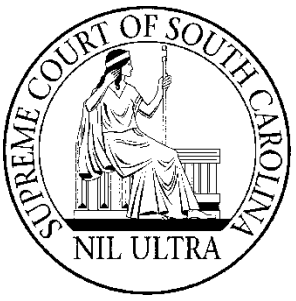

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 2, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5975 – Rita Glenn v. 3M Company	Pending
5994 – Desa Ballard v. Admiral Insurance Company	Pending
5995 – The State v. Kayla M. Cook	Pending
5996 – Palmetto Pointe v. Tri-County Roofing	Pending
5997 – Mack Washington, Jr. v. State	Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

6000 – Jeffrey Fossett v. Melissa Fossett	Granted 7/28/2023

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

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

5934 – Nicole Lampo v. Amedisys Holding, LLC	Pending
5946 – The State v. Frankie L. Davis, III	Pending
5947 – Richard W. Meier v. Mary J. Burnsed	Pending
5948 – Frankie Padgett v. Cast and Crew Entertainment	Pending
5951 – State v. Xzariera O. Gray	Pending
5953 – State v. Nyquan T. Brown	Pending
5954 – State v. Rashawn Carter	Pending
5955 – State v. Philip Guderyon	Pending
5963 – Solesbee v. Fundamental Clinical	Pending
5965 – National Trust for Historic Preservation v. City of North Charleston	Pending
5969 – Wendy Grungo-Smith v. Joseph Grungo	Pending
5972 – McEntire Produce v. SCDOR	Pending
5974 – The State v. Calvin D. Ford	Pending
5986 – The State v. James E. Daniels, Jr.	Pending
2021-UP-242 – G. Allen Rutter v. City of Columbia	Pending
2022-UP-095 – Samuel Paulino v. Diversified Coatings, Inc.	Pending
2022-UP-251 – Lady Beaufort, LLC v. Hird Island Investments	Pending
2022-UP-252 – Lady Beaufort, LLC v. Hird Island Investments (2)	Pending
2022-UP-253 – Mathes Auto Sales v. Dixon Automotive	Pending

2022-UP-270 – Latarsha Docena-Guerrero v. Government Employees Insurance — Pending

2022-UP-303 – Daisy Frederick v. Daniel McDowell — Pending

2022-UP-307 – Frieda H. Dortch v. City of Columbia — Pending

2022-UP-314 – Ronald L. Jones v. Rogers Townsend & Thomas, P.C. — Pending

2022-UP-326 – Wells Fargo Bank v. Michelle Hodges — Pending

2022-UP-380 – Adonis Williams v. State — Pending

2022-UP-382 – Mark Giles Pafford v. Robert Wayne Duncan, Jr. — Pending

2022-UP-402 – Todd Olds v. Berkeley County — Pending

2022-UP-413 – Lucas Marchant v. John Doe — Pending

2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust — Pending

2022-UP-422 – Paula Russell v. Wal-Mart Stores, Inc. — Pending

2022-UP-425 – Michele Blank v. Patricia Timmons (2) — Pending

2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour — Pending

2022-UP-435 – Andrew Desilet v. S.C. Dep't of Motor Vehicles — Pending

2022-UP-437 – Nicholas Thompson v. Bluffton Township Fire District — Pending

2022-UP-444 – State v. James H. Baldwin — Pending

2022-UP-452 – In the Matter of Kevin Wright — Pending

2022-UP-462 – Karrie Gurwood & Howard Gurwood v. GCA Services Group, Inc. — Pending

2023-UP-005 – David Abdo v. City of Charleston Pending

2023-UP-020 – Bridgett Fowler v. Fedex Pending

2023-UP-037 – Diana Bright v. Craig Bright Pending

2023-UP-041 –Joy Wymer v. Floyd Hiott Pending

2023-UP-044 – Deutsche Bank National Trust Company v. Doris J. Dixon Pending

2023-UP-051 – State v. Jason E. Stoots Pending

2023-UP-055 – M. Baron Stanton v. Town of Pawleys Island Pending

2023-UP-062 – Raglins Creek Farms, LLC v. Nancy D. Martin Pending

2023-UP-064 – Karen K. Baber v. Summit Funding, Inc. Pending

2023-UP-070 – James Kincannon v. Ashely Griffith Pending

2023-UP-075 – Dana Dixon v. SCDMH (2) Pending

2023-UP-087 – The State v. Seth H. Smith Pending

2023-UP-091 – The State v. Dale E. King Pending

2023-UP-096 – Viola M. Hackworth v. Bayview Manor LLC Pending

2023-UP-118 – Joseph N. Grate v. Jameka Cohen Pending

2023-UP-119 – The State v. Angelita Wright Pending

2023-UP-121 – Mathew C. Dwyer v. State Pending

2023-UP-132 – Monica Brown-Gantt v. Centex Real Estate Pending

2023-UP-138 – In the Matter of John S. Wells Pending

2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-158 – Herman Holcomb v. City of North Augusta	Pending
2023-UP-164 – Randall G. Dalton v. The Muffin Mam, Inc.	Pending
2023-UP-172 – The State v. Gary M. Wirtz	Pending
2023-UP-177 – John Mayers v. Konan Henthorn	Pending
2023-UP-178 – CRM of the Carolinas, LLC v. Trevor W. Steel	Pending
2023-UP-180 – The State v. Samuel L. Burnside	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Trisha Gibbons, Respondent,

v.

Aerotek, Inc., Appellant.

Appellate Case No. 2020-001065

Appeal From Richland County
Perry H. Gravely, Circuit Court Judge

Opinion No. 6006
Heard June 5, 2023 – Filed August 2, 2023

AFFIRMED

Bryson Moore Geer, of Nelson Mullins Riley & Scarborough, LLP, of Charleston; Patrick Devin Quinn, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and William E. Corum and Megan A. Scheiderer, both of Kansas City, Missouri, all for Appellant.

James Paul Porter, of Cromer Babb Porter & Hicks, LLC, of Columbia, for Respondent.

LOCKEMY, A.J.: In this appeal from an order denying a motion for attorney's fees and costs, Aerotek, Inc. argues the trial court erred by holding (1) Aerotek had an obligation to plead its entitlement to attorneys' fees and that it did not

sufficiently do so in its answer and (2) Aerotek did not authenticate an employment agreement. We affirm based on preservation and the two-issue rule.

FACTS/PROCEDURAL HISTORY

In October 2018, Gibbons filed a complaint against Aerotek and Schneider Electric USA, Inc.[1] (Schneider Electric), alleging (1) a violation of section 41-1-70 of the South Carolina Code (2021)[2] and (2) a breach of contract. She asserted Schneider Electric and Aerotek terminated her employment because she complied with a subpoena to testify in court and they breached "a written agreement" when they failed to increase her pay from $12 per hour to $16 per hour after ninety days of employment.

Aerotek answered and argued it took no part in the decision to terminate her and although the Employment Agreement provided Gibbons was employed as a temporary contract employee assigned to Schneider Electric for a wage of $12 per hour, the Employment Agreement never provided she would receive a raise after ninety days of employment. Aerotek concluded its answer with a request for dismissal of Gibbons's complaint and an award of attorneys' fees and costs.

Aerotek moved for summary judgment and asserted Gibbons's claims pursuant to section 41-1-70 failed as a matter of law because (1) it had no involvement in Schneider Electric's decision to terminate Gibbons and (2) it had no knowledge

---

[1] During litigation, all parties consented to the dismissal of Schneider Electric with prejudice.

[2] Section 41-1-70 provides:

> Any employer who dismisses . . . an employee because the employee complies with a valid subpoena to testify in a court proceeding . . . is subject to a civil action in the circuit court for damages caused by the dismissal . . . .
>
> Damages for dismissal are limited to no more than one year's salary or fifty-two weeks of wages based on a forty-hour week in the amount the employee was receiving at the time of receipt of the subpoena.

Gibbons was served with a subpoena to testify.[3] Aerotek's memorandum in support of summary judgment was accompanied by four attachments: the Employment Agreement; an affidavit of Jason Pritchard, an employee relations manager at Aerotek; Aerotek's job posting for a position with Schneider Electric; and Gibbons's April 2019 deposition transcript.

The trial court denied Aerotek's motion for summary judgment. In January 2020, the matter proceeded to a jury trial. At the close of evidence, Aerotek moved for a directed verdict, which the trial court granted.

Subsequently, Aerotek requested attorneys' fees in the amount of $201,450.50 and costs in the amount of $10,365.10. Aerotek asserted it was not involved in terminating Gibbons's employment and it had no initial knowledge Gibbons was served with a subpoena. Aerotek argued the Employment Agreement entitled it "to recover reasonable attorneys' fees and all costs." Aerotek also addressed the reasonableness of hours and rates and attached the Employment Agreement and affidavits asserting the reasonableness of the fees and costs.

In opposition, Gibbons requested the court deny the motion. She asserted various defenses and equitable matters as to why the fee-shifting provision in the Employment Agreement was invalid. She attached various documents to her motion in opposition, including her affidavit, stating that (1) Aerotek never mentioned or explained the fee-shifting provision, (2) she never had notice of the Employment Agreement, (3) she had "no contemporaneous memory of receiving or reviewing that document in any form or fashion when [she] allegedly signed it electronically," and (4) even if she did sign the Employment Agreement, she "received nothing of value for doing so."

The trial court denied Aerotek's motion for attorneys' fees and costs "on [two] separate grounds." First, the court found Rule 8(a), SCRCP, required Aerotek's pleadings to contain a "short and plain statement of the facts" showing Aerotek was entitled to relief. The trial court determined Aerotek's pleadings did not comport with Rule 8(a) because the pleadings failed to include the allegations and facts supporting Aerotek's basis for attorneys' fees and costs and made no reference to the Employment Agreement. Second, the trial court determined the authenticity of the Employment Agreement was in dispute. It noted the Employment

[3] Gibbons and Aerotek subsequently filed a joint stipulation of dismissal as to the breach of contract claim.

Agreement was never introduced as evidence at trial. Further, the trial court stated the authenticity of the Employment Agreement was at issue because Gibbons stated she did not recall signing the Employment Agreement and Aerotek did not include a representative's affidavit as to the authenticity of the Employment Agreement. Therefore, the trial court concluded Aerotek did not meet its burden of authenticating the Employment Agreement. Aerotek did not file a Rule 59(e), SCRCP, motion. This appeal followed.

ISSUES ON APPEAL

1. Can Aerotek seek contractual attorneys' fees in this action for which fees have been incurred, without having pled a counterclaim for such fees, if Gibbons brought a claim for breach of the same contract under which Aerotek seeks its fees, and when Aerotek did request an award of attorneys' fees in its answer, or must it file a separate lawsuit asserting an original claim for its attorneys' fees?

2. Did Aerotek have an obligation to authenticate the contract under which it seeks contractual, prevailing party attorneys' fees and, if so, did it do so sufficiently?

STANDARD OF REVIEW

"The decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion." *Maybank v. BB&T Corp.*, 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016). "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004).

LAW/ANALYSIS

Aerotek argues the trial court erred in holding it failed to authenticate the Employment Agreement. Aerotek contends it provided the document to the court when it attached it to the motion and memorandum for summary judgment and provided Pritchard's affidavit, stating Gibbons electronically signed the agreement. It avers the burden to authenticate was not high and notes that during her deposition, Gibbons did not dispute signing the agreement. Finally, Aerotek contends the trial court did not cite any authority to support its holding for this issue and it had no opportunity to address the authentication issue because the trial court *sua sponte* raised the issue in its order denying attorneys' fees. We disagree.

