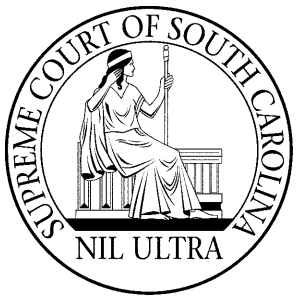

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
August 22, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27823 - Kyle Pertuis v. Front Roe Restaurants	Denied 8/16/2018
27826 - The State v. Tyrone King	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5550-Brian Morin v. Innegrity, LLC	Pending
5562-Raymond Farmer v. CAGC Insurance	Pending
5563-Angel Gary v. Lowcountry Medical	Denied 08/16/18
5564-J. Scott Kunst v. David Loree	Denied 08/16/18
5565-State v. Johnnie Lee Lawson	Denied 08/16/18
5566-Tyrone York v. Longlands Plantation	Pending
5567-Karl Jobst v. Brittany Martin	Denied 08/16/18
5568-Amisub of South Carolina, Inc. v. SCDHEC	Denied 08/22/18
5569-State v. Preston Shands, Jr.	Denied 08/16/18
5571-William Crenshaw v. Erskine College	Pending
5572-State v. Steven Otts	Denied 08/16/18

5573-Skydive v. Horry County	Pending
5574-State v. Jeffrey D. Andrews	Pending
5576-Oien Family Investments, LLC v. Piedmont Municipal Power	Denied 08/16/18
5578-In Re: The Estate of James Brown	Pending
5581-Nathan Bluestein v. Town of Sullivan's Island	Pending
5583-Leisel Paradis v. Charleston County	Pending
2018-UP-087-David Rose v. SCDPPPS	Denied 08/16/18
2018-UP-173-Ex parte Anthony Mathis	Denied 08/16/18
2018-UP-178-Callawassie Island Members Club v. Gregory Martin	Pending
2018-UP-179-Callawassie Island Members Club v. Michael Frey	Pending
2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-183-South Carolina Community Bank v. Carolina Procurement	Denied 08/16/18
2018-UP-196-State v. Loushanda Myers	Denied 08/16/18
2018-UP-213-Heidi Kendig v. Arthur Kendig	Denied 08/16/18
2018-UP-214-State v. Tavarious Settles	Denied 08/16/18
2018-UP-218-State v. Royres A. Patterson	Denied 08/16/18
2018-UP-221-Rebecca Delaney v. CasePro, Inc.	Denied 08/16/18
2018-UP-231-Cheryl DiMarco v. Brian A. DiMarco	Denied 08/16/18
2018-UP-236-James Hall v. Kim Hall	Denied 08/16/18
2018-UP-237-Harold F. Jones v. State Farm Mutual Ins. Co.	Denied 08/16/18
2018-UP-242-Linda Estrada v. Andrew Marshall	Denied 08/16/18

2018-UP-244-Albert Henson v. Julian Henson	Pending
2018-UP-249-Century Capital v. Midtown Development	Pending
2018-UP-250-Morningstar v. York County	Denied 08/16/18
2018-UP-260-Kenneth Shufelt v. Janet Shufelt	Denied 08/16/18
2018-UP-268-Holly Lawrence v. Jennifer Brown	Denied 08/16/18
2018-UP-269-Carlton Cantrell v. Aiken County	Denied 08/16/18
2018-UP-273-State v. Maurice A. Odom	Denied 08/16/18
2018-UP-274-Corey Ross v. Carolina Adventure World, LLC	Pending
2018-UP-275-Ronald Jarmuth v. The International Club	Denied 08/16/18
2018-UP-280-Scott Ledford v. Department of Public Safety	Denied 08/16/18
2018-UP-283-Estate of John Fortney v. Berkeley Electric Cooperative	Denied 08/16/18
2018-UP-287-South Carolina Farm Bureau v. Michael Harrelson	Denied 08/16/18
2018-UP-305-Jerome Owens v. SCDC	Denied 08/16/18
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-318-Theresa Catalano v. Jack Catalano	Pending
2018-UP-319-Carol Goodson-Eaddy v. Travien L. Capers	Denied 08/16/18
2018-UP-323-Cheryl Burch v. Thomas Burch	Pending
2018-UP-327-State v. Joe Ross Worley	Pending
2018-UP-329-John Alden Bauer, III v. Beaufort County Sch. Dist.	Pending
2018-UP-331-Basil Akbar v. SCDPPPS	Pending
2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending

2018-UP-335-State v. Samuel Edward Alexander, Jr. Pending

2018-UP-338-John Rakowsky v. Law Office of Adrian Falgione Pending

2018-UP-339-State v. James Crews Pending

2018-UP-340-Madel Rivero v. Sheriff Steve Loftis Pending

2018-UP-343-State v. Benjamin C. Hernandez Pending

2018-UP-348-Frederick Tranfield v. Lily Tranfield Pending

2018-UP-349-Verma Tedder v. Darlington County Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5511-State v. Lance L. Miles Pending

