practices, and measurements of service. Pursuant to these powers, the PSC is entitled to create incentives for utilities to improve their business practices. Accordingly, the PSC may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers." (citations omitted) (internal quotation marks omitted)). The PSC's order on appeal here is primarily focused on providing incentives to the utility to improve its business practices.

The appellant, Blue Granite Water Co. (Blue Granite), is a utility that provides water and sewer services. Blue Granite was formerly known as Carolina Water Service (CWS). CWS changed its name to Blue Granite as part of a rebranding campaign, for the utility had earned an unfavorable reputation throughout the state. In rejecting Blue Granite's request for an approximate 50% rate increase, and in an effort to incentivize Blue Granite to improve its business practices, the PSC set a lower return on equity (ROE) than requested and allowed only certain portions of Blue Granite's requested costs, citing to the utility's known, poor reputation and service problems. On appeal, Blue Granite contends the PSC's attempts to incentivize the utility actually unfairly punished the company in violation of law.

While Blue Granite raises nine specific concerns, we have condensed those concerns to four primary issues on appeal: whether the PSC erred in (1) setting the permissible ROE; (2) using a ten-year average—rather than a five-year average—to calculate typical storm costs; (3) disallowing all costs associated with Blue

Granite moving its headquarters from West Columbia to Greenville, including any office rental expenses; and (4) staying Blue Granite's ability to implement its new, higher rates under bond during the course of the appeal. We reverse in part and affirm in part. As to the issues involving the ROE, storm costs, and bond, we find the PSC's decision was not unfairly punitive, not arbitrary or capricious, and not clearly erroneous. However, as to the Greenville office expenses, we find the PSC's decision to *completely* deny yearly rental expenses was arbitrary and capricious. We therefore remand to the PSC for additional proceedings.

I.

Blue Granite is a relatively small-size utility providing water and sewer services to approximately 28,000 customers in South Carolina. In October 2019, Blue Granite filed an application for ratemaking with the PSC. Prior to that application, Blue Granite received annual rate revenues of almost $24 million. It sought to increase those rates by nearly $12 million per year, an approximate 50% increase.

Unsurprisingly, Blue Granite (and former CWS) customers from all over the state protested such a large increase, and, at the affected customers' requests, the PSC scheduled six hearings to receive testimony from customers. At those hearings, customers complained extensively about Blue Granite's relatively-high rates compared to other utilities in the area and the impact Blue Granite's proposed flat fees would have on low-income customers. Likewise, many of the customers who testified reported "incidents of poor water quality, unresponsive customer service, inaccurate meter readings, billing errors, and unwarranted cut-offs, among other problems." For example, one of the customers testified Blue Granite had wrongfully plugged his sewer line, resulting in his house being flooded with sewage. Another testified to a similar event in her neighborhood, resulting in raw sewage running through the entire neighborhood, including the community park and pool. Due to the extensive service problems, a number of the customers requested the PSC deny Blue Granite's application outright, particularly because of the number of rate increases Blue Granite had been granted in the recent past, and the dollar amounts associated with those past increases.[1]

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[1] One customer testified, "Blue Granite is applying for a 50 percent average rate increase, only two years after a 30 percent rate increase, which is unreasonable for their consumers. Add to that their statement to Representative Chris Wooten that they intend to pursue additional rate cases every two years following this one."

Ultimately, the PSC granted Blue Granite a rate increase of approximately $5 million, an amount comparable to the increases granted to other similarly-sized utilities in the state. Notably, in its final order, the PSC found the customer testimony "very compelling and indicative of persistent, widespread, and pervasive problems consistent with those which have frustrated customers of this utility for many years." However, the PSC explained,

> Giving effect to [*Utilities Services of South Carolina*,] as we must, we are legally foreclosed from denying Blue Granite's application for a rate increase in its entirety. . . . We have further considered all the customer [] hearing testimony and used it to guide us in creating incentives for Blue Granite to improve its business practices, cut costs, improve efficiency, and enhance quality of service.

Blue Granite filed a petition for rehearing, but the PSC denied the petition in large part. Blue Granite then directly appealed to this Court pursuant to Rule 203(d)(2)(A), SCACR.

II.

In reviewing a decision from the PSC, this Court employs a deferential standard of review. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010). As set forth in section 1-23-380 of the South Carolina Code, the Court may not substitute its own "judgment for the judgment of the [PSC] as to the weight of the evidence on questions of fact," but may reverse or modify the decision if the PSC's findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(e)–(f) (Supp. 2020). "A decision by the [PSC] is arbitrary if it is without a rational basis, is based 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." *Daufuskie Island Util. Co. v. S.C. Office of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019) (internal alteration and quotation marks omitted) (citation omitted). Likewise, substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (citation omitted). "Because the [PSC's] findings are presumptively correct, the party challenging the [PSC's] order bears the burden of convincingly proving the

decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *S.C. Energy Users Comm.*, 388 S.C. at 491, 697 S.E.2d at 590 (citation omitted).

III.

Return on Equity

a. Underlying Facts

Three witnesses testified about the proper ROE before the PSC: (1) David Parcell on behalf of the South Carolina Office of Regulatory Staff (ORS, one of the two respondents here); (2) Aaron Rothschild on behalf of the South Carolina Department of Consumer Affairs (the Department, the second respondent); and (3) Dylan D'Ascendis on behalf of Blue Granite. According to Parcell, the ROE is the "most difficult" portion of the rate of return to estimate, and experts therefore employ various analytical models to attempt to narrow down what an appropriate ROE might be. Thus, here, each witness used three models to calculate a reasonable ROE for Blue Granite. The results of their analyses under each model resulted in an ROE range, rather than a single number. Averaging the low results for each model and the high results for each model, Parcell calculated an overall ROE range of 7.7% to 8.36%; Rothschild calculated an ROE range of 7.46% to 8.75%; and D'Ascendis calculated an ROE range of 10.2% to 10.7%.[2]

In Blue Granite's previous ratemaking applications, the PSC had expressed concern that the utility's relatively-small size could make it a riskier investment and, therefore, required a higher ROE in order to attract investors. However, both Parcell and Rothschild strongly disagreed Blue Granite's small size automatically required a higher ROE.[3] Nonetheless, both witnesses based the remainder of their

[2] Following Parcell's and Rothschild's criticism of his calculations, D'Ascendis later revised his ROE range to 9.75% to 10.25%.

[3] For example, Parcell explained many small water utilities were subsidiaries of larger companies, and those smaller water utilities did not raise equity capital directly from their individual investors, but rather as part of a consolidated entity from the investors in the larger parent company. Thus, according to Parcell, smaller water utilities were not riskier merely because of their size, and did not require a correspondingly larger ROE to compensate for their small size because they were not a truly risky investment. Of note, Blue Granite is a wholly-owned

calculations on the high ends of the ranges for each model in recognition of the PSC's prior concerns.

More specifically, in generating his particular ROE recommendation, Parcell used the high values from two of his three models "in order to give some consideration to any perceived unique attributes of" Blue Granite, specifically, its relatively small size—although, as stated, he disagreed the size of the utility should affect its ROE. Likewise, Parcell discounted the results from his third model because they appeared "to be somewhat low at this time, relative to the" results from the other two models. Consequently, Parcell recommended an ROE range between 8.9% (the high result from one model) and 10% (the high result from the other model), ultimately selecting 9.45% as the midpoint of that range.

In contrast, Rothschild considered the results of all three of his selected models, using the high values of the ranges "primarily because this Commission expressed concern in [Blue Granite's 2018] rate case . . . regarding its size" and whether its relatively-small size made it a riskier investment, therefore requiring a higher ROE to attract investors. However, Rothschild recommended a slightly lower ROE than the average high result of his three chosen models (8.75%) because (1) Blue Granite had less financial risk than other water utilities due to having "more equity in its capital structure" following its recent reorganization; and (2) "its business risk ha[d] declined since its last rate case and therefor[e] its cost of capital ha[d] decreased as well."[4] As a result, Rothschild recommended an ROE of 8.65%.

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subsidiary of Corix Regulated Utilities, Inc. (formerly known as Utilities, Inc.), one of the three largest private water and wastewater utility operators in the United States.

Additionally, Parcell acknowledged that, on an overall market basis, it was true that smaller companies tended to be riskier investments. However, he stated that was "not the case for regulated utilities." Specifically, Parcell asserted that "*all public utilities operate in an environment with regional monopolistic power . . . . As a result, the business and financial risks are very similar among the utilities regardless of their size*." (Emphasis added.)

[4] Moreover, according to Rothschild, "the cost of equity for utility companies [was] decreasing." Parcell similarly testified the current low-equity returns were "reflective of a decline in investor expectations of equity returns and risk

Rothschild further explained the 8.65% figure was "on the high end of results to account for *the possibility* that [Blue Granite's] small size impact[ed] the return expectations required by investors." (Emphasis added.) Rothschild reiterated several times that he had seen no evidence—and, in fact, there seemed to be evidence to the contrary—that smaller companies had a higher cost of equity. Nonetheless, Rothschild stated, "*to be conservative*, to recognize *the possibility* that that's [the case,] I went to the higher end of my range." (Emphasis added.)

Before Rothschild was excused from the witness stand, one PSC Commissioner questioned why Rothschild had picked a specific number for his recommended ROE, rather than a range. Rothschild said he had provided ranges to other public utilities commissions in the past, but he was then usually asked to provide a single, specific number. Nonetheless, Rothschild explained, "to assume that [] this exercise is that precise is an excellent question, so I think you generally can't say it's 8.65 or 8.61. So there are various ranges that I do show in my testimony that I hope would help understand a range that's reasonable."

Rothschild additionally provided data from other major financial institutions that indicated returns on stock market investments generally ranged from 5.25% to 8.75% at the time. According to Rothschild, investments in the overall stock market were much riskier than investments in a utility of any size and, therefore, generally earned a higher ROE than an investment in a utility. He concluded, "It is unlikely that investors would expect to earn a higher return of equity for a cost[-]of[-]service regulated utility company than the overall stock market."

In its final order, the PSC considered and rejected D'Ascendis's testimony and ROE recommendation.[5] The PSC further found Rothschild to be the most credible witness, placing special emphasis on the fact that his analysis "was unique in that

premiums."

[5] There is ample basis supporting the rejection of D'Ascendis's testimony. For example, after summarizing Parcell's and Rothschild's testimony in which they thoroughly discredited D'Ascendis, the PSC found D'Ascendis's calculations lacked "analytical transparency" and "statistical coherence." Having reviewed the record, the evidence firmly supports the PSC's extensive criticism of D'Ascendis's testimony, and we thus do not discuss the specifics of that testimony any further. *See* S.C. Code Ann. § 1-23-380(5) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

he included the use of both historical and forward-looking, market-based data." The PSC explained Rothschild's results from his three chosen analytical models "provide[d] an ROE in the range of 7.46% to 8.75%." Noting it was "[c]onsidering the quality of service issues known to exist with Blue Granite," the PSC concluded the "recommended ROE of 7.46% proposed by witness Rothschild" was appropriate.

b. Analysis

Blue Granite now argues an ROE of 7.46% is unsupported by the evidence in the record because Parcell and Rothschild both recommended a higher ROE. We disagree with the suggestion that the PSC was foreclosed as a matter of law from selecting an ROE within the range provided by the evidence. While the PSC was, of course, empowered to select a higher ROE in accordance with the witnesses' precise recommendations, the question before us is whether the ROE actually selected (7.46%) is supported by substantial evidence.

We find there is substantial evidence in the record supporting the PSC's decision. Specifically, the PSC found Rothschild's testimony to be the most credible, including when Rothschild testified there was no reason to artificially inflate the ROE simply because Blue Granite was a smaller utility—an opinion, we note, with which Parcell completely agreed. Thus, although Rothschild *and* Parcell testified they selected the high values of their ranges in deference to the PSC's prior concern that Blue Granite's size *could* affect its level of risk, the PSC apparently reevaluated and discarded that prior concern after hearing Rothschild's and Parcell's explanations for why such a concern was unwarranted. *See S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 610, 244 S.E.2d 278, 288 (1978) (Ness, J., concurring in part and dissenting in part) (noting the PSC is "not bound by its prior decisions, and it may re-examine and alter its previous findings as to reasonableness when conditions warrant"); 73A C.J.S. *Public Administrative Law and Procedure* § 352 (June 2021 Update) (explaining administrative agencies are not bound by stare decisis and may reevaluate their prior decisions so long as they rationally justify their change of position). Once the PSC's prior concern—that Blue Granite's small size could impact its cost of equity—was diminished, the testimony suggested the low end of the range from Rothschild's three models (7.46%) was equally justifiable to the high end of the range (8.75%).

Blue Granite contends the PSC had no authority to select an ROE other than the ones specifically recommended by either Rothschild (8.65%) or Parcell (9.45%). However, the precise number selected by the PSC need not come from a witness's

specific recommendation, but may instead be determined from the totality of the evidence in the record before the agency. Here, the record supports the 7.46% ROE determination, as it is within the stated range calculated by Rothschild. Moreover, Rothschild testified selecting an ROE is not a precise exercise. Given the fact that, regardless of which model was used, Rothschild and Parcell calculated an ROE range rather than a precise number, and those numbers did not always overlap even when both experts used the same model, we see no reason to doubt Rothschild's testimony that selecting an ROE is not an exercise in precision. *Cf. In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 & n.59 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders.").

Finally, the PSC specifically stated it set the ROE at the low end of the proffered ranges in an effort to incentivize Blue Granite to improve its admittedly-poor business practices, evidenced by the extensive customer complaints at the PSC hearings. As we previously stated in *Utilities Services of South Carolina*, the PSC is empowered to do so in appropriate circumstances, and there is nothing inherently wrong or punitive in the PSC choosing to follow that path here. *See Utils. Servs. of S.C., Inc.*, 392 S.C. at 105, 708 S.E.2d at 760. Rather, a utility's business practices and reputation are two of a number of factors the PSC may consider in selecting an appropriate ROE.[6]

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[6] Additionally, there were other factors present here that supported the PSC's decision to impose a lower ROE, including: (1) the ROEs and overall rate increases allowed to other similarly-sized utilities in the same general time frame; (2) the ROEs expected by investors in the overall (i.e., riskier) stock market; (3) the apparent lack of a need to artificially inflate the ROE of relatively-smaller utilities such as Blue Granite; (4) Blue Granite's decreased financial risk following its reorganization due to now having more equity in its capital structure; (5) Blue Granite's decrease in business risk since its last rate case, resulting in a decreased cost of capital; (6) the overall decreased cost of equity for utility companies; and (7) a "decline in investor expectations of equity returns and risk premiums." *See generally Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692–93 (1923) ("A public utility . . . has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures,"

As a result, because there is a basis on which a reasonable person could find a 7.46% ROE appropriate, the PSC's decision is supported by substantial evidence in the record, and we therefore affirm. *See Parker v. S.C. Pub. Serv. Comm'n*, 281 S.C. 22, 24, 314 S.E.2d 148, 149 (1984) ("We recognize that the [PSC's] interpretation of the evidence on this issue is not indisputable, but we cannot substitute our judgment for that of the [PSC] upon a question as to which there is room for a difference of intelligent opinion." (internal alteration and quotation marks omitted) (citation omitted)); *see also Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320, 323, 364 S.E.2d 455, 456 (1988) ("This Court is without authority to set aside an agency's judgment on a factual issue where there is evidence of record to support the agency's decision." (citation omitted)).

IV.

Storm Costs

a. Underlying Facts

Blue Granite sought allowance of $51,802 per year in costs associated with anticipated future storm damage—the amount incurred during the test year. ORS reviewed Blue Granite's storm costs for the past ten years and found the average yearly storm costs were only $28,320.51.[7] As a result, ORS proposed a downward adjustment to account for the unusually-high storm costs incurred in the test year.

In response, Blue Granite stated it was "not opposed to using a multi-year historical average of costs," but that it believed the average storm costs should be calculated from the last five years of data, rather than the ten years proposed by ORS.[8] However, ORS rejected using a five-year average, explaining:

> ORS has consistently used a ten [] year average when proposing normalization of storm costs in past rate proceedings . . . . This is a more representative method to ensure enough data is gathered and

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such as those earned in the overall stock market.).

[7] ORS excluded the highest and lowest values from the past ten years to account for the possibility that those extremes were statistical outliers.

[8] Were the PSC to adopt the five-year average, the allowed amount would have been $42,494, rather than the $28,320.51 proposed by ORS.

> used over a reasonable period of time to form an accurate view of storm costs. Using a five [] year average as proposed by [Blue Granite] would not allow for significant outliers that occur due to fluctuations in annual costs to be determined and removed from the average. Using a ten [] year average allows for a more complete assessment of costs over time. Therefore, ORS recommends the Commission reject [Blue Granite's] proposal to use a five [] year average for the normalization of storm costs.

The PSC found use of a ten-year average more accurately reflected storm costs for each year than use of a five-year average. Additionally, the PSC found it had previously used a ten-year average in normalizing storm costs from a test year. Therefore, the PSC adopted ORS's proposed downward adjustment, finding the adjustment to be "just and reasonable."

b. Analysis

Blue Granite contends the PSC's decision to apply a ten-year average, rather than a five-year average, was arbitrary and capricious and unsupported by substantial evidence. We disagree. As explained by the PSC and ORS, using a larger sample size more accurately establishes the true average cost of storm damages to Blue Granite's system in any given year, thus providing a more accurate forecast in setting prospective rates for anticipated storm damages in years to come.

Moreover, in adopting the ten-year average, the PSC did not foreclose Blue Granite from seeking a deferred account for unusually high storm damages in future years. For example, in 2018, South Carolina was hit in back-to-back months with Hurricanes Florence and Michael, resulting in substantial costs to Blue Granite due to storm damages above and beyond the amount granted in its prior ratemaking proceeding. However, the PSC allowed Blue Granite to create a deferred account and recover those additional, unexpected expenses from its customers. Thus, even though the PSC used the ten-year average here, Blue Granite can request deferred accounting treatment in the event of unusually high storm costs in the future. *See Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 231–32, 493 S.E.2d 92, 97–98 (1997) (explaining that in the event a utility experiences expenses that are truly "extraordinary," i.e., "unanticipated and non-recurring," the PSC should allow the utility to create a deferred account for those expenses and amortize the expenses in calculating the rate base in the utility's next ratemaking application).

Accordingly, we find the PSC's decision to use a ten-year average to normalize storm costs was neither arbitrary nor capricious, nor unsupported by substantial evidence. We therefore affirm the PSC's decision as to this issue.

V.

Greenville Office Expenses

a. Underlying Facts

Until 2018, Blue Granite/CWS owned an office building located in an industrial park in West Columbia. That office building cost ratepayers $27,260 annually for things such as water, sewer, electric, gas, landscaping, and property taxes. However, according to Blue Granite, the location had no other office buildings or amenities nearby, so it was not a "viable location" to retain highly-qualified employees. Likewise, Blue Granite conceded that "[a]ttracting talent in the [West] Columbia market [was] extremely difficult [for the utility] due to the legacy brand issues in that market," including CWS's abysmal reputation for customer service and wastewater leaks. Therefore, in 2018, when changing its name from CWS to Blue Granite, the utility decided to relocate its headquarters, selling the West Columbia building and removing the $27,260 in annual expenses from its rate base.

Blue Granite then explored three alternate locations for its headquarters: Greenville, Columbia, and West Columbia. In selecting the new location, Blue Granite analyzed the labor statistics (also known as CBRE data[9]) in all three cities. According to Blue Granite, the CBRE data was the most favorable in Greenville, and the utility therefore opted to locate its new headquarters there, renting prime office space downtown at the historic Family Court building on South Main Street.

The yearly rent for Blue Granite's new Greenville office space was $73,665—almost triple the $27,260 annual cost of office space in West Columbia. Moreover, the $73,665 annual rent in Greenville's prime real estate market stood in stark contrast to the $11,174 in yearly, combined rental expenses for Blue Granite's other five locations throughout the state.[10] Equally perplexing, the new Greenville

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[9] CBRE stands for Coldwell Banker Richard Ellis Group, Inc., an American commercial real estate services and investment firm.

[10] These locations included an office and warehouse in Rock Hill, an office in

office required extensive upgrades to make it a functional office space, including things such as new drywall, paint, telephone ports, wiring, and office furniture. While Blue Granite repeatedly claimed that its new office was "not luxurious or gold-plated," the upfit expenses totaled approximately $500,000 for an office space intended to house only ten employees.

At the PSC hearing, ORS contested the Greenville office upfit and rental expenses. As to the $500,000 in upfit expenses, ORS contended the amount was unreasonably incurred by Blue Granite. In particular, ORS pointed to a letter from the utility to its customers explaining the name change from CWS to Blue Granite. In that letter, Blue Granite stated it was "refreshing [its] brand *at no cost to [its] customers* to reflect [its] legacy and to showcase [its] new direction." (Emphasis added.) ORS explained:

> [Blue Granite] reasons that legacy brand issues diminished the Company's ability to acquire talented workers in the [West] Columbia market. The Company asserts its rebranding and relocation were aimed to alleviate the Company's talent acquisition issues. The Company represented to its customers that the refreshing of the Company's brand would be at no cost to them and is now contradicting that representation by attempting to pass on to customers relocation and office upgrade costs that were part of its rebranding.
>
> The long-term issues that caused the Company's brand to hinder talent acquisition in the [West] Columbia area [are] not the fault of customers. Nor is the former location of the Company's headquarters in [West] Columbia the cause of any talent acquisition problems. Such problems were caused by the Company, not its location.

ORS pointed out the new office space "contain[ed] many amenities for employees such as the premium location in a historic building, luxury office finishes and appointments, high-end office furniture, large communal spaces, and an overall large footprint relative to the small number of employees." Thus, ORS concluded,

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Anderson, a Water Service Corporation public storage unit, and a Water Service Corporation office.

the upfit expenses were unreasonable and "difficult to explain to customers that struggle[d] to pay their water and sewer bills."

Likewise, as to the rental expenses, ORS argued (1) the rental expenses were for a "premium" space in the most expensive area of town, rather than a merely functional space in a more modestly-priced area; and (2) the PSC should "thoroughly review[]" the costs associated with "office relocation and office rent . . . to ensure [Blue Granite] took steps to minimize cost[s]" to the ratepayers.

Additionally, ORS took issue with the rental expenses due to inconsistencies in the CBRE data relied upon by Blue Granite in selecting Greenville for its new headquarters location, rather than Columbia or West Columbia. In particular, CBRE scores are inverted, such that a score above 100 indicates a market with overall lower costs than the national average. ORS stated the CBRE scores provided by Blue Granite for all three prospective locations were above 100, with Greenville scoring 105, Columbia scoring 103, and West Columbia scoring 101. Critically, however, in generating the CBRE scores, Blue Granite used different criteria for Greenville and Columbia as compared to West Columbia. Specifically, Blue Granite "used a 20-mile radius to evaluate market metrics for Columbia and Greenville, whereas [it] used a 10-mile radius for West Columbia." Blue Granite made no attempt to explain why it used different criteria to evaluate the labor market around West Columbia, stating only it "no longer had access to the CBRE database." ORS admitted it would be difficult to say how the different radii would impact the scores, although the smaller 10-mile radius excluded the potential workforces in Blythewood, Chapin, and portions of Lexington, among other municipalities that would have been included if Blue Granite had used a 20-mile radius as it did with Greenville and Columbia. Likewise, ORS stated "that the 2- to 4- point difference in [s]cores d[id] not justify the high cost to relocate [] and upfit the Company's new office [or pass those costs along to Blue Granite's] customers."

Finally, ORS pointed out the incongruity of locating the new office in Greenville, where only 2.6% of Blue Granite's customers lived, rather than in Lexington County or York County, where 43% and 38.6% of Blue Granite's customers lived, respectively. Moreover, apparently, Blue Granite did not even evaluate the CBRE scores for Rock Hill or Anderson, despite already having offices in those locations. Likewise, even in comparing only Greenville, Columbia, and West Columbia, Blue Granite witnesses could not say whether the utility had considered or compared office space prices in the three locations, or only labor statistics.

Ultimately, the PSC concluded that "the Greenville move and its resulting rent and upfit costs are directly and ca[us]ally related to Blue Granite rebranding itself," not mere talent acquisition issues. The PSC cited the testimony of a Blue Granite witness who stated "Blue Granite's relocation and lease of Greenville office space was due to legacy brand issues which were caused by the Company itself," and "attracting talent in the Columbia market has been extremely difficult due to the legacy brand issues in that market." Thus, the PSC found the upfit expenses were unreasonably incurred, stating "Blue Granite's customers should not have to pay the cost to upfit the Greenville office, given the move was necessitated by legacy brand problems the Company created."

The PSC additionally disallowed all rental expenses for the Greenville office ($73,665), explaining those expenses also stemmed from Blue Granite's legacy brand issues. The PSC therefore concluded the rental expenses were unreasonable and denied them in their entirety.

b. Analysis

Blue Granite now argues the PSC's disallowance of upfit and rental expenses was arbitrary and capricious and unsupported by substantial evidence in the record. Regarding the upfit expenses, we disagree. However, we agree the complete disallowance of rental expenses amounts to reversible error.

As to the upfit expenses, there is a wealth of evidence in the record supporting the PSC's finding that the headquarters relocation was caused by Blue Granite's self-created "legacy brand issues," and not merely by its employee-retention problems. In fact, as quoted in the PSC's order, Blue Granite itself conceded that its employee-retention problems were caused, at least in part, by the utility's poor reputation in the community. We therefore hold the PSC's finding—that "Blue Granite's customers should not have to pay the cost to upfit the Greenville office, given the move was necessitated by legacy brand problems the Company created"—is supported by substantial evidence.

Similarly, we find the PSC's decision to deny the upfit costs was not arbitrary or capricious, and that the upfit costs were unreasonably incurred. First, Blue Granite promised its customers its rebranding would come at no cost to them. Because there is substantial evidence in the record tending to show the rebranding required moving the utility's headquarters, the upfit costs associated with that headquarters relocation also directly stemmed from the rebranding. The PSC's decision to hold

Blue Granite to its promise not to pass along rebranding costs to its customers was in no way whimsical or irrational.

Second, we find the amount of upfit costs incurred was entirely unreasonable, particularly for a small utility such as Blue Granite. Blue Granite chose to move to a historic building that required extensive modernization to turn it into a functional office space. The utility produced no evidence that it attempted to evaluate the cost of other potential office locations in Greenville, much less that other potential locations would have required similar upfit expenses.[11] It is, of course, not unreasonable for Blue Granite to want to provide its executives opulent offices as a job perk. However, as the PSC found, it is unacceptable to pass the costs associated with that opulence on to ratepayers, who receive no quantifiable benefit from an expenditure of that type. We therefore find the PSC's decision to deny the upfit expenses was not arbitrary or capricious.

As to the rental expenses, we first express our concern that, upon realizing it might be necessary to relocate the utility's headquarters, Blue Granite's management made the decision to rent some of the highest-priced real estate in Greenville—and did so after trying to disassociate itself from the poor public perception of CWS and its business practices. The decision to rebrand the company while simultaneously moving into an unnecessarily-expensive office location is yet another example of Blue Granite self-inflicting wounds to its reputation and requesting its customers reimburse it for the associated expense. We find there is overwhelming evidence in the record to support the PSC's refusal to allow the full amount of the rental expenses requested, as the rental expenses—like the upfit costs—stemmed directly from Blue Granite's poor reputation and subsequent effort to rebrand itself.

However, notwithstanding Blue Granite's regrettable reputation in the community, we find it was arbitrary and capricious for the PSC to entirely deny *all* rental expenses. While the decision of the PSC to disallow the requested $73,665 for rental expenses is supported by the evidence, Blue Granite is entitled to collect from ratepayers some reasonable amount for its headquarters office rental. After

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[11] Likewise, it is unclear from the record why, for example, the office furniture from the West Columbia office could not be reused in the new Greenville office, rather than buying new "high-end office furniture."

all, neither ORS nor the Department object to allowing Blue Granite some sort of reasonable rental rate.

We therefore reverse the PSC's decision to deny all rental expenses for the Greenville office and remand for additional proceedings to determine what a reasonable amount of yearly office rental expenses would be. The burden remains on Blue Granite to establish a reasonable rental allowance. Should Blue Granite continue to rely on CBRE data, Blue Granite must produce comparable CBRE data for Greenville, Columbia, West Columbia, Rock Hill, and Anderson—the three original, prospective locations plus the locations of its two existing offices—including using an identical geographical radii for each city. Moreover, it is incumbent upon Blue Granite to present evidence of reasonable rental amounts for similarly-sized offices, regardless of their location in Greenville or throughout the state. We find it highly likely there are a number of alternate office locations—in Greenville and elsewhere—that would demand significantly less in yearly rental expenses than a historic building on South Main Street.[12] Such a consideration is crucial for a utility that serves the public, and for whom the public ordinarily is required to pay for office expenses, rent or otherwise.

We therefore affirm the PSC's disallowance of upfit expenses, but reverse and remand the PSC's disallowance of office rental expenses. On remand, the PSC shall determine a reasonable rental allowance for Blue Granite's headquarters.

VI.

Stay of Bond

a. Underlying Facts

Following the PSC's denial of Blue Granite's motion for reconsideration, the utility filed a motion pursuant to section 58-5-240(D) of the South Carolina Code (2015),

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[12] We find this to be particularly true given that the Greenville office rental expenses are six to seven times the amount of rental expenses for all of Blue Granite's other office locations combined. Additionally, although not directly relevant to the rental expenses issue, it seems equally likely that many alternate office locations in Greenville would have required significantly less in upfit costs as well, demonstrating again that the PSC's decision to deny the upfit expenses was not arbitrary or capricious.

which provides, in relevant part, that if the PSC issues a ruling,

> and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule [(i.e., its original application to the PSC for ratemaking)] into effect under bond only during the appeal and until final disposition of the case. *Such bond must be in a reasonable amount approved by the Commission*, with sureties approved by the Commission, conditioned upon the refund . . . to the persons . . . entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; *or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested*. . . .

(Emphasis added.) Via directive—rather than formal, written order—the PSC unanimously voted to approve Blue Granite's proposed appellate bond.

Shortly thereafter, the Department filed a letter with the PSC seeking clarification as to whether Blue Granite was permitted to implement the rates under bond the following month, as the utility had informed its customers it intended to do. Specifically, the Department was concerned the bond had only been approved via directive, rather than a written order, and therefore the decision might not be final. The Department also raised concerns about the impact the new rates-under-bond would have on Blue Granite's customers during the coronavirus pandemic, and offered alternatives to the immediate implementation of the bond.

The PSC subsequently issued an order staying Blue Granite's ability to implement the higher rates under bond until further notice and scheduled oral arguments on the matter. Three days before the arguments, Blue Granite filed a Conditional Petition for Approval of an Accounting Order. In that petition, Blue Granite stated denying it the ability to implement higher rates under bond would constitute an unconstitutional taking. However, according to Blue Granite,

> *There are two possible remedies to avoid an unconstitutional taking*. The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. *An alternative remedy is to grant the instant deferral request*.

(Emphasis added.) More specifically, Blue Granite proposed the PSC allow the utility to create a deferred account for a regulatory asset that would increase at a rate of $5,970 per day—the difference between the rates approved in the PSC's order on reconsideration and the rates originally requested in Blue Granite's application. Then, assuming Blue Granite prevailed on appeal, it would be able to recover the amount in the deferred account in a future ratemaking case.