Initially, we hold Aerotek failed to preserve issue two, regarding the authentication

of the contract, for review. Rule 59(e) motions "serve a vital purpose for proper issue preservation." *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). A Rule 59(e) motion would have given Aerotek the opportunity to argue the errors it believed the trial court committed in denying its motion for attorneys' fees and allowed the trial court to reconsider the *sua sponte* ground and its ruling. However, in the absence of this motion, such an opportunity was lost. After the trial court issued its order, Aerotek was required to file a Rule 59(e) motion addressing the trial court's finding that Aerotek did not properly authenticate the Employment Agreement. *See In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."). Because Aerotek's failure to preserve issue two barred appellate review, this issue is therefore, right or wrong, the law of the case. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the [circuit] court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the [circuit] court erred."); *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review."). Accordingly, we affirm issue two.

Further, the trial court based its decision to deny Aerotek's motion for attorneys' fees on "[two] separate grounds": first, that Aerotek failed to sufficiently plead its entitlement to attorneys' fees and costs and second, that it did not properly authenticate the Employment Agreement. Because we hold the trial court's finding regarding the authentication issue is the law of the case, it is, therefore, a ground supporting the denial of Aerotek's motion for attorneys' fees and costs. Accordingly, pursuant to the two-issue rule, we affirm and do not address issue one. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case."), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating "an unappealed ruling, right or wrong, is the law of the case").

CONCLUSION

Based on the foregoing, the trial court's denial of Aerotek's motion for attorneys' fees and costs is

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dominic A. Leggette, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001793

ON WRIT OF CERTIORARI

Appeal From Georgetown County
Paul M. Burch, Post-Conviction Relief Judge

Opinion No. 6007
Heard December 5, 2022 – Filed August 2, 2023

AFFIRMED

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

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., of Columbia, both for Respondent.

MCDONALD, J.: In this action for post-conviction relief (PCR), Petitioner asserts the PCR court erred in finding trial counsel provided effective assistance of

counsel. Petitioner contends trial counsel was ineffective in failing to object to the trial court's instruction on voluntary manslaughter as a lesser-included offense of murder because the evidence presented at trial did not support a voluntary manslaughter charge. We affirm.

Facts and Procedural History

On August 9, 2008, Petitioner and several others from his uptown Andrews neighborhood were involved in a fight with Al Ingram and other men from the Andrews westside area. Groups from the two neighborhoods clashed again on August 11. According to testimony presented at trial, a longstanding conflict existed between these two neighborhoods, often culminating in fisticuffs.

On August 13, 2008, Officer Verney Cumbee of the Andrews Police Department (APD) responded to the scene of a shooting. When he arrived, he found approximately fifteen people surrounding Antonio Tisdale, a westside man with a gunshot wound to his chest. Several individuals at the scene reported that "Dominic just shot Tony." Tony Tisdale ultimately died from the gunshot wound.

Investigator Eddie Lee of the APD assisted in the investigation. Investigator Lee identified Petitioner as a suspect based on eyewitness testimony gathered from the scene. According to Investigator Lee, Al Ingram recognized Petitioner but did not know his name; Ingram knew only that he had seen him around town and in the neighborhood conflicts. Ingram subsequently identified Petitioner from a photo lineup and named him as the shooter.

In the meantime, Petitioner remained at large. Investigator Lee completed a fugitive form requesting the assistance of the United States Marshals Service, and Officer Cumbee subsequently arrested Petitioner on September 9, 2008. The Georgetown County grand jury later indicted Petitioner for murder and assault and battery with intent to kill (ABWIK).

At Petitioner's trial began before Judge Benjamin H. Culbertson, the State presented evidence showing Tisdale and Ingram, along with several others from their westside neighborhood, were at a nightclub on the night of the shooting. Ingram and Tisdale saw Petitioner from a distance and followed him as he walked away from a group of westside men. While the two men were following him, Petitioner turned and fired a gun several times, injuring Ingram and killing Tisdale.

The State also elicited testimony about prior fights between Ingram and Petitioner and between the rival neighborhoods. Both Ingram and Petitioner testified as to their involvement in a physical dispute about one year prior to the shooting. Ingram admitted he participated in scuffles with Petitioner's neighborhood two and four days prior to the shooting; however, he maintained no weapons were involved on those occasions. Ingram claimed Petitioner was not present during the fight four days before the shooting and maintained he and Petitioner had not fought or threatened each other since the altercation the previous year.

Petitioner also recalled incidents between the rival neighborhoods, including lynchings and jumpings. However, Petitioner's testimony about the more recent encounters differed from Ingram's—Petitioner claimed he and Ingram indeed were involved in the fight four days before the shooting. He further noted he saw Ingram again two days before the shooting.

Additionally, both the State and Petitioner presented evidence regarding the moments leading up to the shooting. Ingram testified he saw Petitioner arguing with two or three people from Ingram's westside neighborhood and that as he approached Petitioner, he heard people say "there goes Al, there goes Al," which Ingram interpreted as an encouragement to fight. When Petitioner walked away from the first group of westside men, Ingram and Tisdale followed ten to fifteen feet behind him.[1] Ingram saw Petitioner turn and fire his weapon three or four times, but he did not see Petitioner with a gun prior to the shots. Ingram testified that he had no weapon, did not see Tisdale pull a weapon, and denied that he and Tisdale followed or yelled at Petitioner. Ingram further noted no other men from the rival neighborhoods were fighting the night of the shooting.

Jamar Mitchum, Tisdale's brother, also saw Petitioner that night. He heard no arguments or fights that evening but did see a few people near Petitioner. Mitchum testified that when Petitioner walked away from the area where Ingram and Tisdale were standing, Ingram and Tisdale followed behind him. He acknowledged he did not see the shooting; however, he heard three or four gunshots. He did not see Petitioner or anyone else with a weapon that night.

[1] Ingram claimed he had no intention of fighting Petitioner that night.

Just prior to the shooting, Craig Jackson was outside Carnell's Bar and Grill taking a break from work when he saw approximately ten men, including Tisdale, standing around outside. The men were not loud or rowdy, but Jackson heard someone say "[t]hat's Dominic right there" before Tisdale and Ingram walked toward Petitioner. When Tisdale and Ingram were approximately three feet behind Petitioner, Jackson saw Petitioner turn and start shooting. He did not hear Petitioner say anything and did not see any weapon other than Petitioner's gun. Jackson testified he watched as Tisdale and Ingram walked away because he believed a fight would ensue.

Leron Gardner was with Petitioner the night of the shooting. He testified Ingram and Tisdale were standing in front of Carnell's as he and Petitioner walked past. According to Gardner, the group "just rushed up on us out of nowhere out of the blue" so Petitioner took off running. Gardner noted he was scared after Ingram and Tisdale chased after Petitioner. Gunshots followed after Petitioner ran down a side street, but Gardner could not see what happened. He did not see Ingram or Tisdale with a weapon.

Petitioner testified he received a call from his ex-girlfriend and had an "iffy" or "messed up feeling that something was going to happen" the night of the shooting. Despite his reservations, Petitioner and Gardner went out that night. Petitioner admitted he showed Gardner a gun, which he said he bought for protection because he was scared of Ingram due to the escalating situation between the two men. He explained that when he saw the westside group, he kept walking to avoid any confrontation, but he became scared when the men confronted him. Petitioner believed he was going to be jumped because the group formed a semi-circle around him, and one flagged down Tisdale and Ingram to tell them he was there. As Petitioner walked away, he heard someone come up behind him and ask, "What's up now?" Petitioner then turned around and saw the two men approximately three feet from him. When Petitioner saw Ingram reach toward his waist, he believed Ingram was reaching for a gun, so he pulled his own weapon, shot two or three times, and fled. Petitioner maintained he did not provoke Tisdale or Ingram that night. He noted he was already scared of Ingram due to their confrontation two days earlier, the escalating violence between the rival neighborhoods, and Ingram's reputation for carrying a gun. He further acknowledged his varying and contradictory statements to police after the shooting.

The trial court instructed the jury on murder, ABWIK, voluntary manslaughter, assault and battery of a high and aggravated nature (ABHAN), and self-defense. Trial counsel did not object to these instructions, and the charge conference was not on the record. After asking several questions and deliberating for nine hours over two days, the jury reported an impasse and the court gave an *Allen*[2] charge. Two and a half hours later, the jury found Petitioner guilty of the lesser-included offenses of ABHAN and voluntary manslaughter. The trial court sentenced Petitioner to thirty years' imprisonment for voluntary manslaughter and ten years' imprisonment for ABHAN, to run concurrently.

Following a timely appeal, this court affirmed Petitioner's convictions and sentence. *State v. Leggette*, Op. No. 2012-UP-203 (S.C. Ct. App. filed March 28, 2012). The supreme court denied the petition for a writ of certiorari in Petitioner's direct appeal.

Petitioner subsequently filed an application for PCR, claiming ineffective assistance of counsel and "constitutional and statutory violation[s]." At his PCR hearing, Petitioner testified "there were amended stipulations that did not meet murder" and stated murder and voluntary manslaughter were "two different things" based "on the same acts." The State objected to Petitioner's "legal" testimony, and PCR counsel responded that Petitioner was trying to explain his understanding of the indicted offenses versus the charges on which the jury convicted him. The PCR court allowed Petitioner to address his belief that counsel was ineffective based on a misunderstanding of the law and due to "discrepancies" between the indicted offenses and the jury's verdict. Petitioner admitted trial counsel explained his initial charges but stated he "found out there were some stipulations that were not [conducive] with what [he was] . . . found guilty of." Petitioner also believed his voluntary manslaughter conviction did not warrant a thirty-year sentence.[3]

---

[2] *Allen v. United States*, 164 U.S. 492 (1896).

[3] Trial counsel addressed the thirty-year sentence during his testimony at the PCR hearing, explaining, "If you're convicted, he (the trial judge) to my experience—if you're convicted at trial, to my experience he basically gives you every day he can." However, upon further questioning, trial counsel admitted he recalled the trial court stating during sentencing that "the biggest problem [the court had] with [Petitioner's] case is the fact that with [his] prior record by federal law [he was]

Petitioner further asserted trial counsel was ineffective in failing to call a character witness, whom he argued "would have proved to the courts that law enforcement was creating perjury when they were on the stand, because there were altercations that were going on since 2006." In light of this history, Petitioner believed the State's witnesses falsely portrayed the incident as an ambush killing. Petitioner set forth a litany of other areas in which he believed trial counsel was ineffective, including the failure to request a charge of involuntary manslaughter.[4]

Trial counsel testified he and Petitioner discussed the indictments and the possibility that the jury could find him guilty of a lesser-included offense. In trial counsel's opinion, the State failed to disprove self-defense or establish Petitioner's guilt beyond a reasonable doubt. He noted the jury deliberated for an "inordinate length of time" and likely reached a compromise verdict. Trial counsel believed he presented sufficient evidence of self-defense but questioned whether his jury charge requests were as strong as they would be in his current practice. Although trial counsel specifically referenced an instruction regarding Petitioner's right to act on appearances, he couched this concern as a "vague recollection." Neither the State nor PCR counsel asked trial counsel about the submission of voluntary manslaughter to the jury as a lesser-included offense or whether this was a legal strategy he discussed with Petitioner.

