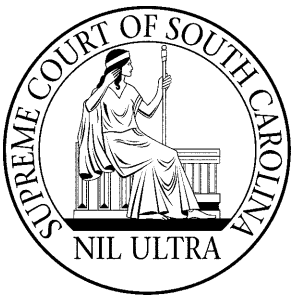

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
September 2, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Cunningham, Respondent/Petitioner,

v.

Anderson County, Petitioner/Respondent.

Appellate Case No. 2013-000678

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27568
Heard March 18, 2015 – Filed September 2, 2015

REVERSED

William W. Wilkins and Kirsten E. Small, both of Nexsen Pruet, LLC, of Greenville, for Petitioner/Respondent.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and Brian P. Murphy, of Stephenson & Murphy, LLC, of Greenville, for Respondent/Petitioner.

JUSTICE HEARN: This case arises from the termination of Michael Cunningham as the county administrator for Anderson County. Cunningham brought this action alleging breach of contract, wrongful discharge, and violation of the Payment of Wages Act. The trial court granted summary judgment in favor of the County on all causes of action. The court of appeals affirmed the trial court on the breach of contract and Payment of Wages claims, but reversed and remanded the wrongful discharge claim. *Cunningham v. Anderson Cnty.*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). The County contends the court of appeals erred by reversing the trial court's grant of summary judgment on the wrongful discharge claim because Cunningham has never argued he is a noncontractual, at-will employee. We agree and reverse the portion of the court of appeals' opinion reversing and remanding that claim.[1]

FACTUAL/PROCEDURAL BACKGROUND

During the November 18, 2008 Anderson County Council meeting, the seven member council—three of whom had not been reelected earlier that month—voted 5-2 to enter into a Master Employment Agreement (the Contract) with Cunningham, employing him as the new county administrator. Cunningham signed the Contract for employment the following day. The term of his employment was three years, and the Contract would perpetually renew absent ninety days' notice. The Contract provided that the administrator "serve[s] at the pleasure of [the council]" and although it indicated that nothing could prevent the council from terminating Cunningham, those terms were subject to other limitations provided in the "Termination and Severance Pay" section. Under that section, the County could only terminate Cunningham for cause if he was convicted of any crime involving personal gain or of moral turpitude; refused to perform the duties of his office; or suffered a serious illness requiring more than ninety days' absence. If the council terminated Cunningham without cause, he would be entitled to "all pay and financial benefits remaining on his contract for the balance of the contract period" as well as compensation for "all earned sick leave, vacation, holidays, compensatory time and other accrued benefits." Additionally, the Contract provided that Cunningham would receive "additional

[1]Cunningham also filed a petition for certiorari, which this Court initially granted. Although we disagree with the County's contention that Cunningham's petition was untimely, we nevertheless dismiss that writ of certiorari as improvidently granted.

severance pay . . . based upon the length of his total service to the County, and computed at the rate of one month aggregate compensation under this Agreement for every two years of such service."

The newly constituted county council, which began serving in January of 2009, immediately passed a resolution condemning the manner in which Cunningham was hired. The new council later offered Cunningham another contract of employment which was expressly at-will and contained none of the "parachute" provisions entitling him to severance for termination without cause, which Cunningham rejected. The council thereafter recommended Cunningham be terminated. Cunningham requested a hearing and upon its conclusion, the council voted 5-2 to terminate him.

Cunningham subsequently brought this action alleging breach of contract, wrongful discharge, and requesting payment under the Payment of Wages Act. He argued he was due severance and sick leave under the Contract, and that he was wrongfully discharged in violation of public policy because he refused to commit the criminal act of discharging employees for political reasons.

The parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor of the County on all claims. Specifically, it found the contract was unenforceable against the new council and that because Cunningham had never argued he was an at-will employee, he could not claim he was wrongfully discharged in violation of public policy. Cunningham appealed, and the court of appeals affirmed the portion of the trial court's order finding the Contract unenforceable. *Cunningham*, 402 S.C. at 450, 741 S.E.2d at 554. However, it reversed and remanded on the issue of wrongful discharge stating the "illegality of [the Contract], . . . relegated Cunningham to an at-will status" and he should therefore not be precluded from proceeding on the wrongful discharge claim. *Id.* at 456, 741 S.E.2d at 557. The County petitioned for a writ of certiorari which the Court granted.

ISSUE PRESENTED

Did the court of appeals err in reversing the trial court's grant of summary judgment for the County on Cunningham's claim for wrongful discharge?

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) (internal quotation omitted). In reviewing a grant of summary judgment, the Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). Accordingly, summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When determining whether any triable issues of fact exist, the Court views the evidence and all reasonable inferences that may be drawn in the light most favorable to the non-moving party. *Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 81–82, 708 S.E.2d 745, 748 (2011). To withstand a summary judgment motion in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

LAW/ANALYSIS

The County argues the court of appeals erred in holding Cunningham had alleged a claim for wrongful termination as an alternative to his breach of contract claim. We agree.

The court of appeals affirmed the trial court by holding Cunningham's Contract was unenforceable against the new county council. However, it reversed and remanded the case for Cunningham to argue he was wrongfully discharged as an at-will employee under the public policy exception. Unlike the trial court, the court of appeals found Cunningham had preserved the argument he was an at-will employee because he submitted a supplemental filing likening his case to *Stiles v. American General Life Insurance Co*, 335 S.C. 222, 516 S.E.2d 449 (1999). We find a mere reference to the *Stiles* case in a document filed with the court insufficient to preserve the argument.

In *Stiles*, the Court addressed a certified question of whether an employee under an at-will contract with a thirty-day notice provision may maintain an action

for wrongful discharge in violation of public policy. *Id*. at 226, 516 S.E.2d at 451. In answering in the affirmative, the Court noted that in this case, "the employee does not have an alternate remedy based on an allegation of wrongful discharge." *Id.* The court of appeals accordingly took the reference to *Stiles* as enough to conclude Cunningham argued he was an at-will employee with a contract.

We disagree with the court of appeals that Cunningham advanced the argument that he was an at-will employee. Initially, the memorandum contains no reference to Cunningham having an at-will status. Although he claims his employment agreement "does not limit the reasons for which Anderson County could terminate [him]," he also repeatedly refers to having a contract for a definite term.[2] Nothing precluded Cunningham from making alternative arguments based on whether he was deemed a contractual or at-will employee; however, he did not do so. In his complaint, Cunningham clearly alleged that his employment was "for a term pursuant to a written agreement." There is no mention in his pleading that his employment was at-will. Additionally, the trial court specifically found, in its order granting summary judgment in favor of the County, that "[a]t no point in this litigation has Cunningham *ever alleged that he was an at-will employee* . . . ." Cunningham's assertion that he has always argued he is an at-will employee is belied by his pleadings and significantly, by the trial court's clear finding to the contrary.

Moreover, there is a distinction between Cunningham arguing he is a noncontractual at-will employee, as the remand would allow, and arguing, as he does before this Court, that he is at-will pursuant to the Contract. Equally as important, any suggestion that Cunningham was claiming at-will status is in direct

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[2] We recognize the notions of contractual employment and at-will employment are not always mutually exclusive. *E.g. Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) (holding the employment contract at issue, while for a definite term, was terminable at-will). Nevertheless without more, a contract for a definite term and an at-will contract are distinct. *See id.*, 365 S.C. at 319, 618 S.E.2d at 883 (holding that an employment contract for an indefinite term is presumptively terminable at-will and a contract for a definite term is presumptively terminable only upon just cause but these presumptions can be altered by express contract provisions); *Stiles*, 335 S.C. at 227, 516 S.E.2d at 451 (Toal, J., concurring) ("Employment in South Carolina has been classified as either for a definite term or at-will.").

contravention to the primary thrust of his argument before the trial court: that he was a contract employee and that the County had breached that contract. Cunningham has consistently declined to plead alternatives which might limit his remedy, instead requesting damages for both breach of contract and wrongful discharge under the Contract.[3] The court of appeals' opinion effectively gives Cunningham an opportunity to make an argument he has never made before. We hold Cunningham is limited to the allegations in his complaint and his chosen strategy before the trial court. Because he has not preserved the argument he is an at-will employee, we find the court of appeals' remand erroneous.

CONCLUSION

Accordingly, we reverse the court of appeals' remand of the case for a determination of whether Cunningham was an at-will employee, and affirm the trial court's grant of summary judgment.

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

[3] Cunningham admits as much at the summary judgment hearing when he states that "just because you have a contract doesn't mean you give up the right to sue in court. They are not the same. It's not alternative causes of action."

JUSTICE BEATTY: I respectfully dissent. I would affirm the Court of Appeals' well-reasoned decision. Like the majority, I would affirm the Court of Appeals on the Breach of Contract and the Payment of Wages Act claims. I depart from the majority when it asserts that the Court of Appeals erred in remanding the wrongful discharge claim for further consideration. The majority grounds its conclusion on a perceived failure of Cunningham to argue that he was an at-will employee when he asserted a public policy violation by the County Council. I view the pleadings and the record differently.

Cunningham's Complaint clearly sets forth a second cause of action entitled "Wrongful Discharge - Public Policy." Throughout these proceedings, Cunningham has argued that the County had the right to terminate him at any time. In a County Council meeting and by letter, prior to his termination, Cunningham acknowledged his at-will employment status. Cunningham told Council members "what I offered was a willingness to continue to work under my current conditions, which is as the Council views it as an at-will employee. I have no desire to argue that point." This statement was introduced at trial and considered by the trial judge and the Court of Appeals.

It is important to recognize that, at the time of termination of employment, Cunningham was an acknowledged at-will employee. Some of the alleged conduct, which violated public policy, took place while he was an at-will employee under the supervision of the new County Council. Therefore, the Breach of Contract cause of action should have no bearing on the wrongful discharge cause of action even under the majority's view of the claims. In my view, the majority errs when it conflates the two.

The majority finds significance in Cunningham's statement that "It's not alternative causes of actions." The majority interprets this statement to mean that Cunningham only advanced one claim, Breach of Contract. Considering the statement in what I believe to be its proper context, it appears that Cunningham meant that he was making two independent claims and, thus, because one is grounded on a contract for employment for a specific period of time he was not precluded from bringing a wrongful discharge claim as an at-will employee. Specifically, Cunningham argued "just because you have a contract doesn't mean

you give up the right to sue in court. They are not the same. It's not alternative causes of action. They address very different things. They exist independently of each other."

Moreover, under our jurisprudence, a contract of employment for a determined period of time does not necessarily eliminate at-will employment or vice versa. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) ("An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. These are mere presumptions, however, which the parties can alter by express contract provisions."); *Prescott v. Farmers Tel. Coop.*, 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999) ("Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity."); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999) (holding that an employee under an at-will contract with a thirty-day notice provision may maintain an action for wrongful discharge in violation of public policy); *see also Shivers v. John H. Harland Co.*, 310 S.C. 217, 423 S.E.2d 105 (1992) (recognizing that when an employee is wrongfully discharged under a contract for a definite term, the measure of damages is generally the wages for the unexpired portion of the term, but concluding that trial judge correctly limited employee's recovery to the amount of pay and other benefits the employee would have received during the fifteen-day notice period).

In my view, the record reflects evidence that Cunningham asserted his at-will status, which allows him to pursue a wrongful discharge claim under the public policy exception. However, assuming Cunningham did not argue that he was an at-will employee, the issue is still preserved because of the necessary inference inherent in the claim itself. A wrongful discharge claim premised on the public policy exception necessarily infers that the plaintiff asserts the status of an at-will employee.

It is undisputed that Cunningham was a County employee. Under our jurisprudence, an employment contract may be either at-will or for a determined period of time. County argued, and the trial judge agreed, that Cunningham's contract, for a determined period of time, was void because it attempted to bind a

future County Council. By operation of law, Cunningham was an at-will employee at the time he was terminated. As such, his wrongful discharge claim, which was premised on a violation of public policy, survived and should be considered on the merits.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Shawn Reaves, Petitioner.

Appellate Case No. 2014-000813

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Marion County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27569
Heard May 6, 2015 – Filed September 2, 2015

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Mark R. Farthing, both of Columbia, for Respondent.

JUSTICE HEARN: Shawn Reaves was convicted of voluntary manslaughter after the shooting death of Keshawn Applewhite. He now argues

that deficiencies in the police investigation—including the loss of potentially exculpatory evidence and the failure to ascertain the identity of a second shooter—deprived him of a fair trial, and delays occasioned by the State's faulty investigation deprived him of the right to a speedy trial. Reaves asks the indictment be dismissed. We disagree and therefore affirm.

FACTUAL/PROCEDURAL HISTORY

Police responded to a call about a fight in progress in Marion. On their way to the scene, the officers were notified that shots had been fired. When they arrived, officers found Applewhite slumped inside the rear passenger seat of a white Crown Victoria with apparent gunshot wounds. Applewhite was transported to the hospital, but later died as a result of his injuries.

An autopsy revealed that Applewhite had been shot five times. Three of the bullets passed through his body. Another bullet entered and remained lodged in Applewhite's shoulder. The fifth bullet, which was determined to be the fatal one, entered Applewhite's upper back, struck his lung, aorta, and liver, and ultimately stopped in his colon. A South Carolina Law Enforcement Division (SLED) analyst determined the fatal bullet was a .38 or .357 caliber likely fired from a revolver, and the shot lodged in his shoulder was a 9mm caliber likely fired from a semiautomatic pistol. Accordingly, the analyst concluded the two shots were fired from different guns.

As the police investigation progressed, witnesses identified sixteen-year-old Reaves as one of the shooters. Police obtained a warrant for Reaves' arrest, and he was apprehended in Philadelphia in May of 2007, where he had fled after the shooting. Reaves was transported back to South Carolina and charged with murder and assault and battery with intent to kill. After more than three years had passed while incarcerated, Reaves made a speedy trial motion in August of 2010. Reaves' case was called for trial later that same month.

During the first day of Reaves' trial, an eyewitness to the shooting, Jackie McGill, and multiple police officers testified. After the jury was excused for the day, defense counsel had the opportunity to review a number of documents in the investigator's file which were previously unknown to either party. Among these documents was a signed statement from a hearsay witness saying that Jeremy Vereen, not Reaves, was the shooter who fired the fatal bullet. Also among the

materials was a handwritten note from the lead investigator in the case indicating that Vereen may have been the second shooter. Reaves moved for a mistrial based on the possible exculpatory value the documents presented, and because he had not been provided them pursuant to his request for disclosure under Rule 5, SCRCrimP. The State agreed a mistrial was appropriate. The trial judge granted a mistrial.

Prior to his second trial, Reaves moved for dismissal of the indictment on due process grounds. Reaves also made a motion to dismiss the case because his right to a speedy trial had been violated. Both motions were denied.

At the second trial, McGill again testified about the shooting. McGill stated he and Applewhite, along with Applewhite's cousin, Karen Graves, and McGill's friend, Travis Lane, drove together to see Applewhite's former girlfriend, Joemilla Wilson. Applewhite and Wilson had been living together in Atlanta as recently as a month before the shooting. However, Wilson was then at the house of her new boyfriend, Deshawn Bellamy.

According to McGill, Applewhite called Wilson out of the house to talk and the two started walking down the street, arguing. They soon started fist-fighting, and Applewhite threw Wilson to the ground. After McGill broke up the fight and put Applewhite back in the car, Wilson came over and spit on Applewhite through an open window. Applewhite then got back out of the car and chased after Wilson, who retreated to the porch of the house. Applewhite followed, but was intercepted by Reaves, who met him at the bottom of the porch steps. It was at this point that Reaves shot Applewhite.

McGill's testimony was corroborated by Wilson, who stated she saw Reaves fire a revolver at Applewhite. Additionally, the initial lead investigator in the case, Captain Jim Gray, testified to his investigation of the shooting and the second lead investigator, Lieutenant Farmer Blue, who took over after Captain Gray became ill, testified about his identification of Reaves as the shooter. This was Lt. Blue's first murder investigation, and he conceded "there would have been a lot of other things I would have done different (sic) in the case."

Over the course of the trial, it became clear there were serious problems with the investigation into Applewhite's death. The crime scene had not been properly sealed, and the crime scene log of people entering and exiting the area was not

accurately maintained.[1] A number of pieces of physical evidence—including two hats, a credit card bearing the name of William A. Bellamy, three cell phones, and a Bluetooth headset—were collected at the scene but not tested. Three gold chains, which Wilson testified were snatched off Reaves' neck by Applewhite moments before the shooting, were collected at the scene but were missing at the time of trial. Further, Applewhite's clothing, which was collected by police from the hospital, was also lost or destroyed. Additionally, five witness statements, written by McGill, Lane, Graves, and two other people, were purportedly taken by police officers at the scene that night but were unaccounted for at trial.

The problems with the investigation coincided with three main discrepancies in the facts of the case. First, although there was information Vereen was involved in Applewhite's death, the second shooter had not been definitively identified at the time of trial.[2] Second, both McGill and Lane were shown a photo lineup with Reaves in it, and despite testifying they had known Reaves for years, they both selected another person named "BT" as the shooter. Third, the inconsistency between expert testimony that the fatal shot was to Applewhite's upper back and witness testimony placing Applewhite in front of Reaves during the shooting was never explained.