Following oral arguments, the PSC maintained the stay on Blue Granite's ability to implement the higher rates under bond, but granted the utility's alternative request for the creation of a deferred account. Blue Granite moved for reconsideration, arguing:

> Establishment of the regulatory asset authorized by the Commission in the August 31, 2020 directive is an inadequate remedy. . . . [U]nlike implementing rates under bond, future recovery of a regulatory asset is not guaranteed, and it is therefore not a substitute for implementing rates under bond. . . . While the regulatory asset was necessary to protect the Company's potential ability to recover the revenues to which it is entitled, there is no adequate substitute for the Commission issuing final approval of the bond and permitting the Company to implement rates under bond.

The PSC denied the motion for reconsideration, noting "Blue Granite offered the accounting order as a[n] alternative to putting rates in effect under bond, while at the same time, waiving any objection to the continuing Stay."

b. Analysis

Blue Granite now raises a number of arguments as to why the PSC's decision to stay the bond was improper. However, we find the issue is moot and, therefore, decline to address the merits of the utility's arguments.

Blue Granite proposed two remedies that it originally contended would prevent an unconstitutional taking: (1) implement the rates under bond, or (2) grant the deferred accounting request. The PSC chose the second option. Blue Granite therefore received the relief it requested, and there is nothing further for the Court to decide as to the propriety of one remedy over the other. *See, e.g.*, *State v. Parris*, 387 S.C. 460, 465, 466, 692 S.E.2d 207, 209, 210 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide." (citing *State v. Sinclair*, 275 S.C. 608, 610, 274

S.E.2d 411, 412 (1981))). The fact that Blue Granite has now changed its mind and decided the deferred accounting option is an "inadequate remedy" is of no consequence. *Cf. McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012) ("A party may not argue one ground at trial and an alternate ground on appeal." (citation omitted)). We therefore affirm the PSC's decision as to this issue.

VII.

The Victory Tweet

As a final matter, Blue Granite discusses a social media post on the PSC's official Twitter account. Specifically, following the issuance of the PSC's final order, the Department posted a "victory tweet" on Twitter, sharing its excitement that Blue Granite failed to prevail on its request for a substantial rate increase, and that the decision was a win for consumers during the midst of the coronavirus pandemic. A gloating victory tweet by a prevailing party may be unbecoming, but it is understandable. Regrettably, the PSC then retweeted the victory tweet on its own official account, reveling in the defeat of Blue Granite's requested rate increase. As a quasi-judicial body, the PSC's retweet was inappropriate. The PSC must not only be fair and impartial, it must be diligent in its duty to avoid the appearance of impropriety. While we are confident that no commissioner of the PSC sanctioned the publication of the victory tweet, we trust the PSC will give more care and consideration to its social media posts in the future. Regardless, we have thoroughly reviewed the record and find the PSC's extensive questioning and diligence throughout Blue Granite's ratemaking proceeding reflects its commitment to fairly and impartially decide this application for a rate increase. When we consider the conscientious manner in which the PSC handled this complicated proceeding, together with its proper and detailed order, we commend the PSC. We therefore do not find the retweet a basis to reverse the PSC's entire final decision.

VIII.

In conclusion, we affirm the PSC's decision in part and reverse in part. Specifically, we affirm the PSC's decisions as to the ROE, storm costs, Greenville office upfit expenses, and stay of an appellate bond.[13] We reverse the PSC's

[13] While Blue Granite also initially raised a question as to the PSC's treatment of the allowance for non-revenue water, the utility conceded the issue at oral argument. We therefore affirm the PSC's decision as to Blue Granite's non-

decision to deny all rental expenses for Blue Granite's new headquarters and remand to the agency for further consideration of what a reasonable rental allowance should be.[14]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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revenue water allowance.

[14] Blue Granite challenges three additional issues that were not contested by either respondent before the PSC or on appeal: whether the PSC erred in (1) amortizing its annual water and wastewater service expenses that it purchased in the test year from third parties; (2) disallowing recovery of legal expenses incurred in prior cases filed and then later voluntarily withdrawn by Blue Granite; and (3) disallowing recovery of legal expenses related to administrative law court proceedings dealing with Blue Granite's I-20 system. The PSC's order does not contain sufficient findings of fact or analysis to allow us to evaluate the merits of these issues on appeal. As a result, we reverse and remand these issues as well.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Calvin Felder, Claimant,

v.

Central Masonry Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co./Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are the Respondents.

Appellate Case No. 2018-000939

Appeal From The Workers' Compensation Commission

Opinion No. 5852
Heard April 15, 2021 – Filed September 1, 2021

AFFIRMED

George D. Gallagher, of Speed, Seta, Martin, Trivett & Stubley, LLC, of Columbia, for Appellant.

Jonathan R. Hendrix, of Hendrix & Steigner, of West Columbia, for Respondent Central Masonry.

Lisa C. Glover, of the South Carolina State Accident Fund, for Respondent South Carolina Uninsured Employers Fund.

HEWITT, J.: This case is about who has to pay a workers' compensation claim: AmGuard Insurance Co. or the South Carolina Uninsured Employers Fund. The Workers' Compensation Commission held AmGuard was liable because a phone conversation involving AmGuard misled the injured worker's employer into believing AmGuard would add South Carolina coverage to the employer's workers' compensation policy.

We affirm. This case is controlled by the Commission's findings of fact. The record supports the key findings, and those findings in turn support the Commission's ruling that the phone call caused the employer to mistakenly (but reasonably) believe it had coverage.

FACTS

AmGuard issued a workers' compensation insurance policy to Central Masonry—a Georgia-based company. The policy covered Central's operations in Georgia and North Carolina.

In August 2015, Central had an insurance broker contact AmGuard about getting workers' compensation coverage in South Carolina. Central was scheduled to start a series of jobs in South Carolina and needed proof of coverage.

The request led to a back-and-forth that played out over several weeks. The broker took the pertinent information from Central, submitted the request that AmGuard add coverage, and told Central everything should be in order. The broker also issued Central a certificate for proof of coverage, but about two weeks later, AmGuard called the broker for more information.

AmGuard began the phone call by explaining South Carolina would be added to Central's policy, but then asked how Central's $10,000 in expected South Carolina payroll should be allocated between various jobs. After the broker responded that Central would be using subcontractors for three of the four jobs listed on Central's coverage request, the AmGuard representative advised that Central would not need coverage in South Carolina unless it had payroll in South Carolina.

The conversation was stilted and confusing. No further mention was made of the fourth job on Central's coverage request—the one that indisputably had $10,000 in expected payroll. The broker explained Central would be hiring subcontractors to perform much of the work but wanted to add South Carolina coverage because Central had been "hit" in the past. The call closed with AmGuard explaining it would add a "waiver" to Central's policy because an "excluded officer" would be overseeing the work on the South Carolina jobs. The term "excluded officer" appears to be a reference to the rule that a business owner may elect to exclude himself from the business's workers' compensation coverage. *See* S.C. Code Ann. § 42-1-130 (2015). Still, the phone call ended as it began: with AmGuard's statement to the broker that something was being added to Central's policy.

About three months later—in December 2015—Calvin Felder broke his wrist while working for Central at a job in South Carolina. Central notified its insurance broker of the incident.

It soon became apparent that AmGuard had not added South Carolina to Central's policy months before. The reason given for this was that Central had supposedly reported to its broker (and the broker had supposedly relayed to AmGuard) that there would be no South Carolina payroll on the jobs.

As a factual matter, that reason was mistaken. The record is clear that Central told the broker there was $10,000 of expected payroll on a job in Charleston. Also, the phone call between the broker and AmGuard began with an acknowledgment that Central expected to have around $10,000 in South Carolina payroll.

The single commissioner found Central and the Uninsured Employers Fund were liable for the claim. That decision was focused on agency—the single commissioner found the broker was not AmGuard's agent and had no authority to bind AmGuard by issuing Central a certificate of insurance.

The appellate panel reversed and held AmGuard was estopped from denying coverage. The panel focused on the acknowledgment in the phone call between AmGuard and the broker that Central would have some South Carolina payroll. The panel also noted AmGuard began the phone call by assuring the broker that South Carolina was being added to Central's policy, that Central did nothing wrong, and that Central was unaware until after Mr. Felder's accident that AmGuard had not added South Carolina coverage to its policy. This became the Commission's final

decision per the Workers' Compensation Act. *See* S.C. Code Ann. § 42-17-60 (2015).

ISSUES

1. Whether the Commission erred by finding AmGuard was liable when the broker was not AmGuard's agent.

2. Whether the Commission erred by finding the call between AmGuard and the broker contained a misleading representation regarding coverage.

3. Whether the Commission erred by not finding the doctrine of unclean hands barred Central from securing relief.

STANDARD OF REVIEW

The Administrative Procedures Act supplies the standard of review for workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132-35, 276 S.E.2d 304, 305-06 (1981). Under the APA, the Commission's findings of fact are binding unless they are clearly erroneous in the view of the reliable, probative, and substantial evidence in the record. *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2020).

ESTOPPEL/MISLEADING REPRESENTATION

We begin with this issue because we find it controls. The Commission's appellate panel found: the phone call between AmGuard and the broker acknowledged Central would have at least some direct employees in South Carolina, AmGuard began the conversation by assuring the broker that South Carolina would be added to the policy, and AmGuard's statements to the broker misled Central. The Commission's impressions of the phone call are questions of fact. We cannot say they are clearly erroneous in light of the record.

Estoppel applies if an insurer has misled the insured into believing a particular risk is within an insurance policy's coverage. *Standard Fire Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990). The elements of estoppel are familiar: ignorance of the truth by the party claiming estoppel, misleading representations or conduct by the party to be estopped, reliance by the party claiming estoppel, and a prejudicial change in position as the result of reliance. *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 552, 148 S.E.2d 369, 371 (1966).

It is not difficult to map the Commission's findings on these elements. The Commission found Central was ignorant of the truth (that AmGuard had not added coverage) and AmGuard's statements to the broker misled Central. Reliance and prejudice are similarly straightforward—Central hired Mr. Felder believing it had workers' compensation coverage and did not seek coverage elsewhere.

This case admittedly has some differences from other cases involving coverage-by-estoppel. In *Pitts*, for example, estoppel applied because the insurance company continued accepting and retaining premiums long after a certain coverage expired. 247 S.C. at 552-53, 148 S.E.2d at 371-72. Central apparently did not pay any increased premium here—a point AmGuard understandably employs in support of its argument. And in *Spencer v. Republic National Life Insurance Co.*, 243 S.C. 317, 133 S.E.2d 826 (1963), the misleading representation was arguably more explicit. There, an employee of the insurance company promised the insured that there would be no gap or delay in coverage if the insured elected to switch insurance providers. *Id*. at 324, 133 S.E.2d at 829.

We do not see these distinctions as controlling. The Commission believed the critical takeaway from the phone call was AmGuard erroneously told the broker—and (by extension) Central—that Central was getting some sort of workers' compensation coverage for South Carolina or did not need it. As mentioned above, the phone call began with AmGuard assuring the broker that it was adding "waivers" for South Carolina, and the call ended the same way; the second time, with reference to waivers for excluded officers. Even as to the second statement, the only way we are able to make sense of it is to read it as a promise that something South Carolina related was being added to Central's coverage. We are not alone in this confusion. According to the record, the parties were puzzled by what this statement meant. Thus, as we see it, this case tracks with the insurer's promise of coverage in *Spencer*.

OTHER ISSUES

AmGuard's agency argument focuses on a purported lack of authority by the broker to bind AmGuard and issue a certificate that Central had workers' compensation coverage. AmGuard insists the broker was Central's agent, not AmGuard's agent, and that the broker had no authority to issue a certificate unless a policy providing coverage was in place.

We respectfully reject this argument. As we recounted in our discussion of estoppel, the Commission found the broker informed AmGuard that Central would have

payroll in South Carolina. In response, AmGuard told the broker something was being added to Central's coverage even though Central might not need coverage. The Commission's decision was driven by estoppel, not agency. *Cf. Id.* at 321-22, 133 S.E.2d at 828 (holding an argument about parole testimony was irrelevant because oral testimony was not admitted to vary the terms of a written contract, but was admitted on the issue of estoppel).

AmGuard also argues that the broker has unclean hands and that the broker's unclean hands in turn make Central's hands dirty. This argument is not preserved. An appellant may only argue grounds for reversal that were argued below. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422-23, 526 S.E.2d 716, 724 (2000). There is no question AmGuard consistently argued the broker bore the lion's share of the fault, but AmGuard never argued the broker had unclean hands preventing Central from claiming estoppel.

AFFIRMED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shelby Harper Taylor, Appellant.

Appellate Case No. 2018-000341

Appeal From Horry County
Robert E. Hood, Circuit Court Judge

Opinion No. 5853
Submitted March 1, 2021 – Filed September 1, 2021

AFFIRMED

John H. Blume, III, of Elizabeth Franklin-Best, P.C., and Emily C. Paavola, of Death Penalty Resource & Defense Center, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

HEWITT, J.: The question in this case is whether "inferred malice"—the concept that a jury may deduce malice from a defendant's actions—is inconsistent with the specific intent to kill required for attempted murder. We hold it is not. After all, actions can speak louder than words.

Sometimes the jury is left with nothing to consider except the defendant's actions. That was the case here. Shelby Harper Taylor placed her newborn baby in a trash bag and left the bag in a dumpster. The jury was charged that it could not convict her unless it found she intended to kill the baby and that the difference between "express" and "implied" malice related to whether malice was proved by words, preparation, or by inferring malice from other facts. This was proper under the law. Thus, we affirm.

FACTS

This case's background is heartbreaking. Taylor gave birth to a baby girl in the bathroom of her apartment during the early hours one morning in April 2015. She was in her early twenties and had successfully hidden the pregnancy from her family. This was Taylor's second child.

At the time, she lived in the apartment with her husband and their sixteen-month-old daughter. After giving birth, Taylor placed the newborn inside a trash bag, tied the bag, took the bag downstairs, and placed it in the apartment's shared trash dumpster. Taylor also cleaned the bathroom.

Taylor's husband and toddler slept through all of this. Taylor proceeded with her day as though nothing had happened: she took a nap, took her toddler for a well checkup, and visited her mother.

Early that afternoon, two boys from another unit in the apartment complex were taking out the trash and heard what they believed was an animal in the dumpster. When they investigated, the boys saw the newborn's face pressed against the side of the trash bag and rescued the baby.

A receipt inside the bag led police to a local restaurant. The police got the restaurant's internal surveillance video, isolated the picture of a person of interest, and sent the image to local media.

Taylor went to the police station after she learned her picture was on the news. Taylor denied knowing anything about the baby or how the baby came to be in a bag that indisputably contained her trash. Police did not believe her denial, nor did Taylor's husband, whom police initially questioned separately.

Taylor confessed after her husband sat with police while they interviewed her a second time. She was then taken to the hospital where a doctor confirmed she had recently given birth. Taylor also spoke with a psychologist and a social worker. She told them she was not the victim of any domestic abuse and that she had hidden the pregnancy from her family.

The basic facts we have recited were not disputed at trial. The sole issue in court was Taylor's mental state and her intent. Taylor claimed she did not intend to kill the newborn when she discarded the child. She said the event occurred during a state of Transient Peripartum Psychosis. In other words, she claimed this happened while she was temporarily delusional.

Taylor supported this argument with testimony from an expert who opined Taylor experienced impermanent psychosis in the months leading up to and immediately after the child's birth. The expert explained Taylor told him she was the victim of emotional and physical domestic abuse, she was stressed because her family already did not support her decision to have the couple's first child, and the couple was in a difficult financial situation. The expert explained these things (and others) were consistent with a finding of Transient Peripartum Psychosis.

The State argued the only logical inference from the evidence was that Taylor intended to kill the child. The State believed this was the most obvious explanation for placing the newborn in a trash bag and dumpster rather than dropping the baby at a hospital or fire station, and this was also the best way to understand Taylor's hiding the pregnancy from her family and not seeking prenatal care. The State believed Taylor's theory of psychosis was refuted by Taylor's months-long decision to conceal her pregnancy, by Taylor's cover-up of the birth, and by the fact that Taylor resumed normal daily activities immediately following the birth.

The case was tried in February 2018. This was shortly after our supreme court's October 2017 decision in *State v. King*, holding attempted murder is a specific intent crime. 422 S.C. 47, 63–64, 810 S.E.2d 18, 26–27 (2017). *King* was a central feature of the discussions concerning the jury charges.

The jury convicted Taylor of attempted murder, and the trial court sentenced her to twenty-five years' imprisonment. This appeal followed.

ISSUE

Whether the trial court erred in instructing the jury on inferred malice.

STANDARD OF REVIEW

In criminal cases, the appellate court sits solely to review errors of law. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009).

LAW/ANALYSIS

Attempted murder was codified as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished several common law assault and battery offenses including assault and battery with intent to kill, also known as ABWIK. *See* Act No. 273, 2010 S.C. Acts 1947–49. It replaced these with new, codified offenses including the crime of attempted murder. *Id*. at 1948. In pertinent part, the attempted murder statute provides that "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).

King held the attempted murder statute "[wa]s not [simply] a codification of the offense of ABWIK[, instead] the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element" that was not required for ABWIK. 422 S.C. at 63–64, 810 S.E.2d 18, 26–27.

Taylor's argument about implied or inferred malice is drawn from a footnote in *King*. In footnote five, *King* suggested the General Assembly re-evaluate the statute's language because "the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime." *Id*. at 64 n.5, 810 S.E.2d at 27 n.5. Taylor argues this language makes implied malice out-of-bounds. We disagree.

When our supreme court spoke of implied malice in *King*, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts. *King* cited *Keys v. State*, 766 P.2d 270 (Nev. 1988), for its holding that specific intent to kill is an essential element of attempted murder. *King*, 422 S.C. at 56–57, 810 S.E.2d at 23. *Keys* distinguished attempted murder from murder by defining "express malice" as a specific intent to kill and said "express malice" was "malice in fact." 766 P.2d at 272. "Implied malice," on the other hand, consisted of a "general malignant recklessness" rather than the specific intent to kill. *Id*. at

273. As *Keys* and *King* explain, malignant recklessness is a sufficient criminal intent for murder but not for attempted murder because the attempted murder statute explicitly requires "intent to kill." Recklessness is not enough.

If "implied malice" is used to describe mere "malignant recklessness," *King* plainly holds implied malice is inconsistent with and falls short of the bar for attempted murder. Even so (and critically), nothing in *Keys*, *King*, or any other case prevents a jury from being charged that it can look at a defendant's actions and imply or infer from those actions that the defendant "in fact" had the specific intent to kill.

Here, the jury charges repeatedly emphasized that the jury could not convict Taylor without finding she specifically intended to kill the child. The judge gave the jury a general charge on "criminal intent." Then, the judge charged the language of the attempted murder statute. Next, the judge charged the jury on malice, but excluded any language about negligence or recklessness. Finally, the judge charged that attempted murder was a specific intent crime.

The judge charged the jury that malice could be expressed or inferred—but that those terms referred to the whether malice was proven by direct evidence or by the jury's inferences from other facts. The judge charged the jury that malice means hatred or ill will and that it could be inferred from conduct that shows a total disregard for human life. He also charged that specific intent to kill can be shown by acts and conduct from which someone would naturally and reasonably infer intent and that specific intent could be inferred from voluntary and willful actions that naturally tend to destroy another's life.

Abundant authorities support using inferences to find specific intent. *See, e.g., State v. Raglin*, 699 N.E.2d 482, 488 (Ohio 1998); *Williams v. Maggio*, 695 F.2d 119, 122 (5th Cir. 1983); 4 *Wharton's Criminal Law* § 695 (15th ed.); 41 C.J.S. *Homicide* § 283. Here, the judge charged malice in a way that complied with *King*, using language from both *King* and *Keys*.

To be fair, the first section of the general malice charge included language common in malice charges that malice includes intentionally doing a wrongful act without just cause or excuse, with an intent to inflict an injury, or "under circumstances that the law will infer an evil intent." Even so, there were no charges regarding the circumstances under which *the law* may imply malice. This was the only reference to malice implied by operation of law. The judge gave the jury multiple instructions that it could not find Taylor guilty unless it found she intended to kill the child. Thus,

when taken in its entirety, we believe the charge was correct. *See Simmons*, 384 S.C. at 178, 682 S.E.2d at 36 ("In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial."); *see also State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002) ("A jury charge is correct if it contains the correct definition of the law when read as a whole.").

Taylor contends *State v. Shands* supports her argument that implied malice instructions do not belong in an attempted murder case. 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). There, the relevant issue was whether the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. *Id*. at 128, 817 S.E.2d at 535–36. This court wrote "malice can never be implied in an attempted murder case," and that attempted murder requires the State to prove the defendant "acted with express malice *and* the specific intent to kill." *Id*. at 130–31, 817 S.E.2d at 536–37.

As already noted, we understand "implied malice" as prohibited in *King* to mean malice implied by the law, not malice found by the jury based on the circumstances. Again, neither *King* nor any other case holds an intent to kill cannot be shown through circumstantial evidence, as Taylor seems to insist. *Shands* turned on this court's analysis of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), which has since been overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (holding the charge that malice may be inferred from use of a deadly weapon is improper in all instances). Critically, no deadly weapon instruction was given here.

Finally, Taylor argues the court should not have allowed the solicitor to suggest during closing argument that the jury could find malice based upon Taylor's attempts to cover up the crime. The solicitor told the jury it could infer malice from Taylor's effort to cover up a crime and her intentional denials to police in the face of the evidence against her. Nothing suggests this argument was improper. Indeed, our supreme court has emphasized that parties are free to argue the existence or nonexistence of malice based on the evidence. *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582–83.

AFFIRMED.[1]

LOCKEMY, C.J., and HUFF, J., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey Lance Cruce, Respondent,

v.

Berkeley County School District, Appellant.

Appellate Case No. 2018-000791

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5854
Heard February 2, 2021 – Filed September 1, 2021

REVERSED

E. Brandon Gaskins, of Moore & Van Allen, PLLC, and Joshua Steven Whitley, of Smyth Whitley, LLC, both of Charleston; Andrew F. Lindemann, of Lindemann & Davis, P.A., and Richard J. Morgan, of Burr & Forman LLP, both of Columbia, all for Appellant.

Lucy Clark Sanders and Nancy Bloodgood, both of Bloodgood & Sanders, LLC, of Mount Pleasant, for Respondent.

KONDUROS, J.: Berkeley County School District (the District) appeals the circuit court's denial of its motions for a directed verdict and a judgment notwithstanding the verdict (JNOV) on Jeffrey Lance Cruce's defamation cause of

action. The District contends it had absolute sovereign immunity because Cruce qualified as either a public official or a limited public figure. It also maintains Cruce failed to prove each element of defamation. We reverse.

FACTS/PROCEDURAL HISTORY

Cruce was a high school teacher in South Carolina for twenty-eight years, an athletic director in Berkeley County at various high schools[1] for a total of twenty-one years, and head football coach at high schools for about twenty years. He began serving as head football coach, athletic director, and teacher at Berkeley High School (the School) in 2011. In December 2015, the District removed him as athletic director and football coach. The District reassigned him to a middle school as a guidance counselor starting in January of 2016. Cruce left the District and retired at the completion of the school year.

During his tenure as head football coach at the School, Cruce had one winning season and several losing seasons, including a three-wins-and-seven-losses record during his final football season. That season, Cruce used an analytics-based strategy in coaching the team.[2]

As athletic director, Cruce was certified to maintain student athlete eligibility files (eligibility files) in Berkeley County, and the eligibility files were generally audited three times a year. A few months before he was removed as athletic director, the high school league conducted an audit and determined everything was proper.

On January 7, 2016, Chris Stevens, Berkeley High School's head athletic trainer, sent an email to the School's athletic coaches—paid and volunteer—as well as others involved in the athletic department and some administrators at the School, totaling approximately forty-five recipients. The subject of the email was "Student Athlete Eligibility and Medical Files." The email stated:

> Today, January 7th 2016, myself, [C]oach Ward, and Mr. Gallus went into the athletic director[']s office to check

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[1] The county includes seven high schools.

[2] Cruce and the District differ as to the focus of his strategy. Cruce termed it as a "less-hitting philosophy." The District referred to it as a "no-punting" philosophy.

on the status of the student files left by our previous athletic director. After spending some time looking through files it has come to my attention that there could be some documents that could be misplaced and others that are out of order. From a liability stand point with competing sports and athletes it is necessary that all of the files be present to safeguard the athletes as well as to maintain the proper care for those athletes if something were to happen.

I will be in the [athletic director's] office during the next few day[s] to make sure the correct files are in place for competing athletes and those weightlifting after school to make sure EVERY child has the correct paperwork on file.

I would ask if you have athletes competing and/or conditioning at the present time, this includes weightlifting, that you send me a copy of that roster ASAP so that I can check your student-athletes off the "no-fly" list. ALL students MUST have the following files in order to participate in scholastic sports:

- Risk Acknowledgment and Consent to Participate form
- Pre-participation Physical Examination form (signed by a doctor)
- Proper understanding of HIPAA and FERPA rights
- Emergency Insurance Information and Consent to Treat form
- ANY special accommodations such as asthma, allergies etc. must have a written Doctor's note filed and must have necessary treatment (Inhaler, Epi-pen) present at all times.
- Copies of Birth Certificate and Social Security Cards.

I will update everyone again next week once everything has been checked off. Thank you in advance for your cooperation.

In 2016, Cruce filed an action against the District for wrongful termination and defamation. As to the defamation cause of action, Cruce alleged the District's agents, while acting within the scope of their authority, made false and defamatory statements about his "fitness for his profession to employees, students, volunteers, potential employers, and members of the community" "with conscious indifference to and complete disregard of the truth of their statements and the effect that the false statements would have on [him] and his career." Cruce asserted the statements were plain in meaning and constituted defamation per se because they stated he was unfit for his profession. He further contended the statements were made with common law malice. The District answered, raising several defenses including that the South Carolina Tort Claims Act barred the claims in whole or in part. The District asserted because Cruce could not show actual malice, his claims were barred because he was "a public official, [a] limited purpose public official, and/or any complained-of speech was on a matter of public concern."

At trial, Cruce testified Stevens was not certified to handle student athlete eligibility files and did not know what documents had to be included in the files. Cruce indicated only athletic directors are certified to maintain the athlete eligibility files. Cruce stated only head coaches were allowed to review eligibility files and most of the forty-five email recipients were not head coaches and thus those recipients did not need to know information about eligibility files. Stevens testified his job was to take care of athletic injuries and illnesses; he indicated he was not an athletic director. He agreed he was not certified to maintain eligibility files. He provided that some of the recipients of the email were former coaches.

Cruce disputed the statement in the email that the files could be a liability because his files were usually audited three times a year and the last audit that occurred was only a few months before the email was written and was "clean." Cruce further testified the information contained in the email about what documents should be in the eligibility files was incorrect. Cruce provided, "You have to be certified to -- there are certain files -- as an athletic director, there's three things you've got to have on file. You've got to have a current physical; you've got to have a birth certificate; and you've got to have their grades on file." Cruce testified several forms the email specified as missing from the files were not missing for a variety of reasons: the risk acknowledgement and consent to participate form was attached to the physical itself; HIPPA and FERPA forms were not required to be in the file;

information about special accommodations for a student were written by the doctor on the physical form; and a social security card was not required to be in the file.

The principal was asked if the email was "talking about a former employee" and "talking about problems that have been found in his office," and he responded affirmatively to both questions.

Cruce and his principal's testimony at trial differed as to the focus of his coaching strategy for 2015. Cruce maintained it was a "less-hitting philosophy." He asserted that while not punting was part of the philosophy, it "has no bearing on what the philosophy is." When asked if "that philosophy involved use of statistics, number of plays that were run, yards that were gained," he responded, "It was driven by offensive productivity, yes, sir."

The principal testified:

> [Cruce] said, I'm going to be using analytics, because I -- there's one gentleman in Little Rock who does the no punting and does all this stuff, so I'm going to use analytics this year.
>
> And that's where he talked about earlier about telling me about the no-kick rule.
>
> When he said, no punting, it also meant no kicking extra points, no punting under any situation, 4th and 20 doesn't matter, and no kickoffs. So all of our kickoffs were -- basically were either muffs or short little kicks instead of deep kicks.
>
> And that's where that whole conversation kind of went down with our analytics, him explaining all of that. And that's why analytics was number one.

The District maintained Cruce sought out media attention due to his use of a no-punt philosophy. The District provided almost two hundred articles that mentioned the football team for the years Cruce was the coach and the following year. The District pointed to a few articles—one from Kansas City discussing the no-punt

strategy, the coach who created it, and other coaches who were using it as well as some local articles that mentioned the strategy in reporting on game outcomes or predictions for area football games during the 2015 season. Most of the articles were summaries of or predictions for area football games over the years Cruce coached at Berkeley High School; less than ten reference the no-punt strategy. Some of the articles are about the team the season following Cruce's departure and Cruce's lawsuit.

Cruce further testified:

> The no-punt philosophy, what you said -- the strategy of the no-punt philosophy, that wasn't the strategy. The guy in the paper in all -- everybody got enamored with the no punt. It was a philosophy based on a strategy with numbers involved and no punt was part of it. The no punt -- we punted that season.
>
> So when you assess a new philosophy, which I've done through my whole career, this philosophy worked. And everybody got enamored with the word no punt. We punted during the season. So as your philosophy takes shape, as a coach, you monitor and adjust.
>
> So there were times during the season that we did punt. So the writer of this particular article leaves out part of what was said in that, and that being that the -- putting your chips all in one spot was about the safety of the kids, about not hitting as much in practice, about taking full gear off on a Wednesday.
>
> . . . .
>
> I said it to the reporter and the reporter took liberties of what he wrote. I can't -- I can't make the reporter write everything that we talked about.

Cruce testified that as the football team's head coach, he had a Friday night radio spot one year early on at the School in 2011 or 2012. He provided that if there was

a game, such as basketball, baseball, or football, the coach for that team had access to media. He indicated:

> My teams got press coverage. I just happened to be the head coach, but they wrote about my team, not necessarily about me.
>
> . . . .
>
> I had opportunities to praise my kids and give stats that would promote my program and my kids, yes, sir, I did.
>
> . . . .
>
> Well, the old saying goes, the buck stops here, and if they were going to talk to anybody, they were going to talk to me. So they didn't talk to an assistant coach because there w[ere] no wins or losses by their names. It was always the head coach. So, yes, sir, most interviews you see in the paper will be from the head coach.

At the close of Cruce's case[3] and again at the close of all the evidence, the District moved for a directed verdict on several grounds, including sovereign immunity under the Tort Claims Act, section 15-78-60(17) of the South Carolina Code (2005). The District argued Cruce was a limited public figure, which required that he prove actual malice. The District also asserted no statement in Stevens's January 7, 2016 email was defamatory. The circuit court granted a directed verdict in the District's favor on the wrongful termination claim. The circuit court also granted a directed verdict to the District on the defamation claim based on the District's silence when it removed Cruce as head football coach and athletic director. However, the circuit court denied the District's directed verdict motion on the remaining defamation claim arising from the January 7, 2016 email. The circuit court found as a matter of law Cruce did not qualify as a limited public figure under defamation law.

[3] Due to timing issues, the circuit court continued the motions until after the District called its witness.

The jury found for Cruce and awarded him $200,000 in damages. The District moved for a JNOV, new trial absolute, or a new trial *nisi* remittitur. On March 29, 2018, the circuit court denied the District's posttrial motions. This appeal followed.