The PCR court denied relief and dismissed Petitioner's application, finding trial counsel was not ineffective in failing "to object to [Petitioner's] conviction for voluntary manslaughter." The PCR court found Petitioner failed to offer any support for his argument that voluntary manslaughter should not have been charged and noted it appeared Petitioner did "not recognize it as a lesser-included offense of murder." The court further concluded the record demonstrated "the voluntary manslaughter instruction was appropriate and supported by the facts" and found trial counsel was not ineffective with regard to Petitioner's other claims.

---

prohibited from owning a firearm. In spite of that[, he] went and [he] purchased one illegally and then [he] carried it down there that night."

[4] Initially, Petitioner testified he believed trial counsel should have requested a charge of voluntary manslaughter, but when PCR counsel asked him about this more specifically, he responded, "I felt like he should have motioned for involuntary manslaughter when it came to Tisdale."

Standard of Review

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). An appellate court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, an appellate court "review[s] questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

Law and Analysis

I. Issue Preservation

At the outset of our analysis, we must contend with the imprecise allegations asserted in Petitioner's PCR pro se application for relief. Although his brief to this court ably sets out Petitioner's argument that trial counsel was ineffective in failing to object to the voluntary manslaughter charge, the argument before the PCR court was not so specific, leaving the PCR court to glean the deficiencies asserted from the pro se application and hearing testimony. Petitioner's arguments before the PCR court—that there were "discrepancies" between the indicted offenses and the offenses for which he was convicted and that he did not understand he could be convicted of an unindicted lesser-included offense—differ somewhat from his argument to this court that the evidence at trial did not support the voluntary manslaughter instruction. *See, e.g.*, *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (reiterating that an issue is not preserved for appellate review when one ground is raised to the trial court and a different ground is raised on appeal); *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017) (recognizing that in most PCR cases, our supreme court has "refused to excuse the pleading and issue-preservation requirements that apply in all civil cases").

While we recognize this initial lack of clarity lends weight to the State's preservation argument, we address the merits here in light of the arguments made before the PCR court, the PCR court's comprehensive analysis of the evidence supporting the voluntary manslaughter instruction, the lack of an amended application, and the failure of either party to ask trial counsel whether seeking the

lesser-included charge was a strategic decision.[5] *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) ("While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.").

II. The PCR Court's Analysis of the Lesser-Included Offense

Petitioner contends the PCR court erred in finding trial counsel was not ineffective in failing to object to the voluntary manslaughter instruction because the evidence presented at trial did not support the instruction. He asserts the evidence did not demonstrate he acted in the heat of passion because it did not show he was "out of control as a result of his fear," "was acting under an uncontrollable impulse to do violence," "lacked control over his actions," or was engaged in any argument or altercation with Tisdale. In Petitioner's view, the State failed to set forth evidence of sufficient legal provocation because although the evidence indicated Petitioner believed Ingram was reaching for a gun, the evidence did not show Tisdale committed an overt act or provoked Petitioner into firing his weapon. Petitioner asserts he was prejudiced because he contends the jury likely would have found he acted in self-defense had the voluntary manslaughter charge not been given and

---

[5] Neither party asked trial counsel about the voluntary manslaughter instruction, and trial counsel was most concerned about the jury's rejection of self-defense and the lengthy sentence imposed by the trial court. Because he was not asked the question, trial counsel was not able to explain why he failed to object to the instruction—if it was a failure at all. Because here, requesting a voluntary manslaughter instruction would have been a legitimate strategic attempt to mitigate the consequences of the sentence Petitioner faced on the murder charge if the jury were to reject his theory of self-defense, as it ultimately did. A murder conviction carries a sentence of thirty years to life (day-for-day) while the sentencing exposure for voluntary manslaughter is two to thirty years computed at 85%. S.C. Code Ann. § 16-3-20(A) (2015) (punishment for murder); § 16-3-50 (2015) ("A person convicted of manslaughter . . . must be imprisoned not more than thirty years or less than two years."). Challenging the voluntary manslaughter instruction at trial would have been a huge risk in light of Petitioner's very contradictory statements to law enforcement and his decision to obtain an illegal firearm and go out that night—armed—despite his escalating beef with Ingram and his anticipation that "something was going to happen."

believes the jury reached a compromise verdict after deliberating for almost twelve hours and receiving an *Allen* charge. We disagree.

In order to establish a claim for ineffective assistance of counsel, a PCR applicant must show: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." *State v. Starnes*, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010). "To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Id.* at 596, 698 S.E.2d at 608.

> Voluntary manslaughter is a lesser offense of murder not by virtue of the elements test, but because it has traditionally been considered a lesser offense of murder. Therefore, a trial court must allow the jury to consider the lesser offense of voluntary manslaughter if there is evidence from which it could be inferred that a defendant committed voluntary manslaughter rather than the greater offense of murder.

State v. Burdette, 427 S.C. 490, 497, 832 S.E.2d 575, 579 (2019).

"[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Cook v. State*, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015) (quoting *Hopper v. Evans*, 456 U.S. 605, 611 (1982)). However, "[i]f there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." *State v. Sims*, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019) (quoting *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006)).

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *Cook*, 415 S.C. at 556, 784 S.E.2d at 668 (quoting *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)). "[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. "A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion" or "merely because he was legally provoked." *Id.* at 596–97, 698 S.E.2d at 608. Rather, "there must be evidence that the heat of passion was caused by sufficient legal provocation." *Id.* at 597, 698 S.E.2d at 608.

"In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

> The sudden heat of passion need not dethrone reason entirely or shut out knowledge and volition, but it must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what may be called an uncontrollable impulse to do violence.

State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014).

"[A] person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609. "However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge." *Id.* "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id.* "Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it." *Id.* at 599, 698 S.E.2d at 609.

We acknowledge the question of whether Petitioner acted in a sudden heat of

passion is a close one. But instruction on a lesser offense is appropriate when "any evidence" supports the lesser charge. Both Petitioner and Ingram testified as to prior altercations between their respective neighborhoods, referencing separate incidents two and four days prior to the shooting. Regarding the night of the shooting, Petitioner and Gardner both testified they were surrounded in a threatening manner by several westside men after they arrived at Carnell's, and Petitioner feared he was about to be jumped when the group formed a semi-circle around him. Both Petitioner and Gardner were scared. Several witnesses testified people pointed Petitioner out to Ingram when Ingram and Tisdale arrived, and Ingram believed people were encouraging him to fight Petitioner.

Witnesses also testified that as Petitioner either walked or ran away from the group of westside men, Ingram and Tisdale followed closely behind him, with Gardner testifying Ingram and Tisdale "went after" Petitioner immediately after he started towards the Super Chic store. Jackson continued to watch after the men walked off because he thought he was about the see a fight. Petitioner testified that when he heard someone come up behind him and ask, "What's up now?" he turned and saw Ingram and Tisdale just three feet from him. Petitioner recalled he was scared when he saw Ingram reach toward his waist because Ingram was known to carry a weapon, "So, I proceeded to pull my gun out and shot two, two to three times." Petitioner admitted that Tisdale and Ingram running after him caused him to be fearful and frightened; he was already scared and did not know what to do because the prior incidents indicated hostilities between the opposing groups were escalating.

Although Petitioner's testimony established the main provocation on the night of the shooting came from Ingram, Tisdale accompanied Ingram in following Petitioner and both were clearly part of the approaching, threatening westside group. *See State v. Locklair*, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) ("Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to *the victim* in order to constitute sufficient legal provocation." (emphasis added)); *id.* ("The provocation *of the deceased* must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or *terror*, rendering the mind incapable of cool reflection." (second emphasis added) (quoting *State v. Franklin*, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1993))). In light of the prior troubles between Petitioner and the westside group and the menacing actions of the various westside men on the night of the shooting,

we find evidence exists to support the PCR court's finding that trial counsel was not deficient in failing to object to the voluntary manslaughter instruction as a lesser-included offense. *See*, *e.g.*, *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608 ("If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge.").

Conclusion

Accordingly, the PCR court's order denying relief and dismissing Petitioner's PCR application is

AFFIRMED.

GEATHERS, J., and HILL, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tekayah Hamilton, individually and as parent and guardian ad litem for Robert Lee M. Jr., a minor child under the age of 18, Respondent,

v.

Regional Medical Center, Appellant.

Appellate Case No. 2019-001921

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 6008
Heard December 8, 2022 – Filed August 2, 2023

AFFIRMED

Michael C. Tanner, of Michael C. Tanner, LLC, of Bamberg, and Morgan Rebekkah Long, of Michael Tanner, LLC, of Trenton, North Carolina, both for Appellant.

Jonathan F. Krell, of Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA, of Charleston; David Reynolds Williams and Virginia Watson Williams, both of Williams & Williams, of Orangeburg; and Kathleen Chewning Barnes, of Barnes Law Firm, LLC, of Hampton, all for Respondent.

KONDUROS, J.: In this medical negligence action, Regional Medical Center (Regional) appeals the trial court's (1) determinations of issues concerning expert witnesses, (2) admission of photographs, (3) publishing requests to admit to the jury, and (4) denial of its motions for a directed verdict and for a new trial absolute or new trial *nisi* remittitur. We affirm.

FACTS/PROCEDURAL HISTORY

On October 25, 2014, a five-week old child, Robert Lee M., Jr. (Minor), was admitted to Regional for a high fever. Jamie Downing worked at Regional as a nurse and treated Minor during his hospital stay. Medical personnel at Regional did not initially know the cause of Minor's fever but on the day of his admission, they started him on IV antibiotic therapy in case he had an infection. In the early morning of October 28, 2014, Downing administered an antibiotic, ampicillin, into Minor's IV. Shortly thereafter, Minor's hand became swollen with a dark spot and his mother, Tekayah Hamilton, called the nurses' station because Minor was "really crying." The antibiotic Downing gave Minor through the IV caused a third-degree burn to his hand because it infiltrated outside of his vein. On October 30, 2014, Minor was discharged from Regional.

On October 7, 2015, Hamilton, individually and as parent and guardian ad litem for Minor, filed an action against Regional[1] for medical negligence. Regional answered, denying liability and any wrongdoing and asserting numerous affirmative defenses.

Prior to trial, Regional moved to exclude Hamilton's expert, Monica Stobbs, a nurse, from being qualified as an expert witness "in administering/managing pediatric IV therapy." Regional argued Stobbs was not qualified to testify about IV therapy for pediatric patients because she had not administered IV therapy to a

[1] Downing was also named as a defendant in the complaint but was dismissed from the action on June 29, 2016, pursuant to the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-70(c) (2005) (requiring a person who brings an action against a governmental entity under the Tort Claims Act to "name as a party defendant only the agency or political subdivision for which the employee was acting").

pediatric patient and did not review literature specifically about IV therapy for pediatric patients. Hamilton argued the administration and monitoring of an IV is the same for a pediatric or an adult patient and Regional's argument went to Stobbs's credibility rather than her qualifications. The trial court determined it would qualify Stobbs as a nursing care expert and Regional could "make all the hay you want to" about her pediatric experience.

Regional also moved to exclude photographs of Minor's hand on the ground that the danger of unfair prejudice substantially outweighed the probative value of the photographs. The trial court denied that motion as well.

At trial, Hamilton's expert witness, Stobbs, testified the standard of care for IV management is the same for pediatric and adult patients. She indicated that before administering medication through an IV, a nurse must flush the IV with saline to ensure the IV is actually going into the vein and not instead into the skin. She explained saline would not harm the area and cause a burn type of injury if it went into the surrounding tissue of the vein, unlike like an antibiotic which could if it did not go directly into the vein. Stobbs testified that Regional's policies and procedures for IV therapy state a saline flush should be given. Stobbs provided that Minor's medical chart indicated his IV was flushed on several occasions before the medication was administered but that on the occasion when the injury occurred, the chart did not indicate the IV was flushed. Stobbs noted Regional's policies and procedures state that the flush should be documented on the medication record. Stobbs stated: "If it's not documented, it wasn't done." Stobbs testified that Regional breached the standard of care by not documenting the saline flush and by not staying with Minor for at least five minutes after starting medication.