Reaves renewed his motions to dismiss regarding his right to a fair trial and right to a speedy trial after the State's case and again at the close of all the evidence. Although the trial court expressed concern over the investigation of the shooting, it denied both motions.[3]

Reaves was ultimately convicted of voluntary manslaughter. He was sentenced to twenty-five years' imprisonment. Reaves appealed his conviction and sentence, claiming he was deprived of the right to a fair trial as a result of the lost

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[1] Marion's longtime mayor, Bobby Gerald, was walking around the scene after the shooting for unknown reasons, although it was determined he was *not* investigating the shooting.

[2] Lt. Blue testified that although he had information that Vereen was the second shooter, he had not talked to Vereen regarding the shooting in the three-and-a-half years or so between the incident and trial.

[3] At one point, the same trial judge, who had earlier granted Reaves' motion for a mistrial, stated: "obviously we've got a messed up trial based on that bad investigation."

evidence as well as his right to a speedy trial. The court of appeals affirmed in an unpublished opinion. *State v. Reaves*, Op. No. 2014-UP-057 (S.C. Ct. App. filed February 12, 2014). Reaves filed a petition for certiorari, which this Court granted.

ISSUES PRESENTED

I. Did the court of appeals err in affirming the trial court's denial of Reaves' motion to dismiss the indictment because his right to a fair trial had been violated?

II. Did the court of appeals err in affirming the trial court's denial of Reaves' motion to dismiss the case because his right to a speedy trial had been violated?

LAW/ANALYSIS

I. FAIR TRIAL

Reaves argues the court of appeals erred in affirming the trial judge's denial of his motion to dismiss the indictment because the evidence lost by police in the investigation of his case effectively deprived him of a fair trial. We disagree.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant's fundamental right to a fair trial. U.S. Const. amend XIV. Where a defendant's right to a fair trial due to missing or destroyed evidence is at issue, the applicable standard is derived from the United States Supreme Court's opinion in *Arizona v. Youngblood*, 488 U.S. 51 (1988).

In *Youngblood*, a ten-year-old boy was abducted and brutally sodomized by a middle-aged man. *Id.* at 52. The police obtained a sexual assault kit from the hospital as well as the boy's underwear and shirt. *Id.* at 52–53. However, police did not timely examine the assault kit or refrigerate the boy's clothing; as a result, later tests on the kit and clothing were inconclusive as to the identity of the assailant. *Id.* at 53–54. Nevertheless, the State proceeded to trial based primarily on the boy's photo lineup identification of Larry Youngblood as his attacker. *Id.* at 53. Youngblood's primary defense was that the boy misidentified him as the perpetrator, but he was nevertheless convicted of child molestation, sexual assault, and kidnapping. *Id.* at 53–54. The Arizona Court of Appeals reversed Youngblood's conviction reasoning that the timely performance of tests with properly preserved semen samples may have produced results which could have exonerated him. *Id.* at 54–55.

Examining the question of whether Youngblood's right to a fair trial had been violated, the United States Supreme Court acknowledged that "'[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'" *Id.* at 57–58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)). Rejecting an approach which would impose on the State an absolute duty to retain and preserve all potentially exculpatory evidence, the Court instead crafted a standard which focused on police conduct where evidence was lost or destroyed:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id. at 58. Finding no bad faith present in the police's failure to refrigerate the clothing and perform tests on the semen samples, the Court reversed the Arizona Court of Appeal's dismissal of the case. *Id.* at 58–59.[4]

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[4] The Supreme Court in *Youngblood* was divided. Justice Stevens concurred in the result because although he agreed the defendant's right to a fair trial was not violated, he concluded "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* at 61 (Stevens, J. concurring). Justice Blackmun wrote for three dissenters, noting "the Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial," and further that "[r]egardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process." *Id.* at 61, 62 (Blackmun, J. dissenting). The Supreme Court recently reiterated the *Youngblood* standard in *Illinois v. Fisher*, 540 U.S. 544 (2004).

A number of state courts have declined to follow the bad faith standard established in *Youngblood* based on state law grounds. *See, e.g.*, *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) ("Because we deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the *Youngblood* analysis in its pure form."); *State v. Osakalumi*, 461 S.E.2d 504, 512 (W. Va. 1995) ("As a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record."); *Commonwealth v. Henderson*, 582 N.E.2d 496, 497 (Mass. 1991) ("The rule under the due process provisions of the Massachusetts Constitution is stricter than that stated in the *Youngblood* opinion."). However, Reaves does not ask this Court to do so here; his argument rests solely on the Fourteenth Amendment to the United States Constitution.

Specifically, Reaves argues the police's actions in failing to preserve evidence were so egregious as to constitute misconduct and bad faith. While he does not argue the police acted intentionally, he asserts the police's negligent and reckless conduct amounted to bad faith. However, Reaves cites no authority to support this proposition, and we found only a single federal district court case which has adopted this approach. *See United States v. Elliott*, 83 F. Supp. 2d 637, 647–48 (E.D. Va. 1999) ("[W]here the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test."). The weight of federal authority seems to reject

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Ironically, Youngblood was later exonerated by DNA evidence. *See* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241, 276 (2008). After his parole and rearrest for failing to register as a sex offender, Youngblood's attorney requested that police test a rectal swab taken from the victim with new, more sophisticated technology. *Id.* Once conducted, the DNA profile did not match Youngblood; instead, it showed that Walter Calvin Cruise, who had two prior child sex abuse convictions in Texas, committed the assault. *Id.* at 277. Youngblood was released from prison and his conviction was vacated. *Id.* at 276.

this premise and has adopted the view that the extraordinary remedy of dismissal should only be granted when the authorities act intentionally and in bad faith. *See, e.g.*, *United States v. Tyerman*, 701 F.3d 552, 560 (8th Cir. 2012) ("[The defendant] argues that a reckless destruction equates to bad faith. This court rejects that argument."); *United States v. Vera*, 61 Fed. Appx. 330, 331 (9th Cir. 2003) ("An officer does not act in bad faith unless he or she acts with the purpose of depriving the defendant of the potentially exculpatory evidence. Although the property officer may have acted negligently or even recklessly in destroying the chemical samples, there is no evidence that the officer acted in bad faith by deliberately destroying the evidence to deprive [the defendant] of access to relevant evidence." (internal citations omitted)).

Even if we were to accept the theoretical premise of Reaves' argument—that recklessness can equate to bad faith—we disagree the police were reckless in not preserving evidence in this case. Although the record is replete with indications the police investigation was deeply flawed, the record also contains no indication these flaws were the product of more than mere negligence. *See State v. Cheeseboro*, 346 S.C. 526, 539, 552 S.E.2d 300, 307 (2001) (declining to dismiss the indictment where police department negligently destroyed gun used to commit murder before the defendant was given the opportunity to run tests on it).

Further, to the extent Reaves was disadvantaged by the State's loss of evidence, Reaves' attorney was allowed to forcefully cross-examine the police officers on the deficiencies in their investigation. Additionally, the trial court instructed the jury "[w]hen evidence is lost or destroyed by a party you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party."[5]

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[5] Although we note a similar jury charge was issued by the trial court in *Youngblood*, the propriety of this charge under state evidence law is not before the Court. Heretofore, an adverse inference charge based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina. *See Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (holding spoliation instruction was warranted in medical malpractice action where two pieces of evidence initially collected by hospital were missing); Kevin R. Eberle, *Spoliation in South Carolina*, 19 S.C. Law. 26 (2007) ("The courts of South Carolina have long recognized that a party is entitled to favorable presumptions [in civil cases] about

Accordingly, although we acknowledge there are deeply troubling aspects of the investigation in this case, the errors made by the police do not indicate bad faith as is required to dismiss an indictment under the federal constitutional test. Therefore, we affirm the court of appeals' decision to affirm the trial judge's denial of Reaves' motion to dismiss.

II. SPEEDY TRIAL

Reaves argues the court of appeals erred by affirming the trial judge's denial of his motion to dismiss the indictment because his right to a speedy trial had been violated. We disagree.

A defendant's right to a speedy trial is derived from the Sixth Amendment to the United States Constitution which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend VI. The United States Supreme Court has deemed this right as different from any other right enumerated in the Constitution for the protection of the accused due to the reality that "[d]elay is not an uncommon defense tactic" and "deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Barker v. Wingo*, 407 U.S. 514, 521 (1972)).

The United States Supreme Court has identified four factors to consider in determining whether a criminal defendant's right to a speedy trial has been violated: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. "[T]he determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing *Barker*, 407 U.S. at 530).

The length of the delay serves as a trigger mechanism for the analysis of the other three factors. *Barker*, 407 U.S. at 530. The delay begins to be measured when a defendant is indicted, arrested, or otherwise accused. *State v. Langford*,

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the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant.").

400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) (citing *United States v. MacDonald*, 456 U.S. 1, 6 (1982)). Until there is some delay which is presumptively prejudicial to the defendant, there is no necessity to examine the other factors. *Barker*, 407 U.S. at 530. However, there is no length of delay which is per se unconstitutional; the right to a speedy trial may be violated where the delay is arbitrary or unreasonable. *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155.

Closely related to the length of the delay is the reason the State advances to justify the delay. *Barker*, 407 U.S. at 531. A deliberate effort by the State to delay the trial to injure the defense should be weighted heavily against it. *Id.* Neutral reasons, such as overcrowded dockets or negligence, should be weighted less heavily; however, the State is still ultimately responsible for bringing a criminal defendant to trial. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (citing *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155). Delays caused by the defendant should weigh against him. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483.

The third factor—assertion of the right—recognizes that while a criminal defendant has no responsibility to bring himself to trial, the extent to which he exercises his right to a speedy trial is significant. *Barker*, 407 U.S. at 527–28. This consideration prevents a criminal defendant from strategically acquiescing in a delay which works to his advantage, then asking the case be dismissed at the last moment once it is called for trial. Accordingly, "the defendant's failure to assert the right, although not conclusive, makes it more difficult to show that the right was violated." *Pittman*, 373 S.C. at 550, 647 S.E.2d at 155.

The final factor—prejudice to the defendant—requires a reviewing court to analyze the three different types of prejudice the speedy trial right seeks to prevent: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility the defense will be impaired. *Barker*, 407 U.S. at 532. The most serious of these interests is the last one because the inability of the defense to prepare its case—due to the death or disappearance of a witness, for example—cuts to the heart of the fairness inherent in the system. *Id.*

Reaves' speedy trial clock began to run when he was apprehended in May of 2007 and ran at least until his first trial in August of 2010, nearly thirty-nine months later. This length of time is presumptively prejudicial and triggers the remaining *Barker* inquiry. *See Pittman*, 373 S.C. at 551, 647 S.E.2d at 156 (finding delay of three years and two months was sufficient to trigger analysis of

other factors); *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (holding delay of two years and four months lengthy enough to warrant review of other factors).

The State asserts that the lengthy delay was due to a heavy backlog of cases in Marion County and the complexities involved in the investigation of the case. However, neither of these are compelling reasons, especially in light of how little had been done by the police to investigate the identity of a possible second shooter. Accordingly, this factor weighs against the State. *See State v. Brazell*, 325 S.C. 65, 76, 480 S.E.2d 64, 70 (1997) (finding the State could not justify three year and five month delay where it claimed complexities in the case and upheaval in the solicitor's office caused the delay).

Turning to the third factor, Reaves did not assert his right to a speedy trial until over three years after his arrest. Significantly, his case was called for trial later that same month; the additional three-month delay was due to the trial judge's granting of Reaves' motion for a mistrial. Therefore, while we refuse to hold Reaves waived his right to a fair trial by acquiescing in the lengthy delay, his failure to assert his right to a speedy trial weighs strongly against him. *See id.* at 76, 480 S.E.2d at 71 (finding no speedy trial violation where trial was set for two months after defendant first moved for a speedy trial).

Finally, although we are cautious to not diminish the injurious effect of his lengthy incarceration prior to trial, we find Reaves has not shown the delay caused any particularized prejudice to his defense. He argues that the evidence missing in this case was lost by police during the delay, thus hampering the preparation of his defense. However, the record does not support this assertion. While it is not clear precisely when most of the evidence was lost, it is most likely that it happened shortly after Lt. Blue took over from Captain Gray as lead investigator, which was only two days after the shooting.

Further, there is no indication the lost evidence would have helped Reaves' case rather than hurt it; therefore, even assuming the evidence *was* lost during the delay, the record does not show how this would have been prejudicial to Reaves' defense. *See State v. Foster*, 260 S.C. 511, 515, 197 S.E.2d 280, 282 (1973) (finding no speedy trial violation after seven-year delay in bringing defendants to trial where the record was void of even minimal prejudice). Moreover, there is no question that Reaves was able to use the State's bungled investigation to his

advantage by subjecting the police's actions to the crucible of cross-examination and by securing the spoliation of evidence charge at trial.

While this is an extremely close case, a trial court's decision as to whether to dismiss an indictment based on speedy trial grounds is reviewed for an abuse of discretion. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482. Despite our disappointment in the manner in which the criminal justice system operated in this case, we cannot say the able trial judge abused his discretion in denying Reaves' request to dismiss the case based on the violation of his right to a speedy trial. Although there was a significant delay between Reaves' arrest and his convictions and the State puts forth no compelling reason for the delay, Reaves cannot show he timely asserted his right to a speedy trial—or that his assertion when made was ignored—and cannot show that he suffered particularized prejudice as the result of the delay.

Nonetheless, we express our deep concern with a system which kept a sixteen-year-old offender in pretrial incarceration for over three years. This is precisely the type of prosecutorial discretion we sought to limit in our decision of *Langford*, which came too late to assist Reaves in timely being brought to trial. We fully expect that *Langford* will now prevent similar dilatory practices, and note that once this case was brought to the attention of the trial court through a speedy trial motion, it was expeditiously brought to trial.

CONCLUSION

For the foregoing reasons, we hold the court of appeals did not err in affirming the trial judge's denial of Reaves' motions to dismiss the indictment regarding his right to a fair trial or his right to a speedy trial. Accordingly, we affirm.

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

JUSTICE PLEICONES: I concur with the majority's decision to affirm the Court of Appeals' opinion upholding petitioner's conviction and sentence. I write separately to emphasize the standard under which petitioner's fair trial claim should be analyzed. Further, although I find the trial judge did not abuse his discretion in denying petitioner's motion for a speedy trial, I concur with the majority's opinion in result only.

In South Carolina, to establish deprivation of a fair trial due to the destruction or loss of evidence, a defendant must show: (1) the State destroyed the evidence in bad faith; or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. *State v. Cheeseboro*, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001). While I understand the majority's exclusive reliance on *Arizona v. Youngblood*, 488 U.S. 51 (1988), is likely due to petitioner's failure to preserve for appellate review his argument under the second prong of *Cheeseboro*, in my view, it is worth noting that the analysis in South Carolina is more expansive than *Youngblood*, and includes a second prong as articulated in *Cheeseboro*.

I concur in the majority's decision to affirm the Court of Appeals.

The Supreme Court of South Carolina

In the Matter of J. Todd Kincannon, Respondent.

Appellate Case No. 2015-001824

ORDER

The Office of Disciplinary Counsel asks this Court to issue an order transferring respondent to incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR, or in the alternative, placing respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients.

IT IS ORDERED that respondent's license to practice law in this state is suspended and respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

August 28, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Allen Cain, Appellant.

Appellate Case No. 2013-000817

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

Opinion No. 5324
Heard January 7, 2015 – Filed July 15, 2015
Withdrawn, Substituted and Refiled September 2, 2015

AFFIRMED

Thomas James Rode, of Thurmond Kirchner Timbes & Yelverton, P.A., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

WILLIAMS, J.: Charles Allen Cain appeals his conviction for trafficking methamphetamine, arguing the circuit court erred in (1) admitting testimony from the State's forensic chemistry expert regarding the "theoretical yield" of

methamphetamine he could have produced and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 2012, Deputy Kevan Kyle and Deputy Chris Wilbanks, both of the Spartanburg County Sheriff's Office (the Sheriff's Office), encountered Cain and Tiphani Parkhurst while attempting to serve a family court bench warrant for Travis Kirby at a Spartanburg County home. Although the house had no running water or electricity, it appeared Cain and Parkhurst were illegally obtaining both through a drop cord and a hose pipe running from a neighboring trailer. Further, the house appeared to be under construction.

The deputies knocked on the backdoor of the house—which led to a single bedroom—because they saw a vehicle parked directly in front of that door. When Cain and Parkhurst came to the door, the deputies explained they were looking for Kirby and requested identification. Cain and Parkhurst produced their driver's licenses but denied knowing Kirby. They also told Deputy Kyle they were "renting the bedroom from the owner of the house . . . and they had nothing else to do with the rest of the house." While it appeared Cain and Parkhurst had been living in the bedroom, which had no bathroom or kitchen, the deputies believed they had access to the rest of the house as well. Deputy Kyle further believed Cain and Parkhurst were hiding Kirby because they seemed nervous, were "making furtive gestures," and did not want him to look inside the rest of the house.