5534-State v. Teresa A. Davis Pending

5535-Clair Johnson v. John Roberts (MUSC) Pending

5536-Equivest Financial, LLC v. Mary B. Ravenel Pending

5537-State v. Denzel M. Heyward Pending

5541-Camille Hodge Jr. (Camille Hodge, Sr.) v. UniHealth Pending

5542-S. C. Lawyers Weekly v. Scarlett Wilson Pending

5546-Paul Boehm v. Town of Sullivan's Island Pending

5548-James Dent v. East Richland County Pending

5554-State v. Antwan J. Jett Pending

5556-BLH by parents v. SCDSS Pending

5557-Skywaves v. Branch Banking Pending

5559-Commissioners v. City of Fountain Inn Pending

2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3) Pending

2017-UP-403-Preservation Society of Charleston v. SCDHEC	Pending
2017-UP-425-State v. Esaiveus F. Booker	Pending
2017-UP-427-State v. Michael A. Williams	Pending
2017-UP-455-State v. Arthur M. Field	Pending
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending
2018-UP-031-State v. Arthur William Macon	Pending
2018-UP-063-Carolina Chloride, Inc. v. SCDOT	Pending
2018-UP-074-Edward W. Miller v. SCPEBA	Pending
2018-UP-078-David Wilson v. John Gandis	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-081-State v. Billy Phillips	Pending
2018-UP-083-Cali Emory v. Thag, LLC	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-092-State v. Dalonte Green	Pending
2018-UP-109-State v. Nakia Johnson	Pending
2018-UP-111-State v. Mark Lorenzo Blake, Jr.	Pending
2018-UP-121-State v. James W. Miller	Pending
2018-UP-128-Patricia E. King v. Margie B. King	Pending
2018-UP-130-State v. Frederick S. Pfeiffer	Pending
2018-UP-150-Cedric E. Young v. Valerie Poole	Pending
2018-UP-176-State v. Terry Williams	Pending

2018-UP-182-Bank of America v. Carolyn Deaner	Pending
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending
2018-UP-187-State v. Rodney R. Green	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-193-Mark Ostendorff v. School Dt .of Pickens Cty.	Pending
2018-UP-201-Knightsbridge Property Owners v. Paul Nadeau	Pending
2018-UP-211-Hamilton Duncan v. Roy Drasites	Pending
2018-UP-216-Nicholas Geer v. SCDPPPS	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Judge Robert E. Peeler of the
Edgefield County Probate Court, Respondent.

Opinion No. 27830
Submitted August 3, 2018 – Filed August 22, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Julie Kay Martino, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert E. Peeler, of Edgefield, *pro se*.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to a confidential admonition or a public reprimand. Respondent has also resigned his position as a probate judge and has agreed never to seek or accept judicial office in South Carolina without the express written permission of the Court, after providing written notice to ODC. We accept the Agreement and publicly reprimand respondent, the most severe sanction we are able to impose under these circumstances.

Facts

Two complaints against respondent relate to him calling court

personnel "heifers" and "DW" (double wide). Respondent admits making the inappropriate and unprofessional comments, but maintains he was joking when the comments were made. The Agreement also references "pranks and jokes" respondent instigated and participated in during working hours and which he admits were unprofessional and discourteous. However, no details are provided regarding the "pranks and jokes" and it is not clear if this is simply a further reference to the inappropriate comments.

A second complaint stems from respondent using the probate court account for personal financial dealings. Respondent admits he had repairs done to his roof and received two checks from his insurance company to cover the cost. Because respondent's ex-wife's name remained on the deed, the insurance checks were made out to both respondent and his ex-wife. The ex-wife is a former associate probate judge who previously worked for respondent, but lived in Ohio at the time of these events. Respondent asked his stepson to secure the ex-wife's signature on the checks, which he did. When the bank would not accept the checks for deposit, the stepson took the checks to respondent who, in turn, deposited them in the probate court account and wrote a check from that account to the stepson in the amount of the insurance proceeds. The stepson did not use the funds to pay the roofing company and, instead, used the money for his own benefit. Respondent learned of the stepson's actions upon being served with a summons and complaint by the roofing company. Respondent has filed suit against his stepson to recover the money.

Respondent's relevant disciplinary history includes: a letter of caution on March 26, 2004, citing Canons 2A and 4D(1); a confidential admonition on June 10, 2005, citing Canons 1, 1A, 2, 2A, and 4A(2); and a letter of caution on June 26, 2015, citing Canon 3B(4).

Law

Respondent admits his conduct violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1A (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2A (a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); Canon 3B(4) (a judge shall be

patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity); and Canon 4D(1)(a) (a judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position). Respondent also admits his actions violated Rules 7(a)(1) and (9), RJDE, Rule 502, SCACR (it shall be grounds for discipline for a judge to violate the Code of Judicial Conduct and the Judge's Oath of Office).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand because respondent is no longer a probate judge and because he has agreed, hereafter, not to seek or accept another judicial position in South Carolina without first obtaining express written permission from this Court, after providing due notice in writing to ODC. As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a probate judge. *See In re Gravely*, 321 S.C. 235, 237, 467 S.E.2d 924, 925 (1996) ("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office."). Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Mutual Insurance Company and Gilliam Construction Company Inc., Respondents,

v.

Eagle Window & Door, Inc., Petitioner.

Appellate Case No. 2016-001459

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 27831
Heard March 28, 2018 – Filed August 22, 2018

REVERSED

G. Dana Sinkler, of Gibbs & Holmes, of Charleston, and Ainsley Fisher Tillman, of Charleston, for Petitioner.

Jason M. Imhoff and Ginger D. Goforth, both of The Ward Law Firm, of Spartanburg, for Respondents.