Downing testified that at the time she treated Minor, she had worked as a nurse at Regional for less than three months and had been allowed to work on her own for about two weeks. Downing stated Regional's policies and procedures "are direct instructions" and there is "not room for interpretation" of them. Downing testified that Regional's policies require a saline flush before putting medication into an IV. She believed the policies require flushing be documented on the electronic medical record only when not associated with giving a medication. Downing testified she could not specifically remember administering a saline flush prior to ampicillin that morning but testified her practice is to flush prior to giving medication. Downing stated Minor's medical records indicated a saline flush was given every

four hours but Regional's system provided no way to document giving a saline flush before an antibiotic.

Hamilton testified that early in the morning on October 28, Minor's hand swelled and turned black with a "bubble," which burst the following day. She introduced photographs and testified they accurately showed Minor's hand at the time the injury occurred. Hamilton provided she does "a lot of hand motion things with [Minor] because his hand . . . cramp[s] up." She testified he sometimes has itching and irritation under the skin and tells her it hurts. Hamilton explained she was hesitant to have Minor get injections into the injury site because he had already gone through so much. She was afraid that if he received injections, he would need to have his hand and arm wrapped and would not be able to do anything. She testified that after the initial injury, he could not crawl because of his hand and she had to constantly watch him to make sure he did not hurt himself. During Hamilton's testimony, Minor was brought into the court room for the jury to observe his hand. Hamilton testified she lives in Santee but she takes Minor to MUSC in Charleston to see two doctors.

Minor visited a wound care center fifteen times due to his injury. Dr. Peter DeVito, an expert in plastic surgery, examined Minor in February 2015, when he was four months old. Dr. DeVito testified the injury was "too contaminated for a skin graft" and took "a lot of wound care" and time to heal. Dr. Devito believed the burn resulted in a keloid. He explained a keloid is "a tumor of scar tissue" that "invades" the normal skin surrounding it and causes burning and itching. He testified that some areas of the injury were painful while other parts were not due to the nerve damage but that "[t]he whole nature of the wound [wa]s painful." During Dr. Devito's testimony, Hamilton entered medical bills into evidence. Hamilton also questioned Dr. DeVito as to the cost of surgery to repair Minor's hand. He provided it could cost $6,500 to $14,500 or even more if a hospital stay needed to be extended.

During trial, Hamilton moved to publish certain requests to admit from Regional as a stipulation.[2] Those requests to admit stated:

[2] The Record contains Hamilton's responses to the requests to admit but does not contain Regional's document in which it made the requests.

> 1. Admit the value of the amount in controversy in this action is less than $100,000.00.
> . . . .
> 2. Admit the value and amount in controversy in this action is greater than $100,000.00.
> . . . .
> 3. Admit the value of Plaintiff's actual damages exceeds $100,000.00.

Hamilton denied the first request to admit and admitted the second and third.

Regional objected, arguing the purpose of the requests was to obtain an independent medical examination (IME) under Rule 35, SCRCP,[3] and it was not a stipulation or admission. Regional asserted the prejudicial effect of publishing the requests outweighed the probative value under Rule 403, SCRE, because it would "reemphasiz[e] for the jury" Hamilton's position that "the case is worth more than a [$100,000]." Hamilton asked to "explain to the jury what a request to admit is." The trial court allowed Hamilton to read the exact language of the requests and answers to the jury with no explanation.

After Hamilton rested, Regional made a directed verdict motion, arguing Hamilton failed to present any evidence of gross negligence, particularly because Stobbs did not testify Regional was grossly negligent. The trial court denied the motion. Thereafter, Hamilton moved to exclude Regional from asking its expert, Cindy Hurley, a nurse, whether Regional committed gross negligence. The trial court granted the motion because Hurley was not qualified to testify about the legal concepts of negligence and gross negligence and Regional could elicit testimony about those topics without using the exact legal terminology.[4]

---

[3] *See* Rule 35(a), SCRCP ("In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control.").

[4] The trial court allowed Regional to proffer Hurley's testimony as to if Regional was negligent or grossly negligent.

Following Regional's presentation of its case, it renewed its motion for a directed verdict, which the trial court again denied. After the parties made their closing arguments and the trial court gave the jury instructions, the jury deliberated and found Regional was grossly negligent; the gross negligence proximately caused Minor's and Hamilton's injuries; Minor sustained actual damages of $1,127,280; and Hamilton sustained actual damages of $135,477.

Regional filed a posttrial motion for judgment notwithstanding the verdict (JNOV), for a new trial absolute, or alternatively, for a new trial *nisi* remittitur. Regional also filed a motion to reduce Minor's damages to the $300,000 statutory cap pursuant to the Tort Claims Act[5] and to reduce Hamilton's damages to the amount of the medical expenses, which it asserted was $20,854. Hamilton filed a memorandum in opposition to the motions. The trial court granted the motion to reduce Minor's damages to $300,000 and denied all other motions. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law . . . ." *Byrd ex rel. Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 412, 831 S.E.2d 152, 154 (Ct. App. 2019) (quoting *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006)). Additionally, the jury's factual findings will not be disturbed unless the record contains no evidence to reasonably support those findings. *Id.*

LAW/ANALYSIS

I. Hamilton's Expert Testimony

Regional maintains the trial court abused its discretion in qualifying Hamilton's expert Stobbs as a general nurse and in permitting her to testify as to the standard of care for pediatric IV administration. Regional argues the case was about pediatric—not adult—nursing and IV medicine; Stobbs failed to meet the qualifications as set forth in Rule 702, SCRE, and *Gooding v. St. Francis Xavier*

[5] *See* S.C. Code Ann. § 15-78-120(a)(1) (2005) (providing "no person shall recover in any action or claim brought hereunder a sum exceeding [$300,000] because of loss arising from a single occurrence").

Hospital[6]; and the court allowed Stobbs to testify outside of the scope of her expert qualification. We disagree.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope." *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010). "All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

"The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. The qualification of a witness as an expert is within the trial court's discretion, and this [c]ourt will not reverse that decision absent an abuse of discretion." *Watson*, 389 S.C. at 447, 699 S.E.2d at 176 (citation omitted). "The qualification of an expert witness and the admissibility of the expert's testimony are each matters largely within the trial [court's] discretion." *McMillan v. Durant*, 312 S.C. 200, 204, 439 S.E.2d 829, 831 (1993). "An abuse of discretion occurs when the [trial] court's rulings 'either lack evidentiary support or are controlled by an error of law.'" *Graves*, 401 S.C. at 74, 735 S.E.2d at 655 (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding*, 326 S.C. at 252-53, 487 S.E.2d at 598 (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)). For expert testimony to be admissible, "the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field.'" *Graves*, 401 S.C. at 74, 735 S.E.2d at 655 (quoting *Watson*, 389 S.C. at

[6] 326 S.C. 248, 487 S.E.2d 596 (1997).

446, 699 S.E.2d at 175); *see also Melton v. Medtronic, Inc.*, 389 S.C. 641, 655, 698 S.E.2d 886, 893 (Ct. App. 2010) ("Expert testimony need not come from a specialist in the same field as the defendant."). "The test is a relative one, depending on the particular witness's reference to the subject; an expert is not limited to any class of persons acting professionally." *Botehlo v. Bycura*, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984). "The fact that a witness is not a specialist in the particular branch involved affects only the weight of the witness's testimony, and affords no basis for completely rejecting it." *Bonaparte v. Floyd*, 291 S.C. 427, 439, 354 S.E.2d 40, 48 (Ct. App. 1987).

"In *Creed*[*v. City of Columbia*], a general practitioner was allowed to testify as an expert witness on the mental and emotional damages suffered by a tort victim, even where the [defendant] objected to the evidence because the expert was not a neurologist or psychologist." *McMillan*, 312 S.C. at 204, 439 S.E.2d at 831 (citing *Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993)). In that case, the supreme court determined "[a] physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved." *Creed*, 310 S.C. at 345, 426 S.E.2d at 786. The court held, "The fact that [the physician was] not a specialist [went] to the weight of his testimony, not its admissibility." *Id.*

In *Botehlo*, this court affirmed the grant of summary judgment to the defendant podiatrist when the plaintiff submitted expert testimony by an orthopedic surgeon as to the standard of care for a podiatrist. 282 S.C. at 585-87, 320 S.E.2d at 64-65. The court recognized the standard of care for a podiatrist is different from that of a physician or surgeon. *Id.* at 585, 320 S.E.2d at 64. The court noted the orthopedic surgeon had no knowledge of or experience in the practice of podiatry. *Id.* at 587, 320 S.E.2d at 65. The court found the plaintiff "had to present evidence on the standard of care required of podiatrists, not physicians and surgeons." *Id.* at 585, 320 S.E.2d at 64.

In *McMillan*, the supreme court determined the trial court did not abuse its discretion in admitting the expert's testimony. 312 S.C. at 205, 439 S.E.2d at 832. The supreme court stated, "[T]he expert physician was thoroughly examined as to his credentials and background, which included his professional interaction with a multitude of various nursing staffs and his teaching nursing courses at" universities. *Id.* The court noted the hospital "based its objection to the physician's qualification as an expert on nursing on the contention that a neurosurgeon was not

qualified to testify about the appropriate standard of nursing care." *Id.* The court found, "The fact that the expert was a physician and not a nurse would merely go to the weight of his testimony, not to its admissibility. As a teacher in the field of nursing, the neurosurgeon here . . . was amply qualified to render an opinion in the field of nursing." *Id.*

In *Gooding*, the plaintiff patient "sought to have [an emergency medical technician (EMT) and paramedic] qualified as an expert witness in intubation, not as an expert in the field of anesthesiology. [The EMT's] training and experience qualified him to testify as an expert in the limited area of intubation." 326 S.C. at 253, 487 S.E.2d at 598. "There was no requirement that [the plaintiff's] expert witness be an anesthesiologist in order to testify about intubation procedures." *Id.* "The fact that [the EMT] may have had less medical training and education than [the anesthesiologist defendant] is relevant to his credibility as a witness and affects the weight, not the admissibility of his testimony." *Id.* at 253-54, 487 S.E.2d at 598. Accordingly, both the supreme court and this court found the EMT "should have been permitted to testify as an expert witness." *Id.* at 254, 487 S.E.2d at 598.

In the present case, the trial court did not abuse its discretion in allowing Stobbs to testify as an expert witness. Regional's concerns with Stobbs not having experience in pediatric IVs as opposed to general IV knowledge went to the weight of the evidence, not Stobbs's qualification as an expert. Stobbs testified that there was not a difference in the IV treatment for children and adults. Therefore, we affirm the trial court's qualification of her as an expert witness.[7]

---

[7] To the extent Regional argues Stobbs's testimony exceeded the scope for which the trial court qualified her, we find this issue unpreserved. "[A]n expert's testimony may not exceed the scope of his expertise." *State v. Commander*, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011). In its motion in limine, Regional argued Hamilton was "actually trying [to] qualify[] [Stobbs] as a pediatric nurse or a nurse familiar with pediatric IVs." The trial court qualified Stobbs as a nursing care expert, "[n]ot neonatal or anything like that." At the beginning of Stobbs's testimony, Hamilton stated she was introducing Stobbs as an expert in nursing, and the trial court informed the jury she was qualified as an expert in nursing. At this point, Stobbs had testified regarding only her educational and employment background. Regional asked the court to note its prior objection for the record; Regional made no further objection regarding her qualification. Once Stobbs

II. Directed Verdict and JNOV

Regional asserts because Hamilton did not establish gross negligence, the trial court erred by denying its motions for a directed verdict and JNOV. It contends because it is a governmental entity, Hamilton was required to prove gross negligence. Regional maintains Hamilton failed to demonstrate through evidence or testimony that Downing failed to exercise slight care or intentionally failed to do what she ought to have done in the care and treatment of Minor. It argues because Hamilton failed to provide any evidence or testimony of gross negligence, no reasonable jury could have made any such finding. We disagree.

