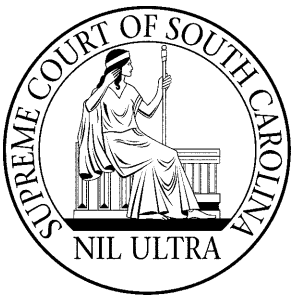


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 33**
**August 20, 2014**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

## PUBLISHED OPINIONS AND ORDERS


27433 - Stevens & Wilkinson v. City of Columbia (2012-208527) 14

27434 - Stevens & Wilkinson v. City of Columbia (2012-208490) 19

27435 - Delores Williams v. GEICO 34

27436 - Clifford C. Hansen v. Fields Company 54

27437 - Edward D. Sloan, Jr. v. SC Department of Revenue 63

27438 - James Robert Malloy v. Swain N. Thompson, Jr. 69

27439 - The State v. Bentley Collins 74


## UNPUBLISHED OPINIONS


2014-MO-034 - Barbara Clark v. Fred Moore
(Jasper County, Special Referee Richard E. Fields)


## PETITIONS – UNITED STATES SUPREME COURT


27303 - The State v. Billy Wayne Cope Pending

27317 - Ira Banks v. St. Matthew Baptist Church Pending

27358 - The State v. Quashon Middleton Pending

27362 - Ann Coleman v. Mariner Health Care Pending

## PETITIONS FOR REHEARING

| | |
|---|---|
| 27393 - State v. Phillip Wesley Sawyer | Pending |
| 27416 - The State v. Theodore Wills | Pending |
| 27418 - The State v. James Ervin Ramsey | Pending |
| 27422 - Shannon Ranucci v. Corey Crain | Pending |
| 27423 - Vicki Wilkinson v. East Cooper | Pending |
| 2014-MO-021 - Seyed D. Tahaei v. Sherri L. Tahaei | Pending |
| 2014-MO-022 - Travelers Property v. Senn Freight | Pending |
| 2014-MO-027 - The State v. Jake Antonio Wilson | Pending |
| 2014-MO-031 - Andreal Holland v. J. C. Witherspoon, Jr. | Pending |

## The South Carolina Court of Appeals

### PUBLISHED OPINIONS


5261-The State v. Roderick Pope 88

5262-Bloody Point Property Owners Assoc. Inc. v. William A. Ashton, Jr. 99

5263-The Milton P. Demetre Family Limited Partnership v. Harry Beckmann, III 107

5264-Prakash and Urmila Solanki v. Wal-Mart Store #2806 123

5265-The State v. Wayne McCombs 134

5266-The State v. Anthony K. Blakney 142


### UNPUBLISHED OPINIONS


2014-UP-324-State v. Randy Jarrod Crosby

2014-UP-325-Madeleine R. Arata and Kenneth C. Arata v. Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime


### PETITIONS FOR REHEARING


5219-Moorhead Construction Inc. et al. v. Pendleton Station et al. Pending

5229-Coleen Mick-Skaggs v. William Skaggs Denied 08/01/14

5232-State v. Clarence W. Jenkins Pending

5237-Palms v. School District of Greenville County Denied 07/10/14

5241-Richard A. Fisher v. Shipyard Village Council Pending

5242-Patricia Fore v. Griffco of Wampee, Inc. Pending

5243-Kerry Levi v. Northern Anderson County EMS Pending

5244-Clifford Thompson v. State Pending

| | |
|---|---|
| 5245-Allegro, Inc. v. Emmett J. Scully et al. | Pending |
| 5246-State v. Jason Alan Johnson | Pending |
| 5247-State v. Henry Haygood | Pending |
| 5248-Demetrius Mack v. Leon Lott | Pending |
| 5250-Precision Walls v. Liberty Mutual Fire Ins. | Pending |
| 5251-State v. Michael Wilson Pearson | Pending |
| 5252-State v. Daisy Lynne Mimms | Pending |
| 5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc. | Pending |
| 5254-State v. Leslie Parvin | Pending |
| 5260-Jennifer Brown v. Baby Girl Harper | Denied 08/14/14 |
| 2014-UP-200-Branch Banking and Trust v. Luquire | Pending |
| 2014-UP-203-Helena P. Tirone v. Thomas W. Dailey | Pending |
| 2014-UP-206-State v. Forrest K. Samples | Pending |
| 2014-UP-210-State v. Steven Kranendonk | Pending |
| 2014-UP-215-Yossi Haina v. Beach Market, LLC | Pending |
| 2014-UP-217-State v. Douglas Bret Bishop | Pending |
| 2014-UP-222-State v. James Curtis Tyner | Pending |
| 2014-UP-223-Permanent General v. Karen D. Givens | Pending |
| 2014-UP-224-State v. James E. Wise | Pending |
| 2014-UP-228-State v. Taurus Thompson | Pending |
| 2014-UP-230-State v. Travis N. Buck | Pending |
| 2014-UP-234-State v. Julian C. Young | Pending |

| | |
|---|---|
| 2014-UP-235-Rest Assured, LLC v. SCDEW | Pending |
| 2014-UP-241-First Citizens Bank v. Charles T. Brooks, III | Pending |
| 2014-UP-248-SCDOT v. RI CS5, LLC | Pending |
| 2014-UP-250-Xu Dong Sun v. Xiaolan Wang | Pending |
| 2014-UP-255-Loretta Katzburg v. Peter Katzburg | Pending |
| 2014-UP-265-State v. Gregory A. Ivery | Pending |
| 2014-UP-266-Mark R. Bolte v. State | Pending |
| 2014-UP-267-Jane Doe v. Charles Smith | Pending |
| 2014-UP-268-Jones Herring v. Gilbert Bagnell | Pending |
| 2014-UP-270-Progressive Northern Ins. v. Stanley Medlock | Pending |
| 2014-UP-273-Gregory Feldman et al. v. William Casey et al. | Pending |
| 2014-UP-277-Raymond Weatherford v. Shelly Weatherford | Pending |
| 2014-UP-279-Jacqueline Smith v. Horry County Schools | Pending |
| 2014-UP-281-Tina Mayers v. OSI Group | Pending |
| 2014-UP-282-State v. Donald M. Anderson | Pending |
| 2014-UP-284-John Musick v. Thomas Dicks | Pending |
| 2014-UP-288-Gayla Ramey v. Unihealth Post Acute | Pending |
| 2014-UP-292-Keith Roberts v. Randall J. Drew | Pending |
| 2014-UP-299-Lucille Smith v. The Heirs at law of Benjamin Days | Pending |
| 2014-UP-304-State v. Tawanda Allen | Pending |
| 2014-UP-305-Tobacco Merchant v. City of Columbia Zoning | Pending |

2014-UP-306-Yadkin Valley v. Oaktree Homes Pending

2014-UP-307-Desiree Gabriel Brown v. Wendell Brown Pending

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

4909-North American Rescue v. Richardson Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

5008-Willie H. Stephens v. CSX Transportation Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al. Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual Pending

5025-State v. Randy Vickery Pending

5031-State v. Demetrius Price Pending

5052-State v. Michael Donahue Pending

5055-Hazel Rivera v. Warren Newton Pending

5072-Michael Cunningham v. Anderson County Pending

5077-Kirby L. Bishop et al. v. City of Columbia Pending

5078-Estate of Livingston v. Clyde Livingston Pending

5084-State v. Kendrick Taylor Pending

5092-Mark Edward Vail v. State Pending

5095-Town of Arcadia Lakes v. SCDHEC Pending

5099-Roosevelt Simmons v. Berkeley Electric Pending

| | |
|---|---|
| 5111-State v. Alonza Dennis | Pending |
| 5112-Roger Walker v. Catherine Brooks | Pending |
| 5117-Loida Colonna v. Marlboro Park (2) | Pending |
| 5118-Gregory Smith v. D.R. Horton | Pending |
| 5119-State v. Brian Spears | Pending |
| 5126-A. Chakrabarti v. City of Orangeburg | Pending |
| 5131-Lauren Proctor v. Whitlark & Whitlark | Pending |
| 5135-Microclean Tec. Inc. v. Envirofix, Inc. | Pending |
| 5140-Bank of America v. Todd Draper | Pending |
| 5144-Emma Hamilton v.Martin Color Fi | Pending |
| 5151-Daisy Simpson v. William Simpson | Pending |
| 5152-Effie Turpin v. E. Lowther | Pending |
| 5156-State v. Manuel Marin | Pending |
| 5160-State v. Ashley Eugene Moore | Pending |
| 5166-Scott F. Lawing v. Univar USA Inc. | Pending |
| 5175-State v. Karl Ryan Lane | Pending |
| 5176-Richard A. Hartzell v. Palmetto Collision, LLC | Pending |
| 5178-State v. Michael J. Hilton | Pending |
| 5181-Henry Frampton v. SCDOT | Pending |
| 5188-Mark Teseniar v. Professional Plastering | Pending |
| 5191-Jacqueline Carter v. Verizon Wireless | Pending |

| | |
|---|---|
| 5193-Israel Wilds v. State | Pending |
| 5195-Laura Riley v. Ford Motor Company | Pending |
| 5196-State v. James Anderson | Pending |
| 5197-Gladys Sims v. Amisub | Pending |
| 5198-State v. Julia Gorman and Robert Palmer | Pending |
| 5200-Tynyasha Horton v. City of Columbia | Pending |
| 5201-Phillip Grimsley v. SLED | Pending |
| 5203-James Teeter v. Debra Teeter | Pending |
| 5209-State v. Tyrone Whatley | Pending |
| 5217-H. Eugene Hudson v. Mary Lee Hudson | Pending |
| 5224-State v. Alex Lorenzo Robinson | Pending |
| 5227-State v. Frankie Lee McGee | Pending |
| 5230-State v. Christopher L. Johnson | Pending |
| 5231-Centennial Casualty v. Western Surety | Pending |
| 2011-UP-502-Heath Hill v. SCDHEC and SCE&G | Pending |
| 2012-UP-078-Seyed Tahaei v. Sherri Tahaei | Pending |
| 2012-UP-081-Hueble v. Vaughn | Pending |
| 2012-UP-276-Regions Bank v. Stonebridge Development et al. | Pending |
| 2012-UP-312-State v. Edward Twyman | Pending |
| 2012-UP-351-State v. Kevin J. Gilliard | Pending |
| 2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al. | Pending |

| | |
|---|---|
| 2012-UP-479-Elkachbendi v. Elkachbendi | Pending |
| 2012-UP-502-Hurst v. Board of Dentistry | Pending |
| 2012-UP-552-Virginia A. Miles v. Waffle House | Pending |
| 2012-UP-577-State v. Marcus Addison | Pending |
| 2012-UP-600-Karen Irby v. Augusta Lawson | Pending |
| 2012-UP-603-Fidelity Bank v. Cox Investment Group et al. | Pending |
| 2012-UP-608-SunTrust Mortgage v. Ostendorff | Pending |
| 2012-UP-658-Palmetto Citizens v. Butch Johnson | Pending |
| 2012-UP-663-Carlton Cantrell v. Aiken County | Pending |
| 2013-UP-015-Travelers Property Casualty Co. v. Senn Freight | Pending |
| 2013-UP-062-State v. Christopher Stephens | Pending |
| 2013-UP-066-Dudley Carpenter v. Charles Measter | Pending |
| 2013-UP-071-Maria McGaha v. Honeywell International | Pending |
| 2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health | Pending |
| 2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley | Pending |
| 2013-UP-127-Osmanski v. Watkins & Shepard Trucking | Pending |
| 2013-UP-147-State v. Anthony Hackshaw | Pending |
| 2013-UP-158-CitiFinancial v. Squire | Pending |
| 2013-UP-188-State v. Jeffrey A. Michaelson | Pending |
| 2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars | Pending |
| 2013-UP-256-Woods v. Breakfield | Pending |

| | |
|---|---|
| 2013-UP-257-Matter of Henson (Woods) v. Breakfield | Pending |
| 2013-UP-272-James Bowers v. State | Pending |
| 2013-UP-279-MRR Sandhills v, Marlboro County | Pending |
| 2013-UP-288-State v. Brittany Johnson | Pending |
| 2013-UP-290-Mary Ruff v. Samuel Nunez | Pending |
| 2013-UP-297-Greene Homeowners v. W.G.R.Q. | Pending |
| 2013-UP-310-Westside Meshekoff Family v. SCDOT | Pending |
| 2013-UP-322-A.M. Kelly Grove v. SCDHEC | Pending |
| 2013-UP-358-Marion L. Driggers v. Daniel Shearouse | Pending |
| 2013-UP-393-State v. Robert Mondriques Jones | Pending |
| 2013-UP-424-Lyman Russell Rea v. Greenville Cty. | Pending |
| 2013-UP-428-State v. Oran Smith | Pending |
| 2013-UP-435-State v. Christopher Spriggs | Pending |
| 2013-UP-442-Jane AP Doe v. Omar Jaraki | Pending |
| 2013-UP-459-Shelby King v. Amy Bennett | Pending |
| 2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc. | Pending |
| 2013-UP-489-F.M. Haynie v. Paul Cash | Pending |
| 2014-UP-013-Roderick Bradley v. The State | Pending |
| 2014-UP-020-Joseph Marshall v. Carrie Marshall | Pending |
| 2014-UP-047-State v. Sam Harold Smith | Pending |
| 2014-UP-056-In the matter of the care and treatment of P. Guess | Pending |

| | |
|---|---|
| 2014-UP-062-Stoneledge v. IMK Development | Pending |
| 2014-UP-074-Tim Wilkes v. Horry County | Pending |
| 2014-UP-082-W. Peter Buyck v. Williams Jackson | Pending |
| 2014-UP-087-Moshtaba Vedad v. SCDOT | Pending |
| 2014-UP-088-State v. Derringer Young | Pending |
| 2014-UP-091-State v. Eric Wright | Pending |
| 2014-UP-094-Thaddeus Segars v. Fidelity National | Pending |
| 2014-UP-103-State v. David Vice | Pending |
| 2014-UP-113-State v. Jamaal Hinson | Pending |
| 2014-UP-114-Carolyn Powell v. Ashlin Potterfield | Pending |
| 2014-UP-121-Raymond Haselden v. New Hope Church | Pending |
| 2014-UP-122-Ayree Henderson v. State | Pending |
| 2014-UP-128-3 Chisolm Street v. Chisolm Street | Pending |
| 2014-UP-132-State v. Ricky S. Bowman | Pending |
| 2014-UP-143-State v. Jeffrey Dodd Thomas | Pending |
| 2014-UP-159-City of Columbia v. William K. Wilson | Pending |
| 2014-UP-167-State v. David G. Johnson | Pending |
| 2014-UP-172-Willie Rogers v. Charles Carr | Pending |
| 2014-UP-173-Reda Reilly v. Kevin Reilly | Pending |
| 2014-UP-178-State v. Anthony R. Carter | Pending |
| 2014-UP-180-State v. Travas D. Jones | Pending |

| | |
|---|---|
| 2014-UP-183-Allison Johnson v. Russell Johnson | Pending |
| 2014-UP-192-Lawrence Terry v. Allen University | Pending |

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

Stevens & Wilkinson of South Carolina, Inc.,
Respondent,

v.

City of Columbia, South Carolina, Petitioner.

Appellate Case No. 2012-208527

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

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Opinion No. 27433
Heard January 16, 2014 – Filed August 20, 2014

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**AFFIRMED AS MODIFIED**

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Michael W. Tighe, D. Reece Williams, III, Richard C. Detwiler, and Kathleen M. McDaniel, all of Callison Tighe & Robinson, LLC, of Columbia, for Petitioner.

Richard A. Harpootlian and Graham L. Newman, both of Richard A. Harpootlian, PA, of Columbia, for Respondent.

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**JUSTICE HEARN:** This case arises from a grant of partial summary judgment in favor of an architectural firm finding a contract existed between it and the City of Columbia. On certiorari, the City concedes a contract exists, but argues the contract terms have been satisfied. We find the City's arguments are unpreserved and affirm as modified.

## FACTUAL/PROCEDURAL BACKGROUND

In April 2003, the City entered into a Memorandum of Understanding (MOU) with Stevens & Wilkinson of South Carolina, Inc. (S&W) and several other parties, to develop a publicly-funded hotel adjacent to the Columbia Metropolitan Convention Center. As architect, S&W was to complete sufficient preliminary design work to determine a guaranteed maximum price for the project, which would be used by the City to obtain municipal bond funding to cover the cost of the hotel. Pursuant to the MOU, the construction company was to pay S&W directly. On June 26, 2003, the City received a letter stating S&W would complete its preliminary design on July 10, 2003, and would thereupon cease further work until the bond financing for the hotel was finalized. Realizing this could delay the start of construction, S&W offered to continue working the remaining ninety days until the anticipated bond closing date of October 13, 2003, but required assurance it would be compensated for the work it performed during this time frame. It provided an estimate requiring $650,000 through October 13 and $75,000 per week after that. On July 30, the City approved "$650,000 for interim architectural design services for a period of 90 days prior to bond closing."

The bond closing did not occur as scheduled, but S&W nevertheless continued to work. On December 16, 2003, S&W submitted an invoice to the City for $697,084.79 for work that took place from July 10 to December 15, 2003. By letter dated December 17, 2003, S&W informed the construction company that the City had voted that day "to advance [$705,000.000] to the design team for design services and expenses at cost covering the time period between July 10, 2003 to December 15, 2003." Because under the MOU the construction company was to pay S&W, not the City, the construction company agreed to reimburse the City for the funds paid to S&W after the bond closing. The City remitted $697,084.79 directly to S&W later that month. S&W continued to work on the project, but in March 2004, the City abandoned its plans under the MOU and ended its

relationship with S&W. S&W received no further compensation and sued the City for breach of contract under the MOU and the July 2003 agreement.[1] S&W then moved for partial summary judgment arguing it had a contract with the City as a matter of law based on the performance of and payment for architectural design services agreed to in July 2003. S&W's motion clarified that it only sought resolution of whether there was a contract, and did not seek summary judgment on the issue of breach or damages.

The City argued there was no separate agreement and the payment of interim fees was merely an advance on fees under the MOU and furthermore, the MOU provided that S&W was to be paid by the construction company, not the City. The circuit court agreed with S&W and granted partial summary judgment on the sole issue of the existence of a contract under the July 2003 agreement. Specifically, the court found S&W made an offer by delivering its estimate to the City, and the City accepted the offer, "albeit on seemingly modified terms," by voting to authorize the $650,000.

The City filed a Rule 59(e) motion, abandoning the argument that there was no contract. For the first time, the City argued the authorization of the $650,000 could not constitute an acceptance on "seemingly modified terms" because any modification of the terms resulted in a counteroffer, which S&W accepted by performance. It further argued that because S&W accepted by performance, the terms were limited to the counteroffer of $650,000. Because S&W had already been paid that sum, the City argued the court should find the City had fully performed and the contract was satisfied.

The circuit court denied the motion, finding the City never argued the authorization of payment was a counteroffer and consistent with settled principles, it would not consider new theories in a Rule 59(e) motion. It further declined to address satisfaction of the contract because the issue of breach and damages was not before the court, only the issue of the existence of a contract.

The City appealed and the court of appeals affirmed the circuit court as modified, adopting the City's position that the agreement to pay $650,000 was a counteroffer which S&W accepted by performance. *Stevens & Wilkinson of South*

[1] The breach of contract claim under the MOU is the subject of this Court's opinion in *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, Op. No. 27434 (S.C. Sup. Ct. filed August 20, 2014).

*Carolina, Inc. v. City of Columbia*, Op. No. 2011-UP-519 (S.C. Ct. App. filed November 29, 2011). However, the court declined to address the issue of satisfaction on preservation grounds and remanded to the circuit court for determination of the terms of the contract, whether it had been breached, and if so, the amount of damages. *Id.* We granted certiorari.

## ISSUE PRESENTED

Did the court of appeals err in declining to find the City's counteroffer constituted the final terms of the contract and accordingly find the contract obligations satisfied?

## LAW/ANALYSIS

Although this appeal arises from the grant of S&W's motion for partial summary judgment finding a contract existed between the parties, we note that the City now concedes this very issue. The City instead argues the court of appeals erred in remanding the case for determination of the terms of the contract because S&W accepted the City's counteroffer for payment of $650,000 and there was no evidence that agreement was modified. Therefore, the City asks the Court to hold the contract has been satisfied. We decline to address this issue because it is not properly before us.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

As an initial matter, we hold it was error for the court of appeals to consider the City's argument that the agreement to pay $650,000 constituted a counteroffer. The circuit court, relying on well-settled precedent, declined to reach this issue

because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons.

Similarly, we find equally unpreserved the City's request that this Court deem the terms of the contract satisfied. The issue before the circuit court was limited to the existence of a contract. The initial order explicitly states: "Whereas the existence of a contract between [S&W] and [the City] as a result of the July 30, 2003 agreement *is the only issue now before the court*, the Court hereby grants [S&W's] motion for partial summary judgment." (emphasis added). Furthermore, in the order denying the Rule 59(e) motion, the court declined to find the contract was satisfied and reiterated that the "previous order did not rule on the question of the breach of contract or any damages related thereto. Thus it would be inappropriate [to] extend a ruling in this case." We agree with the circuit court and employ the same restraint. It is improper for the City to concede the sole issue before the circuit court and attempt to inject new issues and theories on appeal. S&W never had the opportunity to present an argument on the exact terms of the contract, how the contract was breached, and what damages flowed from that breach. Those were not the questions before the circuit court and we will not allow them to now be placed before us.

## CONCLUSION

We therefore affirm the court of appeals' opinion as modified and hold S&W's estimate to continue services constituted an offer and the City's authorization to pay $650,000 in interim architectural design services served as an acceptance. We remand the case for further proceedings for determination of the terms of the contract and whether the contract has been satisfied or damages should be awarded.

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

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

Stevens and Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., Garfield Traub Development, LLC, and Turner Construction Company, Plaintiffs,

Of Whom Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., and Garfield Traub Development, LLC, are Respondents,

v.

City of Columbia, Paul C. "Bo" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners, LLC, and Hilton Hotels Corporation, Defendants,

Of Whom the City of Columbia, is Petitioner.

Appellate Case No. 2012-208490

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Richland County
The Honorable George C. James, Jr., Circuit Court Judge

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Opinion No. 27434
Heard January 21, 2014 – Filed August 20, 2014

---

**REVERSED**

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Michael W. Tighe, D. Reece Williams, III, Richard C. Detwiler, and Kathleen M. McDaniel, all of Callison Tighe & Robinson, LLC, of Columbia, for Petitioner.

Richard A. Harpootlian and Graham L. Newman, both of Richard A. Harpootlian, PA, of Columbia; Kenneth M. Suggs and Francis M. Hinson, IV, both of Janet Jenner & Suggs, LLC, of Columbia, for Respondents.

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**JUSTICE HEARN:** The respondents, two developers and an architectural firm, entered into a Memorandum of Understanding (MOU) with the City of Columbia as part of a larger project team to develop a publicly-funded hotel for the Columbia Metropolitan Convention Center. The City eventually abandoned its plan under the MOU, and the respondents brought suit on several causes of action including breach of contract and equitable relief. The City moved for summary judgment arguing the MOU was not a contract and therefore the contract claims failed. The circuit court agreed and, rejecting the equitable claims as well, granted summary judgment in favor of the City. The respondents appealed and the court of appeals affirmed in part and reversed in part. *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 396 S.C. 338, 721 S.E.2d 455 (Ct. App. 2011). We reverse.

## FACTUAL/PROCEDURAL BACKGROUND

In January of 2001, the City, seeking a team to develop a publicly-funded, full-service hotel adjacent to the convention center, issued a request for qualifications. The City settled on a project team in December of 2002 that consisted of the architectural firm of Stevens & Wilkinson of South Carolina, Inc. (S&W); Turner Construction Company; Hilton Hotels Corporation; the underwriter Salomon Smith Barney, Inc.; and three developers—Edens & Avant Real Estate Services LLC; Garfield Traub Development, LLC; and Gary Realty Company Inc.

In April of 2003, the City and the project team members entered into the MOU. The MOU documented "the understandings reached with respect to the financing, development and operation of the Hotel." It contemplated multiple future agreements to fully define the duties of the parties—the Development

Management Agreement, the Design/Build Agreement, the Qualified Management Agreement, and the HQ Hotel Room Block Commitment, a joint use agreement for parking, and a bond financing agreement. At the outset, the MOU provided:

> This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained. Notwithstanding anything herein to the contrary, if the City determines that is it not feasible to proceed with the Hotel project it shall have no liability under this MOU.

Additionally, the MOU illustrated the roles of the signatories. The City was to acquire the land and prepare it for construction, establish a non-profit corporation to own the Hotel and issue bonds for financing, and "retain [Salomon] and legal counsel to structure and issue approximately $60 million in tax exempt hotel revenue bonds." Under the MOU, the "Developer"—Edens, Garfield, and Gary—"will coordinate design, development, construction and delivery of Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation]." S&W, the architect, "shall develop and implement a design review process."

The MOU also addressed payment of the project team, stating:

> The Project Team will be responsible for the costs incurred prior to closing the financing. . . . If Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Management Agreement, . . . the City will reimburse the Project Team for actual, documented costs incurred to that point up to an amount to be agreed upon.

Additionally, the MOU clarified any payment to S&W, Turner, or Salomon was contingent upon Salomon successfully closing the bond financing. The MOU also stated: "All studies, tests, plans and the like prepared or obtained by the Project Team will be assigned to and become property of the City."

The parties began negotiating the contracts required under the MOU during the course of the next year. S&W completed its initial design thereby allowing Turner to determine the guaranteed maximum price of the project as envisioned under the MOU, and that price was approved by the City in July 2003. S&W informed the City it would cease design work for the ninety days remaining until

the bond financing closed unless the City agreed to compensate it for work performed in the interim. S&W submitted an estimate of $650,000 to continue working until the anticipated bond closing and $75,000 per week after that. On July 30, 2003, the city council voted to approve "$650,000 for interim architectural design."

Over the course of the negotiations, the bond issuance required to fund the project rose from the $60 million estimated in the MOU to $71 million by February 2004. Nevertheless, the non-profit organization accepted the financing plan for the $71 million and set the bond closing date as April 1, 2004. However, by mid-March the estimate had climbed to above $72 million. A little over a week after receiving this most recent financial report, the City issued a new request for proposals to develop a privately-funded hotel for the convention center. Ultimately Windsor/Aughtry Co., Inc. was chosen as the developer and it successfully constructed the Hilton.

S&W sued the City for breach of contract based on the MOU and the July 30 agreement, and on the equitable grounds of quantum meruit and estoppel.[1] Gary and Garfield also sued the City for quantum meruit and breach of the duty of good faith, later adding a breach of contract claim. The City moved for summary judgment arguing the MOU was not a contract, it retained no benefit from the work of the project team, and the MOU contained no promise to pay S&W.

In a consolidated order, the circuit court granted summary judgment in favor of the City on all claims.[2] Specifically, the court found the MOU was not a binding contract, and instead was a nonbinding agreement to agree in the future. It further held that the respondents failed to present any evidence they had conferred

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[1] S&W moved for partial summary judgment arguing the July 30 agreement created a contract between it and the City. That case is the subject of our opinion in *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, Op. No. 27433 (S.C. Sup. Ct. filed August 20, 2014).

[2] Turner Construction also filed suit against the City for breach of contract, quantum meruit, contract implied by law, and breach of the duty of good faith and fair dealing. Turner's case was consolidated with the respondents' cases and it simply joined the arguments of the respondents at the hearing. It did not file an appeal.

a benefit on the City, and that S&W failed to prove a promise to pay existed within the MOU or that reliance on the MOU for payment was reasonable.

S&W appealed the issue of whether the MOU was a contract and the issue of promissory estoppel. Gary and Garfield appealed the issue of whether the MOU was a contract and their claim for quantum meruit. The court of appeals affirmed in part and reversed in part. *Stevens*, 396 S.C. at 340, 338 S.E.2d at 456. The court affirmed the grant of summary judgment on S&W's claim for promissory estoppel. *Id.* It held the circuit court erred in granting summary judgment on the grounds the MOU is not a contract, finding there was conflicting evidence as to whether the parties intended to create a binding contract, and therefore reversed and remanded on that issue. *Id.* at 344, 721 S.E.2d at 458. The court of appeals also reversed the grant of summary judgment on Gary and Garfield's quantum meruit claims, stating it could not rule as a matter of law the City retained no benefit. *Id.* at 347, 721 S.E.2d at 460. The Court granted certiorari to review the court of appeals' opinion.

## ISSUES PRESENTED

I. Did the court of appeals err in finding a genuine issue of material fact existed as to whether the MOU is a binding contract?

II. Did the court of appeals err in reversing the circuit court's grant of summary judgment in favor of the City on Gary and Garfield's claim for quantum meruit?

## STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003**)**. On review from a grant of summary judgment, the Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Knight v. Austin*, 396 S.C. 518, 521–22, 722 S.E.2d 802, 804 (2012). Accordingly, summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery prove there is no genuine issue of material fact and the movant must prevail as a matter of law. *Id.* In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party. *Id.*

## LAW/ANALYSIS

### I. MEMORANDUM OF UNDERSTANDING

#### A. Extrinsic Evidence

Initially, the City argues the court of appeals erred in looking outside the four corners of the MOU to determine whether it constituted a binding contract. Because we find the MOU is unambiguously not an enforceable contract, we agree.

"Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

The respondents argue the MOU is a complete contract, lacking no material terms and the MOU itself claims it fully "identifies the understandings of the parties." Although the majority of case law addressing extrinsic evidence pertains to contract *construction* and not the *existence* of a contract, the inquiry in both instances involves giving force and effect to the intent of the parties, and we discern no reason for different rules of analysis.[3] As this Court has stated:

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[3] The respondents rely heavily on *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005), for the proposition that "when the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached." *Id.* at 473, 611 S.E.2d at 912. The facts of *Conner* are inapposite. *Conner* was a so-called "employee handbook claim" which dealt with the termination of an employee and posed the question of whether evidence of the employer's grievance procedures was admissible in determining whether the employee handbook provisions constituted contractual terms. *Id.* at 473, 611

> When a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed.

*Gladden v. Keistler*, 141 S.C. 524, 542, 140 S.E. 161, 167 (1927). We accordingly hold that where the language of a purported contract clearly expresses the intent to be non-binding, the analysis is limited to the four corners of the document.[4]

**B. Existence of Enforceable Contract**

The City also argues the court of appeals erred in holding a genuine issue of material fact exists as to whether the MOU is a contract. We agree.

Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Thus, for a contract to be binding,

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S.E.2d at 912. The employee contended the handbook *modified* the terms of her existing at-will employment contract, and therefore the Court held evidence that the employer followed the procedures within the handbook was probative of the intent to treat the handbook as contractual. *Id.* at 473, 611 S.E.2d at 911. Therefore, *Conner* addressed contract modification, not whether a single document constituted a contract.

[4] The dissent contends our holding in some way does violence to the parol evidence rule as well as the statute of frauds. We disagree. Of course the parol evidence rule involves actual contracts, not purported ones such as the written agreement here. We make only the unremarkable assertion that where a written document, by its own terms, unambiguously indicates it is meant to be non-binding, we will not allow the introduction of extrinsic evidence in an attempt to contradict that clear expression.

material terms cannot be left for future agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986). "In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation." *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

In reversing the circuit court, the court of appeals focused on the intent of the parties, noting that there were mutual promises within the MOU and some boilerplate contractual language that at least create a genuine issue of material fact as to whether the parties intended the MOU to be a contract. However, regardless of intent, an agreement which leaves open material terms is unenforceable. *Aperm*, 290 S.C. at 447, 351 S.E.2d at 173; 1 Corbin on Contracts § 2.8 (Rev. ed. 1993) ("Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement, because of the difficulty of administering the agreement."); 1 Corbin on Contracts § 4.1 ("A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood.").

Examining the plain language of the document, we find there was no meeting of the minds as to all material terms and the MOU is therefore unenforceable. It is only an agreement to agree in the future outlining the framework under which the parties would proceed to negotiate the development of the hotel. By its own terms, it "reflects the intent to proceed in good faith *to execute definitive written agreements* with respect to the business terms and conditions herein contained." (emphasis added). The MOU expressly states the intention to enter into future "definitive" agreements, such as the Development Management Agreement, the Design/Build Agreement, the Qualified Management Agreement, and the HQ Hotel Room Block Commitment. Thus, the clear language of the MOU indicates the parties consciously agreed to finalize binding agreements at some point in the future.

The respondents counter that the MOU provides clear guidelines for the subsequent agreement and therefore the MOU is enforceable under *Aperm*. In that case, Aperm of South Carolina, the owner of a roof coating composition and application method entered into an option agreement with Roof and granted him exclusive license to research, develop, manufacture and sell its invention. *Aperm*, 290 S.C. at 444, 351 S.E.2d at 172. The agreement allowed Roof to terminate the contract upon written notice by August 1, otherwise the agreement would become

fixed. *Id.* Under the agreement, Roof was also required to present Aperm with a comprehensive manufacturing and marketing program which conformed to the agreement's guidelines. *Id.*

> The program was required to include minimum royalty payments of $4,800.00 per month during the period August 1, 1981 to July 31, 1982, and increased monthly royalty payments thereafter. The marketing and manufacturing program was subject to Aperm's approval, but disapproval had to be reasonably related to the guidelines set out. The contract stated specifically that if the program provided for the minimum royalties, then objections to the program by Aperm would be subject to arbitration, but if the program failed to provide for minimum royalties, Aperm could cancel the contract.

*Id.* at 444–45, 351 S.E.2d at 172. Roof exercised his rights under the agreement to proceed therewith, but almost immediately defaulted for failing to pay the required royalties to Aperm. *Id.* at 445, 351 S.E.2d at 172. Aperm sued Roof for breach of contract and the trial court awarded damages pursuant to the licensing agreement. *Id.* at 446, 351 S.E.2d at 173. Roof appealed, arguing the licensing agreement was merely an agreement to enter into a contract after August 1 and was therefore unenforceable. *Id.* at 446–47, 352 S.E.2d at 173. The court of appeals disagreed, finding sufficient guidelines for drafting a subsequent manufacture and marketing agreement within the licensing agreement to enforce it. *Id.* at 447, 352 S.E.2d at 174. The court stated that the *sine qua non* of the manufacture and marketing program was the payment of minimum royalties, noting Aperm agreed to arbitrate the other terms. *Id.*

We find this case distinguishable from *Aperm*. In *Aperm*, the licensing agreement clearly set out the specific sum of minimum royalties and clarified that this payment was the salient factor for the program. Additionally, the *Aperm* agreement only contemplated one future document. Here, the MOU envisions the parties entering into multiple agreements and describes the intended agreements with a fluidity that renders it impossible for a court to anticipate the terms. For example, pursuant to the MOU, "The Developer will coordinate design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation] and the Developer." This leaves the scope of work to be performed by the Developer still undefined as it is as yet unclear *how* it will design, develop, and construct the hotel. We cannot see how merely stating a

forthcoming document will dictate the terms of the "design, development, construction and delivery" does not plainly leave material terms undecided. The whole project *is* the design, development, construction, and delivery of the hotel.[5]

Nor is the scope of S&W's duties clearly defined. The only description of the work S&W was to perform under the MOU is to "develop and implement a design review process" and contains no specific reference to an actual design. There are no guidelines as to what this process should look like, only that it should "provide the City, neighborhood and professional staff input into the design of the hotel." The MOU lacks any provisions on actual design duties of S&W and instead plainly envisions a subsequent contract between S&W and Turner. It is pursuant to this contract with Turner that S&W would be paid.

Furthermore, although initially the parties' compensation appears ascertainable with some certainty, calculating the amounts requires unknown numbers. For example, the Developer "is to be paid a development fee of 4.75% of the project budget," which was undetermined. S&W was to be paid by Turner "a fee of 7.25% . . . based on hard construction costs together with [Turner's] general expenses and fees." Aside from the fact Turner, and not the City, was to pay S&W, that amount was based on a sum—costs and fees determined by Turner—that was yet to be determined. Additionally, the MOU specifically states in reference to Turner and S&W that "[i]f the Underwriter does not close the financing, the City will not be responsible for reimbursing any costs incurred [unless the City breached its duties in the Development Agreement]." The MOU further clarifies that "[t]he Project Team will be responsible for the costs incurred prior to closing the financing. . . . If the Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Agreement, . . . the City will reimburse the Project Team for actual, documented costs incurred to that point in time up to an amount to be agreed upon." Thus, any possible liability of the City for costs incurred prior to closing the financing was to be agreed upon in a future agreement—the Development Agreement. This document would

[5] The respondents claim the Preliminary Development Management Scope of Services which was an attachment to the MOU, could have been the final Development Management Agreement. We disagree. That document also lacks significant material terms, including any duties of the City and caps on financial liability as contemplated in the MOU.

illustrate the obligations of the City and create liability for any breach. Furthermore, the document would contain an agreed upon limitation on liability. It appears the parties all acknowledged the City's liability would be predicated on the Development Agreement, a forthcoming contract that was never executed.

Nevertheless, the respondents argue that focusing on the unfilled gaps of the agreement, such as the bond financing, ignores the fact that one of the duties under the MOU was to obtain the bond financing. Essentially, they argue the MOU is comprised of interdependent parts that are all promises to perform certain specified duties to develop a plan for a feasible, publicly-funded hotel. While we agree that the determination of many of the terms within the MOU necessarily depend on the execution of other portions of the MOU, we fail to see how that changes the analysis.

> Frequently, agreements are arrived at piecemeal with different terms and items being discussed and agreed upon separately. However, as long as the parties know there is an essential term not yet agreed on, there is no contract. The preliminary agreements on specific items are mere preliminary negotiation building up the terms of the final offer that may or may not be made.

1 Corbin on Contracts § 2.8. From the plain language of the MOU, it is clear the parties knew material terms still remained to be agreed upon. They were also undoubtedly aware that payment and reimbursement was contingent upon obtaining bond financing, which never took place. The parties were in the process of negotiating a plan to develop the hotel and the MOU simply memorialized how the parties planned to proceed in those negotiations toward the execution of binding contracts.

Because the MOU is simply comprised of agreements to execute further agreements, there was no meeting of the minds on numerous material terms which had not yet been defined. Accordingly, we reverse the court of appeals and hold the MOU is unenforceable as a matter of law.

## II. QUANTUM MERUIT

The City also argues the court of appeals erred in reversing the circuit court's grant of summary judgment finding no evidence of a benefit conferred on the City to maintain Gary and Garfield's quantum meruit claim. We agree.

Quantum meruit is an equitable doctrine which allows recovery for unjust enrichment under a quasi-contract theory. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "The elements of a quantum meruit claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010).

Gary and Garfield point to plans and drawings prepared by the project team, as well as their expertise, to argue the City retained a benefit from their services. At oral argument, they focused on the site location and orientation of the hotel that was eventually used. Additionally, they highlight the deposition of the City's Rule 30(b)(6) representative, the assistant city manager, who admitted the City gave a rendering of the original project team's proposed hotel to Windsor/Aughtry. It is unclear what Windsor/Aughtry then did with the rendering, but the City manager noted the rendering "looks much like the building, the hotel that we presently have." Additionally, Raymond Garfield, the founding member of Garfield Traub, stated in his deposition that Gary and Garfield's work "gave [the City] the ability to distinguish the different financing types, different hotel types" and the City was "educated significantly by [Gary and Garfield and their] team in all respects."

The circuit court found this was insufficient to create a genuine issue of material fact, noting it was not enough to say the constructed building "looks like" the previous rendering, with no further detail as to specific "striking similarities." Furthermore, there was no evidence Windsor/Aughtry did anything with the plans or how that directly benefitted the City. The court also rejected the argument that the City benefitted from the project team's expertise, stating any benefit as to how these deals should be structured was conferred upon the other project members, not the City. However, the court of appeals reversed stating, "We do not believe it is possible to rule as a matter of law that the alleged benefit to the City had no value. Therefore, we reverse the circuit court's decision to grant summary judgment on this element of the quantum meruit claim." *Stevens*, 396 S.C. at 347, 721 S.E.2d at 460.

We agree with the circuit court's finding there was no genuine issue of material fact as to whether the City retained a benefit. An anecdotal visual comparison alleging the building Windsor/Aughtry constructed looks similar to the schematics for Gary and Garfield's proposed hotel and a vague assertion that Gary

and Garfield imparted some knowledge to the City does not suffice to withstand the mere scintilla standard. There is no other evidence offered that Windsor/Aughtry used the plans in any way or, even if it did, how that benefitted the City. Likewise, we are unpersuaded that the City retained a benefit by learning from Gary and Garfield's expertise. To some extent any dealing with other professionals is educational, and this is certainly true in the context of business negotiations. We again, however, fail to find any intrinsic value to the City.

Moreover, even if we were to find the City received some benefit, we find no evidence any enrichment was unjust. There is no evidence Gary and Garfield had any reason to expect the City would otherwise compensate them for any work they performed in the event the project was not completed. As the MOU makes plain, the parties were aware they were proceeding at risk until the bond financing closed.

## CONCLUSION

Accordingly, we reverse the opinion of the court of appeals and reinstate summary judgment in favor of the City on the contract claims and on Gary and Garfield's quantum meruit claim.

**TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.**

**JUSTICE PLEICONES:** I respectfully dissent and would affirm the decision of the Court of Appeals as I agree that the circuit court erred in granting the City summary judgment on S&W's contract claim and on Gary and Garfield's quantum meruit claim. As explained below, I strongly disagree with that portion of the majority's opinion that would extend the applicability and scope of the parol evidence rule.

The parol evidence rule is a substantive rule of law that prohibits the introduction of evidence to contradict, add to, alter, explain, or vary the terms of an unambiguous **valid written contract**. *E.g. Garnett v. WRP Enterps., Inc*, 380 S.C. 206, 669 S.E.2d 591 (2008). The scope of this rule is limited to evidence of understandings and negotiations that preceded the making of the **complete written agreement**, not post-formation conduct or agreements. 6 Peter Linzer, *Corbin on Contracts* § 25.2 (Joseph M. Perillo ed. 2010).

The majority would now expand the reach of the parol evidence rule in two ways. As explained above, the predicate for the application of the parol evidence rule is a valid and complete written contract: the majority now proposes to apply the rule to an **incomplete writing**. The majority would also expand the scope of the rule and hold not only that it bars pre-writing understandings of the parties, but all extrinsic evidence, whether ante- or post-writing. Explaining the effect of this newly expanded rule, the majority holds that when a writing "unambiguously fails to create an enforceable agreement," the determination whether that document is a valid contract is to be made by looking only within the four corners of the [unambiguously unenforceable] document. In other words, if parties place some part of their contract in writing, but that writing is insufficient to stand alone as a contract, then as a matter of law the parties have no contract.

This new rule unintentionally affects the statute of frauds,[6] since, for example, no longer could evidence of part performance satisfy the statute where the written memoranda did not. *E.g. Mims v. Chandler*, 21 S.C. 480(1884) (written receipt insufficient to satisfy statute but part performance allowed court to order specific performance). Moreover this new rule fundamentally alters the law of contracts in this State. *See e.g. Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927) (while

[6] S.C. Code Ann. § 32-3-10 (2007). *See also Corbin*, *supra* at pp. 20-22, "The Statute of Frauds Compared with the Parol Evidence Rule."

holding a receipt was a contract, opinion acknowledges parol evidence rule does not apply to incomplete written agreements). Further, the majority purports to distinguish *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005), which reiterates and applies the here-to-fore well settled rule that evidence of conduct is admissible to decide an issue of contract formation. In the majority's view, *Conner* asked whether an employee handbook altered the employee's "at-will employment contract." As I understand *Conner*, there was no pre-handbook "at-will employment contract." Instead, the employee's at-will status resulted from South Carolina's continued recognition of the doctrine of at-will employment, that is, "employment at-will is presumed absent the creation of a specific contract of employment." *E.g.*, *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). In my opinion, the majority errs when it holds that evidence found outside the four corners of an incomplete writing is no longer admissible to prove the existence of a contract.

I respectfully dissent and would affirm the decision of the Court of Appeals.

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

Delores Williams, Personal Representative of the Estate of Edward Murry, Deceased, and Matthew Whitaker, Jr., as Personal Representative of the Estate of Annie Mae Murry, Deceased, Appellants,

v.

Government Employees Insurance Company (GEICO), Respondent.

Appellate Case No. 2011-196449

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Appeal From Richland County
George C. James, Jr., Circuit Court Judge

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Opinion No. 27435
Heard March 21, 2013 – Filed August 20, 2014

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**AFFIRMED IN PART, REVERSED IN PART**

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Terry E. Richardson, Jr. and Christopher James Moore, both of Richardson, Patrick, Westbrook & Brickman, LLC, of Barnwell; and Robert A. McKenzie, of McDonald, McKenzie, Rubin, Miller and Lybrand, LLP, of Columbia, for Appellants.

William H. Bowman, III and Robert P. Wood, both of Rogers Townsend & Thomas, PC, of Columbia, for Respondent.

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**JUSTICE BEATTY:** Delores Williams, the personal representative of the Estate of Edward Murry, and Matthew Whitaker, Jr., the personal representative of the Estate of Annie Mae Murry (PRs), brought this declaratory judgment action to determine whether a GEICO motor vehicle insurance policy issued to the Murrys provided $15,000 or $100,000 in liability proceeds for bodily injury for an accident in which both of the Murrys were killed. The circuit court concluded coverage was limited to the statutory minimum of $15,000 based on a family step-down provision in the policy that reduced coverage for bodily injury to family members from the stated policy coverage of $100,000 to the statutory minimum amount mandated by South Carolina law during the policy period. The PRs appeal, contending the step-down provision is ambiguous and/or violative of public policy. We affirm in part and reverse in part.

## I. FACTS

The facts in this case were either stipulated to by the parties or are not in dispute. The Murrys, who were husband and wife, purchased a motor vehicle insurance policy from GEICO, policy number 0685-44-55-04, effective September 2, 2006 until March 2, 2007. The Murrys were the only named insureds on the policy. The Murrys carried liability coverage in excess of the statutory minimum limits. As indicated on the "Family Automobile Renewal Policy Declarations" page for the policy (Declarations), they purchased liability insurance with limits of $100,000 per person and $300,000 per accident for bodily injury, and $50,000 per accident for property damage.

On September 3, 2006, the Murrys were the sole occupants of their vehicle when it was struck by a train. Both of the Murrys died from injuries caused by the collision. It is unknown who was the driver and who was the passenger at the time of the accident. However, since both of the Murrys were insureds under the policy, the accident resulted in bodily injury to an insured, regardless of who was driving.

A dispute arose as to the amount of liability proceeds due under the policy. The PRs believed the proper amount of coverage was the stated policy amount of $100,000. GEICO took the position that only $15,000 was owed under the Exclusions portion of the policy as a result of the following provision contained under Section I, entitled "Liability Coverage":

EXCLUSIONS
When Section I Does Not Apply

We will not defend any suit for damage if one or more of the exclusions listed below applies. We do not provide liability coverage, under Exclusions 1, 2, 3 and 8, in excess of the minimum limits of liability required by South Carolina law. We do not provide any liability coverage for the remaining Exclusions.

1. ***Bodily injury*** to any ***insured*** or any ***relative*** of an ***insured*** residing in his household is not covered.[1]

The above language is often referred to as a family "step-down provision" as it operates to "step down," or reduce, coverage for injured family members from the original policy limit, which was $100,000 here, to the statutory minimum limit required by law during the policy period, which was $15,000.[2]

The PRs filed this complaint against GEICO seeking a declaratory judgment as to the amount of liability proceeds due under the policy for the accident. After a bench trial, the circuit court entered judgment for GEICO. The court concluded

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[1] With respect to an "***owned vehicle***," the policy provides Section I applies to the following "***insureds***": (1) "***you*** and ***your relatives***"; (2) "any other person driving the auto with ***your*** permission and within the actual scope of your permission"; and (3) "any other person or organization for his or its liability because of acts or omissions of an ***insured*** under 1. or 2. above."

[2] Although GEICO has called the policy provision a "family member exclusion," we believe the provision here is more accurately termed a "step-down provision" as it does not eliminate all coverage, contrary to its captioning. A step-down provision is one in which "the coverage 'steps down' from the actual policy limits to the minimum required by statute." *Liberty Mut. Ins. Co. v. Shores*, 147 P.3d 456, 458 n.4 (Utah Ct. App. 2006) (quoting 1 Rowland H. Long, *The Law of Liability Insurance* § 2.05[5] (2003)). However, it should be noted that in previous litigation in other jurisdictions GEICO has successfully argued that similar provisions totally excluded family members.

"the Family Member Exclusion in the Policy applies to limit liability coverage to $15,000.00 for damages arising out of the accident of September 3, 2006."[3]

The court rejected the PRs' assertion that the GEICO insurance policy was ambiguous, stating even though the Declarations page listed liability coverage for bodily injury of $100,000/$300,000, the policy terms had to be read as a whole and the family step-down provision was capable of only one reasonable interpretation. The circuit court also found the family step-down provision did not violate this state's public policy or the statutes governing automobile insurance, particularly S.C. Code Ann. § 38-77-142. The PRs appealed, and this Court certified the case from the Court of Appeals for its review pursuant to Rule 204(b), SCACR.

## II. STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012) (citation omitted).

"In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46-47, 717 S.E.2d 589, 592 (2011) (citation omitted); *accord Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." *Kennedy*, 398 S.C. at 610, 730 S.E.2d at 864. "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

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[3] The circuit court noted that S.C. Code Ann. § 38-77-140 provided for liability coverage with a minimum limit of $15,000 at the time the policy was issued. Section 38-77-140 was later amended in 2006 for policies issued or renewed on or after January 1, 2007 to increase the minimum to $25,000. The limits are currently $25,000 per person and $50,000 per accident for bodily injury, and $25,000 for property damage. S.C. Code Ann. § 38-77-140 (Supp. 2013).

## III. LAW/ANALYSIS

On appeal, the PRs contend the circuit court erred in failing to find (1) the insurance contract was misleading and ambiguous, and (2) the family step-down provision violates South Carolina's public policy.

### A. Ambiguity

The PRs first argue the insurance contract is contradictory and misleading and that the circuit court erred in failing to find the policy was ambiguous.

An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008); *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 656 S.E.2d 17 (2007); *Estate of Revis v. Revis*, 326 S.C. 470, 484 S.E.2d 112 (Ct. App. 1997); *see generally* S.C. Code Ann. § 38-61-10 (2002) ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State.").

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977).

"It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The *construction* of a clear and unambiguous contract is a question of law for the court to determine. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). If the court decides the language is ambiguous, however, evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder.[4] *Id.* at 592, 493 S.E.2d at 878-79.

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State*

[4] The circuit court conducted a bench trial here and, thus, was the fact-finder.

*Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)).

"A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008).

The PRs contend the circuit court wrongly found they were reading the Declarations in isolation when they had actually pointed to a variety of contradictions in the Declarations and the body of the policy document to show the contract "was far from clear." The PRs argue the policy starts out by listing the Murrys as the named insureds with $100,000/$300,000 of liability coverage for bodily injury, but it is not indicated anywhere in the Declarations that the coverage does not include either of the named insureds or their household relatives and that only the statutory minimums in South Carolina apply to them. Further, there is nothing in the Declarations or the rest of the policy stating what the statutory minimum limits *are* in South Carolina.

The PRs additionally point out that the general language in the policy states GEICO will pay damages which an insured becomes legally obligated to pay because of bodily injury sustained by a person, but the policy does not define "person" or explicitly limit that term to everyone who is *not* an insured or a resident relative. The PRs argue, "After repeated indications that the named insureds are covered up to the liability amounts provided in the declarations page for bodily injury, GEICO slips in the family step-down, which is unclear in and of itself." The PRs contend, "It fails to alert the purchaser what the statutory minimums are, and fails to alert them that this provision means you and your household relatives are NOT protected in these amounts shown. This creates an irreparable ambiguity upon which GEICO cannot deny coverage in the full liability limits."

In contrast, GEICO argues the PRs do not consider the entire integrated agreement, but instead read the Declarations and certain provisions in the policy in isolation to create an ambiguity. GEICO asserts, "Insurance contracts contain many limitations and exclusions and it would be unrealistic and unreasonable to expect an insurer to identify every such limitation and exclusion and note it on the declarations page. Hence, the rule that the entire integrated agreement must be considered."

GEICO contends "person" need not be defined in the policy as it is understood to refer generically to "any human being."[5] Moreover, any of the provisions for coverage in the policy must be read in conjunction with the exclusions explicitly contained therein.

Section V, paragraph 12 of the policy, entitled "Declarations," states in relevant part: "By accepting this policy, ***you*** agree that . . . this policy, along with the application and declaration sheet, embodies all agreements relating to this insurance." Thus, by its terms, the policy, along with the application and the Declarations, constitute the entire agreement between the Murrys and GEICO. *Compare Prince v. State Mut. Life Ins. Co.*, 77 S.C. 187, 191, 57 S.E. 766, 767 (1907) ("For the general purposes of construction, an application will be considered a part of the contract, if it is referred to in the policy in such a way as to indicate a clear intent to make it a part thereof." (citation omitted)) *with Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 299 (Iowa 1994) ("When construing insurance policies we consider the effect of the policy as a whole, in light of all declarations, riders, or endorsements attached.").

Section I of the policy states GEICO will pay damages that an insured becomes legally obligated to pay because of bodily injury sustained by a person and damages to or destruction of property. Although the Declarations page indicates the named insureds have liability limits of $100,000 per person and $300,000 per accident for bodily injury, Section I of the policy contains a list of twelve enumerated items under the heading "EXCLUSIONS," among them, the family step-down provision and three others (1, 2, 3, and 8) for which the statutory minimum limits apply. Consequently, these specified items are not actually full exclusions, but rather, are limitations on, or reductions in, coverage.

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[5] "Person" is statutorily defined in this context as "[e]very natural person, firm, copartnership, association or corporation[.]" S.C. Code Ann. § 56-9-20(10) (2006).

GEICO concedes, "While perhaps Exclusions 1, 2, 3, and 8 might more properly have been labeled 'limitations' under a separate heading, there is only one fair and reasonable way to interpret this language. Liability coverage will be provided for Exclusions 1, 2, 3, and 8 but only up to the minimum limits of liability required by South Carolina law while no liability coverage will be provided for the other Exclusions. Simply because an insurance contract is not written in the most desirable manner, if it is unmistakable in its meaning, when carefully read, it is valid and enforceable." GEICO maintains, "When all of the provisions of the [p]olicy are read together, it unambiguously provides that liability coverage for bodily injury to an insured or resident relative is limited to the minimum limits of liability required by South Carolina law."

Read as a whole, we agree with the circuit court that the language in the contract is unambiguous. Although it was not artfully worded, as GEICO acknowledges, it is, nevertheless, apparent upon examination that there is an unambiguous limitation in this regard because it may only be understood one way. The PRs correctly note that the exclusion for named insureds and resident relatives actually states there is "no coverage"; however, when all of the pertinent provisions are read together, including the sentences immediately before it that "[w]e do not provide liability coverage, Under Exclusions 1, 2, 3 and 8, in excess of the minimum limits of liability required by South Carolina law" and "[w]e do not provide any liability coverage for the remaining Exclusions," then it is unmistakable what the intent for coverage is here.

Moreover, we disagree with the PRs' assertion that the failure to specifically state *what* the statutory minimum limits of coverage were renders the GEICO policy ambiguous. An ambiguity exists only when the language is reasonably capable of being understood in more than one way. *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878. The fact that the parties would need to look up the statutory minimum limits for coverage does not render the policy ambiguous. *See Universal Underwriters Ins. Co. v. Hill*, 955 P.2d 1333, 1336-37 (Kan. Ct. App. 1998) (holding step-down provision and language in addendum limiting liability to "limits required by Kansas law" might be "stylistically inelegant," but it was not ambiguous as a reasonable person would not be misled as to the policy limits). Consequently, we hold the circuit court did not err in failing to find the GEICO policy contained an ambiguity that invalidated the step-down provision.

## B. Public Policy

The PRs next assert the circuit court erred in failing to find the step-down provision is invalid because it contravenes this state's public policy.

As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989); *Cobb v. Benjamin*, 325 S.C. 573, 580-81, 482 S.E.2d 589, 593 (Ct. App. 1997).

While parties are generally permitted to contract as they see fit, freedom of contract is not absolute and coverage that is required by law may not be omitted. *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975). Statutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid. *Allstate Ins. Co. v. Thatcher*, 283 S.C. 585, 587, 325 S.E.2d 59, 61 (1985); *Jordan*, 264 S.C. at 297, 214 S.E.2d at 820; *Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973).

The purpose of the Motor Vehicle Financial Responsibility Act (MVFRA), contained in Title 56 of the South Carolina Code, is to give greater protection to those injured through the negligent operation of automobiles. *Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). This legislation requires insurance for the benefit of the public, and an insurer may not nullify its purposes by engrafting exceptions from liability as to uses that the evident purpose of the legislation was to cover. *Id.*; *Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 539-40, 753 S.E.2d 437, 440 (Ct. App. 2013). Similarly, the stated purpose of the chapter on automobile insurance in Title 38 was to implement a complete reform of automobile insurance in order to, among other things, make sure every risk meeting certain criteria was entitled to automobile insurance and prevent the evasion of coverage provided for by that chapter. S.C. Code Ann. § 38-77-10 (2002).