Deputy Kyle showed Cain and Parkhurst the bench warrant and explained the deputies had a right to search the house if they believed Kirby was inside. With the consent of Cain and Parkhurst, the deputies searched the bedroom as well as the rest of the house. During the search, Deputy Kyle observed a bottle resting on the counter that had "tubing coming from the top." The tubing ran through a window and opened up outside. He also discovered several discarded bottles with multicolored pellets, coffee filters, tin foil, and batteries in the living room—all of which are "common [for] a one pot meth lab." Based on the deputies' training and experience, they determined the house was being used as a lab to manufacture methamphetamine.

When the deputies returned to Cain and Parkhurst's bedroom, they found the interior door to the bedroom that led to the rest of the house was barricaded. Additionally, the deputies discovered Cain and Parkhurst had left the residence in

Parkhurst's vehicle. The deputies further noticed what appeared to be the contents of a one pot meth lab—multicolored pellets poured out onto the grass and concrete. The pellets were still fresh and wet.

Thereafter, Cain and Parkhurst were indicted for trafficking methamphetamine in violation of section 44-53-375(C) of the South Carolina Code (Supp. 2014). The case was called for a jury trial in Spartanburg County. Because Cain and Parkhurst failed to appear at trial, they were jointly tried in their absence on February 28 and March 1, 2013.

During pretrial motions, Cain moved to dismiss his indictment, arguing the State could not establish the "attempt to manufacture" element for trafficking methamphetamine because no methamphetamine was found in the home. The State, however, sought to establish Cain's guilt "through extrapolation from the aggregate components" found in the house to demonstrate the yield of methamphetamine would have been more than the trafficking quantity, arguing the plain meaning of the statute allowed it to proceed under a theoretical yield theory. Based on this theoretical yield calculation, the State argued Cain and Parkhurst had the necessary ingredients to produce between ten and twenty-eight grams of methamphetamine.[1]

Subsequently, the State called Beth Stuart to testify. Stuart, a forensic chemist with the Sheriff's Office, examined the crime scene on January 17, 2012.[2] Per the State's request, the circuit court qualified Stuart as an expert in "forensic chemistry and chemical analysis" without objection.

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[1] Acknowledging the novelty of this issue, the State directed the circuit court to two cases from other jurisdictions in support of its argument: *State v. Knapp*, 778 N.W.2d 218, 2009 WL 4842395, at *1 (Iowa Ct. App. 2009), and *United States v. Spencer*, 439 F.3d 905 (8th Cir. 2006). The circuit court repeatedly took the matter under advisement.

[2] Stuart has a B.S. in chemistry and biochemistry from the College of Charleston, a M.S. in chemistry from the University of South Carolina, and over eight years of experience as a chemical analyst. Stuart testified she completed training at the police academy, as well as the Drug Enforcement Administration's "forensic chemist school" and "clandestine lab school." Stuart is also a member of the Clandestine Lab Investigating Chemist Association and is certified by the American Board of Criminalistics in all areas of forensic science.

Stuart explained that people often use common household products to manufacture methamphetamine. She then described the "one pot method" in great detail and stated Cain and Parkhurst employed this method to manufacture methamphetamine at the Spartanburg County home. According to Stuart, the Sheriff's Office photographed the components in and around the house—and a company specializing in the disposal of chemical waste came to the house to dispose of the meth lab components—because the components were too dangerous to bring back to the Sheriff's Office. She also said the Sheriff's Office does not fingerprint meth labs due to the inherent danger of the chemicals used to manufacture methamphetamine.

Moreover, Stuart testified that "the only thing of significance" she found inside the bedroom was a piece of aluminum foil shaped to smoke methamphetamine. In the living room, however, Stuart found twenty empty pseudoephedrine packets (blister packs) in trash bags, each of which previously contained twenty-four 30-milligram tablets. She found four additional blister packs in a trashcan outside Cain and Parkhurst's bedroom that each previously contained ten 120-milligram tablets of pseudoephedrine. Stuart concluded the blister packs previously contained a total of 19.2 grams of pseudoephedrine. In addition to the empty blister packs, Stuart found the following items in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot."

To calculate the theoretical yield, Stuart explained she "can see how much starting stuff they had and work [her] way to how much product they could [have] made with that starting stuff." She further stated she uses "the weights of all the different compounds in [an equation] to determine theoretical yield." The State then asked Stuart how much methamphetamine an individual could make with 19.2 grams of pseudoephedrine. Cain objected to the admission of this testimony, questioning its reliability and doubting whether "some learned treatise" supported the theory. Cain argued Stuart's theoretical yield testimony was outside the scope of her qualification as an expert in forensic chemistry. The circuit court overruled the objection subject to the State laying a proper foundation.

The State then established that—as part of earning her bachelor's degree as well as her master's in chemistry—Stuart worked in "actual research settings" with equations and theoretical yields "to determine how much product [she] wanted and how much [she] needed to start with" to perform reactions. On voir dire, Stuart

explained the theoretical yield equation was "pseudoephedrine, plus lithium, plus ammonia gas yields methamphetamine." She also stated she knew it is "a one-to-one molar ratio between pseudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]." The circuit court then qualified Stuart as "an expert in the field of chemistry to be able to give her opinion in the area of theoretical yields."

After the additional qualification, Stuart testified that an individual could manufacture the following amounts of methamphetamine with 19.2 grams of pseudoephedrine: 17.67 grams with a 100% yield, 14.13 grams with an 80% yield, 13.25 grams with a 75% yield, and 11.48 grams with a 65% yield. Stuart, however, acknowledged she had no way of determining the percentage yield Cain and Parkhurst theoretically would have been able to obtain. She also acknowledged that her figures were based on chemical conversions performed by a trained chemist using pure chemicals, a hood, and real glassware in "ideal laboratory conditions." Stuart agreed that, if some chemicals do not properly react and become wasted, it is not possible to attain a 100% yield. Moreover, she conceded that neither methamphetamine nor pseudoephedrine was found in or around the house.

Cain moved for a directed verdict after the State rested its case, arguing the evidence of custody and control of the requisite ingredients was insufficient to establish intent to traffic methamphetamine. The circuit court denied Cain's motion for a directed verdict on the custody and control argument but took under advisement the theoretical yield issue, electing to take it up at the close of all evidence.

Subsequently, the defense presented testimony from Leon Fowler Sr., who lived in the trailer located one hundred feet behind the house the deputies searched. Fowler explained that his son owned both the house and the trailer. Fowler further stated he thought Cain and Parkhurst were "living in that one [bed]room," but he was not sure. He was also unsure about how long Cain and Parkhurst lived in the house, but said it was "not over two or three weeks." Fowler testified that he did not know Cain and Parkhurst; he just knew they were his son's friends. Nevertheless, he would let them come to his trailer to bathe and use the restroom because the house had no running water.

Although Fowler was not sure whether Cain and Parkhurst had a power cord running from his trailer to the house, Fowler said his son sometimes did "when he

was working on the house." Fowler further stated it seemed like a power cord was hooked up when the police arrived, but he would not swear to it. Finally, Fowler confirmed he was unaware of the meth lab in the house, stating he did not want to know what was going on in the house.

At the close of all evidence, the circuit court denied Cain's motion to dismiss based on a "plain reading of the statute" and the "persuasive authority" provided by the State. The circuit court believed "theoretical yield would be an appropriate analysis in this case" and submitted a special interrogatory to the jury, instructing it to determine whether the State proved beyond a reasonable doubt that the theoretical yield was ten or more, but less than twenty-eight, grams.

The jury found Cain guilty of trafficking methamphetamine, and the circuit court denied his motion for a new trial. On April 11, 2013, Cain was sentenced to ten years in prison. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in admitting Stuart's scientific expert testimony regarding the theoretical yield of methamphetamine Cain could have produced from the empty blister packs of pseudoephedrine?

II. Did the circuit court err in denying Cain's motion for a directed verdict?

LAW/ANALYSIS

I. Theoretical Yield Testimony

A. Reliability

Cain first argues the circuit court erred in admitting Stuart's expert testimony regarding the theoretical yield of methamphetamine he could have produced because the State failed to prove Stuart's methodology was reliable and would assist the trier of fact. We disagree.

"Generally, the admission of expert testimony is a matter within the sound discretion of the [circuit] court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)). "Thus, we will not reverse the [circuit] court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion." *Id.* at 343–44,

748 S.E.2d at 208 (citing *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted).

"All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Rule 702, SCRE, provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The admissibility of scientific evidence depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citation omitted). When the circuit court admits scientific evidence under Rule 702, it "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

"Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686 (citations omitted). A court should look at several factors to determine the reliability of scientific expert testimony: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citation omitted).

Additionally, if the evidence is admissible under Rule 702, then the circuit court should determine whether "its probative value is outweighed by its prejudicial

effect."[3] *Id.* at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *Id.* at 20–21, 515 S.E.2d at 518.

In the instant case, after the State laid a foundation and Cain cross-examined Stuart during voir dire, the circuit court properly qualified her as an expert in chemistry to be able to give her opinion on theoretical yields. *See id.* at 20, 515 S.E.2d at 518 (stating the circuit court must find the expert witness is qualified). Cain, however, does not contest the circuit court's finding that the expert was qualified. Thus, our analysis focuses on his argument that Stuart's theoretical yield methodology was not reliable and could not assist the trier of fact. *See id.* (stating the circuit court must also find the expert's testimony will assist the trier of fact and the underlying science reliable).

Based upon our review of the record, we find the circuit court properly concluded Stuart's scientific expert testimony regarding the theoretical yield methodology was reliable. First, the circuit court thoroughly considered the prior application of theoretical yield analysis to the type of evidence involved in this case. *See id.* at 19, 515 S.E.2d at 517 (stating the circuit court should consider the "prior application of the method to the type of evidence involved in the case" (citation omitted)). At the beginning of trial, the State cited cases from other jurisdictions in which courts approved of experts giving theoretical yield testimony in similar situations,[4] and the circuit court repeatedly took the matter under advisement. At the close of all evidence, the circuit court denied Cain's motion to dismiss, finding these cases persuasive and the theoretical yield analysis appropriate for this case.

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[3] Because neither party addresses whether the circuit court properly weighed the probative value of Stuart's theoretical yield testimony against its prejudicial effect, we decline to address that portion of the analysis in determining this issue.

[4] *See Spencer*, 439 F.3d at 916 (holding the evidence was sufficient for the jury to find the appellant attempted to manufacture methamphetamine when, although he may not have possessed all the materials for a fully working methamphetamine lab, he "had ordered, received, and possessed chemicals and equipment necessary to manufacture methamphetamine"); *Knapp*, 2009 WL 4842395, at *4 (holding the amount of methamphetamine appellant could have yielded based upon the crushed pseudoephedrine found on the appellant's person, coupled with the other evidence presented, was sufficient for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine).

The cases on which the court based its ruling were directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter.

Furthermore, the circuit court had sufficient evidence from which it could conclude the theoretical yield methodology was consistent with recognized scientific laws and procedures. *See Council*, 335 S.C. at 19, 515 S.E.2d at 517 (stating the court should also consider "the consistency of the method with recognized scientific laws and procedures" (citation omitted)). At trial, Stuart testified that calculating the theoretical yield involved basic chemistry equations. Stuart stated she began using chemical equations during her first semester of college, explaining that every chemistry course involved equations. She further testified that determining a yield based on multiple ingredients is a "core standard" of chemistry. Accordingly, Stuart's testimony demonstrates the science behind the methodology was reliable because it was consistent with recognized scientific laws and procedures.

Additionally, Stuart adequately explained the quality control procedures she uses to ensure reliability of the theoretical yield method. *See id.* (stating the court should look at "the quality control procedures used to ensure reliability" (citation omitted)). Throughout her schooling and in actual research settings, Stuart used equations and theoretical yields to perform reactions and make chemicals. Stuart stated she had produced methamphetamine "[i]n the DNA methamphetamine school," where she "ha[d] to go through the reactions and methamphetamine and determine yields." Moreover, Stuart was able to calculate the quantity of methamphetamine that could have been produced based on different yield percentages, taking into account various rates of error.

Based on the foregoing, we hold the circuit court clearly performed its gatekeeping function in the instant case by thoroughly considering the reliability of Stuart's methodology. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (stating the circuit court must perform its "gatekeeping function [by] ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration"); *Council*, 335 S.C. at 20, 515 S.E.2d at 518 (outlining the factors a court should consider in determining whether the underlying science used in expert testimony meets the reliability standard under Rule 702, SCRE).

Nevertheless, Cain argues the theoretical yield analysis did not assist the trier of fact because it was not reliable. In light of our previous holding that Stuart's methodology was reliable, we disagree and find the circuit court properly

concluded Stuart's expert testimony regarding the theoretical yield analysis would assist the trier of fact in determining a fact at issue in this case. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518 (stating the circuit court must find the scientific evidence will assist the trier of fact). While Stuart and the deputies found all of the components of a methamphetamine lab in Cain's home, the blister packs of pseudoephedrine they discovered were empty. Thus, Stuart's theoretical yield equations helped the jury determine how much methamphetamine Cain could have produced—an important fact at issue—based on the amount previously contained in the empty blister packs as well as the other components found at the scene.

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield of methamphetamine Cain could have produced because the court properly found her methodology was reliable and would assist the trier of fact in determining a fact at issue.

B. Stuart's Conclusion

Cain further contends the circuit court erred in admitting Stuart's expert testimony because the State failed to establish her conclusion was supported by facts. According to Cain, Stuart improperly relied solely on hypothetical facts—the empty blister packs of pseudoephedrine—to calculate the theoretical yield, and she presented no testimony regarding the amounts of other ingredients present at the scene. We disagree.

Rule 703, SCRE, outlines the basis upon which experts may offer opinion testimony and provides the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While an expert may offer an opinion based upon hypothetical facts, those facts must have evidentiary support. *See Campbell v. Paschal*, 290 S.C. 1, 17, 347 S.E.2d 892, 902 (Ct. App. 1986) ("The facts used in a hypothetical question presented to an expert witness must have some evidentiary support." (citations

omitted)); *see also Newman v. Hy-Way Heat Sys., Inc.*, 789 F.2d 269, 270 (4th Cir. 1986) ("It is fixed law that an expert can give [an] opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced." (citation omitted)).

Other jurisdictions considering the theoretical yield issue have determined evidence of yield calculations based upon empty precursor containers is admissible and sufficient to support a factual finding for the intended quantity of methamphetamine production. *See, e.g.*, *United States v. Engler*, 521 F.3d 965, 974 (8th Cir. 2008) (finding the evidence of "empty blister packs representing 2,016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine" was sufficient to support a verdict for attempted manufacture of more than five grams); *United States v. Titlbach*, 339 F.3d 692, 696 (8th Cir. 2003) ("A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers."); *United States v. Basinger*, 60 F.3d 1400, 1409–10 (9th Cir. 1995) (finding that, for sentencing purposes, reliance on an expert's yield calculations of methamphetamine based upon two empty one-pound containers of ephedrine was not clearly erroneous); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present").

Additionally, in *Varble v. Commonwealth*, the Kentucky Supreme Court rejected the appellant's argument that he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. 125 S.W.3d 246, 254 (Ky. 2004), *superseded on other grounds by statute*, KRE 103, *as recognized in Stansbury v. Commonwealth*, 454 S.W.3d 293, 298 n.1 (Ky. 2015). According to the court, testimony that the odor of anhydrous ammonia was emanating from two air tanks and the discoloration of brass fittings was likely caused by anhydrous ammonia was circumstantial evidence of the appellant's possession of the precursor. *Id.* The court further stated appellant's argument was "akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." *Id.* Nevertheless, the court concluded that, given the appellant "was found in possession of all the other chemicals necessary to manufacture methamphetamine,"

it was for the jury to decide whether he possessed those chemicals at the same time he possessed the anhydrous ammonia and the Sudafed. *Id.*

In the instant case, Stuart gave the following explanation of the equation she used to calculate the theoretical yield:

> I can take the weight of the [p]seudoephedrine and do the math of its mass from the periodic table and tell you how many moles of [p]seudoephedrine I have. I know it's a one-to-one molar ratio between [p]seudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]. . . . [A]ll I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

Based upon the amount of pseudoephedrine each empty blister pack contained, as well as her experience using this equation, Stuart calculated the theoretical yield of methamphetamine Cain could have produced under various yield percentages. Stuart further testified she found bottles of "pink mush"—the waste product of methamphetamine—along with two one-pots in the last stages of production, as evidenced by a "grimy" two-liter bottle with a tube running out of the bathroom window. According to Stuart, the pink mush was comprised of remnants of cold medicine tablets stripped of the active ingredient necessary to produce methamphetamine.

Based on the foregoing, we find the hypothetical facts upon which Stuart based her calculations and offered an opinion regarding the theoretical yield were supported by other evidence properly admitted into the record. *See, e.g.*, *Beshore*, 961 F.2d at 1383 (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present"); *Newman*, 789 F.2d at 270 (noting "an expert can give his opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced" (citation omitted)); *Campbell*, 290 S.C. at 17, 347 S.E.2d at 902 (stating hypothetical facts relied upon by experts "must have some evidentiary support" (citation omitted)). Further, to the extent Cain argues the record contains conflicting evidence and testimony, we believe the jury was free to give Stuart's testimony such weight as it deemed appropriate when weighing all of the evidence. *See Council*, 335 S.C. at 20–21,

515 S.E.2d at 518 (noting once scientific evidence is found to be reliable and admitted under the *Jones* standard, Rule 702, SCRE, and Rule 403, SCRE, "the jury may give it such weight as it deems appropriate").