STANDARD OF REVIEW

When ruling on a directed verdict motion, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the" nonmoving party. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). A motion for JNOV "is a renewal of the directed verdict motion." *Glover v. N.C. Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). When the only reasonable inference from the evidence is the plaintiff has failed to prove a material element of his cause of action, it becomes the duty of the court to grant a directed verdict against the party having the burden of proof. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 534-35, 462 S.E.2d 321, 323 (Ct. App. 1995). This court will reverse the trial court's denial of a motion for a directed verdict only when no evidence supports its ruling. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "When reviewing a motion for directed verdict, this court . . . may only reverse a jury's verdict if the factual findings implicit within it are contrary to the only reasonable inference from the evidence." *Maher v. Tietex Corp.*, 331 S.C. 371, 376, 500 S.E.2d 204, 207 (Ct. App. 1998). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

LAW/ANALYSIS

The District contends the circuit court erred in denying its motion for directed verdict and JNOV as it had absolute sovereign immunity under the Tort Claims Act because Cruce was a public official or a limited public figure. It argues because Cruce was a public official or limited public figure, he was required to

prove the District acted with actual malice. It asserts section 15-78-60(17) of the South Carolina Code (2005) establishes a governmental entity is not responsible for employee conduct constituting actual malice. We agree.

The tort of defamation allows plaintiffs to recover for injuries to their reputation as the result of defendants' communications to others of falsities regarding the plaintiffs. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001). "Defamatory communications take two forms: libel and slander. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct. If a communication is libelous, then the law presumes the defendant acted with common law malice." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 133-34 (1999) (citation omitted). "In cases involving the defamation of a public official, the plaintiff must prove that the defendant acted with constitutional actual malice, that is, with knowledge that the statement was false or with reckless disregard of its falsity." *Sanders v. Prince*, 304 S.C. 236, 239, 403 S.E.2d 640, 643 (1991) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

"The Tort Claims Act 'is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in [section] 15-78-70(b)'" of the South Carolina Code (2005). *Curiel v. Hampton Cnty. E.M.S.*, 401 S.C. 646, 649, 737 S.E.2d 854, 856 (Ct. App. 2012) (quoting *Wells v. City of Lynchburg*, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998)); *see also* S.C. Code Ann. § 15-78-200 (2005) ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). The Tort Claims Act provides: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) (quoting S.C. Code Ann. § 15-78-40 (2005)).

"Under the [Tort Claims Act], a governmental entity is not liable for a loss that results from 'employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral

turpitude.'" *Gause v. Doe*, 317 S.C. 39, 41, 451 S.E.2d 408, 409 (Ct. App. 1994) (emphasis added by court) (quoting S.C. Code Ann. § 15-78-60(17) (Supp. 1993)). "In a case involving the defamation of a public official, the plaintiff must prove the defendant acted with actual malice." *Id.* (footnote omitted). "The [Tort Claims Act] clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice." *Id.* at 42, 451 S.E.2d at 409. In *Gause*, this court held "the [Tort Claims Act] bars [the plaintiff's] slander claim against the [police department] because [the plaintiff] must prove the [police department's] employee's conduct constituted actual malice in order to recover on this claim." *Id.*

An important step in beginning to analyze a defamation case is determining whether the plaintiff is a public official, public figure, or private figure. *Garrard v. Charleston Cnty. Sch. Dist.*, 429 S.C. 170, 208, 838 S.E.2d 698, 718 (Ct. App. 2019), *petition for cert. filed*. This determination is a matter of law to be decided by the court. *Id.* In considering whether a person is a public official, the employee's position must invite public scrutiny and discussion of the person holding it, unrelated to the current controversy. *Id*. A public official's status may be sufficient because of the public interest in that official's activity in a particular context instead of the official's place in the organization's hierarchy. *Id*.

> For purposes of a First Amendment analysis, our courts have held a variety of public school administrators and employees to be public officials. *See Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991) (finding school board members to be public officials); *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978) (finding school trustee to be a public official). Other jurisdictions have held that public school teachers and athletic coaches are public officials for purposes of applying the *New York Times* doctrine. *See Mahoney v. Adirondack Publ'g Co.*, 517 N.E.2d 1365, 1368 (N.Y. 1987) (finding a public high school football coach to be a public figure); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1102 (Okla. 1978) (finding person holding the dual positions of public school coach and physical education teacher to be a public official); *Johnson v. Sw. Newspapers Corp.*, 855 S.W.2d 182, 184 (Tex. Ct. App.

> 1993) (finding person holding the dual position of athletic director and head football coach to be a public official).

Garrard, 429 S.C. at 208, 838 S.E.2d at 718.

In *Garrard*, a high school football coach (Coach Walpole) brought suit against a newspaper for defamation. *Id.* at 181, 838 S.E.2d at 703-04. The circuit court granted summary judgment to the newspaper, finding Coach Wadpole was a public official and was required to prove the newspaper acted with actual malice. *Id.* at 188, 838 S.E.2d at 707. Coach Wadpole appealed, arguing he was a private figure and not a public official. *Id.* at 207, 838 S.E.2d at 718. This court determined "Coach Walpole is a public official for purposes of applying the *New York Times* doctrine." *Id.* at 209, 838 S.E.2d at 719. The court noted "Coach Walpole holds many positions within the School District"—head football coach, head coach of the women's basketball team, and teacher. *Id.* "Coach Walpole testified that he interacts with the parents of the athletes after each game and he participates in newspaper and television interviews. Furthermore, as head coach, he is responsible for the oversight of the teams' activities." *Id.* at 209-10, 838 S.E.2d at 719.

Initially, Cruce argues the District's argument he was a public official is not preserved because the District did not raise it during the directed verdict motion and first raised it in the JNOV motion. During the directed verdict motion, the District repeatedly asserted Cruce was a limited public figure, and Cruce disagreed. However, the District also referenced the related concept of a public official and asserted other jurisdictions have held that all public employees are public officials. In response to questioning by the circuit court if the statements had to relate to coaching for the actual malice standard to apply, the District answered "it does not matter if you follow the line of cases that says that every public employee is a public official. Because in that case, whether a teacher or as a coach, he's a public employee, he's a public official, and all public officials must prove actual malice." "[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). As our supreme court has observed, "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285

(2012). Accordingly, the issue was sufficiently argued to the circuit court to address it on appeal.

Based on this court's decision in *Garrard*, the circuit court erred in not finding Cruce was a public official or a limited public figure.[4] Cruce was an athletic director, a football coach, and a teacher, similar to Coach Wadpole in *Garrard*, who was a coach of two different teams, including football, and a teacher. Accordingly, Cruce was a public official.

Because Cruce was a public official, he has the burden of proving actual malice. Under the Tort Claims Act, the District, as a governmental entity, is not liable for a loss resulting from employee conduct that constitutes actual malice. *Gause*, 317 S.C. at 41, 451 S.E.2d at 409. Therefore, the Tort Claims Act bars Cruce's defamation action because he has to prove the District's employee's conduct constituted actual malice in order to recover on this claim. *See id.* at 42, 451 S.E.2d at 409 ("The [Tort Claims Act] clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice. We therefore agree with the trial court that the [Tort Claims Act] bars [the plaintiff's] slander claim against the [police department] because [the plaintiff] must prove the [police department's] employee's conduct constituted actual malice in order to recover on this claim."); *see also Kennedy v. Richland Cnty. Sch. Dist. Two*, 428 S.C. 98, 118, 833 S.E.2d 414, 425 (Ct. App. 2019) ("[A]ctual malice does, in fact, refer to constitutional malice when defamation involves the First Amendment, a public official, or an issue of public concern.").[5]

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[4] Because our court's opinion in *Garrard* was not issued until November of 2019, it was not available to the circuit court in the present case as the trial here occurred in 2017 and the circuit court issued its posttrial order in 2018.

[5] The District also contends the circuit court erred in denying its motion for directed verdict and JNOV because Cruce failed to prove each element of his defamation cause of action. It contends the email was not false and defamatory. It also asserts Cruce presented no evidence the email was sent with common law malice or recklessness as to show conscious indifference or that the email proximately caused any damages. Based on our holding that Cruce is a public official or limited public figure, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598

Accordingly, the Tort Claims Act bars the action as Cruce was required to prove actual malice because he was a public official. Therefore, the circuit court's denial of the District's motion for directed verdict and JNOV on Cruce's defamation cause of action is

REVERSED.

GEATHERS and MCDONALD, JJ., concur.

(1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Consumer Affairs, Appellant,

v.

Cash Central of South Carolina LLC, Respondent.

Appellate Case No. 2017-002639

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5855
Heard October 14, 2020 – Filed September 1, 2021

REVERSED

James Cochran Copeland and Kelly Hunter Rainsford, both of the South Carolina Department of Consumer Affairs, of Columbia, for Appellant.

James Y. Becker and Mary M. Caskey, both of Haynsworth Sinkler Boyd, PA, of Columbia; and Sarah P. Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondent.

LOCKEMY, C.J.: The South Carolina Department of Consumer Affairs (the Department) appeals the circuit court's order granting final judgment in favor of Cash Central of South Carolina, LLC (Cash Central) as to the Department's

allegations that it failed to comply with sections 37-3-201 and 37-3-305 of the South Carolina Consumer Protection Code (the SCCPC).[1] The Department argues the circuit court erred by finding Cash Central was not required to refund excess charges to consumers because it substantially complied with the posting and filing requirements of sections 37-3-201 and 37-3-305 and established the bona fide error and excusable neglect defenses of sections 37-3-201(6) and 37-5-202(7) of the SCCPC. We reverse.

FACTS/PROCEDURAL HISTORY

Cash Central is an internet-based lender that provides short- and medium-term consumer loans ranging from $750 to $5,000. It is a wholly owned subsidiary of Direct Financial Solutions, LLC (Direct Financial), which, in turn, is a wholly owned subsidiary of Community Choice Financial, Inc. (Community Choice). Cash Central had no employees but instead used those of Direct Financial and Community Choice. In February 2013, Community Choice began preparing to do business in South Carolina, and in September 2013, Cash Central submitted two applications for supervised lender licenses—one for Cash Central and one for "www.cashcentral.com"—to the South Carolina Board of Financial Institutions (the Board). The Board issued two supervised lender licenses to Cash Central on October 2, 2013. Cash Central's website went live on October 23, 2013. From October 23, 2013, until April 10, 2015, Cash Central made 15,000 loans to South Carolina consumers, including 1,642 loans with loan finance charges over 239.99% APR.[2]

The Board audited Cash Central in March 2015 and informed Cash Central on April 3, 2015, that it had failed to file and post a maximum rate schedule. On April 10, 2015, Cash Central filed a maximum rate schedule with the Department, delineating a maximum rate of 246.9% APR. The Department determined Cash Central failed to file or post a maximum rate schedule from October 24, 2013, until April 10, 2015. The Department then brought this action against Cash Central on behalf of South Carolina consumers pursuant to section 37-6-113(A) of the

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[1] S.C. Code Ann. § 37-3-201 (2015); S.C. Code Ann. § 37-3-305 (Supp. 2020); *see generally* §§ 37-1-101 to 37-29-100 (2015 & Supp. 2020).
[2] An annual percentage rate (APR) is the sum of the interest rate and other finance charges, calculated on a yearly basis and expressed as a percentage.

SCCPC[3] for violation of sections 37-3-201 and 37-3-305 of the SCCPC and sought a refund of excess charges.

The circuit court held a trial on the matter. At trial, James Copeland, then-acting commissioner of the Board, testified that when the Board issued a supervised lending license, it would send the license to the business's headquarters along with a letter stating that the lender must file and post its maximum rate schedule. Carolyn Grube-Lybarker, of the Department, testified supervised lenders must file a maximum rate schedule with the Department before they can assess finance charges in excess of 18% APR.

Assistant general counsel for Community Choice, Rebecca Fox, was responsible for ensuring Community Choice complied with state law when it began business in a new state. To accomplish this, she created a "compliance outline" specific to each state. To make the outline, Fox downloaded state statutes, visited websites, and summarized the information. She confirmed she obtained a copy of a "guide for business" from the Department's website and acknowledged this document discussed the maximum rate schedule. Fox stated she saved this and other documents pertaining to compliance with South Carolina law to her electronic file during the first week of February 2013. She could not recall if she realized two regulatory agencies oversaw supervised lenders in South Carolina or that Cash Central was required to file a maximum rate schedule with a different agency.

Fox testified that after Cash Central made its first loan, she reviewed the loan documents, compared them to her outline, and discovered Cash Central had failed to post the maximum rate schedule or the 127-word disclosure on its website.[4] Fox informed Cash Central's head of marketing of these discrepancies. Cash Central then added the 127-word statutory disclosure and posted the rate schedule showing eight different APRs based on loans of $1,000; $2,000; and $4,000. The website included a calculator feature, which allowed the user to adjust the terms and

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[3] § 37-6-113(A) ("[T]he administrator may bring a civil action against . . . a person subject to this title to recover actual damages sustained and excess charges paid by . . . consumers who have a right to recover explicitly granted by this title."); § 37-5-202(2) ("A consumer is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid.").
[4] *See* § 37-3-305(3) (providing a 127-word disclosure that must be included with the posted rate schedule).

amount of the loan to view different rates based on those factors. Fox believed the rate schedule on the website satisfied the posting requirement but agreed the website did not state the maximum rate was 246.64%.

Todd Jensen, CEO of Direct Financial, admitted that between October 23, 2013, and April 10, 2015, the maximum APR did not appear on the website, and he agreed the schedules Cash Central provided on its website did not provide the applicable rates for a $750 loan. He stated a consumer could use the loan calculator to determine the maximum APR but a consumer would have to enter forty-two possible variations to determine the highest possible APR. Jensen acknowledged Cash Central collected $11 million in interest on the loans it made between October 2013 and April 2015.

Cash Central presented the testimony of an expert in the field of consumer and firm behavior in household-financial settings, who opined the rate calculator on Cash Central's website provided consumers with more "salient and timely" information than the static disclosure that section 37-3-305 required.

The circuit court found subsection 37-5-202(7) excused Cash Central's admitted failure to file the maximum rate schedule. Next, it found Cash Central substantially complied with sections 37-3-201 and 37-3-305 because its website's disclosures "better promote[d] the purposes of [s]ection 37-3-305 than the [m]aximum [r]ate [s]chedule issued by the Department." In addition, the circuit court concluded any monetary liability for Cash Central's failure to file was strictly limited by the provisions of section 37-3-201(6) because its failure to file was a good faith error and qualified as excusable neglect. It further found section 37-3-201(6) must apply to initial failures to file to avoid the absurd result of requiring Cash Central to recast its loans to 0% APR. However, the circuit court ordered Cash Central to pay a civil penalty of $5,000 under section 37-3-201(6) for each of the three years it failed to file its maximum rate schedule with the Department. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by finding Cash Central was not required to refund excess charges to consumers because it substantially complied with the filing and posting requirements of sections 37-3-201 and 37-3-305?

2. Did the circuit court err by finding Cash Central was not required to refund excess charges to consumers pursuant to the bona fide error defenses of sections 37-3-201(6) and 37-5-202(7)?

STANDARD OF REVIEW

"Statutory interpretation is a question of law subject to de novo review." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013). This court is free to decide questions of law without any deference to the circuit court. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

LAW/ANALYSIS

I. Filing and Posting Requirements of Sections 37-3-201 and 37-3-305

The Department argues Cash Central was not authorized to charge more than 18% APR pursuant to section 37-3-201 because it never filed its maximum rate schedule with the Department. The Department contends that when construed in light of the SCCPC's primary purpose of protecting consumers, sections 37-3-201(2) and 37-6-113(A) do not require a consumer to pay—or allow a creditor to retain—an excess charge. The Department therefore asserts the charges in excess of 18% APR that Cash Central collected between October 24, 2013, and April 10, 2015, were excess charges in violation of 37-3-201(2), and as a matter of law, it was required to return the excess charges collected to consumers. We agree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

"A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 290 (Ct. App. 2007). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that

harmonizes with its subject matter and accords with its general purpose." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (quoting *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). "General and special statutes should be read together and harmonized if possible. But to the extent of any conflict between the two, the special statute must prevail." *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 293, 188 S.E.2d 459, 464 (1972).

"[T]he purpose of the SCCPC is to clarify the law governing consumer credit and to protect consumer buyers against unfair practices by suppliers of consumer credit." *Freeman v. J.L.H. Invs., LP*, 414 S.C. 362, 373, 778 S.E.2d 902, 907 (2015) (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 401, 472 S.E.2d 242, 244 (1996)); *see also Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) ("The purpose of SCCPC is to protect consumers."). The SCCPC must be "liberally construed and applied to promote its underlying purposes and policies." *See* § 37-1-102(1)-(2) (setting forth the policies of the SCCPC, which include "protect[ing] consumer[s] . . . against unfair practices by some suppliers of consumer credit" as well as "provid[ing] rate ceilings to assure an adequate supply of credit to consumers," "further[ing] consumer understanding of the terms of credit transactions," and "foster[ing] competition among suppliers of consumer credit so that consumers may obtain credit at [a] reasonable cost").

A supervised lender is an organization authorized to make supervised loans. § 37-3-501(2); § 37-1-301(20). A supervised loan is "a consumer loan in which the rate of the loan finance charge exceeds twelve percent per year as determined according to the provisions on the loan finance charge for consumer loans (Section 37-3-201)." § 37-3-501(1); § 37-3-109(1) (defining a loan finance charge as the sum of all charges payable by the debtor and imposed by the lender "as an incident to the extension of credit, including . . . interest"). A supervised lender may contract for and receive a loan finance charge "(b) on loans with a cash advance exceeding six hundred dollars . . . [at] any rate *filed and posted* pursuant to Section 37-3-305; *or* (c) *on loans of any amount, eighteen percent per year on the unpaid balances of principal*. § 37-3-201(2) (emphases added).

In October 2013, subsections 37-3-305(1)-(3) provided:

> (1) Every creditor . . . making supervised or restricted consumer loans . . . in this State shall . . . on or before

the date the creditor begins to make such loans in this State, file with the Department . . . and . . . post in one conspicuous place in every place of business, if any, in this State in which offers to make consumer loans are extended, a certified maximum rate schedule meeting the requirements set forth in subsections (2), (3), and (4). . . .

(2) The rate schedule required to be filed and posted by subsection (1) must contain a list of the maximum rate of loan finance charge . . . stated as an annual percentage rate . . . that the creditor intends to charge for consumer credit transactions in each of the following categories of credit:

(a) unsecured personal loans;

. . . .

(3) The rate schedule that is filed by the creditor shall be reproduced in at least fourteen-point type for posting as required by subsection (1). The terms "Loan Finance Charge" and "Annual Percentage Rate" will be printed in larger size type than the other terms in the posted rate schedule. . . .

(4) A rate schedule filed and posted as required by this section shall be effective until changed in accordance with this subsection. A creditor wishing to change any of the maximum rates shown on a schedule previously filed and posted . . . shall file with the Department . . . and shall post as required by subsection (1) a revised schedule of maximum rates. The revised schedule shall be certified and returned to the creditor if properly filed. . . .

S.C. Code Ann. § 37-3-305(1)-(4) (2015).[5] We apply the foregoing language in our analysis because it was the law in effect during the filing and posting periods at issue in this matter.

In 2013, the statutory requirement that a supervised lender file a maximum rate schedule with the Department was already in effect. *See* § 37-3-305(1) (2002). Subsection 37-3-305(2), which remains unchanged, required the schedule to "contain a list of the maximum rate of loan finance charge . . . stated as an annual percentage rate . . . that the creditor intends to charge for consumer credit transactions in . . . unsecured personal loans." Subsection 37-3-305(7) provided that a creditor making supervised loans must file a maximum rate schedule with the Department by January 31 of each state fiscal year. S.C. Code Ann. § 37-3-305(7) (Supp. 2020) (amended by 2016 Act No. 244 to redesignate former paragraph (8) as paragraph (7)). If the creditor fails to do so by January 31, any maximum rate schedule previously filed with the Department would be deemed ineffective, "and the maximum credit service charge that the creditor may impose on any credit extended after that date *may not exceed eighteen percent a year* until such time as the creditor files a revised maximum rate schedule that complies with this section." *Id.* (emphasis added).

We find the plain language of sections 37-3-201(2) and 37-3-305 requires that a supervised lender intending to charge rates above 18% APR file and post its maximum rate. Unless and until it complies with this requirement, such lender is not authorized to contract for or receive finance charges in excess of 18% APR.

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[5] In 2016, the legislature made several changes to these subsections; the revisions now provide that after the supervised lender files a rate schedule with the Department, the Department will issue a maximum rate schedule containing the items required by subsections (2), (3), and (4), which the lender must post. In addition, subsection (3) now provides the Department will reproduce the rate schedule provided by the creditor "in at least fourteen-point type for posting as required by subsection (1)." S.C. Code Ann. § 37-3-305(1)-(3) (Supp. 2020). Subsection (4) provides a creditor seeking to revise a schedule must submit the revised schedule to the Department, which will issue the revised schedule, which the creditor must then post in accordance with subsection (1). S.C. Code Ann. § 37-3-305(4) (Supp. 2020).

II. Defenses

Next, we consider whether the circuit court erred in finding Cash Central was not required to refund excess charges because it (1) substantially complied with these statutory requirements and (2) established the defense of bona fide error pursuant to sections 37-3-201(6) and 37-5-202(7).

A. Substantial Compliance

The Department argues the defense of substantial compliance did not apply to Cash Central's failure to satisfy sections 37-3-201 and 37-3-305. It next asserts that even if it did apply, section 37-3-305 required lenders to file *and* post the maximum rate schedule, and Cash Central was required to show it substantially complied with both the filing requirement and the posting requirement. We agree.

"Substantial compliance has been defined as 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" *Brown v. Baby Girl Harper*, 410 S.C. 446, 453 n.6, 766 S.E.2d 375, 379 n.6 (2014) (quoting *Orr v. Heiman*, 12 P.3d 387, 389 (Kan. 2000)). However, there is no recognized doctrine of substantial compliance in this context. In *Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997), our supreme court found a lender substantially complied with the borrower preference statute by providing the borrower the statutorily required information contemporaneously with her credit application, even though it was not contained on the first page of the application as the statute required. There, the court found the purpose of the statute was the clear and prominent disclosure of the information necessary to ascertain the relevant preferences of the borrowers. *Id.* at 86-87, 484 S.E.2d at 473. This case is distinguishable. Here, the statutory provisions at issue have a regulatory purpose. They provide filing and licensing requirements that a supervised lender must meet to operate and impose finance charges higher than 18% APR in this state. The purpose of filing a maximum rate schedule serves not only to inform consumers, it triggers the Department's oversight of the lender, which is critical to assuring the SCCPC's objectives of protecting consumers, providing rate ceilings, and fostering competition among suppliers of consumer credit.

More than 1,600 of the loans Cash Central made to South Carolina consumers exceeded 239.9% APR, and the highest rate it charged was 246%. The SCCPC

allows supervised lenders to contract for and receive loan finance charges at any rate they wish so long as they meet the statutory filing and posting requirements. If the lender fails to meet such requirements, the statute prohibits it from imposing finance charges at a rate higher than 18% APR. If we were to allow substantial compliance in this context, supervised lenders would be able to charge excessive rates without ever actually meeting the statutory filing and posting requirements. Because the legislature has given supervised lenders the freedom to charge such high rates, such lenders must strictly comply with the applicable statutory provisions. We therefore conclude a defense of substantial compliance is inapplicable.

We find the circuit court erred by determining Cash Central substantially complied with sections 37-3-201 and 37-3-305. Section 37-3-305 requires a supervised lender to file a rate schedule with the Department *and* post a maximum rate schedule in a conspicuous place. It is undisputed Cash Central did not file a maximum rate schedule with the Department prior to April 2015. Because the statute requires both filing and posting, Cash Central's compliance with only one of these requirements would have been insufficient to establish the defense. Moreover, no evidence in the record supports the circuit court's conclusion that Cash Central complied with the statute's posting requirement. Jensen admitted Cash Central's website—its only place of business—did not state the maximum APR. Likewise, he acknowledged the fee schedule Cash Central posted did not reflect rates for $750 loans even though it offered loans ranging from $750 to $5,000. The SCCPC evidences an intent to provide consumers with information about the maximum rate a supervised lender can charge. A posting that does not provide the maximum rate does not achieve this purpose. We therefore conclude that even assuming a defense of substantial compliance were applicable, the record does not support the circuit court's finding that the fee schedule posted on Cash Central's website substantially complied with the SCCPC's statutory filing and posting requirements.

B. Section 37-3-201(6)

Section 37-3-201(6) provides:

> Notwithstanding subsection (2), if a lender can demonstrate with competent evidence that (a) any failure to post rates properly filed under [s]ection 37-3-305 or

> failure to properly file these rates under [s]ection 37-3-305 was a result of a bona fide error or excusable neglect, (b) the rates were properly posted or properly filed when the error or neglect was discovered or brought to the lender's attention, and (c) that no other failure to post or file rates has been brought to the lender's attention by the Department . . . or by consumers within the previous forty-eight month period*,* then the maximum rate of loan finance charges assessable by the lender is *the rate previously properly filed with the Department*[,] . . . provided, however, the lender that has failed or neglected to post rates or to file rates is subject to a civil penalty of up to $5,000.00 payable to the Department . . . .

(emphasis added).

The Department contends the language of section 37-3-201(6) suggests the legislature intended this statutory defense to be available only to lenders that previously properly filed a maximum rate schedule with the Department. It argues Cash Central did not satisfy the prerequisites of section 37-3-201(6) because it never filed rates with the Department and it therefore could not avail itself of this statutory defense. However, the Department contends that even assuming the defense applied and Cash Central satisfied the three elements, Cash Central must roll back its contracted rates to 18% APR, in addition to paying the $5,000 penalty. Further, it asserts the circuit court erred in finding Cash Central would have to recast its loans to 0% APR as opposed to 18% APR. We agree.

We find the circuit court erred in concluding this provision excused Cash Central from refunding excess charges to consumers. The provisions of 37-3-305 are clear: to charge a rate higher than 18%, a supervised lender *must* file *and* post its maximum rate; if it fails to do so, it is not authorized to contract for or receive finance charges over 18% APR. Although section 37-3-201(6) creates an exception that allows a lender to assess finance charges at or below the rate it previously properly filed with the Department if the lender meets the requirements of subsection 37-3-201(6), Cash Central had *never* filed a maximum rate with the Department prior to 2015. Thus, there was no "previously properly filed" rate to apply, and even assuming Cash Central established its failure to post was the result

of a bona fide error or excusable neglect, it was not permitted to assess charges higher than 18% APR. *See* § 37-3-201(2) (stating that a supervised lender may contract for and receive finance charges "(b) on loans with a cash advance exceeding six hundred dollars . . . any rate *filed and posted* pursuant to Section 37-3-305; *or* (c) *on loans of any amount, eighteen percent per year on the unpaid balances of principal*" (emphases added)); § 37-3-305(7) (providing that with respect to the renewal of maximum rate filings, "[i]f any creditor has not filed a maximum rate schedule with the Department . . . by the thirty-first day of January of the year in which it is due, then on this date the filing is no longer effective and the maximum credit service charge that the creditor may impose on any credit extended after that date *may not exceed eighteen percent a year*" (emphasis added)). For the foregoing reasons, the circuit court erred in concluding subsection 37-3-201(6) excused Cash Central from refunding excess charges.

C. Section 37-5-202(7)

The Department next argues the bona fide error defense of section 37-5-202(7) is likewise inapplicable here. We agree.

Section 37-5-202(1) provides generally,

> If a creditor has violated any provisions of this title applying to . . . schedule of maximum loan finance charges to be filed and posted [under section 37-3-305] . . . the consumer has a cause of action to recover actual damages and also a right in an action . . . to recover from the person violating this title a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. . . .

§ 37-5-202(1). In addition, subsection 37-5-202(2) states, "A consumer is *not obligated to pay* a charge in excess of that allowed by this title and has a right of refund of any excess charge paid." (emphasis added). However, subsection 37-5-202(7) provides,

> A creditor may not be held liable in an action brought under this section for a violation of this title if the

> creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

The Department asserts that because the defense in section 37-3-201(6) is more specific than section 37-5-202(7), section 37-3-201(6) is the only applicable statutory defense for failure to comply with the maximum rate provisions.

We find the circuit court erred in determining section 37-5-202(7) relieved Cash Central from any obligation to refund excess charges to consumers. Section 37-5-202(7) provides a defense generally available to creditors while section 37-3-201(6) is a specific defense available to supervised lenders for the failure to file a maximum rate. Further, if the defense contained in 37-5-202 were available for the failure to file a maximum rate, section 37-3-201(6) would be superfluous. Thus, we find subsection 37-3-201(6) prevails over section 37-5-202.[6] *See Criterion Ins. Co.*, 258 S.C. at 293, 188 S.E.2d at 464 ("General and special statutes should be read together and harmonized if possible. But to the extent of any conflict between the two, the special statute must prevail.").

Next, the Department argues the defense in subsection 37-5-202(7) is reserved for clerical errors rather than errors of law and the record failed to show Cash Central maintained procedures reasonably adapted to avoid the error. We agree.

Subsection 37-5-202(7) does not define "bona fide error." The Federal Truth in Lending Act contains a similar provision, which states that "[e]xamples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and program[m]ing, and printing errors, *except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error*." 15 U.S.C. § 1640(c) (emphasis added); *see also* 15 U.S.C. § 1601

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[6] The Department argues the circuit court erred in failing to defer to its 1986 administrative interpretation that the bona fide error defense of subsection 37-5-202(7) did not apply to a lender's failure to file a maximum rate. In light of our disposition of this issue, 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) (holding an appellate court need not address an appellant's remaining issues when the disposition of a prior issue is dispositive).

(providing the purpose of the subchapter was "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices"). *Black's Law Dictionary* defines the term "bona fide" as "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine." *Bona Fide*, *Black's Law Dictionary* (11th ed. 2019). It defines "bona fide error" as "[a] violation that is unintentional and occurs despite procedures reasonably adapted to avoid any such error" and states it "is sometimes a defense to a technical violation of a statute that otherwise imposes strict liability." *Error*, *Black's Law Dictionary* (11th ed. 2019) (citing 15 U.S.C. § 1640(c)).

Even assuming subsection 37-5-202(7) applies, the circuit court erred in finding Cash Central's failure to comply with subsection 37-3-305(1) was a bona fide error. This defense requires that the violation was not intentional *and* was a bona fide error. The circuit court found Fox—the person responsible for ensuring legal compliance—simply "forgot, due to innocent human error" to file the maximum rate schedule with the Department. Fox testified her failure to file the schedule or realize this additional filing requirement was an "oversight." Furthermore, Bridgette Roman, general counsel for Community Choice and Fox's direct supervisor, corroborated Fox's testimony that her compliance outline was the only written procedure Community Choice used to ensure compliance when beginning operations in a new state. Fox acknowledged her compliance outline specifically referenced the filing and posting requirement of section 37-3-305 but admitted it did not specifically refer to the Board or the Department. Fox testified her file included the "Initial Maximum Rate Filing Schedule for Consumer Loans" form but she did not complete or file the form at that time. Fox stated that eight months later, when Cash Central applied for and received the license from the Board, she did not recall whether it was required to file anything else and stated that it was "pretty easy to forget that [she] h[ad] this other piece of paper to file." Fox was the only person who contributed to the creation of the outline, Roman acknowledged she did not review the outline to verify its completeness or accuracy, and Cash Central had no other procedure in place that required anyone to review the outline for accuracy. In addition, Fox and Roman testified the outlines were unique to each state and there was no overarching policy governing what information was to be included in the outline. Based on the foregoing, no evidence showed Cash Central's procedure of creating a compliance outline was reasonably adapted to

avoid the errors here. Therefore, we find the circuit court erred in finding Cash Central's failure to post and file the maximum rate schedule was a bona fide error.