JUSTICE HEARN: This products liability case presents a narrow question: Is Petitioner Eagle Window & Door, Inc. (Eagle) subject to successor liability for

defective windows manufactured by a company who later sold its assets to Eagle in a bankruptcy sale? The answer requires us to revisit our holding in *Simmons v. Mark Lift Industries, Inc.*[1] and clarify the doctrine of successor liability in South Carolina. The court of appeals affirmed the trial court's holding that Eagle is the "mere continuation" of the entity. *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, Op. No. 2016-UP-168 (S.C. Ct. App. filed Apr. 6, 2016). We now reverse because both the trial court and court of appeals incorrectly applied the test for successor liability.

FACTUAL BACKGROUND

In 1999, homeowners Renaul and Karen Abel contracted with Gilliam Construction Company, Inc. for the construction of a house in an upscale Landrum subdivision. In constructing the house, Gilliam used windows manufactured by Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. (Eagle & Taylor). Sometime after the home was completed, the Abels discovered damage from water intrusion around the windows. The Abels brought suit against Gilliam for the alleged defects and settled with Gilliam and its insurer, Nationwide Mutual, for $210,000. Nationwide and Gilliam (collectively Respondents) then initiated this contribution action seeking repayment of the settlement proceeds from several defendants, including Eagle, alleging it was liable for the obligations of Eagle & Taylor.

At the time of the manufacture and sale of the windows used in the Abel home, Eagle & Taylor was a wholly-owned subsidiary corporation of American Architectural Products Company (AAPC). Eagle & Taylor did business under two fictitious entities, neither of which was incorporated: Eagle Window & Door, Inc. and Taylor Building Products, Inc. In 2000, AAPC filed for reorganization under the U.S. Bankruptcy Code in the Northern District of Ohio. With the approval of the bankruptcy court, AAPC placed substantially all of the assets of the fictitious entity Eagle Window & Door, Inc. up for auction in 2002, where Linsalata Capital Partners Fund IV, L.P. (Linsalata)[2] was the successful bidder. To purchase and take title to the assets, Linsalata formed EWD Acquisition Co., a wholly-owned

[1] 366 S.C. 308, 622 S.E.2d 213 (2005).

[2] Linsalata is an investment partnership owned and managed by private equity buyout firm Linsalata Capital Partners.

subsidiary corporation. After the assets were conveyed, EWD Acquisition Co. formally changed its name to Eagle Window & Door, Inc.—the entity against which Respondents brought their contribution claim and the Petitioner in this appeal.

After the acquisition, Eagle engaged in substantially the same business of manufacturing and selling windows and doors, using the same facilities where Eagle & Taylor conducted business in Dubuque, Iowa.[3] Five officers from Eagle & Taylor joined Eagle in similar capacities after the sale, including David Beeken, who served as president of Eagle & Taylor since 2000 and had been with the company for several decades.

a. Shareholders

Prior to the asset sale, AAPC was the sole shareholder of Eagle & Taylor. After the sale was completed, Linsalata owned roughly 88% of the outstanding shares in Eagle, with the rest distributed in small amounts to Eagle officers and various investors.

b. Directors

From 1997 through May 2001, Frank Amedia was the sole director of Eagle & Taylor, with Joseph Dominijanni replacing him as sole director until the company's liquidation in 2002.[4] At the time of the asset purchase, Linsalata's Senior Vice President, Stephen Perry, was the sole director of Eagle (then known as EWD Acquisition Co.). After the transaction was completed and the corporate name changed to Eagle Window & Door, Inc., Perry issued a resolution adding Frank Linsalata and Ronald Neill as additional directors. At some point after May 2002, David Beeken was added as a director of Eagle.

---

[3] At the time of litigation, Eagle's website acknowledged that it was under new ownership since 2002 when it was acquired by Linsalata.

[4] AAPC's two directors were controlling shareholders George Hofmeister and Joseph Dominijanni.

c. Officers

Out of Eagle & Taylor's eight officers, five assumed similar roles as officers with Eagle after the asset sale. The remaining three officer positions were filled by Linsalata appointees.

Contribution Suit

In 2007, Respondents initiated a contribution suit against Eagle seeking to recover for amounts paid in the settlement with the Abels. Eagle defended against the claim on the ground that no successor liability flowed from Eagle & Taylor, the entity responsible for the manufacture and sale of the defective windows.[5] Respondents argued Eagle should be treated as a "mere continuation" of Eagle & Taylor because it retained a substantially similar name, produced the same products in the same facility, and benefitted from the brand's history by holding itself out as the successor entity. Moreover, Respondents asserted *Simmons* established that a plaintiff must only show commonality of officers, directors, *or* shareholders between predecessor and successor corporations in order to satisfy the mere continuation test.

The trial court ultimately entered judgment in favor of Respondents, finding Eagle to be a mere continuation of its predecessor. In its order, the trial court found the "predecessors [sic] and successor Eagle companies shared directors, officers, and shareholders." Citing *Simmons*, the trial court stated, "A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, *or* shareholders." (Emphasis added.). Finding five of Eagle's eight officers served in the same capacity with Eagle & Taylor, the trial court determined Eagle met the mere continuation test. The order further explained, "the Court finds that a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation," finding Eagle retained the same president (Beeken) as its predecessor, and that it benefitted from its name recognition and history. Lastly, the trial court found it unnecessary to

---

[5] The trial court originally granted Eagle's motion to dismiss based on the bankruptcy sale's "free and clear" provisions, but the order granting dismissal was reversed by this Court, *see Nationwide Mut. Ins. Co., Inc. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 714 S.E.2d 322 (2011), wherein we held the contribution action was not barred by the terms of the bankruptcy sale, and the bankruptcy court did not retain jurisdiction over the contribution suit.

determine whether *Simmons* required "officers, directors, and shareholders" or "officers, directors, or shareholders" because Respondents had proven commonality among all three classes in the successor and predecessor corporations. As a result, the court ordered Eagle to pay $187,758.42 in contribution and interest to Respondents.