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield based on the empty blister packs of pseudoephedrine because her testimony was supported by the facts.

II. Directed Verdict

Next, Cain contends the circuit court erred in denying his motion for a directed verdict, arguing the State presented insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine to support a trafficking conviction. We disagree.

"Attempt crimes are generally ones of specific intent[,] such that the act constituting the attempt must be done with the intent to commit that particular crime." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (citation omitted).

> In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. The preparation consists [of] devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission[] after the preparations are made.

Id. (internal citations and quotation marks omitted). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." *Id.* (quoting *State v. Quick*, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942)).

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination[,] except in extreme cases when there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) (quoting *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971)).

The statute under which Cain was charged provides as follows:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or *who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine* . . . is guilty of a felony which is known as trafficking in methamphetamine . . . .

S.C. Code Ann. § 44-53-375(C) (Supp. 2014) (emphasis added). The State charged Cain with violating the trafficking statute by attempting or aiding and abetting in the manufacture of methamphetamine. *See id.* Upon conviction of a first offense, an individual must be punished for "a term of imprisonment not less than three years nor more than ten years, no part of which may be suspended nor probation granted," if the quantity involved is "ten grams or more, but less than twenty-eight grams." § 44-53-375(C)(1)(a).

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . ." S.C. Code Ann. § 44-53-110(25) (Supp. 2014). "'Methamphetamine' includes any

salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine." § 44-53-110(28). "Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." § 44-53-375(D). Paraphernalia is statutorily defined as "any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance." § 44-53-110(33).

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Zeigler*, 364 S.C. 94, 101, 610 S.E.2d 859, 863 (Ct. App. 2005) (citations omitted). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (citing *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)). Further, the circuit court "should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Id.* (citing *State v. Hernandez*, 382 S.C. 620, 625–26, 677 S.E.2d 603, 605–06 (2009)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Zeigler*, 364 S.C. at 102, 610 S.E.2d at 863 (citations omitted). The circuit court, however, "is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 102–03, 610 S.E.2d at 863 (citations omitted).

In reviewing the denial of a motion for a directed verdict, this court must view "the evidence and all reasonable inferences in the light most favorable to the State." *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (citing *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, we must find the case was properly submitted to the jury. *Id.* (citation omitted). This court may only reverse a denial of a motion for a directed verdict when no evidence supports the circuit court's ruling. *Zeigler*, 364 S.C. at 103, 610 S.E.2d at 863 (citation omitted).

In the instant case, Cain argues the circuit court erred in denying his motion for a directed verdict for the following reasons: (1) under the trafficking statute, the State was required to present evidence of potential yield and could not simply rely on a "hypothetical theoretical yield"; and (2) the State failed to prove Cain had custody and control of the pseudoephedrine sufficient to form an intent to

manufacture in excess of ten grams of methamphetamine. We address each issue in turn.

A. Evidence of Intent

Cain contends the circuit court erred in denying his motion for a directed verdict because the record lacked substantial circumstantial evidence of his intent to manufacture ten or more grams of methamphetamine. We disagree.

As a preliminary matter, Cain argues the State was required to present evidence of "potential yield" calculations based on his particular capabilities and the manufacturing site—and could not simply rely on a "hypothetical theoretical yield"—to prove his intent. We find this issue is not preserved for our review. A review of the record reveals that, aside from the constructive possession issue, the only other issue raised in Cain's directed verdict motion was whether the State's evidence of trafficking was too speculative to present that charge to the jury. The theoretical yield versus potential yield argument was not raised as a ground in Cain's directed verdict motion, nor at any other point during the trial.[5] Thus, we decline the invitation to create a legal distinction between these terms of art for the first time on appeal. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (stating issues not raised to the circuit court in support of a motion for directed verdict are not preserved for appellate review (citation omitted)); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." (citation omitted)).

To the extent Cain argues the evidence of his intent to manufacture ten or more grams of methamphetamine was too speculative, we disagree and find the circuit court properly submitted the trafficking charge to the jury. When viewed in a light most favorable to the State, the evidence of Cain's possession of the meth lab components—coupled with Stuart's properly admitted theoretical yield testimony—was sufficient for the circuit court to allow the jury to decide whether

[5] The record is devoid of any reference to a potential yield calculation. Although Cain raised several objections during trial to the State relying on a theoretical weight to establish his intent to traffic methamphetamine, his objections were based on the fact that the State could not show evidence of an *actual* weight of methamphetamine because the pseudoephedrine blister packs were empty.

Cain intended to manufacture in excess of ten grams of methamphetamine. *See* S.C. Code Ann. § 44-53-375(C) (providing that a person "who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine . . . is guilty of a felony which is known as trafficking in methamphetamine"); § 44-53-375(D) (stating "[p]ossession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture"); *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (noting when contraband materials are found on premises under the control of the accused, this "gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury"); *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (stating if any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury (citation omitted)).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on this ground.

B. Evidence of Constructive Possession

Cain contends the circuit court also erred in denying his motion for a directed verdict because the evidence of custody and control—when viewed in the light most favorable to the State—does not support the finding that Cain possessed pseudoephedrine at a single time as part of a plan to manufacture in excess of ten grams of methamphetamine. Instead, Cain argues "the only inference to be drawn is that there were either several smaller manufacturings, or several failed attempts over a period," all of which would be independent of the others. We disagree.[6]

[6] Initially, we note while Cain did not renew his motion for a directed verdict until after the jury was charged, the circuit court accepted the renewal as timely and ruled upon the motion, stating "[o]bviously we visited the issue, and you may not have said . . . I'll renew, but that's the way I took it for both of you." The State raised no objection during this colloquy—and the record demonstrates the parties had a mutual understanding—but now maintains on appeal that the issue of constructive possession is not preserved. We disagree and find this issue preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court].").

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." *State v. Burgess*, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981) (citations omitted). "Possession requires more than mere presence." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citation omitted).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of contraband. *Id.* at 255, 717 S.E.2d at 612 (citing *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605). "Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the power and intent to control the disposition and use of the drugs." *State v. Brown*, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995) (citation omitted). In a case in which "contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury." *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (citation omitted).

In the instant case, we find the State presented substantial circumstantial evidence of Cain's custody and control of the pseudoephedrine originally contained in the empty blister packs to establish constructive possession. The evidence shows the deputies discovered an active meth lab with a batch of methamphetamine in the gassing-out phase. Moreover, the record indicates Stuart and the deputies found the following components in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot." Although some evidence suggested Cain rented only a single bedroom and had no connection to the rest of the house, the record indicated he and Parkhurst were living alone in the house. Cain also fled the home and barricaded the door to his bedroom before the deputies discovered the meth lab, actions which we find to be further circumstantial evidence of his guilt. *See State v. Crawford*, 362 S.C. 627, 635–36, 608 S.E.2d 886, 890–91 (Ct. App. 2005) (noting flight may be considered as evidence of guilt (citations omitted)).

Based upon our review of the record, the evidence of possession created a quintessential jury question, such that the circuit court properly denied Cain's motion for a directed verdict. *See, e.g.*, *Varble*, 125 S.W.3d at 254 (concluding when appellant was found in possession of all the other chemicals necessary to manufacture methamphetamine, it was for the jury to decide whether he possessed those chemicals at the same time he possessed anhydrous ammonia and Sudafed). While Cain argues the circuit court should have drawn a different inference from the evidence, the court was concerned with the existence of evidence, not its weight. *See Zeigler*, 364 S.C. at 101, 610 S.E.2d at 863 (noting that, when a circuit court rules upon a directed verdict motion, the court "is concerned with the existence or nonexistence of evidence, not its weight"(citations omitted)).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on the issue of constructive possession.

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George S. Glassmeyer, Respondent,

v.

City of Columbia, Appellant.

Appellate Case No. 2013-001880

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

Opinion No. 5347
Heard March 5, 2015 – Filed September 2, 2015

AFFIRMED IN PART AND REVERSED IN PART

W. Allen Nickles, III, of Nickles Law Firm, of Columbia, for Appellant.

Lyndey Ritz Zwingelberg and Kirby Darr Shealy, III, both of Adams and Reese LLP, of Columbia, for Respondent.

HUFF, J.: The City of Columbia appeals the trial court's declaration it violated the Freedom of Information Act (FOIA)[1] by failing to disclose to George S. Glassmeyer the home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager. It also appeals the trial

[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2014).

court's award of attorney's fees to Glassmeyer. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

On January 14, 2013, Glassmeyer sent the City a FOIA request for "all materials relating to not fewer than the final three applicants for the most recent vacancy announcement for the position of city manager." The City provided these documents but redacted certain information including the home addresses of applicants; some, but not all, of the telephone numbers belonging to applicants and their respective references; applicants' driver's license numbers and restrictions to their respective driver's licenses; and some, but not all, of their reasons for leaving or wanting to leave previous employment positions. In a letter dated January 24, 2013, Glassmeyer requested the City provide him the redacted information. In his response dated January 28, 2013, the City attorney, Kenneth Gaines, explained section 30-4-40 of the South Carolina Code (2007 & Supp. 2014) enumerates matters exempt from disclosure and provides for the redaction of exempt materials from public records. He declared, "Therefore, the City of Columbia has complied with the provisions of the South Carolina Freedom of Information Act and will not release unredacted material to you as you requested."

Glassmeyer filed this action seeking a declaratory judgment the City was in violation of the FOIA and an injunction prohibiting the City from further withholding the information Glassmeyer sought. In addition, Glassmeyer sought attorney's fees and costs. Before formally answering, counsel for the City wrote Glassmeyer's counsel stating he did not agree the public interest outweighed privacy concerns with matters like home addresses, personal telephone numbers, and email addresses of applicants and references, and salaries other than public employees making more than $50,000. In addition, he believed the reasons for leaving employment were personal and this information was available through independent inquiry. The City's counsel assured Glassmeyer's counsel there was no "smoking gun" in any of the redacted information and offered to make the unredacted response available to him for review in a confidential manner.

The City subsequently answered the complaint and both parties moved for summary judgment. Prior to the trial court issuing its order, Glassmeyer conceded state law required the City to withhold the applicants' driver's license information. In its order, the trial court held the City was in violation of the FOIA for failing to

timely provide its reason for the redactions. The court further found none of the exemptions to disclosure applied. It held the South Carolina Family Privacy Protection Act,[2] was not applicable. Accordingly, it granted Glassmeyer's motion for summary judgment and denied the City's motion. In addition, the court struck the City's motion for attorney's fees. It held the record open for Glassmeyer to submit an affidavit for attorney's fees. The City subsequently filed a motion to alter or amend, which the trial court denied. In an order filed August 27, 2013, the trial court awarded Glassmeyer $11,185.01 in attorney's fees.

On September 4, 2013, the City served its notice of appeal. The same day it also filed a modified response to plaintiff's FOIA request, noting it was in keeping with the notice of appeal. The response contained all information previously redacted except for personal addresses, personal telephone numbers, and personal email addresses of the applicants.

STANDARD OF REVIEW

The determination of the proper interpretation of a statute is a question of law, which the appellate court reviews de novo. *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252-53 (2014) (interpreting the FOIA and determining an autopsy report is a medical record under section 30-4-20(c) of the South Carolina Code (2007)). The appellate court is free to decide the question with no particular deference to the lower court. *New York Times Co. v. Spartanburg Cty. Sch. Dist. No. 7*, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007).

LAW/ ANALYSIS

A. Redactions

The City argues the trial court erred in finding the FOIA compelled disclosure of home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the General Assembly's intent. *Perry*, 409 S.C. at 140, 761 S.E.2d at 253. The plain language of a statute is considered the best evidence of legislative intent. *Id.* "When

[2] S.C. Code Ann. §§ 30-2-10 to -50 (2007).

interpreting an undefined statutory term, the Court must look to its usual and customary meaning." *Id.* at 140-41, 761 S.E.2d at 253. "[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014). "Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." *Id.*

In enacting the FOIA, the General Assembly stated its findings and purpose as follows:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007).

The essential purpose of the FOIA is to protect the public from secret government activity. *Perry*, 409 S.C. at 141, 761 S.E.2d at 253. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the General Assembly. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). Whether a record is exempt from disclosure depends on the particular facts of the case. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Underlying each case, however, is the principle the exemptions in section 30-4-40 of the South Carolina Code (2007) are to be narrowly construed so as to fulfill the purpose of the FOIA. *Evening Post Publ'g. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005). To further advance this purpose, the government has the burden of proving an exemption applies. *Id.*

The FOIA requires disclosure of materials gathered by a public body during a search to fill an employment position relating to not fewer than the final three applicants under consideration for a position. S.C. Code Ann. § 30-4-40(a)(13) (2007). This section further provides, "For the purpose of this item 'materials relating to not fewer than the final three applicants' do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section." *Id.*

South Carolina Code section 30-4-40(a)(2) (2007), known as the "privacy exemption," exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." As this court noted, "Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure." *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). Thus, we must "resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Id.* The right to privacy is defined as the right of an individual to be let alone and to live a life free from unwarranted publicity. *Id.* "However, 'one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.'" *Id.* (quoting *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984)).

Interpreting the privacy exemption contained in the Michigan Freedom of Information Act, the Supreme Court of Michigan found employees' home addresses and telephone numbers were exempt from disclosure. *Mich. Fed'n of Teachers & Sch. Related Pers. v. Univ. of Mich.*, 753 N.W.2d 28, 43 (2008). It explained, "Where a person lives and how that person may be contacted fits squarely within the plain meaning of this definition [of information of a personal nature] because that information offers private and even confidential details about that person's life. . . . [T]he release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home." *Id.* at 40. In addition, the court noted, "The potential abuses of an individual's identifying information, including his home address and telephone number, are legion." *Id.* In concluding the disclosure of this information would constitute an unwarranted invasion of an individual's privacy, the Michigan court explained as follows:

> Simply put, disclosure of employees' home addresses and telephone numbers to plaintiff would reveal little or nothing about a governmental agency's conduct, nor would it further the stated public policy undergirding the Michigan FOIA. Disclosure of employees' home addresses and telephone numbers would not shed light on whether the University of Michigan and its officials are satisfactorily fulfilling their statutory and constitutional obligations and their duties to the public. When this tenuous interest in disclosure is weighed against the invasion of privacy that would result from the disclosure of employees' home addresses and telephone numbers, the invasion of privacy would be clearly unwarranted.

Id. at 43 (internal citations omitted).

Similarly, the U.S. Supreme Court found disclosure of employees' addresses would not appreciably further "the citizens' right to be informed about what their government is up to " and "would reveal little or nothing about the employing agencies or their activities." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994). It held, "Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a 'clearly unwarranted invasion of personal privacy.'" *Id.* at 502 (citation omitted).

Glassmeyer contends the City's disclosure of the information would not result in a substantial invasion of privacy because the telephone numbers and addresses are publicly available information and email addresses are generally available through online research. The U.S. Supreme Court rejected a similar argument, explaining,

> It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but "[i]n an organized society, there are few facts that are not at one time or another divulged to another." The privacy interest protected by [the federal exemption] "encompass[es] the individual's control of information concerning his or her person." An

> individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.

U.S. Dep't of Def., 510 U.S. at 500 (first and third alterations in original) (citations omitted). Similarly, the Supreme Court of Michigan found,

> An individual's home address and telephone number might be listed in the telephone book or available on an Internet website, but he might nevertheless understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance. The disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance.

Mich. Fed'n of Teachers & Sch. Related Pers., 753 N.W.2d at 42.

Home addresses and telephone numbers are information our General Assembly has recognized as entitled to protection for personal privacy. In legislation enacted subsequent to the FOIA, the General Assembly recognized, "Although there are legitimate reasons for state and local government entities to collect social security numbers and other personal identifying information from individuals, government entities should collect the information only for legitimate purposes or when required by law." S.C. Code Ann. § 30-2-300(2) (Supp. 2014). It thus provided, "When state and local government entities possess social security numbers *or other personal identifying information*, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public." S.C. Code Ann. § 30-2-300(3) (Supp. 2014) (emphasis added).

In the Family Privacy Protection Act, the General Assembly recognized the need for state agencies to develop privacy policies and procedures to limit and protect the collection of personal information. S.C. Code Ann. §§ 30-2-10 to -50. It

included in the definition of "personal information" home addresses and home telephone numbers. S.C. Code Ann. § 30-2-30 (2007).

We find the home addresses, personal telephone numbers, and email addresses of the applicants are information in which the applicants have a privacy interest. However, we must balance the privacy interest of the applicants against the interest of the public's need to know this information. We find the trial court was mistaken in stating the public's interest would be served by disclosure of the applicants' home addresses because "[t]he public has a right to know whether the applicants live in the city of Columbia, the area over which the city manager has authority." The City only redacted the street name and number of the applicants' home addresses. It provided Glassmeyer with the city name and zip code. Thus, the public could determine the city in which the applicants lived through the materials the City provided. The trial court did not declare any interest served by revealing the personal phone numbers or email addresses of the applicants.