When ruling on a directed verdict or JNOV motion, the trial court must view the evidence and the inferences that reasonably can be drawn from it 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). "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). The issue must be submitted to the jury if material evidence tends to establish the issue in a reasonable juror's mind. *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). The appellate court will reverse the trial court's ruling only when no evidence supports the ruling or when an error of law controls the ruling. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "[N]either 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).

"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). An appellate court must affirm a trial

---

provided testimony Regional believed exceeded her qualification in nursing, Regional was required to object at that point. *See Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.").

court's denial of a directed verdict motion unless it determines the jury could not reasonably have found in favor of the nonmoving party. *Broyhill v. Resol. Mgmt. Consultants, Inc.*, 401 S.C. 466, 472, 736 S.E.2d 867, 870 (Ct. App. 2012). The appellate court must determine whether a verdict for the nonmoving party would be reasonably possible if the facts were liberally construed in that party's favor. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663.

A "governmental entity is not liable for a loss resulting from . . . responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . . patient . . . of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (2005). Gross negligence is the absence of care necessary under the circumstances. *Grooms v. Marlboro Cnty. Sch. Dist.*, 307 S.C. 310, 313, 414 S.E.2d 802, 804 (Ct. App. 1992). "It 'connotes the failure to exercise a slight degree of care.'" *Id.* (quoting *Wilson v. Etheredge*, 214 S.C. 396, 400, 52 S.E.2d 812, 814 (1949)). "A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing." *Jackson v. S.C. Dep't of Corr.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990) (per curiam). Gross negligence concerns the intentional, conscious failure to do something that it is incumbent upon one to do or the intentional doing of a thing one ought not to do. *Grooms*, 307 S.C. at 313, 414 S.E.2d at 804. "[T]he fact that the [defendant] might have done more does not negate the fact that it exercised 'slight care.'" *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 312, 534 S.E.2d 275, 278 (2000).

"Additionally, while gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.* at 310, 534 S.E.2d at 277. "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Faile v. S.C. Dep't of Juv. Just.*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

The trial court properly denied Regional's motions for directed verdict and JNOV. Hamilton's expert was not required to state that Minor's treatment at Regional amounted to gross negligence.[8] The testimony presented a question of fact for the

[8] Hamilton notes that she "argued at trial that a medical malpractice, not a gross negligence, standard applies to this case because it concerns a nurse's

jury as to whether the facts amounted to gross negligence. Accordingly, we affirm the denial of the motions.

III. Photographs

Regional argues the trial court abused its discretion by admitting into evidence photographs of Minor's hand. It contends the photographs were not necessary to substantiate Hamilton's case because it did not dispute the existence of a wound and Hamilton had ample other evidence of the wound that was less prejudicial than the photographs. It maintains the photographs were grotesque, up-close images that made the wound appear substantially larger than reality and the photographs did not include a scale to indicate measurements and proportions. Regional argues the photographs were graphic, inflammatory, and not an accurate reflection of the child's hand and injuries. It asserts the photographs, by their very nature, had a prejudicial tendency to arouse the emotions of the jury. Regional further contends the photographs did not reflect the current state of the wound. It asserts Minor appeared during trial and showed the jury his scar, which did not appear as it did in the photographs. It argues that witnesses, including Hamilton's own expert, testified the scar appeared healed since February 2015 and did not look like the photographs shown. Accordingly, it maintains the photographs were of little probative value. Regional contends the excessive jury verdict demonstrates the prejudice from the photographs and the purpose of the photographs was to arouse the sympathy of the jury. We disagree.

"The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." *Johnson v. Sam Eng. Grading, Inc.*, 412 S.C. 433, 448, 772 S.E.2d 544, 551 (Ct. App. 2015) (quoting *Davis v. Traylor*, 340 S.C. 150, 157, 530 S.E.2d 385, 388 (Ct. App. 2000)). "The trial court's ruling on the admission of evidence will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998).

---

administration of medication and not 'supervision, protection, control, confinement, or custody' of a patient." But she states that due to the jury's verdict and Regional's arguments, her argument on appeal is based on the gross negligence standard. However, she asserts this case should not be construed as establishing that the gross negligence standard in section 15-78-60(25) applies to a nurse's administration of medication.

"An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *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.*

"As a general rule, all relevant evidence is admissible. '"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (citation omitted) (quoting Rule 401, SCRE). "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Hoeffner v. Citadel*, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

"Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance." *Clark v. Cantrell*, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). "Demonstrative evidence is distinguishable from exhibits that comprise 'real' or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements." *Id.*

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. If [an] offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (citation omitted). "Courts must often grapple with disturbing and unpleasant cases, but that does not

justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." *Collins*, 409 S.C. at 535, 763 S.E.2d at 28. "[I]t is the duty of courts and juries to examine the evidence in even the most unpleasant of circumstances: 'Courts and juries cannot be too squeamish about looking at unpleasant things, objects, or circumstances in proceedings to enforce the law and especially if truth is on trial.'" *Id.* (quoting *Nichols v. State*, 100 So. 2d 750, 756 (Ala. 1958)). "The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it." *Id.* (quoting *Nichols*, 100 So. 2d at 756); *id.* ("Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand [the] testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered." (alteration by court) (quoting *Camargo v. State*, 940 S.W.2d 464, 467 (Ark. 1997))).

"Numerous jurisdictions have found that photos are not inadmissible merely because they are gruesome, especially where . . . the photos simply mirror the unfortunate reality of the case." *Id.* at 535-36, 763 S.E.2d at 28. "As one court has stated, 'The law is well settled that the mere fact that a photograph is gruesome is not a reason for its non admission.'" *Id.* at 536, 763 S.E.2d at 28 (quoting *State v. Ernst*, 114 A.2d 369, 373 (Me. 1955)).

"Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE[,] is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." *Id.*

In *Holmes v. Black River Electric Cooperative, Inc.*, the defendant asserted "pictures of [the plaintiff's] injured and amputated arm should not have been admitted in evidence because they may have aroused the sympathy of the jury to [the defendant's] prejudice." 274 S.C. 252, 258, 262 S.E.2d 875, 878 (1980). The defendant argued "the injuries depicted by the photographs were hideous, grotesque, and grossly unfair" but did not contend the photographs did not accurately reflect the plaintiff and the injuries at the time taken. *Id.* The supreme court stated the photographs undoubtedly "prejudiced the defendant's case in the sense that they were detrimental, but they showed a condition [that the plaintiff]

was entitled to either describe to the jury in words or by pictures, or a combination of the two." *Id.* The court held, "This demonstrative evidence aided the jury in its evaluation of the injuries and pain suffered." *Id.* The court found the photographs were not introduced "for the sole purpose of inflaming the minds of the jury; they served the proper purpose of bringing vividly to the jurors the details of tremendous injuries." *Id.* Accordingly, the court held the trial court did not abuse its discretion in admitting the photographs into evidence. *Id.*

In the present case, the photographs at issue were relevant as the injury was to Minor's hand. Particularly given Minor's age, the photographs were helpful in showing what the injury was like for him. The photographs helped corroborate the testimony concerning the extent of the injury. Regional provides no support for its argument that the jury could consider the injury in only its current state and not when it occurred or was still healing. Further, the danger of unfair prejudice does not substantially outweigh the probative value. Accordingly, the trial court did not abuse its discretion in allowing the photographs. Therefore, we affirm the trial court's admission of the photographs of Minor's injured hand.

IV. Regional's Expert Testimony

Regional asserts the trial court abused its discretion in prohibiting its expert Hurley from testifying as to whether Regional was grossly negligent or negligent. It argues it was not asking Hurley to give an opinion as to an issue of law, as this was not possible because Hurley was a nurse and not a legal expert. It contends that asking Hurley this question should not have led to any confusion, as the jury was aware that Hurley was an expert in nursing, not law. Regional maintains that the purpose of the question was to ask its expert her opinion, based on her experience in pediatric nursing, and this would have helped educate and better inform the jury. Regional further asserts that this error prejudiced it as evidenced by the fact that the jury returned a grossly excessive verdict. We disagree.

"The trial court's ruling on the admission of evidence will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *Hawkins*, 330 S.C. at 108, 498 S.E.2d at 404. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields*, 363 S.C. at 26, 609 S.E.2d at 509.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Graves*, 401 S.C. at 73-74, 735 S.E.2d at 655 (quoting Rule 702, SCRE). The supreme court has held that "[w]hile it is true that 'an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact,'" an affidavit that "attempted to usurp the trial court's role in determining whether" a party was entitled to summary judgment was inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433, 437 (2003) (omission by court) (quoting Rule 704, SCRE). "In general, expert testimony **on issues of law** is inadmissible." *Id.* at 66, 580 S.E.2d at 437. In *O'Quinn v. Beach Associates*, the supreme court found "testimony . . . was offered to establish a conclusion of law within the exclusive province of the court and thus was properly excluded." 272 S.C. 95, 107, 249 S.E.2d 734, 740 (1978).

"Generally, '[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' However, expert testimony on issues of law is rarely admissible." *Carter v. Bryant*, 429 S.C. 298, 313, 838 S.E.2d 523, 531 (Ct. App. 2020) (alteration by court) (quoting Rule 704, SCRE). In excluding opinion testimony in the form of a legal conclusion, "courts have advanced such reasons as it allows a witness to tell the jury what verdict to reach, it tends to confuse jurors, and . . . it increases the likelihood that jurors will look to the witness rather than the trial [court] for guidance as to the law." *Hermitage Indus. v. Schwerman Trucking Co.*, 814 F. Supp. 484, 486 n.4 (D.S.C. 1993).