In a split decision, the court of appeals affirmed the trial court's finding that Eagle was a mere continuation of Eagle & Taylor but reduced the contribution award to $78,333.33. *Eagle Window & Door*, Op. No. 2016-UP-168. Like the trial court, the court of appeals majority also found commonality of officers alone was sufficient to establish successor liability as a mere continuation.[6] Dissenting, Judge Konduros found *Simmons* and *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008, established that shareholder continuity was a critical component of the mere continuation test. The dissent further held the trial court erroneously relied upon the "continuation of operations" approach urged in Justice Burnett's dissent, which was ultimately rejected by the *Simmons* majority in favor of requiring continuity of ownership to establish a mere continuation. This Court granted Eagle's petition for a writ of certiorari to review the decision.

ISSUES

I. Did the court of appeals err in holding Eagle was a mere continuation of its predecessor corporation when there was no commonality of ownership?

II. Did the court of appeals err in holding Eagle abandoned the issue of whether Nationwide failed to prove a manufacturing or design defect?

[6] The majority opinion found Eagle & Taylor was a "wholly-owned subsidiary" of AAPC but also stated the trial court found Nationwide had proven "'that officers, directors, and stockholders remained in the successor corporation from the predecessor corporation.'" The opinion does not explain these factual inconsistencies with regard to ownership.

DISCUSSION

I. Successor Liability

Eagle argues the court of appeals' holding conflicts with the established law on successor liability in South Carolina. According to Eagle, the *Simmons* court recognized the presumption that ordinarily, a successor corporation is not liable for the obligations of its predecessor, apart from four exceptions, including the mere continuation exception. Eagle's argument is straightforward: *Simmons* established the mere continuation exception only applies where there is continuity of ownership, and the court of appeals erred by finding commonality of corporate officers alone was sufficient to establish mere continuation. On the other hand, Respondents argue the court of appeals properly applied *Simmons* by requiring commonality between officers, directors, or shareholders, rather than all three groups. Consistent with their approach throughout this litigation, Respondents rely heavily on Justice Burnett's dissent and effectively ignore the *Simmons* majority's holding, arguing in favor of the broader enterprise continuation doctrine which the *Simmons* majority unequivocally rejected. We agree with Eagle that the court of appeals erred by finding that carryover of corporate officers resulted in a mere continuation when the record demonstrates there was no commonality of shareholders and directors between Eagle and its predecessor.

Ordinarily, in the absence of a statute, a successor or purchasing corporation is not liable for the debts of a predecessor or seller unless: (1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to a consolidation or merger of the two corporations; (3) the successor company was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). In this case we are concerned only with the third exception—mere continuation.

In *Simmons*, the Court was presented with a certified question asking whether a plaintiff may bring a product liability action based on a successor liability theory when the defendant corporation purchased the assets of the seller through a court-approved bankruptcy sale. 366 S.C. at 309, 622 S.E.2d at 213–14. A companion question then asked the Court to clarify which test is employed to determine whether there is successor liability for a company which purchased the assets of an unrelated

company. *Id.* at 310, 622. S.E.2d at 214. The underlying product liability suit was premised on a defective elevated scissorlift that collapsed and injured the plaintiff in a work-related accident. *Id.* The scissorlift was designed, manufactured, and sold by Mark Industries. After selling the scissorlift, and years before the plaintiff's injuries, Mark Industries filed for bankruptcy, selling many of its assets[7] to Terex Corp. at auction. *Id.* at 310–11, 622 S.E.2d at 214. To implement the asset purchase, Terex formed a wholly-owned subsidiary, Mark Lift Industries, Inc., which continued to manufacture scissorlifts at the former Mark plant for several months prior to relocating the assets and equipment to Terex's plant in Iowa. *Id.* There was no commonality of officers, directors, or stockholders between Mark Industries and Terex. *Id.* at 311, 622 S.E.2d at 215. After his injuries, the plaintiff filed suit against Mark Lift Industries and Terex, seeking recovery under a theory of successor liability.

Answering the first question in the affirmative, the Court held that a product liability claim could be maintained under a theory of successor liability, provided the plaintiff met one of the tests set forth in *Brown*, *supra*. *Id.* at 313, 622 S.E.2d at 215. The Court instructed the district court to apply *Brown* to determine whether there is successor liability when one company purchases the assets of an unrelated company. *Id.* at 312, 622 S.E.2d at 215. In response to Justice Burnett's dissent, and critical to the current case, the Court included this footnote with its discussion of the *Brown* test:

> Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership,** *i.e.,* **the predecessor and successor corporations have substantially the same officers, directors, or shareholders.** We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. Further, we find no conflict with *Holloway v. John E. Smith's Sons Co.,* 432 F.Supp. 454 (D.S.C.1977). We do not find that the *Holloway* court established a new test of successor liability. Although the court in *Holloway* did not cite the test established

[7] The assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property, and technology. *Id.* at 311, 622 S.E.2d at 214.

> in *Brown,* it applied the mere continuation exception. Unlike the present case in which Mark Lift and Terex did not share common officers, directors and shareholders, it appears from a reading of *Holloway* that there was, indeed, a commonality of ownership. Accordingly, the mere continuation exception was properly applied to that case.

Id. at 312 n.1, 622 S.E.2d at 215 n.1 (emphasis in original).