Glassmeyer asserts the disclosure of the information would serve the public's interest by demonstrating whether the applicants were truthful in their applications. Other than the home addresses, telephone numbers, and email addresses, the City has disclosed the applicants' entire applications, including their educational backgrounds and employment histories. We fail to see how disclosure of the limited information the City seeks to protect would serve to establish the veracity of the applicants more than the information already provided.

In balancing the interests of protecting personal information against the public's need to know the information, we find no evidence in the record demonstrates disclosure would further the FOIA's purpose of protecting the public from secret government activity. Accordingly, we hold the applicants' home addresses, personal telephone numbers, and personal email addresses are "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" and are exempt from disclosure under section 30-4-40(a)(2).

B. Attorney's Fees

The City argues the trial court erred in awarding Glassmeyer's requested attorney's fees and costs with the exception of $1,407. We disagree.

"The FOIA provides for attorney's fees to a prevailing party seeking relief under the act." *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 288, 580 S.E.2d 163, 170 (Ct. App. 2003). "If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof." S.C. Code Ann. § 30-4-100(b) (2007). "Under this section, the only prerequisite to an award of attorney's fees and costs is that the party seeking relief must prevail, in whole or in part. Where a plaintiff prevails on his request for declaratory relief, it is within the trial judge's discretion to award attorney's fees and costs to the plaintiff." *Campbell*, 354 S.C. at 288-89, 580 S.E.2d at 170.

As a separate basis for its award of attorney's fees, the trial court found Glassmeyer was the prevailing party because the City failed to provide any basis for its redactions when it produced the responsive documents. The City did not appeal this decision.[3] This ruling alone supports the trial court's award of attorney's fees to Glassmeyer. In addition, Glassmeyer challenged the redaction of other information, which the City has provided to him since the commencement of litigation. Although we find Glassmeyer was not entitled to the applicants' home addresses, phone numbers, and email addresses,[4] Glassmeyer prevailed on significant issues in the action entitling him to attorney's fees. Accordingly, we affirm the trial court's award of attorney's fees to Glassmeyer.

CONCLUSION

We hold the trial court erred in ordering the City to disclose the home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager and **REVERSE** its grant of summary judgment to Glassmeyer on this issue. However, we **AFFIRM** the trial court's award of attorney's fees to Glassmeyer.

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[3] *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating "an unappealed ruling, right or wrong, is the law of the case").

[4] In addition, Glassmeyer acknowledged he was not entitled to the applicants' driver's license information.

AFFIRMED IN PART AND REVERSED IN PART.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gretchen A. Rogers, as Guardian ad Litem for Mark A. Malloy, Appellant,

v.

Kenneth E. Lee and Law Offices of Lee & Smith, P.A., Respondents.

Appellate Case No. 2013-002699

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

Opinion No. 5348
Heard May 7, 2015 – Filed September 2, 2015

AFFIRMED

Thomas A. Pendarvis and Catherine Brown Kerney, both of Pendarvis Law Offices, PC, of Beaufort, and Brent Paul Stewart, of Stewart Law Offices, LLC, of Rock Hill, for Appellant.

David W. Overstreet and Michael Baxter McCall, both of Carlock Copeland & Stair, LLP, of Charleston, for Respondents.

HUFF, J.: Gretchen A. Rogers, as guardian ad litem (GAL) for Mark A. Malloy, brought this legal malpractice action against Kenneth E. Lee (Attorney Lee) and

Law Offices of Lee & Smith, P.A. (the Law Office) (Attorney Lee and the Law Office hereinafter collectively referred to as LEE), based upon LEE's representation of Malloy in a North Carolina workers' compensation claim. Rogers appeals from an order of the trial court granting summary judgment in favor of LEE on the basis that North Carolina's substantive law applies such that the state's statute of repose bars the legal malpractice claim. We affirm.

FACTUAL/PROCEDURAL HISTORY

Attorney Lee, who is licensed to practice law in North Carolina, represented Malloy in a North Carolina workers' compensation claim after Malloy sustained injuries in 2002 when he fell from a ladder while working in North Carolina for a North Carolina employer. On April 16, 2003, Malloy entered into a contract of representation, retaining the Law Office to represent him in the matter and pursue the North Carolina workers' compensation claim. Among other things, this agreement provided representation of Malloy would end "when the case is either settled or decided at a hearing." Additionally, it stated as follows: "This agreement shall be governed by the law of the State of North Carolina and the Rules and Regulations of the North Carolina Industrial Commission." On November 25, 2003, Malloy entered into a settlement agreement with the employer and carrier to accept payment of $100,000 in full satisfaction of any current and future claims he may have as a result of the accident. Both Attorney Lee and Malloy were present at mediation in North Carolina when the settlement was reached and, along with Malloy's wife, executed the agreement at that time. By letter dated February 25, 2004, the Law Office disbursed Malloy's settlement funds from its South Carolina office to Malloy's South Carolina home. The Law Office's last correspondence with Malloy occurred on January 10, 2005, when Malloy was provided with a copy of a form in regard to his workers' compensation claim.

Rogers, as GAL for Malloy, filed this action in Spartanburg County's Court of Common Pleas on December 6, 2012, asserting claims for professional negligence, breach of fiduciary duty, and breach of contract. Thereafter, LEE filed a motion for summary judgment on the ground Malloy's claims were barred by North Carolina's four-year statute of repose, asserting the claims were governed by North Carolina substantive law and more than four years had elapsed since the last alleged act or omission giving rise to the causes of action.[1] Rogers opposed the

[1] This North Carolina statute of repose provides as follows:

motion for summary judgment, arguing South Carolina follows the traditional choice of law principle whereby the substantive law applied in a tort action is governed by the *lex loci delicti*, which is the law of the state in which the injury occurred. She asserted Malloy's financial injury stemming from LEE's professional negligence and breach of fiduciary duty occurred in South Carolina, where he resided. She additionally maintained South Carolina, which has not adopted a statute of repose for professional negligence or breach of fiduciary claims against lawyers, has an interest in compensating victims for injuries resulting from such negligence and breach of duty, and in particular when the resulting injury occurs in South Carolina.

The trial court filed a Form 4 order on September 5, 2013, granting summary judgment to LEE. In this order, the trial court noted the contract between the parties contained a choice of law clause providing North Carolina substantive law would govern the contract, that Rogers alleged LEE negligently settled the North Carolina workers' compensation action, and North Carolina's statute of repose would bar the present action. The court held the case of *Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007) controlled the matter and, noting the underlying workers' compensation action was filed, mediated, settled and approved in North Carolina, concluded the *lex loci delicti* of the action arose in North Carolina.

The trial court thereafter filed a formal order, again finding this case indistinguishable from *Nash*, as Rogers alleged Malloy's injuries were directly and proximately caused by Malloy's acceptance of LEE's advice to settle his workers' compensation claim and that advice was given and relied upon at mediation in

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> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: . . . . Provided . . . that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C. Gen. Stat. § 1-15(c) (2013).

North Carolina, and Malloy agreed to the settlement and executed the settlement agreement in North Carolina. Additionally, the trial court found Malloy sought out and retained an attorney licensed to practice in North Carolina to pursue a workers' compensation claim in North Carolina, his underlying workers' compensation claim was for injuries sustained in North Carolina while working for a North Carolina employer, and the parties' relationship was governed by the substantive law of North Carolina pursuant to the terms of their contract of representation. In regard to any public policy exception as a basis for declining to apply North Carolina's statute of repose, the trial court found the fact that the law of two states may differ does not necessarily indicate the law of one state violates the public policy of another. It noted our courts have specifically held the "good morals or natural justice" of South Carolina are not violated when foreign law is applied to preclude a tort action for money damages, even if recovery could be had in application of South Carolina law, and our courts have also repeatedly adhered to the *lex loci delicti* rule to apply foreign law to defeat a claim which would have survived under South Carolina law. Accordingly, it found North Carolina's statute of repose did not violate the public policy of South Carolina.

Rogers filed a motion to alter or amend, asserting the location where Malloy's "injury was manifested" was the key to applying South Carolina's choice of law jurisprudence, and because all of Malloy's financial injuries occurred in South Carolina, the substantive law of South Carolina governed this legal malpractice tort action. In argument before the trial court, Rogers cited *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) and *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994) in support of her position that South Carolina substantive law controlled the tort claims. As to the trial court's finding that the parties' relationship was governed by North Carolina law pursuant to the terms of their contract of representation, Rogers argued this was a misstatement, as the contract was between Malloy and the Law Office, not Attorney Lee individually. Rogers conceded that the contract of representation between Malloy and the Law Office contained a North Carolina choice of law provision which would operate to bar Malloy's breach of contract cause of action against the Law Office, but maintained such would not bar the other tort claims.

Following the hearing on Rogers' motion for reconsideration, the trial court issued an order finding *Lister* and *Bannister* to be distinguishable from the case at hand. The trial court further noted Rogers encouraged the court to read the principle that "the substantive law governing a tort action is determined by the state in which the

injury occurred" to mean "the state in which the *results of the injury manifest themselves*." The trial court then stated as follows: "Clearly, the financial harm to [Malloy] manifested itself in South Carolina because [Malloy] is and always has been a citizen of this state. However, the court cannot ignore that the entire transaction which led to [Malloy's] damages occurred in North Carolina." The trial court therefore declined to alter or amend its prior orders.

LAW/ANALYSIS

I. South Carolina Choice of Law Analysis

Under South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred, commonly referred to as the *lex loci delicti* rule. *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Bannister*, 316 S.C. at 515, 450 S.E.2d at 630. A statute of repose "creates a *substantive right* in those protected to be free from liability after a legislatively-determined period of time," and it "constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation." *Nash*, 375 S.C. at 40, 650 S.E.2d at 83.

We disagree with Rogers' assertion that the *lex loci delicti* is determined simply by the location of manifestation of a plaintiff's financial damages in a legal malpractice action. South Carolina law clearly provides *lex loci delicti* is determined by the state in which *the injury occurred*, not where the results of the injury were felt or where the damages manifested themselves. *Boone*, 345 S.C. at 13, 546 S.E.2d at 193; *Bannister*, 316 S.C. at 515, 450 S.E.2d at 630. The alleged injury to Malloy was the loss of his opportunity to further pursue his underlying workers' compensation claim or settle for a greater sum of money, and this injury occurred in North Carolina where LEE undertook representation of Malloy in his workers' compensation claim, where Malloy accepted Attorney Lee's advice to settle his claim for $100,000, and where Malloy entered into the binding settlement agreement.

Additionally, we find Rogers' reliance on *Lister* is misplaced. There, the plaintiffs, while vacationing in Aruba, rented a vehicle from an Avis agency using their NationsBank Visa credit card. *Lister*, 329 S.C. at 138, 494 S.E.2d at 452. The car was involved in an accident, which plaintiffs averred was caused by a deflating tire, and the plaintiffs returned to Avis and discussed closing out their account. *Id.*

The plaintiffs believed Avis closed out their credit card account. *Id.* at 139, 494 S.E.2d at 452. A few months later, however, plaintiffs discovered their credit card had been charged $7,696.63 for the wrecked vehicle, even though plaintiffs never authorized the charge. *Id.* Citing *Hester v. New Amsterdam Cas. Co.*, 287 F. Supp. 957 (D.S.C. 1968), this court noted, *in a fraudulent misrepresentation action*, the place of the wrong is not where the misrepresentations are made but where the plaintiff, as a result of the misrepresentation, suffers a loss. *Lister*, 3290S.C. at 143, 494 S.E.2d at 455. The court then held "[s]ince the [plaintiffs] suffered their financial loss as a result of [the Avis employees'] misrepresentation [that they were authorized to charge the plaintiffs' credit card] in South Carolina, we conclude South Carolina law applies under the choice of law test for torts." *Id.* at 144, 494 S.E.2d at 455. In *Lister*, the injury that occurred was the misappropriation of the plaintiffs' money and this injury was directly to their money, which occurred in South Carolina. In *Lister*, the injury was not considered to have occurred in South Carolina simply because the plaintiffs resided in South Carolina and therefore felt the financial consequences of it there. Rather, as noted by this court in *Lister*, "South Carolina was the place where the money was wrongfully appropriated." *Id.* at 145, 494 S.E.2d at 456. Additionally, in coming to its conclusion in *Lister*, this court relied on the South Carolina federal district court case of *Hester*, another fraudulent misrepresentation matter. *Id.* at 143, 494 S.E.2d at 455. In *Hester*, the court found the place of the wrong was not in the place where fraudulent misrepresentations were made concerning the plaintiff's purchase of land. 287 F. Supp. at 972. Rather, it found the place of the wrong was in Florida, where the transaction occurred and was culminated and the land was located, as this was where the plaintiff, as a result of the misrepresentation, suffered a loss. *Id.* Notably, the court found the place of injury was Florida, even though the plaintiffs resided in Georgia. *Id.*

We likewise find no merit to Rogers' assertion that the trial court's reconsideration order was contrary to the law in *Bannister*. That case involved the rental of a van in New York from Hertz Corporation to transport New York residents to South Carolina. 316 S.C. at 515, 450 S.E.2d at 630. The van was involved in an accident in North Carolina, resulting in injury to Bannister and her daughter and the death of Bannister's husband. *Id.* Bannister brought actions in South Carolina against Hertz for negligence, alleging the driver was a permissive bailee, and moved for summary judgment on the ground New York law governed Hertz's vicarious liability for the negligence of the driver. *Id.* Hertz argued North Carolina substantive law should apply to the tort action, and under North Carolina's

substantive law, it could not be held vicariously liable. *Id.* In reversing the trial court's application of New York law, this court noted "[u]nder South Carolina conflict of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred," and found "North Carolina substantive law therefore governs this case." *Id.* at 515-16, 450 S.E.2d at 630. As previously stated, the place in which the injury occurred in the case at hand was in North Carolina, where Malloy allegedly sustained a loss of his opportunity to further pursue his underlying workers' compensation claim or settle for a greater sum of money.

Rogers also takes issue with the trial court's finding that, "[a]lthough the parties entered into their relationship in South Carolina, that relationship was governed by the substantive law of North Carolina pursuant to the terms of the [c]ontract of [r]epresentation." We disagree with Rogers' assertion this is a "misstatement" by the trial court because the contract was entered into between Malloy and the Law Office, and Attorney Lee was not an individual party to the contract. First, Rogers alleged in her complaint that "[a]t all times relevant hereto, [Attorney Lee] is or was acting as an agent for [t]he Law [O]ffice"; that "[t]he negligent acts, omissions, and liability of [the Law Office] include[] the acts and/or omissions of [its] agents, principals employees and/or servants, including but not limited to those by [Attorney Lee]"; and that "[the Law Office] acted by and through its employees and agents, included but not limited to Defendant, [Attorney Lee], who acted within the course and scope of his employment and/or agency." Additionally, Rogers admitted in her discovery responses to Attorney Lee's requests to admit that "the lawyer-client relationship between [Malloy] and [Attorney Lee] was entered into pursuant to the terms of the [c]ontract of [r]epresentation." Further, as noted by LEE, after indicating Malloy retained the Law Office to represent him in his workers' compensation claim, the agreement's next sentence states Malloy "authorized the attorneys to take all appropriate actions to resolve the claim." Thus, it is clear Attorney Lee and the Law Office were considered one and the same. Accordingly, we find no error in the trial court's determination the relationship between LEE—which includes Attorney Lee—and Malloy was governed by the substantive law of North Carolina pursuant to the choice of law provision in the contract.

II. State Where the Client Resided at the Time of the Injury

Rogers next urges this court to adopt the substantive law of the state where a plaintiff resided at the time of the injury to govern legal malpractice claims, asserting this would improve "predictability in determining choice of law problems." In so arguing, Rogers cites several cases from other jurisdictions. However, in all but one of these cases, the courts in those jurisdictions applied a different choice of law test—the most significant relationship test or some similar test—and not *lex loci delicti* in determining the substantive law to be applied. The only case cited by Rogers not involving the application of an alternate choice of law test is *Dow v. Jones*, 311 F. Supp. 2d 461 (D. Md. 2004). In that legal malpractice case, Dow met with the defendant attorney at the attorney's Washington, D.C. law office, where the attorney agreed to represent Dow on a criminal charge in Maryland. *Id.* at 463. The court noted "[u]nder Maryland conflict of law rules, a tort claim is governed by the law of the place where the injury occurred, which is the place where the last act required to complete the tort occurred." *Id.* at 466 n.3. The court found, while legal malpractice liability could arise under either tort or contract law, Dow's complaint was framed as sounding in tort. *Id.* The court then determined the alleged tort occurred in Maryland, which is where the underlying criminal trial that was the basis for the legal malpractice action was held. *Id.* The *Dow* decision was not dependent, as Rogers implies, upon the plaintiff having sustained any financial injury in Maryland or the fact that the plaintiff resided in Maryland.