Finally, we find the circuit court erred as a matter of law in concluding this defense allowed Cash Central to retain charges it obtained in excess of 18% APR. Cash Central admitted it failed to file the maximum rate schedule with the Department. As we stated, until it filed the maximum rate schedule, the maximum rate it was permitted to charge pursuant to the SCCPC was 18% APR. Cash Central did not file this form until April 10, 2015. Therefore, all finance charges over 18% APR that it collected from South Carolina consumers from the time it began making consumer loans in South Carolina until April 10, 2015, were excess charges. Subsection 37-5-202(2) states consumers are not obligated to pay charges in excess of those allowed by the SCCPC and have a right to a refund of any excess charges paid. We conclude this provision is a distinct remedy, independent of a consumer's right to bring an action for damages or penalties for the violation of a failure to file. *See* § 37-5-202(1) (stating "[i]f a creditor has violated any provisions of this title applying to . . . schedule of maximum loan finance charges to be filed and posted" under section 37-3-305, a consumer has a cause of action to recover actual damages and "to recover from the person violating this title a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars"); § 37-5-202(3) ("[I]f a consumer is entitled to a refund and a person liable to the consumer refuses to make a refund within a reasonable time after demand, the consumer may recover from the creditor or the person liable in an action other than a class action a penalty in an amount determined by the court not less than one hundred nor more than one thousand dollars."). Subsection 37-5-202(2) provides "consumer[s are] *not obligated to pay* a charge in excess of that allowed by this title and ha[ve] a right of refund of any excess charge paid." (emphasis added). The provisions of subsections 37-5-202(2) and 37-5-202(7) are mutually exclusive, and section 37-5-202(7) does not excuse Cash Central from refunding excess charges. Nothing in these provisions require Cash Central to recast its rates to 0%; rather, they require it to refund charges in excess of 18% APR. Therefore, we find the circuit court erred in concluding Cash Central's failure to file was a bona fide error and that it was excused from refunding excess charges.[7]

[7] We note neither party has challenged the imposition of the $15,000 penalty.

CONCLUSION

For the foregoing reasons, we find the circuit court erred by concluding Cash Central was not required to refund excess charges to affected consumers, and the circuit court's order finding in favor of Cash Central is

REVERSED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Sullivan's Island, Respondent,

v.

Michael Murray, Appellant.

Appellate Case No. 2018-000511

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5856
Heard September 23, 2020 – Filed September 1, 2021

REVERSED

Mary Duncan Shahid, of Nexsen Pruet, LLC, and Stephen Peterson Groves, Sr., of Butler Snow, LLP, both of Charleston, for Appellant.

John Joseph Dodds, III, of The Law Firm of Cisa & Dodds, LLP, of Mount Pleasant; and John Phillips Linton, Jr. and George Trenholm Walker, both of Walker Gressette Freeman & Linton, LLC, of Charleston, all for Respondent.

LOCKEMY, C.J.: Michael Murray appeals the circuit court's order affirming his municipal court conviction for violating the Town of Sullivan's Island's (TOSI's) ordinances related to the construction of a dock. He argues the circuit court erred

by (1) applying TOSI's municipal code, (2) holding TOSI's interpretation of its enforcement authority did not violate the rule of fair notice, (3) failing to find TOSI's ordinance criminalized conduct otherwise legal in South Carolina, and (4) failing to hold TOSI's actions were arbitrary and capricious. We reverse.

FACTS/PROCEDURAL HISTORY

Murray owns American Dock and Marine Construction (ADMC) and is a licensed marine contractor. ADMC specializes in dock, boatlift, and other construction in wetlands areas. Jason Tomkins hired ADMC to construct a dock (the Dock) at 1102 Osceola Avenue. In 2014, Murray obtained an accessory structures permit from TOSI for the construction of the Dock. As part of that permit, TOSI also issued ADMC a Certificate of Zoning Compliance, which stated, "Move pierhead, floating[, and] boatlift landward to not exceed adjacent docks." Additionally, the permit required Murray to submit an "as-built" survey[1] to TOSI when he completed the Dock.

ADMC completed the Dock in 2014. Murray's as-built survey showed the Dock extended nine feet past the adjacent docks. Subsequently, TOSI arrested Murray and Tomkins and charged them with violation of TOSI's ordinance sections 21-75[2] and 5-10.[3] Murray moved to dismiss the charge, arguing that TOSI's interpretation was arbitrary and that the dock did not interfere with navigation because the boundaries of the body of water are not fixed and move with the flow of the body of water. The municipal court denied Murray's motion.

The case proceeded to a bench trial before the municipal court. Joseph Henderson, TOSI's zoning administrator, testified Murray's construction plan showed the Dock extended beyond adjacent docks. He explained he approved the permit but added a specific condition under the work description section that the Dock not extend beyond adjacent docks. Henderson spoke with Murray about this requirement. He

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[1] An "as-built" survey is a survey performed after construction is completed indicating the metes and bounds of the final location of the structure.
[2] Town of Sullivan's Island, S.C., Code § 21-75 (2007) ("No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation.").
[3] Town of Sullivan's Island, S.C., Code § 5-10 (2005) (requiring builders to submit permit applications in writing to the TOSI Building inspector).

testified TOSI's interpretation of section 21-75 was that docks could not extend farther than adjacent docks because they would interfere with navigation. He testified that by constructing the Dock beyond adjacent docks, Murray violated the terms and conditions of the permit that was issued.

Randy Robinson, TOSI's chief building inspector, testified he established TOSI's requirement that docks cannot exceed adjacent docks. He testified TOSI requires new docks not exceed adjacent docks in order to facilitate navigation because the docks act as a guide going down the water.

Murray testified the Dock was built at mean low water; thus, there was no navigability where the Dock was located because it was on mud plats. Murray stated navigation was in the centerline of the body of water, and there was no reason to navigate near a dock. Murray stated his crew lined up the docks the best they could. He admitted he reviewed the permit's language that the Dock could not "exceed adjacent docks" and signed the permit. He also acknowledged the Dock extended beyond the adjacent docks by 9.2 feet. Murray admitted the specific notation "must not exceed adjacent docks" was a part of the building permit.

TOSI argued that Murray was required to have a permit to construct the Dock, it gave specific approval with conditions, and Murray did not meet those conditions. Murray argued TOSI's decision not to allow the construction of a dock beyond adjacent docks was TOSI's interpretation, and the ordinances did not state a dock could not exceed adjacent docks. He further asserted TOSI presented no evidence the Dock interfered with navigation. Murray claimed the only condition on the permit was that he submit an as-built survey. The municipal court found Murray guilty of the offense and ordered him to pay a fine of $1,040.

Murray appealed to the circuit court, arguing TOSI presented no evidence the Dock interfered with navigation and that no legal requirement prohibited a dock from exceeding adjacent docks. Murray further asserted no evidence supported his conviction because he complied with all requirements for approval to construct the Dock. He also argued the condition contained in the permit was ambiguous. Murray claimed he did not have fair notice that building the Dock nine feet forward of adjacent docks was a criminal violation and TOSI's prosecution of such an unwritten standard was arbitrary.

The circuit court affirmed Murray's municipal court conviction, stating, "Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murray has failed to demonstrate an error of law." Although the circuit court found TOSI's ordinances contained no express requirement prohibiting a dock from extending farther than adjacent docks, it concluded Murray was required to obtain a building permit for the Dock, the permit prohibited the Dock from extending past adjacent docks, and it was undisputed the Dock extended past adjacent docks. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by affirming Murray's municipal court conviction based on TOSI's ordinances?

2. Did the circuit court err by affirming the municipal court because TOSI's ordinances violated the rule of fair warning of potential illegality?

3. Did the circuit court err by failing to find TOSI's interpretation of its authority resulted in criminalizing conduct that was otherwise legal under South Carolina law?

4. Did the circuit court err by failing to hold TOSI's actions were an arbitrary and capricious violation of Murray's due process rights?

STANDARD OF REVIEW

"In criminal appeals from municipal court, the circuit court does not conduct a de novo review." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). "In criminal cases, the appellate court reviews errors of law only." *State v. Vinson*, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." *Suchenski*, 374 S.C. at 15, 646 S.E.2d at 880.

LAW/ANALYSIS

Murray argues the circuit court erred in affirming his conviction. He asserts sections 21-75 and 5-10 do not prohibit a dock from extending farther into the channel than adjacent docks. He asserts TOSI's interpretation that a dock cannot

extend past adjacent docks was an unpromulgated and noncodified requirement that did not provide fair warning of criminal liability. We agree.

Section 21-75(B)(1) states, "No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation . . . ." "It shall be unlawful to erect, construct, improve, alter or repair any building, sign, or other structure . . . or alter any parcel of land in preparation of such erection, construction, improvement or repair without first having obtained from the Building Inspector a written permit for such erection . . . ." Town of Sullivan's Island, S.C., Code § 5-9 (2007). Section 5-10 requires permit applications be made in writing to the TOSI building inspector.

"Any person violating . . . this Zoning Ordinance shall be guilty of a misdemeanor and, upon conviction, shall be fined and/or imprisoned, . . . in an amount of no more than $500.00 or imprisonment for 30 days or both." Town of Sullivan's Island, S.C., Code § 21-192 (2005).

> Violation of the provisions of this ordinance or failure to comply with grants of variance or special exceptions, shall constitute a misdemeanor. Any person who violates this ordinance or fails to comply with any of its requirements shall, upon conviction thereof, be fined not more than $500.00 or imprisoned for not more than 30 days, or both . . . . Each day such violation continues shall be considered a separate offense.

Town of Sullivan's Island, S.C., Code § 5-75 (1997).

"[P]enal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor." *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017). "One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality." *Id.* "Criminal ordinances are, of course, to be strictly construed and a defendant has a right to know just wherein he is charged with the commission of a crime . . . ." *Town of Conway v. Lee*, 209 S.C. 11, 18, 38 S.E.2d 914, 917 (1946).

"The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007)). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

"[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "[A]ll the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) (alteration in original) (quoting *Curtis*, 345 S.C. at 572, 549 S.E.2d at 599)).

We hold the circuit court erred in affirming Murray's municipal court conviction because TOSI's ordinances were vague as applied here, such that they did not provide Murray with sufficient fair notice that violation could result in criminal liability. Further, TOSI failed to present evidence the docks actually interfered with navigation or in any way extended into the channel. Here, Robinson's testimony was the only evidence that Murray's dock interfered with navigation, and his conclusory statements were premised on only the permit notation and not the legal provisions of any ordinance. TOSI presented no evidence of how the dock actually interfered with boats navigating the channel.

Moreover, the ordinance failed to provide fair notice this conduct was a criminal violation. The United States Supreme Court in *Connally* held a criminal statute that required employers to pay a minimum wage equivalent to the "current rate of per diem," as determined by the Oklahoma Commissioner of Labor, was unenforceable because it did not state a specific sum sufficient to give fair notice. *Connally*, 269 U.S. at 393-94. The Court held the statute failed to provide an ascertainable standard of guilt because it did not forbid a specific or definite act. *Id.* Here, TOSI's ordinance did not expressly proscribe the prohibited conduct—constructing a dock farther into the waterway than adjacent docks—for which Murray was found guilty. Moreover, like in *Connally*, the prohibited act was not

determined by the language of the law itself, but instead by a decision of a government employee.

Without an express prohibition in the ordinance itself, the ordinance lacked proper standards for adjudication. *See Neuman*, 384 S.C. at 402, 683 S.E.2d at 271 (providing "procedural due process requires fair notice and proper standards for adjudication" (quoting *Houey*, 375 S.C. at 113, 651 S.E.2d at 318)). Testimony at trial showed there were different interpretations regarding what constituted a dock that interfered with navigation. *See Connally*, 269 U.S. at 393 ("The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions."). The ordinance that TOSI claims prohibits the construction of a dock from extending past other docks only states a dock cannot interfere with navigation. This broad statement renders the ordinance vague as TOSI sought to apply it here because interference is not defined and was based solely on the interpretation of the building inspector. *See Connally*, 269 U.S. at 391 ("[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ."). Because the building inspector decided what constituted prohibited conduct without any guidance from the codified language, the citizenry was not informed what acts were criminal. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("To make the warning fair, so far as possible the line should be clear."). Thus, the ordinance was too vague to support criminal prosecution. *See Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

We reverse the circuit court's order affirming Murray's conviction because TOSI's ordinances failed to provide Murray with fair notice that building a dock beyond adjacent docks was a criminal violation. Because this issue is dispositive, we need not address Murray's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address [the] remaining issues.").

CONCLUSION

For the foregoing reasons, the circuit court's order affirming Murray's conviction is

REVERSED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maurice Dawkins, Appellant,

v.

James A. Sell, Respondent.

Appellate Case No. 2017-002520

Appeal From Hampton County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5857
Submitted June 1, 2020 – Filed September 1, 2021

AFFIRMED

Richard Alexander Murdaugh and William Franklin Barnes, III, both of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, for Appellant.

Kelly Dennis Dean and Ernest Mitchell Griffith, both of Griffith Freeman & Liipfert, LLC, of Beaufort, for Respondent.

WILLIAMS, J.: In this negligence action against James A. Sell, Maurice Dawkins appeals the trial court's denial of his motions for a directed verdict, a judgment notwithstanding the verdict (JNOV), and a new trial. Dawkins argues the trial court erred in denying his motions for a directed verdict and JNOV on (1) Sell's affirmative defense of Dennis Owens's intervening and superseding

negligence and (2) Sell's negligence. Dawkins also asserts the trial court erred in denying his motion for a new trial because (1) the jury instruction on intervening and superseding negligence was unwarranted, (2) Sell improperly published Dawkins's interrogatory answer, and (3) Sell exceeded the empty-chair defense. We affirm.

FACTS/PROCEDURAL HISTORY

This matter arises out of an automobile accident that occurred on I-95 in the morning hours of August 21, 2010. Sell, who was sixty-one years old at the time, was helping his son move from Ohio to Georgia, and he was driving a moving truck (Moving Truck) with his grandson. Sell began driving the truck around 11:30 A.M. on August 20, and he stopped a few times to rest and help repair his son's vehicle. Between 3:30 and 4:00 A.M. on August 21, while it was raining, Sell lost control of the Moving Truck when the front right tire veered off the lane of travel into the emergency lane. Sell attempted to return the Moving Truck to the lane of travel, but the truck overturned and came to rest blocking both lanes of travel, resulting in the emergency lane being the only navigable path around the Moving Truck.

Multiple individuals, including Dawkins, stopped to render aid. While these individuals were helping Sell and his grandson exit the vehicle and ensuring they were uninjured, between ten to twenty other vehicles and one to three tractor-trailer trucks passed the Moving Truck via the emergency lane. Approximately five to ten minutes after the Moving Truck overturned, a tractor-trailer truck (Semi) owned by Pierce National, Inc. and operated by Owens collided with the Moving Truck, causing it to strike and injure Sell, Dawkins, and the other drivers rendering aid.

Dawkins filed a complaint against Sell, Owens, and Pierce National and amended it twice. Dawkins asserted, among other claims, that Sell and Owens were both negligent in their operation of their respective vehicles and their negligence caused him harm. Sell filed answers to Dawkins's complaints and asserted, among other defenses, that Owens's negligence intervened and superseded any negligence on his part. Additionally, Sell asserted a cross-claim against Pierce National and Owens contending he had been injured by their negligence. Prior to trial, Pierce National and Owens settled with Dawkins and Sell.

The trial occurred from October 9 through 12, 2017. Prior to trial, Dawkins moved in limine to exclude evidence generally related to the prior inclusion of Pierce National and Owens in the trial and their settlement. The trial court excluded some evidence that was agreed upon by the parties but denied the motion to exclude the remaining evidence. After Dawkins rested, Sell published portions of Owens's deposition relating to his conduct prior to the accident and called John W. Pinckney, an expert in motor carrier safety and compliance, to testify regarding Owens's conduct. At the close of evidence, both parties moved for a directed verdict on Sell's intervening and superseding negligence defense, and the court denied both motions. Dawkins also moved for a directed verdict on the issue of Sell's negligence, which the court also denied. The trial court instructed the jury on the defense of intervening and superseding negligence and other particular statutes that Dawkins claimed Sell violated. After deliberating, the jury issued a general verdict for Sell. Dawkins moved for JNOV or a new trial in the alternative, both of which the trial court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in denying Dawkins's motions for a directed verdict and JNOV on the issue of Sell's affirmative defense of Owens's intervening and superseding negligence?

II. Did the trial court err in denying Dawkins's motions for a directed verdict and JNOV on the issue of Sell's negligence?

III. Did the trial court err in denying Dawkins's motion for a new trial because the jury charge on intervening and superseding negligence was unwarranted?

IV. Did the trial court err in denying Dawkins's motion for a new trial because Sell improperly published Dawkins's interrogatory answers identifying a trucking expert previously retained by Dawkins?

V. Did the trial court err in denying Dawkins's motion for a new trial because Sell exceeded the bounds of the empty-chair defense?

STANDARD OF REVIEW

A negligence action is an action at law. *Hartman v. Jensen's, Inc.*, 277 S.C. 501, 502, 289 S.E.2d 648, 648 (1982). On appeal from an action at law tried by a jury, appellate courts correct errors of law and do not disturb the jury's factual findings unless the record reveals no evidence reasonably supporting those findings. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

When ruling on directed verdict or JNOV motions, "the [trial] court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party" and must deny the motions "[i]f the evidence at trial yields more than one reasonable inference or its inference is in doubt." *Kunst v. Loree*, 424 S.C. 24, 37–38, 817 S.E.2d 295, 301–02 (Ct. App. 2018). We apply the same standard on appeal. *Wright*, 372 S.C. at 18, 640 S.E.2d at 495. Neither the trial court nor this court has the authority to make credibility determinations or resolve conflicting evidence. *Kunst*, 424 S.C. at 38, 817 S.E.2d at 302. The trial court's ruling on a directed verdict or JNOV motion will be reversed only if the ruling is governed by an error of law or no evidence supports the ruling. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

"[T]he appellate court reviews a denial of a new trial motion for an abuse of discretion." *Kunst*, 424 S.C. at 38, 817 S.E.2d at 302 (quoting *Duncan v. Hampton Cnty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999)). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). "In determining whether the [trial] court erred in denying a motion for a new trial, the appellate court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Kunst*, 424 S.C. at 38, 817 S.E.2d at 302.

LAW/ANALYSIS

I. Dawkins's Motions for a Directed Verdict and JNOV

A. Intervening and Superseding Negligence

Dawkins argues the trial court erred in denying his motions for a directed verdict and JNOV on Sell's intervening and superseding negligence defense. We disagree.

A plaintiff must prove three elements on a negligence claim: "(1) a duty of care owed by [the] defendant to [the] plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368–69, 635 S.E.2d 97, 101 (2006). Proximate cause is ordinarily a question of fact for the jury and "requires proof of: (1) causation-in-fact, and (2) legal cause." *Id.* at 369, 635 S.E.2d at 101; *see Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))). "Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence, and legal cause is proved by establishing foreseeability." *Baggerly*, 370 S.C. at 369, 365 S.E.2d at 101. Foreseeability "is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause*, 403 S.C. at 150, 742 S.E.2d at 649.

"Evidence of an independent negligent act of a third party is directed to the question of proximate cause." *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962). "For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated." *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 205, 781 S.E.2d 534, 546 (2015) (quoting *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997)). If the original tortfeasor's "negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736, 739 (Ct. App. 1983) (quoting *Locklear v. Se. Stages, Inc.*, 193 S.C. 309, 318, 8 S.E.2d 321, 325 (1940)). The defense of intervening third-party

negligence ordinarily presents a question of fact for the jury and only rarely becomes a question of law for the court to determine. *See Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994); *id.* at 491, 450 S.E.2d at 616 (holding it was error for the trial court to direct a verdict in favor of defendants on the ground of intervening third-party negligence because the record contained some evidence the third-party's negligence was foreseeable).

i. Admission in Pleading

First, Dawkins argues the trial court erred because Sell admitted in his cross-claim that Owens's actions were foreseeable. We disagree.

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)). "Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position." *Id.*

In Sell's cross-claims against Pierce National and Owens, he asserted they were negligent in multiple ways and he suffered damages "as a direct and proximate result of" their conduct. In answering Dawkins's complaints, Sell asserted as an affirmative defense that Owens's negligence intervened and superseded any negligence on his part. Dawkins argues that Sell cannot claim Owens's actions were foreseeable in his cross-claim while also claiming Owens's actions were unforeseeable in his defense against Dawkins's claim.

Dawkins mischaracterizes Sell's pleadings. Sell does not assert in his cross-claim that Owens's *actions* were foreseeable; rather, he asserts *his injuries* were *the foreseeable result* of Owens's alleged negligent actions. *See Baggerly*, 370 S.C. at 368–69, 635 S.E.2d at 101 (stating the third element of a negligence action is the breach of the duty proximately causing the plaintiff's damages). In the same pleading, Sell asserts Owens's negligent actions were an unforeseeable result of Sell's alleged negligent conduct and therefore an intervening and superseding cause of Dawkins's injuries. *See Stephens*, 415 S.C. at 205, 781 S.E.2d at 546 (stating the intervening negligence of a third party supersedes the negligence of the defendant when the third party's negligence could not have been reasonably

foreseen). Sell's claim that his injuries were the foreseeable result of Owens's negligence is not equivalent to asserting that Owens's negligence was the foreseeable result of Sell's alleged negligence. Therefore, we find the trial court did not err in denying Dawkins's motions for a directed verdict and JNOV on this ground.

ii. Reasonable Inference from Evidence

Dawkins also asserts the trial court erred because the only reasonable inference drawn from the evidence is that Owens's negligence and collision with the Moving Truck was a foreseeable result of Sell's negligence. Dawkins relies on our supreme court's opinion in *Matthews v. Porter*, which he asserts contains nearly identical facts to the case at issue. We disagree.

In *Matthews*, our supreme court affirmed the denial of Porter's motions for a directed verdict, JNOV, and a new trial on the issue of intervening and superseding negligence. 239 S.C. at 631–32, 124 S.E.2d at 327. In that case, Porter and a third individual were involved in an automobile collision that blocked the lane of traffic, making the roadway impassable. *Id.* at 623, 629, 124 S.E.2d at 322, 326. Matthews stopped to render assistance, and while she was providing aid, a fourth individual—McKnight—sideswiped another car and pinned her between his car and Porter's car. *Id.* at 623, 124 S.E.2d at 322. Porter moved for a directed verdict on the ground that McKnight was an intervening and superseding negligent cause, but the trial court denied the motion, and the jury ultimately issued a verdict in Matthew's favor. *Id.* at 624, 124 S.E.2d at 323. Our supreme court, reviewing the evidence in the light most favorable to Matthews, affirmed the denial of Porter's motions because there was sufficient evidence to raise a question of fact as to whether McKnight's negligence was an intervening and superseding cause of Matthews's injuries. *Id.* at 625, 628–32, 124 S.E.2d at 323, 325–27. Because the evidence was susceptible to more than one inference, the court held it could not find as a matter of law that McKnight's negligence superseded Porter's negligence and affirmed the trial court's denial of Porter's motions. *Id.* at 632, 124 S.E.2d at 327.

However, in *Gibson v. Gross*, this court held the evidence supported a directed verdict in favor of the defendant on the issue of intervening and superseding negligence. 280 S.C. at 197–98, 311 S.E.2d at 739. In that case, Gross was involved in accident that left his vehicle resting on the traveled portion of the road,

and Gibson stopped to lend assistance. *Id.* at 195, 311 S.E.2d at 737. Gross took no action to warn other drivers of his disabled vehicle, and while Gibson was assisting, another individual, Edwards, struck Gibson with his vehicle. *Id.* at 195, 311 S.E.2d at 737–38. Gross asserted he was not negligent and even if he was, Edwards was negligent and was an intervening and superseding cause of Gibson's injuries. *Id.* at 196, 311 S.E.2d at 738. The trial court granted a nonsuit in favor of Gross because no evidence indicated Gross's alleged negligence proximately causes Gibson's injuries and any potential negligence "'was only an indirect or remote cause' of Gibson's injury." *Id.* at 195, 311 S.E.2d at 738. This court noted the first tortfeasor's negligence is an "indirect or remote cause" when it merely creates "a condition of affairs" in which the second tortfeasor's negligence intervenes and causes the injury. *Id.* at 197–98, 311 S.E.2d at 739 (quoting *Locklear*, 193 S.C. at 318, 8 S.E.2d at 325). The court held Gross could not have foreseen that Edwards would have negligently collided with Gibson and affirmed the trial court. *Id.* Upon a petition for rehearing, the court interpreted and distinguished *Matthews*. *Id.* at 198–99, 311 S.E.2d at 739. The court stated the cases superficially mirrored each other but noted key differences, such as the fact that in *Matthews*, the vehicles "*completely* blocked a lane of the highway" but only one lane of a four-lane highway was blocked in *Gross*. *Id.* at 198, 311 S.E.2d at 739. The court also observed that McKnight testified Porter's failure to warn and blocking of the highway caused McKnight to hit Matthews and that Matthews presented "witnesses whose testimony established an unbroken chain of causation from the negligent act of [Porter] to [her] injuries." *Id*. The court noted there was no evidence in its case that Edwards struck Gibson because the highway was blocked or that Gross failed to warn him. *Id.*

We find the trial court did not err in denying Dawkins's motions for a directed verdict or JNOV. Similar to the discussion in *Gibson*, we note that the vehicles in *Matthews* blocked the highway and made it impassable. *See Matthews*, 239 S.C. at 628, 124 S.E.2d at 325; *Gibson*, 280 S.C. at 198, 311 S.E.2d at 739. In this case, however, multiple witnesses, including Dawkins and Owens, testified the interstate was not impassable after the Moving Truck overturned because the emergency lane was unblocked and usable. Witnesses, including Dawkins, also testified other vehicles used the emergency lane to safely avoid the Moving Truck prior to Owens's collision. Conversely, Owens testified in his deposition that he was watching the painted lines—not scanning the road for obstacles—and traveling around sixty-five miles per hour, which was three miles per hour under the maximum possible speed for the Semi due to a speed cap placed on its engine,

while driving at night in rain. Owens also he said he struck the Moving Truck traveling around sixty-five miles per hour. Owens never testified that he was unable to avoid the Moving Truck or attributed his collision with the Moving Truck to some fault of Sell. Instead, he testified he collided with the Moving Truck after unsuccessfully applying his brakes. Pinckney—Sell's expert witness—opined Owens breached his duty of prudent driving by not scanning the road and overdriving his headlights.[1] Additionally, Pinckney further opined that Owens was a fatigued driver because evidence showed that on the afternoon preceding the collision, Owens picked up a shipment at the same time his driving log showed he was resting in his bunk, which was a violation of Federal Motor Carrier Safety Regulations. When viewed in the light most favorable to Sell, we find the evidence presented a reasonable inference that Owens's negligence was not foreseeable as a matter of law and Sell's negligence merely created a "condition of affairs" in which Owens's subsequent negligence caused Dawkins's injuries. *See Gibson*, 280 S.C. at 197, 311 S.E.2d at 739 ("When the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." (quoting *Locklear*, 193 S.C. at 318, 8 S.E.2d at 325)). Accordingly, we hold the trial court did not err in denying Dawkins's motions for a directed verdict or JNOV on Sell's intervening and superseding negligence defense, and we affirm the trial court on this issue.

B. Sell's Negligence

Dawkins argues the trial court erred in denying his motions for a directed verdict and JNOV on the issue of Sell's negligence. Dawkins asserts the trial court should have held as a matter of law that Sell was negligent because the evidence only supported the inference that Sell failed to maintain proper control of the Moving Truck. We disagree.

Dawkins asserts the case of *Fettler v. Gentner* is factually similar to this case and controls this issue. 396 S.C. 461, 722 S.E.2d 26, (Ct. App. 2012). In that case, the Fettlers stopped at a yield sign due to an oncoming car, and Gentner rear-ended

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[1] Overdriving one's headlights means driving at a rate of speed that makes it impossible to stop the vehicle within the range of sight provided by the headlights. *See Gautreaux v. Orgeron*, 84 So. 2d 632, 633 (La. Ct. App. 1955).

them. *Id.* at 461, 465, 722 S.E.2d at 28. The Fettlers moved for a directed verdict on the issue of Gentner's negligence, which the trial court denied. *Id.* at 465–66. 722 S.E.2d at 28–29. On appeal, this court noted Gentner admitted he took his eyes off the road and failed to keep a lookout after the Fettlers reached the yield sign. *Id.* at 467, 722 S.E.2d at 30. Because the evidence was not susceptible to more than one reasonable inference on the issue of Gentner's negligence, this court reversed the denial of Fettler's directed verdict. *Id.* at 468–69, 722 S.E.2d at 30.

We find *Fettler* is distinguishable from the instant case. In *Fettler*, Gentner admitted he took his eyes off his lane of travel and Fettler's vehicle. *Id.* Although Sell stated he was responsible for overturning the Moving Truck, this is not the same as (1) admitting he breached his duty of care or (2) Gentner's admission that he took his eyes off his lane of travel and Fettler's vehicle while continuing to approach it. Additionally, when considered in the light most favorable to Sell, the record contains evidence creating an inference that Sell was not negligent. Sell testified he drove "considerably slower than [he did] in a car" because it was raining and the steering wheel "seemed to be a little bit loose, which made the truck tend to sway a little bit." Sell also stated that when the Moving Truck's tire veered into the emergency lane, he tried to steer the tire back onto the road and "steered a little bit more" when the tire "did[not] seem to respond as quickly as [he] thought" it should. He asserted that he had traveled a lot for his work and was familiar with knowing when to stop and that although he was somewhat tired and it had been a long day, he did not believe it was unsafe for him to be driving at that time. He further testified that in addition to stopping for two hours earlier in the day due to his son having vehicle trouble, he stopped twice to rest for twenty to thirty minutes—one of which was around twenty to thirty minutes before the accident. Sell did not make any concession similar to Gentner's admission that he removed his eyes from the road. Therefore, we find this evidence, when viewed in the light most favorable to Sell, creates an inference that he was not negligent. *See Wright*, 372 S.C. at 18, 640 S.E.2d at 496 ("On appeal from an order denying a directed verdict [or JNOV], an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party."). Accordingly, the trial court did not err in denying Dawkins's motions for a directed verdict and JNOV, and we affirm.[2]

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[2] Dawkins also argues only one reasonable inference could be drawn regarding Sell's negligence due to his failure to comply with a statutory requirement of placing warning devices to warn oncoming drivers of the overturned Moving

II. Dawkins's Motion for a New Trial

Dawkins asserts the trial court erred in denying his motion for a new trial. We disagree.