Whether a particular provision in an insurance policy violates the public policy of the state is a question of law that is reviewed *de novo* by an appellate court. *County Preferred Ins. Co. v. Whitehead*, 979 N.E.2d 35, 42 (Ill. 2012). Public policy considerations include not only what is expressed in state law, such

as the constitution and statutes, and decisions of the courts, but also a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare. *Id.* at 42-43.

The PRs contend the public policy of this state, as evidenced in section 38-77-142, prevents an insurer from reducing coverage from the amount stated in the policy, which here was $100,000, to the statutory minimum limit required by section 38-77-140(A), which was $15,000 per person for bodily injury during the policy period at issue. We agree.

Section 38-77-142 provides in relevant part as follows:

> **SECTION 38-77-142.** Policies or contracts of bodily injury or property damage liability insurance covering liability; required provisions.
>
> (A) No policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle . . . **unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability** for death or injury sustained or loss or damage incurred **within the coverage of the policy or contract** as a result of negligence in the operation or use of the vehicle by the named insured or by any such person. . . .
>
> (B) No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle . . . **without an endorsement or provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured**, against liability for death or injury sustained, or loss or damage incurred **within the coverage of the policy or contract** as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other person. If an insurer has actual notice of a motion for judgment or complaint having been

> served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.
>
> . . . .
>
> (C) Any endorsement, **provision**, or rider attached to or **included in any policy of insurance which purports or seeks to limit or reduce the coverage[6] afforded by the provisions required by this section is void**.

S.C. Code Ann. § 38-77-142 (2002) (emphasis added).

The PRs rely particularly upon subsection (C) and argue "[t]he statute mandates that all South Carolina insurance policies must insure the named insureds against liability for death or injury and, more importantly, the insurance policy may not limit or reduce that coverage or it will be void [as] against public policy." The PRs contend, "Here, GEICO is attempting to reduce the coverage its policy states is provided for the named insureds through the step-down provision which plainly contravenes this statue because it reduces the amount of coverage stated in the declarations page under Section I." The PRs note section 38-77-142 does not reference in any way the minimum coverage statutorily provided by section 38-77-140, but instead specifically states that an insurance contract may not reduce the coverage afforded in the policy against liability for death or injury, and the amount contracted for under the policy at issue is $100,000, not the $15,000 statutory minimum.

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[6] The concurrence/dissent interprets the word "coverage" as referring to the individuals protected by the policy. However, such an interpretation conflicts with the way the word "coverage" is used in subsections (A) and (B). It is striking that the word "coverage" is used in these sections to refer to the levels of protection afforded by the policy. Moreover, these subsections clearly indicate that the General Assembly knew when and how to use the words "insured" or "person" and would have used those words in subsection (C) if that was what it intended "coverage" to mean.

The circuit court correctly concluded that section 38-77-142 "requires every policy issued to insure the named insured and permissive users against liability for death or injury sustained or loss or damage incurred 'within' the coverage of the policy." However, the court erred when it found "that 'within the coverage of the policy' does not mandate coverage up to the maximum amount of liability coverage under a policy when there is a family member claimant." The court failed to give any consideration to subsection (C).

The circuit court found section 38-77-142 provides liability coverage may be reduced, so long as it is not reduced below the statutory minimum mandated by section 38-77-140. Therefore, it does not contravene public policy, citing *Hansen ex rel. Hansen v. United Services Automobile Association*, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002) (holding a step-down provision along with an out-of-state provision in an Ohio insurance policy did not create an ambiguity voiding coverage).

Initially, we note *Hansen* is not controlling of our decision here as it involved Ohio insurance provisions drafted in accordance with Ohio law and did not address section 38-77-142. The accident in that case occurred in 1998, prior to the effective date of the statute. *See Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 626, 594 S.E.2d 275, 276 (2004) (noting the General Assembly enacted section 38-77-142 in 1997 and it became effective on March 1, 1999). Although the circuit court recognized this fact, it nevertheless referenced the case in support of its conclusion.

Likewise, several decisions GEICO additionally references for the proposition that coverage for insureds may be reduced from the policy amount to the statutory minimums are not controlling here as they, like *Hansen*, involve accidents that occurred prior to the effective date of section 38-77-142, and the decisions do not address the statute's application. *See, e.g., United Servs. Auto. Ass'n v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000); *Universal Underwriters Ins. Co. v. Metro. Prop. & Life Ins. Co.*, 298 S.C. 404, 380 S.E.2d 858 (Ct. App. 1989). To the extent the concurrence/dissent maintains the validity of step-down provisions has already been established by this Court, it is mistaken. Although it refers to the Court of Appeals's decision in *Universal Underwriters*, that case cannot possibly control our decision here because the accident in *Universal Underwriters* occurred at least a decade prior to the effective date of section 38-77-142. In any event, we are not limited by a decision of the Court of Appeals, as this Court exercises *de novo* review of public policy issues. The

General Assembly is presumed to know the law, so in our view, the enactment of section 38-77-142 could be perceived as a response to these earlier decisions. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (stating "we presume the General Assembly is 'aware of the common law'" when enacting subsequent legislation (citation omitted)).

In viewing the plain wording of section 38-77-142, we find subsections (A) and (B) require a policy for liability insurance to contain a provision insuring the named insureds and permissive users against liability for damage incurred "within the coverage of the policy." Subsection (B) additionally contains a provision regarding notice that states the mere failure to turn over a motion or complaint will not void coverage. Finally, subsection (C) provides that no policy provision may limit *or reduce* the coverage required by *this section*, which refers to section 38-77-142, or else it is void.

We think it is significant that section 38-77-142 provides insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability coverage in the policy below the amount provided *in this section*, meaning section 38-77-142. Thus, it is the face amount of the coverage that is relevant under section 38-77-142, not the statutory minimum limits of liability coverage set forth in section 38-77-140, which are not even mentioned in the statute.[7] In contrast to the circuit court's interpretation, we believe the General Assembly could have simply stated coverage may not be reduced below the statutory minimum limits and/or below the amount provided in section 38-77-140, if that was its intent. However, it did not do so. Here, the circuit court has engrafted an additional restriction into section 38-77-142 that was not included by the General Assembly by determining coverage may be reduced to the statutory minimum, in direct contravention to the explicit language of section 38-77-142(C) that coverage may not be reduced below the coverage in the policy.

The General Assembly, in considering section 38-77-142, contemplated how automobile insurance is actually marketed. It realized that the actual policy containing any exclusions or limitations is not provided contemporaneously with the entering of the insurance agreement. As a result, the General Assembly

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[7] Moreover, the Declarations page of the Murrys' policy explicitly states: "This is a description of your *coverage*" and it lists bodily injury liability coverage of $100,000/$300,000. (Emphasis added.)

specifically included language in section 38-77-142(C) prohibiting provisions in the policy that limit or reduce coverage:

> (C) Any endorsement, **provision**, or rider attached to or **included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void**.

S.C. Code Ann. § 38-77-142(C) (2002) (emphasis added).

Therefore, once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage. Any other interpretation of section 38-77-142(C) would render the section useless, and the General Assembly is presumed not to perform useless acts. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." (citing *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 503 S.E.2d 471 (1998)). After agreeing on a policy with $100,000 in stated liability coverage for the named insureds, GEICO should not be permitted to subsequently reduce it with what it deems an "exclusion" in the policy.

There is, indeed, a wide divergence of authority in this area, as courts have considered the statutory schemes, case law, and public policy determinations in their own jurisdictions in scrutinizing provisions attempting to reduce or eliminate coverage to family members. *See* Martin J. McMahon, Annotation, *Validity, Under Insurance Statutes, of Coverage Exclusion for Injury to or Death of Insured's Family or Household Members*, 52 A.L.R.4th 18 (1987 & Supp. 2014) (discussing a variety of scenarios in which courts have examined such provisions). There is no true consensus.

In one case, *Lewis v. West American Insurance Co.*, 927 S.W.2d 829 (Ky. 1996), the Supreme Court of Kentucky found a step-down provision was void as against that state's public policy. The Kentucky court focused on two key points: (1) a customer's motivation in purchasing liability insurance above the statutory minimum is to obtain increased protection for anyone injured; and (2) the fact that the only possible justification for these types of exclusions is to prevent the

possibility of collusion among family members, a concern which has been mostly abrogated in other contexts.

In *Lewis*, the court acknowledged that neither Kentucky's state constitution nor its statutes addressed family exclusions, so it would turn to its court decisions to determine the state's public policy. *Id.* at 836. The court stated it has long been recognized that, where there is no legislative prohibition on a certain character of agreement, before a court is authorized to declare it void "it must appear that such an agreement or contract has a tendency to injure the public or is against the public good, or is contrary to sound policy . . . ." *Id.* at 835 (citation omitted). The court observed that, "[w]ith the erosion of the immunities provided by the doctrines of interspousal and parental immunity, insurance companies sought to protect their interests by inserting family exclusions into their insurance contracts." *Id.* at 832. Over the years, the purported justification for those rules, the possibility of fraud and collusion, was determined to no longer justify the hardships imposed by these rules. *Id.* The court found the family exclusion "prevents a specific class of innocent victims from receiving adequate financial protection" and is based entirely on the person's status. *Id.* "Without documentation or factual basis, every member of this excluded class is labeled high risk and branded as being more likely to engage in collusion and fraud." *Id.* The court concluded, "To uphold the family exclusion would result in perpetuating socially destructive inequities." *Id.* at 833.

> Family exclusions are injurious to a substantial segment of the citizens of our Commonwealth. They deny injured persons the ability to rely upon the insurance coverage purchased by the policyholder. As a result, seriously injured accident victims will suffer financial hardship if family exclusion clauses are validated. Almost every member of the public is potentially a member of this excluded class. The exclusion is overly broad, based upon surmise, and against the public good.
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> It is time for us to take the next logical step . . . . Thus, we hold that family exclusion provisions in liability insurance contracts violate the public policy of this Commonwealth and are unenforceable.

*Id.* at 836. We agree with the court's reasoning in *Lewis*. To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious

and violative of public policy. *See Mut. of Enumclaw Ins. Co. v. Wiscomb*, 643 P.2d 441, 444 (1982) ("This exclusion becomes particularly disturbing when viewed in light of the fact that this class of victims is the one most frequently exposed to the potential negligence of the named insured. Typical family relations require family members to ride together on the way to work, church, school, social functions, or family outings. Consequently, there is no practical method by which the class of persons excluded from protection by this provision may conform their activities so as to avoid exposure to the risk of riding with someone who, as to them, is uninsured."), *cited with approval in Lewis*, 927 S.W.2d at 832-33; *see also Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 380-81, 182 S.E.2d 727, 729 (1971) (stating liability insurance not only affords protection to insured motorists, it serves the important "public purpose of affording protection to *innocent victims* of motor vehicle accidents" (citation omitted) (emphasis added)).

As written by GEICO, the policy in the current matter provides very limited coverage to families where those injured would otherwise undisputedly fall within the defined class of "insureds." As noted above, children injured while being driven to school by a parent would come under the family step-down provision, and thus only the statutory minimum limit would be available, regardless of the actual policy coverage purchased by the parent. The exclusion would also apply to the transportation of infants in family vehicles, where collusion could not be seriously asserted. Likewise, a husband and wife traveling together, as happened in the current appeal, would have only the statutory minimum amount, not the coverage provided for in the policy. In this case involving the Murrys, there can be no possibility of collusion, as both of the named insureds tragically perished in the accident.

The policy provision here has far-reaching effects that can impact a substantial segment of the population, as it serves not only to markedly reduce coverage to family members, but it even reduces the policy's coverage to the *named insureds*, as happened with the Murrys. The legislative purpose of affording protection to the innocent victims of motor vehicle accidents is eviscerated by GEICO's reduction in coverage to injured family members, who are no less innocent victims in accidents solely because they are injured by the negligence of a family member. It would indeed be an unusual public policy that would condone denying coverage to a child where he or she is catastrophically injured while being driven by a parent to school, but would allow recovery where the parent injures a stranger while on the way to work.

Ultimately, regardless of the split of authority from other jurisdictions, we find the clear terms of section 38-77-142 are controlling of this state's public policy and justify the result we reach today.[8] In this case, the Murrys, the named insureds, purchased a policy with liability coverage limits of $100,000 per person and $300,000 per accident for bodily injury, and $50,000 per accident for property damage. In our view, GEICO has improperly attempted to reduce the coverage in the policy to the named insureds by means of the step-down provision, which it has characterized as an "exclusion." We find this provision is in direct contravention to the prohibition set forth in section 38-77-142. In addition, to allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary, capricious and injurious to the public good. *See Lewis*, 927 S.W.2d at 836. For these reasons, the family step-down provision is void as against the public policy of this state.

A provision that is against public policy is void *ab initio* and, because it is deemed legally never to have come into existence, it is incapable of being enforced by courts. 16 Richard A. Lord, *Williston on Contracts* § 49:12 (4th ed. 2000). We

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[8] We disagree with the position taken by the concurrence/dissent that section 56-9-20(d) of the MVFRA somehow serves to thwart the application of section 38-77-142(C) because the Murrays purchased coverage over the statutory minimum limits. This assertion rests on the premise that "excess" coverage is not part of the insurance policy that is subject to the MVFRA and, consequently, its public policy considerations. *See* S.C. Code Ann. § 56-9-20(d) (2006) (stating "excess or additional coverage shall not be subject to the provisions of this chapter," and "the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this article [Article 1 of Chapter 9]"). However, by its express terms, section 56-9-20(d) limits its reach to the provisions in the MVFRA. *Id.* (stating excess coverage "shall not be subject to the provisions of this chapter," i.e, Chapter 9 of Title 56); *see id.* § 56-9-10 ("This chapter [Chapter 9 of Title 56] may be cited as the 'Motor Vehicle Financial Responsibility Act.'"). As a result, section 56-9-20(d) has no bearing on the application of *other* motor vehicle laws, such as section 38-77-142, or the related consideration of our state's public policy. *See generally id.* § 56-9-100 ("This chapter [Chapter 9 of Title 56] shall in no respect be considered a repeal of any other provision contained in this Title or the motor vehicle laws of this State but shall be considered as supplemental and cumulative thereto.").

see no reason to depart from this procedure here, as suggested in the concurrence/dissent, as it would be a hollow victory indeed for the prevailing parties if we were to enforce the offending provision here and restrict relief to prospective cases only. Where courts have found insurance provisions to be void as against public policy, they have, as a matter of course, refused to give any effect to those provisions in the appeals before them. *See generally Lewis v. W. Am. Ins. Co.*, 927 S.W.2d 829, 836 (Ky. 1996); *Watters v. Dairyland Ins. Co.*, 361 N.E.2d 1068 (Ohio Ct. App. 1976); *Ryan v. Knoller*, 695 A.2d 990 (R.I. 1997).

## IV. CONCLUSION

We agree with the circuit court that GEICO's policy is not ambiguous, but we conclude the family step-down provision, which reduced the coverage under the liability policy from the stated policy amount to the statutory minimum, is violative of public policy and is, therefore, void. The provision not only conflicts with the mandates set forth in section 38-77-142, but its enforcement would be injurious to the public welfare.

**AFFIRMED IN PART, REVERSED IN PART.**

**TOAL, C.J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs.**

**JUSTICE PLEICONES:** I agree with the majority that the insurance policy at issue here is not ambiguous, but disagree with the finding that the family step-down provision offends South Carolina's public policy. I therefore concur in part and dissent in part, and would therefore affirm the circuit court order.

The majority finds the family step-down provision offends public policy as expressed by the General Assembly in S.C. Code Ann. §38-77-142 (C) (2006). In my opinion, reliance on § 38-77-142 is misplaced here, as that statute is concerned with the persons who must be covered under an automobile insurance policy, and nothing in the family step-down alters the individuals covered by the GEICO policy. In my view, the relevant statutes against which we should judge the step-down are S.C. Code Ann. 38-77-140 (2006)[9] and S.C. Code Ann. § 56-9-20 (d)(2006).[10] I find nothing in the family step-down provisions that offends the policies expressed in these statutes.

Section 38-77-140 provides that all South Carolina automobile insurance policies must contain "a provision insuring the persons defined as insured against losses from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles . . ." and then establishes the minimum liability limits. § 38-77-140. The statute concludes "Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements." *Id*. Section 38-77-140 is the statute that establishes the minimum monetary coverage that must be a part of every South Carolina automobile liability policy. While this section permits but does not require an insurer to offer a policy that provides coverage in excess of the minimums, § 38-77-140 contains no language analogous to that found in § 38-77-142 (C).

Sections 38-77-142(A) and (B), on the other hand, are concerned with the persons who must be afforded coverage under an automobile insurance policy, and not with

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[9] This version of the statute rather than the amended version found in the 2012 Supplement applies here.

[10] This section found in the Motor Vehicle Financial Responsibility Act (MVFRA), S.C. Code Ann. §§56-9-10 *et seq.* (2006 and Supp. 2012), states that any liability coverage offered over the minimum statutory limits is "not subject to the provisions of this chapter." Thus the legislature has explicitly permitted insurers to offer different terms so long as the mandatory minimum coverage amounts are met. Nothing in GEICO's family step-down provision offends the MVFRA.

the amount of coverage that must be offered. When § 38-77-142(C) voids any provision "which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section," it is referring only to the persons who must be covered, which is the subject of § 38-77-142, and not to the monetary amount of liability coverage, which is the subject of § 38-77-140. In my opinion, a family step-down provision does not offend § 38-77-142(C) because it does not limit or reduce the type of coverage to an individual identified in § 38-77-142(A) or (B), but rather only reduces the amount of monetary coverage to the minimum limits found in § 38-77-140.

Moreover, we have already decided that an automobile insurance policy may contain a provision stepping-down coverage to minimum limits without offending public policy. *Universal Underwriters Ins. Co. v. Metropolitan Prop. and Life Ins. Co.*, 298 S.C. 404, 380 S.E.2d 858 (Ct. App. 1989) (insurers have the right to limit their liability within statutory limits, and while permitted to offer additional coverage, are only required to provide the mandatory minimums). In my opinion, given the pervasive statutory regulation of automobile insurance policies, it is for the General Assembly and not for the Court to decide that a family step-down provision offends South Carolina's public policy. That the legislature has not acted to alter the rule announced in *Universal Underwriters* indicates to me that we were correct in holding that step-downs are valid. Finally, if we are to change the rules and now prohibit step-down provisions in automobile insurance policies, we should do so prospectively. Such a delay would permit both insurers and insureds entering contracts after the date this opinion becomes final to decide what coverage they will offer, and what coverage they will buy.

I would affirm.

**KITTREDGE, J., concurs.**

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

Clifford C. Hansen, Respondent/Appellant,

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.; Beechwood Development Group of South Carolina, LLC; and Beechwood Development Group, Inc., Defendants,

Of whom Beechwood Development Group of South Carolina, LLC, is the Appellant/Respondent.

Appellate Case No. 2011-190886

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Appeal from Charleston County
The Honorable Kristi L. Harrington, Circuit Court Judge

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Opinion No. 27436
Heard February 4, 2014 – Filed August 20, 2014

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**REVERSED**

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Tanya A. Gee, Manton M. Grier, Jr., and Val H. Stieglitz, III, all of Nexsen Pruet, LLC, of Columbia, for Appellant/Respondent.

William E. Hopkins, Jr., of Hopkins Law Firms, LLC, of Pawleys Island, for Respondent/Appellant.

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**JUSTICE HEARN:** At its simplest, this appeal concerns whether a limited liability company (LLC) may be held liable for the actions of a promoter and whether any evidence to support such liability was presented here. We reverse and hold the circuit court erred in denying the directed verdict on the issue of liability because there was no evidence on which a jury could hold the defendant Beechwood Development Group of South Carolina, LLC (Appellant) liable.

## FACTUAL/PROCEDURAL BACKGROUND

The events giving rise to this lawsuit involve numerous individuals and corporate entities and are particularly fact-intensive. Prior to recounting those facts in detail, briefly, the facts are these: Clifford Hansen, the plaintiff, was introduced to Robert Fields and through Fields engaged the services of Beechwood Advisory Group, Inc. (Advisory Group) to assist him in procuring capital in order to purchase a water bottling company in South Carolina. Fields and Hansen worked together toward this goal until Fields disavowed any obligation to Hansen and effectively cut him out of the deal. In doing so, Fields found investors, formed Appellant, and purchased the water bottling company. Hansen sued Appellant for the actions of Fields and his various corporate entities, and following the denial of Appellant's motion for a directed verdict, a jury returned a verdict in favor of Hansen.

In much greater detail, the facts are as follows. Hansen, an entrepreneur, sought to purchase Hickory Springs Water Company, Inc. (Water Company) in Elloree, South Carolina. He met with the company's owner, George Milner, and thereafter, Milner produced a letter of understanding setting forth initial terms for the purchase. Hansen created Carolina Springs Bottling, LLC as the entity that would purchase Water Company, and because he did not have the necessary capital to close the deal, he approached Fields about locating investors and financing for him. Fields was a Charleston businessman who was involved in and acted on behalf of a number of corporate entities including Advisory Group which was owned by Fields, Dennis Byrd, Andrew Easter, and Richard Gregg.

Advisory Group agreed to represent Hansen in procuring capital and produced a letter of understanding to that effect dated December 16, 2003, which Fields signed on behalf of the corporation. The agreement provided that Advisory Group would assist Hansen in securing capital and financing the purchase. However, on January 12, 2004, Advisory Group terminated its representation of

Hansen and informed him that it reserved the right to purchase Water Company.[1] During that same week, the four partners of Advisory Group—Fields, Byrd, Gregg, and Easter—created a new corporation, Beechwood Development Group, Inc. (Development Group), whose purpose was to purchase the water company.

Despite the letter and his knowledge that Fields, Byrd, Gregg, and Easter had set up a new corporate entity for the purpose of purchasing Water Company, Hansen approached Fields about the possibility of his wealthy friend from Texas, David Hunt, investing in the deal. Hansen and Fields then executed a second agreement whereby Advisory Group again committed to assist Hansen in finding capital.[2] Hansen would compensate Advisory Group in the amount of $100,000 for those services. It also provided that in the deal, Hunt would own 75% and Hansen would own 25% of the resulting company, Carolina Springs Bottling, LLC. Carolina Springs Bottling, LLC would own 100% of Carolina Springs Bottling, Inc. which would be the entity that owned the springs and bottling facility.[3]

Several weeks after flying to Texas to meet with Hunt, Fields sent an e-mail to Patrick Cobb, a business acquaintance, soliciting interest in the deal. Fields signed the e-mail as "Partner, Beechwood Advisory Group, Inc." and attached an "Executive Summary" for Carolina Springs Bottling, Inc. The Executive Summary mentioned Hansen in three respects. The cover page provided contact information for "Clifford Hansen" and "Robert Fields, Beechwood Advisory Group." It also described the proposed management team of Carolina Springs Bottling, Inc. as including Hansen as chief executive officer and listed Hansen as a member of the board of directors.

Three days later, Fields e-mailed Cobb with a new purpose, signing as "Partner, Beechwood Advisory Group." He proposed a new deal in which Hunt would own 60% of the equity, "Beechwood" would own 15%, another investor

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[1] Advisory Group had previously informed Hansen that he failed to pay as required by the agreement and if he did not meet the requirements of the agreement within a week, it would cease representing him.

[2] More specifically, Advisory Group agreed to secure capital from Hunt, advise Hansen on negotiations with Milner, and assist in obtaining bank financing.

[3] Although the agreement consistently referred to Advisory Group, Fields indicated by his signature that he executed it on behalf of Development Group.

would own 15%, and 10% would "be for the owner/operator (Hansen) on an earn in basis." About this time, Fields and Hansen's relationship became strained. Viewing the facts in the light most favorable to Hansen as we must, Hansen realized Fields was working to acquire the water company to his exclusion. Hansen thus began working on his own to secure financing.[4]

On May 26, Fields sent Hansen a letter on behalf of Advisory Group stating that it had "terminated any representation on [his] behalf." By this time, Hansen's letter of understanding with the water company's owner had long since expired. Hansen sent Milner a proposed new letter of understanding, but Milner did not sign it.

On July 7, Hickory Springs Water, LLC was incorporated. The entity's members were Appellant and Greenbax Enterprises, Inc., with Appellant owning a 48% interest and Greenbax owning a 52% interest.

On July 12, Appellant was formed. The members of the LLC were Development Group which owned a 43.5% interest, ACC Ventures, LLC which owned a 41.5% interest, and TDTF Partnership which owned a 15% interest. ACC Ventures was an LLC operated by Cobb and owned by him and his three sons. ACC Ventures committed to the deal in July. TDTF Partnership was a partnership between George Finnegan and James Felder. Finnegan met Fields in March of 2004 and became involved in the deal in May.

Hickory Springs Water, LLC ultimately purchased Water Company. At the closing, Fields was present on behalf of Appellant.

Hansen brought suit against Fields Company, LLC; Advisory Group; Development Group; and Appellant. He asserted the defendants were all jointly and severally liable for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, misrepresentation, conversion, and

[4] Hansen applied for a bank loan in his effort to secure financing. The bank requested financial information for Water Company in order to decide whether to approve the loan. Hansen had previously either prepared or obtained financial documents from Milner and then provided those documents to Fields. Due to a computer crash, Hansen lost the documents and contacted Fields seeking copies. Fields responded to his request by rejecting the idea of bank financing and refusing to provide the documents.

interference with prospective contractual relations. Prior to trial, he settled his claims against Advisory Group and potential claims against Gregg and Byrd. Fields Company, LLC and Development Group did not file an answer and ultimately defaulted. Appellant proceeded to trial.

Following the close of Hansen's case, Appellant moved for a directed verdict on all causes of action, arguing the allegedly wrongful acts were all committed by Fields, Advisory Group, and Development Group, and it should not be held liable for those other parties' acts. The circuit court denied the motion, concluding there was evidence from which a jury could find that Appellant ratified the conduct of the other parties.

The circuit court permitted a bifurcated jury deliberation whereby the jury would first determine liability on all claims. If the jury found Appellant liable on any of the claims, Hansen would then have to elect a cause of action. The jury would then determine Hansen's damages.

The jury returned a liability verdict for Hansen on all causes of action. Thereafter, Hansen elected to proceed on his interference with prospective contractual relations claim, and the jury returned a damages verdict in the amount of $1,189,408. The trial court granted Appellant's motion for a set off and reduced the verdict by $130,000, the amount of Hansen's settlement with the other defendants.

The parties filed cross-appeals, and this Court certified the case pursuant to Rule 204(b), SCACR.

## LAW/ANALYSIS

Appellant appeals the denial of its motion for a directed verdict on all of Hansen's claims, asserting there was no evidence from which a jury could conclude that it is liable to Hansen. The parties do not dispute that Appellant did not breach any contract with Hansen, nor did it act tortiously towards him. Rather, Hansen's theory of the case depends on Appellant being liable for its promoters'—specifically Fields' and his related entities'—acts.[5]

[5] A promoter of a corporate entity is a person who acts to organize the entity by preparing it to transact business and establishing it. *See Bivens v. Watkins*, 313

The first step in resolving this case is determining if and when a limited liability company can be held liable for its promoter's pre-incorporation contracts or torts, issues of first impression in South Carolina. Turning first to a corporate entity's liability for preformation contracts, we adopt the prevailing rule that "[b]ecause a corporation cannot have agents, contract for itself, or be contracted with prior to its incorporation, it is not liable on any contracts that a promoter makes for its benefit prior to incorporation unless it assumes the obligation by its own act after incorporation . . . ." 18 Am. Jur. 2d *Corporations* § 123 (2014); *see also Duray Dev., LLC v. Perrin*, 792 N.W.2d 749, 755 (Mich. Ct. App. 2010) (applying the rule to a limited liability company); *JCL Props., LLC v. Equity Land Developers, LLC*, 958 N.Y.S.2d 433, 434 (N.Y. App. Div. 2013) (applying the rule to a limited liability company).

While initially not liable for a promoter's contracts, a corporation may become liable for a promoter's preformation contract either through expressly ratifying the contract or through implicitly ratifying it by accepting its benefits with full knowledge of its terms. *See, e.g.*, *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 745 (Del. 2006) ("'[I]f the subsequently formed corporation expressly adopts the preincorporation agreement or implicitly adopts it by accepting its benefits with knowledge of its terms, the corporation is bound by it.'" (quoting *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 350 (Del. Ch. 2003)); *Yost v. Early*, 589 A.2d 1291, 1300 (Md. Ct. Spec. App. 1991) ("If the corporation ratifies the contract or accepts its benefits with full knowledge of the circumstances of their acquisition, however, the corporation is bound by the contract's obligations.") (internal quotation omitted); *Fortune Furniture Mfg. Co. v. Mid-South Plastic Fabric Co.*, 310 So. 2d 725, 727 (Miss. 1975) ("The general rule is that a contract made by promoters with a view towards incorporation will be binding upon the corporation if it accepts benefits of the contract with the full knowledge of the terms of the contract."); 18 Am. Jur. 2d *Corporations* § 123 ("A corporation may after its organization become liable on preliminary contracts made by its promoters by expressly adopting such contracts or by receiving the benefits from them . . . .").