"The common law and the federal rules of evidence forbid opinions on issues of law, except foreign law." *Carter*, 429 S.C. at 313, 838 S.E.2d at 531. "Rule 704, SCRE, is identical to Rule 704 of the Federal Rules of Evidence as it existed before a 1984 amendment." *Id.* "The federal advisory committee note emphasizes that Rule 704's 'abolition of the ultimate issue rule does not lower the bar so as to admit all opinions,' because an opinion on the ultimate issue has to be 'otherwise admissible' . . . ." *Id.* In *Carter*, this court found this meant the opinion "must be helpful to the jury as required by Rule 702, SCRE, and satisfy the strictures of Rule 403, SCRE." *Id.* The court determined the opinion in that case "was not helpful to the jury because it stated a legal conclusion and essentially told the jury what result to reach on the probable cause question." *Id.*

"[S]everal courts have held that the term 'negligence' conveys a legal conclusion and is therefore inadmissible." *Hermitage Indus.*, 814 F. Supp. at 487 (citing *Shahid v. City of Detroit*, 889 F.2d 1543, 1547 (6th Cir. 1989); *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 709 (2d Cir. 1989)). "With respect to negligence actions, an opinion phrased in terms of negligence itself, involving not only the formulation of a legal standard by the witness but also one substantially immune to exploration, seems calculated to confuse or mislead rather than assist the trier." *Id.* (quoting Michael H. Graham, *Federal Practice and Procedure* § 6661, at 319 (interim ed. 1992)). "[T]he term 'negligence' in the common vernacular encompasses a much broader standard" than the legal definition. *Id.* "While there are undoubtedly non-lawyers whose definition of the term 'negligent' more closely resembles the legal term, the conclusion is inescapable that the legal definition of the term has a separate meaning which is distinct from the common vernacular." *Id.* In *Hermitage Industries*, the South Carolina federal district court found "the proffered testimony of [the] defendant's expert witness that [the] plaintiff was 'negligent' constitute[d] a legal conclusion and [wa]s therefore inadmissible." *Id.*

When a plaintiff "relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). "[T]he highly technical nature of malpractice litigation" mandates this rule. *Id.* Because "many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary." *Id.*

The trial court did not abuse its discretion by preventing Regional from asking Hurley explicitly if Regional committed negligence or gross negligence. Asking Hurley that question would have been asking her to form a legal conclusion, which would have been inadmissible. The fact that she is a nurse and not a lawyer or other legal expert does not make a difference; her answer could confuse the jury particularly because negligence could have a broader meaning outside of the legal definition. Accordingly, we affirm the trial court's prohibiting Hurley from testifying if she believed Regional was negligent or grossly negligent.

V. Requests to Admit

Regional maintains the trial court abused its discretion in permitting the requests to admit to be published to the jury. Regional asserts the publication prejudiced it, violating Rule 403, SCRE, because the publication only confused the issues for the jury. Regional concedes this is an unusual circumstance and the case law seems to address only issues with withdrawal by the admitting party. Regional asserts the requests to admit were not stipulations under Rule 43(k), SCRCP,[9] but rather were a discovery tool. It contends the purpose of the requests to admit was to obtain an IME, not for Hamilton to represent that Regional admitted the damages exceeded $100,000. Regional contends that although facts may be stipulated, the requests to admit were subjective, as they went to damages. It argues that because the purpose for the requests was to get Hamilton's view of the case in order to obtain an IME, the requests were subjective, not factual, and thus, could not be stipulated. It maintains that allowing the requests to admit to be published caused the jury to believe it had to award a verdict of at least $100,000. Regional argues this effectively directed a verdict of liability in Hamilton's favor, thereby impeding presentation of the merits of its case. We disagree.

The South Carolina Rules of Civil Procedure provide:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of [the rules of discovery] set forth in the request that relate to statements or opinions of fact or of the application of law to fact . . . .

Rule 36(a), SCRCP.

"Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Rule 36(b), SCRCP.

---

[9] Rule 43(k), SCRCP ("No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.").

"Requests for [a]dmissions [a]re just as binding as pleadings on the parties . . . ." *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 648, 579 S.E.2d 151, 156 (Ct. App. 2003). "The efficacy of these admissions is akin to the doctrine of judicial estoppel: an admission precludes the admitting party from arguing facts at trial contrary to its responses to a request to admit, absent an amendment to or revocation of the admission as allowed under the rules." *Com. Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554, 556 S.E.2d 718, 723 (Ct. App. 2001) (footnote omitted). "Admissions under Rule 36 are treated as admissions in pleadings." *Id.* at 554-55, 556 S.E.2d at 723 (citing James F. Flanagan, *South Carolina Civil Procedure* 304 (1996) ("Admissions are similar to pleadings."); *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.*, 496 S.E.2d 546, 548 (Ga. Ct. App. 1998) ("In form and substance [a response to a request to admit] is comparable to an admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than evidentiary admission of a party.")). "Pleadings are not evidence." 71 C.J.S. *Pleading* § 1; *see also Sears v. Smith*, 142 S.E.2d 792, 795 (Ga. 1965) ("Pleadings per se are not evidence . . . ."); *TNT Cattle Co. v. Fife*, 937 N.W.2d 811, 831 (Neb. 2020) ("The pleadings in a cause are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.").

Similarly, "[j]udicial admissions . . . 'are "not evidence at all but rather have the effect of withdrawing a fact from contention."'" *Wells Fargo Bank, N.A. v. Mesh Suture, Inc.*, 31 F.4th 1300, 1313 (10th Cir. 2022) (quoting *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995)). "In the same category are admissions in response to a request to admit under" Rule 36 of the Federal Rules of Civil Procedure. 2 Kenneth S. Broun et al., *McCormick On Evidence* § 254 n.12 (Robert P. Mosteller ed., 8th ed.).

"[R]equests to admit are not submitted to the jury; rather, the proper course of action is to publish the admissions to the jury." *Scott*, 353 S.C. at 649, 579 S.E.2d at 156; *see also* Rule 43(g), SCRCP ("Counsel for any party may read his pleadings to the jury. . . .").

"Once an answer to a [r]equest for [a]dmissions is amended under Rule 36, both the initial answer and the amended answer may be published to the jury." *Tuomey Reg'l Med. Ctr., Inc. v. McIntosh*, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (1993). "The jury may consider the initial answers as evidence, while the party who made

such answers 'is free to explain why it was made and [amended].'" *Id.* (alteration by court) (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure:* Civil § 2264 at 745 (1970)). "It was for the jury to weigh the evidence along with" the answers to the requests for admissions. *Id.*

As Regional acknowledges, case law is limited on this issue, as most of the law speaks to conflicts over publishing to the jury requests to admit *responses*. Here, the dispute is over publishing the actual request. However, based on the South Carolina Rules of Civil Procedure, publishing requests to admit is proper. Rule 403, SCRE, does not apply to the publication of a request to admit. Moreover, in addition to the requests to admit that the damages, amount in controversy, or value were over $100,000, a request to admit "the value of the amount in controversy in this action is less than [$100,000]" was also published to the jury. The trial court also instructed the jury to evaluate the evidence and if it decided any damages were warranted, it was to determine the amount. *See McLean v. Godwin Props., Inc.*, 292 S.C. 518, 522, 357 S.E.2d 473, 475 (Ct. App. 1987) ("[A] jury is presumed to understand the charge."). Accordingly, the trial court did not err in allowing the requests to admit to be published to the jury.

VI. New Trial Absolute or New Trial *Nisi* Remittitur

Regional asserts the trial court abused its discretion in not granting a new trial absolute when the verdict was grossly excessive and shockingly disproportionate and contrary to the evidence admitted at trial. It contends (1) little testimony was given regarding any pain and suffering; (2) testimony was given establishing that very little has been done or is planned in regards to treatment; and (3) although there is scar tissue and the scar is permanent, the hand is fully functioning, and the wound is "well-healed" and "stable" and will not get worse. Regional argues the evidence presented cannot support a $1,127,280 verdict for Minor and $135,477 for Hamilton, and thus, the size of the verdict alone is sufficient to show that the jury must have been moved by passion or prejudice. It asserts the verdict of $1,127,280 for Minor is 54 times the amount of actual damages of $20,854, which is grossly excessive and shocks the conscience. It further contends the $135,477 verdict for Hamilton is also grossly excessive, as past and future medical damages only amount to $20,854, she testified she has no plans for Minor to undergo any steroidal injections or scar revision surgery, and she is not entitled to any pain or suffering.

In the alternative, Regional argues the verdict was, at the very least, merely excessive entitling it to a new trial *nisi* remittitur. It contends that even after capping Minor's judgment at $300,000 as required by the Tort Claims Act, the judgment is still, at the very minimum, merely excessive. Moreover, it contends the amount awarded to Hamilton was also, at the very minimum, merely excessive. We disagree.

In reviewing the jury's verdict, appellate courts give great deference to the trial court because the trial court "possesses a better-informed view of the damages than" an appellate court because the trial court "heard the evidence and is more familiar with the evidentiary atmosphere at trial." *Vinson v. Hartley*, 324 S.C. 389, 405-06, 477 S.E.2d 715, 723 (Ct. App. 1996). "Accordingly, the decision to grant a new trial is left to the sound discretion of the trial court and generally will not be disturbed on appeal." *Wright v. Craft*, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006). "An abuse of discretion occurs when the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Id.* "In deciding whether to assess error when a new trial motion is denied, this [c]ourt must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.* (alteration by court) (quoting *Welch*, 342 S.C. at 302-03, 536 S.E.2d at 420). "[T]he jury's determination of damages is entitled to substantial deference." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial [court] must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *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, 530, 431 S.E.2d 557, 558 (1993)).

"[W]hen the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur*." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420. "A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice[,] or prejudice." *Id.* "The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638

S.E.2d 667, 670 (2006). "In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420.

"If the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice[,] or some other influence outside the evidence, the trial [court] must grant a new trial absolute, not a new trial *nisi remittitur*." *Id.* "The trial [court] must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption[,] or some other improper motives." *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723. "To warrant a new trial, the verdict must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury." *Wright*, 372 S.C. at 36, 640 S.E.2d at 505. "The failure of the trial [court] to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this [c]ourt will grant a new trial absolute." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

The trial court did not abuse its direction in denying Regional's motion for a new trial absolute or a new trial *nisi* remittitur. The record contains evidence to support the damages award. The verdict does not shock the conscience or clearly indicate it was reached as the result of passion, caprice, prejudice, partiality, corruption or other improper motives. Additionally, the verdict was not excessive. Moreover, the trial court substantially reduced the damages awarded for Minor pursuant to the Tort Claims Act. Accordingly, we affirm the denial of the motions.

CONCLUSION

Based on the foregoing, the trial court did not abuse its discretion in qualifying Hamilton's expert witness and allowing her to testify as to the standard of care, prohibiting Regional's expert from testifying as to whether Regional was grossly negligent or negligent, or admitting the photographs of Minor's hand. Additionally, the trial court did not err in publishing the requests to admit to the jury. Further, the trial court did not err in denying Regional's motion for a directed verdict or abuse its discretion in denying Regional's motion for a new trial absolute or new trial *nisi* remittitur. Accordingly, the trial court's determinations are

AFFIRMED.

HEWITT and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

Bishop of Charleston, a Corporation Sole, and The Bishop of the Diocese of Charleston, in his official capacity, Respondents.

Appellate Case No. 2020-000804

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Opinion No. 6009
Heard June 15, 2023 – Filed August 2, 2023

AFFIRMED

Lawrence E. Richter, Jr., of The Richter Firm, LLC, of Mount Pleasant, and David K. Haller, of Haller Law Firm, of Charleston, both for Appellant.

Richard S. Dukes, Jr., of Turner Padget Graham & Laney, PA, of Charleston, and R. Hawthorne Barrett, of Turner Padget Graham & Laney, PA, of Columbia, both for Respondents.

WILLIAMS, C.J.: John Doe (Appellant) filed this action against the Diocese of Charleston and the Bishop of the Diocese of Charleston (collectively,

Respondents) alleging that as a child in 1970, he was sexually molested by two teachers at Sacred Heart Catholic School, a parochial school operated by the Respondents. Appellant argues the circuit court erred in granting summary judgment based on the doctrine of charitable immunity. We affirm.