A. Jury Instruction

Dawkins contends the trial court erred in denying his motion for a new trial because the court instructed the jury on intervening and superseding negligence, which he asserts was unwarranted. Because we affirm above the trial court's denial of Dawkins's directed verdict and JNOV motions on this ground, we similarly affirm the trial court's denial of his motion for a new trial. *See Stephens*, 415 S.C. at 204–05, 781 S.E.2d at 546 (finding the trial court did not err in charging the jury

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Truck. *See* S.C. Code Ann. § 56-5-5090 (2018) (requiring the driver of certain vehicles to utilize warning devices, such as lighted flares or electric lanterns, if the vehicle is disabled upon the traveled portion of a highway or the shoulder). However, this argument is unpreserved. At the close of evidence, Dawkins only argued he should be given a directed verdict "on the issue that [Sell] breached a duty in overturning the truck, blocking both southbound lanes in the rain at night," and he did not argue that the court should direct a verdict on the issue of negligence because Sell failed to set out warning devices. *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[The] preservation requirement . . . is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and *arguments*." (emphasis added)); *Scoggins v. McClellion*, 321 S.C. 264, 267, 468 S.E.2d 12, 14 (Ct. App. 1996) (per curiam) (holding an appellate court will not consider an issue on appeal from the denial of a directed verdict if the issue was not raised in a directed verdict motion at trial). Dawkins did not raise the statute to support his motion for a directed verdict until his posttrial motion for JNOV. *See Duncan v. Hampton Cnty. Sch. Dist. No. 2*, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999) ("A motion for [JNOV] under Rule 50(b)[, SCRCP,] is a renewal of the directed verdict motion and is limited to the grounds asserted in the directed verdict motion." (second alteration in original) (quoting *Glover v. N.C. Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988))); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)) ("[A]n issue may not be raised for the first time in a [posttrial] motion."). Accordingly, this ground is not preserved for our review, and we affirm the trial court.

on intervening and superseding negligence because evidence that a third party was unforeseeably negligent supported the charge).

B. Interrogatory Response

Dawkins argues the trial court improperly denied his motion for a new trial because the court erred in allowing Sell to publish an answer to an interrogatory identifying a trucking expert that Dawkins previously intended to use against Pierce National and Owens. Dawkins argues it was error to publish the answer because it identified a nonparty with whom Dawkins had previously settled. We disagree.

Answers to interrogatories can be used in trials "to the extent permitted by the rules of evidence." *See* Rule 33(d), SCRCP. Generally, relevant evidence is admissible, and irrelevant evidence is inadmissible. Rule 402, SCRE. Relevant evidence is evidence that tends to make the existence of any fact of consequence for the case more or less probable. Rule 401, SCRE. Admitting evidence is within the trial court's sound discretion "and will not be disturbed absent an abuse of discretion and a showing of prejudice." *Fountain v. Fred's, Inc.*, 429 S.C. 533, 560, 839 S.E.2d 475, 490 (Ct. App. 2020) (quoting *Oconee Roller Mills, Inc. v. Spitzer*, 300 S.C. 358, 360, 387 S.E.2d 718, 719 (Ct. App. 1990)).

We find the trial court did not abuse its discretion in admitting the answer. In his response to Pierce National's and Owens's interrogatories, Dawkins indicated he was prepared to call an expert named David L. Dorrity to testify regarding Owens's operation of the Semi and compliance with federal laws. This fact, indicating Dawkins believed Owens was negligent, made the fact that Owens was negligent more probable. *See* Rule 401. Owens's negligence was a "fact of consequence" because it was a necessary element of Sell's affirmative defense of intervening and superseding negligence. *Id.* Because Owens's negligence remained relevant, the trial court did not abuse its discretion in admitting the interrogatory answer. *See Robinson*, 416 S.C. at 536, 787 S.E.2d at 495 ("An abuse of discretion occurs when the trial court's order is controlled by an error of law . . . ."). Moreover, any error in admitting the answer did not prejudice Dawkins because whether Dawkins was prepared to allege Owens violated federal motor laws was cumulative to the evidence offered by Sell's expert Pinckney that Owens did violate such laws. *See Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009) ("When improperly admitted evidence is merely cumulative, no prejudice exists,

and therefore, the admission is not reversible error."). Accordingly, the trial court properly denied Dawkins's motion for a new trial on this ground, and we affirm.[3]

C. Empty-Chair Defense

Dawkins argues the trial court erred in denying his motion for a new trial after allowing Sell to exceed the bounds of the empty-chair defense. Dawkins asserts the trial court "enabled Sell to fashion and extract a benefit from the fact that Pierce National and Owens were not defendants." Dawkins avers Sell exceeded the bounds of the empty-chair defense by presenting evidence of Owens's negligence. Dawkins contends because Sell was entitled to a setoff for any amount Dawkins received from his settlement with Pierce National and Owens, the issues surrounding Pierce National and Owens were irrelevant. We disagree.

The empty-chair defense is the defendant's "right to assert another potential tortfeasor, *whether a party or not*, contributed to the alleged injury or damages" and was codified in the Uniform Contribution Among Tortfeasors Act (the Act) at section 15-38-15 of the South Carolina Code (Supp. 2020). *Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (emphasis added) (quoting § 15-38-15(D)). Dawkins relies on *Tiffany* for the proposition that the defense "is not boundless and the non-settling defendant cannot expand the scope of the case and make evidence relevant by the fact [that] another tortfeasor settled." However, *Tiffany* is distinguishable. In that case, the court interpreted the Act on appeal of a defendant's request to join as a party an individual—with whom plaintiff had already settled and released from the action—in order to allow the jury to apportion fault. *Id.* at 554–55, 799 S.E.2d at 482–83. The court held the plain language of the Act precluded the defendant from joining the prior codefendant. *Id.* at 555–59, 799 S.E.2d at 483–85.

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[3] Dawkins also claims the trial court improperly (1) allowed Sell to cross-examine Dawkins as to the allegations he raised as to Owens in his complaint over his objection and (2) admitted portions of Owens's deposition over his objections on relevancy. However, Dawkins does not list these as issues in his statement of issues on appeal, and we decline to address them. *See* Rule 208(b)(1)(B), SCACR ("The statement shall be concise and direct as to each issue . . . . Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Because *Tiffany* did not discuss the empty-chair defense in the context of an intervening and superseding negligence defense or provide the parameters of the defense, it does not support Dawkins's argument. The evidence Sell offered of Pierce National's and Owens's negligence was relevant because it related to Sell's assertion of the affirmative defense of intervening and superseding negligence, for which Sell had the burden of proof, not because they settled. *See Small*, 316 S.C. at 481, 450 S.E.2d at 611 (noting intervening and superseding negligence is an affirmative defense); *Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003) ("It is well established that a party pleading an affirmative defense has the burden of proving it."), *aff'd as modified on other grounds*, 362 S.C. 445, 608 S.E.2d 859 (2005). The fact that Sell may be entitled to a setoff of any judgment the jury enters against him does not preclude him from offering evidence to show the jury why it should not enter a judgment against him at all. *See* § 15-38-15(D) ("A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party."). Therefore, we find Sell did not "fashion and extract a benefit from the fact that Pierce National and Owens" had settled and did not exceed the empty-chair defense. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 197–98, 777 S.E.2d 824, 831 (2015) (finding the defendant improperly extracted a benefit from the settlement between the plaintiff and a prior codefendant when the court reapportioned the allocation of settlement proceeds between the settling parties in a manner that decreased the defendant's liability).

Dawkins also asserts that after allowing Sell to present evidence that Dawkins had sued Pierce National and Owens, the court should have allowed him to reveal to the jury that he had settled with Pierce National and Owens as well as the amount of the settlement. Dawkins asserts that by allowing the jury to learn he originally sued Pierce National and Owens without instructing the jury (1) of his settlement with both parties, (2) of the amount of the settlement, and (3) that Sell would receive credit for that amount, the court "undoubtedly left the jury with the belief that Dawkins had been fully compensated by Pierce National and Owens." This argument is unpersuasive because mere knowledge of a suit between Dawkins and the former defendants would not "undoubtedly" lead the jury to assume Dawkins had been fully compensated. Moreover, Dawkins cites no supporting authority for this proposition, and this request goes beyond the parameters set forth in *Lucht v. Youngblood* for the proper procedure when the jury learns the plaintiff previously sued another in the same or a related action. 266 S.C. 127, 221 S.E.2d 854 (1976).

In that case, our supreme court stated that when there is a concern that admissible evidence could indirectly inform the jury that another defendant has been released from the action due to a settlement, the court should admit the evidence and "simultaneously charge the jury that a plaintiff may choose which defendant he wishes to sue and that if any actions against a former defendant are relevant, they would be a matter for the court and not for the jury." *Id.* at 135, 221 S.E.2d at 858. Dawkins did not request the trial court issue such an instruction, and his request to disclose the amount of the settlement extends beyond the guidance provided by *Lucht*, which specifically stated that evidence of the amount should not be presented to the jury. *See id.* at 134, 221 S.E.2d at 858. In light of the above reasoning, the trial court did not err in denying Dawkins's motion for a new trial on this ground. Thus, we affirm the trial court on this issue.

CONCLUSION

Based on the foregoing, the trial court is

AFFIRMED.[4]

KONDUROS and HILL, JJ., concur.

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[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beverly Dale Jolly and Brenda Rice Jolly, Respondents,

v.

General Electric Company, et al., Defendants,

Of whom Fisher Controls International LLC and Crosby Valve, LLC are the Appellants.

Appellate Case No. 2017-002611

Appeal From Spartanburg County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 5858
Heard November 2, 2020 – Filed September 1, 2021

AFFIRMED

C. Mitchell Brown, Allen Mattison Bogan, James Bruce Glenn, and Nicholas Andrew Charles, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellants.

Theile Branham McVey and John D. Kassel, both of Kassel McVey, of Columbia; and Lisa White Shirley and Jonathan Marshall Holder, both of Dean Omar Branham Shirley, LLP, of Dallas, Texas, all for Respondents.

GEATHERS, J.: In this complex mesothelioma case, Appellants Fisher Controls International LLC (Fisher) and Crosby Valve, LLC (Crosby) seek review of the circuit court's denial of their motions for a directed verdict and a judgment notwithstanding the verdict (JNOV), its granting of a new trial *nisi additur* to Respondents Beverly Dale Jolly (Dale) and Brenda Rice Jolly (Brenda), its partial denial of Appellants' motion for setoff, and its denial of Appellants' motion to quash subpoenas for their corporate representatives. Among the multitudinous arguments made in their brief, Appellants assert there was no scientifically reliable evidence that Dale's workplace exposure to their products proximately caused his mesothelioma. We affirm.

FACTS/PROCEDURAL HISTORY

From early 1980 to late 1984, Dale worked as a mechanical inspector for Duke Power Company (Duke) at the Oconee, McGuire, and Catawba nuclear power plants in South Carolina and North Carolina.[1] During this time, his duties regularly brought him within close proximity to his co-workers' removal of asbestos gaskets from valves supplied by various manufacturers,[2] including Appellants. Appellant Fisher Controls International LLC sold customized process control valves to Duke, and Appellant Crosby Valve, LLC sold customized safety valves to Duke. Flanges connected these valves to pipelines,[3] and each flange housed a gasket for the purpose of providing a tight seal to the connection. Whenever a worn gasket was replaced, Dale had to verify the number on the replacement gasket by the manufacturer's manual and document this verification. He also had to verify that the gasket was torqued correctly.

Dale was so close to the process of removing the worn gaskets that he saw and breathed in the dust being released from the brushing and grinding of the gaskets,[4] and he wore safety goggles to keep the dust out of his eyes. Although

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[1] The Oconee plant is in Seneca, South Carolina; the McGuire plant is in Huntersville, North Carolina; and the Catawba plant is in York, South Carolina.

[2] A gasket is "a material (such as rubber) or a part (such as an O-ring) used to make a joint fluid-tight." *Gasket*, Merriam-Webster Dictionary, https://www.meriam-webster.com/dictionary/gasket (last visited August 24, 2021).

[3] A flange is "a rib or rim for strength, for guiding, or for attachment to another object." *Flange*, Merriam-Webster Dictionary, https://www.meriam-webster.com/dictionary/flange (last visited August 24, 2021).

[4] When an asbestos gasket is new, it is encapsulated, but after normal use of the product, it deteriorates. Therefore, before a used gasket could be replaced, it had to

Appellants manufactured only the valves and not the gaskets used with these valves, Appellants kept the gaskets in stock and sold them to Duke upon receiving Duke's purchase orders and specifications.

In late 1984, Dale left his position as a mechanical inspector and, except for a two-month break in 2002, continued to work for Duke in other capacities until December 2015, when he was diagnosed with mesothelioma, a type of lung cancer. After his diagnosis, Dale underwent extensive treatment for his condition, including several rounds of chemotherapy, a complicated surgery, a subsequent hospitalization, and experimental immunotherapy.

On April 25, 2016, Dale and his wife, Brenda, filed the present products liability action against Appellants and numerous co-defendants, alleging that Dale was exposed to asbestos emanating from the defendants' products. Respondents asserted causes of action for, inter alia, negligence, strict liability, breach of implied warranty, fraudulent misrepresentation, and loss of consortium. Respondents alleged, inter alia, that (1) Appellants were strictly liable for the harm caused to Dale by their products because the lack of an adequate warning or adequate use instructions rendered the design of these products defective and dangerous; (2) Appellants were negligent in the design of their products and in failing to warn of the harm resulting from the use of their products; and (3) Appellants breached their implied warranties that their products were of good and merchantable quality and fit for their intended use. Prior to trial, Respondents settled their claims against Appellants' co-defendants for a total sum of $2,270,000. In exchange for these proceeds, Respondents released all of their present and future claims against the co-defendants, including any future wrongful death claim.

In July 2017, the circuit court conducted a trial on Respondents' claims against Appellants. At the conclusion of the trial, the jury awarded $200,000 in actual damages to Dale for his negligence and breach of warranty claims and $100,000 in actual damages to Brenda for her loss of consortium claim. The circuit court later granted Respondents' motion for a new trial *nisi additur* and increased Dale's award to $1,580,000 and Brenda's award to $290,000.

The circuit court also granted, in part, Appellants' motion for a setoff of Respondents' pre-trial settlement proceeds against the increased verdicts for Dale and Brenda. The circuit court accepted Respondents' stated allocation of the

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be removed with grinders and brushes so that the face of the flange it sat against was clean enough to prevent future leaks.

proceeds, which assigned one-third to Dale's claims; one-third to Brenda's claims; and one-third for a future wrongful death claim. As to the portion of proceeds Respondents had allocated to a future wrongful death claim, the circuit court denied setoff. The circuit court also denied Appellants' motion for a JNOV and issued a separate written order memorializing its pre-trial denial of Appellants' motion to quash Respondents' trial subpoenas. Appellants later filed a motion for reconsideration, which the circuit court denied. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict/JNOV

Appellants challenge the circuit court's denial of their motion for a JNOV on the following grounds: (1) there was no reliable evidence that Dale's workplace exposure to their products proximately caused his mesothelioma; (2) Respondents failed to meet their burden of proof on their claims that were based on a failure to warn; (3) Respondents failed to meet their burden of proving a design defect for purposes of their negligence and implied warranty claims; and (4) Respondents failed to show Appellants deviated from the standard of care. We will address these grounds in turn.

A motion for a JNOV is "merely a renewal of [a] directed verdict motion." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). "When ruling on a JNOV motion, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). "This court must follow the same standard." *Id.* "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." *Id.* (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)).

"In considering a JNOV, the [circuit court] is concerned with the existence of evidence, not its weight," and "neither [an appellate] court, nor the [circuit] court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (second alteration in original) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005)). "The jury's verdict must be upheld unless no evidence reasonably supports the jury's

findings." *Id.* In other words, a motion for a JNOV "may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

A. Proximate Cause

Appellants maintain there was no evidence that Dale's exposure to asbestos from their products proximately caused his mesothelioma. Specifically, Appellants argue there was no reliable evidence showing Dale's exposure to their products was a "substantial cause" of his illness. We disagree.

Whether the theory under which a products liability plaintiff seeks recovery is negligence, strict liability, or breach of warranty, it is necessary to show "the product defect was the proximate cause of the injury sustained." *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003).[5] "Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability." *Bray*, 356 S.C. at 116–17, 588 S.E.2d at 95. "Ordinarily, the

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[5] *See also* S.C. Code Ann. § 15-73-10 (2005) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if (a) The seller is engaged in the business of selling such a product, and (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."); S.C. Code Ann. § 15-73-30 (2005) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter."); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 462–63, 494 S.E.2d 835, 842 (Ct. App. 1997) ("A products liability case may be brought under several theories, including strict liability, warranty, and negligence[, and] regardless of the theory on which the plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant." (citation omitted)); *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 15, 677 S.E.2d 612, 614–15 (Ct. App. 2009) ("In addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design."); *Small*, 329 S.C. at 466, 494 S.E.2d at 844 ("[L]iability may be imposed upon a manufacturer *or* seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller . . . ." (emphasis added)).

question of proximate cause is one of fact for the jury[,] and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Small*, 329 S.C. at 464, 494 S.E.2d at 843.

Further, "[t]o establish medical causation in a product liability case, a plaintiff must show both general causation and specific causation." *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011) (quoting *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010)). "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* (quoting *In re Bausch & Lomb*, 693 F. Supp. 2d at 518); *see also* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 52 (2008). General causation "is generally not an issue in asbestos litigation" due to the parties' acknowledgment that exposure to asbestos causes mesothelioma. *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even If Legal Conclusions Are Scientifically Sound. — Haskins v. 3M Co.* (hereinafter *Asbestos Litigation*), 131 HARV. L. REV. 658, 658 n.4 (2017). However, to show specific causation,

> a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.

Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997).

Moreover, when there are multiple possible sources of the plaintiff's exposure to a toxin, as in the present case, the plaintiff must also show that his exposure to a particular defendant's product was a "substantial factor" in the development of the plaintiff's disease. *See* Bernstein, 74 BROOK. L. REV. at 52 ("[W]ith regard to cases in which a plaintiff alleges injury after exposure to a toxin from multiple sources, a given defendant may only be held liable if the plaintiff proves by a preponderance

of the evidence that exposure to that defendant's products was a 'substantial factor' in causing that injury."). South Carolina has adopted the substantial factor test:

> In determining whether exposure is actionable, we adopt the "frequency, regularity, and proximity test" set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[–63] (4th Cir. 1986): "To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked."

Henderson v. Allied Signal, Inc., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) (emphases added); *see also Lohrmann*, 782 F.2d at 1158, 1162 (applying Maryland law to a pipefitter's products liability claims and restating Maryland's substantial factor test: "To establish proximate causation in Maryland, the plaintiff must introduce evidence [that] allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a *substantial factor* in bringing about the result." (emphasis added)).[6] While the substantial factor test relaxes the "but-for" requirement of traditional tort cases,[7] it still requires the plaintiff to show "more than a casual or minimum contact with the product." *Lohrmann*, 782 F.2d at 1162.[8]

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[6] *See also* Bernstein, 74 BROOK. L. REV. at 55 ("Beyond general and specific causation, an additional causation issue arises when multiple defendants are responsible for exposing the plaintiff to a harmful substance. The most common example is a plaintiff who contracts an asbestos-related disease, such as lung cancer or asbestosis, and was exposed to asbestos from multiple sources. Assuming the plaintiff is able to show that his disease was more probably than not caused by asbestos exposure, he still has to prove that a particular defendant's asbestos-containing product was a 'proximate cause' of that injury to recover damages from that defendant.").

[7] *See Asbestos Litigation*, 131 HARV. L. REV. at 658–59 (explaining that courts presiding over asbestos litigation have departed from traditional tort standards to overcome evidentiary hurdles inherent in these cases and highlighting the substantial factor test as a departure from requiring the plaintiff to show that he would not have developed mesothelioma but for exposure to the defendant's product).

[8] Use of the "substantial factor test" has become widespread. *See, e.g.*, *Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991) ("The most frequently used test for causation in asbestos cases is the 'frequency-regularity-proximity' test announced in [*Lohrmann*]."); *id.* n.3 (listing jurisdictions adopting the *Lohrmann* test).

The evidence in the present case satisfies general causation, specific causation, and the substantial factor test. At trial, Dale testified that during his four years as a mechanical inspector, his duties regularly brought him within close proximity to his co-workers' removal of asbestos gaskets from valves supplied by various manufacturers, including Appellants. Dale recounted that he regularly and consistently worked in the vicinity of other workers removing asbestos gaskets from a "good many" Crosby valves and "[a] lot of" Fisher valves. These asbestos gaskets were used in not only the flanges connecting the valve to a pipe but also internal flanges, i.e., flanges within the valve, and some internal gaskets appeared to be used with other internal components of the valve.

This work occurred at the Oconee, McGuire, and Catawba power stations whenever each respective station would shut down its operations to change out the uranium core and perform system maintenance. Each plant had at least one shutdown per year, and each shutdown would last approximately ten to twelve weeks. Dale was so close to the removal process that he saw and breathed in the dust being released from the brushing and grinding of the gaskets, and he wore safety goggles to keep the dust out of his eyes. Some of the valves were so large that the flange opening was tall enough for a person to fit in, and the removal process was time-consuming. David Taylor, Dale's co-worker, testified that there were hundreds of these valves at the Oconee plant.

Although Appellants manufactured only the valves and not the gaskets used with these valves, Appellants kept the gaskets in stock and sold them to Duke upon receiving Duke's purchase orders and specifications. *See supra* n.5. A major component of many of these gaskets, as well as replacement gaskets supplied by Appellants, was asbestos.

Appellants maintain that they sold to Duke only internal gaskets rather than "flange gaskets," implying that Dale's work around gasket removals was limited to only those flanges connecting the valve to a pipe. However, the evidence shows at least some of Appellants' valves had internal flanges that required a gasket. Therefore, the term "flange gasket" should encompass these internal gaskets that Appellants undoubtedly sold to Duke. Appellants also maintain that Dale's testimony regarding his exposure did not include these internal gaskets. However, Dale testified that his duties included inspecting the work of the valve crews on the valves' internal components and this required being very close to the crews, even standing right beside them on many occasions. He also described the crews taking valves apart and his own verification of the number on the particular replacement

gasket that went into a valve using the valve manufacturer's manual. Further, several of Duke's purchase orders and Fisher's invoices show Fisher's sale of flange gaskets to Duke, and there is no obvious indication of whether these gaskets were for internal flanges or flanges that connect the valve to a pipe.[9]

The evidence summarized above, by itself, meets *Henderson*'s substantial factor test.[10] In a nutshell, Dale testified that during his four years as a mechanical inspector, he regularly and consistently worked in close proximity to co-workers removing asbestos gaskets from a "good many" Crosby valves and "[a] lot of" Fisher valves and that he breathed the dust, which was visible.[11] Additionally, the expert testimony is sufficient to show both general and specific medical causation. Respondents presented the testimony of Dr. Arthur Frank, a physician specializing in occupational medicine;[12] Dr. John Maddox, a pathologist; and Dr. Arnold Brody, a cell biologist. Additionally, the affidavit of Dr. Frank was admitted into evidence.

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[9] Several Duke purchase orders submitted to Fisher designate asbestos gaskets with a "flanged fitting."

[10] *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("In determining whether exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[–63] (4th Cir. 1986): 'To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.'").

[11] In support of their challenge to the sufficiency of Respondents' causation evidence, Appellants cite the Fourth Circuit's opinion in *Lohrmann*, in which the court upheld the district court's ruling that the plaintiff's asbestos exposure on ten to fifteen occasions of between one and eight hours duration was insufficient "to raise a permissible inference that such exposure was a substantial factor in the development of his asbestosis." 782 F.2d at 1163. However, the present case does not concern asbestosis, which, according to Dr. Frank, requires higher exposure levels than the exposure levels that can cause mesothelioma. Therefore, the facts in *Lohrmann* do not lend themselves to a valid comparison with the facts in the present case.

[12] Dr. Frank also has a doctorate in biomedical sciences, and he has been a consultant to the National Institute for Occupational Safety and Health and an advisor to the Occupational Safety and Health Administration ("OSHA"). He has testified in numerous mesothelioma cases nationwide. *See, e.g.*, *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (Pa. 2016). In addition to performing cancer research at the National Cancer Institute, he participated in epidemiologic studies of asbestos-exposed populations.

Critically, Dr. Frank stated in his affidavit that his opinions were his "medical and scientific opinions" and that he was "not offering legal opinions about whether an exposure is 'significant' or 'substantial' within the meaning of the law." Dr. Frank also stated, "Evaluation of all available human data provides no evidence for a threshold or for a 'safe' level of asbestos exposure," and "[t]here is overwhelming, generally accepted evidence that inhalation of asbestos fibers of any type, from any source or product, causes mesothelioma."[13] Dr. Frank noted that the median latency period for malignant pleural mesothelioma, with which Dale was diagnosed, is 44.6 years among males.

Dr. Frank also noted that this particular illness is "an aggressive cancer of the membranes lining the lungs" and cited a study recognizing that all forms of asbestos cause mesothelioma. He also offered his scientific opinion that every "occupational, para-occupational, environmental or domestic exposure contributes to the risk of developing mesothelioma" and the cumulative exposure to asbestos contributes to the total dose of asbestos. Dr. Frank explained at trial that "cumulative exposure" means the likelihood of contracting cancer rises with increasing amounts of exposure. Dr. Frank added, "So[,] if someone has multiple exposures, even to multiple products, all of them have contributed to make up the cumulative dose. And for any given individual, it is that cumulative dose that gave them that disease." In his affidavit, he stated that all of the epidemiological studies he cited use cumulative exposure when discussing risk. He further stated that even in occupational settings,

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[13] Dr. Frank explained,

> While scientists working for the asbestos industry and defendants in asbestos product liability lawsuits contend that one can extrapolate a "no adverse effect level" from the existing data and/or that massive potency differences [exist] between hypothetical identical fibers of different types of asbestos, those opinions are outside of the scientific mainstream and *have been considered and rejected by independent panels of scientific experts with no bias or agenda*, such as [the International Agency for Research on Cancer, the Agency for Toxic Substances and Disease Registries, and the National Institute for Occupational Safety and Health]."

(emphasis added).

it is usually difficult, if not impossible, to quantify the amount of exposure. Dr. Frank frequently referenced the epidemiological studies on which he based his testimony as well as the statements in his affidavit.

After having reviewed Dale's deposition testimony, his medical records, and other case documents, Dr. Frank testified at trial that the body of literature about the level of asbestos emitted when asbestos flange gaskets are removed from a valve indicates that significant levels of asbestos fibers are released when the gasket is removed using a hand wire brush or an electric-powered grinder. He explained that a significant level of asbestos fibers that can cause disease cannot be seen with the naked eye, and therefore, if one can see dust emanating from an asbestos product, the level is "potentially very high," depending on the percentage of asbestos in the product. Given Dale's testimony that he saw dust emitted from the removal of gaskets, Dr. Frank stated the level of asbestos fibers to which Dale was exposed could have been very high. Dr. Frank quantified this type of exposure by comparing it to the background or ambient (non-workplace) exposure in urban areas, concluding that Dale's exposure to the removal of one gasket for a short period of time would have been in the range of 1 to 99 fibers per cubic centimeter, millions of times higher than background exposure.

Dr. Frank further testified that even the current permissible exposure limit of one-tenth of one fiber per cubic centimeter over the course of a year presents a cancer risk. According to Dr. Frank, some countries allow no exposure, and although rare, a single day of exposure to asbestos has been documented in epidemiological data as causing a person to contract mesothelioma. He also stated that a month or less of exposure has been documented as doubling the risk of lung cancer. Dr. Frank concluded that during Dale's four years working as a mechanical inspector for Duke, his regular and frequent exposures, from a distance of ten feet or less, to the removal of asbestos gaskets from the flange face of valves using wire brushing tools and scrapers contributed to the cumulative exposure that resulted in Dale's mesothelioma. He stated that if Dale's exposures "to either Crosby or Fisher valves had been his only exposure, that . . . would have been sufficient to cause his mesothelioma."

Dr. John Maddox, a pathologist who has diagnosed over 500 patients with mesothelioma, cited studies establishing that even individuals in the lowest exposure category can develop mesothelioma after asbestos exposure. He also cited a study indicating that individuals in high-exposure occupations had shorter latency periods than those in occupations with lower exposures, citing mean latency periods for the high-exposure occupations of insulators and shipyard workers as 29.6 years and 35.4

years, respectively. In comparison, Dale's latency period was 31 years, as he was diagnosed with mesothelioma in 2015, thirty-one years after his last exposure to the asbestos gaskets sold by Appellants in late 1984.

After examining Dale's pathology records, Dr. Maddox determined that Dale had a right pleural malignant mesothelioma, epithelioid type. Dr. Maddox concluded that Dale's mesothelioma was caused by his cumulative asbestos exposure throughout his life. Dr. Maddox was asked to give his opinion on whether Dale's asbestos exposures from 1980 to 1984 caused his mesothelioma based on the following assumptions: (1) over the course of "three to four years," Dale's exposures "came from asbestos-containing gaskets and packing used in some but not all of the valves at a power plant during outages . . . at several plants"; (2) as a regular part of his job, Dale was close enough to see the dust created by the removal of these gaskets, "often working one to two feet from" this process; and (3) the level of each of these exposures was hundreds of thousands of times higher than background levels. Dr. Maddox testified these exposures were significant, repetitive, high enough to provide visible dust, and within a reasonable latency period, which is at least ten years. Dr. Maddox stated that those exposures would be "sufficient to deem that causative." Subsequently, Dr. Maddox was asked to assume that of those exposures, Dale had "multiple exposures . . . from [Appellants'] valves in addition to several other companies' equipment." Based on this assumption, Dr. Maddox testified that the exposures to Appellants' products "would be significant contributors to the diagnosis and development of malignant mesothelioma."

Dr. Arnold Brody, a cell biologist, testified concerning how the inhalation of asbestos causes mesothelioma. Dr. Brody explained that there is a consensus in the scientific community that all of the commercial varieties of asbestos fibers "cause all of the asbestos diseases." He also explained that whether an individual develops a disease from his or her exposure depends on the dose and that individual's personal susceptibility based on the response of his or her genetic defenses, and for mesothelioma, there is no known threshold or level above background levels that is known to be "safe or [that] will not cause mesothelioma."

In sum, the above evidence showed that human inhalation of asbestos fibers of any type can cause mesothelioma, establishing general causation.[14] This evidence also showed that (1) Dale worked in closed proximity to the asbestos released from

[14] *See Fisher*, 817 F. Supp. 2d at 814 ("General causation is whether a substance is capable of causing a particular injury or condition in the general population . . . ." (quoting *In re Bausch & Lomb*, 693 F. Supp. 2d at 518)).

gaskets sold by Appellants; (2) these exposures, each one being at least 1 to 99 fibers per cubic centimeter per gasket (millions of times higher than background exposure), occurred on a regular basis for an extended period of time, 1980 to 1984; (3) even the current permissible exposure limit of one-tenth of one fiber per cubic centimeter over the course of a year presents a cancer risk; (4) Dale's latency period was 31 years; (5) the median latency period for malignant pleural mesothelioma, with which Dale was diagnosed, is 44.6 years among males; and (6) Dr. Maddox found the latency period for Dale's development of mesothelioma after exposure to Appellants' gaskets to be reasonable. Therefore, this evidence also established specific causation and satisfied the elements of the substantial factor test.[15]

Appellants argue Respondents' causation evidence did not meet the substantial factor test because their experts "did not provide scientifically reliable evidence of either the amount of asbestos to which Dale was exposed from Crosby or Fisher products or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma." Appellants maintain that the expert testimony is unreliable because it employed the "each and every exposure" theory of causation. We disagree with Appellants' characterization of the expert testimony. We also disagree with Appellants' implication that the substantial factor test requires a precise quantification of the number of asbestos fibers to which Dale was exposed and a "threshold exposure." We will address these matters in turn.