Here, the directed verdict should have been granted as to Hansen's contract claims because he failed to present any evidence from which a jury could find that

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S.C. 228, 233 n.5, 437 S.E.2d 132, 135 n.5 (Ct. App. 1993) ("[P]ersons who plan or organize a corporation are 'promoters.'").

Appellant ratified any contract with Hansen.[6] There was no evidence that Appellant expressly ratified any preformation contract. There also was no evidence to show that Appellant benefited from or accepted any benefits of Fields' or his related entities' contracts with Hansen. The contracts Hansen entered into with Advisory Group and Development Group dealt with those entities finding capital for him in order to enable him to purchase Water Company. Appellant wanted to purchase Water Company and was a competitor in that respect. Therefore, Appellant could not and did not benefit from any efforts to find capital for Hansen. Thus, because there was no evidence from which a jury could find that Appellant expressly or impliedly ratified any contract with Hansen, the directed verdict should have been granted as to Hansen's contractual claims.

Turning to Hansen's tort claims, for the preformation torts of a corporate entity's promoter, the rule among those jurisdictions that have considered the issue is that a "corporation is not liable for torts that its promoters committed before it came into existence." 1A William M. Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* § 218 (perm. ed., rev. vol. 2010); *see also Arch Aluminum & Glass Co. v. Haney*, 964 So. 2d 228, 234 (Fla. Dist. Ct. App. 2007) (rejecting the plaintiff's tort claim against a corporation for the acts of its promoters on the basis of the rule that a corporation is not liable for the tortious acts of its promoters); *Nilavar v. Osborn*, 711 N.E.2d 726, 740 (Ohio Ct. App. 1998) ("[A] corporation cannot be held liable for the acts of a promoter that were performed before the corporation's existence."); *Fisk v. Leith*, 3 P.2d 535, 535 (Or. 1931) (holding a corporation cannot be held liable for the acts of its promoter undertaken prior to the corporation's existence); *Edmunds v. Sanders*, 2 S.W.3d 697, 704 (Tex. App. 1999) ("Normally, a corporation which has no legal existence at the time of an incident cannot be liable for that incident."). Hansen has not cited, nor have we found, any authority applying a different rule. Additionally, three policy concerns lead us to conclude that it is the proper rule. First, there is no agency relationship between a promoter and a non-existent corporate entity. Second, the individual tortfeasor—the promoter—is still liable for any tort he committed and thus, the injured party is not denied recourse for the wrong suffered. To the extent the

[6] Hansen failed to point to any particular contract and articulate how it was expressly or impliedly ratified. Rather, Hansen relies on broad and conclusory contentions that Appellant "sought to and did, in fact, ratify all of the actions, agreements, representations, contracts and warranties made by Fields in furtherance of their purchase of [Water Company] . . . ."

promoter owns a portion of the corporate entity, the injured party could use that interest to satisfy any judgment against the promoter. Additionally, other members of the corporate entity could potentially be held liable under a conspiracy theory if they knew of and aided in the tort. *See Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56–57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage."). Third, a contrary rule would permit innocent investors to be financially harmed due to tortious conduct they neither aided nor were aware of and therefore, may stifle investment by causing potential investors to fear that a corporation will be held liable for tortious conduct of which it had no knowledge. Accordingly, we adopt the rule that a corporation is not liable in tort for the preformation acts of its promoter.[7]

Because a corporation is not liable for the preformation acts of its promoter, Appellant cannot be liable in tort for Fields' or his related entities' preformation acts. Thus, the circuit court should have granted the motion for a directed verdict.

## CONCLUSION

Because Hansen failed to present any evidence Appellant ratified Fields' or his related entities' contracts, Appellant was entitled to a directed verdict on the contract claims. Additionally, consistent with the prevailing rule elsewhere, we

[7] Although inapplicable here because there is no evidence Appellant ratified Fields' conduct, we recognize there are exceptions to this rule. *See Nanodetex Corp. v. Defiant Techs.*, 349 F. App'x 312, 322 (10th Cir. 2009) ("[C]orporations are usually prevented from retaining the benefits of wrongful conduct while escaping liability for it."); 18 C.J.S. Corporations § 104 ("A corporation is not liable for the fraud, negligence, or other torts of its promoters or corporators prior to its creation, unless it has in some way rendered itself liable by its own act after acquiring corporate existence.").

hold Appellant was not liable for any torts committed by its promoters. Accordingly, we hold the circuit court erred in denying Appellant's motion for a directed verdict and reverse.[8]

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

[8] Because our resolution of this issue is dispositive, we need not reach Hansen's arguments or the other issues raised by Appellant. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

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

Edward D. Sloan, Jr., individually and on behalf of all others similarly situated, and South Carolina Public Interest Foundation, Appellants,

v.

South Carolina Department of Revenue and James F. Etter, its Director, Respondents.

Appellate Case No. 2013-000577

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Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 27437
Heard May 20, 2014 – Filed August 20, 2014

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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James G. Carpenter and Jennifer J. Miller, of Carpenter Law Firm, PC, of Greenville, for Appellants.

Milton G. Kimpson, Adam N. Marinelli, and Harry T. Cooper, Jr., of Columbia, for Respondents.

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**JUSTICE KITTREDGE:** After the South Carolina Department of Revenue (DOR) failed to produce public documents requested by Appellant Edward D.

Sloan, Jr., Sloan[1] filed this Freedom of Information Act[2] (FOIA) action against DOR and its director, James F. Etter, seeking declaratory relief, injunctive relief, and attorney's fees and costs. After suit was filed, DOR produced the requested information and asserted that Sloan's action was mooted and should be dismissed. The trial court agreed with DOR and dismissed the complaint, denying all relief. We affirm in part, reverse in part, and remand for an award of reasonable attorney's fees and costs to Sloan.

**I.**

On November 19, 2012, Sloan sent a FOIA request to DOR, seeking specific documents related to the procurement process through which DOR retained a computer security company in response to a cyber-attack on DOR databases.

DOR responded to Sloan by letter on December 10, 2012:

> The South Carolina Department of Revenue has received your Freedom of Information request dated November 19, 2012. Your request is currently being researched and reviewed. As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you.
>
> If we are unable to locate, obtain or release the requested file(s) you will be notified of the decision and the reasons for it.

"The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." *Sloan v. Friends of the Hunley, Inc.* (*Friends I*), 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006) (citing *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991)). To that end, FOIA provides:

> Each public body, upon written request for records made under this chapter, *shall within fifteen days* (excepting Saturdays, Sundays, and

[1] Sloan brought this action on behalf of himself and all others similarly situated as well as the South Carolina Public Interest Foundation. We refer to these parties collectively as "Sloan."

[2] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2013).

> legal public holidays) of the receipt of any such request notify the person making such request *of its determination and the reasons therefor*. Such a determination shall constitute the *final opinion* of the public body as to the *public availability* of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

S.C. Code Ann. § 30-4-30(c) (2007) (emphasis added). Part of the December 10, 2012 letter appears compliant with section 30-4-30(c), but the final one-sentence paragraph—the "if we are unable to . . . release the requested file(s) you will be notified of the decision" language—seeks to delay DOR's final determination as to the public availability of the requested documents. DOR's response is best characterized as "we will get to it when we get to it," which is manifestly at odds with the clarity mandated by section 30-4-30(c).

When a public body does not render a final opinion within the fifteen-day determination period, FOIA provides for both declaratory and injunctive relief. *Id*. § 30-4-100(a) (2007). FOIA also provides for attorney's fees and costs to the prevailing party. *Id*. § 30-4-100(b) (2007).

Because DOR's response did not satisfy the requirements of FOIA, Sloan filed suit on December 21, 2012, seeking a declaratory judgment that DOR's actions violated FOIA, an injunction requiring DOR to cease violating FOIA by producing the requested documents, and attorney's fees and costs pursuant to section 30-4-100(b).

Three weeks after Sloan filed suit, DOR provided Sloan with the documents he had requested. The trial court held a hearing at which Sloan conceded that his request for injunctive relief was mooted by DOR's production of documents, but Sloan maintained that his request for declaratory relief and attorney's fees and costs remained viable. Conversely, DOR contended Sloan was entitled to no relief. The trial court, in a Form 4 order, summarily ended the case, thereby agreeing with DOR and denying all relief Sloan sought. Sloan appealed, and this Court certified the appeal pursuant to Rule 204(b), SCACR.

## II.

On appeal, Sloan contends that DOR did not comply with FOIA, that his claim for declaratory relief was not mooted by DOR's production of documents, and that he is entitled to reasonable attorney's fees and costs.

DOR's response did not comply with the statutory dictates of FOIA. While DOR did respond to Sloan, its equivocal and evasive response was not a final opinion on the public availability of the requested documents and did not state whether the information requested by Sloan was publicly available for inspection, copying, or production.[3] *See* S.C. Code Ann. § 30-4-30(c) (requiring a "final opinion of the public body as to the public availability of the requested public record" within fifteen days of the receipt of a FOIA request).

Despite DOR's failure to comply with the requirements of FOIA, we hold the trial court properly found that Sloan's request for a declaratory judgment was mooted when DOR produced the requested information. Indeed, Sloan acknowledges that his claim for injunctive relief was mooted when he received the documents. Sloan contends, however, that the claim for declaratory relief remained viable. We disagree, for "the information Sloan sought has been disclosed, [and] there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Friends I*, 369 S.C. at 26, 630 S.E.2d at 478. This, however, does not end the case, for Sloan further sought to recover his attorney's fees and costs[4] as provided in section 30-4-100(b).

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[3] We are not unsympathetic with the burden placed on public bodies to make a final determination within fifteen days. This requirement is, however, a legislatively mandated time period with which public bodies must comply and courts must enforce.

[4] DOR contends the issue of attorney's fees and costs is not preserved for appellate review because the Form 4 order did not explicitly reference the issue. We disagree, for Sloan sought attorney's fees and costs in his complaint and the issue was argued at the hearing. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("'[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.'" (quoting *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939))). By denying all requested relief and "ending" the case, the Form

Sloan is the prevailing party. *See Sloan v. Friends of the Hunley, Inc.* (*Friends II*), 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed." (citations omitted)). As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs.[5] Sloan is entitled to recover his reasonable attorney's fees and costs in this action. *See Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions."). We reverse the trial court and remand to the trial court for an award of reasonable attorney's fees and costs to Sloan.

**III.**

We affirm the trial court's dismissal of Sloan's claims for declaratory and injunctive relief, and we reverse the denial of attorney's fees and costs and remand for a determination of Sloan's reasonable attorney's fees and costs in this action.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**TOAL, C.J., and BEATTY, J., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which HEARN, J., concurs.**

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4 order necessarily ruled on Sloan's request for attorney's fees and costs, as well as his request for injunctive and declaratory relief. Because we construe this summary dismissal as a denial of Sloan's request for attorney's fees and costs, the remand proposed by the dissent to revisit the issue anew is not warranted.

[5] Sloan's request for attorney's fees and costs is not limited to the period of time concluding with the production of the requested documents. The temporal limitation in *Friends II* was a consequence of the law of the case doctrine from *Friends I*, as we were "constrained to reverse the award of fees beyond the time [the public body] produced the requested documents." *Friends II*, 393 S.C. at 158, 711 S.E.2d at 898. No such constraint is present here.

**JUSTICE PLEICONES:** I concur in part and dissent in part. I agree with the majority's holding that DOR's response to Sloan's document request failed to comply with the requirement of FOIA. [6] I further agree that Sloan's action for declaratory relief was rendered moot when DOR produced the requested information.

I dissent from that portion of the majority's decision as mandates an award of attorney's fees and costs to Sloan upon remand. The award of fees and costs to the prevailing person or entity in a suit brought pursuant to section 30-4-100(a) is entrusted to the discretion of the trial court. S.C. Code Ann. § 30-4-100(b) (2007) ("If a person or entity seeking such relief prevails, he or it *may* be awarded reasonable attorney fees and other costs of litigation.") (emphasis supplied). The trial court in this case declined to exercise its discretion in regard to an award of fees and costs. Therefore, I would remand this case to circuit court where the parties should be permitted to present the full panoply of considerations germane to an award of fees and costs.

**HEARN, J., concurs.**

[6] I share in the majority's concern over the burden placed on public bodies to make a final determination within fifteen days. *See* S.C. Code Ann. § 30-4-30(c) (2007). I note that our version of FOIA, unlike the Federal Act, does not allow an agency to extend its determination of a FOIA request where that request is especially burdensome or voluminous. *See* 5 U.S.C. 552 § (a)(6)(B)(i)-(iii).

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

James Robert Malloy, Plaintiff,

v.

Swain N. Thompson, Jr., Defendant.

In the Matter of: Estate of Robert L. Chamblee.

James Robert Malloy, Respondent,

v.

Swain N. Thompson, Jr., Merrill Lynch, Pierce, Fenner & Smith, Inc., Joseph T. Argo, and Greene and Company, L.L.P., Defendants,

Of whom Merrill Lynch, Pierce, Fenner & Smith, Inc. is the Appellant,

In the Matter of: Estate of Robert L. Chamblee.

Appellate Case No. 2012-213385

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Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

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Opinion No. 27438
Heard April 16, 2014 – Filed August 20, 2014

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**AFFIRMED**

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Christopher A. Ogiba and E. Brandon Gaskins, both of Moore & Van Allen, PLLC, of Charleston; Tara A. LaClair, Rodney J. Heggy, and Mary H. Tolbert, all of Crow & Dunleavy, PC, of Oklahoma City, OK, for Appellants.

James R. Gilreath and William Mitchell Hogan, both of Gilreath Law Firm, PA, of Greenville, and S. Alan Medlin, of Columbia, for Respondents.

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**JUSTICE PLEICONES:** We affirm the circuit court's denial of Appellant Merrill Lynch's motion to dismiss and compel arbitration. Because we find Respondent Robert Malloy's claim is not based on a duty derived from the agreements containing arbitration clauses as asserted by Merrill Lynch, we agree with the circuit court that as a non-signatory Malloy cannot be compelled to arbitrate under these agreements.

## FACTS

This action arises out of a dispute between Malloy and Swain R. Thompson, regarding assets of Robert L. Chamblee (Decedent). The complaint alleges that Thompson, with the assistance of Merrill Lynch,[1] acted to disrupt Decedent's estate plan and divert Decedent's assets from Malloy to Thompson.

Malloy denominates his claims against Merrill Lynch as: (a) intentional interference with inheritance;[2] (b) aiding and abetting intentional interference with inheritance; (c) and civil conspiracy.

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[1] The complaint also alleges that the other named defendants, Greene and Company, L.L.P. and Joseph T. Argo, assisted in diverting these assets.

[2] The parties give this claim different titles including: tortious interference with inheritance, tortious interference with an expectancy of inheritance, intentional interference with inheritance, and intentional interference with an expectancy of inheritance. The correct name is intentional interference with inheritance. *See*

Merrill Lynch moved to dismiss and compel arbitration arguing that its only connection to this dispute is through its contractual duties under the client relationship agreements (CRAs) entered into between Decedent and Merrill Lynch, which contained mandatory arbitration clauses. Merrill Lynch argued that although Malloy was a non-signatory to the agreements, any duty, if any, owed by Merrill Lynch to Malloy derives from the CRAs, and therefore, he is bound by the arbitration clauses.

The circuit court denied the motion and found that while non-signatories may be bound to an arbitration agreement under common law principles of contract and agency law, none of those principles apply in this case, and therefore, there was no basis to compel Malloy to arbitrate. Merrill Lynch appealed.

## ISSUES

1. Whether Malloy has sufficiently pled a valid claim against Merrill Lynch since South Carolina has not adopted the tort of intentional interference with inheritance?

2. If South Carolina does recognize the tort, are Malloy's claims subject to arbitration?

## DISCUSSION

### 1. Did Malloy's complaint sufficiently allege a valid cause of action?

Merrill Lynch contends for the first time on appeal that the circuit court should have dismissed Malloy's claim for failure to state a claim upon which relief can be granted because the tort it alleges, intentional interference with inheritance, is not recognized by South Carolina. Additionally, Merrill Lynch argues that even if South Carolina were to recognize the tort, Malloy's complaint fails to allege facts necessary to sustain such an action. We decline to address these contentions because this issue was neither argued nor ruled upon in the proceedings below.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The issue must be sufficiently clear to bring into focus the precise nature of

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*Douglass v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001) (discussing "intentional interference with inheritance").

the alleged error so that it can be reasonably understood by the judge. *Id.* at 76, 497 S.E.2d at 733. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Id.*

The issue whether South Carolina recognizes intentional interference with inheritance was neither raised nor ruled upon below, nor was there any discussion or ruling as to the sufficiency of Malloy's complaint. While our rules allow us to affirm the trial court's ruling on any ground appearing in the record, Rule 220 SCACR, Merrill Lynch asks us to reverse on such a ground. We decline to do so, and this opinion must not be understood as either adopting or rejecting the tort of intentional interference with inheritance.

**2. Should Malloy's claims against Merrill Lynch be subject to arbitration?**

Merrill Lynch contends that Malloy is bound by the arbitration agreement contained in two CRAs that Decedent executed with Merrill Lynch. Merrill Lynch avers that at all times germane to this asserted claim, its relationship with Decedent was pursuant to the CRAs. Merrill Lynch contends that any duty owed to Malloy was derivative of its duty to Decedent under the CRAs, and therefore, the circuit court erred in not compelling arbitration. We disagree.

The circuit court ruled that as a non-signatory to the CRAs Malloy could be bound by an arbitration agreement under common law principles of contract and/or agency law, but none of those principles apply in this case, and therefore, there was no basis to compel Malloy to arbitrate. We agree.

The court of appeals has recognized that five theories "'aris[ing] out of common law principles of contract and agency law' could provide a basis 'for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" *Pearson v. Hilton Head Hosp.,* 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416 (4th Cir. 2000)). In addition to these theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347 (5th Cir. 2003).

Merrill Lynch does not argue that any contract, agency, or third-party beneficiary theory supports a finding that Malloy is obligated to arbitrate pursuant to the CRAs.[3] Instead, it presents its general argument that arbitration should be compelled because any duty violated by Merrill Lynch is derivative of its duties to Decedent under the CRAs.

Merrill Lynch's argument that a derivative "duty" from the CRAs binds Malloy, a non-signatory to the CRAs, conflates the duties created by the CRA contracts and general tort duties. Malloy does not claim that Merrill Lynch breached a duty created by the CRAs, but rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance. The contractual duties between Decedent and Merrill Lynch are irrelevant to whether Merrill Lynch intentionally interfered with Malloy's expected inheritance. Accordingly, we find that Malloy is not bound by the CRA's arbitration agreements and affirm the circuit court's denial of Merrill Lynch's motion to dismiss and compel arbitration.

**AFFIRMED.**

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

[3] Regardless, we agree with the circuit court that in this case none of these theories could bind Malloy to the arbitration agreement CRAs.

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

The State, Petitioner,

v.

Bentley Collins, Respondent.

Appellate Case No. 2012-211266

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Dillon County
The Honorable Paul M. Burch, Circuit Court Judge

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Opinion No. 27439
Heard April 15, 2014 – Filed August 20, 2014

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**REVERSED**

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

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent.

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**JUSTICE BEATTY:** Respondent Bentley Collins was convicted of involuntary manslaughter and three counts of owning a dangerous animal causing

injury to a person after a ten-year-old boy was killed and partially eaten by his dogs, most of whom were pitbull mixes. The State appeals from a decision of the Court of Appeals that reversed and remanded the matter for a new trial based solely on the trial court's admission of seven pre-autopsy photos of the victim. *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). We reverse.

## I. FACTS

On November 3, 2006, the mother of the victim returned to her home in Dillon County around 7:00 p.m. and discovered that her ten-year-old son had not come home for dinner at 5:30 p.m. as expected. She checked with her aunt, who resided with her, and then began looking around the neighborhood. She called the police when she could not find her son. The police arrived and the mother rode with them as they scoured the neighborhood. Shortly after 10:00 p.m., they discovered the boy's body on the ground in Collins's yard, with a group of dogs nearby. The mother poignantly recalled that her son "was tore to pieces. Pieces."

The mother and the police tried to get to the boy, but the dogs ran at them each time they approached his body. Agents from SLED arrived, and they could not process the crime scene until animal control employees arrived to capture and remove the dogs from the scene.

Neither Collins nor any of his family members were at home. Collins had six dogs on the premises, all of which were unrestrained. Collins had no fence or dog pens, and neighbors reported that he never kept his dogs on leashes or chains. Most of the dogs appeared to be pitbull mixes. The three largest dogs weighed 47 pounds, 44 pounds, and 36 pounds, respectively, and they ranged in age from about one to two years old. Several of the dogs had bite wounds on their shoulders, which was indicative of dog fighting. One of the female dogs captured was determined to be in heat.

An autopsy of the victim revealed the boy died of extensive traumatic injury secondary to being severely mauled by dogs. According to the forensic pathologist, Edward Proctor, the boy suffered a "tremendous number" of bite marks on his legs and had "extensive" loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were "completely eaten away" by the dogs. Areas of the boy's chest and his arm had also been eaten, exposing the bone. The boy's jugular vein on the left side was torn in half, causing significant blood loss leading to his death. The pathologist determined the boy "would have

been alive until the injuries to the neck that transected the blood vessel in the neck allowing him to bleed enough until he either became unconscious or expired."

Two boys who lived in the neighborhood, "J" and "B," gave statements to the police the day after the incident. They were in J's yard at around sunset on November 3, 2006 when they heard growling and barking nearby. J had been looking for his puppy, so they went to investigate and saw three of Collins's dogs eating something on the ground that appeared to be "a bloody piece of meat." As J walked to within about ten feet of the "meat," another dog that they had not seen ran out and jumped on J, knocking him to the ground. J shoved that dog away, but another one then came after him. One of the larger dogs bit J "behind [his] neck," so the boys left immediately.

Collins was indicted for involuntary manslaughter and three counts of owning a dangerous animal[1] and allowing it to be unconfined, resulting in the mauling death of the victim. A jury convicted Collins of all charges. Collins appealed to the Court of Appeals, which reversed and remanded for a new trial based solely on the admission of seven photographs that were taken by the pathologist to document the victim's injuries prior to performing the autopsy. This Court granted the State's petition for a writ of certiorari.

## II. STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Wise,* 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

[1] The State charged Collins with three counts of owning a dangerous animal (although six dogs were at the scene) based on the fact that the neighborhood boys specifically saw three of Collins's dogs eating the victim's body.

## III. LAW/ANALYSIS

On appeal, the State contends the challenged photos, taken before the autopsy was commenced, accurately documented the injuries sustained by the victim in this case and, while graphic, were properly admitted in accordance with the trial court's broad discretion over evidentiary matters. The State argues the Court of Appeals (1) failed to give due deference to the trial court's decision, (2) erred in finding the photos were more prejudicial than probative, (3) erred in finding the photos were not material to the elements of the offenses charged and corroborative of other evidence, and (4) erred in making a purely emotional decision to reverse and remand for a new trial. We agree.

### A. Admissibility of Photos

In this case, Collins faced three charges under section 47-3-760 for being the owner of a "dangerous animal"[2] that attacked and injured a human being in

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[2] Section 47-3-710(A) defines "dangerous animal" to "mean[] an animal of the canine or feline family:

> (1) which the owner knows or reasonably should know has a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings or domestic animals;
>
> (2) which:
>
> (a) makes an unprovoked attack that causes bodily injury to a human being and the attack occurs in a place other than the place where the animal is confined as required by Section 47-3-720; or
>
> (b) commits unprovoked acts in a place other than the place where the animal is confined as required by Section 47-3-720 and those acts cause a person to reasonably believe that the animal will attack and cause bodily injury to a human being;
>
> (3) which is owned or harbored primarily or in part for the purpose of fighting or which is trained for fighting."

violation of section 47-3-710(A)(2)(a) of the South Carolina Code. *See* S.C. Code Ann. § 47-3-760(B) (Supp. 2013) (penalty for dangerous animals). As noted by the Court of Appeals, under section 47-3-760(B) and its associated statutes, the State was required to prove (1) the defendant owned or had custody or control of a canine or feline; (2) he knew or reasonably should have known the animal had a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings; (3) the animal made an unprovoked attack; (4) the attack caused bodily injury to a human being; and (5) the attack occurred while the animal was unconfined on the defendant's premises. *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012).

Collins was also charged with involuntary manslaughter. *See* S.C. Code Ann. § 16-3-60 (2003) (providing "[a] person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence," which "is defined as the reckless disregard of the safety of others"). To establish this offense, the State must show the defendant killed another person without malice and unintentionally while the defendant was engaged in either (1) an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) a lawful activity with a reckless disregard of the safety of others. *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003); *State v. Tyler*, 348 S.C. 526, 560 S.E.2d 888 (2002).

In this case, the ten-year-old victim's body was discovered in the defendant's yard, having suffered numerous bite marks and being partially eaten by the dogs. There were no eyewitnesses to the attack. At trial, the State attempted to piece together a theory of what transpired with the best evidence available, the victim's body, and its expert witnesses, which included a forensic pathologist and a dog behaviorist. They theorized that it was an unprovoked attack in which the victim was taken down by his legs first based on the wounds observed on the body, and

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S.C. Code Ann. § 47-3-710(A) (Supp. 2013). Section 47-3-720, referenced above, provides: "No person owning or harboring or having the care or the custody of a dangerous animal may permit the animal to go unconfined on the premises," with "unconfined" in this context meaning "the animal is not confined securely indoors or confined in a securely enclosed fence or securely enclosed and locked pen or run area upon the person's premises." *Id.* § 47-3-720.

then the boy suffered additional harm to his jugular vein and other areas, leading to his death. According to the State's dog behavior expert, the dogs, who were not restrained in any way, acted as a pack and could have been malnourished or mistreated based on the dogs' gaunt appearance, the absence of any food at the scene, and the appearance of the victim's body, which appeared to have been eaten by more than one dog due to the significant tissue loss. The dog expert noted that in over ten years of working for the Sheriff's Office analyzing dog bites, dog attacks, and deaths caused by dogs, this was the worst case he had ever seen.

The State also presented evidence of the dogs' prior acts of aggression towards people in the neighborhood, several occurring while Collins stood by and watched without taking any action to restrain his dogs. For example, B, one of the two boys who came upon the victim's body after the attack, testified he had numerous encounters with the dogs, as they were "never" restrained. B recounted that on at least two occasions, Collins stood by and watched as the dogs ran out into the road after him and his friend J as they drove four-wheelers. Collins did not attempt to intervene. In addition, when B and his mother tried to walk in the neighborhood for exercise, the dogs would "frequently" come out and try to bite their legs, so they wound up having to change their route just to avoid Collins's aggressive dogs.

In order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist, before he began the autopsy. The trial court engaged in an extended colloquy *in camera* with the State and defense counsel in which the trial court allowed both sides to make arguments, and then the attorneys and the court examined the pathologist about each of the proposed photos in turn. The trial court pulled some photos and ultimately allowed into evidence seven of the pre-autopsy photos, State's Exhibits 27 and 30 to 35, over defense counsel's Rule 403, SCRE objection.[3]

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[3] The first two photos, numbers 27 and 30, show the boy's legs having numerous bite marks, but they clearly do not rise to a level that could be deemed unfairly prejudicial. The remaining five photos, 31 to 35, which are the true focus of our inquiry, variously show the boy's exposed jawbone and upper arm bone, and the areas where his chest and face had been partially eaten during the dog attack.

In his trial testimony, Proctor explained that he did not normally take autopsy photos, but in his years of experience he had "never seen an attack by animals of this type, [so he] actually left the autopsy and went to [his] home and brought [his] camera back and took pictures *for [] documentation purposes*." (Emphasis added.) Proctor found there was "tremendous traumatic injury to this young man" that was as "significant [a] traumatic injury as [he had] seen."

During cross-examination, defense counsel questioned Proctor's findings extensively by asking him whether he had surveyed the dogs' teeth marks to determine which dogs inflicted specific injuries, whether the boy's jugular artery was "actually severed," and which came first, the "shredding" of the boy's jugular artery or the veins in his arms, etc. Thus, the nature and extent of the boy's physical injuries as described by the pathologist were in contention by the defense.

Moreover, while Collins did not testify, his witnesses, including his children and friends, did so, and they maintained the dogs were not at all dangerous, that they had never run at people in an aggressive manner, and that they had always been given an abundance of food. The defense opined that the presence of the female dog in heat had perhaps made the dogs more agitated and territorial than normal, but they were not dangerous animals. However, after considering all of the available evidence, the jury made a determination of guilt as to the charges.