The circumstances and legal determinations in the cases from the other jurisdictions cited by Rogers are readily distinguishable from the case at hand, and we are not persuaded our courts should blindly apply the residence of a plaintiff in a legal malpractice claim as the location of the injury.[2] We decline to depart from

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[2] We do not believe the law of this state is so broad as to find the *lex loci delicti* is the state in which the plaintiff resides simply because he suffers financial damage there. As observed by the trial court, under Rogers' argument, whenever an attorney licensed to practice in South Carolina brings a tort claim in this state on behalf of an out-of-state litigant involved in an automobile accident in this state, and that litigant thereafter sues the attorney for malpractice, the substantive law to be applied would be the law of whatever state the plaintiff resided, regardless of

our courts' traditional application of *lex loci delicti* in determining the substantive law to be utilized in tort causes of action. Neither are we convinced it would be appropriate to adopt an exception for torts involving legal malpractice claims.

III. Public Policy

Rogers also argues South Carolina has an interest in compensating victims of legal malpractice for injuries accruing in South Carolina and in regulating the conduct of persons within its territory and providing redress for injuries that occur here. Noting South Carolina failed to adopt a statute of repose for legal malpractice, she contends it was error for the trial court to impose a North Carolina statute of repose to avoid a South Carolina cause of action in this matter. Essentially, Rogers appears to argue our courts should apply a public policy exception and decline to give effect to the North Carolina statute of repose in question.

"[F]oreign law may not be given effect in this State if 'it is against good morals or natural justice . . . '" *Dawkins v. State*, 306 S.C. 391, 393, 412 S.E.2d 407, 408 (1991) (quoting *Rauton v. Pullman Co.*, 183 S.C. 495, 508, 191 S.E. 416, 422 (1937)). "[U]nder the 'public policy exception,' the Court will not apply foreign law if it violates the public policy of South Carolina." *Boone*, 345 S.C. at 14, 546 S.E.2d at 193. Our courts "will refuse to follow [the law of *lex loci delicti*] when it is against good morals or natural justice, or 'for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens.'". *Id.* (citing *Dawkins*, 306 S.C. at 393, 412 S.E.2d at 408 and *Rauton*, 183 S.C. at 508, 191 S.E. at 422). However, "[t]he 'good morals or natural justice' of our State are not violated when foreign law is applied to preclude a tort action for money damages, whether against an individual or the State, even if recovery may be had upon application of South Carolina law.'" *Dawkins*, 306 S.C. at 393, 412 S.E.2d at 408. Further, even though the law of two states may differ, this fact "does not necessarily imply that the law of one state violates the public policy of the other." *Id.* (citation omitted).

We cannot say the public policy of this state would be violated by application of North Carolina's statute of repose in this matter, as the good morals or natural

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the fact that the underlying action was brought in South Carolina by a South Carolina-licensed attorney for injuries the plaintiff sustained in South Carolina.

justice of our State would not be violated. Thus, we find no public policy exception to the *lex loci delicti* rule would be appropriate in this case. *See Dawkins*, 306 S.C. at 392-93, 412 S.E.2d at 408 (declining to recognize a public policy exception to the *lex loci delicti* rule and determining application of Georgia substantive law, which required actual bodily contact with a plaintiff as a result of the defendant's conduct in emotional distress actions, was appropriate); *Nash*, 375 S.C. at 42, 650 S.E.2d at 84 (wherein this court concluded North Carolina's shorter, six-year statute of repose for actions alleging defective or unsafe conditions of an improvement to realty, as opposed to South Carolina's eight-year statute of repose in such actions, did not violate public policy).

IV. Rogers' Remaining Arguments

Rogers argues on appeal that North Carolina law governs the proximate cause element of the malpractice claims. She further asserts South Carolina's three-year statute of limitations and discovery rule are procedural laws which would govern Malloy's claims.[3] The only issue before the trial court on LEE's motion for summary judgment dispositive of this appeal concerns whether North Carolina substantive law should apply such that its statute of repose bars this claim. Because we find it does apply, these other arguments raised by Rogers need not be addressed. *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 on appeal when its determination of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we affirm the trial court's grant of summary judgment for LEE based on application of North Carolina's statute of repose.

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[3] Although Rogers made these arguments to the trial court within the context of her assertion that South Carolina substantive law should generally govern Malloy's legal malpractice claims, and continued to assert the argument concerning application of North Carolina law on the issue of proximate cause in her motion to alter or amend, the trial court never specifically addressed these arguments. This is likely so because they were not necessary for the determination of whether North Carolina's statute of repose would apply to bar Malloy's claims.

AFFIRMED.

WILLIAMS, J., concurs.

FEW, C.J., concurring: I agree that when a South Carolina lawyer represents a South Carolina resident before the North Carolina Industrial Commission, and the client subsequently sues the lawyer for malpractice that occurred in North Carolina exclusively in the course of the representation before the North Carolina forum, the substantive law of North Carolina applies to the malpractice claim. Specifically, I agree with the majority and the circuit court the client must bring an action against the lawyer within the time limit imposed by the North Carolina statute of repose—N.C. Gen. Stat. § 1-15(c) (2013). I write separately to emphasize that the choice of law provision in the original fee agreement does not govern the entire relationship between the lawyer and the client.

Mark A. Malloy was a South Carolina resident on September 9, 2002, when he sustained a serious head injury in a workplace accident in North Carolina. On April 16, 2003, Malloy sat down in the Law Offices of Lee & Smith, P.A. in Spartanburg, South Carolina to meet with Kenneth E. Lee, an attorney licensed in South Carolina, as well as North Carolina. As the majority emphasizes, the fee agreement Malloy signed that day indicates the purpose of the representation included pursuing a workers' compensation claim. However, the fiduciary duty Lee and his law firm assumed by representing Malloy provided the lawyers in the firm the opportunity to consider a variety of other options, including (1) considering whether Malloy should go to probate court to have a guardian and/or conservator appointed;[4] (2) advising Malloy a lawyer could investigate a third-party action, such as a claim against the ladder manufacturer, the floor installer, or his medical providers, some of which the record indicates were in South Carolina; (3) pursuing a workers' compensation claim, possibly in South Carolina;[5] and (4)

[4] The record indicates Malloy's head injury was serious enough to raise the question of whether he was competent to handle his own affairs.

[5] The record indicates Malloy's employer was Aneco Electrical Construction, which is based in Clearwater, Florida but does business throughout the southeastern United States, apparently including South Carolina. The record does not indicate whether Aneco hired Malloy in South Carolina, which, if Aneco regularly employs four or more employees here, would give the South Carolina

advising Malloy he could pursue a claim for social security disability under federal law in South Carolina.[6] In fact, the record indicates Lee's law firm represented Malloy in a federal disability claim based on the injuries he sustained on September 9, 2002.

In that initial conversation, therefore, Lee's duty to exercise reasonable care related to a variety of options that included the possibility of bringing an action in South Carolina. That duty of due care arose under South Carolina law. The fact that one of the services Lee eventually performed for Malloy involved a proceeding before the North Carolina Industrial Commission does not automatically transform the entire attorney-client relationship to one arising under North Carolina law, and neither does the choice of law provision in the fee agreement that covered only that proceeding. Rather, the fact of proceeding before the North Carolina forum simply invokes the substantive law of that state for the lawyer's actions in the course of that component of the representation.

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workers' compensation commission jurisdiction to award him benefits. *See* S.C. Code Ann. § 42-15-10 (2015) (providing an "employee covered by the provisions of this title is authorized to file his claim under the laws of the state where he is hired"); S.C. Code Ann. § 42-1-360 (2015) ("This title does not apply to . . . (2) any person who has regularly employed in service less than four employees in the same business within the State . . . .").

[6] Federal law provides that a disability claim may be filed and heard anywhere, 20 C.F.R. § 405.315 (2015); 20 C.F.R. § 404.614 (2015), but the claimant "may obtain a [judicial] review of [the] decision by a civil action . . . in the district court . . . for the judicial district in which the plaintiff resides," 42 U.S.C. § 405(g) (2012).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Scarlet Williams, Appellant,

v.

Lexington County Board of Zoning Appeals,
Respondent.

Appellate Case No. 2013-000314

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5349
Heard December 9, 2014 – Filed September 2, 2015

AFFIRMED

Renae Stacie Alt-Summers, of Columbia, for Appellant.

Jeffrey M. Anderson and William Joseph Maye, both of Davis Frawley LLC, of Lexington; for Respondent.

MCDONALD, J.: Appellant Scarlet Williams seeks review of the circuit court's order upholding the Lexington County Board of Zoning Appeals' unanimous decision that the county zoning ordinance prohibits Williams from operating a dog grooming business at her home. We affirm.

FACTS/PROCEDURAL BACKGROUND

Scarlet Williams resides in the Richmond Farms subdivision of Lexington County. Prior to any events relevant to this case, Williams converted her single-car garage into an additional living space with a modified shower for her mother-in-law. When Williams' mother-in-law moved into an assisted living facility, Williams left her job as a dog groomer at PetSmart and began grooming dogs for friends and neighbors in the converted garage.

In the summer of 2010, Walt McPherson, the Lexington County Zoning Administrator, received an anonymous letter regarding Williams' in-home dog grooming business.[1] McPherson then contacted Williams and determined that dog grooming services were in fact being performed at her home.

In September 2011—over a year after receiving the first letter—McPherson received another anonymous letter reporting that Williams was running a dog grooming business from her home. McPherson again contacted Williams about "trying to get her into compliance with the Zoning Ordinance[,] . . . issuing a zoning permit, maybe a home occupation zoning permit, [or] . . . [trying] an alternate location."

McPherson opined that he could not issue Williams a regular zoning permit because her street's zoning classification is "Resident Local 5" (RL5). Section 22.00 of the Lexington County Zoning Ordinance[2] (County Ordinance) defines an RL5 street as "[a] street with frontage over 50 percent residentially developed . . . or platted as a residential subdivision." Section 22.00 explains that "[t]his type street is intended to accommodate some residential activities at five dwelling units per acre. Access will be limited to this type development and allowed home occupations or accessory activities."

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[1] McPherson explained that his office received three anonymous letters about the dog grooming business—the first in 2010, the second in September 2011, and the third in November 2011. These letters were not introduced as evidence at the initial hearing.

[2] *See* Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 22.00 (2013).

McPherson also stated that because Appellant's street was zoned RL5, activities that fell within the "Kennels, Catteries, and Stables" classification of the County Ordinance were prohibited.

> Kennels, Catteries, and Stables include any person, establishment, partnership, corporation, or other legal entity that owns, keeps, harbors, or is custodian of domestic animals and/or domestic fowl kept or used for stud for which a fee is charged and/or for breeding purposes for which a fee is charged for the offspring, or for the purpose of commercial boarding, ***grooming***, sale[], or training. Animal rescue and/or adoption facilities, whether operated for profit or as a non-profit organization, shall be included in this category. Activities under this category shall not include livestock and other farm animals used in customary and normal agricultural husbandry practices or fancier's kennel or cattery or an Animal Hospital maintained by a licensed veterinarian.

Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 21.10 (2013) (emphasis added).

McPherson then reviewed the County Ordinance to determine whether the dog-grooming business could fall under the category of a "home occupation," an activity permitted within the RL5 zoning classification. Lexington County's home occupation guidelines, located in Chapter 1, Section 21.22 of the County Ordinance, state:

> [A] home occupation is an accessory activity of a nonresidential nature which is performed within a dwelling unit, or within an accessory structure to a residence. It shall not occupy more than 25[%] of the total floor area of such dwelling unit and in no event occupy more than 750 square feet of floor area. A home occupation shall not include the manufacture or repair of transportation related equipment or animal impoundment activities (kennel) and shall be subject to the performance standards contained in this Ordinance as applicable.

> Home occupations shall require zoning permits in addition to those of their residential principal activities.

Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 21.22 (2013).

Additionally, McPherson concluded that "since the definition of Kennels, Catteries, and Stables includes grooming[,] and the guidelines of the Home Occupation [category] include[] animal impoundment activities (kennel), [a] dog grooming service may not be permitted under the Home Occupation Zoning Permit."

McPherson determined that the private restrictions of the Richmond Farms subdivision would permit him to issue a home occupation permit for an administrative office only. In response, Williams requested written confirmation from the Richmond Farms Homeowners' Association Board (HOA Board) that her home-based dog grooming business did not violate the covenants and restrictions of the subdivision. After a closed executive board meeting, the HOA Board president confirmed in writing that "Williams' home based dog grooming business does not violate the covenants or restrictions of this community. This [HOA] Board has no objection to the grant of a home-based business zoning permit for Mrs. Williams' dog grooming business."

McPherson subsequently found that the County Ordinance's "home occupation" provision prohibited Williams from operating the dog grooming business at her residence. Williams appealed McPherson's decision to the Lexington County Board of Zoning Appeals (BZA). During its February 21, 2012 hearing, the BZA unanimously denied the appeal, finding that dog grooming was a prohibited activity for Williams' residence under the County Ordinance. The circuit court affirmed this decision by order dated January 11, 2013. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in affirming the BZA's denial of a home occupation permit for Williams' dog grooming business?

STANDARD OF REVIEW

"On appeal, we apply the same standard of review as the circuit court below: the findings of fact by the [BZA] shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence." *Austin v. Bd. of*

Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (citing S.C. Code Ann. § 6-29-840(A) (Supp. 2014)). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." *Id.* (citation omitted). "Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.'" *Id.* (citing *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "However, a decision of a municipal zoning Board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* (citation omitted).

LAW/ANALYSIS

Williams argues the circuit court erred in affirming the BZA's decision to deny her a zoning permit for her dog grooming business. Specifically, Williams contends the home occupation exception under Section 21.22 permits her to engage in dog grooming—despite section 21.10's prohibition of permits for kennels—because the ordinary meaning of "kennel" does not include dog grooming. We disagree.

The governing body's intent as embodied in an ordinance "must prevail if it can be reasonably discovered in the language used." *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (citation omitted). "[W]ords in a statute must be construed in context," and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008) (citation and quotation marks omitted). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Id.* at 570-71, 666 S.E.2d at 896 (citation and quotation marks omitted).

Williams concedes "grooming" is explicitly included in the activities of a kennel pursuant to Section 21.10[3] and would otherwise be prohibited where she lives.

[3] The pertinent portion of Section 21.10 states that "[k]ennels . . . include any . . . establishment . . . that keeps, harbors, or is a custodian of domestic animals . . . for the purpose of commercial boarding, grooming, sale, or training." Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 21.10 (2013).

However, Williams argues the home occupation exception in Section 21.22[4] only prohibits "animal impoundment activities (kennel[s])," and because her dog grooming business is not a "kennel," the circuit court erred in finding this exception inapplicable.

Williams cites to several dictionary definitions of "kennel" in support of her argument that kenneling an animal—as prohibited in Section 21.22—does not include the act of dog grooming. However, because the County Ordinance—when read as a whole—plainly includes dog grooming within the ambit of a kennel, we need not resort to dictionary definitions. *See Eagle Container Co.*, 379 S.C. at 570, 666 S.E.2d at 896 ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." (citation omitted)). To that end, although the home occupation exception does not specifically enumerate "grooming" as a prohibited activity, we find that when Sections 21.10 and 21.22 are read in tandem, it is clear that domestic animal grooming is an activity included within the definition of "kennel" and that county council intended to prohibit any type of kennel activities from occurring in residences on an RL5 street.[5] *See Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 232 (2001) (noting "[i]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." (citation omitted)).

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[4] Section 21.22 states, in relevant part, "A home occupation shall not include . . . animal impoundment activities (kennel) and shall be subject to the performance standards contained in this Ordinance as applicable." Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 21.22 (2013).

[5] Further, although "kennel" is not defined in the "Definitions" section of the County Ordinance, we find this interpretation is in accordance with the provisions of the County Ordinance and is an appropriate classification based on the common functional characteristics of these two terms. *See* Lexington County, S.C., Code of Ordinances, art. 1, ch. 2, § 12.10 (2013) ("Except when definitions are specifically included in this text, words in the text of this Ordinance shall be interpreted in accordance with the provisions set forth in this section."); Lexington County, S.C., Code of Ordinances, art. 2, ch. 1, § 21.00 (2013) ("The purpose of this chapter is to classify all uses into a number of specially defined activities on the basis of common functional characteristics and similar compatibility with other uses.").

Therefore, we conclude the circuit court properly upheld the BZA's decision to deny Williams' request for a permit to operate a dog grooming service at her residence.

CONCLUSION

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

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Helicopter Solutions, Inc. d/b/a Helicopter Adventures,
Respondent,

v.

Richard Hinde and Horry County Zoning Administrator,
Defendants,

Of whom Richard Hinde is the Appellant.

Appellate Case No. 2013-000971

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

Opinion No. 5350
Heard October 8, 2014 – Filed September 2, 2015

AFFIRMED

Kenneth Ray Moss, of Wright, Worley, Pope, Ekster & Moss, PLLC, of North Myrtle Beach, for Appellant.

David B. Miller and Benjamin Albert Baroody, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Respondent.

MCDONALD, J.: Appellant Richard Hinde appeals the circuit court's ruling that a helicopter sight-seeing tour facility is a permitted use within the

Amusement/Commercial (AC) zoning district pursuant to Article VII, Section 712.1 of the Horry County Zoning Ordinance (County Ordinance). Hinde contends the circuit court erred in failing to recognize and defer to the findings of fact made by the Horry County Board of Zoning Appeals (Zoning Board) and by expanding the range of permitted uses in the Horry County AC zoning district to include a heliport or airport. We affirm.