Dissenting, Justice Burnett recognized the plaintiff was arguing for an expansion of successor liability law beyond the four exceptions outlined in *Brown*, urging the Court to adopt either a continuity of enterprise exception or product line exception. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 315, 622 S.E.2d 213, 216–17 (2005) (Burnett, J., dissenting). Analyzing the mere continuation exception, Justice Burnett acknowledged "[m]ost courts traditionally have applied" the exception "only when there is commonality of ownership, *i.e.*, the predecessor and successor corporations have substantially the same officers, directors, or shareholders, ..." *Id.* at 316, 622 S.E.2d at 217 (citing *Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992). Justice Burnett then explained he would not interpret the mere continuation exception as narrowly as other courts and would instead consider a number of factors, including:

> (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's.

Id. at 323, 622 S.E.2d at 221. Thus, Justice Burnett advocated for a more flexible approach to the mere continuation test, beyond the scope of the traditional test which relied on continuity of ownership.[8]

The issue now before the Court hinges on the proper application of the mere continuation test established in *Simmons*. Eagle argues the trial court and court of appeals erred by holding *Simmons* only required a plaintiff to prove commonality of officers, directors, *or* shareholders, rather than all three classes, to establish mere continuation. We agree with Eagle. The confusion arises from the use of the disjunctive "or" when the *Simmons* majority explained that under the traditional approach, the mere continuation exception is "applicable only when there is commonality of ownership, *i.e.,* the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Simmons*, 366 S.C. at 312, n. 1, 622 S.E.2d at 215 n. 1 (emphasis omitted). Despite the use of "or," the preceding clause of that sentence indicates that commonality of *ownership* is required for the exception to apply. In the corporate context, without commonality of shareholders, there is no commonality of ownership. Moreover, the sentence that follows carries the full force and effect of the majority's holding: "We **decline to extend** the exception to cases in which there is no such commonality of officers, directors **and** shareholders." *Id.* (emphasis added).

We hold the court of appeals erred by finding *Simmons* only required commonality of officers to establish a mere continuation while failing to acknowledge the clear and unequivocal language declining to extend the exception beyond instances where there is commonality of officers, directors, and shareholders. Contrary to the court of appeals' holding in this case, an earlier court of appeals opinion also interpreted the mere continuation exception from *Simmons* to require commonality between officers, directors, and shareholders. *See Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008 ("In *Simmons v. Mark Lift Industries, Inc.*, the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser.").

---

[8] Admittedly, if Justice Burnett's dissent had carried the day, the trial court and the court of appeals majority would be correct in finding that Eagle is a mere continuation of its predecessor corporation.

The trial court's "mere continuation" analysis mirrored Justice Burnett's dissent and focused heavily on Eagle's name, location, website, and goodwill. This analysis was error, as it falls within the continuity of enterprise theory of successor liability that the *Simmons* majority flatly rejected. *See Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883–84 (Mich. 1976) (setting forth factors to determine successor liability based on continuity of enterprise, including whether (1) there was retention of key personnel, assets, and corporate name; (2) the purchasing corporation assumed liabilities and obligations of the seller ordinarily necessary for the continuation of the business; and (3) the purchasing corporation held itself out to the world as the effective continuation of the seller). While there arguably may be merits to expanding South Carolina's successor liability test to include the continuity of enterprise theory, that is not the question currently before the Court, nor is that the argument advanced by Respondents. Instead, Respondents conflate the theories of successor liability and transform the mere continuation analysis into something more akin to continuity of enterprise. *See Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1283 (8th Cir. 1994) (explaining the continuity of enterprise exception is "significantly different" from the mere continuation exception, with the focus on the continuity of the seller's business operation and not the continuity of management and ownership).

The *Simmons* majority's decision to limit the mere continuation exception to cases where there is commonality of officers, directors, and shareholders is consistent with the traditional application of the doctrine. *See, e.g.*, *Grand Laboratories, Inc.*, 32 F.3d at 1283 ("The traditional mere continuation exception focuses on the continuation of management and ownership between the predecessor and successor corporations."); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977) ("The key element of a 'continuation' is a common identity of the officers, directors and stockholders in the selling and purchasing corporations."); *Vernon v. Schuster*, 688 N.E.2d 1172, 1176 (Ill. 1997) ("In determining whether one corporation is a continuation of another, the test used in the majority of jurisdictions is whether there is a continuation of the *corporate entity of the seller*—not whether there is a continuation of the *seller's business operation*, as the dissent appears to emphasize. . . . In accord with the majority view, our appellate court has 'consistently required identity of ownership before imposing successor liability under [the continuation exception].'") (emphasis in original) (internal citations omitted); Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 372 (1996) ("In applying the mere continuation doctrine, courts have rejected the 'totality of the circumstances' standard

and instead have insisted that all of the necessary elements must be satisfied."). While some states have expanded successor liability to include enterprise continuity,[9] the existence of these cases alone is not sufficient to override the express language contained in *Simmons* signifying that the Court declined to expand the doctrine where there is no commonality between officers, directors, and shareholders. Accordingly, with only commonality of officers but no commonality of directors or shareholders, the court of appeals erred in affirming the trial court's conclusion that Eagle is a mere continuation of Eagle & Taylor.