The Court of Appeals reversed and remanded for a new trial solely on the basis of the trial court's decision to admit the pre-autopsy photos, reasoning the probative value of the challenged photos was substantially outweighed by their potential for being unfairly prejudicial under Rule 403, SCRE, and that the error was not harmless. *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). The court "agreed[d] that the photos have some probative value in helping the jury," and "recognize[d] that the photos add a visual element not present in the testimony of the witnesses," but ultimately found these considerations were outweighed by the danger of unfair prejudice. *Id.* at 206-12, 727 S.E.2d at 756-60. In finding the trial court abused its discretion, the court repeatedly described the photos as "disturbing" and "gruesome." *Id.* at 208-09, 727 S.E.2d at 757-58.

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'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." Rule 401, SCRE. "Although

relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Id.* "When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Adams,* 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.*

Under our highly deferential standard of review, we conclude, contrary to the Court of Appeals, that the trial court did not abuse its wide scope of discretion in admitting the pre-autopsy photos. The Court of Appeals's obvious revulsion for the evidence, while certainly understandable, permeated its legal analysis. The evidence was highly probative, corroborative, and material in establishing the elements of the offenses charged; its probative value outweighed its potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented.[4]

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. As one court

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[4] To the extent the Court of Appeals stated it would not defer to the trial court's discretion because it did not conduct its "own" Rule 403 analysis, we find the record shows the trial court did thoroughly consider the arguments of both the State and the defense, and it examined each photo while also conducting an examination of the forensic pathologist who took the photographs before making its decision. Moreover, Collins did not object to any alleged delict in the trial court's procedure at the time of the ruling.

has astutely observed, it 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. 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.

*Nichols v. State*, 100 So. 2d 750, 756 (Ala. 1958) (citations omitted); *see also Camargo v. State*, 940 S.W.2d 464, 467 (Ark. 1997) ("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." (internal citation omitted)).

Numerous jurisdictions have found that photos are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case. *See* M.C. Dransfield, Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death*, 73 A.L.R.2d 769 (1960 & Later Case Serv. 2013) (collecting cases involving death photos). 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." *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. Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim's death, the photos here provided concrete evidence as to what transpired on that fateful day. We particularly note the photos were taken *before* the autopsy was conducted as a means to document the extent and nature of the victim's injuries. Thus, they show the unaltered condition of the victim, not any additional wounds that could have been made to the body by the pathologist in performing his examination.

These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

In *Turnipseed v. State*, 367 S.E.2d 259 (Ga. Ct. App. 1988), the Court of Appeals of Georgia considered a case in which a four-year-old was mauled by the defendant's pitbull terriers. The court held a jury could find that the defendant's conduct of leaving the dogs unguarded, along with his knowledge of past incidents involving the dogs, constituted reckless conduct supporting a charge of involuntary manslaughter. *Id.* at 261. In doing so, the court rejected the defendant's assertion that the trial court's "admission of five pre-autopsy photographs of the victim lying on the autopsy table" was error because the photos "were irrelevant and prejudicial." *Id.* at 262. The court stated:

> The photographs were not devoid of probative value because they showed the nature of the attack on the victim. From observation of the wounds of the victim, the jury could draw conclusions about the vicious propensities of the animals and weigh this in light of the other evidence about the dogs to determine whether or not Turnipseed's conduct regarding them was criminally reckless.

*Id.* at 262-63; *cf. State v. Holder*, 382 S.C. 278, 290-91, 676 S.E.2d 690, 697 (2009) (stating "[a]lthough the photos were graphic, the facts in this case were graphic" and holding the trial court properly exercised its discretion in admitting autopsy photos of the child victim as they corroborated the pathologist's testimony and aided the jury in understanding that testimony); *State v. Edwards*, 194 S.C. 410, 412, 10 S.E.2d 587, 588 (1940) (holding, in a murder prosecution, that the trial court did not abuse its discretion in admitting a graphic photo of the victim's decomposed body where "everything depicted by the photograph was . . . testified to in detail by the witnesses").

### B. Harmless Error

Although we find no abuse of the trial court's broad scope of discretion here, we further find any alleged error would be harmless beyond a reasonable doubt.

*See State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004) (stating both error and probable prejudice must be shown to warrant reversal).

The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial . . . ." *Id.* at 166, 420 S.E.2d at 838. Rather, "[t]o say that an error did not contribute to the verdict is . . . to find that error unimportant *in relation to everything else the jury considered on the issue in question*, as revealed in the record." *Id.* at 166, 420 S.E.2d at 839 (citation omitted) (emphasis added).

"No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having *changed the result* of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) (emphasis added) (citing *Chapman v. California,* 386 U.S. 18 (1967))).

Another description frequently cited is that error "is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); *see also* 5 Am. Jur. 2d *Appellate Review* § 659 (2007) ("The United States Supreme Court has recognized that although the harmless error inquiry is entirely distinct from a sufficiency of the evidence inquiry, this does not mean that overwhelming evidence of guilt is irrelevant." (citing *United States v. Lane*, 474 U.S. 438 (1986))).

We hold there was overwhelming evidence presented of Collins's guilt as to the charges of (1) having an unrestrained, dangerous animal that attacked and injured a human being, and (2) involuntary manslaughter. The undisputed evidence was that Collins's dogs were unattended and they were not confined, as there were no fences, leashes, dog pens, or chains used to restrain them. In addition, other evidence showed Collins's dogs attacked, killed, and partially ate the ten-year-old victim in this case, and they also attacked one of the neighborhood boys who happened upon the scene soon thereafter and bit him on the neck. Lastly, there was evidence that Collins was aware of his animals' dangerous

propensities, as the dogs, the largest of whom weighed 47 and 44 pounds, had previously exhibited overt acts of aggression towards people in the neighborhood while Collins was present. In light of the foregoing, a jury could not rationally conclude anything other than that Collins had violated the law governing unrestrained dangerous animals and was criminally negligent in the death of the victim. *See generally State v. Powell*, 446 S.E.2d 26 (N.C. 1994) (affirming a conviction for involuntary manslaughter where the jury found the defendant guilty based on the defendant's culpable negligence in leaving his dogs, two Rottweilers, unattended and unrestrained, and the dogs mauled the victim).

## IV. CONCLUSION

We conclude the trial court did not abuse its discretion in admitting the pre-autopsy photos. Consequently, we reverse the decision of the Court of Appeals.

**REVERSED.**

**TOAL, C.J., concurs. KITTREDGE, J., concurring in a separate opinion in which HEARN, J., concurs. PLEICONES, J., dissenting in a separate opinion.**

**JUSTICE KITTREDGE:** I concur in result. In my judgment, the admission of the autopsy photographs was clear error. The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense. I agree with Justice Pleicones that these challenged photographs far exceed "the outer limits of what our law permits a jury to consider." *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). I fully understand that there are circumstances where autopsy photographs are relevant and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice. *See* Rules 402, 403, SCRE. But this is not such a case. I nevertheless believe the error was harmless for the reasons set forth in the majority opinion. I note this case was tried in 2009, prior to our decision in *Torres*, where we expressed our concern over the State's seeming practice of seeking admission of highly prejudicial and inflammatory autopsy photographs.

**HEARN, J., concurs.**

**JUSTICE PLEICONES:** I respectfully dissent, and would affirm the well-reasoned opinion of the court of appeals. I agree with the court of appeals that any minimal probative value of the admitted photographs was substantially outweighed by the danger of unfair prejudice and that their admission violated Rule 403, SCRE. In my opinion, the prejudice to Collins from the admission of these photographs requires reversal.

This Court recently addressed to the bench and bar our concern over the admission of gruesome photographs in *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), where we observed:

> Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.
>
> *Id.* at 624, 703 S.E.2d at 229.[5]

In my judgment, the majority has today approved the admission of evidence that far exceeds ". . . the outer limits of what our law permits a jury to consider." *Id.* In my opinion, the only way we can educate the bench and bar as to that which is and is not beyond the pale is to publish these horrific photographs with our opinion.

I would affirm the court of appeals.

[5] Photographs 31 to 35 at issue here are at least as disturbing as the autopsy dissection photo in *Torres*.

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

The State, Respondent,

v.

Roderick Pope, Appellant.

Appellate Case No. 2012-207226

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Appeal From Union County
John C. Hayes, III, Circuit Court Judge

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Opinion No. 5261
Heard June 2, 2014 – Filed August 20, 2014

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**AFFIRMED**

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Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

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**SHORT, J.:** Roderick Pope appeals his conviction for possession with intent to distribute crack cocaine. Pope argues the trial court erred in: (1) refusing to suppress the evidence seized during the search of the vehicle when law enforcement did not have reasonable suspicion to justify the traffic stop; (2) refusing to suppress the evidence seized during the search of the vehicle because law enforcement did not have probable cause to believe the vehicle contained

evidence of criminal activity and no exigent circumstances existed to justify the warrantless search; and (3) finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car. We affirm.

**FACTS**

Officers arrested Vincent Harris at approximately 3:30 p.m. on June 24, 2010, after he sold crack cocaine to a confidential informant.[1] In an attempt to get out of jail on bond, Harris agreed to arrange a drug transaction with his supplier, Pope.[2] Harris called Pope to arrange a deal that same day for a half ounce of crack cocaine for six hundred dollars.[3] Harris told Union County Sheriff's Sergeant James Johnson that Pope would be traveling on Highway 176 from Spartanburg into Union, and he would be driving a black Ford Expedition. Sergeant Johnson relayed the information about the deal and the vehicle to officers who set up at various locations along Highway 176. Harris called Pope to check on his location and told Sergeant Johnson that Pope had just passed the Lighthouse Fish Camp. Sergeant Johnson relayed Pope's location to the officers on the highway, and Captain James McNeil said he had a visual sighting on an Expedition at the Lighthouse Fish Camp. At approximately 6 p.m., Sheriff David Taylor saw the vehicle; he activated his blue lights; the Expedition pulled over; and Lieutenant John Sherfield and Captain McNeil pulled in behind the vehicles.

Three men were in the vehicle: Pope, Randy Crosby, and Lashad Brewton. Brewton was driving; Pope was in the front passenger seat; and Crosby was in the right rear seat. The vehicle was registered to Pope's wife, but Pope's license was suspended. Brewton stopped in the median instead of the right shoulder of the highway and took about a minute to pull over. As Lieutenant Sherfield approached the vehicle, he observed Crosby turn around, look back at him, bend down, and sit

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[1] The confidential informant knew Harris as "Vince."

[2] Harris testified his bond was reduced to $2,000 in exchange for making the calls to Pope. He later pleaded guilty to distribution of crack cocaine and was sentenced to three years' imprisonment. Harris was facing ten to thirty years' imprisonment if he had not offered to help the police.

[3] A half ounce equals fourteen grams.

back up. After the officers removed the three men from the vehicle and handcuffed them, Lieutenant Sherfield searched the vehicle. Underneath the seat where Crosby had been sitting, he found a digital scale with white residue. He tested the residue with a field test kit and determined it was cocaine. All three men were arrested for possession of cocaine. The officers did not find drugs on the men when they searched them on the side of the road. However, Lieutenant Sherfield found two hundred eighty dollars and a cell phone on Brewton, and five hundred seventy dollars on Crosby. The officers also found a cell phone on Pope that had fourteen incoming calls and five outgoing calls on that day to a person listed as "Vince." After arriving at the jail, Corporal Russell Vinson searched the vehicle he used to transport Brewton and Crosby.[4] In the back, underneath the seat where Crosby had been seated, Corporal Vinson found a yellow plastic bag containing a little more than eleven grams of crack cocaine.

Pope was indicted for trafficking more than ten grams but less than twenty-eight grams of crack cocaine. The case proceeded to trial on December 6 through 8, 2011. The State tried Pope with his two co-defendants, Crosby and Brewton. The jury found Pope guilty of the lesser-included offense of possession with intent to distribute crack cocaine. The court sentenced him to fifteen years, suspended upon the service of ten years with five years' probation. The court denied Pope's motion to reconsider his sentence. This appeal followed.

**STANDARD OF REVIEW**

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's

[4] Corporal Vinson testified he searched his vehicle prior to putting Brewton and Crosby in the back seat to make sure there was nothing there.

ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

## LAW/ANALYSIS

### I. Reasonable Suspicion

Pope argues the trial court erred in denying his motion to suppress the evidence seized during the search of the vehicle because law enforcement did not have reasonable suspicion to justify the traffic stop. We disagree.

In criminal cases, this court only reviews errors of law. *State v. Butler*, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). This standard of review also applies to preliminary factual findings in determining the admissibility of certain evidence. *Id.* In Fourth Amendment search and seizure cases, our review is limited to determining whether there is any evidence to support the trial court's finding. *State v. Moore*, 404 S.C. 634, 640-41, 746 S.E.2d 352, 355 (Ct. App. 2013). This court will not reverse a trial court's findings of fact merely because we would have reached a different conclusion. *Id.*

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." *Id.* In analyzing reasonable suspicion, "it is entirely appropriate for courts to credit the practical experience of officers who observe on a daily basis what transpires on the street." *State v. Wallace*, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011) (internal quotation marks and citations omitted). "In determining whether reasonable suspicion exists, the whole picture must be considered." *Woodruff*, 344 S.C. at 546, 544 S.E.2d at 295. "Factors that are alone consistent with 'innocent travel' can, when 'taken together' produce a reasonable suspicion of criminal activity." *Wallace*, 392 S.C. at 52, 707 S.E.2d at 453 (quoting *United States v. Sokolow*, 490 U.S. 1, 9 (1989)). "In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.'" *Id.* (quoting *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988)).

Pre-trial, Pope moved to suppress the drugs seized during the search of the vehicle. During trial, Pope again moved to suppress the evidence, arguing no reasonable suspicion existed for the traffic stop, and law enforcement did not have probable cause to search the vehicle. The State responded the corroboration between the information Harris gave Sergeant Johnson and the officers' observations gave them reasonable suspicion to stop the vehicle.

The court denied the motion to suppress, stating, "I think the ice here is thin, but I think it's thick enough to support the arrest, the stop first, then the search and then the arrest, and they went in that order." The court determined Harris was not a confidential informant, but he was "somewhere between [a] confidential informant and [an] anonymous tip[ster]." The court found law enforcement had reasonable suspicion to stop the vehicle:

> [L]ooking at the totality of the circumstances, . . . it was a police investigation that determined the validity of the information they received from [Harris] . . . . Not a lot of information, that's true, but enough, I think, to establish probable cause to make the stop, and that corroboration is that a black Ford Expedition would be coming from Spartanburg to Union on 176 out of Spartanburg. That alone would not be enough, but the . . . key is the fact that [Harris] . . . gave information that he had been contacted by whoever was on the other end of that phone, whether it was [Pope] or not, that the car in question was passing the Lighthouse Fish Camp, and that was confirmed by [Captain] McNeil . . . . So I think that's enough to create probable cause for the stop.

Pope argues on appeal the officers did not have reasonable suspicion to justify the traffic stop because: (1) the information provided by Harris is inherently unreliable; (2) the vehicle was not in a high crime area; (3) the vehicle was traveling legally and no citations were issued; (4) there was no evidence of attempted flight; (5) there was no evidence of evasive behavior; (6) the time was 6:00 pm on June 24, so it was not late; (7) the trial court relied on incorrect information that Captain McNeil saw the Ford Expedition at the Lighthouse, when it was actually a mile down the interstate; and (8) law enforcement failed to verify

any information regarding the black Ford Expedition prior to the stop. Therefore, he asserts the trial court erred in refusing to suppress the evidence seized by law enforcement.

In *State v. Peters*, 271 S.C. 498, 502-03, 248 S.E.2d 475, 477 (1978), our supreme court determined that where the informant gave the officer a description of an automobile that would contain marijuana and would be leaving shortly, the officer's direct observation of an automobile conforming in every respect to the informant's tip provided sufficient circumstances to assure reliability of the informant's information. "In determining whether the evidence is sufficiently detailed to give rise to probable cause, all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." *State v. Roper*, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979). Additionally, "a non-confidential informant should be given a higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false." *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996); *see also Lopez v. State*, 664 S.E.2d 866, 869 (Ga. Ct. App. 2008) ("[I]n terms of providing probable cause for an arrest, the admissions against penal interest of a known informant in the hands of police (even though that informant's name is not disclosed at the trial of the accused) are valuable facts indicating that the informant is telling the truth and is reliable.").

Sergeant Johnson was at the jail with Harris when Harris made several phone calls to Pope, and Pope made several calls to Harris. Sergeant Johnson testified he heard Harris on the phone and told Lieutenant Sherfield that Harris arranged a transaction to purchase fourteen grams of crack cocaine from Pope for six hundred dollars. Sergeant Johnson said Pope told Harris he would be traveling on Highway 176 into Union County from Spartanburg County in a black Ford Expedition. Sergeant Johnson said other people were in the vehicle because Harris could hear them talking in the background while he was on the phone with Pope. During a subsequent phone call, Pope told Harris he was almost in Union County and was driving past the Lighthouse Fish Camp. Sergeant Johnson radioed officers Pope's location, and Captain McNeil said he had a visual on the black Ford Expedition at Lighthouse Fish Camp heading towards Union. Captain McNeil followed the vehicle in his unmarked truck, and Lieutenant Sherfield followed behind him until Sheriff Taylor initiated the stop. As Lieutenant Sherfield approached the vehicle, he observed Crosby turn around, look back at him, bend down, and sit back up.

We find Harris' description of the vehicle, including the color, make, and model; the highway and direction the vehicle would be traveling; the location of the vehicle at a specific time; and that more than one person was in the vehicle, was corroborated by officers observing a vehicle matching the exact description, traveling in the specified direction, located in the stated area, and containing more than one person. Furthermore, Harris was not a confidential informant and exposed himself to criminal liability should the information he supplied to officers prove to be false. Therefore, we find the trial court did not err in denying the motion to suppress the evidence seized during the search of the vehicle because law enforcement had reasonable suspicion to justify the traffic stop.

## II. Probable Cause

Pope argues the trial court erred in denying his motion to suppress the evidence seized during the search of the vehicle because law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search. We disagree.

A warrantless search is generally *per se* unreasonable, and therefore, violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). However, a warrantless search will withstand constitutional scrutiny if the search falls within one of several well-recognized exceptions to the warrant requirement, one of which is the automobile exception. *Id.* "Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." *Id.* at 320, 649 S.E.2d at 482. Probable cause has been defined as "'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation." *Weaver*, 374 S.C. at 320, 649 S.E.2d at 482. "The automobile exception does not contain a separate exigency requirement." *Id.*

During trial, Pope again moved to suppress the evidence, arguing the officers did not have probable cause to search the vehicle. The State argued the officers had reasonable suspicion to stop the vehicle, and therefore, they had probable cause to search it. The State maintained the officers had probable cause to think the vehicle would contain illegal drugs that were about to be used in the drug transaction Harris arranged, so they had a right to search the vehicle. The court found the search was proper under the automobile exception.

On appeal, Pope argues the officers did not have probable cause to believe the vehicle contained evidence of criminal activity because they failed to conduct an investigation to gain probable cause. He asserts they only had the unreliable information provided by Harris, who was facing jail time. Therefore, he asserts the trial court erred in refusing to suppress the evidence seized by law enforcement.

We find that based on the corroboration of Harris' information—including the description of the vehicle, the highway and direction the vehicle would be traveling, the location of the vehicle at a specific time, and that more than one person was in the vehicle—combined with an officer observing Crosby turn around, look back at him, bend down, and sit back up, gave officers probable cause to search the vehicle for the drugs Harris had arranged to purchase. Therefore, the trial court did not err in denying the motion to suppress the evidence seized during the search of the vehicle because law enforcement had probable cause to believe the vehicle contained evidence of criminal activity.

## III. Chain of Custody

Pope argues the trial court erred in finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car. We disagree.

"[T]his court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *Id.* "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Id.* at 7,

647 S.E.2d at 206. "[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive." *Id.* at 6, 647 S.E.2d at 205-06. "[T]he chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

In contrast, "[w]hile the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

> If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.

*Id.* at 134, 620 S.E.2d at 741-42.

During trial, Pope moved to suppress the scales found during the search of the vehicle, arguing the State failed to establish a sufficient chain of custody. The State responded that Lieutenant Sherfield testified he found the scales and put the case number on the scales.

The court addressed the chain of custody issue as it related to the scales found in the vehicle:

> [T]here's certainly a lot of questions about the way it was handled, but it was not a fungible item. It's like a pistol or a shotgun or a television that could be not—I guess it could be tampered with. In fact, the battery was missing, but the character of it is not readily changeable, is not fungible; that it, it cannot be mixed in with something

> else and be confused. It could be under the way it was kept, had it not been marked, but it was marked on the [scales] itself. [If] [i]t could only be marked on the bag, we'd have a problem because the bag came open while it was in custody. But, it's my understanding of the testimony . . . that there is an identifying number on the [scales] itself. So I find that the . . . scales, I'm not going to suppress the introduction of the scales.

At trial, the court entered the scales over Pope's objection.

On appeal, Pope argues the trial court erred in finding a sufficient chain of custody existed because the scales were not secured in an evidence bag and one of the batteries was missing, and Lieutenant Sherfield provided false information on the affidavit accompanying the evidence bag.

We agree with the trial court that the scales were a non-fungible item; therefore, the establishment of a strict chain of custody was not required. However, the State also presented evidence of the chain of custody. Lieutenant Sherfield testified he found the scales in the vehicle, put the case number on the scales, and secured it inside a locked vault. He explained the scales were not still in the original evidence bag because that bag had broken open when he got it out of the vault the day before. Also, he testified a battery was missing from the scales, but was not missing when he put the scales into the vault. He asserted he had the scales in his vault the entire time.

During trial, Pope moved to exclude the crack cocaine found in the police car based on an alleged problem with the chain of custody because Lieutenant Sherfield's affidavit stated he seized the drugs from Crosby, Brewton, and Pope when he was not the one who seized the drugs. The court denied the motion.

We find the evidence shows the State properly established the chain of custody as to the drugs found in the police car. Lieutenant Sherfield testified he took the crack cocaine Corporal Vinson found in the back seat of the patrol car back to his office; secured it in an evidence bag to be sent to SLED for analysis; marked the bag with his name and the date; and secured the evidence in a vault in his office. Lieutenant Sherfield transported the evidence to SLED, along with several other evidence bags, on September 21, 2010. Willie Smith, a senior criminalist-chemist

in the drug analysis department of SLED, testified he received the evidence on September 22, 2010. He determined the substance was eleven and a half grams of crack cocaine. He testified to the chain of custody of the drugs; that the evidence bag was still sealed when he received it; he resealed it after he tested it; and it was still in the same condition it was when he resealed it.

Therefore, the trial court did not err in admitting either the scales or the drugs found in the police car because the scales were a non-fungible item and the establishment of a strict chain of custody was not required, and a complete chain of custody was established for the drugs, which were a fungible item.

**CONCLUSION**

Accordingly, the decision of trial court is

**AFFIRMED.**

**FEW, C.J., and GEATHERS, J., concur.**

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

Bloody Point Property Owners Association, Inc., David L. Fingerhut, and Patricia M. Santry, Respondents,

v.

William A. Ashton, Jr. and Michele C. Ashton, Appellants.

Appellate Case No. 2013-000222

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Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

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Opinion No. 5262
Heard May 7, 2014 – Filed August 20, 2014

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**AFFIRMED**

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James Frederick Berl, of Law Offices of James F. Berl, PC, of Hilton Head Island, and Dustin Lee, of Lee Law Firm, LLC, of Hilton Head Island, for Appellants.

Terry A. Finger, of Finger & Fraser, PA, of Hilton Head Island, for Respondent Bloody Point Property Owners Association, Inc.; and Matthew Tillman, of Womble Carlyle Sandridge & Rice, LLP, of Charleston, for Respondents David L. Fingerhut and Patricia M. Santry.

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**LOCKEMY, J.:** William A. Ashton, Jr. and Michele C. Ashton appeal the master-in-equity's denial of their motion to vacate/set aside a foreclosure sale, arguing the master erred in finding (1) they were properly served; (2) their due

process rights were not violated; (3) the foreclosure sales price did not shock the conscience of the court; and (4) David L. Fingerhut and Patricia M. Santry were bona fide purchasers for value pursuant to section 15-39-870 of the South Carolina Code. We affirm.

## FACTS/PROCEDURAL BACKGROUND

This action arises from the foreclosure sale of Lot 55, Daufuskie Island Club, Phase l, Bloody Point, in Beaufort County (the Property). The Bloody Point Property Owners Association, Inc. (the Association) commenced the foreclosure action on May 17, 2011. The Association asserted claims for foreclosure of a lien against the Property's owners, William A. Ashton, Jr. and Michelle C. Ashton (Appellants),[1] for payment of Association dues and fees.

Appellants are residents of Chester County, Pennsylvania. The foreclosure summons and complaint were delivered to the Chester County Sheriff's Office (the Sheriff's Office) for service on Appellants at their last known address. According to the affidavits of service returned by the Sheriff's Office, a deputy unsuccessfully attempted to serve Appellants on four separate occasions. Thereafter, Julie Scarfino, counsel for the Association, filed an affidavit for service by publication. On July 20, 2011, the Beaufort County Clerk of Court filed an order of publication authorizing service of Appellants by publishing a copy of the summons and complaint in Beaufort County's *The Island Packet* newspaper once a week for three consecutive weeks and mailing a copy of the summons and complaint to Appellants at their last known address.

On September 27, 2011, the master-in-equity found Appellants in default. Subsequently, on December 2, 2011, the master entered a report and judgment of foreclosure and sale wherein he held Appellants owed the Association $2,971.70 in unpaid assessments and $5,738.97 in attorney's fees and costs. A foreclosure sale was held on January 3, 2012. David L. Fingerhut and Patricia Santry (the Fingerhuts) purchased the Property for $8,800 at the sale.

On February 2, 2012, Appellants filed a motion to vacate/set aside the foreclosure. In their motion, Appellants argued the foreclosure sale should be set aside because the sales price was so low as to "shock the conscience" of the court. Appellants further asserted the Association improperly served the summons and complaint by

[1] Appellants purchased the Property in 2001 for $201,500.

publication. Appellants did not dispute the validity of the debt or their failure to pay dues and fees to the Association.

On May 9, 2012, the Fingerhuts filed a memorandum in opposition to the motion to vacate, wherein they argued they were good faith purchasers for value under section 15-39-870 of the South Carolina Code. The Fingerhuts further asserted (1) $2,793.20 in taxes and fees unpaid by Appellants should be added to the sale price; (2) the foreclosure sales price did not shock the conscience of the court; and (3) the Association properly served Appellants pursuant to section 15-9-710 of the South Carolina Code.

On July 24, 2012, the master issued an order denying the motion to vacate, holding (1) the Fingerhuts were good faith purchasers for value; (2) the Fingerhuts paid $11,593.20 for the Property; (3) the foreclosure sales price did not shock the conscience of the court; (4) the Association complied with the order for publication; and (5) Appellants were properly served with the summons and complaint. On July 25, 2012, Appellants filed a motion to reconsider the master's order denying the motion to vacate. The master denied the motion in a form order. This appeal followed.

## STANDARD OF REVIEW

The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court. *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

## LAW/ANALYSIS

### I. Bona Fide Purchasers

Appellants argue the master erred in finding the Fingerhuts were bona fide purchasers for value pursuant to section 15-39-870 of the South Carolina Code. We disagree.

Pursuant to section 15-39-870,

> [u]pon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2005). "The rationale for the statute is the well-established public policy of protecting good faith purchasers and upholding the finality of a judicial sale." *Robinson v. Estate of Harris*, 378 S.C. 140, 144-45, 662 S.E.2d 420, 422 (Ct. App. 2008) *aff'd*, 390 S.C. 272, 701 S.E.2d 740 (2010), (citing *Cumbie v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968) (stating "a sound public policy requires the validity of judicial sales be upheld, if in reason and justice it can be done"); *Wooten v. Seanch*, 187 S.C. 219, 222, 196 S.E. 877, 878 (1938) (upholding a foreclosure sale in which the mortgagee purchased the property sold and further stating that, to set aside a sale, "there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that appellant was defrauded or misled to his injury and loss")).

Here, the master relied on *Robinson* in finding the Fingerhuts were bona fide purchasers for value. In *Robinson*, the defaulting owner of the subject property sought to vacate the foreclosure sale due to ineffective service. 378 S.C. at 143, 662 S.E.2d at 421. This court noted the bona fide purchaser submitted documents from the court file demonstrating (1) service was made upon defendants; (2) both defendants were in default; (3) the attorneys of record were notified of the hearing; and (4) neither defendants were in the United States military service. *Id.* at 145, 662 S.E.2d at 423. The court further noted the purchaser had satisfied all of the elements to be considered a bona fide purchaser for value: (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect." *Id.* at 146, 662 S.E.2d at 423.