FACTS/PROCEDURAL BACKGROUND

Respondent Helicopter Solutions, Inc., d/b/a Helicopter Adventures, owns and operates a helicopter sight-seeing tour business in Horry County.

Helicopter Adventures is located between the NASCAR Speed Park and the City of Myrtle Beach Wastewater Treatment facility on approximately 5.47 acres within a 46.17-acre tract off the Highway 17 bypass and 21st Avenue in North Myrtle Beach. Burroughs & Chapin, Inc. owns the land, which is split-zoned Amusement/Commercial (AC) and Limited Industrial (LI). Helicopter Adventures is located within the AC portion of the property, which has been zoned AC since at least 2000, when Burroughs & Chapin entered an agreement with Horry County to develop this and other parcels for amusement and commercial use.

In the summer of 2010, Freddie Rick (Rick), who owns Helicopter Adventures with his wife, Mitzi Rick, began searching for property locations that might be suitable for operating a helicopter sight-seeing business. Rick initially contacted the Myrtle Beach and North Myrtle Beach airports to determine whether such a business could be conducted at either site; however, neither airport would allow this type of business.

Hinde, a real estate broker and resident of Plantation Pointe subdivision, purchased his home on March 17, 2011. Helicopter Adventures' landing pads are approximately 1,350 feet from the Plantation Pointe subdivision property line, and the properties are buffered with a large berm covered in fully-grown trees. Hinde testified before the Zoning Board that he knew the property behind his home was zoned AC and that he read the County Ordinance before buying his home. Hinde also testified that, after reading the County Ordinance, he "realized what could potentially be back there" and "interpreted from that Ordinance that it could be a helicopter business."

Although the AC zoning district portion of the County Ordinance allows for a variety of outdoor amusements and includes "sight-seeing depots," helicopter sight-seeing facilities are not specifically referenced in any zoning district provision.[1] Thus, Rick sought county zoning approval as well as Federal Aviation Administration (FAA) approval prior to making any financial commitments towards the proposed business. Rick hired AVN Solutions, LLC to assist him in obtaining FAA approval as well as an engineering firm, the Earthworks Company, to work toward county zoning approval.

On November 18, 2011, Steven Strickland, a professional engineer with Earthworks, emailed Horry County Deputy Planning Director Carol Coleman about locating the helicopter sight-seeing tour facility on the AC portion of the Burroughs & Chapin property. Coleman replied, "[t]he zoning looks good, and the airport will be taken care of with the FAA application." On November 22, 2011, Zoning Administrator Rennie Mincey wrote to Strickland informing him that a helicopter tour facility would be allowed in the AC district pursuant to the County Ordinance. The Horry County Planning & Zoning, Code Enforcement, Engineering, and Stormwater Departments conducted a series of site plan reviews and revisions; the stormwater permit was issued on February 17, 2012; and a final

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[1] Section 712 of the County Ordinance explains that the intent of the AC district is to "allow for the mixing of certain specified land uses in the county where both residential and limited business uses are competing for land and accelerated transition is in evidence." Horry County, S.C., Code of Ordinances, app. B, art. VII, § 712. Additionally, the AC section of the County Ordinance lists "permitted uses" for an AC district, including,

> Establishments providing entertainment primarily as a commercial activity, including but not limited to theaters, billiard halls, pool halls, bowling alleys, water slides, skating rinks, dance halls, shooting galleries, gift and novelty shops, taverns, clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, boardwalks, bath houses, and sight-seeing depots.

Horry County, S.C., Code of Ordinances, app. B, art. VII, § 712.1(A).

site plan for construction approval was granted on March 28, 2012. Horry County issued the certificate of occupancy on May 25, 2012.

After obtaining preliminary approval of site building plans from both Coleman and Mincey, Helicopter Adventures submitted an application for a building permit, which was issued on April 10, 2012. In addition, the Ricks made investments in the business, including: (1) entering marketing and public relations contracts; (2) commencing construction of the structure, building pads, and parking lot; (3) signing the land lease; (4) purchasing four helicopters; (5) leasing a fifth helicopter; and (6) hiring and training pilots to operate the helicopters. Because a portion of Helicopter Adventures' parking lot is located within the limits of the City of Myrtle Beach, the City's Community Appearance Board (CAB) published notice of the plans and held a hearing on May 3, 2012. Thereafter, the CAB granted approval of the site plan. Following various public notices and advertising, Helicopter Adventures opened for business on May 25, 2012.

On June 22, 2012, Hinde filed an appeal to the Zoning Board challenging the Zoning Administrator's decision that a helicopter tour facility was a permissible use in the AC zoning district.[2] This request was deferred at an August 13, 2012 Board hearing. On September 10, 2012, by a 4-3 vote, the Zoning Board overturned the Zoning Administrator's Decision.[3] The Zoning Board's September 10, 2012 order set forth the following conclusions of law:

> Based on the evidence presented . . . this appeal was filed within a reasonable time after the applicant knew or

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[2] Pursuant to Section 1403 of the County Ordinance, "[a]ppeals to the Board may be filed by any person aggrieved or by any officer, department, board, or bureau of the county. Such appeal shall be filed within a reasonable time, as provided by the rules of the Board, by filing with the Zoning Administrator and with the Board of Zoning Appeals notice of said appeal specifying the grounds thereof." Horry County, S.C., Code of Ordinances, app. B, art. XIV, § 1403 (1999).

[3] Section 1402 of the County Ordinance provides, "[t]he concurring vote of a majority of the members present at a meeting of the Board of Zoning Appeals shall be necessary to reverse any order, requirement, decision or determination of the Zoning Administrator . . . ." Horry County, S.C., Code of Ordinances, app. B, art. XIV, § 1402 (1999).

> should have known of the November 22, 2011 decision by the Zoning Administrator. Although the plans and permits referenced above were maintained as records of the county and available for public inspection for months before the appeal was filed, the appellant had no reason to inquire and lacked knowledge of them.
>
> The Board overturns the decision of the Zoning Administrator finding that a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC zoning district. Therefore, the appeal is granted and the Zoning Administrator's decision is overturned.

(emphasis omitted). On September 12, 2012, Horry County's attorney notified Helicopter Adventures by email that the business was an "impermissible use of the location at issue." The letter explained that as a result of the Zoning Board's decision, Horry County was "compelled to take immediate action to enforce the decision of the [Zoning Board], which includes the termination of such operations at the site, should an appeal of the [Zoning Board's] decision not be filed by Helicopter Adventures, together with an application for supersedeas."

That same day, Helicopter Adventures filed its notice of appeal to the circuit court, along with a petition for writ of supersedeas.[4] The circuit court granted the petition for writ of supersedeas on September 28, 2012.[5]

On December 11, 2012, the circuit court conducted a hearing on the merits of Helicopter Adventures' appeal. By order dated January 16, 2013, the circuit court found Hinde had sufficient standing to challenge the determination of the Zoning Administrator and that he appealed to the Zoning Board within a reasonable time.

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[4] Pursuant to sections 6-29-820(A) and (B) of the South Carolina Code (Supp. 2014), "[a] person who may have substantial interest in any decision of the board of appeals" or "a property owner whose land is the subject of a decision of the board of appeals" may appeal from a decision of the board of appeals to the circuit court. *See also* Rule 65(f), SCRCP.

[5] This order allowed Helicopter Adventures to remain in business during the pendency of the appeal.

The order adopted the Zoning Board's uncontested findings of fact, but reversed its "error of law in interpreting Section 712 of the Horry County Zoning Ordinance to exclude a helicopter sight-seeing tour facility as a permitted use within the Amusement Commercial District."

On January 28, 2013, Hinde and the Horry County Board of Zoning Appeals filed motions for reconsideration pursuant to Rule 59(e), SCRCP. Following a February 13, 2013 hearing, the circuit court ordered the deletion of one sentence from a footnote in the January 16 order. It denied the motions as to the remaining grounds asserted by Hinde and the Zoning Board. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in failing to recognize and defer to findings of fact by the Zoning Board?

II. Did the circuit court err by expanding the range of permitted uses in the Horry County Amusement/Commercial zoning district to include a heliport or airport?

STANDARD OF REVIEW

"Generally, appeal from a final order of the circuit court following its review of the zoning board's decision is to the court of appeals." *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (citing S.C. Code Ann. § 6-29-850 (2004); Rule 203(d), SCACR)). "On appeal, the findings of fact by the [Zoning] Board shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012) (citing S.C. Code Ann. § 6-29-840(A) (Supp. 2011)). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [Zoning] Board is correct as a matter of law." *Id.* at 147-48, 735 S.E.2d at 661. "Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.'" *Id.* at 148, 735 S.E.2d at 661 (citing *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "However, a decision of a municipal [Z]oning Board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* (citation omitted). "Appellate courts regard appeals from zoning decisions in the same manner as

appeals from other circuit court judgments in law cases." *Newton*, 396 S.C. at 116, 719 S.E.2d at 284.

LAW/ANALYSIS

I. Zoning Board's Findings of Fact

Hinde argues the circuit court erred in failing to recognize and defer to the findings of fact by the Zoning Board. We disagree.

On appeal, "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A) (Supp. 2014). Furthermore, "[a] reviewing court in a zoning case may rely on uncontroverted facts [that are] not in a zoning board's findings [but appear in the record]." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E. 2d 892, 898 (Ct. App. 2000) (citation omitted).

"[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (citing *Eagle Container, LLC v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008)). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* (citing *Eagle Container*, 379 S.C. at 568, 66 S.E.2d at 894).

Here, the circuit court left the Zoning Board's findings of fact undisturbed. Hinde argues the Zoning Board's finding that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses in the AC zoning district" is actually a finding of fact, rather than a conclusion of law. In support of his argument, Hinde cites *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 412, 552 S.E.2d 42, 47-48 (2001), in which the supreme court held that a zoning board's determination of whether a particular activity or purpose constitutes a "use" of property is a finding of fact.

Yet, Hinde concedes the Zoning Administrator made an "administrative interpretation" of the County Ordinance, which Hinde then appealed to the Zoning Board. He thus challenges the Zoning Administrator's construction of the County Ordinance as it applies to a "sight-seeing depot." We agree with the circuit court

that in construing the County Ordinance, the Zoning Administrator, and subsequently, the Zoning Board, made a legal conclusion. *See Mikell*, 386 S.C. at 158, 687 S.E.2d at 329. Thus, the circuit court did not improperly substitute its own factual determination for that of the Zoning Board.

II. Permitted Use

In the alternative, Hinde argues the circuit court wrongly concluded as a matter of law that the County Ordinance's definition of "sight-seeing depot" includes the operation of helicopters or other types of aircraft. We disagree.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mikell*, 386 S.C. at 160, 687 S.E.2d at 330 (citation omitted). "When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used." *Id.* (citation omitted). "When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law." *Id.* (citation omitted).

> If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Where a statute is ambiguous, however, we must construe the terms of the statute according to settled rules of construction.

Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) (citations omitted).

We conclude the circuit court correctly held that the County Ordinance, on its face, permits the use of a helicopter sight-seeing tour facility. Section 712 states "the intent of the [AC] district is to allow for the mixing of certain specified land uses in the county where both residential and limited business uses are competing for land and accelerated transition is in evidence." Additionally, Section 712.1(A) sets forth a list of AC district "permitted uses," including the following:

> Establishments providing entertainment primarily as a commercial activity, including but not limited to theaters, billiard halls, pool halls, bowling alleys, water slides, skating rinks, dance halls, shooting galleries, gift and

> novelty shops, taverns, clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, boardwalks, bath houses, and sight-seeing depots.

Horry County, S.C., Code of Ordinances, app. B, art. VII, § 712.1(A). Neither the phrase "sight-seeing depot" nor any term within the phrase is defined within the County Ordinance. Therefore, such words are to be given their "customary dictionary definitions." *See* Horry County, S.C., Code of Ordinances, app. B, art. IV, § 400.

As the circuit court recognized, it is undisputed that Helicopter Adventures operates a sight-seeing business and that the tours conducted originate and terminate upon the subject property. Moreover, it is undisputed that the purpose of the sight-seeing business is for entertainment and commercial/business activity. Since there was no apparent dispute as to the meaning and applicability of the term "sight-seeing," the only issue Hinde raised to the Zoning Board with regard to consideration of the County Ordinance concerned the meaning of the word "depot." However, the determination of what constitutes a "sight-seeing depot" under the AC section of the County Ordinance cannot be made in a vacuum.

> The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.

City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967) (citations omitted).

The obvious purpose of the AC zoning district is to accommodate "[e]stablishments providing entertainment primarily as a commercial activity." Zoning Administrator Mincey provided further guidance before the Zoning Board as to the intent of section 712:

> Helicopter sight-seeing tour facilities function as outdoor amusements. Historically, outdoor amusement uses that may create noise, such as outdoor gun ranges and

> outdoor motor sport facilities have been limited to the AC district. Years ago, this was determined to be [an] appropriate zoning district for these use types because it was the only commercial district that allows outdoor amusements and does not allow residential uses. Further, there are a very limited number of properties in the County zoned AC. Therefore, anyone desiring to establish a use of this type has been told they would either have to procure one of the few properties already zoned for it or initiate a rezoning action that requires public notice and County Council approval. Thus, the AC zoning district historically has been regarded as one of the most intense zoning districts and commercial sight-seeing uses by land, water or air; and, other outdoor amusement commercial uses have been limited to this district.

Hinde conceded before the circuit court that the term "sight-seeing depot" would include a sight-seeing tour facility operating through a form of "ground transportation," such as a "bus ride [or] jeep ride." He also conceded that section 712 does not exclude air transportation. Thus, Hinde effectively seeks to add the limiting words "by ground transportation" or "by bus or jeep" to the County Ordinance, ultimately restricting the scope of the AC zoning designation.

This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that

> statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted); *see also Keane/Sherratt P'ship by Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d

193, 196 (Ct. App. 1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted). Thus, we find the circuit court properly held the Zoning Board made an error of law in construing the County Ordinance to exclude a helicopter sight-seeing tour facility as a permissible use within the AC district.

CONCLUSION

As the circuit court properly held the range of permitted uses in the Horry County Amusement/Commercial zoning district to include a helicopter sight-seeing tour business, the circuit court's decision is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Sarah Denise Cardwell, Appellant.

Appellate Case No. 2012-213334

Appeal From Georgetown County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5351
Heard September 9, 2014 – Filed September 2, 2015

AFFIRMED

Appellate Defender Benjamin John Tripp, of Columbia, for Appellant.

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

MCDONALD, J.: Sarah Cardwell (Cardwell) appeals her conviction for two counts of unlawful conduct toward a child and two counts of first-degree sexual exploitation of a minor. Cardwell argues the circuit court erred in refusing to suppress her laptop computer and a video seized from the laptop without a search warrant. She contends that the search and seizure violated her Fourth Amendment rights because law enforcement instructed a computer technician to locate, play,

and copy the video prior to obtaining a search warrant. Cardwell further asserts that her constitutional rights were violated when the Johnsonville Police Department provided the video to a Georgetown County Sheriff's Office investigator, who viewed it prior to obtaining a warrant. We affirm.

FACTS/PROCEDURAL HISTORY

In November 2010, Cardwell took her laptop computer to David Marsh (Marsh) for repair at his home office, which is located in Florence County. Marsh explained to Cardwell that repairing the laptop would entail downloading the data from the hard drive, rebuilding the hard drive, and then reloading the previously extracted data to the hard drive. Because Cardwell's laptop would not boot, Marsh removed the hard drive from her computer and connected it to his own computer to download the data.

On December 8, 2010, as Marsh was downloading Cardwell's data to his computer, Johnsonville Police Chief Ron Douglas (Chief Douglas) entered Marsh's home office to deliver some packages. When Marsh left the office to take the packages to his garage, Chief Douglas saw an image of "a nude child maybe holding a ladies' bra up across his chest." Chief Douglas then told Marsh, "I just saw something go across the screen, can you back it up?" Marsh subsequently located the image of a male child wearing nothing but a pink bra and determined that the questionable image was actually part of a video. Chief Douglas indicated that he wanted to see the video, so Marsh played "just a little bit . . . possibly a minute" of the video.

The video shows Cardwell's two minor children (Minor 1 and Minor 2) dancing naked with Cardwell's co-defendant and then-boyfriend, Michael Cardwell, who was also naked. Although Sarah Cardwell does not appear in the video, her voice is heard directing the children. In 2007, when the video was filmed, Minor 2 was seven years old and his sister, Minor 1, was six years old. The minor children had just finished bathing before they ran into the living room and pulled down Michael Cardwell's gym shorts, at which point Sarah Cardwell started filming. The video shows Minor 2 "touching his front private part." The video also shows Michael Cardwell "flapping" his own penis back and forth and "tweaking" his own nipples. At trial, Minor 2 testified that his mother and Michael Cardwell instructed him to touch his penis.

Because he was concerned about losing the video in the event of a hard drive crash, and because Cardwell lived in Georgetown County rather than Florence

County, Chief Douglas instructed Marsh to make a copy of the video and shut down the laptop. Marsh turned over the copy of the video and Cardwell's laptop to Chief Douglas, who subsequently submitted them to Investigator Phillip Hanna (Investigator Hanna) of the Georgetown County Sheriff's Department.