FACTS/PROCEDURAL HISTORY

In August 2018, Appellant filed this action against Respondents, alleging that as a child around the ages of 12 to 14 (i.e., around 1969 to 1971), he was sexually molested by two teachers at Sacred Heart Catholic School. Appellant asserted claims for relief based on sexual abuse, outrage, negligence/gross negligence, breach of fiduciary duty, intentional infliction of emotional distress, fraudulent concealment, civil conspiracy, negligent retention or supervision, breach of contract, and breach of contract accompanied by a fraudulent act. Respondents filed multiple motions for summary judgment based upon the absence of any genuine issue of material fact regarding: (1) the defense of common law charitable immunity; (2) the defense of the statute of limitations; and (3) the defense of res judicata. Respondents additionally argued there was no genuine issue of material fact regarding the elements of each claim asserted by Appellant.

The circuit court heard oral argument on Respondents' dispositive motions based on charitable immunity, the statute of limitations, and res judicata pursuant to a 2007 class action settlement. The circuit court granted Respondents summary judgment based on the doctrine of charitable immunity. Appellant filed a Rule 59(e), SCRCP, motion requesting the circuit court alter or amend its order. The circuit court denied Appellant's Rule 59(e) motion and this appeal followed.

ISSUE ON APPEAL

Did the circuit court err in granting summary judgment to Respondents based on the doctrine of charitable immunity?

STANDARD OF REVIEW

> When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to

> any material fact and the moving party is entitled to judgment as a matter of law.

S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 490, 732 S.E.2d 205, 208–09 (Ct. App. 2012). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." *Id.* at 490, 732 S.E.2d at 209.

LAW/ANALYSIS

Appellant argues the circuit court misapplied the law of charitable immunity as it existed at the time of Appellant's injury when his right of action accrued. Appellant asserts that although his causes of action accrued no later than 1970, the circuit court erred in determining that the charitable immunity defense in 1970 provided a complete defense to the types of claims asserted in this case. Appellant argues the law regarding charitable immunity that controlled in 1970 was the same law that controlled in 1973, when a unanimous South Carolina Supreme Court explained in *Jeffcoat v. Caine*, 261 S.C. 75, 198 S.E.2d 258 (1973), that the doctrine of charitable immunity had never extended beyond tort claims based on "mere negligence." As such, Appellant contends the scope of the doctrine of charitable immunity at the time of the injury would not have afforded Respondents exemption from liability.

"This Court has consistently ruled that the abrogation of immunities defenses is to be applied prospectively only." *Hupman v. Erskine Coll.*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984). To determine whether the doctrine applies, the triggering event is when the cause of action arose. *See Laughridge v. Parkinson*, 304 S.C. 51, 54, 403 S.E.2d 120, 121 (1991). In determining whether the doctrine of charitable immunity protected Respondents at the time of the alleged abuse, the analysis is twofold: (1) we must determine whether the immunity applied at the time of the alleged injury and (2) whether the corporation had, at the relevant time, a charitable rather than commercial purpose. *See Eiserhardt v. State Agric. & Mech. Soc'y of S.C.*, 235 S.C. 305, 311, 111 S.E.2d 568, 571 (1959); *Laughridge*, 304 S.C. at 54, 403 S.E.2d at 121. Because Appellant does not contest that Respondents are classified as a charitable organization, we are only tasked with determining whether the law of charitable immunity in 1970 provided exemption from liability. We find it did.

The doctrine of charitable immunity was first announced by the South Carolina Supreme Court in *Lindler v. Columbia Hospital of Richland County*, 98 S.C. 25, 27, 81 S.E. 512, 512 (1914). *Lindler* involved alleged injuries suffered by a paying patient in a hospital supported, in part, by charity. *Id.* at 27, 81 S.E. at 513. The court held, "A charitable corporation is not liable to injuries, resulting from the negligent or tortious acts of a servant, in the course of his employment, where such corporation has exercised due care in his selection." *Id.* at 27, 81 S.E. at 512. The court explained its rationale stating "[t]he true ground upon which to rest the exemption from liability is that it would be against public policy to hold a charitable institution responsible for the negligence of its servants, selected with due care." *Id.* at 28, 81 S.E. at 513.

The doctrine of charitable immunity was discussed next in *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649 (1916). The court in *Vermillion* considered whether a charitable entity was liable to a plaintiff who paid for entry to musical entertainment in its auditorium balcony, which subsequently fell. *Id.* at 199, 88 S.E. at 649. The defendant claimed exemption from liability on the ground that it was a public charity. *Id.* The court held that charitable immunity rendered charitable entities exempt from liability "for the torts of their superior officers and agents as well as for those of their servants or employ[ee]s, whether these be selected with or without due care." *Id.* at 202, 88 S.E. at 650. The court's rationale was that, in some instances, the rights of the individual must yield to the public good, and charities should not face ruin to compensate one or more individuals. *Id.*

In the case of *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 343–44, 47 S.E.2d 788, 790 (1948), the court held that a charitable organization or institution was not liable under the workers compensation act. In determining whether the immunity doctrine applied, the court stated "the question has been settled in this jurisdiction by adoption of the rule of full immunity of such institutions from the torts of their agents and servants." *Id.* at 343, 47 S.E.2d at 790.

In *Bush v. Aiken Electric Cooperative Inc*., 226 S.C. 442, 449–50, 85 S.E.2d 716, 719–20 (1955), the court held that even though a rural, electric co-operative was a non-profit organization, it was not a charitable corporation immune from tort liability. The court stated "[u]nder our decisions institutions of this kind, on grounds of public policy, enjoy full immunity from tort liability" and cited *Lindler*, *Vermillion*, and *Caughman*. *Id.* at 448, 85 S.E.2d at 719. However, the *Bush* court reiterated the *Caughman* court, stating "the writer desires to repeat the observation

made in *Caughman*[], to the effect that he seriously doubts the soundness of the rule giving charitable institutions immunity from tort liability." *Id.* at 451, 85 S.E.2d at 720.

In *Eiserhardt v. State Agricultural & Mechanical Society of South Carolina*, 235 S.C. at 311–12, 111 S.E.2d at 571–72, the court reaffirmed the defense of charitable immunity though it refused to extend immunity to activities outside the scope of the charitable organization's mission. The court found the charitable immunity doctrine inapplicable to a commercial venture conducted by a charitable corporation, stating, "we do not think immunity should be extended to a situation where the activity out of which the alleged liability arose is primarily commercial in character and wholly unconnected with the charitable purpose for which the corporation was organized. This view is supported by the overwhelming weight of authority." *Id.* at 312, 111 S.E.2d at 572. However, the court reiterated the principle that South Carolina has "adhered to the general rule laid down in *Lindler*[], of full immunity of charitable institutions from the torts of their agents and servants," yet has also "refrained from extending this immunity to a degree never contemplated when the rule was adopted." *Id.* at 311, 111 S.E.2d at 571.

Finally, in *Decker v. Bishop of Charleston*, 247 S.C. 317, 325, 147 S.E.2d 264, 268 (1966), the court applied charitable immunity to a tort claim against the Diocese and declared the church to be a true charity entitled to immunity from suit altogether. More importantly, the *Decker* court went through an exhaustive analysis of the history of charitable immunity in South Carolina, stating:

> For us to withdraw immunity from charitable institutions at this time, against the existing background of decisions of the court would, in effect, be an act of judicial legislation in the field of public policy. Whether some change in our rule is advisable is a question to be considered and resolved by the law making body.

Id.

Appellant relies almost exclusively on *Jeffcoat v. Caine* in arguing that charitable immunity did not apply to intentional torts at the time of the alleged abuse. The court in *Jeffcoat* addressed whether the South Carolina Baptist Hospital could be liable for false imprisonment, an intentional tort. *Id.* at 77–78, 198 S.E.2d at 259.

While the court declined to extend charitable immunity to exempt charitable organizations from liability for intentional torts, the court refused to overturn *Lindler*, *Vermillion*, and *Decker*. *Id.* at 79–80, 198 S.E.2d at 260. Appellant relies on the court's following statements:

> There can be no doubt that the decisions in *Lindler*, *Vermillion*, and *Decker* contain broad general expressions to the effect that charitable institutions are exempt from all tort liability. However, the broad statement of a rule of complete exemption from tort liability was unnecessary to a decision in those cases, and the rule of charitable immunity has never been extended by our decisions beyond the facts in *Lindler*, *Vermillion*, and *Decker*. . . . These decisions point up the fact that this Court, while adhering in the past to the rule that charitable institutions are exempt from liability for mere negligence, has in every instance refused to further extend the rule. Therefore, the application of the immunity doctrine in a case of intentional tort is not required by precedent, nor, we conclude, by reason or justice.

Id. Appellant's reliance on *Jeffcoat* is misplaced. First, *Jeffcoat* was decided three years after the cause of action in this case arose and is therefore not an accurate representation of the law in 1970.

At its outset, the supreme court in *Lindler* held that charitable immunity in South Carolina meant that "a charitable corporation is not liable to injuries, resulting from the negligent or tortious acts of a servant, in the course of his employment." 98 S.C. at 27, 81 S.E. at 512. Two years later, the *Vermillion* court echoed the court in *Lindler* and stated that law of charitable immunity rendered charitable entities exempt from liability "for the torts of their superior officers and agents as well as for those of their servants or employ[ee]s." *Id.* at 202, 88 S.E. at 650. Then, the court in *Caughman* stated that "the question [of charitable immunity] has been settled in this jurisdiction by adoption of the rule of *full immunity* of such institutions from the torts of their agents and servants." *Id.* at 343, 47 S.E.2d at 790 (emphasis added). Once more, the court in *Bush* stated that "[u]nder our decisions institutions of this kind, on grounds of public policy, *enjoy full immunity*

from tort liability" and cited *Lindler*, *Vermillion*, and *Caughman*. *Id.* at 448, 85 S.E.2d at 719 (emphasis added).

Then, in *Eiserhardt*, while the court refused to extend the immunity to ventures conducted by a charitable organization not aligned with its charitable purpose, it again reiterated that South Carolina has "adhered to the general rule laid down in *Lindler*[], of *full immunity* of charitable institutions from the torts of their agents and servants." *Id.* at 311, 111 S.E.2d at 571 (emphasis added). Most notably, four years before Appellant's alleged injury date, the court in *Decker* went through the history of charitable immunity precedent in South Carolina and stated that "withdraw[ing] immunity from charitable institutions at this time, against the existing background of decisions of the court would, in effect, be an act of judicial legislation in the field of public policy." *Id.* at 325, 147 S.E.2d at 268. As such, the court believed judicial restraint was necessary to prevent the erosion of an immunity historically based on public policy, which only the legislature should control. *Id.*

Jeffcoat acknowledges that the case law prior to its decision contained "expressions to the effect that charitable institutions are exempt from *all tort liability.*" 261 S.C. at 79, 198 S.E.2d at 260 (emphasis added); *see also Vermillion*, 104 S.C. at 202, 88 S.E. at 650 ("The rule of total exemption is, perhaps, without exception, based upon grounds of public policy."); *Caughman*, 212 S.C. at 343, 47 S.E.2d at 790 ("[T]he question has been settled in this jurisdiction by adoption of the rule of full immunity of such institutions from the torts of their agents and servants."); *Bush*, 226 S.C. at 448, 85 S.E.2d at 719 ("Under our decisions institutions of this kind, on grounds of public policy, enjoy full immunity from tort liability."). As a result, there existed authority supporting Respondents' position that complete immunity existed for charitable institutions in 1970. No court in this state had, at that time, restricted the charitable immunity doctrine to such an extent as to hold Respondents liable for intentional torts.