As an alternative argument, Respondents suggest the Court need not debate the proper application of *Simmons* because there was in fact commonality among officers, directors, and shareholders in this case. This assertion is factually incorrect; we found *no* evidence in the record to support the trial court's finding that there was any shareholder continuity between Eagle and Eagle & Taylor.[10]

Eagle & Taylor was a wholly-owned subsidiary of AAPC at the time of the asset sale, meaning AAPC held 100% of the corporation's stock. After the sale, AAPC did not acquire any shares in the newly-formed Eagle corporation, nor did it possess any ownership in Linsalata. Contrary to the trial court's order, Stephen Perry's affidavit stated there was no commonality of ownership between the predecessor and successor entities, and none of the officers of Eagle & Taylor (who went on to become officers of Eagle and are the only possible source of shareholder commonality between Eagle and Eagle & Taylor) possessed any ownership interest in the predecessor prior to the sale. While Beeken and other officers were given shares in Eagle *after* the acquisition, none of them owned any shares in Eagle & Taylor. Moreover, Beeken served as a director only with Eagle and enjoyed no such role at Eagle & Taylor. The sole director of Eagle & Taylor had no role with Eagle after the acquisition. Thus, the record indicates the corporate officers were the only group with commonality between Eagle and its predecessor, while no continuity

---

[9] *See, e.g., Stanley v. Miss. State Pilots of Gulfport, Inc.*, 951 So.2d 535, 539–40 (Miss. 2006) ("[W]e adopted the 'continuity of enterprise' theory to hold a successor corporation liable for the predecessor's debts where the successor benefitted from the goodwill of the predecessor without sharing the liabilities.").

[10] In support of this assertion, Respondents cite only to the conclusory findings of fact in the trial court's order.

existed with directors and shareholders. Because there was no commonality of shareholders and directors between Eagle and Eagle & Taylor, we reverse the court of appeals' finding of successor liability.

We recognize the mere continuation test is a strict one, but we temper our holding by noting it is not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, we stress control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability.[11] Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, our successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied.

II. Failure to Plead Defect

Eagle claims the court of appeals erred in finding it abandoned the issue of whether Respondents failed to prove a design or manufacturing defect in the windows. Eagle argues that because it included the issue in its statement of issues on appeal, it preserved the argument despite failing to raise it anywhere else in the brief. We find no merit in this argument as our appellate jurisprudence has clearly established that "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006).

[11] Such a scenario is not present in this case, as the record indicates the asset sale was engineered primarily by Linsalata, and the officers who continued in similar capacities with Eagle were merely along for the ride, rather than the drivers.

CONCLUSION

Applying the mere continuation test as enunciated in *Simmons*, we find the trial court erred in holding Eagle to be the mere continuation of Eagle & Taylor, and therefore we reverse the court of appeals.

REVERSED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Diane Goodstein, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Jennifer Lynn Alexander, Respondent.

Appellate Case No. 2016-002145

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27832
Heard May 2, 2018 – Filed August 22, 2018

REVERSED AND REMANDED

General Counsel Marcus K. Gore, of the Department of Public Safety, of Blythewood, for Petitioner.

Norbert E. Cummings, Jr., and Henry Richard Schlein, both of The Cummings Law Firm, LLC, of Summerville, for Respondent.

JUSTICE KITTREDGE: This case stems from a municipal police officer responding to a 911 call received through his dispatch center regarding a report of

a disabled vehicle. After arriving on the scene, the officer found the vehicle slightly off the roadway in a ditch. While the road was in the city limits, the officer learned the shoulder area of the roadway was beyond the city boundary. The officer, not knowing the condition of the alleged driver (Respondent), checked to ensure she was not in immediate distress. While doing so, the officer confirmed with dispatch that the disabled vehicle had come to rest a few feet outside of the city limits. Dispatch was informed of the need for a state trooper,[1] as the officer suspected Respondent was intoxicated. The officer remained on the scene, and although Respondent was not handcuffed or otherwise restrained, it is acknowledged that Respondent was not free to leave the scene, as she was detained by the officer. The state trooper arrived quickly and conducted field sobriety tests on Respondent.

Respondent was charged by the state trooper with Driving Under the Influence (DUI). The magistrate court granted Respondent's motion to dismiss the case, finding the officer lacked authority to detain Respondent because the vehicle came to rest outside the municipality's limits. On appeal, the State argued that the officer had the authority to detain Respondent pursuant to section 17-13-45 because it extends an officer's authority when he is responding "to a distress call or a request for assistance in an adjacent jurisdiction." S.C. Code Ann. § 17-13-45 (2014). We granted certiorari to review the court of appeals' decision, which held the statute did not apply to this case. *State v. Alexander*, Op. No. 2016-UP-377 (S.C. Ct. App. filed July 27, 2016). We reverse the court of appeals' decision because section 17-13-45 provided the officer with authority to detain Respondent and we remand this case for further proceedings.

I.

Just after 11:30 p.m., on July 29, 2013, a 911 call was routed to the City of Goose Creek Police Department (GCPD) and relayed a concerned citizen reporting a vehicle on the side of U.S. Highway 176. Because U.S. Highway 176 is within the City of Goose Creek's boundaries, Goose Creek Police Officer Hadden, while on duty and in uniform, was dispatched to the scene. Officer Hadden arrived on the scene within a few minutes in his marked vehicle.

[1] State troopers with the South Carolina Department of Public Safety have statewide jurisdiction. *See* S.C. Code Ann. § 23-6-140 (2007).

Upon arrival, Officer Hadden observed that the vehicle appeared to be stuck in a ditch with its lights on, the driver's door open, and the engine still running without anyone inside the vehicle. The alleged driver, Respondent, was located on the other side of the vehicle, and she was the only person in the area. Then, Respondent crawled into the driver's seat of the vehicle. Due to Respondent's state of partial undress, Officer Hadden's initial concern was that Respondent might have been sexually assaulted. Respondent assured Officer Hadden that she was "okay" and explained that she had been relieving herself. Based on Respondent's demeanor, Officer Hadden suspected Respondent might be intoxicated.