Relying on *Cumbie*, Appellants argue the foreclosure sale should be set aside because the Fingerhuts were not bona fide purchasers for value. In *Cumbie*, our supreme court held:

> A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be

> done. In the furtherance of this principle, our decisions have applied the general rule, applicable here, that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

251 S.C. at 37, 159 S.E.2d at 917. Appellants contend the Fingerhuts failed to (1) properly inquire as to the jurisdiction of the court that ordered the foreclosure sale and (2) properly and sufficiently inquire as to whether all parties were properly before the court when the order was made. Additionally, Appellants argue the order of publication did not comply with the publication requirements of section 15-9-740 of the South Carolina Code. Pursuant to section 15-9-740,

> [t]he order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him.

S.C. Code Ann. § 15-9-740 (Supp. 2013). Appellants assert it is unreasonable to expect a newspaper in Beaufort County to be the newspaper most likely to give notice to the Appellants, who reside in Pennsylvania. Appellants further assert the Association's failure to properly serve the summons and complaint violated Appellants' due process rights.

The Fingerhuts contend the purchaser (1) is deemed to be on notice of documents contained in the court's file and (2) takes title to the property without notice of lien or defect. Citing *Gladden v. Chapman*, 106 S.C. 486, 91 S.E. 796, 797 (1917), they argue the foreclosure purchaser is entitled to a presumption that the court

considered and properly adjudicated issues of service. In *Gladden*, our supreme court held:

> It must be presumed from the judgment rendered that the Court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process upon the defendants, and the rights and interests of the parties to the action under the allegations and evidence; and although the conclusions with respect to those matters, or any of them, might have been erroneous, so that they would have been reversed on appeal, they do not make the judgment void collaterally.

*Id.*

We find the master did not abuse his discretion in determining the Fingerhuts were bona fide purchasers. At the time of the foreclosure sale, the court file reflected Appellants had been served, were in default, had received notice, and were not in the military. Furthermore, the Fingerhuts made actual payment of the purchase price at the foreclosure sale and acquired title through the master-in-equity deed. Finally, the Fingerhuts had no notice of any title defect or other adverse claim, lien, or interest in the Property.

While Appellants assert the master lacked jurisdiction to sell the Property because of defects in service, the *Robinson* court held the foreclosure purchaser was a bona fide purchaser for value without notice such that claims of defective service in the foreclosure action did not affect purchaser's title. 378 S.C. at 147, 662 S.E.2d at 423. Although the *Robinson* court found the disputed affidavits of service were not in the record and Appellants' arguments regarding improper publication were not preserved, the court held:

> Moreover, there is no evidence . . . [the foreclosure purchaser] . . . had notice, constructive or otherwise, of Appellants' claims that [the property owners] . . . were . . . not properly served in the foreclosure action. Pursuant to section 15-39-870, then, we hold [the foreclosure purchaser]'s title is not affected by Appellants' claims of defective service of process in the foreclosure action.

*Id.* at 146-47, 662 S.E.2d at 423. Thus, the *Robinson* court found foreclosure proceedings were res judicata as to bona fide purchasers without notice of defective service claims.

Here, as in *Robinson*, there is no evidence the Fingerhuts had any notice of Appellants' claims they were not properly served. Thus, the Fingerhuts were bona fide purchasers and their title to the Property was not affected by Appellants' claims of defective service of process in the foreclosure action. In light of our finding the Fingerhuts were bona fide purchasers without notice, we need not address Appellants' argument regarding improper service. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not address remaining issues when disposition of prior issue is dispositive).

## II. Foreclosure Sales Price

Appellants argue the master erred in failing to set aside the foreclosure sale because the foreclosure sales price shocks the conscience. We disagree.

"A judicial sale will be set aside when either: (1) the sale price 'is so gross as to shock the conscience[;]' or (2) the sale 'is accompanied by other circumstances warranting the interference of the court.'" *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (alteration by court) (quoting *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 157, 177 S.E. 24, 27 (1934)). "South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court." *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). "However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court." *Id.*

Appellants purchased the Property in 2001 for $201,500. The Fingerhuts subsequently purchased the Property for $11,593.20 at the foreclosure sale in 2012. Appellants submitted an appraisal (Appellants' Appraisal) to the master which set the Property's value at $140,000. This appraisal stated its intended use was to rebut the foreclosure sales price. The master found the Appellants' Appraisal used non-comparable sales data from oceanfront lots and only cited Multiple Listing Service listing data for interior lots as support for the valuation conclusion.

In contrast, the Fingerhuts produced evidence showing the Property was sold for $10,000 in the 2010 Beaufort County Delinquent Tax Auction.[2] Additionally, the Fingerhuts submitted an appraisal (Fingerhuts' Appraisal) stating the Property was valued at $17,000 as of January 19, 2012. The master found the Fingerhuts' Appraisal used comparable sales data, not listing data, from interior lots. The master noted the Fingerhuts' Appraisal was supported by an affidavit submitted by David Fingerhut affirming that the appraisal was ordered for the purpose of obtaining title insurance and not to support the value for purposes of this action.

In denying Appellants' motion to vacate the judicial sale, the master found the Property would have to be worth more than $115,930 for the foreclosure sales price to be less than 10% of the actual value. The master concluded the Fingerhuts' Appraisal and the 2010 tax sale data were more reliable than the valuation information provided by the Appellants. The master held the actual value of the Property was far less than the $115,932 required to shock the conscience of the court.

We find the master did not abuse his discretion in determining the foreclosure sales price of the Property did not shock the conscience of the court. First, the master applied the correct legal standard in making his determination. The master noted that our courts have consistently held that when foreclosure sales prices amount to less than ten percent of the actual value of the property, the discrepancy shocks the conscience of the court. Furthermore, the master's decision is supported by the evidence in the record. The master considered all of the evidence presented, including both appraisals, and found the evidence provided by the Fingerhuts was more reliable.

**CONCLUSION**

We find the master did not err in denying Appellants' motion to vacate/set aside a foreclosure sale.

**AFFIRMED.**

**WILLIAMS and KONDUROS, JJ., concur.**

[2] The Property was subsequently redeemed by Appellants.

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

The Milton P. Demetre Family Limited Partnership, Appellant,

v.

Harry Beckmann, III, Patricia P. Beckmann, Annie Ruth Hilton Crowley, Raymond Moody Crowley, Donald William Crowley, Harris L. Crowley, Jr. and Annie Ruth Crowley Atkinson, Respondents.

Appellate Case No. 2012-212136

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Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

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Opinion No. 5263
Heard June 2, 2014 – Filed August 20, 2014

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**AFFIRMED IN PART AND VACATED IN PART**

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John Hughes Cooper and John Townsend Cooper, both of John Hughes Cooper, P.C., of Mount Pleasant, and Cain Denny, of Cain Denny, P.A., of Charleston, for Appellant.

Jefferson D. Griffith, III, and Richard L. Whitt, both of Austin & Rogers, P.A., of Columbia, for Respondents.

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**SHORT, J.:** In this action to quiet title, the Milton P. Demetre Family Limited Partnership (Demetre) appeals an order of the Master-in-Equity (the master), arguing the master erred in finding Demetre did not quiet title to certain property on Folly Island. We affirm in part and vacate in part.

## I. BACKGROUND FACTS[1]

In 1920, Jefferson Construction Company platted and subdivided most of the Island of Folly Beach, South Carolina. The 1920 plat was recorded in the Charleston County Register of Mesne Conveyance Office (RMC). In 1965, the 1920 plat was redrawn due to deterioration, and in 1968, it was traced. The redraw added parcels to the 1920 plat; however, the tracing appears to be identical to the 1920 plat. The 1965 and 1968 plats were also recorded and share the same book and page number as the 1920 plat. The 1965 plat added parcels to the 1920 plat; however, the 1968 plat appears to be identical to the 1920 plat and does not include the subject parcels, lots 209 and 210, on Indian Avenue, East.

Between approximately 1921 and 1926, the Folly Beach Improvement Company (FBIC) acquired the entire island of Folly Beach and mortgaged its complete interest to Citizens and Southern National Bank of Savannah (C & S Bank). In 1937, the FBIC sold the streets, avenues, and/or lanes in and upon Folly Island to the Board of Township Commission of Folly Island for the use of the public.

In 1942, C & S Bank foreclosed on the mortgage, and Edward Seabrook, Sr., purchased the land at a public auction. The deed conveyed the island to Seabrook "[s]aving and excepting therefrom such lots and portions of land as have from time to time been conveyed to sundry parties by [FBIC] by deeds recorded in the RMC Office for Charleston County." The 1942 deed also states the property conveyed is "bounded . . . on the West by the Channel of Folly River and Folly Creek . . . as delineated by the red line" of an 1895 plat (the Tartus survey). The 1942 Deed also refers to the 1920 plat. Seabrook, Sr., and his wife, Fannie, conveyed Seabrook's property to their son, Edward Seabrook, Jr., through the wills of Seabrook, Sr., who died in 1956, and of Fannie, who died in 1960.

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[1] The Background Facts are substantially taken from the facts in *The Milton P. Demetre Family Limited Partnership v. Beckmann*, Op. No. 2009-UP-029 (S.C. Ct. App. filed Jan. 14, 2009, withdrawn, substituted, and refiled, Apr. 21, 2009). We refer to the April 2009 opinion as *Demetre I*.

From Seabrook, Jr., in 2002, Demetre purchased lots 206 to 208 on Indian Avenue, East for $45,000. Demetre purchased lots 202 to 205 in 2002 from another seller for $475,000. Also in 2002, Demetre purchased "[a]ny and all interest in marshland or highland north of lot 201 Indian Avenue East" for $5 from another seller.

On May 30, 2002, Demetre purchased from Seabrook, Jr., the "portion of . . . roadway [on Indian Avenue] that is undeveloped and unpaved" bordering lots 201 to 205 for $10,000 by quitclaim deed. After contact with the City of Folly Beach, Demetre believed Seabrook owned the land.[2] However, neither the mayor nor the city administrator remembered notifying Demetre or its realtor that the City of Folly Beach did not own the land.

On December 6, 2002, Demetre brought an action against the City of Folly Beach to quiet title in the road located at the two-hundred block of East Indian Avenue on Folly Beach, South Carolina ("Road"), which borders other property Demetre owns (The "Road" case). Folly Beach asserted ownership of the Road. Emily Brown, intervenor, owns lot 204 on East Huron Avenue and has used the Road to access her property since January 30, 1986.

On January 23, 2004, Demetre purchased two riverfront lots, 209 and 210, on East Indian Avenue from Seabrook, Jr., for $23,700 by quitclaim deed. The deed references the 1920 plat.[3] Lots 209 and 210 are shown on the 1965 plat, but they do not appear on the 1920 plat or the Charleston County tax map.[4] Both the 1920 plat and the 1968 plat portray a portion of East Indian Avenue extending from lot

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[2] Demetre's realtor, Keith McCann, sent Demetre a letter stating the Mayor and City Administrator had determined the City of Folly Beach did not own the road and that Seabrook did.

[3] The quitclaim deed also states, "portions of the roadways named Indian Avenue, East and Third Street, East conveyed by this deed are unimproved, undeveloped, unpaved, undedicated, and abandoned; and, now become[] part of a private fifty (50) foot wide roadway owned by [Demetre] . . . as shown on the [1920] Plat that is adjacent to and borders on Lot Numbers [201-210] Indian Avenue, East."

[4] Demetre alleged he paid taxes on the property, including the roads and marshland.

201 to the northwest corner of lot 205. Beyond that, the plats portray the land as marshland.

In a separate action, on October 7, 2005, Demetre brought an action against Annie Crowley, Raymond Crowley, Donald Crowley, Harris Crowley, Jr., and Annie Atkinson (the "Crowleys"), and Harry and Patricia Beckmann (the "Beckmanns") for declaratory judgment and to quiet title to lots 209 and 210 where the Crowleys and Beckmanns have docks. The Crowleys and Beckmanns were permitted to intervene in the Road case because their lots abut East Indian Avenue. The Crowleys purchased lot 210, East Huron Avenue, on September 1, 1964, and the Beckmanns purchased lot 209, East Huron Avenue, on April 27, 1972. Both of the deeds referenced the 1920 plat, which shows no lots between their lots and the marsh abutting the river. The Crowleys and Beckmanns believed they owned all of the property from their homes to the marsh. Harry Beckmann testified he believed the State owned everything from his property line to the Folly River. In 1988, both the Crowleys and the Beckmanns applied for permits from the South Carolina Coastal Council (Council) to construct docks from their lots to the Folly River across East Indian Avenue lots 209 and 210. The Council granted the permits, and the docks were constructed.[5]

After reference to the master and consolidation, the cases were tried on December 12, 2006. On March 2, 2007, the master issued the "Road" Order, finding the Road was dedicated to the public and the City of Folly Beach owned the Road. On March 26, 2007, the master issued the "Dock" Order, ruling in favor of the dock owners on all grounds. The master denied Demetre's post-trial motions to reconsider. Demetre timely appealed both orders to this court, and we consolidated the appeals. This court heard the matter, *Demetre I*, on November 6, 2008, and issued its refiled opinion on April 21, 2009.[6]

In *Demetre I*, this court separated the appeal into "The Road Case" and "The Dock Case." As to the Road Case, the court explained the 1937 deed dedicated all streets, avenues, and/or lanes to Folly Beach. The court noted the 1920 plat, which was referenced in Demetre's deeds, showed East Indian Avenue extending from lot

[5] The docks were destroyed by Hurricane Hugo in 1989, and they were rebuilt in approximately 1990.

[6] The original opinion in *Demetre I* was filed January 14, 2009. The original opinion was withdrawn, substituted, and refiled April 21, 2009.

201 to the northwest corner of lot 205. The court affirmed the master's finding that the Road was dedicated to Folly Beach, and it accepted the dedication. The court also affirmed the master's finding that Demetre did not satisfy the elements of equitable estoppel. In its conclusion, the court stated: "[W]e affirm the master's . . . order finding Folly Beach owns East Indian Avenue . . . ."

As to the Dock Case, this court found the following:

> Demetre sought a declaration that [it] owns all the property between the Crowleys' and the Beckmanns' lots and the mean high water mark, and [it] sought to quiet any defects in [its] title to the land. The master did not rule on either request and only held the Crowleys and the Beckmanns believed the State owned the land when they applied for their dock permits, which does not resolve the question of actual ownership. Demetre does not dispute the presumption that the State holds in trust for public purposes the property below the mean high water mark. Therefore, because the master failed to rule on Demetre's requests for a declaration of ownership and to quiet title to the portions of the lots above the high water mark, we remand this case to the master for a determination on this issue.

The supreme court denied Demetre's petition for certiorari on April 8, 2010.

## II. FACTS PERTAINING TO THIS APPEAL

On remand, after Demetre's written request, the master heard arguments without receiving additional evidence. Demetre initally argued the issue on remand was settled because the parties stipulated at trial to record title. The Crowleys and Beckmanns (Respondents) argued the stipulation was merely "that the records were what the records were, and we simply were stipulating that if you went down to the [RMC] . . . that this is what you would find. There were deeds into [Demetre]. . . . But what those deeds mean, that's a whole 'nother story. We certainly are not stipulating to any good title . . . ."

Demetre also argued Respondents' affirmative defenses were no longer viable because they had "been either abandoned or lost at the trial level and/or overruled by the Court of Appeals." Demetre argued the defenses were either not ruled upon; not appealed; waived; and/or law of the case. Respondents disputed their affirmative defenses were not viable. Respondents claimed entitlement to the defenses of the forty-year statutory presumption of a grant; the twenty-year common law presumption of a grant; adverse possession; and laches.

On the merits, the parties argued the issues as "Chain of Title" and "Accretion." Demetre argued the deeds described the footage of the Respondents' lots as 150 feet from East Huron Avenue and did not "say anything about going an inch further than 150 feet" and did not mention East Indian Avenue. Demetre also argued Respondents' permit applications, signed under oath, claimed 150 feet from Huron Avenue. Demetre relied on his chain of title, including the quitclaim deed, for property north of lots 209 and 210 to the Folly River and the "unpaved roadway bordering 201 through 210 and Third Street roadway adjacent to Lot 210 East Indian."

Respondents argued any property not owned by the State from their lots to the Folly River belongs to them because their deeds reference the 1920 plat showing nothing behind their lots except marshland, and Demetre's alleged lots situated between Respondents' lots and the marshland were not effectively transferred by the quitclaim deed.

Demetre next argued the only evidence of true delineation was in a 2005 plat (referred to by the parties as the Kennerty Topograpic Survey) and the 1965 plat. Demetre argued the 1920 plat did not indicate the mean high water mark, and its designation of "marshland" included low and high land. Demetre argued because the 1965 plat indicates the lots, and Respondents stipulated to record title, then it purchased the lots by its quitclaim deed. Further, Demetre argued it was entitled to quiet title because the 1965 plat is recorded at the same location, page 158 of Plat Book C, as the 1920 plat.

As to the accretion argument, Respondents maintained the State owned the marsh, and any accretion belonged to them as owners of the properties adjacent to the marsh. Demetre maintained there was no evidence of accretion. Demetre also argued Respondents' dock permit applications indicated Respondents were not claiming accretion. Demetre argued the attachments to the permit applications

showed high marshland beyond the 150 feet that Respondents did not claim. The permit applications were for 700 foot docks "to Folly River."

The master questioned if the State needed to be a party to the action. Demetre and Respondents argued the issue was related to land above the high water mark; therefore, the State was not required to be a party.

By order filed January 13, 2012, the master first determined "any challenge to ownership of this marshland must be pursued in an action against the State . . . ." The master, after noting the parties did not want to add the State as a party, concluded, "this court disagrees [because] the 'high marsh' is contained within the area previously denoted as Marshland." The master determined the issue was the "highland contained within what was formerly marshland" and looked to the chain of title, finding although the 2005 Kennerty plat delineates both high and low marsh, the 1920 plat shows the property in question to be "Marshlands." The master further found only the 1965 plat shows lots located at the area in dispute. Thus, the master found the "1965 plat is incorrect and, therefore, cannot serve as a basis for the creation of new lots on Folly Beach." The master found the lots "did not exist" at the time of the conveyance to Seabrook, Sr. The master also found, "The subsequent plat from 1968 also shows the area in question to be marshland. I find [the] 1968 plat evidently intended to correct the 1965 plat error."

The master found the 1942[7] deed to Seabrook, Sr., did not include the lots, stating "[t]his fact was apparently known to [Seabrook, Jr.,] who determined he would only convey the lots in question to [Demetre] by Quitclaim deed in 2004," which the master recognized "is not a representation of good and valid title. . . ." The master concluded Respondents' docks had been in place for many years prior to Demetre's purchase of the property, and Demetre's purchase was done "with full knowledge and understanding that [Respondents] had a vested property interest, granted under license from the [S]tate, to the docks which run from in front of their property, commencing in . . . Indian Avenue, and running to the Folly River."

The master also found the following,

[7] The master's reference to the "Master's Deed of January 5, 1943" to Seabrook, Sr., refers to the 1942 deed, which was recorded January 5, 1943.

> [W]hile the oldest diagram submitted to the court in this litigation was an 1895 engineer's "Map of Folly Island," this court concludes, based upon *Query*[*v. Burgess*, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2006)], that the 1786 plat is the genesis for title to all marshland located on Folly Island – this issue has previously been decided by *Query* and is adverse to the position taken by either party in this litigation. At a minimum, the parties should present the full history of title to the court for a complete hearing.
>
> The purpose of the remand order was to determine [Demetre's] interest in the property and quiet title in [Demetre] if applicable. I find under the facts presented here, as between these parties, that [Demetre] has not prevailed under its burden of proof. I further find that there is no basis to quiet title, in Demetre, based on Demetre's claim of title to the land.

The master summarized the findings of fact: (1) Demetre's deeds refer to the 1920 plat; (2) the 1920 plat does not show Demetre's lots; therefore, they do not exist; (3) Demetre can only own what was deeded in the 1920 plat, which is described as marshland; (4) Respondents' deeds show East Indian Avenue as their riverward boundary; (5) any highland riverward of Respondents' lots was contained within the designation of "Marshland" in the 1920 plat; (6) the State is the owner of the land seaward of Respondents' lots; and (7) Demetre is not entitled to quiet title. The master ruled against Respondents on their affirmative defenses. The master concluded: "[Demetre] does not own any portion of the highland between [Respondents'] lots and the mean high water mark on lots 209 and 210, East Indian Avenue; [and Demetre] is not entitled to have title quieted in its name." Demetre moved for reconsideration, which the master denied, finding the 1786 plat dispositive. This appeal followed.

## III. LAW/ANALYSIS[8]

### 1. The Stipulation Issue[9]

Demetre argues the master erred by disregarding Respondents' stipulation to record title. We disagree.

During the trial,[10] the parties retired to the master's chambers to discuss the parties' stipulations. After returning to the courtroom, the parties entered the following stipulation on the record:

> It is stipulated by and between attorneys for the parties that record title for [Demetre] has been stipulated to.
>
> . . . .
>
> The chain of title for Lot 210 Huron Avenue East into the Crowleys has been stipulated to.
>
> And the chain of title to the Beckmanns to Lot 209 Huron Avenue East has been stipulated to.
>
> All of those have been agreed by counsel that they are stipulated to, as far as record title.

During the hearing, Demetre argued entitlement to quiet title because the parties stipulated at trial to record title. Respondents argued the stipulation was merely that "the records were what the records were, and we simply were stipulating that if you went down to the [RMC] . . . that this is what you would find. There were deeds into [Demetre]. . . . But what those deeds mean, that's a whole 'nother story.

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[8] We consolidate Demetre's sixteen arguments into four issues: (1) the stipulation; (2) Respondents' affirmative defenses; (3) the master's findings as to the State or Respondents' ownership in the property; and (4) the master's finding Demetre failed in its burden of proof to quiet title.

[9] Demetre's Issue 4.

[10] References to the trial refer to the trial prior to the first appeal in *Demetre I*; references to the hearing refer to the post-remand hearing.

We certainly are not stipulating to any good title . . . ." The master found the stipulations were "to how each got their title."

"A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998). "Stipulations, of course, are binding upon those who make them." *Id.* "The court must construe [a stipulation] like a contract, i.e., interpret it in a manner consistent with the parties' intentions." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998). The interpretation of a stipulation is addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *See id.* at 31, 507 S.E.2d at 337 ("Whether to abrogate the stipulation is addressed to the sound discretion of the trial judge, and an appellate court will not interfere with that decision except when there is a manifest abuse of discretion.").

We conclude the master properly interpreted the meaning of the stipulation at issue in this case. The question litigated was not whether Demetre held record title to the property; rather, the question litigated was whether the record title validly conveyed the subject property as to quiet title in Demetre. Accordingly, we affirm the master's interpretation of the stipulations.[11]

## 2. Respondents' Affirmative Defenses[12]

Demetre argues the master erred in ruling on the affirmative defenses, claiming the court's action in *Demetre I* rendered the affirmative defenses "law of the case." It also argues the master should have cited to authority in ruling against Respondents on their affirmative defenses. We find no reversible error.

During the hearing, Demetre argued Respondents' affirmative defenses were no longer viable because they had "been either abandoned or lost at the trial level and/or overruled by the Court of Appeals." Demetre argued the defenses were either not ruled upon, not appealed, waived, and/or law of the case. Respondents asserted their affirmative defenses were viable. The master ruled against

[11] We find no merit to Demetre's summary argument that it is entitled to quiet title because it paid property taxes on the property at issue. The citations to the record do not support Demetre's argument.

[12] Demetre's issues 5, 6, and 15.

Respondents on its affirmative defenses. We find no prejudice to Demetre arising from the master's rulings against Respondents on their affirmative defenses; thus, any error is not reversible. *See Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant.").

Finally, Demetre argues the master erred in failing to quiet title in Demetre because the master ruled against Respondents' affirmative defenses. Demetre claims, without citation to authority, "Where there are no affirmative defenses, record title is good." Respondents argue a stipulation to record title is not a stipulation to good title. Respondents maintain Demetre had the burden to prove good title. "In an action to quiet title, the plaintiff must recover on the strength of his own title, not on the alleged weakness of the defendant's title." *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 313, 433 S.E.2d 875, 880 (Ct. App. 1992) (citations omitted). We find no merit to Demetre's claim of automatic vesting of title in its action to quiet title based on Respondents' failure to prove its affirmative defenses.

### 3. The Master's Findings Granting Property Interests to Others[13]

Demetre argues the master erred in the following: (1) finding the State was a necessary party; (2) holding the State owns the subject property above the mean high water mark; (3) concluding Respondents have vested property interests in their docks; (4) finding the State owns any accreted highland; (5) finding the State owns the land seaward of Respondents' lots because the subject property was within the designation of "Marshland" on the 1920 plat of Folly Island; (6) finding the 1965 plat was "incorrect" and the 1968 plat corrected the error; and (7) finding the State owns the undeveloped portion of the roadway riverward of Respondents' lots when *Demetre I* affirmed only the Town's ownership to the end of the northeast corner of Lot 205. As to all findings regarding the necessity of the State as a party, the State or Respondents' interests in the subject property, and the interpretation of all plats other than as applied to the issue of Demetre's ability to quiet title in Lots 209 and 210, we agree and vacate those portions of the order on appeal.

"[A] trial court has no authority to exceed the mandate of the appellate court on remand." *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250, 551 S.E.2d 274,

[13] Demetre's issues 2, 3, 7, 8, 9, 13, and 16.

279 (Ct. App. 2001). "The mandate of the appellate court is jurisdictional. The trial court has a duty to follow the appellate court's directions." *Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) (citation omitted); *see Basnight*, 346 S.C. at 250-51, 551 S.E.2d at 279 (noting "[o]nce a mandate is issued from an appellate court to a trial court, the trial court 'is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate'" (quoting 5 Am. Jur. 2d *Appellate Review* § 784, at 453 (1995))).

The mandate in *Demetre I* directed the master to "rule on Demetre's requests for a declaration of ownership and to quiet title to the portions of the lots above the high water mark." To the extent the master exceeded the mandate by finding the State was a necessary party, by finding any property interest in the State or Respondents, by finding the 1965 plat was "incorrect," and by determining the location of the mean high water mark, we vacate that portion of the order.

### 4. Demetre's Failure to Quiet Title in Lots 209 and 210[14]

Demetre argues the master erred in the following: (1) relying on the 1920 plat to determine Demetre's claim; (2) finding its predecessor in interest, Folly Beach Corporation, took title based on the 1920 plat, rather than the 1895 Tartus Map referenced in the deed to Folly Beach Corporation;[15] (3) finding the 1786,[16] 1895, and 1920 plats are more precise than the 2005 Kennerty Topographic Survey, which is the only plat that shows the location of the mean high water mark; (4) finding Lots 209 and 210 "do not exist" because they are not shown on the 1920 plat;[17] and (5) finding Seabrook, Jr., believed he did not have title to the property.

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[14] Demetre's issues 1, 10, 11, 12, and 14.

[15] This issue also asserts error in the master's finding that the State owns the property, which we vacate in the previous section. To the extent the master erred in finding the deed referenced the 1920 plat rather than the 1895 plat, we find no prejudice because neither plat depicts the lots Demetre claims.

[16] The 1786 plat is referred to in *Query v. Burgess*, 371 S.C. 407, 412, 639 S.E.2d 455, 457 (Ct. App. 2006) ("The plat roughly delineates Folly Island. The plat contains the bare bones of a survey and is neither precise nor detailed.").

[17] We find no merit to Demetre's claim that the master's finding–that lots 209 and 210 on Indian Avenue East do not exist–conflicts with the remand mandate in *Demetre I*. The mandate directed the master to rule on Demetre's requests for a declaration of ownership and to quiet title to the portions of the lots above the high

Demetre entered an exhibit indicating the following chain of title:

- Deed from Folly Island Company to Folly Beach Corporation recorded November 18, 1919, referring to the 1895 Tartus Map;

- Deed and quitclaim deed from Alexander family members to Folly Beach Corporation recorded January 17, 1921, referring to an 1863 Parker survey;[18]

- Deed except for lots already conveyed from Folly Beach Corporation to Folly Beach Improvement Company recorded January 20, 1926, referring to the 1863 Parker survey and February and May 1920 plats;

- 1942 master's deed to Seabrook, Sr., except for lots already conveyed, recorded January 5, 1943;

- Seabrook, Sr., to Seabrook, Jr., by will;

- Quitclaim deed from Seabrook, Jr., to Demetre of lots 209 and 210 Indian Avenue, East, including the roadway, referring to February 1920 plat.

Thus, Demetre's chain of title references the 1863 survey, the 1895 Tartus plat, and the 1920 plat. The deed to Demetre references only the 1920 plat.

During the trial, when asked why he only paid $23,000 for the lots, Milton Demetre testified Seabrook, Jr., told him to make him an offer. Mr. Demetre continued, "He could have sold it for $5 and a deed. I don't know." When asked why he offered Seabrook, Jr., $23,000, Mr. Demetre responded, "He said make him an offer, and that's what I did."

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water mark. We read the mandate as requiring the master to determine whether Demetre proved the right to quiet title. We do not read, as argued by Demetre, a directive to determine who owns the subject property.