Further, we find *Roe v. Bishop of Charleston*, No. 2:21-CV-20-RMG, 2022 WL 1570810, at *2 (D.S.C. May 18, 2022), *aff'd*, No. 22-1754 (4th Cir. May 17, 2023). which involves the same respondents as the instant case, instructive. *Roe* involved similar circumstances to our present case. The plaintiff alleged a priest of the Dioceses of Charleston, sometime between 1961–1966, sexually abused her. *Id.* at *1. She brought claims for (1) fraudulent concealment; (2) negligence/gross negligence/recklessness; (3) breach of fiduciary duty; (4) outrage/intentional

infliction of emotional distress; (5) civil conspiracy; and (6) negligent retention or supervision. *Id.* The defendants filed various motions for summary judgment including one based on charitable immunity. *Id.* The District Court of South Carolina discussed South Carolina's history regarding the doctrine of charitable immunity including a discussion of *Lindler*, *Vermillion*, *Eiserhardt*, and *Decker*. *Id.* at *3–4. The district court found evidence that the defendants were a charitable organization during 1961–1966 and further found that the doctrine of charitable immunity would have barred the entirety of the plaintiff's claims. *Id.* at *3.

Based on Appellant's concession of Respondents' charitable designation at the time of the alleged injury and the precedent at the time demonstrating support of complete immunity, we hold the circuit court properly granted summary judgment to Respondents on the basis of charitable immunity.

Accordingly, the order of the circuit court is

AFFIRMED.

GEATHERS and VERDIN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anaptyx, LLC, Appellant,

v.

Golf Colony Resort II at Deer Track Homeowners' Association, Inc., Respondent,

AND

Anaptyx, LLC, Appellant,

v.

Golf Colony Resort IV at Deer Track Homeowners' Association, Inc., Respondent,

AND

Anaptyx, LLC, Appellant,

v.

Deerfield Plantation Community Services Association, Inc., Respondent,

AND

Anaptyx, LLC, Appellant,

v.

Tradewinds Homeowners' Association, Inc., Respondent.

Appellate Case No. 2020-000391

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

Opinion No. 6010
Heard March 9, 2023 – Filed August 2, 2023

AFFIRMED

Robert Wade Maring, of Maring & Moyer, LLC, of Georgetown, for Appellant.

Willard D. Hanna, Jr., of Hanna Law, PA, of Myrtle Beach, and Jonathan Patrick Hanna, of Neill Law Firm, PA, of Murrells Inlet, for Respondents.

GEATHERS, J.: In these four consolidated appeals, Appellant Anaptyx, LLC (Anaptyx) seeks review of the circuit court's respective orders granting summary judgment to Respondents, Golf Colony Resort II at Deer Track Homeowners' Association, Inc., Golf Colony Resort IV at Deer Track Homeowners' Association, Inc., Deerfield Plantation Community Services Association, Inc., and Tradewinds Homeowners' Association, Inc. (collectively, the HOAs). Anaptyx argues the circuit court erred by dismissing its respective breach of contract actions against the HOAs because there was no evidence to support the finding that the contracts to provide internet access service, via Wi-Fi,[1] to the HOAs were contracts "for services to or for real property" for purposes of New York General Obligations Law § 5-903. We affirm.

FACTS/PROCEDURAL HISTORY

On October 1, 2012, Anaptyx entered into four separate contracts with the respective HOAs to provide "Bulk Wi-Fi and Internet access services" to occupants

[1] A "Wi-Fi" certification mark is "used to certify the interoperability of wireless computer networking devices." *Wi-Fi*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/Wi-Fi (last visited June 12, 2023).

of the properties owned by each HOA. The recitals in each contract state, "Owner owns the property referred to above (including all buildings, improvements, and the underlying land, the 'Property')" and "Owner and Operator desire to make the Service available to occupants at the Property ('Occupants') in accordance with the terms and conditions of this agreement."

The four contracts were identical except for information identifying the respective signatories, and the initial term of each contract was five years and three months. Section 5 of each contract provided that the initial term would be automatically extended for an additional term "equal to the initial Term years unless either party notifie[d] the other at least 121 days before the expiration of the . . . Term . . . that it d[id] not wish to extend the agreement." Further, section 14.3 of each contract stated, "This agreement is governed by and shall be interpreted under the laws of the state of New York, without regard to its choice-of-law provisions."[2]

On April 3, 2018, Anaptyx filed these four breach of contract actions against the respective HOAs, alleging that after the initial term for each contract had been automatically extended, the HOAs advised Anaptyx that they had hired another service provider and disconnected the equipment of Anaptyx located at their respective properties. Anaptyx also alleged that the HOAs had failed to pay the sums due under the contracts since January 1, 2018. The HOAs then filed their respective answers and counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act.[3] They later amended their pleadings to add the defenses of failure to state a claim on which relief can be granted (Rule

---

[2] "Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law." *Howell v. Covalent Chem., LLC*, 435 S.C. 345, 351, 867 S.E.2d 264, 267 (Ct. App. 2021) (quoting *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 448–49, 814 S.E.2d 643, 652 (Ct. App. 2018)). "However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy." *Id.* (quoting *Skywaves*, 423 S.C. at 449, 814 S.E.2d at 652). No party in the present case questions the application of New York law to the respective contracts or argues that this application would result in a violation of South Carolina public policy. Additionally, under New York law, contractual choice-of-law provisions "typically apply to only substantive issues." *Portfolio Recovery Assocs., LLC v. King*, 927 N.E.2d 1059, 1061 (N.Y. 2010).

[3] S.C. Code Ann. §§ 39-5-10 to -730 (2023).

12(b)(6), SCRCP) and failure to provide the notice required by New York General Obligations Law § 5-903. Section 5-903 covers contracts for "service, maintenance[,] or repair to or for real or personal property" and addresses automatic renewal provisions in those contracts. The statute conditions the enforceability of an automatic renewal provision on the service provider's notice to the receiver of the services calling the recipient's attention to the existence of the automatic renewal provision at least fifteen days before the time specified in the contract for the service recipient to serve notice of cancellation.

Subsequently, the HOAs filed their respective summary judgment motions on the ground that Anaptyx failed to provide the notice required by section 5-903 and, therefore, rendered the automatic renewal provision in each contract unenforceable. The circuit court granted summary judgment to the HOAs and later denied the respective motions for reconsideration filed by Anaptyx. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err by concluding that the disputed contracts are contracts for services to or for real property for purposes of New York General Obligations Law § 5-903?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In that way, '[a] motion for summary judgment is akin to a motion for a directed verdict' because '[i]n each instance, one party must lose *as a matter of law*.'" *Id.* (quoting *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984)).

LAW/ANALYSIS

Anaptyx maintains there was no evidence to support the circuit court's finding that the disputed contracts are contracts for services to or for real property for purposes of New York General Obligations Law § 5-903. We disagree.

Section 5-903(2) of the New York General Obligations Law provides:

> No provision of a contract for service, maintenance[,] or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance[,] or repair gives notice to the person furnishing such contract service, maintenance[,] or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance[,] or repair, *unless the person furnishing the service*, maintenance[,] or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, *shall give to the person receiving the service*, maintenance[,] or repair *written notice*, served personally or by certified mail, *calling the attention of that person to the existence of such provision in the contract*.

(emphases added). "The purpose of the notice provision is to protect service recipients from the harm of unintended automatic renewals of contracts for consecutive periods." *Healthcare I.Q., LLC v. Tsai Chung Chao*, 986 N.Y.S.2d 42, 46 (N.Y. App. Div. 2014). "Since § 5-903 is remedial in nature it is construed broadly." *Id.*; *see also Tel. Secretarial Serv. v. Sherman*, 284 N.Y.S.2d 384, 385–86 (N.Y. App. Div. 1967) ("The words 'service, maintenance or repair' in section 5-903 are to be generously read in order that their scope will engage the variegated evil the statute was intended to meet.").

Here, the circuit court concluded that the respective contracts between Anaptyx and the HOAs were contracts for services to or for real property. Although the circuit court employed the word "find" rather than "conclude" in its final order, the court's ruling was more characteristic of a conclusion of law because it applied New York statutory law to the parties' contracts and construed the statute broadly in accordance with New York case law. *See supra*. In fact, during the summary

judgment hearing and oral argument before this court, Anaptyx conceded that the question of whether its internet service fell within the language of section 5-903 was a "matter of law."

In any event, the circuit court included in its findings of fact the contracts' terms requiring the provision of Wi-Fi service by Anaptyx to "the occupants of [the respective properties] owned by the [HOAs]," and these contractual provisions provide ample evidence to support the circuit court's ultimate "finding" that the respective contracts were contracts for services to or for real property, as we explain below. The circuit court also noted that counsel for Anaptyx conceded every finding of fact set forth in the order, including the finding that Anaptyx did not provide the notice required by section 5-903. Therefore, this case is one that does "not require the services of a fact finder." *George*, 345 S.C. at 452, 548 S.E.2d at 874.

As a matter of law, the circuit court correctly applied section 5-903 to the contracts between Anaptyx and the HOAs. The recitals of each contract state that (1) "Owner owns the property referred to above (including all buildings, improvements, and the underlying land, the 'Property')" and (2) "Owner and Operator desire to make the Service available to occupants at the Property ('Occupants') in accordance with the terms and conditions of this agreement." Section 1 of each contract, entitled "Operator's Service Obligations," states, in part, "Upon completion of construction of the System (as defined hereafter), Operator shall make the Service available *to the Occupants* during the Term." (emphasis added).

Section 1 also defines "Services" as "Operator's Bulk Wi-Fi and Internet access services delivered over the Operator's System" and requires Anaptyx to "make the services available to end-users 24 hours per day, 7 days per week, excluding scheduled maintenance and required repairs." The term "System" is defined in each contract as "Operator[']s wi-fi System, [which] is comprised of all equipment, wiring (including internal building wiring and external distribution wiring), conduit, molding and other facilities that the Operator owns or installs or that Operator otherwise uses *to deliver the services to the property*." (emphasis added). As the Operator, Anaptyx is required by each contract to "*maintain*, *repair*[,] and operate the System in accordance with industry standards and Laws and Regulations." (emphasis added).

In sum, applying the terms of section 5-903, which must be broadly construed,[4] to the plain language of the contracts' provisions, compels us to conclude that the contracts are "for service, maintenance[,] or repair to or for any real or personal property."[5] Therefore, section 5-903 required Anaptyx to notify the HOAs of the automatic renewal provision in the respective contracts at least fifteen, and not more than thirty, days prior to the time specified in the contracts for serving a notice of cancellation on Anaptyx. Anaptyx conceded that it did not provide this notice.

CONCLUSION

Accordingly, we affirm the circuit court's respective orders granting summary judgment to the HOAs.

AFFIRMED.

WILLIAMS, C.J., and VERDIN, J., concur.

---

[4] *Healthcare I.Q.*, 986 N.Y.S.2d at 46.

[5] As to whether the services were provided to real or personal property, there is merit in the HOAs' argument that the contracts concerned real, as opposed to personal, property because the Occupants must be located on, or very near, the subject real property in order to access the Wi-Fi signal.

On the other hand, the parties' contracts expressly contemplate the use of hardware and software in accessing the Wi-Fi service. For example, section 8.2 disclaims liability for any "file or data loss or hardware or software loss or destruction" resulting from use of the Wi-Fi service. The hardware and software used to access the service is undoubtedly personal, rather than real, property. Nonetheless, services provided to personal property are also covered by section 5-903, which references "a contract for service, maintenance[,] or repair to or for any real *or* personal property." (emphasis added). Therefore, even if the contracts were for "service, maintenance[,] or repair to or for" personal, rather than real, property, this court may affirm the circuit court's ruling on that ground. *See* Rule 220(c) ("The appellate court may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal.").