The "each and every exposure" theory espouses the view that "'each and every breath' of asbestos is substantially causative of mesothelioma." *See Rost*, 151 A.3d at 1044 ("[E]xpert testimony based upon the notion that 'each and every breath' of

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[15] *See Havner*, 953 S.W.2d at 720 ("To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study"); *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("In determining whether exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[–63] (4th Cir. 1986): 'To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.'").

asbestos is substantially causative of mesothelioma will not suffice to create a jury question on the issue of substantial factor causation."); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 31 (Pa. 2012) (noting the report of plaintiffs' causation expert concluded that each exposure is "a substantial contributing factor in the development of the disease that actually occurs" and did not assess the plaintiffs' individual exposure history "as this was thought to be unnecessary, given the breadth of the any-exposure theory" (emphasis removed)); *see also Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). A significant number of jurisdictions have found the "each and every exposure" theory to be unreliable. *See, e.g.*, *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Yates*, 113 F. Supp. 3d at 846 (listing jurisdictions); *In re New York City Asbestos Litig.*, 48 N.Y.S.3d 365, 370 (2017); *Betz*, 44 A.3d at 53 (stating that the trial court "was right to be circumspect about the scientific methodology underlying the any-exposure opinion. [The court] . . . was unable to discern a coherent methodology supporting the notion that every single fiber from among, potentially, millions is substantially causative of disease").

Respondents distinguish between the "each and every exposure" theory and the cumulative dose theory. They maintain that their experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinion is not the equivalent of testifying that "each and every exposure" was a substantial factor in causing Dale's mesothelioma. We agree. Respondents explain, "Even though the experts testified that *all exposures contribute to the cumulative dose that causes disease*, that does not mean that every exposure rises to the level of a *substantial factor*." (first emphasis added). Respondents note that this distinction was also made in *Rost*, a case in which Dr. Frank testified.

In *Rost*, the Supreme Court of Pennsylvania concluded,

> We must agree with the Rosts that Ford has confused or conflated the "irrefutable scientific fact" that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are "substantial factors" in causing the disease. It was certainly not this [c]ourt's intention, in [its precedent], to preclude expert witnesses from

> informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation. In this case, while Dr. Frank clearly testified that every exposure to asbestos cumulatively contributed to Rost's development of mesothelioma, he never testified that every exposure to asbestos was a "substantial factor" in contracting the disease.
>
> Instead, by way of, inter alia, the lengthy hypothetical that detailed the entirety of Rost's exposure to asbestos-containing Ford products while at Smith Motors, Dr. Frank testified that Rost's **actual exposures** to asbestos at Smith Motors over three months was substantially causative of his mesothelioma. . . . . In other words, Dr. Frank did not testify that a single breath of asbestos while at Smith Motors caused Rost's mesothelioma, but rather that the entirety of his exposures during the three months he worked there caused his disease. In this regard, Dr. Frank stressed that, unlike with some other asbestos-related diseases (e.g., asbestosis), mesothelioma may develop after only relatively small exposures.

Id. at 1045–46.[16] *Rost* is particularly persuasive given that Dr. Frank testified in that case and his testimony was similar to his testimony in the present case. Moreover,

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[16] *See also Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1301 (11th Cir. 2017) (holding that the district court did not abuse its discretion in admitting expert testimony stating there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma and that all "significant" exposures to asbestos "contribute to cause mesothelioma"); *id.* (stating that the defendant mischaracterized the opinion of the plaintiff's expert "as essentially that 'any exposure' to asbestos is a substantial factor in causing mesothelioma, which it says makes his opinion scientifically unreliable. That is not what he said"); *id.* ("While [the plaintiff's expert] testified that all significant exposures to asbestos contribute to causing mesothelioma, he did not say that <u>any</u> exposure to asbestos is a substantial factor in causing mesothelioma, or even that every significant exposure causes it."); *id.* (stating that the expert's opinion was also based on an extensive knowledge of the facts in the case and was supported by scientific literature").

the other expert testimony on medical causation, including the application of scientific standards to Dale's occupational exposure history, was compelling.

Appellants assert that Respondents' distinction between the each and every exposure theory and the cumulative dose theory is artificial. They also assert that the presentation of the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard. We disagree with both assertions. Stating that a certain exposure *contributes* to an individual's cumulative dose does not espouse the view that "each and every breath" of asbestos is "substantially" causative of mesothelioma or imply that one exposure meets the legal requirement for causation.[17] We view the testimony concerning cumulative dose as background

[17] At oral argument, Appellants alleged that under cross-examination, Dr. Frank testified each of approximately 60 exposures was a substantial cause of Dale's mesothelioma. We disagree with Appellant's characterization of Dr. Frank's testimony. Counsel attempted to elicit an admission from Dr. Frank that he had earlier stated "any and all exposures [Dale] may have had from any product was a substantial cause of . . . his mesothelioma." Dr. Frank replied that he had not used the phrase "any and all" but had stated all of Dale's exposures from all products containing all fiber types were a substantial cause. It is clear that Dr. Frank rejected the "any" characterization and was clarifying that *collectively*, all of the exposures substantially caused Dale's mesothelioma.

Counsel then asked if these exposures would *include* products from General Electric, and Dr. Frank replied, "If they contained asbestos and if he was exposed, yes." Counsel then asked the same question as to numerous other businesses, one by one, to which Dr. Frank gave the same answer. Dr. Frank took care to clarify this answer part of the way through counsel's laundry list, stating, "Again, if he had exposures to such a product containing asbestos, it would have contributed to his cumulative exposure." It is clear that during this line of questioning, Dr. Frank was indicating Dale's collective exposures included products from the businesses mentioned by counsel if they contained asbestos and Dale was exposed to them.

Dr. Frank later stated that Dale's exposure to the product of one business would be "the contributing cause." We view his use of the article "the" as inconsistent with the term "contributing" and, thus, we attribute no significance to his use of this article. Subsequently, when asked about a product from another business, Dr. Frank stated, "If he was exposed to asbestos-containing John Crane packing, it would have been, in my opinion, a substantial contributing cause to his mesothelioma." Although he included the term "substantial" in this response, it was

information essential for the jury's understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test.

Further, Dr. Frank supplemented this background information with his assessment of the probable level of exposure, 1 to 99 fibers per cubic centimeter, for each asbestos gasket removal and replacement Dale inspected. He further explained that this level is millions of times higher than background exposure and that the frequency of Dale's exposures over a four-year period accumulated to a level that could be considered a specific medical cause of Dale's mesothelioma. In other words, Respondents' experts were guided by the facts specific to Dale's exposure to Appellants' products in forming their opinions concerning causation. We note that the following factors on which Dr. Frank stated he routinely relies in examining a specific case are similar to the *Henderson* factors:

> In determining the relative contribution of any exposures to asbestos above background levels, it is important to consider a number of factors, including: the nature of exposure, the *level* of exposure and the *duration* of exposure, whether a product gives off respirable asbestos fibers, the level of exposure, whether a person was *close to or far from the source* of fiber release, how *frequently* the exposure took place and how long the exposure lasted, whether engineering or other methods of dust control were in place, and whether respiratory protection was used.

(emphases added). Likewise, the factors on which Dr. Maddox relied in forming his opinion overlap with the *Henderson* factors as they included how the exposure levels were measured, the standard that the exposure should be repetitive, dose response, and the exposures falling within a reasonable latency period.

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qualified by the term "contributing" and, therefore, his response as a whole conveyed to the jury the mere contribution of Dale's exposure to this particular product to his cumulative dose. We decline to associate this isolated reference to the term "substantial" with either an adoption of the each and every exposure theory or a rejection of the legal requirement that a plaintiff's exposure to a particular defendant's product must be frequent, especially given Dr. Frank's previous statements in his affidavit that his opinions were medical and scientific and that he was not offering opinions about whether an exposure is substantial within the meaning of the law.

Appellants next argue that in addition to their valves, valves made by ten additional manufacturers were located where Dale worked and this decreased the likelihood that their own products caused Dale's mesothelioma. Yet, this argument is based on the faulty premise that a "but-for" standard of causation applies to mesothelioma cases when all *Lohrmann* requires is substantial causation shown by frequent, regular, and proximate exposure to the defendant's products. *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("In determining whether exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[–63] (4th Cir. 1986): 'To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked.'" (emphases added)); *Asbestos Litigation*, 131 HARV. L. REV. at 662 (analyzing an unpublished opinion of the United States District Court, District of South Carolina, and stating "although the court wrapped its conclusion in substantial factor language, it applied the but-for standard of specific causality—the same standard whose evidentiary difficulties elicited modifications of the test in the first place").

The substantial factor test formulated in *Lohrmann* merely requires a plaintiff to show "more than a casual or minimum contact with the product" of the defendant rather than a comparison of these exposures to the exposures to other defendants' products. 782 F.2d at 1162; *see also Rost*, 151 A.3d at 1050–51 ("[I]n asbestos products liability cases, evidence of 'frequent, regular, and proximate' exposures to the defendant's product creates a question of fact for the jury to decide. *This [c]ourt has never insisted that a plaintiff must exclude every other possible cause for his or her injury*, and in fact, we have consistently held that *multiple substantial causes* may combine and cooperate to produce the resulting harm to the plaintiff." (emphases added) (footnote omitted) (citation omitted)).

Based on the foregoing, we reject Appellants' argument that Respondents' evidence of substantial causation was insufficient. *See Duckett ex rel. Duckett v. Payne*, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred."); *see also Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("In considering a JNOV, the [circuit court] is concerned with the existence of evidence, not its weight."); *id.* ("The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings."); *Williams Carpet Contractors*, 400 S.C. at 325, 734 S.E.2d at 180 ("When ruling on a JNOV motion, the [circuit] court is required to view the evidence and the

inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party."); *id.* ("This court must follow the same standard."); *id.* ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965))); *Small*, 329 S.C. at 464, 494 S.E.2d at 843 ("Ordinarily, the question of proximate cause is one of fact for the jury and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence."); *cf. Est. of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 403, 811 S.E.2d 807, 815 (Ct. App. 2018) (holding multiple inferences that could be drawn from the evidence precluded summary judgment and required a jury to determine the question of causation).

To the extent Appellants challenge the *admissibility* of Respondents' experts' testimony on the ground that it was unreliable,[18] they have failed to show any significant part of the testimony that could be reasonably characterized as espousing the "each and every exposure" theory. Further, the cumulative dose theory on which Respondents' experts relied easily meets the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). *See id.* at 20, 515 S.E.2d at 518 ("[T]he proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the [circuit court] must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable."); *id.* at 19, 515 S.E.2d at 517 (setting forth four of "several factors" a court should examine in considering the admissibility of scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures").

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[18] Technically, the circuit court's ruling on this issue may be considered the law of the case. In its order denying Appellants' JNOV motion, the circuit court concluded that the testimony of Respondents' experts was admissible, and Appellants have not explicitly appealed that ruling. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered [that] is not set forth in the statement of the issues on appeal."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). However, we address the issue out of an abundance of caution. *See* Toal et al., *Appellate Practice in South Carolina* 208 (3d ed. 2016) ("[W]here an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from the appellant's arguments.").

As to items (1) and (2) of the *Council* factors, Dr. Frank's affidavit indicates that scientists have analyzed cumulative asbestos exposure in order to ascribe causation in numerous peer-reviewed, published epidemiological studies, case series, and case reports. These publications "reinforce the scientific consensus that each occupational and para-occupational exposure to asbestos *contributes* to the cumulative lifetime asbestos exposure and increases a person's risk of developing mesothelioma." (emphasis added). As to item (3), Dr. Frank and his peers have not limited their analyses to the epidemiology of a substance but have also considered other scientific data, such as genetics, host factors, immunologic status, the relationship between risk and the level of exposure, and the dose-response principle. He stated,

> It is precisely because scientists and physicians understand the limitations of epidemiology and how certain factors can bias studies toward a lack of statistical significance or finding of a point estimate of no increased risk[] that we look at the epidemiology of a substance *along with* the other scientific data described above. Each epidemiological study must be evaluated for its strengths and weaknesses, and decisions about cause and effect should only be made on reliable data.

(emphasis added).

As to item (4), Dr. Frank stated that he follows the same weight-of-the-evidence methodology used by the International Agency for Research on Cancer, the World Health Organization, the National Institute for Occupational Safety and Health, and the Agency for Toxic Substances and Disease Registries in reaching his conclusions about the health effects of asbestos. He explained that the duties of these organizations are to evaluate the science and not to set policy. He also explained how the cumulative dose theory is consistent with the classic dose-response principle but noted that occupational and environmental epidemiology "is a blunt instrument and is not, in most cases, well suited to examining *precise* dose-response relationships." (emphasis added). Again, Dr. Frank's affidavit indicated that the cumulative dose theory has been analyzed in numerous epidemiological studies, case series, and case reports and "[w]hen examining the question of

causation of sentinel diseases like mesothelioma[,][19] the scientific community recognizes case reports and case series reports are useful and valid tools."

Moreover, Appellants have also failed to show there is a reasonable probability the jury's verdict was influenced by any testimony that could be reasonably characterized as espousing the each and every exposure theory. *See Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."); *id.* at 31–34, 609 S.E.2d at 512–13 (holding the court of appeals erred in concluding the plaintiff showed prejudice from the exclusion of certain testimony because the plaintiff did not show a reasonable probability the jury was influenced by the exclusion). Nothing in the testimony of Respondents' experts indicates they were seeking to substitute their opinions on the science underlying mesothelioma for the legal standard on causation. To the contrary, Dr. Frank's affidavit explicitly stated that his opinions were his "medical and scientific opinions" and that he was "not offering legal opinions about whether an exposure is 'significant' or 'substantial' within the meaning of the law."

With the clear guidance from the circuit court's instructions on the law, which included the *Henderson/Lohrmann* standard, the jury was capable of distinguishing between the science-based testimony concerning medical causation and the legal standard for establishing causation in the face of multiple possible sources of the plaintiff's exposure. Therefore, the presence of any questionable language in isolated portions of the expert testimony paled in comparison to Dale's testimony and his experts' response to specific fact-based hypothetical questions. *See supra*.

Based on the foregoing, the circuit court acted well within its discretion in admitting the experts' testimony into evidence. *See Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000) ("The admissibility of evidence is within the [circuit] court's discretion. Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal." (footnote omitted)).[20]

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[19] According to Dr. Frank's affidavit, a sentinel event is "a case of disease that, when it appears, signals the need for action."

[20] Appellants' additional argument that the expert testimony should have been excluded under Rule 403, SCRE is not preserved for review. The circuit court did not rule on this issue in its order addressing Appellants' post-trial motions, and

B. Failure to Warn

As an additional ground for challenging the circuit court's denial of their JNOV motion, Appellants assert Respondents failed to meet their burden of proof on their failure-to-warn claims because (1) Appellants were protected by the sophisticated intermediary doctrine and (2) the danger of asbestos gaskets was open and obvious. We will address these two grounds in turn, but first we address Appellants' interjection of the burden of proof into their assignment of error. "In considering a JNOV, the [circuit court] is concerned with the existence of evidence, not its weight." *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274. "The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Id.* In other words, neither the circuit court nor this court may re-weigh the evidence in determining whether it is necessary to set aside a jury's verdict.

We will now address Appellants' two grounds for challenging the jury's verdict on Respondents' failure-to-warn claims.

<u>Reasonable Reliance/Sophisticated Intermediary Doctrine</u>

This court first adopted the sophisticated intermediary doctrine in *Bragg v. Hi-Ranger, Inc.* when it upheld the following jury instruction given by the circuit court:

> [A] manufacturer has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, thereby, warn the ultimate user of any alleged inherent dangers involved in

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Appellants did not subsequently seek the circuit court's ruling on this issue in a Rule 59(e) motion. *See, e.g.*, *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (noting the circuit court did not explicitly rule on a particular argument, the appellant failed to show it made a Rule 59(e) motion on this ground, and, therefore, this court should not have addressed the argument); *West v. Newberry Elec. Coop.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) ("This issue was neither addressed by the [circuit court] in the final order nor mentioned in the subsequent Rule 59(e), SCACR, motion. As such, it is not preserved for review by this court.").

> the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which . . . the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.

319 S.C. 531, 549, 462 S.E.2d 321, 331–32 (Ct. App. 1995). This court concluded that the circuit court correctly charged the jury and the charge "was an accurate recitation of the law." *Id.* at 551, 462 S.E.2d at 332.

"The [sophisticated intermediary] doctrine originated in the *Restatement Second of Torts*, section 388, comment n, . . . which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier's duty to warn." *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1033 (Cal. 2016). "The Restatement drafters' most recent articulation of the sophisticated intermediary doctrine appears in the *Restatement Third of Torts, Products Liability*, section 2, comment i, at page 30. The drafters intended this comment to be substantively the same as section 388, comment n, of the Restatement Second of Torts." *Webb*, 370 P.3d at 1034. Comment i states, in pertinent part:

> There is *no general rule* as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. *The standard is one of reasonableness in the circumstances*. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.

Restatement (Third) of Torts: Prods. Liab. § 2, cmt. i (Am. Law. Inst. 1998) (emphases added).

In the present case, the circuit court instructed the jury on the doctrine and advised the jury that it was an affirmative defense for which Appellants bore the

burden of proof.[21] The court later upheld the jury's verdict for Respondents, concluding (1) Appellants failed to show they knew Duke was aware or should have been aware of the danger from asbestos gaskets; (2) there was no evidence Appellants relied on Duke to warn its employees of the dangers of asbestos gaskets; and (3) Duke believed asbestos gaskets did not release fibers when disturbed and, thus, considered them to be harmless.[22]

Appellants contend they reasonably relied on Duke to comply with occupational safety laws, citing Dr. Frank's testimony admitting that OSHA regulations in effect from 1980 to 1984 permitted a certain level of asbestos exposure in the workplace. Appellants also cite to the OSHA regulation requiring employers to take certain precautions when an employee will be exposed to asbestos dust. However, it is not enough to show that the supplier's reliance would have been reasonable—the supplier must also show that it actually relied on the intermediary to convey warnings to end users. *See Webb*, 370 P.3d at 1036 ("To establish a defense under the sophisticated intermediary doctrine, a product supplier must show

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[21] *See Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (stating that the party pleading an affirmative defense has the burden of proving it).

[22] A November 21, 1984 script for an asbestos safety course provided to employees by Duke's construction department indicates Duke knew of the dangers of asbestos insulation but was unaware of the dangers of removing asbestos gaskets from a valve:

> Actually, asbestos is used very little in Duke Construction today, mostly to insulate electrical cabinets and pack valves, and it is used in gasket material. Even so, the asbestos in these jobs is bonded, which means it produces virtually no dust.
>
> In the past, however, nonbonded asbestos has been used for insulation throughout the Duke system. So there's a good chance asbestos dust is present wherever old insulation is being removed.

The script is consistent with the testimony of Duke employee David Taylor, who indicated that Duke distinguished between asbestos insulation, which it warned employees about when Dale worked as a mechanical inspector, and the asbestos in gaskets, which Duke failed to warn employees about until the late 1980s or early 1990s.

not only that it warned or sold to a knowledgeable intermediary, but also that it *actually* and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (emphasis added)).

Here, Fisher's corporate representative testified that the reason Fisher did not warn anyone about the dangers of asbestos gaskets was because the company did not consider them to be a health risk. Crosby's corporate representative also indicated that Crosby did not consider the gaskets in their valves to be dangerous. This belies Appellants' claims that they relied on Duke to warn Dale of the dangers of asbestos gaskets. Therefore, the circuit court properly left within the province of the jury the question of whether Appellants actually relied on Duke to warn Dale about their gaskets. *See Webb*, 370 P.3d at 1036 (stating that a product supplier "must show not only that it warned or sold to a knowledgeable intermediary, but also that it *actually* and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact *for the jury to resolve* unless critical facts establishing reasonableness are undisputed." (emphases added)).

Appellants also maintain that Duke actually warned its employees of the dangers of asbestos. However, the evidence indicates that when Dale worked as a mechanical inspector, Duke distinguished between asbestos insulation and asbestos gaskets and considered the latter to be harmless. *See supra* n.22. It was not until the late 1980s or early 1990s that Duke began warning its employees of the dangers of dust from asbestos gaskets. By then, Duke instructed its employees to wear a respirator or mask and to spray down a gasket with water before removing it from a flange.

Finally, Appellants contend they could not have reasonably warned Dale of the danger associated with their gaskets because Dale would not have seen any warning labels on the gaskets when his co-workers began grinding them up. However, Dale would have seen a warning on a replacement gasket when verifying the number on that gasket. This would have alerted him to the need to take precautions during future gasket removals. Further, Appellants do not address the feasibility of placing a warning on the outside of the valve. Instead, they argue that Respondents did not raise this possibility at trial and have not shown that a warning on the valve would have been effective or feasible. Yet, Respondents did not have this burden at trial. Rather, it was Appellants' burden to show that they met the standard for the sophisticated intermediary doctrine. *See Pike*, 343 S.C. at 231, 540 S.E.2d at 91; *see also Webb*, 370 P.3d at 1034 ("Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of

proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings.").

Moreover, on appeal, it is Appellants' burden to convince this court that the circuit court erred in upholding the jury's verdict as to this defense. *See Duckett*, 279 S.C. at 96, 302 S.E.2d at 343. Because Appellants themselves have not shown that a warning on the outside of the valve would have been ineffective or infeasible, we reject their argument that they could not have reasonably warned Duke employees of the danger associated with their gaskets.

Based on the foregoing, the circuit court properly upheld the jury's verdict as to the sophisticated intermediary doctrine.

Open and Obvious Danger

Next, Appellants assert that the danger of asbestos gaskets was open and obvious and Dale admitted he knew asbestos was dangerous. Therefore, Appellants argue, they were entitled to a JNOV on Respondents' failure-to-warn claims. We disagree.

Appellants rely on *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41–42, 674 S.E.2d 500, 504 (Ct. App. 2009) for the proposition that a seller has no duty to warn of an "open and obvious" danger created by its products or a danger that the product's users generally recognize. However, "[w]hen reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact." *Restatement (Third) of Torts: Prods. Liab.* § 2, cmt. j (1998). Here, the record shows that during Dale's employment as a mechanical inspector, Duke distinguished between asbestos insulation, which it warned employees about, and asbestos gaskets, which Duke considered harmless. Further, although Dale admitted he was warned to avoid areas where old asbestos insulation was being removed, he indicated that he and his co-workers were not made aware of the full extent of the potential for harm from asbestos exposure. Therefore, reasonable minds may differ as to whether the danger of developing cancer from exposure to asbestos gaskets was obvious or generally recognized by Duke employees.

There is no evidence that any safety information about asbestos gaskets was provided to any employees before safety course instructors received a teaching guide in September 1984, nearly four years after Dale first became a mechanical inspector, and that information merely stated that asbestos gaskets produced virtually no dust.

According to David Taylor, Duke did not warn employees about the danger associated with asbestos gaskets until the late 1980s or early 1990s, after Dale was no longer a mechanical inspector. Taylor testified that by the late 1980s, Duke required employees involved with the removal of gaskets from valves to wear a respirator and to wet the gasket before removal to minimize the liberation of the dust. Taylor also testified that the only way a typical employee could know that a particular gasket he or she was working with was made of asbestos was if its packaging had been labeled as containing asbestos. Therefore, a reasonable juror could have inferred that the danger associated with the removal of asbestos gaskets from valves was one that was not obvious to Dale or generally recognized by other Duke employees involved with that process before the late 1980s.

We acknowledge Dale's testimony that his training as a mechanical inspector included distinguishing asbestos gaskets from other types of gaskets and that he could see the dust produced by the removal of certain gaskets from valves. Thus, a juror could draw a reasonable inference that Dale was aware of some health risk posed by the dust generated when a co-worker removed an asbestos gasket from a valve. Yet, in the light most favorable to Dale, an equally reasonable inference from the evidence is that Dale had no clear or timely warning that his proximity to the removal of gaskets from Appellants' valves would cause him to develop mesothelioma. Dale testified that Duke had designated "respirator zones" that employees were prohibited from entering without a respirator, employees were accustomed to receiving a specific directive to wear a respirator for a specific job, and they could not obtain a respirator without first receiving such a directive. During the years Dale worked as a mechanical inspector, employees in proximity to the removal of asbestos gaskets from valves were not directed to wear a respirator.

Appellants also argue the only reasonable inferences from the evidence are that Dale did not heed Duke's warnings about asbestos and, therefore, would not have heeded a warning from Appellants. Appellants contend that Dale "made clear during his testimony that he knew about the hazards of asbestos . . . and that he in fact did not heed warnings from Duke and continued to work around Fisher and Crosby valves despite his knowledge of the alleged hazards." We disagree with Appellants' characterization of the testimony in question. That testimony is consistent with the other evidence indicating that from 1980 to 1984, Duke did not warn its employees of the dangers of asbestos gaskets. *See supra*. Further, we do not interpret the testimony as an admission that Dale knowingly placed himself within proximity of dust from asbestos insulation. Finally, even if the testimony, combined with the other testimony concerning Dale's training, would allow a

reasonable juror to infer that Dale did not heed Duke's warning about asbestos in general, this is not the only reasonable inference.

Based on the foregoing, the circuit court properly upheld the jury's verdict on Respondents' failure-to-warn claims. *See Restatement (Third) of Torts: Prods. Liab.* § 2, cmt. j ("When reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact.").

C. Design Defect

Next, Appellants assert there was no evidence of a reasonable alternative design for the asbestos gaskets used in their valves and, thus, they were entitled to a JNOV on Respondents' negligence and implied warranty claims. We disagree.

"A product can be defective because of a flaw in its design." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). "Liability for a design defect may be based on negligence, strict tort, or warranty." *Id.* "In an action based on strict tort or warranty, plaintiff's case is complete when he has proved the product, as designed, was in a defective condition *unreasonably dangerous* to the user when it left the control of the defendant, and the defect caused his injuries." *Id.* at 579–80, 328 S.E.2d at 112 (emphasis added). "Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* at 580, 328 S.E.2d at 112. "This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it." *Id.*

In analyzing design defect claims, South Carolina courts apply the "risk-utility" test, which weighs the danger associated with the product's use against its utility. *See Bragg*, 319 S.C. at 543, 462 S.E.2d at 328 ("[A] product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product."); *id.* at 544, 462 S.E.2d at 328 ("[I]n South Carolina[,] we balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product."). In *Branham v. Ford Motor Company*, our supreme court refined the risk-utility test to incorporate the American Law Institute's most recent definition of a design defect:

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a *reasonable*

> *alternative design* by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

390 S.C. 203, 223–24, 701 S.E.2d 5, 16 (2010) (emphasis added) (quoting *Restatement (Third) of Torts: Prods. Liab.* § 2(b) (1998)). Based on this definition, the court set forth the following framework for a plaintiff seeking to establish a design defect claim:

> [I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.

Id. at 225, 701 S.E.2d at 16. In other words,

> [t]he analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are worth the benefits that will inhere in the proposed alternative design.

Id. n.16. "The state of the art and industry standards are relevant to show . . . the reasonableness of the design . . . ." *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328.

Here, the circuit court concluded that the evidence created a fact issue for the jury as to the existence of a reasonable alternative design. We agree. We acknowledge that the record shows Duke used the safety valves it purchased from Appellants for high-pressure, high-heat applications—the temperature exceeded 1,000 degrees, and the pressure was approximately 1,200 pounds per square inch. If these valves were not working correctly, the connecting lines could explode, endangering any nearby persons. Asbestos, as opposed to other substances such as fiberglass, rubber, cork, or vegetable fibers, could safely stand up to the extreme

conditions of temperature and pressure. An asbestos gasket was one of the best-performing gaskets for these conditions. Dale, who had been trained in the types of gaskets that could be used in various temperature and pressure settings, explained that a rubber gasket would melt at 1,200 degrees.

On the other hand, Fisher's corporate representative, Ronald Dumistra, admitted that Fisher had non-asbestos gaskets available for its customers. Dumistra also admitted that for high-pressure, high-temperature applications, a metal gasket could have been used. Therefore, a metal gasket was a candidate for the jury's consideration of a reasonable alternative design, given that Dumistra seemed to consider its functionality and safety to be equivalent to that of asbestos gaskets. Further, there was no evidence that a metal gasket was more expensive than an asbestos gasket. Even if there had been such evidence, a juror could have reasonably inferred from the expert testimony on causation that the risk of exposing Duke employees to deadly asbestos fibers was so grave that no economic cost savings would have been worth that risk. *See Branham*, 390 S.C. at 225 n.16, 701 S.E.2d at 16 n.16 ("The analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are *worth the benefits* that will inhere in the proposed alternative design." (emphasis added)); *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328 ("[A] product is unreasonably dangerous and defective if the danger associated with the use of the product *outweighs* the utility of the product." (emphasis added)); *Restatement (Third) of Torts: Prods. Liab.* § 2 cmt. f (1998) ("A plaintiff is not necessarily required to introduce proof on all of [the factors that may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe]; their relevance, and the relevance of other factors, will vary from case to case.").

Therefore, the circuit court properly concluded that the evidence created a fact issue for the jury. *See Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713 (holding that a motion for a JNOV "may be granted only if no reasonable jury could have reached the challenged verdict.").

D. Deviation from Standard of Care

Next, Appellants argue they are entitled to a JNOV on Respondents' negligence claim because they did not present any evidence of the applicable standard of care or Appellants' deviation from such a standard. Specifically, Appellants assert that (1) Respondents' citation of government regulations was not

sufficient evidence of the standard of care; and (2) Respondents did not present evidence of a reasonable alternative design and, therefore, failed to establish that Appellants deviated from any applicable standard of care. We disagree.

"Evidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care.'" *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477, 534 S.E.2d 289, 290 (Ct. App. 2000) (quoting 57A Am. Jur. 2d *Negligence* § 185 (1999)), *aff'd*, 352 S.C. 179, 573 S.E.2d 789 (2002). "Safety standards promulgated by government or industry organizations in particular are relevant to the standard of care for negligence." *Id.* at 477, 534 S.E.2d at 290–91; *see also Albrecht v. Balt. & Ohio R.R. Co.*, 808 F.2d 329, 332–33 (4th Cir. 1987) ("'In a negligence action, regulations promulgated under . . . [OSHA] provide evidence of the standard of care exacted of employers, but they neither create an implied cause of action nor establish negligence per se.' . . . That rule is consistent with 29 U.S.C. § 653(b)(4)[,] which provides . . . that OSHA shall not be construed to supersede, diminish or affect the common law or statutory duties or liabilities of employers with respect to injuries to their employees." (quoting *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 707 (5th Cir. 1981), *abrogated on other grounds by Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 743 (5th Cir. 2018))); *Phelps v. Duke Power Co.*, 332 S.E.2d 715, 717 (N.C. Ct. App. 1985) (holding that the trial court erred in excluding evidence relating to the National Electrical Safety Code because it was "instructive as to whether an electrical company used reasonable care" and, therefore, "admissible as an aid to the prudent or reasonable man rule"); *McComish v. DeSoi*, 200 A.2d 116, 121 (N.J. 1964) ("[A safety] code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or of scientific truth. It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care."); *Stone v. United Eng'g*, 475 S.E.2d 439, 454 (W.Va. 1996) ("Courts have become increasingly appreciative of the value of national safety codes and other guidelines issued by governmental and voluntary associations to assist the trier of fact in applying the standard of due care in negligence cases."); 57A Am. Jur. 2d *Negligence* § 758 ("A number of safety codes and other forms of objective standards of safe construction, operation, and the like, have been developed, issued, or published by governmental authorities, or by voluntary associations, as informative or advisory standards. Where such a code is adopted by an administrative agency pursuant to legislative authority, or after adoption by the agency[,] such code is ratified by the legislature, the code has the force of law, and its violation may constitute negligence per se, or, at least, evidence of negligence." (footnote omitted)).