[18] Neither Demetre nor the master relied on the 1863 Parker survey.

As to Demetre's deeds, the master found the following: (1) Demetre's deeds refer to the 1920 plat; (2) the 1920 plat does not show Demetre's lots; therefore, they do not exist; (3) Demetre can only own what was deeded by reference to the 1920 plat, which is described as marshland; and (4) Demetre is not entitled to quiet title. After finding the lots did "not exist as legal lots today," the master found "[t]his . . . was apparently known to [Seabrook, Jr.,] who determined he would only convey the lots in question to [Demetre] by [q]uitclaim deed." The master further found Seabrook, Jr. "was willing (for a price) to grant whatever title he may have had in this property–whether he had any interest in this property or not."

"In an action to quiet title, the plaintiff must recover on the strength of his own title, not on the alleged weakness of the defendant's title." *Hoogenboom*, 315 S.C. at 313, 433 S.E.2d at 880. "One claiming title by deed has no greater title than the original grantor in the chain of title upon which he relies." *Id.* at 313, 433 S.E.2d at 880-81 (citing *Belue v. Fetner*, 251 S.C. 600, 606-07, 164 S.E.2d 753, 756 (1968) (stating a deed cannot convey an interest which the grantor does not have)). "[T]he purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution." *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 468, 144 S.E.2d 209, 211 (1965). "Where a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed." *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979) (citations omitted). In construing a deed, the court must determine the intent of the grantor. *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). To determine the grantor's intent, the deed must be construed as a whole. *Id.*

A quitclaim deed is a lawful means of conveying title. *Martin v. Ragsdale*, 71 S.C. 67, 77, 50 S.E. 671, 674 (1905) (citing former version of S.C. Code Ann. § 27-7-20 (2007) ("[T]his section shall be so construed as not to oblige any person to insert the clause of warranty or to restrain him from inserting any other clause in conveyances, as may be deemed proper and advisable by the purchaser and seller, or to invalidate the forms formerly in use within this State.")). However, "[a] quitclaim deed does not guarantee the quality of title, but only conveys that which the grantor may lawfully convey." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 601, 608 S.E.2d 587, 594 (Ct. App. 2005) (acknowledging "a quitclaim deed does not

convey the fee, but only the right, title[,] and interest of the grantor") (citing *Martin*, 71 S.C. at 77, 50 S.E. at 674)). Although the supreme court in *Martin* was discussing a purchaser whose seller took title under a quitclaim deed, we find the following language instructive:

> The authorities are conflicting as to whether a person can interpose the defense of purchaser for valuable consideration without notice, when he derives his title from one holding under a mere quitclaim deed. In the case of *Aultman v. Utsey*, 34 S.C. 559, 571, 13 S.E. 848, the Court says: "Some of the cases go so far as to hold that one who purchases from another, holding under a quitclaim deed, cannot, by reason of that fact, claim to be a purchaser without notice. *See* 2 Pom. Eq. Jur., sec. 753, where the cases both *pro* and *con* are cited in a note. . . . The reason given is, that such a purchaser buys no more than what his grantor can lawfully convey; to which, we think, might be added, that the fact that the grantor is unwilling to warrant the title, tends at least to show that there is some defect in the title, known to or apprehended by him, and, therefore, the purchaser is put upon inquiry. While we are not prepared at present to go to the full extent to which the doctrine has been carried by some of the cases, yet we are satisfied that the fact that the immediate grantor of the purchaser holds under a quitclaim deed, is a circumstance well calculated to excite inquiry, which, if not pursued properly, will affect the purchaser with notice of every fact which such inquiry, pursued with due diligence, would disclose . . . .

*Martin*, 71 S.C. at 76-77, 50 S.E. at 674.

We agree with the master's conclusion that Demetre failed in his burden of proving title to Lots 209 and 210. Neither the 1920 plat nor the 1895 Tartus plat depict the lots. Demetre acknowledged at the remand hearing that the lots did not exist as lots on the 1920 plat. Demetre relies on the 2005 Kennerty plat and the 1965 plat, which are not in his chain of title and were not in existence at the time the property was last deeded prior to the quitclaim deed to Demetre. Furthermore, as to the

master's finding that Seabrook, Jr., believed that he did not have title, we find evidence in the record to support the master's finding. *See Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011) (stating a master's factual findings in an action to quiet title will be affirmed by an appellate court if there is any evidence in the record reasonably supporting the findings). We find Demetre has failed to meet his burden of proving title to lots 209 and 210. Accordingly, we affirm the master's order to the extent it found Demetre failed to quiet title in lots 209 and 210.

## IV. CONCLUSION

We affirm the master's order regarding the stipulation, Respondents' affirmative defenses, and Demetre's failure to quiet title in lots 209 and 210. To the extent the master exceeded the mandate by finding the State was a necessary party, by finding any property interest in the State or Respondents, by finding the 1965 plat was "incorrect," and by determining the location of the mean high water mark, we vacate the order.

**FEW, C.J., and GEATHERS, J., concur.**

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

Prakash and Urmila Solanki, Respondents,

v.

Wal-Mart Store #2806, and Spartanburg County Sheriff's Office, Defendants,

Of whom Wal-Mart Store #2806 is the Appellant.

Appellate Case No. 2012-213247

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Appeal From Spartanburg County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 5264
Heard March 5, 2014 – Filed August 20, 2014

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**AFFIRMED**

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Regina Hollins Lewis and Mary Daniel LaFave, both of Gaffney Lewis & Edwards, LLC, of Columbia, for Appellant.

John David Hawkins and Charles Logan Rollins, II, both of The Hawkins Law Firm, of Spartanburg, for Respondents.

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**KONDUROS, J.:** Wal-Mart Store #2806 (Wal-Mart) appeals the trial court's award of punitive damages to Prakash and Urmila Solanki (collectively, the Solankis) in an action for gross negligence. It also appeals the trial court's denial

of its post-trial motions for Judgment Notwithstanding the Verdict (JNOV) and for the reversal or reduction of punitive damages. We affirm.

## FACTS/PROCEDURAL HISTORY

On November 27, 2009, "Black Friday," the Solankis went shopping at the Wal-Mart in Boiling Springs, South Carolina. After they selected their items, Mr. Solanki went to the self-checkout line; however, he experienced a problem with the register. Ryan Smalls, a Wal-Mart employee, attempted to help Mr. Solanki. When Smalls could not get the self-checkout machine to operate correctly, Smalls took Mr. Solanki to a cashier-assisted register. There were also problems with that register. During the transaction, Mr. Solanki handed Smalls his debit card and identification. Smalls manually stenciled Mr. Solanki's debit card, which he used as a credit card because Mr. Solanki could not remember his pin number. However, the credit card information of Robin Martin was hand keyed into the register during this transaction. A receipt with Martin's credit card information was signed by Mr. Solanki and $144.70 was charged to her account. The Solankis left the store unaware of the mistake.

On December 1, 2009, Martin notified the Spartanburg County Sheriff's Office her credit card had been stolen and two unauthorized charges were on her account, including Mr. Solanki's purchase at Wal-Mart. Deputy Gina Cashion was assigned to the case. She requested Wal-Mart provide her with the video surveillance and receipts for the date and time of the unauthorized charges. Wal-Mart found one transaction for that date in the amount of $144.70. It provided Deputy Cashion with video surveillance of the transaction, a copy of the stenciled impression of Mr. Solanki's debit card, the itemized receipt, and the store's copy of the receipt showing Martin's credit card information with Mr. Solanki's signature.

Deputy Cashion tried to contact Mr. Solanki but was unsuccessful. Based on the information at her disposal, she obtained an arrest warrant for Mr. Solanki. He was arrested in Georgia in April 2010 and spent six nights in jail before he was transported to South Carolina where he posted bail. He was indicted on financial transaction card theft and financial transaction card fraud, but the indictments were dismissed on August 24, 2010.

Mr. and Mrs. Solanki filed a complaint against Wal-Mart and the Sheriff's Office for (1) negligence, (2) gross negligence and recklessness, (3) false imprisonment, (4) intentional infliction of emotional distress, (5) defamation and defamation per

se, (6) assault, (7) battery, (8) malicious prosecution, and (9) loss of consortium.[1] The trial court directed a verdict for Wal-Mart on all causes of action except negligence and gross negligence. The jury returned a verdict against Wal-Mart for negligence. They awarded Mr. Solanki $50,000 in actual damages and $225,000 in punitive damages against Wal-Mart. They also found Mr. Solanki was comparatively negligent in the amount of 25%. Wal-Mart filed post-trial motions for JNOV, new trial *nisi* remittitur, reversal or reduction of punitive damages, or new trial pursuant to the Thirteenth Juror Doctrine. The trial court denied all of Wal-Mart's motions. This appeal followed.

## LAW/ANALYSIS

### I. Punitive Damages

Wal-Mart asserts the Solankis presented insufficient evidence to submit the issue of punitive damages to the jury. Specifically, Wal-Mart maintains the Solankis presented no evidence at trial its actions were willful, wanton, or reckless. Instead, it argues this is a case of simple negligence, which is not subject to punitive damages. Furthermore, Wal-Mart contends the trial court erred in applying the gross negligence standard without first making a finding of willful, wanton, or reckless misconduct before submission to the jury.

Additionally, Wal-Mart argues the Solankis asserted a heightened duty of care for Wal-Mart beyond the duty a merchant owes to its customers. Wal-Mart maintains it was not under a heightened duty of care, and under the general duty of care a merchant owes to a customer, no facts were presented at trial that demonstrated Wal-Mart breached its duty. Wal-Mart contends the Solankis presented no evidence showing it deviated from industry standards by handing over the evidence in its possession to the Sheriff's Office without conducting its own investigation. We disagree.

"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, and a factual finding by the jury will not be disturbed unless a review of the record discloses no evidence that reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1,

[1] The trial court granted a directed verdict on all claims against the Sheriff's Office except for the claims of false imprisonment and malicious prosecution. The jury returned a verdict in favor of the Sheriff's Office on both claims.

18, 640 S.E.2d 486, 495 (Ct. App. 2006). According to Rule 220(c), SCACR, an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000).

> The standard of review as regards the refusal to grant a directed verdict is well established: In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this [c]ourt when there is not evidence to support the ruling below.

*Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 28-29, 491 S.E.2d 571, 573 (1997) (internal quotation marks omitted).

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). "Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.* at 378-79, 539 S.E.2d at 533.

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984).

> In light of *Gamble* [*v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)], there are now three stages in this state to a trial court's review of punitive damages.

> First, the court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damage award. If not, the issue of punitive damages may not be submitted to the jury. If so, the jury should be adequately instructed to assess an appropriate amount of damages. Second, the trial judge must conduct a post-trial *Gamble* review to ensure that the award does not deprive the defendant of due process. If the award is determined to violate the defendant's due process rights, then the trial court must either grant a new trial absolute, or a new trial *nisi* remittitur. If the award is determined not to violate the defendant's due process rights, then the trial court reaches the third inquiry, to wit, whether, in the exercise of its discretion, it finds the award excessive or inadequate.

*S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996).

Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care. *Clyburn v. Sumter Cnty. Sch. Dist. # 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "While punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness, yet they are not awarded in this state for mere gross negligence." *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning- the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. "When the evidence supports but one reasonable inference, it is solely a question of law for [the] court, otherwise it is an issue best resolved by the jury. . . . In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006). "[A] merchant is not an insurer of the safety of his customer but owes them only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Pennington v. Zayre Corp.*, 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969).

The record contains no evidence the trial court imposed a heightened duty of care on Wal-Mart. At trial, the Solankis' attorney discussed his own belief that Wal-Mart should be subject to a heightened duty; however, the record does not indicate the trial court instructed the jury on a heightened duty.

We find the Solankis presented sufficient evidence of Wal-Mart's willful, wanton, or reckless misconduct to send punitive damages to the jury in two factual circumstances— the taking of the credit card information for the sale and the turning over of the credit card information to law enforcement. The trial court followed proper procedure in making this finding. At the close of all evidence, Wal-Mart moved for a directed verdict, asserting the Solankis had not proven gross negligence, and the trial court denied the motion. In its order denying Wal-Mart's post-trial motions, the trial court explicitly found sufficient evidence of willful, wanton, or reckless misconduct by Wal-Mart to send the issue to the jury. Particularly in light of the standard of review for directed verdict motions, we find sufficient evidence existed at the close of evidence to allow the issue of gross negligence to go to the jury. Wal-Mart attempted to run Mr. Solanki's credit card at least three times. When that was unsuccessful, the employee resorted to manually stenciling Mr. Solanki's credit card; however, the information hand-keyed into the cash register belonged to Martin. At the end of the transaction, the receipt presented had Mr. Solanki's signature but showed Martin's credit card information. These facts combined with Mr. Solanki's testimony that he did not use Martin's credit card could allow a reasonable jury to determine Wal-Mart's actions amounted to gross negligence. When reviewing these facts in the light most favorable to the Solankis, we find no error in the trial court's conclusions.

The trial court also found evidence was presented from which a reasonable jury could have concluded Wal-Mart was aware of the dangerous condition it created. It determined Wal-Mart knew the employee hand-keyed the transaction and testimony was presented Mr. Solanki did not present any card but his own to the cashier. Therefore, viewing all facts in the light most favorable to the Solankis, the trial court determined it would be reasonable to conclude Wal-Mart was responsible for the error in processing the credit card. Furthermore, the trial court concluded Wal-Mart was responsible for the creation and production of the evidence used to arrest Mr. Solanki and it was in the best possible position to point out the discrepancies to the police officers.

## II. Post-trial Motions

Wal-Mart asserts the evidence was insufficient to sustain the grant of punitive damages. Therefore, the trial court erred in denying the motion to reverse or reduce the amount of punitive damages.

Regarding the motion for JNOV, Wal-Mart argues the denial of this motion was the first time the trial court made a finding of willful, wanton, or reckless misconduct by Wal-Mart. It maintains this was an error of law. Additionally, it asserts the trial court erred in its evaluation of the *Gamble* factors and the trial court's reasoning is insufficient to sustain an award of punitive damages under a clear and convincing standard. In response to the trial court's evaluation of the first *Gamble* factor (defendant's degree of culpability), Wal-Mart contends the hand keying of Mr. Solanki's credit card only speaks to simple negligence. Additionally, Wal-Mart argues that even if its response to the Sheriff's Office's request for information amounted to negligence, it was only simple negligence, and no evidence was presented Wal-Mart was aware of a dangerous condition it then failed to mitigate. Therefore, it contends the evidence was insufficient to sustain the award of punitive damages.[2] We disagree.

When reviewing a motion for JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a motion for JNOV, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012).

In *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354, the supreme court of South Carolina specified an eight-factor post-verdict review for trial courts to conduct to determine if a punitive damages award comports with due process. The factors are:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant’s awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to

[2] Wal-Mart makes no argument regarding the *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), factors.

> the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . other factors deemed appropriate.

*Id*. The trial court is not required to make findings of fact for each factor to uphold a punitive damage award. *McGee v. Bruce Hosp. Sys*., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996).

"[W]e need dwell no longer upon the rationale, or upon the merits or demerits, of the doctrine [of punitive damages]. Acquiescence in it for almost two centuries justifies the conclusion that it is now agreeable to, and part of, the public policy of the state." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 574-75, 106 S.E.2d 258, 261-62 (1958).

As previously noted, the Solankis presented sufficient evidence to send the issue of punitive damages to the jury. Accordingly, the trial court did not err in denying Wal-Mart's post-trial motion to reverse or reduce the amount of the punitive damages. We also disagree with Wal-Mart's proposition it was an error of law for the trial court to explicitly state its finding of willful, wanton, or reckless misconduct for the first time in its order denying Wal-Mart's post-trial motions.

We find the trial court's analysis of the *Gamble* factors is sufficient to sustain the punitive damages award. The trial court made the required *Gamble* analysis after the award of punitive damages. Regarding the defendant's degree of culpability, it found Wal-Mart created and disseminated the evidence used to arrest Mr. Solanki. Therefore, Wal-Mart was in the best position to point out the hand-keying of the credit card information to the Sheriff's Office. As to the duration of the conduct, the trial court determined the transaction itself lasted a few minutes. However, Wal-Mart had the opportunity to explain the odd nature of the transaction throughout the criminal process. Concerning the defendant's awareness or concealment, the trial court found Wal-Mart created the documents and had exclusive knowledge and possession of them when it turned the information over to the Sheriff's Office. Furthermore, Wal-Mart was in the best position to ensure the transaction was handled properly. The trial court stated a punitive damages award may encourage greater oversight in Wal-Mart's and similarly situated vendor's credit card processing procedures. Regarding whether the award is reasonably related to the harm likely to result from such conduct, the trial court found the award was reasonably related to the harm suffered by Mr. Solanki and others who may be improperly accused of a crime due its negligence. It further found Wal-Mart was able to pay the punitive damages award. The court

considered the fact that the jury was able to view the transaction on video and then render its verdict as a significant "other factor." We find the evidence supports the trial court's ruling.

**CONCLUSION**

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

**AFFIRMED.**

**LOCKEMY, J., concurs.**

**WILLIAMS, J:** I respectfully dissent and believe the trial court improperly sent the issue of punitive damages to the jury.

The Solankis failed to submit *any* evidence at trial that Wal-Mart's actions in processing Mr. Solanki's credit card or in complying with law enforcement's request were "willful, wanton, or in reckless disregard of [Mr. Solanki's] rights." *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (finding "the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights" to support an award of punitive damages). Although I believe the error in hand-keying Mr. Solanki's credit card information would give rise to a negligence claim against Wal-Mart, no evidence was introduced at trial to show Wal-Mart's conduct was so gross or reckless of consequences that punitive damages were warranted. *See Rogers v. Florence Printing Co.*, 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958) ("The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights."); *Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952) ("Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances, but the absence of this care alone, whether called 'gross' or 'ordinary' negligence, does not authorize the jury to give exemplary damages."); *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943) ("While punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness, yet they are not awarded in this state for mere gross negligence.").

Specifically, testimony from trial negates the Solankis' claim that Wal-Mart acted in a reckless manner. Ryan Smalls, the Wal-Mart employee who handled Mr. Solanki's transaction, testified at trial to Wal-Mart's internal procedures for handling credit card transactions. Smalls testified that Wal-Mart's policy, when a credit card would not swipe at a self-checkout station, was to first try to finalize the transaction at the self check-out station. If this did not work, an employee would suspend the transaction and attempt to process the transaction at the employee's work station. If the credit card still would not work, the employee would hand key the credit card number into the system twice to ensure accuracy, enter the expiration date, and then ask a customer service manager to manually perform an override. After the override was performed, the employee would then enter the three-digit security code on the back of the credit card before finalizing the transaction. According to Smalls, even a manager could not override the transaction if each of these steps were not properly taken. Although Smalls did not independently recollect this transaction with Mr. Solanki, after viewing the video surveillance, he affirmed that each of the foregoing steps was taken during this transaction. Further, although it is regrettable that Mr. Solanki spent six nights in jail as a result of this incident, the Solankis presented no evidence that Wal-Mart's actions of complying with law enforcement's request were unreasonable or that Wal-Mart intentionally and recklessly processed Mr. Solanki's credit card transaction. *See Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 ("In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. A conscious failure to exercise due care constitutes willfulness." (internal citations omitted)).

Moreover, I believe the trial court erred when it failed to adequately assess the culpability of Wal-Mart's conduct *before* charging the jury on punitive damages. *See S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996) ("*First*, the [trial] court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damages award. If not, the issue of punitive damages may not be submitted to the jury." (emphasis added)); *Longshore*, 365 S.C. at 564, 619 S.E.2d at 11 ("[T]rial judges in this state have long been required, *as a threshold matter*, to assess the culpability of a defendant's conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury)." (emphasis added) (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996))). Rather, the extent

of the trial court's observation on the issues of gross negligence and punitive damages was as follows:

> As a general rule, the issues of gross negligence are properly for the jury to determine. There's evidence, based upon the weirdness of the transaction, for lack of a better word, . . . from which the jury could conclude that, in some way, . . . the defendant Wal-Mart, was grossly negligent in the way they handled the transaction. . . . I'll charge gross negligence and punitives.

I believe the "weirdness of the transaction," standing alone, is insufficient as a matter of law to substantiate a gross negligence claim or to support an award of punitive damages. Thus, I respectfully disagree with the majority and would hold the trial court erred in submitting the issue of punitive damages to the jury.

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

The State, Appellant,

v.

Wayne McCombs, Respondent.

Appellate Case No. 2012-209947

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Appeal From Dorchester County
Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 5265
Heard February 4, 2014 – Filed August 20, 2014

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**REVERSED AND REMANDED**

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Attorney General Alan Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; Solicitor David Michael Pascoe, Jr., of Orangeburg; and Assistant Solicitor Russell D. Hilton, of Ridgeville, for Appellant.

Andrew John Savage, III, and Jonathan Scott Bischoff, II, both of Savage Law Firm, of Charleston, for Respondent.

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**WILLIAMS, J.:** In this criminal appeal, the State argues the circuit court erred in finding evidence of Wayne McCombs' prior bad act was not admissible in his trial for committing a lewd act on a minor. We reverse and remand.

## FACTS/PROCEDURAL BACKGROUND

McCombs was indicted for committing a lewd act on a minor. The case was called for trial on March 5, 2012. During a pretrial hearing to address the State's motion in limine to admit evidence of a prior bad act, the State presented testimony from a prior victim ("Jessica"), the detective who investigated the prior bad act, and the victim whom McCombs was on trial for molesting ("Victim").

Jessica was the first witness called to testify at the pre-trial hearing. She testified that in 2001, when she was eleven years old, she went with her friend Joshua, McCombs' grandson, to McCombs' house for a pool party. Jessica stated she had not met McCombs prior to the party. According to Jessica, she did not initially get into the water, but McCombs told her if she did not get in the pool, she could not be at his house. Jessica testified that in hindsight she was sure he was joking, but she interpreted it differently on the day of the incident. According to Jessica, once she was in the pool, McCombs guided her around in the water by her waist and stuck his finger under her two-piece bathing suit and felt her vagina. Jessica stated McCombs talked to her while he was touching her but not about the touching. Jessica recalled that McCombs had been drinking at the time of the incident. Jessica left the pool, and McCombs followed her into the kitchen and sat her on his lap. Jessica subsequently went into the computer room, and McCombs followed her. Jessica testified McCombs stuck his hands down her pants from behind and touched her vagina in the computer room. On cross-examination, Jessica testified McCombs also stuck his fingers in her mouth. Jessica reported the incident, and McCombs was charged with committing a lewd act on a minor and assault with intent to commit criminal sexual conduct (ACSC). McCombs pled guilty to assault and battery of a high and aggravated nature (ABHAN) in July 2002.

Detective Miller, the investigator assigned to Jessica's case, was also called to testify at the pretrial hearing. Detective Miller stated that after the incident, Jessica reported McCombs groped her in the pool, sucked on her fingers in the kitchen, and attempted to fondle her vagina in the computer room. According to Detective Miller, Jessica did not report that McCombs stuck his hands under her bathing suit in the pool. He testified that if she had reported that McCombs stuck his hand under her bathing suit in the pool, he would have charged McCombs with an additional count of ACSC.

Victim also testified at the pretrial hearing. She testified that on August 1, 2009, when she was nine years old, she was at McCombs' house for her grandmother's birthday party. Victim stated that she lived in the same neighborhood and knew

McCombs. Victim testified she was in the pool with McCombs when he put his hand under her two-piece bathing suit and touched her vagina. According to Victim, McCombs was talking to her about school during the incident. Victim stated she tried to reach a concrete area on the side of the pool as McCombs was pushing harder on her vagina. She testified she did not know if the touching was purposeful, but she thought it was. Victim did not remember if McCombs was drinking at the time of the incident.

At the hearing, the State moved to admit the prior bad act involving Jessica based on the common scheme or plan exception to the exclusion of prior bad act evidence under Rule 404(b), SCRE. The circuit court found the evidence of the prior bad act was inadmissible, ruling:

> [Because] I have found that the evidence, if admissible, would be relevant, . . . I must make a determination of whether it would be under 404(b), whether it would be admissible as a common scheme or plan, in which the State has indicated that is what it intends to proceed under. The court must look at whether the admission of the evidence of the 2001 incident is logically relevant to the crime that we are here for today. The charges are substantially the same. As the State pointed out several times[,] the victims were both female. . . . [T]he alleged incidents occurred at the defendant's home in the pool. The similarities at that point become unclear and it becomes confusing based upon the testimony that was given by [Jessica] and then the detective that has testified today. I agree with the State that the analysis and purpose of the forensic interview is to fully articulate and develop the story and the allegations, and so I can understand why there may be some discrepancy between what the victim testified to, or indicated to the detective and what was disclosed. I am concerned that there, as the analysis unfolds one of the factors from [*Wallace*[1]] is the use of coercion or threats. [The victim] said there was no threats given in the pool. [Jessica] said that he forced her and threatened her to get into the pool. The relationship between the victim and the perpetrator is the same. The

[1] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

> perpetrator, the victims in both cases were friends. They were invited to swim over there at his pool. [Jessica] did testify that the defendant was drinking. The victim . . . testified that she was not sure, and did not know if he had been drinking. I must weigh the similarities against the dissimilarities and if the similarities outweigh the dissimilarities the Bad Act evidence is admissible, if the similarities outweigh the dissimilarities. Then I must do a 403 balancing test if I find that the proof is clear and convincing. Based upon my, as I stated previously, I do feel that the dissimilarities outweigh the similarities as testified to. I do find that even assuming that the similarities would outweigh the dissimilarities the remoteness in time under the 403 balancing test makes it more prejudicial than probative. I am denying the request for the 404(b) analysis . . . .

The State appeals pursuant to *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993).[2]

**STANDARD OF REVIEW**

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the circuit court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

[2] Pursuant to *State v. Henry*, a pretrial order suppressing evidence that significantly impairs the prosecution of a criminal case is directly appealable. 313 S.C. at 107-08, 432 S.E.2d at 490.

## LAW/ANALYSIS

The State argues the circuit court erred in finding McCombs' prior bad act was inadmissible because the similarities outweigh the dissimilarities. We agree.

To admit evidence of prior bad acts, the circuit court must first determine whether the proffered evidence is relevant. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the circuit court finds the evidence is relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) of the South Carolina Rules of Evidence. *Id.* Rule 404(b) precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. *See* Rule 404(b), SCRE.

> To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. . . . When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the [circuit] court's factual findings unless they are clearly erroneous.

*Clasby*, 385 S.C. at 155, 682 S.E.2d at 895 (citations and internal quotation marks omitted). "If the [circuit court] concludes there is clear and convincing evidence that the defendant committed the uncharged acts, he or she must determine whether the prior acts fall within the common scheme or plan exception." *Id.* at 155, 682 S.E.2d at 896.

"Evidence of other crimes, wrongs, or acts is admissible to show a common scheme or plan when a 'close degree of similarity [exists] between the crime charged and the prior bad act.'" *State v. Taylor*, 399 S.C. 51, 59, 731 S.E.2d 596, 601 (Ct. App. 2012) (quoting *State v. Gaines*, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008)). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 277-78. "A close degree of similarity exists when the

'similarities outweigh the dissimilarities.'" *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (quoting *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278). When determining whether a close degree of similarity exists, the circuit court "should consider all relevant factors." *Taylor*, 399 S.C. at 59, 731 S.E.2d at 601.

In *Wallace*, our supreme court listed several factors for the circuit court to consider when determining whether there is a close degree of similarity between the prior bad act and the charged crime in cases involving the sexual abuse of a minor:

> (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

384 S.C. at 433-34, 683 S.E.2d at 278.

In *State v. Hubner*, 362 S.C. 572, 585, 608 S.E.2d 463, 469 (Ct. App. 2005), *rev'd*, 384 S.C. 436, 683 S.E.2d 279 (2009), the court of appeals reversed the circuit court's decision to admit prior bad act evidence after determining the similarities were insufficient to support the admission of the evidence. In *Hubner*, the court of appeals considered the following similarities: (1) the perpetrator inappropriately touched both girls and (2) the girls were the same age when they were abused. *Id.* The court of appeals also considered the following dissimilarities: (1) the location of the abuse; (2) the relationship between the victim and the perpetrator; (3) the use of coercion or threats; and (4) the type of sexual battery. *Id.* at 585-86, 608 S.E.2d at 469-70. Additionally, the acts in *Hubner* occurred fourteen years apart from each other. *Id.* at 584, 608 S.E.2d at 469. In reversing the circuit court, the court of appeals held the events occurred "under different circumstances, at different times, in different places, and in different ways." *Id.* at 586, 608 S.E.2d at 470 (quoting *State v. Berry*, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998)). However, our supreme court reversed the court of appeals. *See State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009). Citing to *Wallace*, our supreme court found the court of appeals erred in reversing the circuit court's admission of the prior bad act evidence. *Id.* at 437, 683 S.E.2d 280.