On December 10, 2010, Investigator Hanna watched the video with Marsh and Chief Douglas at the Johnsonville Police Department. Investigator Hanna then obtained a search warrant "for everything on the computer" prior to sending Cardwell's laptop computer to the Charleston computer lab for analysis. Marsh testified at trial that even if Chief Douglas had not discovered the troubling image, Marsh would have been required to report the matter to law enforcement pursuant to section 63–7–310 of the South Carolina Code of Laws.[1]

Subsequently, Cardwell was indicted on two counts of unlawful conduct toward a child and two counts of first-degree sexual exploitation of a minor. The Honorable Edward B. Cottingham called the case to trial on October 29, 2012. Sarah Cardwell was tried with her co-defendant, Michael Cardwell.

Pre-trial, counsel for Sarah Cardwell made several motions, including a motion to suppress both the video and laptop computer, arguing that the computer was unlawfully searched and both items unlawfully seized in violation of the Fourth Amendment. The circuit court denied the motion to suppress, ruling that there was no Fourth Amendment violation because Cardwell relinquished any expectation of privacy in her laptop when she turned it over to Marsh for repair. The court further opined that the questionable image fell within the plain view of Chief Douglas.

During trial, Cardwell twice renewed her motion to suppress both the video and the computer. After the State rested its case, Cardwell moved for a directed verdict, asserting insufficient evidence to sustain the State's charges against Cardwell. The circuit court denied these motions.

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[1] Computer technicians, among other individuals, "*must report* in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected . . . ." S.C. Code Ann. § 63–7–310(A) (2010 & Supp. 2014) (emphasis added).

The jury subsequently found Cardwell guilty of two counts of unlawful conduct toward a child and two counts of first-degree sexual exploitation of a minor. After the verdict, Cardwell renewed her motion to suppress and moved for a new trial. The circuit court denied these motions.

Thereafter, the circuit court sentenced Cardwell to two years on each count of unlawful conduct toward a child, to run concurrently. As to the first count of first-degree sexual exploitation of a minor, the circuit court sentenced Cardwell to three years, to run consecutively to the previous indictments, and required her to register as a sex offender. As to the second count of first-degree sexual exploitation of a minor, the circuit court sentenced Cardwell to three years, to run concurrently. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in refusing to suppress the laptop computer and video when, without a search warrant, law enforcement instructed a computer technician to locate the questionable image, play the video, copy the video, and then provide the video to another law enforcement officer, who also viewed it prior to obtaining a search warrant?

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only. *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010) (citation omitted). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citation omitted). "The appellate court will reverse only when there is clear error." *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (citation omitted).

LAW/ANALYSIS

I. Reasonable Expectation of Privacy[2]

Cardwell argues that she had a reasonable expectation of privacy in the video evidence found on her laptop computer and that the circuit court erred in denying her motion to suppress the video. We disagree.

An appellate court must affirm a circuit court's Fourth Amendment suppression ruling if it is supported by any evidence. *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) (citation omitted). "However, this deference does not bar this [c]ourt from conducting its own review of the record to determine whether the [circuit court's] decision is supported by the evidence." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citation omitted). The court will only reverse the circuit court's ruling on a motion to suppress when there is clear error. *Narciso v. State*, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012) (citation omitted). This court will not reverse a circuit court's findings of fact merely because we would have reached a different conclusion. *State v. Moore*, 404 S.C. 634, 640, 746 S.E.2d 352, 355 (Ct. App. 2013) (citation omitted).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[3] "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 134 S.Ct. 2473, 2482

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[2] We acknowledge that South Carolina has not specifically addressed whether a reasonable expectation of privacy exists in one's personal computer and its data when voluntarily produced to a third party.

[3] Similarly, article I, section 10 of the South Carolina Constitution provides:

(2014) (citation omitted). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S.Ct. 1368, 1371 (2015).

"To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched." *Missouri*, 361 S.C. at 112, 603 S.E.2d at 596. "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *Id*. (citation omitted); *see also California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (concluding "that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public"); *Katz v. United States*, 389 U.S. 347, 359 (1967) (Harlan, J., concurring); *State v. Robinson*, 396 S.C. 577, 583–84, 722 S.E.2d 820, 823 (Ct. App. 2012) (stating a defendant must show his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable).

Generally, "[a] reasonable expectation of privacy exists in property being searched when the defendant has a relationship with the property or property owner." *Robinson*, 396 S.C. at 584, 722 S.E.2d at 823. Clearly, "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection." *Wright*, 391 S.C. at 444, 706 S.E.2d at 327–28 (quoting *Katz*, 389 U.S. at 351). However, the act of providing an information technology professional access to one's data for the sole purposes of preserving that data and restoring the computer's functionality does not constitute exposing the data to "the public." *Compare United States v. Barth*, 26 F.Supp. 2d 929, 937

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

(W.D. Tex. 1998) ("Defendant gave the hard drive to [a computer technician] for the *limited purpose* of repairing a problem unrelated to specific files and also expected that he would have the unit back the following morning to continue his business. Defendant, therefore, retained his reasonable expectation of privacy in the files when he gave the hard drive to [the technician]." (emphasis added)), *with Rideout v. Commonwealth*, 753 S.E.2d 595, 600 (Va. Ct. App. 2014) ("'Although as a general matter an individual has an objectively reasonable expectation of privacy in his personal computer, we fail to see how this expectation can survive [appellant's] decision to install and use *file-sharing software, thereby opening his computer to anyone else with the same freely available program*.'" (alteration in original) (emphasis added) (quoting *United States v. Stults*, 575 F.3d 834, 843 (8th Cir. 2009))).

The question here is whether Cardwell, in turning her laptop computer over to a technician for repair, relinquished her reasonable expectation of privacy such that the warrantless searches and seizure of the computer and video file were reasonable within Fourth Amendment limits. *See, e.g.*, *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (holding defendant did not have a continued reasonable expectation of privacy in crack cocaine discarded on the floor of a business open to the public). Whether a reasonable expectation of privacy exists in one's personal computer and its data when one voluntarily produces them to a third party has not been specifically addressed in South Carolina; however, other jurisdictions have considered this area of Fourth Amendment jurisprudence.

In *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), the Fourth Circuit Court of Appeals held an employee who knew his internet activity would be scrutinized by his employer had no legitimate expectation of privacy in his internet activity. *Id.* at 398. More recently, the Court of Criminal Appeals of Alabama held a reasonable expectation of privacy does not exist in one's personal computer and its data when that data is contraband. *See Melton v. State*, 69 So.3d 916, 928–929 (Ala. Crim. App. 2010) (explaining that even though computer technicians only viewed highly graphic file names indicating their contents were child pornography, law enforcement did not violate appellant's Fourth Amendment rights in opening the computer files as there is no constitutional protection in contraband).

Several jurisdictions have concluded that although a reasonable expectation of privacy generally exists in one's personal computer and accompanying data, an individual may relinquish this right. *See Stults*, 575 F.3d at 843 ("Although as a general matter an individual has an objectively reasonable expectation of privacy

in his personal computer, we fail to see how this expectation can survive [appellant's] decision to install and use file-sharing software, thereby opening his computer to anyone else with the same freely available program." (citation omitted)); *Commonwealth v. Sodomsky*, 939 A.2d 363, 369 (Pa. Super. Ct. 2007) (finding that when defendant submitted his computer to technicians for repair, he abandoned his privacy interest in the child pornography stored on his hard drive); *Rogers v. State*, 113 S.W.3d 452, 458 (Tex. App. 2003) (upon directing the technician to back up his files, the defendant "no longer had a legitimate expectation of privacy in those files"); *Rideout*, 753 S.E.2d at 600 (by installing file sharing software on his computer, the appellant assumed the risk that other users, including law enforcement, could readily access those incriminating files that appellant shared).

Other jurisdictions have declined to find that an individual relinquishes his reasonable expectation of privacy when turning over equipment to a third party for limited purposes. *See, e.g.*, *Barth*, 26 F.Supp.2d at 937 (holding defendant did not lose a reasonable expectation of privacy in computer files contained in a searched hard drive when he gave the technician, a confidential informant, a hard drive for the limited purpose of repairing a problem unrelated to files that were searched); *State v. Sachs*, 372 S.W.3d 56, 61 (Mo. Ct. App. 2012) ("[U]sing a mouse and/or keyboard to shuffle between files that are not plainly visible on an active computer screen is just as much of a search as opening and looking through Appellant's filing cabinets or desk drawers." (citation omitted)).

In denying the motion to suppress both the video file and the laptop computer itself, the circuit court concluded that because Cardwell "voluntarily turned [her laptop computer] over to a repair technician who took it upon himself to comment on it" there was no Fourth Amendment violation. The circuit court explained, "[w]hen she gave it to the technician she had no concept [of] privacy."

Cardwell argues that she has the same reasonable expectation of privacy in the data stored on her laptop that she would retain in any other closed container, file, document, or personal effect, and that she did not relinquish this expectation merely by turning the laptop over to Marsh for repair. She asserts that when Chief Douglas saw the still image of the video file, it only extinguished her privacy interest in the still image and that she retained a legitimate privacy interest in the video. We disagree that Cardwell had a legitimate privacy interest in the video file.

There is no question that a computer repair professional is required to report a client to law enforcement after discovering child pornography in a client's computer files. *See* S.C. Code Ann. § 16–3–850 (2003) (requiring film processors, photo finishers, and computer technicians to report their discovery of images depicting minors "engaging in sexual conduct, sexual performance, or a sexually explicit posture"); § 63–7–310 (listing persons required to report suspected child abuse or neglect). Therefore, the client takes the risk that the computer professional will disclose to law enforcement officials any of her computer files containing child pornography. *Melton*, 69 So.3d at 928 ("[T]he question in this case is not whether society would generally find an expectation of privacy in computer files to be reasonable. Rather, the question is whether, at the time law enforcement officers were at the Best Buy store, an expectation of privacy *in files with explicit names that suggested that they contained child pornography* was an expectation that society is prepared to consider reasonable." (emphasis added)).

Based on our review of the record and the weight of authority from other jurisdictions, we hold the circuit court properly denied the motion to suppress the video file. While we disagree with the circuit court's statement that Cardwell "had no concept [of] privacy" whatsoever in the computer and its data when she voluntarily turned the computer over to the repair technician, we agree with the circuit court's decision to deny the motion to suppress as to the *particular* video file at issue.

The video file opened and viewed by Marsh and Chief Douglas contained images of a minor "engaging in sexual conduct, sexual performance, or a sexually explicit posture."[4] Once the sexually suggestive still image of the child in a bra appeared, no warrant was required to open and view *this* video file containing that very image. *See, e.g.*, *United States v. Gardner*, 554 Fed.Appx. 165, 167 (4th Cir. 2014) (citing *Arkansas v. Sanders*, 442 U.S. 753, 764–65 n.13 (1979) (plurality opinion), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991)) ("[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.").

Nonetheless, to conduct a full search of the remaining files on the computer, obtaining a warrant was necessary to protect Cardwell's legitimate expectation of privacy in those separate files. Indeed, obtaining the warrant would have been a

[4] *See* §16–3–850.

relatively simple step. *See Riley*, 134 S.Ct. at 2493 ("Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient.").

II. Plain View Doctrine

Cardwell argues that both Chief Douglas and Investigator Hanna improperly watched the video file without first obtaining a search warrant when no applicable Fourth Amendment exception allowed them to do so. We disagree.

Generally, a warrantless search is per se unreasonable and thus violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *State v. Abdullah*, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004) (citation omitted). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." *Id.* (citation omitted). Exceptions to the search warrant requirement include the following: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment. *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted).

"[O]bjects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *Wright*, 391 S.C. at 443, 706 S.E.2d at 327. In *Wright*, South Carolina joined the majority of jurisdictions in adopting *Horton v. California*, 496 U.S. 128 (1990), which discarded the inadvertence requirement of the plain view doctrine. *Id.* "Hence, the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *Id.*

After the verdict, Cardwell again renewed her motion to suppress the video and computer. In denying the motion, the circuit court explained,

> I denied that because the evidence showed that [the] computer was being shown in full view and the officer—police who happened to see it, just happened to stumble across it and saw [the image] in plain view. [There is] no search and seizure [issue] when an officer sees something

> in plain view that he and everybody else passing by could see. It was open to whoever opened the door.

Even if Cardwell had a reasonable expectation of privacy in the video file, there is no question that the still image of Minor 2 was in the plain view of Chief Douglas when he entered Marsh's office. *See Wright*, 391 S.C. at 443, 706 S.E.2d at 327 (recognizing the plain view doctrine as an exception to the warrant requirement). However, an officer's plain view of any still image on a computer screen is not what gives him the authority to open, and thereby search, the video file. *See State v. Sachs*, 372 S.W.3d at 61 ("When [the police detective] began clicking on icons on Appellant's computer screen to view different programs that were not openly visible on the computer screen, he was conducting a search."). In this case, Chief Douglas's authority to open the video file arose from the still image of Minor 2, which allowed an inference to be made about the illegality of the video's content. *See Blair v. United States*, 665 F.2d 500, 507 (4th Cir. 1981) (stating that the contents of a container are considered to be in plain view if the container "proclaims its contents by its distinctive configuration or otherwise and thus allows by its outward appearance an inference to be made of its contents.").

For purposes of Fourth Amendment analysis, we view the file as a "container" and the still image as either the container's label or as an element within the container's contents. *See Barth*, 26 F.Supp.2d at 936 ("Although the protection afforded to a person's computer files and hard drive is not well-defined, the Court finds that the Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person's closed containers and closed personal effects." (citation omitted)); *United States v. Chan*, 830 F.Supp. 531, 534 (N.D. Cal. 1993) (comparing data stored in a pager to the contents of a closed container). Opening the container, i.e., the video file, reveals the container's full content, the video itself. *Cf. Sachs*, 372 S.W.3d at 61 (comparing the use of a mouse or keyboard to shuffle between files not plainly visible on an active computer screen to opening and looking through filing cabinets or desk drawers).

A container in plain view that is seized by law enforcement may be opened only once a warrant has been obtained or pursuant to one of the exceptions to the warrant requirement. *Horton*, 496 U.S. at 141 n.11.

> Even when government agents may lawfully seize [a sealed] package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires

> that they obtain a warrant before examining the contents of such a package. *Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered*.

United States v. Jacobsen, 466 U.S. 109, 114 (1984) (emphasis added) (footnotes omitted).

Rather, "courts will allow a search of a container following its plain view seizure only where the contents of a seized container are a foregone conclusion." *United States v. Williams*, 41 F.3d 192, 197 (4th Cir. 1994) (citation omitted).

> [I]f the container is open and its contents exposed, its contents can be said to be in plain view. Second, if a container *proclaims its contents by its distinctive configuration or otherwise and thus allows by its outward appearance an inference to be made of its contents*, those contents are similarly considered to be in plain view. In either instance, an investigating authority need not obtain a warrant to search the container, the reasoning behind the exception being that a warrant under those circumstances would be superfluous.

Blair, 665 F.2d at 507 (emphasis added) (citation omitted).

Here, the question is whether the "container," i.e., the video file, "allow[ed] by its outward appearance an inference to be made of [the video's] content[]"[5] such that the plain view exception to the warrant requirement may serve as an independent ground for affirming the denial of Cardwell's motion to suppress. The "label" on the container, i.e., the still image, gave the appearance that the video file's content included a nude minor engaging in inappropriate sexual behavior. Therefore, the plain view exception to the warrant requirement supports the denial of the motion to suppress in this case.

[5] *Blair*, 665 F.2d at 507.

III. Inevitable Discovery Doctrine

As an additional sustaining ground, we find the inevitable discovery doctrine further supports the denial of the motion to suppress. *See Nix v. Williams*, 467 U.S. 431, 432 (1984) ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[,] . . . then the deterrence rationale has so little basis that the evidence should be received."). Having seen the still image of Minor 2, both Chief Douglas and Investigator Hanna clearly had probable cause to obtain a search warrant to open the video file. Investigator Hanna testified that it was standard procedure to obtain a search warrant when he discovered images of child pornography, such as the still image of Minor 2, and that after viewing this specific image, he obtained a search warrant for Cardwell's computer. Therefore, the State showed that the video file's content inevitably would have been, and in fact was, ultimately discovered by lawful means.[6]

CONCLUSION

We conclude the circuit court properly denied the motion to suppress the video file seized from Cardwell's laptop computer because Cardwell had no reasonable expectation of privacy in the photograph of Minor 2. This photograph was in Chief Douglas's plain view and gave the appearance that the video file's content included a minor engaging in inappropriate sexual behavior. Thus, the circuit court properly denied the motion to suppress the video file pursuant to the plain view exception to the warrant requirement. Finally, the inevitable discovery doctrine further supports the circuit court's denial of the motion. Therefore, we

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[6] Cardwell also challenges the circuit court's designation of the search as a "private search" despite law enforcement's significant involvement in directing it. Because we hold Cardwell had no legitimate expectation of privacy in the still image or the video file, we decline to reach this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

hold the circuit court properly denied Cardwell's motion to suppress and motion for a directed verdict. Accordingly, the circuit court's ruling is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.