Here, Respondents' occupational medicine expert, Dr. Frank, testified that by 1960, the scientific community had established a causal connection between asbestos exposure and mesothelioma. Dr. Frank, who has been a consultant to the National Institute for Occupational Safety and Health and an advisor to OSHA, further testified that by 1980, OSHA regulations required products containing asbestos to carry a warning label and Appellants were subject to these regulations. To obtain an exemption from the warning label requirement, the manufacturer had to test the product to demonstrate that it did not liberate asbestos fibers into the surrounding environment. Although Appellants manufactured only the valves they sold to Duke and not the asbestos gaskets inside the valves, they had a responsibility to test these components to verify that they would not release fibers. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009) ("A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.").[23]

Further, Dr. Frank indicated Appellants were on notice of the dangers of asbestos and, thus, could have advised Duke to caution employees that if they were going to liberate dust from the asbestos gaskets in Appellants' valves, they needed to do so in a manner that would reduce their exposure. Dr. Frank explained that when an asbestos gasket is new, it is encapsulated, but after normal use of the product, it deteriorates. Dr. Frank further explained that as the asbestos gasket is broken down, especially when removed from a flange with scrapers and electrical equipment, more and more fibers are liberated. Dr. Frank stated that if the resulting dust is visible, as Dale witnessed, the level of exposure is very high, and in fact, there may be millions or billions of asbestos fibers present when the dust is visible.

Appellants' corporate representatives admitted that when Dale worked as a mechanical inspector, Appellants never provided any warnings to their customers or users, they never applied warning labels to their products, and they did not conduct any testing to determine whether maintenance activities would liberate asbestos fibers into the air. Further, the evidence and the reasonable inferences from that

[23] This is consistent with the testimony of Crosby's corporate representative, Robert Martin, who stated that industry standards required valve manufacturers to be responsible for every component between the "inlet flange" and the "outlet flange."

evidence show that Appellants' use of metal gaskets in their valves would have been a reasonable alternative to their use of asbestos gaskets. *See supra*.

Based on the foregoing, Respondents presented sufficient evidence of both the standard of care and Appellants' deviation from that standard.

II. Additur

Appellants challenge the circuit court's granting of Respondents' motion for a new trial *nisi additur* on the ground that the court based its ruling on speculation and did not articulate compelling reasons for increasing the damages awards. We disagree.

"When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the [circuit court] alone has the power to [alter] the verdict by the granting of a new trial *nisi*." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993)). "The consideration of a motion for a new trial *nisi additur* requires the [circuit court] to consider the adequacy of the verdict in light of the evidence presented." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). Motions for a new trial *nisi* "are addressed to the sound discretion of the [circuit court]." *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (quoting *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984)). However, the circuit court's exercise of discretion "is not absolute[,] and it is the duty of this [c]ourt in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law." *Id.* at 192–93, 777 S.E.2d at 828–29 (quoting *Graham*, 282 S.C. at 401–02, 321 S.E.2d at 45); *see also Sapp v. Wheeler*, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013) ("The grant or denial of a motion for a new trial *nisi* rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." (quoting *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000))). "'Compelling reasons' must be given to justify the [circuit] court invading the jury's province in this manner." *Riley*, 414 S.C. at 193, 777 S.E.2d at 829.

"The [circuit court] who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt." *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723. "Accordingly, *great deference is given to the [circuit court]*." *Id.* at 406, 477 S.E.2d at 723 (emphasis added); *see also Riley*, 414 S.C. at 194, 777 S.E.2d at 829 ("[T]he court of appeals

ignored the applicable abuse-of-discretion standard of review, instead focusing its inquiry on a de novo evaluation of whether, in its view, there was sufficient justification for 'invading the jury's province.' This was error."). *But see Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008) (per curiam) ("'While the granting of such a motion rests within the sound discretion of the [circuit] court, *substantial deference must be afforded to the jury's determination of damages*.' To this end, the [circuit] court must offer compelling reasons for invading the jury's province by granting a motion for additur." (emphasis added) (citation omitted) (quoting *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003))), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009).[24]

Here, the jury awarded $200,000 in compensatory damages to Dale and $100,000 to Brenda for loss of consortium. The circuit court concluded that the award to Dale was "inadequate and should be increased to more accurately reflect the extent of their losses." The circuit court then observed, "[t]he jury only awarded [Dale] medical expenses in the amount of $142,000, plus $58,000 for pain and suffering." Appellants argue this observation was speculative and, therefore, cannot serve as a compelling reason to grant an additur. Appellants point out that no medical bills were introduced into evidence and the verdict form did not ask the jury to designate respective amounts for medical expenses and pain and suffering. Appellants maintain that these omissions make it impossible to know (1) how much of the $200,000 award was for medical expenses or (2) whether the loss of consortium award to Brenda included medical expenses.

Appellants also maintain that "parsing" a verdict is prohibited in the absence of a special verdict form. In support of this proposition, Appellants cite to *Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) and *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004). In *Jenkins*, the appellant argued that the circuit court "erred in declining to reduce the jury's award of actual damages for trespass to personal property," but two other causes of action were also submitted to the jury, and the parties had chosen to use a general verdict form. 391 S.C. at 220–21, 705 S.E.2d at 463. This court stated that it was impossible to determine how the jury allocated damages between the three causes of action and declined to speculate as to the allocation. *Id.* at 221, 705 S.E.2d at 463. Therefore, the court left the circuit court's ruling undisturbed. *Id.*

[24] We acknowledge that the body of our case law has seemingly inconsistent standards for reviewing the granting of a new trial *nisi*. We follow in the footsteps of our supreme court's most recent opinion involving a new trial *nisi additur*, *Riley*, by giving due deference to the circuit court's exercise of discretion.

In *Moore*, the appellant argued that the circuit court should not have submitted a breach of fiduciary duty claim to the jury because the respondent did not prove damages with reasonable certainty. 360 S.C. at 253, 599 S.E.2d at 473. This court noted that more than one measure of damages was available for breach of fiduciary duty and concluded that without a special verdict form to determine whether the damages were for lost profit or some other measure, the court would have to engage in speculation to address the appellant's assignment of error. *Id.* at 256–57, 599 S.E.2d at 475. Declining to do so, the court upheld the circuit court's submission of the claim to the jury. *Id.* at 257, 599 S.E.2d at 475.

Neither *Jenkins* nor *Moore* created a generalized rule of law applicable to circuit courts in reviewing the suitability of a jury verdict. In each case, the appellant submitted an assignment of error that required this court to engage in a speculative determination of the components of a jury's general verdict. Thus, this court's conclusions in *Jenkins* and *Moore* were case-specific. If any general rule may be gleaned from these conclusions, it is the time-honored rule that no factual or legal determination may be based on speculation.

In the present case, we do not view the circuit court's observation about the jury's award of medical costs as speculative. *See Speculate*, Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/speculate* (last visited August 25, 2021) (defining "speculate" as "to take to be true on the basis of insufficient evidence"). Rather, the observation was based on Dr. Frank's testimony that he had seen some of the medical bills and the amount he saw was $142,000. Therefore, the circuit court's observation was a reasonable inference from that evidence. Further, it is highly unlikely that the loss of consortium verdict, which was only $100,000, included medical expenses, given the medical bill Dr. Frank saw was for $142,000.

It is more likely that the jury awarded Dale $142,000 for medical expenses and the remainder of the $200,000 ($58,000) for non-economic damages. *Cf. Riley*, 414 S.C. at 193–95, 777 S.E.2d at 829–30 (observing that the plaintiff presented expert testimony that the decedent's family suffered over $228,000 in economic damages; stating that the circuit court "was well aware that the [$300,000] jury verdict included an award of noneconomic damages, yet . . . articulated compelling circumstances that [the circuit court] believed warranted the nisi additur;" and holding that there was no abuse of discretion); *Waring*, 341 S.C. at 260, 533 S.E.2d at 912 ("As to Johnson's claim the jury's verdict may have been intended to represent a portion of Waring's medical expenses, plus pain and suffering, we find this

argument patently untenable. The jury's award of exactly the amount of Waring's medical expenses, to the penny, is an attempt to reimburse her for those very expenses."); *Williams v. Robertson Gilchrist Const. Co.*, 301 S.C. 153, 155, 390 S.E.2d 483, 484 (Ct. App. 1990), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (concurring in the circuit court's conclusion that a damages award in the exact amount of the economic losses as presented by the plaintiff's expert economist indicated the jury's disregard of testimony concerning a funeral bill and non-economic losses); *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 494, 361 S.E.2d 775, 777 (Ct. App. 1987), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (holding the circuit court properly granted a new trial *nisi additur* based on the jury's award matching the exact amount of proven economic loss and failing to award noneconomic damages).

Therefore, unlike the posture of this court in *Jenkins* and *Moore*, the circuit court in the present case possessed concrete information from the evidence on which it could base its observation about the jury's award of medical costs. *See Vinson*, 324 S.C. at 405, 477 S.E.2d at 723 ("The consideration of a motion for a new trial *nisi additur* requires the [circuit court] to consider the adequacy of the verdict *in light of the evidence presented*." (emphasis added)); *id.* ("The [circuit court] who *heard the evidence* and is more familiar with the evidentiary atmosphere at trial possesses a better-informed *view of the damages* than this [c]ourt." (emphases added)).

Moreover, we do not view this particular observation as critical to the circuit court's discretionary determination that the jury's overall verdict was inadequate. After making its observation about the jury's award of medical costs, the circuit court recited the law on all categories of damages applicable to the case and thoroughly summarized the evidence supporting an increased verdict. *See infra*. The circuit court concluded that the evidence supported damages for medical expenses, pain and suffering, loss of enjoyment of life, mental anguish, and future damages and "[t]he jury's award of only $200,000 was not sufficient to make [Dale] whole for the magnitude of his losses." *Cf. Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 692 (1995) (reversing the circuit court's granting of a new trial *nisi additur* because the circuit court made no finding that the verdict was inadequate). The essence of the circuit court's ruling was the inadequacy of the overall verdict in light of the evidence presented at trial. Inconsequential language included in that ruling is not a valid basis for reversal. *See Sapp*, 402 S.C. at 512, 741 S.E.2d at 571 ("The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial [court] and [its] decision *will not be disturbed* on appeal unless [its] findings are *wholly*

unsupported by the evidence or the conclusions reached are *controlled by* error of law." (emphases added) (quoting *Waring*, 341 S.C. at 256, 533 S.E.2d at 910)); *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723 ("The consideration of a motion for a new trial *nisi additur* requires the [circuit court] to consider the adequacy of the verdict *in light of the evidence presented*." (emphasis added)); *id.* ("The [circuit court] who *heard the evidence* and is more familiar with the evidentiary atmosphere at trial possesses a better-informed *view of the damages* than this [c]ourt." (emphases added)).

Appellants also challenge the circuit court's respective summaries of the evidence regarding medical expenses, noneconomic damages, and loss of consortium damages. As to medical expenses, Appellants assert that the circuit court's reliance on Respondents' evidence was misplaced because that evidence was speculative. We disagree.

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with *reasonable* certainty or accuracy." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (emphasis added) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). Although the amount of damages may not "be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* Further, "[i]n a personal injury action, the plaintiff must recover for all injuries, past *and prospective*, which arose and *will arise* from the defendant's tortious activity." *Haltiwanger v. Barr*, 258 S.C. 27, 32, 186 S.E.2d 819, 821 (1972) (emphases added) (quoting 22 Am. Jur. *Damages* § 27). "Thus, recovery must be had for future pain and suffering, and for the reasonable value of medical services and impaired earning capacity, to the extent that these injuries are *reasonably* certain to result in the future from the injury complained of." *Id.* (emphasis added) (quoting 22 Am. Jur. *Damages* § 27). In many instances, a verdict that includes future damages "must be approximated." *Id.* at 32–33. Additionally,

> [a] plaintiff in a personal injury action seeking damages for the cost of medical services provided to him as a result of a tortfeasor's wrongdoing is entitled to recover *the reasonable value of those medical services, not necessarily the amount paid*. Although the amount paid may be relevant in determining the reasonable value of those services, the trier of fact must look to a variety of other factors in making such a finding. Among those

> factors to be considered by the jury are the amount billed to the plaintiff, and the relative market value of those services. Clearly, *the amount actually paid for medical services does not alone determine the reasonable value of those medical services. Nor does it limit the finder of fact in making such a determination*.

Haselden v. Davis, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (emphases added) (citations omitted). Notably, the opinion of a medical expert has been held to reliably indicate the reasonable value of past and future medical care when it is based on medical data specific to the plaintiff's case. *See Koenig v. Johnson*, No. 2:18-CV-3599-DCN, 2020 WL 2308305, at *10–12 (D.S.C. May 8, 2020).

In the present case, by the time of trial, Dr. Frank had been a specialist in both internal medicine and occupational medicine for over thirty-seven years and involved in scientific research on the topics of asbestos and mesothelioma for almost fifty years. In addition to his medical degree, he held a doctorate in biomedical sciences. He also taught courses in environmental medicine and biomedical science. He testified that he reviewed Dale's medical records, testimony, and medical bills and those bills were in line with costs typically associated with treatment of mesothelioma. Dr. Frank also provided a thorough account of the progression of Dale's mesothelioma and his past treatments before assigning a likely cost to all past and future medical costs. *Cf. Koenig*, 2020 WL 2308305 at *10 (noting the plaintiff's expert explained how the plaintiff's diagnoses required certain medical treatment); *id.* at *11 (observing that the expert's cost estimates were based on a review of the plaintiff's medical record and the expert's forty years of experience in rehabilitative medicine and holding the expert's experience and education in the field provided a reliable basis for his opinion on the cost of the plaintiff's future medical care). Dr. Frank estimated that all of Dale's past and future medical expenses would likely range from hundreds of thousands of dollars to $1 million or more. Dr. Frank attributed this estimate to the fact that Dale had already endured approximately 18 months of ongoing care and extensive treatment, including a complicated surgery. Specifically, Dr. Frank stated:

> Cases like his[,] with the kind of extensive treatment and surgery he's had, *clearly* hundreds of thousands. Cases even go to a million dollars or more. So his would be at the high end, given all the things that he's had. Obviously, somebody who comes in, gets diagnosed and dies in a month, their costs are less. He's had ongoing care and

> extensive care for a long period of time. The surgery alone could be hundreds of thousands of dollars. And then with everything else, he would be at the high end of what these kinds of cases cost.

(emphasis added). Dr. Frank further explained that it is likely Dale will die from mesothelioma, and closer to the time of death, the medical interventions and hospitalizations will become more intense and more expensive, such as intravenous feedings and eventually hospice. Appellants' own expert, Dr. James Crapo, admitted that before Dale's death, he would "very likely" have more hospitalizations. Dr. Crapo also admitted that it was likely Dale would eventually need supplemental oxygen and require around-the-clock nursing care. At the time of trial, Dale was undergoing experimental treatment involving immunotherapy as an alternative to the chemotherapy Dale could no longer endure. Dr. Frank confirmed that all of Dale's treatments were medically necessary.

Given Dr. Frank's thorough review and interpretation of Dale's medical data, "viewed through the lens of his extensive and specialized experience, training, and education," we reject Appellants' claim that Dr. Frank's testimony on the cost of Dale's medical care was speculative. *Koenig*, 2020 WL 2308305 at *10 (declining to exclude the opinions of the plaintiff's expert physician regarding the cost of plaintiff’s future medical care and holding the opinions were reliable because they were based on the expert’s "interpretation of objective medical data viewed through the lens of his extensive and specialized experience, training, and education").

In its order granting Respondents' new trial *nisi*, the circuit court observed,

> Dr. Frank testified, *without dispute*, that the total cost of [Dale's] past and future medical care, from the time of his diagnosis to the time of his death, would reasonably be $1,000,000. This undisputed testimony took into account some of [Dale's] past medical bills of $142,000, plus the cost of his surgery that was hundreds of thousands of dollars.
>
> The jury heard evidence that [Dale] is currently undergoing an experimental therapy that requires him to go for treatments and doctor visits several times a week. Experts on both sides agreed that [Dale] would likely die

> from mesothelioma and that his medical needs would increase as he got sicker and closer to death.

(emphasis in original) (transcript citations omitted).

Appellants characterize the above language as "crediting [Dr.] Frank's speculation about medical costs as undisputed evidence that the jury had to believe." Yet, Appellants have not argued that Dr. Frank was unqualified to testify regarding medical costs. While the jury was not required to believe Dr. Frank's testimony,[25] the circuit court was not precluded from exercising its discretion to consider this testimony credible. *See Vinson*, 324 S.C. at 405, 477 S.E.2d at 723 ("The consideration of a motion for a new trial nisi additur requires the [circuit court] to consider the adequacy of the verdict *in light of the evidence presented*." (emphasis added)); *id.* ("The [circuit court] who *heard the evidence* and is more familiar with the evidentiary atmosphere at trial possesses a better-informed *view of the damages* than this [c]ourt." (emphases added)); *id.* at 406, 477 S.E.2d at 723 ("Accordingly, *great deference is given to the [circuit court]*." (emphasis added)); *Sapp*, 402 S.C. at 512, 741 S.E.2d at 571 ("The grant or denial of a motion for a new trial *nisi* rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are *wholly* unsupported by the evidence or the conclusions reached are controlled by error of law." (emphasis added) (quoting *Waring*, 341 S.C. at 256, 533 S.E.2d at 910))*; see also Riley*, 414 S.C. at 194, 777 S.E.2d at 829 ("[T]he court of appeals ignored the applicable abuse-of-discretion standard of review, instead focusing its inquiry on a *de novo* evaluation of whether, in its view, there was sufficient justification for 'invading the jury's province.' This was error."); *id.* at 192, 777 S.E.2d 824, 828 ("When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the [circuit court] alone has the power to [alter] the verdict by the granting of a new trial *nisi*." (quoting *Durham*, 314 S.C. at 531, 431 S.E.2d at 558)). Rather, the circuit court's determination that the verdict should adequately reflect Dr. Frank's reliable opinion on the enormous past and future expenses of Dale's disease serves as a compelling reason to increase the damages award.

As to noneconomic damages, the circuit court first examined awards for pain and suffering in comparable cases. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976) ("The comparison approach is helpful and sometimes forceful, however, each case must be evaluated as an individual one, within the

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[25] *See Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278, 280 (Ct. App. 1997) (holding that the jury was not required to believe uncontradicted evidence).

framework of its distinctive facts."); *Kapuschinsky v. United States*, 259 F. Supp. 1, 8 (D.S.C. 1966) ("Admittedly not controlling, but worthy of note are treatments of verdicts from all over this country."). The circuit court noted, "Damages awards for pain and suffering in comparable mesothelioma cases range from $1.5 million to more than $20 million." The court cited numerous examples of verdicts within this range being upheld by courts across the country.

The circuit court then summarized in stark detail the evidence presented as to Dale's pain and suffering, loss of enjoyment of life, and mental anguish, and this summary is supported by the testimony.[26] *Cf. Riley*, 414 S.C. at 194, 777 S.E.2d at 829 (upholding an additur of $600,000 in a wrongful death action and noting the circuit court gave a thorough recitation of the "uncontested, and emotionally compelling" evidence of economic and noneconomic losses suffered by the decedent's family); *id.* at 194–95, 777 S.E.2d 824, 830 (observing that the circuit court was aware that the jury's $300,000 verdict, which included over $228,000 in economic damages, included an award of noneconomic damages and acted within its discretion in granting additur by articulating compelling circumstances that the presiding judge believed warranted additur); *Jones*, 293 S.C. at 494, 361 S.E.2d at 777 (holding the circuit court properly granted a new trial *nisi additur* based on the jury's award matching the exact amount of proven economic loss and failing to award noneconomic damages).

As to the $100,000 award to Brenda for loss of consortium, the circuit court highlighted Brenda's fifty-one-year marriage to Dale, the neglect of her own health to care for Dale, her fear, and her potential future loss of at least ten more years with Dale.

Based on the foregoing, the circuit court acted well within its discretion in granting Respondents' motion for new trial *nisi additur*. *See Sapp*, 402 S.C. at 512, 741 S.E.2d at 571 ("The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial [court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." (quoting *Waring*, 341 S.C. at 256, 533 S.E.2d at 910)).

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[26] In addition to the testimony summarized in the circuit court's order, we note Appellants' expert admitted that mesothelioma is one of the more aggressive cancers and as the disease progresses, the pain is so intense that "heavy doses of narcotic medication[are] necessary" to control it.

III. Setoff

Prior to trial, Respondents received $2,270,000 in settlement proceeds from Appellants' co-defendants. Respondents allocated one-third of the total proceeds ($756,667) to Dale's claims; one-third to Brenda's claims; and one-third to "the release of future claims." Appellants contend the circuit court erred by accepting Respondents' allocation of one-third of the total proceeds to a "future wrongful death claim." Appellants argue that in addition to the partial setoff the court awarded them for Dale's claims ($756,667) against the damages awarded to Dale ($1,580,000), they were entitled to a setoff of the one-third Respondents allocated for future claims. We disagree.

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" *Id.* (quoting *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012)). "In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act . . . ."[27] *Id.* In particular, section 15-38-50 provides in pertinent part,

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort *for the same injury* or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but *it reduces the claim against the others* to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater[.]

(emphases added). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate *the same plaintiff* on a claim for the *same injury*." *Smith v. Widener*, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphases added). In other words, "[a] non-settling defendant is entitled to credit for the amount paid by another defendant who

[27] S.C. Code Ann. §§ 15-38-10 to -70 (2005 and Supp. 2020).

settles *for the same cause of action*." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830 (emphasis added) (quoting *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145).

"When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Smith*, 397 S.C. at 472, 724 S.E.2d at 190. "Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a [setoff].'" *Id.* (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). On the other hand, when the settlement "involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." *Riley*, 414 S.C. at 196, 777 S.E.2d at 830; *see also Smith*, 397 S.C. at 473, 724 S.E.2d at 191 ("[W]hen the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.").

Here, upon an *in camera* review of the releases executed by Respondents in favor of Appellants' co-defendants, the circuit court verified a settlement amount of $2,270,000. The record does not indicate that the parties to these settlements either agreed to allocate the settlement proceeds among the respective claims released or sought court approval of the agreements. Rather, during a post-trial hearing, Respondents advised the circuit court, "internally, [Respondents] have allocated the [settlement proceeds] as follows: one-third for [Dale's] claims; one-third for [Brenda's] claims; and one-third for the release of future claims." The circuit court "confirmed that all future claims related to [Dale's] mesothelioma, including wrongful death, were released by [Respondents]." The circuit court then concluded that Respondents' internal allocation of the settlement proceeds was reasonable and declined to apply a setoff for the amount Respondents allocated to "future claims related to [Dale's] mesothelioma, including wrongful death," because any such future claims for which the settling defendants were released were distinct from the personal injury and loss of consortium claims tried to verdict. *See Smith*, 397 S.C. at 473, 724 S.E.2d at 191 ("[W]hen the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.").

Initially, we question whether section 15-38-50 contemplates the "internal allocation" that was merely claimed by Respondents post-settlement rather than designated by all parties to the settlement agreement. *See* § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated *by the release or the covenant, or in*

the amount of the consideration paid for it, whichever is the greater[.]" (emphasis added)). However, our case law favors a plaintiff's ability to apportion settlement proceeds "in the manner most advantageous to it." *Riley*, 414 S.C. at 197, 777 S.E.2d at 831.

Appellants argue that the circuit court should not have accepted Respondents' allocation of one-third of the settlement proceeds to a future wrongful death claim because "that claim is barred as a matter of law" by Respondents' execution of the releases. We disagree with the logic of this argument, but we will explain its premise: Although a wrongful death claim is for the benefit of the decedent's family,[28] South Carolina treats this claim as derivative of the decedent's own personal claim during his lifetime. *See Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) (holding that a wrongful death claim "lies in the decedent's estate only when the decedent possessed the right of recovery at his death"); *id.* at 347, 699 S.E.2d at 145 ("[I]f the decedent had no claim at his death, the estate has no claim."). If the decedent settled, or prosecuted to judgment, his personal injury claims against a certain defendant during his lifetime, his heirs or beneficiaries are precluded from bringing a wrongful death claim against that defendant after the decedent's death. *Id.*; *see also* S.C. Code

[28] *See Welch v. Epstein*, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct. App. 2000) (indicating a decedent's heirs or beneficiaries may recover the following damages in a wrongful death action: "(1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries"); *see also* S.C. Code Ann. § 15-51-10 (2005) ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."); S.C. Code Ann. § 15-51-20 (2005) ("Every such action shall be *for the benefit of the wife or husband and child or children of the person whose death shall have been so caused*, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person." (emphasis added)).

Ann. § 15-51-60 (2005) (precluding the application of the Wrongful Death Act to "any case in which the person injured has, for such injury, brought action, which has proceeded to trial and final judgment before his or her death."); *Restatement (Second) of Judgments* § 46 cmt. b (1982) ("The claim for wrongful death that arises in favor of the decedent's family, dependents, or representative can be characterized as either 'derivative' from the injured person's own claim or 'independent' of it. If the claim for wrongful death is treated as wholly 'derivative,' the beneficiaries of the death action can sue only if the decedent would still be in a position to sue. . . . [*S*]*ettlement of the decedent's personal injury claim or its reduction to judgment for or against the alleged tortfeasor extinguishes the wrongful death claim against that tortfeasor*." (emphasis added) (citation omitted)).

Nonetheless, if there is a significant chance that the injury in dispute will cause the plaintiff's death before he can complete the prosecution of his personal injury claim, both the personal injury claim and a future wrongful death claim pose genuine risks for a defendant seeking to settle the case until those claims are actually released as part of the settlement. Therefore, we reject Appellants' assumption that if a settling defendant obtains a release of the personal injury claim, then it is unreasonable for that defendant to also obtain a release of any future wrongful death claim due to its derivative nature. Were this assumption to control how settlement proceeds are allocated, it would allow a non-settling defendant to second-guess the settling defendant's choice of the claims for which it will pay the plaintiff to release. Only the settling parties get that choice. *Cf. Riley*, 414 S.C. at 197, 777 S.E.2d at 831 ("A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in *the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it*. *Settlements are not designed to benefit nonsettling third parties.* They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. *A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do*." (emphases added) (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. 2009))); *id.* ("Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant].").

Further, Appellants' assignment of error does not logically flow from their premise that the wrongful death claim is precluded by the release of the personal injury claim. Should the settling parties effect a simultaneous release of personal

injury and future wrongful death claims within the same document, as was done here, the resulting preclusion of a future prosecution of *either* claim does not affect how the settlement proceeds given in consideration for the release are allocated among these released claims. By way of comparison, no one would doubt that the simultaneous release of a personal representative's claims for survival and wrongful death precludes the future prosecution of both claims, yet it is common practice to allocate settlement proceeds among those claims.[29] Here, Respondents' release of all past and future claims against the settling defendants should not affect the allocation of the settlement proceeds among the various claims that were released—the settlement proceeds were the very consideration for Respondents' release of their claims. It logically follows that those proceeds should be allocated among the claims that were released. Therefore, we reject Appellants' argument that the circuit court should not have accepted Respondents' allocation of one-third of the settlement proceeds to "future claims related to [Dale's] mesothelioma, including wrongful death," because "that claim [wrongful death] is barred as a matter of law."

Appellants also maintain that the settlement amount Respondents allocated to a future wrongful death claim compensates for the same injuries at issue in the present case. They state that wrongful death claims "allow a decedent's heirs to pursue the decedent's personal injury claims after his or her death." In making this conclusion, Appellants rely on *Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct. App. 2002), for the proposition that a wrongful death claim is to compensate the heirs of a decedent, who, if he had survived, could have brought a personal injury action. We do not interpret this proposition as defining the nature of a wrongful death claim or the damages recoverable under such a claim. Rather, it is simply the expression of a prerequisite for the right of the decedent's heirs to recover their own damages in a wrongful death action. *See supra*.

As to personal injuries sustained by the decedent during his lifetime, damages are recoverable through a survival claim should he die before prosecuting a personal injury claim, and it is common for a personal representative of a decedent's estate to assert both a survival claim and a wrongful death claim in the same litigation. *See* S.C. Code Ann. § 15-5-90 (2005) ("Causes of action for and in respect to . . . any and all injuries to the person . . . shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . , any law or rule to the contrary notwithstanding."); *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000) ("Unlike actual damages in a wrongful death action, actual damages

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[29] *See, e.g.*, *Riley*, 414 S.C. at 190–91, 777 S.E.2d at 827 (referencing the parties' "agreed-upon, and court-approved, settlement allocation").

in a survival action are awarded for the benefit of the decedent's estate rather than for the family."). Therefore, we reject Appellants' argument that the amount Respondents allocated to a future wrongful death claim compensates for the same injuries at issue in the present case. *See Smith*, 397 S.C. at 473 n.1, 724 S.E.2d at 191 n.1 (noting that wrongful death and survival actions are different claims for different injuries); *Welch*, 342 S.C. at 303–04, 536 S.E.2d at 420–21 (distinguishing between damages in a survival action and those for a wrongful death action); *id.* at 303, 536 S.E.2d at 420–21 ("Actual damages in a survival action are awarded for the benefit of the decedent's estate. Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." (citation omitted)).

Finally, Appellants maintain that accepting Respondents' allocation allows them a double recovery because (1) the circuit court instructed the jury that the plaintiff "may recover for those future damages that are reasonably certain to result" and (2) the circuit court invoked Dale's expected death in justifying its increase in Dale's and Brenda's damages awards. As to the first ground, Appellants' argument is based on their mistaken assumption that the future wrongful death claim relates to the same injuries for which Dale was compensated in the present action. *See supra* (discussing the distinction between a survival claim and a wrongful death claim). The circuit court's jury instruction on future damages related to Dale's future medical expenses and future pain and suffering likely to occur up to the time of his death. These future damages are recoverable by Dale in the present action (or in a survival action had Dale died prior to trial). In contrast, the future wrongful death claim released by Respondents would have sought compensation for the damages suffered by Dale's heirs or beneficiaries after his death. *See supra*.

As to the second ground, the circuit court justified its increase in Dale's award by recounting the testimony concerning the process of dying and the suffering Dale would experience while dying. Again, these future damages are recoverable by Dale in the present action (or in a survival action had Dale died prior to trial) but not by heirs or beneficiaries in a wrongful death action. *See supra*. On the other hand, the circuit court justified its increase in Brenda's loss of consortium award by describing how Dale's mesothelioma had affected Brenda up to the time of trial and noting that Brenda's time with Dale would be "cut short by at least ten years." Nonetheless, this reference to the time with Dale that Brenda could lose overlaps with merely one or two elements out of many for the damages recoverable in a wrongful death action. Further, the loss of consortium award will compensate Brenda only rather than all of Dale's heirs or beneficiaries. Therefore, this slight overlap in damages does not rise to the level of a "double recovery."

In sum, the circuit court's refusal to allow a setoff of the settlement proceeds allocated to "future claims related to [Dale's] mesothelioma, including wrongful death," did not result in a double recovery for Respondents. Therefore, we affirm the circuit court's setoff ruling. *See Riley*, 414 S.C. at 195, 777 S.E.2d at 830 ("Allowing setoff 'prevents an injured person from obtaining a *double recovery* for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" (emphasis added) (quoting *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145)).

IV. Motion to Quash

Appellants challenge the circuit court's denial of their respective motions to quash subpoenas requiring their corporate representatives to appear and testify at trial. They argue (1) Rule 45, SCRCP, does not authorize courts to exercise subpoena power over out-of-state parties and (2) the subpoenas were not properly served on them. We will address these arguments in turn.