Based on Jessica's testimony, we find the following similarities exist between the prior bad act and the charged crime: (1) the female victims were approximately the same age; (2) the abuse occurred in the pool at the same residence; (3) the abuse

occurred during a party; (4) both victims were neighborhood children; (5) both victims were touched underneath their bathing suits; (6) the touching occurred underwater; and (7) McCombs continued to talk to the victims while the abuse occurred.

Detective Miller testified that Jessica reported McCombs groped her in the pool, sucked on her fingers in the kitchen, and attempted to fondle her vagina in the computer room. Although Detective Miller's testimony differs from Jessica's testimony, we find his testimony still presents the following significant similarities: (1) both victims were young females; (2) both victims were neighborhood children; (3) both victims were abused at the same residence; (4) both victims were groped in the swimming pool; (5) both victims were attending a pool party at McCombs' house; and (6) both victims were inappropriately touched in the vaginal area. Based on Jessica's and Detective Miller's testimonies, we find the events occurred under similar circumstances, in similar places, and in a similar manner.

In contrast, the circuit court considered two dissimilarities: (1) McCombs' use of threats or coercion and (2) McCombs' consumption of alcohol prior to inappropriately touching the girls. Jessica testified that she initially felt coerced into getting into the pool, but she later testified that she was "sure he was joking." Victim did not report the use of any threats or coercion. Regarding McCombs' consumption of alcohol, Jessica testified McCombs was drinking during the commission of the prior bad act, but Victim could not remember if McCombs had been drinking prior to inappropriately touching her. We find these dissimilarities to be insubstantial. Upon review of the factors and in light of our supreme court's holdings in *Wallace* and *Hubner*, we find the circuit court erred in finding the dissimilarities outweighed the similarities. We find a close degree of similarity exists between the prior bad act and the charged crime, and the evidence of the prior bad act should have been admitted under Rule 404(b).

After ruling the evidence should not have been admitted under Rule 404(b), the circuit court found the admission of the prior bad act evidence was more prejudicial than probative under Rule 403 of the South Carolina Rules of Evidence due to the dissimilarities and the "remoteness in time" between the acts. We disagree.

"Once bad act evidence is found admissible under Rule 404(b), the [circuit] court must then conduct the prejudice analysis required by Rule 403, SCRE." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. Under Rule 403, "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." "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278-79. "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" *Scott*, 405 S.C. at 505-06, 748 S.E.2d at 245 (quoting *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013)).

The circuit court does not necessarily err when it permits testimony about a bad act occurring many years prior to the charged crime. *Id.* at 504, 748 S.E.2d at 244; *State v. Tutton*, 354 S.C. 319, 332 n.5, 580 S.E.2d 186, 193 n.5 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) ("That the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of [the victim], is not alone dispositive."). In fact, evidence of prior bad acts that occurred many years before the charged crime is often admissible to prove a common scheme or plan. *Scott*, 405 S.C. at 504, 748 S.E.2d at 244; *see Blanton*, 316 S.C. at 33, 446 S.E.2d at 440 (holding the circuit court properly admitted testimony regarding a bad act that occurred seven to eight years before the charged crime).

In the instant case, the probative value of Jessica's testimony outweighs the danger of unfair prejudice. As previously discussed, the similarities between the charged crime and the prior bad act outweigh the dissimilarities. Additionally, the temporal remoteness between the two acts does not bar the admission of the evidence of the prior bad. Although the incidents occurred eight years apart, we believe the probative value of the prior bad act outweighs the danger of unfair prejudice. Accordingly, we find the circuit court erred in denying the admission of McCombs' prior bad act.

**CONCLUSION**

Based on the foregoing, we find the circuit court erred in denying the admission of evidence of McCombs' prior bad act. Accordingly, we reverse and remand for further proceedings consistent with this decision.

**REVERSED AND REMANDED.**

**KONDUROS, and LOCKEMY JJ., concur.**

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

The State, Respondent/Appellant,

v.

Anthony K. Blakney, Appellant/Respondent.

Appellate Case No. 2012-207286
Appellate Case No. 2012-212966

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Appeals From Richland County
G. Thomas Cooper Jr., Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

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Opinion No. 5266
Heard June 2, 2014 – Filed August 20, 2014

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant/Respondent.

Tommy Evans Jr., South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent/Appellant.

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**GEATHERS, J.:** These consolidated appeals involve two sentencing determinations related to violations of a two-year community supervision program (CSP) administered by Respondent/Appellant, the South Carolina Department of

Probation, Parole and Pardon Services (Department). Appellant/Respondent, Anthony K. Blakney, seeks review of the sentence imposed by the circuit court for his April 2011 CSP violations. The circuit court (hereinafter, "the first CSP judge") revoked Blakney's community supervision, gave him credit for prison time served,[1] and required him to begin a new two-year CSP. Blakney argues he was no longer subject to community supervision because he had satisfied the terms of the original sentence for his first degree burglary conviction, which was fifteen years, suspended on the service of thirty months. Blakney contends once he served an aggregate amount of thirty months in prison for his burglary conviction and subsequent CSP violations, he could no longer be imprisoned for successive CSP revocations or be required to participate in a CSP.

The Department appeals an order issued by the circuit court ("the second CSP judge") after a revocation hearing relating to CSP violations allegedly committed by Blakney in April 2012. The second CSP judge did not consider the alleged violations. Rather, he concluded Blakney had satisfied the terms of his burglary sentence when he completed thirty months of imprisonment and, thus, Blakney was no longer subject to community supervision. We affirm the first CSP judge's ruling, reverse the second CSP judge's order, and remand for a new hearing on the violations allegedly committed by Blakney in April 2012.

## FACTS/PROCEDURAL HISTORY

In 2008, Blakney was convicted of first degree burglary, a "no parole offense."[2] On November 6, 2008, the sentencing judge imposed on Blakney the following sentence:

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[1] Blakney was arrested for his April 2011 CSP violations in May 2011, and the first CSP judge sentenced him in January 2012.

[2] S.C. Code Ann. § 24-13-100 (2007) ("For purposes of definition under South Carolina law, a 'no parole offense' means a class A, B, or C felony or an offense *exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more*." (emphasis added)); S.C. Code Ann. § 16-1-10(D) (Supp. 2013) (listing first degree burglary as exempt from classification under subsections (A) and (B) of section 16-1-10); S.C. Code Ann. § 16-11-311(B) (2003) (setting forth the maximum sentence for first degree burglary as life imprisonment). Section 24-21-560(A) of

> [T]he Defendant is committed to the . . . **State Department of Corrections** . . . for a determinate term of 15 . . . years . . . and/or to pay a fine of $_____; provided that upon the service of 30 . . . months . . . and/or payment of $_____; plus costs and assessments as applicable[]; the balance is suspended with **probation** for ____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

(emphases in original).[3] The Sentence Sheet indicates the sentencing judge gave Blakney credit for time served—Blakney had been in prison since March 23, 2008.

On April 30, 2010, Blakney was released from prison and placed on two years of community supervision.[4] On November 3, 2010, Blakney was arrested for

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the South Carolina Code (2007) requires an individual convicted of a "no parole offense" to complete a CSP operated by the Department after his release from prison.

[3] At oral argument in this appeal, counsel for the Department offered a possible explanation for the sentencing judge's failure to impose a term of probation: In *State v. Dawkins*, 352 S.C. 162, 166-67, 573 S.E.2d 783, 785 (2002), our supreme court held that a term of probation runs concurrently with a mandatory CSP term for a sentence deriving from a "no parole offense." Section 24-21-560(E) of the South Carolina Code provides that a defendant who successfully completes a CSP has satisfied his sentence and must be discharged from his sentence. Therefore, a defendant's completion of his CSP term discharges any residual probation, *Dawkins*, 352 S.C. at 167, 573 S.E.2d at 785, and, thus, circuit judges may have found it futile to add a term of probation to sentences for no parole offenses.

[4] A CSP may last up to two continuous years. S.C. Code Ann. § 24-21-560(B). Further, section 24-13-150(A) (2007) requires the individual to serve "at least eighty-five percent of the actual term of imprisonment imposed" in order to be eligible for a CSP. The statute also states: "This percentage . . . is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence

violating the terms of his CSP. After a revocation hearing on February 25, 2011, the first CSP judge revoked Blakney's community supervision but gave him credit for time served, which was three months and fifteen days, and released him. At this point, Blakney began a new two-year CSP.[5]

On May 13, 2011, Blakney was arrested for additional CSP violations. On December 9, 2011, the first CSP judge conducted another revocation hearing. At this hearing, counsel for Blakney argued that Blakney should not be sanctioned for CSP violations because he had already completed the unsuspended portion of his sentence, i.e., thirty months of imprisonment. In response, the Department argued that, under *State v. Picklesimer*,[6] the limit for the aggregate amount of service upon successive CSP revocations is the term of the original sentence, i.e., in Blakney's case, the full fifteen years. Counsel for Blakney asserted that this case is distinguishable from *Picklesimer* because the sentencing judge had not imposed a term of probation as part of Blakney's sentence.

The first CSP judge took the issue under advisement. After a hearing on January 19, 2012, the first CSP judge revoked Blakney's community supervision, gave him credit for time served, and released him to begin a new two-year CSP. Blakney's appeal followed.

On April 27, 2012, Blakney was arrested once again for CSP violations. After conducting a revocation hearing on August 17, 2012, the second CSP judge issued an order finding Blakney had satisfied the terms of the original sentence for his

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[that] has been suspended." Here, the Department of Corrections apparently determined that Blakney had served eighty-five percent of the unsuspended portion of his sentence, i.e., eighty-five percent of thirty months.

[5] Once an individual's community supervision is revoked, he must begin the required CSP term anew. *See* S.C. Code Ann. § 24-21-560(D) (Supp. 2013) ("If a prisoner's community supervision is revoked . . . and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.").

[6] 388 S.C. 264, 268-69, 695 S.E.2d 845, 848 (2010).

burglary conviction and was no longer subject to community supervision.[7] The Department's appeal followed. Although the second CSP judge's order effectively nullified the first CSP judge's ruling requiring Blakney to begin a new CSP, Blakney did not withdraw his appeal of the first CSP judge's ruling. After the Department appealed the second CSP judge's order, its appeal was consolidated with Blakney's appeal.

## ISSUE ON APPEAL

Has Blakney satisfied the terms of his original sentence such that he is no longer subject to community supervision?

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

## LAW/ANALYSIS

Section 24-21-560(D) of the South Carolina Code states, in pertinent part:

> If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, *the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B)* when he is released from incarceration.
>
> A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in Section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as

[7] During the revocation hearing, the second CSP judge indicated there was no need to place Blakney's CSP violations on the record because "he shouldn't be here."

> provided in Section 24-21-560(D). *The maximum aggregate amount of time a prisoner may be required to serve when sentenced for successive [CSP] revocations may not exceed an amount of time equal to the length of incarceration imposed limited by the amount of time remaining on the original "no parole offense[.]"[] The prisoner must not be incarcerated for a period longer than the original sentence*. The original term of incarceration does not include any portion of a suspended sentence.

(emphases added).

In *State v. McGrier*, 378 S.C. 320, 331, 663 S.E.2d 15, 21 (2008), our supreme court held that revocations for successive CSP violations "should not extend or exceed the term of incarceration that was originally ordered for the underlying offense." The court explained that section 24-21-560(D) limits "the total amount of time an inmate could be incarcerated after a CSP revocation to . . . the length of the remaining balance of the sentence for the 'no parole offense.'" *Id.* at 332, 663 S.E.2d at 21.

Subsequently, in *Picklesimer*, our supreme court applied section 24-21-560(D) to a ten-year sentence that had been suspended on the service of five years' imprisonment and five years' probation. 388 S.C. at 265, 695 S.E.2d at 846. The court held the "original sentence," as referenced in section 24-21-560(D), included "both the suspended and unsuspended portions of a circuit court's sentence." *Id.* at 268, 695 S.E.2d at 848. The court explained "it is, in fact, the total sentence handed down by the court." *Id.*

Here, the thirty months served by Blakney was the unsuspended portion only. The total sentence for Blakney's burglary conviction was fifteen years. Therefore, the aggregate amount of time Blakney is required to serve in prison or participate in a CSP may not exceed fifteen years. *See id.* at 270, 695 S.E.2d at 848-49 ("[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the original sentence[.]"). In other words, to satisfy his burglary sentence, Blakney must either *successfully complete* a CSP or continue in a CSP due to violation revocations until the end of the fifteen-year

sentence.[8] *See* S.C. Code Ann. § 24-21-560(E) ("A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence."); *Picklesimer*, 388 S.C. at 270, 695 S.E.2d at 848 ("'[S]uccessful completion' of CSP connotes the completion of a maximum of two continuous years of CSP, as mandated by section 24-21-560(B), without any violations or revocations, or a determination by the Department that a defendant has fulfilled his CSP responsibilities prior to two years' service in the program."); *id.* at 271, 695 S.E.2d at 849 ("[A] defendant will either successfully complete his CSP, or continue in CSP due to violation revocations until the end of the original sentence, at which time the sentence will have been fulfilled.").

The second CSP judge found Blakney's circumstances were distinguishable from the circumstances in *Picklesimer*. The second CSP judge reasoned that, unlike the sentence imposed in *Picklesimer*, Blakney's sentence for his burglary conviction did not include a term of probation. However, the existence of a term of probation for the prisoner in *Picklesimer* did not make its holding any less applicable to CSP revocations that do not involve a term of probation. The identification of the "original sentence" employs the same uncomplicated analysis in both situations. We read *Picklesimer*'s interpretation of section 24-21-560(D) as applying to all CSP revocations, whether or not the individual subject to a CSP is also subject to a term of regular probation.

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[8] In determining the date that the defendant's original sentence expired, the *Picklesimer* court gave credit to the defendant for not only the time he served in prison but also the time he participated in a CSP. *See Picklesimer*, 388 S.C. at 268 n.3, 695 S.E.2d at 848 n.3 ("[O]ur holding sets only an outside time limit on a defendant's aggregate amount of incarceration and/or CSP participation."); *id.* at 265 n.1, 695 S.E.2d at 846 n.1 (noting the defendant's original ten-year sentence had begun on June 1, 2000); *id.* at 269 n.4, 695 S.E.2d at 848 n.4 (recognizing that the term of the defendant's original sentence had expired on June 1, 2010); *id.* at 270, 695 S.E.2d at 849 (explaining that the defendant would be eligible for incarceration due to CSP revocations "until the outside time limit of his original sentence, June 1, 2010, or until he successfully completed his CSP").

The dissent expresses concern over the fact that Blakney's original fifteen-year sentence was erroneously suspended.[9] However, this erroneous suspension does not affect our application of section 24-21-560(D), as interpreted in *McGrier* and *Picklesimer*, to the present case. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). First, the suspension of Blakney's sentence is the law of the case, as the State has never sought to correct this error. *Cf. State v. Lee*, 350 S.C. 125, 132-33, 564 S.E.2d 372, 376 (Ct. App. 2002) (holding, in a probation revocation case, that any lack of authority on the part of the sentencing judge to impose a particular sentence on the underlying conviction did not affect the circuit court's subject matter jurisdiction to later proceed with the revocation because the defendant did not challenge the underlying sentence in a motion to reconsider, on direct appeal, or as a defense to the probation revocation proceedings, and, therefore, the underlying sentence was the law of the case). Accordingly, this court does not have the authority to correct the error, and, notwithstanding the dissent's statement to the contrary, it is necessary to reference *Picklesimer*'s definition of "original sentence" in applying section 24-21-560(D) to the present case. *See Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control*, 370 S.C. 296, 303, 634 S.E.2d 664, 667 (Ct. App. 2006) (indicating that an issue that is procedurally barred should not be raised sua sponte by an appellate court (citing *State v. Cutro*, 332 S.C. 100, 107, 504 S.E.2d 324, 327 (1998) (Toal, J., dissenting))); *see also Lewis v. Local 382*, 335 S.C. 562, 569 n.11, 518 S.E.2d 583, 586 n.11 (1999)

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[9] *See* S.C. Code Ann. § 24-21-410 (2007) ("After conviction or plea for any offense, *except a crime punishable by death or life imprisonment*, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation." (emphasis added)); S.C. Code Ann. § 16-11-311(B) ("Burglary in the first degree is a felony *punishable by life imprisonment*. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of *not less than fifteen years*." (emphases added)); *State v. Jacobs*, 393 S.C. 584, 589, 713 S.E.2d 621, 624 (2011) ("We find that section 24-21-410 of the South Carolina [C]ode does not give courts the authority to suspend sentences for crimes punishable by death or life imprisonment, and this includes crimes that include lesser sentences than death or life imprisonment.").

("This Court will not generally raise issues *sua sponte*."); *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999) (concluding that a defendant's challenge to the trial court's sentencing authority did not involve a question of subject matter jurisdiction, and, thus, it could not be raised for the first time on appeal); *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (concluding that this court erred in sua sponte raising an issue concerning the propriety of a jury verdict in a nuisance claim finding liability but no damages).

Further, even if (1) Blakney's sentence had not been suspended, or (2) the suspension of his sentence were allowed by our criminal statutes, fifteen years would still serve as the limit on the aggregate amount of time Blakney may be required to serve in prison or participate in a CSP. *See Picklesimer*, 388 S.C. at 268, 695 S.E.2d at 848 (holding that the term "original sentence," as referenced in section 24-21-560(D), is the total sentence handed down by the court); *id.* at 268-69, 695 S.E.2d at 848 (stating that to interpret "original sentence" as only the unsuspended portion "would be to virtually eliminate the suspended portion of any sentence"); *McGrier*, 378 S.C. at 322, 663 S.E.2d at 16 (applying section 24-21-560(D) to a sentence that had not been suspended). Therefore, while the State, currently represented by the Department, is barred from arguing that Blakney's fifteen-year sentence was improperly suspended (*see supra; infra dissent*), it is not barred from taking the position that, *in any event*, for purposes of section 24-21-560(D), as interpreted in *McGrier* and *Picklesimer*, the original sentence was fifteen years. In the Department's appellate brief, it took both of these positions.

As to the dissent's statement that the State should honor the representations the Solicitor made to Blakney in plea negotiations, it is not for this court in this case to speculate on the actual representations made by the Solicitor to Blakney, who was represented by counsel when he signed the Sentence Sheet. Further, we disagree with the dissent's suggestion that Blakney should receive special treatment because when he pled guilty he may not have been aware of the aggregate amount of time he could be required to serve in prison or participate in a CSP after successive CSP revocations. *See McGrier*, 378 S.C. at 331, 663 S.E.2d at 21 (stating that community supervision is a collateral consequence of a conviction for a "no-parole offense" and citing *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002)); *Jackson*, 349 S.C. at 63-64, 562 S.E.2d at 475-76 (rejecting a post-conviction relief applicant's argument that his guilty plea was involuntary because his trial counsel failed to inform him about mandatory participation in a CSP in advising him whether to plead guilty); *id.* at 64, 562 S.E.2d at 476 (holding that counsel was not

ineffective for failing to inform his client about mandatory CSP participation in advising him whether to plead guilty because participation in a CSP is a collateral consequence of sentencing).

Finally, the dissent suggests that if the court interprets Blakney's original sentence as being fifteen years, he will have to serve eighty-five percent of fifteen years in prison. This is not the case. Section 24-13-150(A) requires a "no parole" inmate to serve "at least eighty-five percent of the actual term of imprisonment imposed" in order to be eligible for community supervision. The statute further states: "This percentage . . . is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence [that] has been suspended." Here, Blakney's fifteen-year sentence was suspended upon the service of thirty months, which is the law of the case (*see supra*). Therefore, section 24-13-150(A) does not require Blakney to go back and serve eighty-five percent of the full fifteen years before he is eligible to participate in a CSP. In any event, the *maximum* time Blakney may be required to serve in prison or participate in a CSP is the term of his original sentence, fifteen years. Of course, Blakney can make all of this go away by simply complying with the terms of his CSP for no more than *two* years. *See* S.C. Code Ann. § 24-21-560(E) ("A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence.").

Based on the foregoing, we affirm the first CSP judge's ruling, reverse the second CSP judge's order, and remand for a new hearing on the violations allegedly committed by Blakney in April 2012.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**SHORT, J., concurs.**

**FEW, C.J., dissenting:** The State and Blakney requested, and the trial court imposed, a sentence we now know was impermissible under law. *See State v. Jacobs*, 393 S.C. 584, 588-89, 713 S.E.2d 621, 623-24 (2011) (holding a sentencing court has no power to suspend the minimum fifteen year sentence for burglary in the first degree because it carries a maximum sentence of life in prison). The law does not provide this court a clear resolution for the dispute that has arisen as to the execution of that sentence. The majority has thoroughly explained its proposed resolution, and I agree with the majority's interpretation of

the sentencing statutes. However, I would not resolve this appeal by interpreting the sentencing statutes. Instead, I would hold the State may not argue to a sentencing court that the court has the power to suspend a sentence, and after the court accepts the State's argument and suspends the sentence, turn around and argue, as it has done in this appeal, the sentence may not be suspended. I would hold the State is estopped from taking the position it takes on appeal because it took precisely the opposite position when it asked the sentencing court to suspend the minimum of fifteen years. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with . . . one the litigant has previously asserted in the same or related proceeding." (citation omitted)). I would affirm the second CSP judge's order, and find it unnecessary to rule on the appeal from the first CSP judge's order. I respectfully dissent.

Blakney pled guilty on November 6, 2008. At the sentencing hearing, the State recommended Blakney receive a sentence of no more than five years. In doing so, the State asked the sentencing court to suspend the minimum sentence of fifteen years.[10] *See* S.C. Code Ann. § 16-11-311(B) (2003) ("Burglary in the first degree is a felony punishable by . . . . a term of not less than fifteen years."). In its appellate brief, the State wrote:

> The [State] argues that [Blakney] was not given a thirty month sentence but a fifteen year sentence. For a person

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[10] Interestingly, fourteen months later, the same Solicitor's office that prosecuted Blakney took the opposite position at the plea hearing in *Jacobs*. *See* 393 S.C. at 586, 713 S.E.2d at 622 ("In January 2010, . . . . [t]he circuit judge deferred sentencing . . . and requested the parties submit memoranda in support of their positions regarding the suspension issue."). The Solicitor in *Jacobs* filed a memorandum arguing, "The State respectfully submits that it is not within the power of a judge to suspend a burglary first[-]degree sentence and that doing so is contrary to the laws of the State of South Carolina." Similarly, the Attorney General argued in its brief on appeal in *Jacobs*, "The trial judge properly determined Appellant's sentence for burglary in the first degree . . . cannot be suspended under the plain and unambiguous language of S.C. Code Ann. § 24-21-410."

> to be sentenced to burglary 1st you cannot receive less than fifteen years. The court is obligated to impose the sentence established by the General Assembly. It is clear by the statute the General Assembly did not wish a criminal defendant to receive a sentence less than fifteen years for the offense of burglary 1st.

At oral argument, the State clarified its position on four separate occasions:

> I think the sentence is illegal, your honor.
>
> With all due respect, the sentence is fifteen years.
>
> He would have to serve the eighty-five percent of fifteen years.
>
> I'm taking the position the sentence is fifteen years.

The State is represented on appeal by the general counsel for the Department of Probation, Parole, and Pardon Services, who attempts to escape the inconsistency in the State's positions by arguing the State was represented by a different lawyer—the Solicitor—at the plea hearing. The argument fails. The State's lawyer told the sentencing court it had the power to suspend the minimum sentence, and now the State's lawyer tells this court there is no such power. I would hold the State is bound to accept the sentence it asked for.

Apart from the State's inconsistent positions, I would concur in the result reached by the majority. However, I do not agree that *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845 (2010), applies to this case. In *Picklesimer*, the plea court sentenced the defendant to ten years in prison for criminal sexual conduct with a minor in the second degree, and then suspended the sentence to five years. 388 S.C. at 265, 695 S.E.2d at 846. Section 24-21-410 of the South Carolina Code (Supp. 2013) provides the sentencing court the power to suspend sentences when the crime is not "punishable by death or life imprisonment." *See also State v. Thomas*, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007) (explaining the power conferred upon the sentencing court under section 24-21-410 "does not extend to offenses where the legislature has specifically mandated that no part of a sentence may be suspended"). Thus, the suspended sentence in *Picklesimer* was proper because the crime did not carry life in prison and the applicable statute did not prohibit a suspended sentence. *See* S.C. Code Ann. § 16-3-655(D)(3) (Supp. 2013)

("A person convicted of [criminal sexual conduct with a minor in the second degree] . . . must be imprisoned for not more than twenty years in the discretion of the court.").

In Blakney's case, however, the suspended sentence was not proper because the plea court had no power to suspend the sentence. *See Jacobs*, 393 S.C. at 588-89, 713 S.E.2d at 623-24. In my opinion, the suspension of a sentence is not effective when the law forbids the suspension. *See generally Talley v. State*, 371 S.C. 535, 546 n.6, 640 S.E.2d 878, 883 n.6 (2007) (Pleicones, J., dissenting) (stating "if in fact the original sentence were unlawful" because a magistrate court had no power to impose probation, "then the suspension would be a nullity and Respondent would be required to serve the original . . . sentence.").[11] Therefore, despite the language on the sentencing sheet purporting to suspend the sentence, the sentence given was fifteen years, no portion of which was suspended. Because there was no suspended sentence, it is unnecessary for this court to consider the effect of *Picklesimer*.

My conclusion that Blakney received a fifteen year sentence with no suspension raises a concern as to whether he entered a voluntary plea. The majority's holding that he must serve all fifteen years before he is no longer subject to revocation of his community supervision raises the same concern. The State recommended the plea court sentence Blakney to a maximum of five years in prison. Under *Jacobs* and section 24-21-410, Blakney faced a minimum of fifteen years. The plea court could not have given Blakney correct information about the sentence he faced if the court believed it could suspend his sentence to five years. However, this concern must be addressed in a post-conviction relief (PCR) action. *See Roscoe v. State*, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001) (requiring a PCR applicant to

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[11] The *Talley* majority did not reach the point Justice Pleicones addressed in this statement because it was able to resolve the Sixth Amendment right to counsel issue before it by interpreting a *completely suspended* sentence as leaving "absolutely no possibility the defendant will ever be incarcerated for the underlying conviction." 371 S.C. at 545, 640 S.E.2d at 883. Moreover, the magistrate court in *Talley* had the power to suspend the sentence, but the sentence was unlawful because the magistrate court had no authority to impose probation. 371 S.C. at 544, 640 S.E.2d at 882. Our supreme court has not held that a trial court's *partial* suspension of a sentence is effective even when the court has no power to suspend the sentence.

demonstrate that but for the erroneous statement from the plea court about the penalty he faced, he would have gone to trial); *Dover v. State*, 304 S.C. 433, 435, 405 S.E.2d 391, 392 (1991) (finding a guilty plea involuntary in part because the defendant did not understand the sentence he faced).

I do not intend to suggest the State did anything improper in arguing to the sentencing court it had the power to suspend a minimum sentence for burglary in the first degree. In fairness to the Solicitor, the 2008 plea occurred when many lawyers and circuit judges interpreted section 16-11-311 to permit suspending the minimum sentence. It was not until 2011 when the supreme court decided *Jacobs* that it became clear the minimum could not be suspended. In fairness to the general counsel for the Department, he is correct under *Jacobs*—Blakney did receive a fifteen year sentence. In fairness to Blakney, however, he should get what was promised—a sentence of no more than five years.

The fact the State did not seek to correct the trial court's error is of no consequence. The State is not aggrieved by the error—Blakney is. In fact, the State now embraces the error and seeks to benefit from it by claiming Blakney's sentence is fifteen years. The issue before us, however, is not a matter of "correcting" the error. This appeal requires us in the first instance to interpret the sentence. In doing so, I would hold the State to the position it took at the sentencing hearing, and find that Blakney can no longer be incarcerated on community supervision for this crime.

As the majority aptly points out, and as I acknowledge, my proposed resolution of this appeal does not fit perfectly with the situation the parties and the sentencing court created. However, the resolution I propose honors a fundamental cornerstone of the administration of criminal justice: participants in the system—defendants in particular—are entitled to expect that the State will stand behind its sentencing recommendations. While the sentencing court is never required to follow a recommendation, when it does so, the State should not be permitted to later claim what it and the court meant was the defendant must receive a *minimum* of three times what it recommended as the maximum. That is precisely what the State has done in this case. The Department of Probation, Parole, and Pardon Services and the Department of Corrections should at least recognize the inconsistency of the positions the State has taken in this case, honor the representations the Solicitor made to Blakney in plea negotiations, and interpret the sentence in such a way that he faces only a one-year revocation if he violates community supervision—not eighty-five percent of fifteen years. *See* S.C. Code Ann. § 24-21-560(C) (2007)

(providing "the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program").