Officer Hadden contacted dispatch to provide the address of the scene and confirm the precise boundary line of the city. It was confirmed that although the roadway was within the city limits of Goose Creek, the address of the property—encompassing the ditch adjacent to the roadway—was not within the city's jurisdiction. While awaiting the state trooper's arrival, Officer Hadden stayed with Respondent for approximately fifteen minutes. It is this period of time that is being construed as a detention by Officer Hadden.[2]

When the state trooper arrived, he told Officer Hadden that he believed GCPD had jurisdiction, but the state trooper decided to work the scene nevertheless. Subsequently, the state trooper administered field sobriety tests, arrested Respondent, and charged her with DUI, among other violations. Officer Hadden conducted no field sobriety tests and was not the arresting officer.

Prior to trial, Respondent filed several motions arguing, among other things, that because her vehicle was not located within the City of Goose Creek's limits, Officer Hadden had no authority to detain her until the state trooper arrived and therefore her charges should be dismissed. Relying on *State v. McAteer*, 340 S.C. 644, 532 S.E.2d 865 (2000), and *State v. Boswell*, 391 S.C. 592, 707 S.E.2d 265 (2011), the magistrate court agreed, finding Officer Hadden's detention of Respondent was unlawful and that dismissal of her charges, with prejudice, was

---

[2] Since the hearing before the magistrate court, the State has conceded that Officer Hadden detained Respondent. Although Officer Hadden did not engage Respondent in any field sobriety tests and simply obtained her information while he waited for the state trooper to arrive, our analysis assumes this period of time constituted a detention.

therefore proper. On appeal, both the circuit court and the court of appeals affirmed. We issued a writ of certiorari to review the court of appeals' decision.

II.

"Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

Respondent argues that the court of appeals and the circuit court properly affirmed the magistrate court's dismissal of her charges; however, the State argues that the cases cited by Respondent are inapplicable here and fail to consider the authority provided under section 17-13-45 of the South Carolina Code of Laws. We agree with the State. As discussed below, the court of appeals erred by affirming the lower courts' decisions and holding that Respondent's initial detention was unlawful on the bases of *State v. McAteer*, 340 S.C. 644, 532 S.E.2d 865 (2000), and *State v. Boswell*, 391 S.C. 592, 707 S.E.2d 265 (2011).

The issue in this case is whether section 17-13-45, which extends an officer's authority when he responds to a distress call or request for assistance in an adjacent jurisdiction, applies when an officer responds to a 911 call received through his dispatch center to respond to an incident location, which is later determined to be mere feet beyond his jurisdiction. Under these circumstances, we hold section 17-13-45 extended the officer's authority beyond the city's limits to detain Respondent pending arrival of the state trooper.

"The jurisdiction of a municipal police officer, absent statutory authority, generally does not extend beyond the territorial limits of the municipality." *State v. Harris*, 299 S.C. 157, 159, 382 S.E.2d 925, 926 (1989) (footnote and citation omitted). However, there are some exceptions to this general rule, including "[w]hen a law enforcement officer responds to a distress call or a request for assistance in an adjacent jurisdiction, the authority, rights, privileges, and immunities . . . applicable to an officer within the jurisdiction in which he is employed are extended to and include the adjacent jurisdiction." S.C. Code Ann. § 17-13-45 (2014).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863–64 (citing *Sloan v.*

Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 864 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011)).

The text of the statute is clear—"[w]hen a law enforcement officer responds to a distress call or a request for assistance in an adjacent jurisdiction, the authority . . . applicable to an officer within the jurisdiction in which he is employed [is] extended to and include[s] the adjacent jurisdiction." S.C. Code Ann. § 17-13-45. In this case, a 911 call about a vehicle in a ditch resulted in an officer being dispatched to a location thought to be within his jurisdiction. Officer Hadden did not know if there was an emergency situation to address such as whether the driver had lost consciousness and drove off the road due to a seizure or other medical condition. In fact, Officer Hadden testified during the hearing before the magistrate court that he was initially concerned Respondent was the victim of a sexual assault when he arrived because her pants were around her ankles. Thus, a distress call or request for assistance encompasses this 911 call.

The cases cited—*McAteer* and *Boswell*—are distinguishable from the case at hand because neither involved an officer responding to a 911 call and neither interpreted section 17-13-45. Furthermore, the court of appeals failed to consider all of the relevant statutory authority and overlooked the text of section 17-13-45 that extends an officer's authority to respond to distress calls or requests for assistance. Moreover, the court of appeals improperly relied on *Boswell* to limit section 17-13-45's reach to multi-jurisdictional agreements involving the temporary transfer of law enforcement officers.

To be clear, jurisdictional boundaries mean something and, absent specific lawful authority, an officer has no authority to act in his official capacity beyond his jurisdiction. However, section 17-13-45 provides a narrow exception to the general rule. Under the particular facts of this case, Officer Hadden's response was to a distress call or request for assistance. When an officer responds to a situation under these circumstances, the officer's authority is extended to the adjacent jurisdiction.