Power to compel

Rule 45(a)(2), SCRCP, requires a subpoena commanding attendance at a trial to be issued from the court for the county in which the trial will be conducted. Further, an attorney authorized to practice in that court may issue and sign the subpoena on the court's behalf. Rule 45(a)(3), SCRCP. Here, on July 12, 2017, Respondents' counsel delivered trial subpoenas by courier to Appellants' counsel in Charleston, and counsel himself signed for the delivery. The subpoenas were directed to "Defendant Fisher Controls International, LLC; through Counsel of Record" and "Defendant Crosby Valves, LLC; through Counsel of Record," respectively. Subsequently, Appellants filed their respective motions to quash the subpoenas on the grounds that the circuit court did not have the power to compel out-of-state parties to attend trial and they were not properly served pursuant to Rule 45.

The circuit court conducted a hearing by telephone and orally denied Appellants' respective motions. Appellants' corporate representatives appeared and testified at trial, and the circuit court later issued a written order denying their motions to quash. In its order, the circuit court rejected Appellants' argument that their non-resident status precluded the court from compelling them to send representatives to testify at trial. The court emphasized that Appellants were parties

to the case and submitted to the court's jurisdiction by making a general appearance and litigating the case to trial.

Appellants now assert that a court "does not gain unlimited subpoena power when a party 'submits to the jurisdiction' of the court." Appellants argue there is no overlap between the doctrines of personal jurisdiction and subpoena power. In support of their argument, Appellants cite *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So.2d 121, 128 (Miss. 2005), for the proposition that the "concepts of personal jurisdiction and subpoena power are altogether different." However, we note this statement was made within the context of addressing subpoena power over a foreign corporation that was a non-party: "[T]he provisions of Section 79-4-15.10(a) do not provide for the issuance of a subpoena duces tecum for service upon a foreign corporation's registered agent for service of process, when that foreign corporation is *not a party* to the litigation." *Id.* (emphasis added).

Appellants further argue, "Just as Congress established geographic limits to the federal courts' subpoena power, *see* Fed. R. Civ. P. 45(c)(1), the South Carolina General Assembly established that a state court's subpoena power exists only within South Carolina." We disagree. The legislature did not intend to limit the circuit court's power to subpoena a party or a corporate party's representative when it adopted the current language of Rule 45, which includes the travel burden of non-parties as a ground for quashing a subpoena:

> On timely motion, the court . . . shall quash or modify the subpoena if it:
>
> . . .
>
> (ii) requires a person *who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party*, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held[.]

Rule 45(c)(3)(A)(ii), SCRCP (emphasis added). Our legislature could have easily left out the language "who is not a party . . ." from this provision if it did not intend

for the circuit court to have subpoena power over a party. Instead, this language clearly indicates that parties and their principals may not avail themselves of the non-party travel-burden ground for quashing a subpoena.[30] *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008), *aff'd as modified on other grounds*, 386 S.C. 339, 688 S.E.2d 569 (2010))); *S.C. Dep't of Consumer Affs. v. Rent-A-Ctr., Inc.*, 345 S.C. 251, 255–56, 547 S.E.2d 881, 883–84 (Ct. App. 2001) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000))); *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the [c]ourt applies the same rules of construction used to interpret statutes.").

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[30] Likewise, the legislature could have modeled our Rule 45(c) after the language in the federal rule highlighted by Appellants, which includes parties and their principals in the travel-burden limitation on the court's subpoena power:

> A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense.

Fed. R. Civ. P. 45(c)(1). Yet our legislature chose not to adopt this language.

Further, the official note to the 1995 amendment to Rule 45 states, in pertinent part:

> Rule 45(c)(3)(A)(ii) and 45(c)(3)(B)(iii) are amended to make clear that a non-party general partner of a partnership that is a party, is treated the same as an officer, director or managing agent of a party for purposes of trial subpoenas. Rule 45(c)(3) provides a *non-party*, subpoenaed to appear at trial more than fifty miles from the place of service, the opportunity to move to quash the subpoena unless a special showing of need is made and reasonable compensation is provided to the witness. *These special provisions are not available to parties or officers, directors and managing agents of parties.* The amendment extends the *exclusion* to a general partner of a partnership that is a party.

(emphases added). This confirms that the legislature intended for South Carolina circuit courts to have subpoena power over parties to proceedings over which those courts preside.

This is consistent with the broad discretionary power a circuit court must exercise over parties to proceedings before it in order to effectively dispense justice. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009) ("The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy."); *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 85, 431 S.E.2d 625, 628 (Ct. App. 1993) ("The conduct of trial . . . is largely within the [circuit court's] sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant."); *cf. Hayden v. 3M Co.*, 211 So. 3d 528, 532 (La. App. 2017) ("In the same way that Louisiana exercises personal jurisdiction over parties participating in litigation in the state, those parties may, upon the discretion of the court, be compelled to appear in Louisiana for discovery depositions, hearings, and/or trial. For these reasons[,] we reverse the trial court's quashing of the subpoenas served through the attorneys of record for the non-domiciliary corporations.").

Based on the foregoing, we reject Appellants' argument that the circuit court did not have subpoena power over them.

Validity of service

Next, Appellants contend that service of the subpoenas on their counsel in Charleston was defective because Rule 4, SCRCP, requires service on a person "authorized by [Appellants] to accept service of process—the companies' registered agents" and Appellants have no registered agent in South Carolina. We disagree.

Rule 45(b), SCRCP, allows a subpoena to be served at any place within the state by any person who is not a party and is at least 18 years of age "in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j)." Rule 4(d) provides for service of process through not only personal service (Rule 4(d)(1) through (6)) but also statutory service (Rule 4(d)(7)), certified mail (Rule 4(d)(8)), or commercial delivery service (Rule 4(d)(9)). Further, Rule 4(j) recognizes the long standing practice of acceptance of service as equivalent to personal service: "No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service." *See Langley v. Graham*, 322 S.C. 428, 431–32, 472 S.E.2d 259, 261 (Ct. App. 1996) (stating that Rule 4(j) is "a recognition of the long standing practice that acknowledgement or acceptance of service is equivalent to personal service.").

Here, the circuit court concluded that service of the subpoenas was valid under Rule 4(j) because Appellants' Charleston counsel signed for the package containing the subpoenas. Appellants argue that Rule 4(j) does not change "the requirement in Rule 4(d)(3) that service on a corporation must be made to 'an officer, a managing or general agent, or to any other agent authorized by appointment or by law' . . . ." Appellants maintain that service "must be made to a registered agent to be effective; the attorney's acknowledgement of receipt does not make service effective." We disagree.

The language of Rule 45(b) allows a choice between service of a subpoena in the various manners set forth in Rule 4(d) or obtaining a written and signed acceptance of service from the person to whom the subpoena is directed or his attorney, as provided in Rule 4(j): "Service of a subpoena upon a person named therein shall be made *in the same manner prescribed for service of a summons and complaint* in Rule 4(d) *or* (j)." (emphases added). Although the language of Rule 4(j) primarily focuses on the substitution of a party's, or his attorney's, written acknowledgement of service for the proof of service required by Rule 4(g), the unmistakable reference to Rule 4(j) in Rule 45(b) as prescribing a method for service

of process indicates that the drafter intended for acceptance of service to serve as an alternative to other methods of serving a subpoena. This is consistent with the note to the 2002 amendment to Rule 45, which states, in pertinent part:

> The first 2002 amendment amends Rule 45(b)(1) to permit service of subpoenas by the same method as used to serve a summons and complaint. First, in addition to in hand service of the subpoena, service on an individual could be made by leaving the subpoena at the person's home or usual place of abode with a person of suitable age and discretion then residing there as provided in Rule 4(d)(1). Second, a subpoena could be served on an individual, a corporation, or a partnership by registered or certified mail, return receipt requested and delivery restricted to the addressee under Rule 4(d)(8). *In addition, the person or the person's attorney may accept service under Rule 4(j)*.

(emphasis added). Therefore, we reject Appellants' argument that the attorney's acknowledgement of receipt under Rule 4(j) does not make service effective.

As to the application of Rule 4(j) to the present case, we note that Appellants argued before the circuit court that counsel did not accept service on their behalf pursuant to Rule 4(j) because counsel did not know the contents of the packages containing the subpoenas when he signed for them. However, on appeal, Appellants have merely set forth a one-sentence conclusory argument in a footnote with no supporting authority; therefore, we consider it abandoned. *See* Rule 208(b)(1)(E), SCACR ("At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."); *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) ("[W]e note this issue is abandoned because Mother makes a conclusory argument without citation of any authority to support her claim."); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691–92 (Ct. App. 2001) (holding that a conclusory argument in a footnote, which cited no supporting authority, was deemed abandoned); *State v. Cutro*, 332 S.C. 100, 108 n.1, 504 S.E.2d 324, 328 n.1 (1998), (Toal, J., dissenting) ("[A] one-sentence argument is too conclusory to present any issue on appeal.").

We also note that service was valid under either Rule 4(d)(3), which governs personal service on a corporation, or Rule 4(d)(9), which allows for service by a commercial delivery service. Respondents used the FedEx First Overnight service to deliver the subpoenas to Appellants' counsel. Rule 4(d)(9) allows the use of a commercial delivery service to effect service of a summons and complaint on an individual or a corporation if the commercial delivery service meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). We note that the IRS has included the FedEx First Overnight service in its list of designated private delivery services. *See Designation of Private Delivery Servs.*, 2016-18 I.R.B. 676 (2016). As to who may sign for a package delivered pursuant to Rule 4(d)(9), we draw guidance from the following language:

> Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a delivery record showing *the acceptance by the defendant which includes an original signature or electronic image of the signature of the person served*. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the delivery receipt was *signed by an unauthorized person*. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Rule 4(d)(9) (emphases added). Therefore, the court should focus on whether the person who signed for a package delivered by a commercial service was authorized by the defendant to accept service of process.

Appellants assert their Charleston counsel was not authorized to accept service of process on their behalf. Appellants claim that Rule 4(d) requires personal service and to effect service on a corporation, the plaintiff must serve the corporation's registered agent within the state. We disagree. Personal service is one of multiple options for service of process under Rule 4(d), and Rule 4(d)(3), which governs personal service on a corporation, does not limit those who are authorized to accept service to registered agents:

> Service shall be made as follows: . . . Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, *by delivering a copy of the summons and complaint to an*

> *officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process* and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(emphasis added). Rule 4(d)(1), which governs service on individuals, includes similar language regarding authorized agents: "or by delivering a copy to an *agent authorized by appointment or by law to receive service of process*." (emphasis added). In *Hamilton v. Davis*, this court interpreted Rule 4(d)(1) in the following manner:

> S.C.R.C.P. 4(d)(1), like its federal counterpart, Rule 4(d)(1) of the Federal Rules of Civil Procedure, provides for service upon an agent only if authorized by appointment or by law. Federal cases dealing with agency by appointment indicate an actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process. *The courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent*. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. There must be evidence the defendant intended to confer such authority.

300 S.C. 411, 414, 389 S.E.2d 297, 298 (Ct. App. 1990) (emphasis added).[31]

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[31] Appellants reference authorities interpreting practice under the federal counterpart to Rule 45 for the proposition that service of a subpoena on a corporation's attorney is ineffective. However, we do not find these authorities persuasive because Fed. R. Civ. P. 45(b)(1) limits service of a subpoena to the named person only ("Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law"), while South Carolina's rule is more flexible, allowing

Further, "[e]xacting compliance with the rules is not required to effect service of process." *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). "Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has *personal jurisdiction of the defendant* and the defendant has *notice of the proceedings*." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 210, 456 S.E.2d 897, 899 (1995) (emphases added). "The principal object of service of process is to give notice to the defendant corporation of the proceedings against it." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (quoting *Burris Chemical, Inc. v. Daniel Const. Co.*, 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968)).

Based on the foregoing, the circumstances in the present case allow the authority of Appellants' Charleston counsel to be implied from counsel's representation of them in the very litigation for which the subpoena was issued. *See Hamilton*, 300 S.C. at 414, 389 S.E.2d at 298 ("The courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent."). Significantly, the circuit court already had personal jurisdiction over Appellants, and their counsel already had a duty to ensure they had notice of the proceedings. *See Taylor*, 369 S.C. at 552, 633 S.E.2d at 503 ("Exacting compliance with the rules is not required to effect service of process. 'Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has *personal jurisdiction of the defendant* and the defendant has *notice of the proceedings*.'" (alteration in original) (emphases added) (citation omitted) (quoting *Roche*, 318 S.C. at 210, 456 S.E.2d at 899)). Under these circumstances, counsel was authorized by Appellants to accept service of process under either Rule 4(d)(3) (personal service on a corporation) or (d)(9) (commercial delivery service).

Based on the foregoing, the circuit court properly denied Appellants' motion to quash the subpoenas.

CONCLUSION

Accordingly, we affirm the circuit court's orders denying Appellants' motion to quash, denying their JNOV motion, granting Respondents' motion for new trial *nisi additur*, and granting in part Appellants' motion for set-off.

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service on those persons designated in Rule 4(d) (named person or authorized agent or officer of corporation) or Rule 4(j) (named person or counsel).

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary P. Smith, Maezell Mitchell Jefferson, Individually and as personal representative of the Estate of Annabelle Thornton, Shirrese B. Brockington, as special administrator of the Estate of Janine Gourdine, Emma Smalls, Viola Pringle, Cephus Thornton, Arthur Graddick, III, an imprisoned person, Venetra Watson, and any known or unknown persons or entities claiming any interest in the Estates of Lucinda Pringle, Odessa Graddick, Arthur Graddick, Jr., Annabelle Thornton, and Janine Gourdine, Appellants,

v.

Angus M. Lawton, personal representative of the Estate of Lucinda Pringle, Evelina Brown Moses, Thomas P. Brown, Jr., and Unknown PR Rebecca Patricia Brown, Respondents.

Appellate Case No. 2018-000562

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5859
Heard January 12, 2021 – Filed September 1, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas Jefferson Goodwyn, Jr., of Goodwyn Law Firm, LLC, of Columbia, for Appellants.

Jonathan Scott Altman, of Derfner & Altman, LLC, of Charleston, and Stephen Michael Slotchiver, of Slotchiver & Slotchiver, LLP, of Mount Pleasant, both for Respondents.

LOCKEMY, C.J.: In this probate action, the estates of Mary Smith, Annabelle Thornton, Emma Smalls, and Janine Gourdine (collectively, Children) appeal the circuit court's order affirming the probate court's order probating the will of Lucinda Pringle (Decedent), which devised property to Decedent's grandchildren: Evelina Moses, Thomas Brown, and Rebecca Brown (collectively, Grandchildren). On appeal, Children argue the probate court erred in probating the will because (1) there was no evidence the will was properly executed, (2) the will was altered, and (3) the reopening of Decedent's estate (the Estate) was not timely. We affirm in part, reverse in part, and remand for an evidentiary hearing on whether there was proper execution of the will.

FACTS/PROCEDURAL HISTORY

This case has a lengthy procedural history. Decedent died on October 11, 1989. At her death, Decedent owned a fifty-percent interest in a 10.5-acre parcel of real estate (the Property) located off Highway 17 in Mount Pleasant, South Carolina. The Property was Decedent's sole asset and the focus of this litigation. Decedent had five children: Annabelle Thorton, Mary Smith, Janine Gourdine, Emma Smalls, and Evelina Brown. All of Decedent's children had passed by the time of this appeal. Evelina Brown, who was Grandchildren's mother, predeceased Decedent.

In the wake of Hurricane Hugo in late 1989, Smalls submitted an insurance claim for damage to the house located on the Property. The insurance company issued a check in January 1990, naming Smalls and Grandchildren as "executors of the [E]state." Both Grandchildren and Children have asserted at different stages of this litigation that Smalls altered the will and added herself so that she could receive insurance proceeds to repair the home on the Property, where she lived.

In 1999, the probate court administered the Estate through intestacy, and on August 16, 2000, the probate court closed the Estate. A deed of distribution conveyed a one-fifth interest to Grandchildren who took instead of Brown, their predeceased mother, and a one-fifth interest to each of Decedent's surviving daughters. Administration of the Estate was completed on June 26, 2001.

On August 4, 2005, Evelina Moses filed the will with the probate court. On October 20, 2005, Grandchildren filed a petition for subsequent administration and for recovery of improper distribution, arguing Decedent died testate. They alleged that at the time of Decedent's death, Children possessed the will but concealed it so that the Estate would be distributed through intestacy and they could live out their lives out on the Property.

In early 2006, Thomas Brown, Moses, and Smalls were deposed. In his deposition, Thomas Brown stated he saw a document that purported to be Decedent's will soon after her death, but Thornton and Smalls refused to provide him with the will. He stated that in 2005, he received a copy of the will from Thornton's daughter, Viola Pringle, but the probate court refused to accept a copy of the will. In Smalls's deposition, she denied knowledge of a will and stated she never discussed a will with Moses. In Moses's deposition, she stated she received the original will from Smalls in June 2005.

On January 18, 2007, Grandchildren filed a motion to vacate the probate court's 2001 order closing the Estate. Children filed a motion to dismiss, arguing the ten-year limitations period prevented the probate of any will. On April 8, 2008, the probate court held a hearing on Grandchildren's motion to vacate the probate court's previous order, the petition for improper distribution, and Children's motion to dismiss. At the hearing, Children asserted they were not addressing the will's validity because the will was not in evidence at that stage of the litigation. However, they stated they were not waiving the right to challenge the validity of the will. Grandchildren agreed that at some future date, Children would have the opportunity to challenge the will.

The probate court dismissed Grandchildren's motion to vacate and petition to reopen the Estate. The probate court ruled that there was good cause to reopen the estate but because more than ten years had passed, section 62-3-108 of the South

Carolina Code (Supp. 2020)[1] prevented the probate court from reopening the Estate. The probate court found the copy of the will attached to the petition did not comply with the requirements of section 62-3-402 of the South Carolina Code (Supp. 2020).[2] Grandchildren appealed to the circuit court, which affirmed. Grandchildren appealed to this court, and we reversed and remanded. *Moses v. Haile-Howard ex rel. Estate of Smith*, Op. No. 2011-UP-386 (S.C. Ct. App. filed Aug. 9, 2011). We held the probate court's finding that there was good cause to reopen the Estate based on Smalls's concealment of the will was the law of the case. *Id.* Thus, the concealment of the will meant section 62-3-108 did not prohibit the probate court from admitting the will into probate. *Id.* This court further stated, "Decedent intended [Grandchildren] to inherit from her last will and testament," and ruled the probate court could reopen the Estate. *Id.* The parties did not seek a writ of certiorari as to this opinion.

On March 13, 2012, Children again moved to dismiss, arguing the limitation period found in section 62-3-108 prohibited the probate court from probating the will. Thereafter, the probate court held a final hearing. On March 24, 2013, the probate court ordered that the will could be probated and that Grandchildren "shall submit a Form 300 Application[3] to open the Estate (either formally or informally) with this Court."[4]

On February 20, 2015, Children moved to dismiss this probate of the will, arguing the probate court lacked subject matter jurisdiction, Grandchildren's petition was untimely, and Grandchildren never filed a petition for formal or informal testacy. The probate court denied Children's motion to dismiss. On September 4, 2015, Grandchildren filed a Form 300 Application for informal probate of the will. On

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[1] § 62-3-108(A)(1) ("No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than . . . appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than ten years after the decedent's death.").
[2] § 62-3-402(a) ("If the original will is neither in the possession of the court nor accompanies the petition[,] . . . the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.").
[3] A Form 300ES is the standard form used for applying or petitioning the probate court for formal or informal probate. Form 300ES, SCRPC.
[4] Children appealed the probate court's March 24, 2013 order to this court; however, on March 14, 2014, they withdrew that appeal.

February 4, 2016, Children petitioned for formal testacy, asserting the will was invalid and could not be probated and was barred by the ten-year limitations period of section 62-3-108.

At the November 9, 2016 hearing, Children argued that because Grandchildren had finally offered the will for probate, it was the proper time to challenge the validity of the will. Children challenged the will on the grounds that (1) it was not self-proving and Grandchildren had offered no testimony from witnesses to the will regarding its execution; (2) the beneficiary section of the will was whited out and typed over; and (3) the witnesses had attested that Lucinda Springer, not Lucinda Pringle, signed the will. Grandchildren argued this was the first time Children tried to challenge the validity of the will even after the probate court accepted the will to probate on March 24, 2013. Grandchildren therefore argued the court's order accepting the will to probate was the law of the case.

On January 18, 2017, the probate court denied Children's petition for formal testacy. The probate court held the alteration did not preclude the will from being probated because Grandchildren "[did] not question[] Emma Smalls'[s] status as an heir, any such alteration by Ms. Smalls d[id] not preclude Decedent's will from being probated and that further inquiry [wa]s unwarranted." Next, the probate court determined that because the witnesses to the will were dead, no further inquiry into the attesting witnesses was required. Finally, the probate court concluded the appearance of the name "Lucinda Springer" instead of "Lucinda Pringle" was a scrivener's error.

Children appealed to the circuit court, arguing the probate court erred in failing to make findings related to the will's validity and in finding the will was properly proved and could be admitted to probate. Specifically, Children argued the probate court erred in probating the will because the witnesses to attestation did not testify and the probate court received no evidence of proper execution. Children averred Grandchildren should have acquired an affidavit from one of the attesting witnesses during the pendency of this litigation. Children also argued the attesting witnesses saw Lucinda Springer and not Lucinda Pringle sign the will.

The circuit court affirmed the probate court's order. Specifically, the circuit court ruled the attestation clause was sufficient because section 62-3-406 of the South Carolina Code (Supp. 2020) required witnesses to testify only "if" they were able and, here, the witnesses' deaths rendered them unavailable. The circuit court held

"Springer" was a scrivener's error. Further, the circuit court ruled the probate court did not err in accepting the will to probate. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by affirming the probate court's ruling that Decedent's will was valid when no evidence was offered to show due execution of the will?

2. Did the circuit court err by affirming the probate court's order finding Decedent's will could be probated when it was altered and the petition did not contain how the original will disposed of the Decedent's property?

3. Did the circuit court err by affirming the probate court's finding the ten-year limitations period from section 62-3-108 did not apply and that Grandchildren were not prejudiced by Smalls's concealment of the will?

STANDARD OF REVIEW

"The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). "An action to contest a will is an action at law." *In re Estate of Cumbee*, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). "If a proceeding in the probate court is in the nature of an action at law, review by this court extends merely to the correction of legal errors." *In re Estate of Paradeses*, 426 S.C. 388, 391, 826 S.E.2d 871, 873 (Ct. App. 2019). In such cases, "this [c]ourt may not disturb the probate [court's] findings of fact unless a review of the record discloses there is no evidence to support them." *Cumbee*, 333 S.C. at 670, 511 S.E.2d at 393.

LAW/ANALYSIS

I. DUE EXECUTION OF THE WILL

Children argue the probate court erred by failing to conduct an inquiry into the validity of the will. They assert they could not have raised this issue until September 2015 when Grandchildren offered the will for probate. Children therefore contend the issue was timely raised and had never been litigated.

Children argue the record contains no evidence to support a finding of due execution of Decedent's will.

Children also contend the probate court erred by finding the will was valid because Grandchildren produced no evidence as to the validity of the attestation clause because both witnesses were deceased and sections 62-3-406 to -407 of the South Carolina Code (Supp. 2020) required Grandchildren to present some evidence to prove due execution. Children argue the probate court's finding that the name Lucinda Springer was a scrivener's error was based on speculation because Grandchildren presented no extrinsic evidence that it was scrivener's error. We agree as to the witnesses' attestation but disagree as to the scrivener's error.

In contested cases, "Proponents of a will have the burden of establishing prima facie proof of due execution in all cases . . . ." § 62-3-407. Due execution requires that a will be:

> (1) in writing;
>
> (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and
>
> (3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

S.C. Code Ann. § 62-2-502 (Supp. 2020). When the proper execution of a will is at issue in a contested case,

> [I]f the will is witnessed . . . but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

§ 62-3-406(3). A self-proved will incorporates an affidavit signed by the testator, the witnesses, and a notary into the will, declaring due execution of the will, testator's testamentary capacity, and that there was no undue influence upon the testator. *See* S.C. Code Ann. § 62-2-503 (Supp. 2020). A self-proved will does not require the production of evidence as to the due execution of the will. *See* S.C. Code Ann. §§ 62-3-405 to -406 (Supp. 2020).

> A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding must be commenced by an interested person filing and serving a . . . petition . . . to prevent [the] informal probate of a will which is the subject of a pending application . . . ."

S.C. Code Ann. § 62-3-401 (Supp. 2020). "[I]f a will is opposed by a petition for a declaration of intestacy, it must be determined first whether the will is entitled to probate." § 62-3-407. "[A] proceeding to contest an informally probated will . . . may be commenced within eight months from informal probate or one year from the decedent's death, whichever is later." § 62-3-108(A)(2)(c).

Grandchildren argue Children's petition for formal testacy was untimely because they failed to petition the court within eight months of the admission of the will to probate, as required by section 62-3-108. We find Children's petition for formal testacy proceedings was timely. A petition for formal testacy can be filed following an application to informally probate a will. *See* § 62-3-401. Here, Grandchildren filed an application for informal probate on September 4, 2015. Based on that application, Children were permitted to file a petition for formal probate no later than May 4, 2016. *See* § 62-3-108. Children filed their petition for formal probate on February 4, 2016; thus, Children's petition for formal testacy was timely.

As to Children's argument regarding the scrivener's error, we find the probate court did not err in finding the name Springer was a scrivener's error. "Our courts have corrected scriveners' errors when warranted." *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004); s*ee also Fenzel v. Floyd*, 289 S.C. 495, 498-99, 347 S.E.2d 105, 107-08 (Ct. App. 1986) (noting a scrivener's error in a will could be corrected). Children assert Grandchildren were required to put forth

extrinsic evidence to support a finding of a scrivener's error. However, extrinsic evidence is not required to prove there was a scrivener's error. *See Fenzel*, 289 S.C. at 498, 347 S.E.2d at 107 ("Extrinsic evidence is *also* admissible to prove and correct a scrivener's error." (emphasis added)). Although extrinsic evidence is admissible to help determine such errors, extrinsic evidence is not required for such an apparent scrivener's error in a will. We find the contents of the will support the probate court's finding. The will was only three pages long; Decedent's correct name, "Lucinda Pringle," was on two of the three pages; and a third page contained the error, "Lucinda Springer." The date of the will—July 30, 1988—and the names of beneficiaries and executors were the same across the will's pages, and all the will's pages were similar in style and form. Based on the foregoing, we find the circuit court did not err in affirming the probate court's finding "Lucinda Springer" was a scrivener's error.

As to the due execution of the will, we find the circuit court erred in affirming the probate court's finding there was due execution without requiring an evidentiary showing to prove the witnesses signed the will. Section 62-3-406 states at least one of these attesting witnesses is required to testify if they are able. The death of both witnesses rendered them unable to testify. Nevertheless, the witnesses' death did not relieve Grandchildren, as the proponents of the will, from establishing a prima facie case of due execution. *See* § 62-3-407 ("Proponents of a will have the burden of establishing prima facie proof of due execution in *all* cases." (emphasis added)). As a result of the probate court's conclusion, Grandchildren were not required to present any evidence to support the prima facie case.

South Carolina has adopted the Uniform Probate Code (UPC), which includes section 3-406 of the UPC. *See* § 62-3-406. Massachusetts has partially adopted section 3-406 of the UPC. *See* Mass. Gen. Laws Ann. ch. 190B, § 3-406 (West, Westlaw through chapter 19 of 2021 1st Ann. Sess.) ("If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least [one] of the attesting witnesses, if within the commonwealth, competent and able to testify, is required. Due execution of a will may be proved by other evidence."). Interpreting this statute, the Massachusetts Court of Appeals has come to the same conclusion: it requires the proponent to provide some evidence to show the deceased witnesses signed a will when the will was not self-proved. *See In re Estate of King*, 156 N.E.3d 220, 224 (Mass. App. Ct. 2020) ("[T]he death of an attesting witness, or of all the attesting witnesses, is not to defeat the validity of the will, if, in fact, duly executed. It changes the form

of the proof, and allows the introduction of secondary evidence of the due attestation and execution of the will. Such attestation is then to be shown . . . by proof of the handwriting of the witness. That being shown, prima facie, it is to be taken to be true, and to have been put there for the purpose stated in connection with the signature." (quoting *Leatherbee v. Leatherbee*, 141 N.E. 669, 670 (Mass. 1923)).

The death of the witnesses to the will does not prohibit the court from probating a will because the proponent of the will may present "other evidence" of due execution, whether it be an affidavit from a witness or evidence establishing the witnesses' handwriting. *See* § 62-3-406 ("Proper execution may be established by *other* evidence, including an affidavit of an attesting witness." (emphasis added)); *Hopkins v. De Graffenreid*, 2 S.C.L. (2 Bay) 187, 192 (1798) (stating proof of handwriting of the deceased witnesses was sufficient to prove due execution of a will); *Harleston v. Corbett*, 46 S.C.L. (12 Rich.) 604, 608 (1860) (stating proof of a deceased witness's handwriting can be used to prove due execution of a will). Grandchildren were required to present some evidence to support due execution, and the death of the attesting witnesses did not eliminate the requirement of proving the prima facie case. *See* § 62-3-407. Thus, the circuit court erred by affirming the probate court's order denying formal probate because Grandchildren were required to provide "other evidence" of witness attestation to prove due execution of the will in a contested case. Based on the foregoing, we reverse as to this issue and remand this matter for the probate court to conduct a hearing to consider evidence of due execution of the will.

II. ALTERATION

Children argue that because Smalls altered the will, section 62-3-402 required Grandchildren to state the contents of the will and indicate that the will was lost, destroyed, or unavailable. Children assert the probate court erred by finding the will was the original will because Smalls had altered it. Children contend that because Smalls altered the will and no evidence was presented as to the "original" contents of the will, the probate court had no basis to determine the intent of the Decedent. We disagree.

"If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction

accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable." § 62-3-402(a).

As to Children's argument section 62-3-402(a) required Grandchildren to state the contents of the will, we find the circuit court did not err in affirming the probate court because Grandchildren presented the will they assert was entitled to informal probate, and the contents can be determined from this document.

As to Children's intent and alterations arguments, Children never sought a petition for writ of certiorari as to our 2011 opinion, which stated Decedent intended Evelina Brown Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her will. *Moses*, Op. No. 2011-UP-386. Thus, this finding became law of the case. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Based on the foregoing, we find the circuit court did not err in affirming the probate court's finding Decedent intended Grandchildren to inherit from her will.[5]

III. TIMELINESS

Children argue this court's 2011 opinion did not prohibit the probate court from making additional findings as to whether Smalls's concealment prejudiced Grandchildren because Grandchildren had a copy of the will before the running of the ten-year statute of limitation from section 62-3-108. We disagree.

We find Children's prejudice argument was an attempt to relitigate the issue of whether section 63-3-108 barred Grandchildren from probating the will. In our 2011 opinion, this court decided section 63-3-108 did not bar Grandchildren from reopening the Estate under the will. Because Children did not seek review of that decision, it is the law of the case. *Moses*, Op. No. 2011-UP-386; *see also Robert E. Lee & Co. v. Comm'n of Pub. Works*, 250 S.C. 394, 158 S.E.2d 185 (1967) (providing when a party raises the same argument it made in a former appeal, the decision from the former appeal is binding as precedent and as the law of the case); *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996)

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[5] Grandchildren, as the sole heirs according to this holding, appear to have made a strategic decision to file an application for informal probate and to choose not to contest Smalls's inclusion in the will.

("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.").

CONCLUSION

For the foregoing reasons, we affirm the circuit court's order affirming the probate court's order as to the scrivener's error, alteration of the will, Decedent's intent, and timeliness issues. We reverse and remand for the probate court to conduct a hearing to determine whether there was due execution of Decedent's will.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.