We further find support for Officer Hadden's authority in section 5-7-155, which provides, "If any portion of a . . . highway is within the boundary of a municipality, the right of way . . . not within the municipal boundary but touching the boundary

is nevertheless considered to be within the boundary of that municipality for purposes of its police jurisdiction." S.C. Code Ann. § 5-7-155 (2004). Here, the vehicle went off the road within the municipality's jurisdiction and stopped in a ditch mere feet beyond the road. Thus, Officer Hadden's authority was extended in this situation.

Yet, to resolve this case, we need not determine the full reach of a law enforcement officer's authority when acting pursuant to section 17-13-45, nor do we need to define the full scope of section 5-7-155. Rather, we answer the question narrowly in the context of this case under section 17-13-45—where a law enforcement officer receives a call through his dispatch center from 911 communications regarding an incident believed to be within or immediately adjacent to his jurisdiction, the officer has the authority to respond, assess the situation, and (if necessary) detain the subject where the incident location lies outside of the responding officer's jurisdiction. As a result, we conclude Officer Hadden had the authority to detain Respondent pending the state trooper's arrival to the scene in this case.

III.

We reverse the court of appeals because, under the specific facts of this case, section 17-13-45 extended Officer Hadden's authority to respond to the 911 call and detain Respondent. S.C. Code Ann. § 17-13-45 (2014). Therefore, we reverse the dismissal of Respondent's charges and remand this case to the magistrate court for further proceedings.

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of David R. DuBose, Petitioner.

Appellate Case No. 2018-001448

ORDER

On June 13, 2018, Petitioner was suspended from the practice of law for a period of fifteen (15) days, from the date of the opinion. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

This request is granted and he is hereby reinstates as an inactive member of the South Carolina Bar. This reinstatement is conditioned on his completion of the Legal Ethics and Practice Program Ethics School in September 2018. Proof of completion should be promptly provided to the commission of Lawyer Conduct and Office of Disciplinary Counsel.

s/Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

August 9, 2018

The Supreme Court of South Carolina

In the Matter of Franklin Matthews Jackson, Respondent.

Appellate Case No. 2015-002351

ORDER

In December 2015, this Court authorized respondent to be admitted to practice law subject to certain conditions. He was subsequently admitted to practice law in South Carolina in February 2016.

By order dated August 3, 2018, this Court suspended the respondent from the practice of law for nine months based on his failure to comply with the conditions of his admission. This order is to provide the bench, bar and public with notice of this suspension.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
August 16, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is the Appellant.

Appellate Case No. 2015-000056

ON REMAND FROM THE SUPREME COURT

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

Opinion No. 5568
Submitted May 14, 2018 – Filed June 6, 2018
Withdrawn, Substituted and Refiled August 22, 2018

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen PLLC, of Charleston, for Appellant.

Stuart M. Andrews, Jr. and Daniel J. Westbrook, of Nelson Mullins Riley & Scarborough LLP, of Columbia, for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

GEATHERS, J.: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria, and the 2004-2005 State Health Plan is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.[1] We affirm.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare

[1] This court's previous opinion in this appeal addressed Carolinas' challenge to the ALC's approval of Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill and Carolinas' argument that ALC's application of certain Project Review Criteria was arbitrary and capricious. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed January 11, 2017). Carolinas did not challenge our disposition of those two issues in its Petition for Writ of Certiorari to the South Carolina Supreme Court. Rather, Carolinas challenged our conclusion that its Dormant Commerce Clause argument was unpreserved for review. The supreme court agreed with Carolinas, reversed our conclusion, and remanded the case to this court for a ruling on the merits of the issue. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27792 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 33).

Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas, and owns forty-nine hospitals in ten states.

Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, the Carolinas Physician Network (CPN), many of whom have practices in York County. As of the date of the final contested case hearing, Carolinas employed between seventy and ninety York County physicians. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted applications to DHEC for a CON to build a sixty-four-bed hospital near Fort Mill based on the 2004-2005 State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a one-hundred-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

The ALC concluded DHEC misinterpreted the 2004-2005 State Health Plan to allow only existing providers to obtain a CON. The ALC remanded the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria,[2] and applicable DHEC regulations. By October 2010,[3] the three remaining applicants submitted to DHEC additional information to supplement their respective applications.

In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC

---

[2] There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Throughout this opinion, we cite to the version of a statute or regulation that was in effect when the parties submitted their respective CON applications.

[3] The remaining three applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC ultimately ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review on appeal from a decision of the ALC, allowing this court to

> reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

LAW/ANALYSIS

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the 2004-2005 State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. Carolinas essentially challenges the ALC's conclusions of law concerning adverse impact and outmigration.

On this record,[4] we hold the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria in considering

[4] Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence. *See Spartanburg Reg'l Med. Ctr. v. Oncology &*

the needs of residents in *all* areas of York County and, therefore, did not violate the Dormant Commerce Clause. The ALC placed appropriate significance on adverse impact, as required by the Project Review Criteria, and outmigration, as we explain herein.

We will address each criterion Carolinas references in turn. But first, we will provide a primer on the general principles surrounding the Dormant Commerce Clause and the general provisions of South Carolina's CON law.

Dormant Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 3. "The [United States Supreme] Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093–94 (2018). "Although the Commerce Clause is written as an affirmative grant of authority to Congress, [the United States Supreme] Court has long held that in some instances it imposes limitations on the States absent congressional action." *Id*. at 2089.

The Court's "[D]ormant Commerce Clause jurisprudence 'significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)). "It is driven by a concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state

---

Hematology Assocs. of S.C., LLC, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("On appeal from a contested CON case, the reviewing court 'may not substitute its judgment for the judgment of the [finder of fact] as to the weight of the evidence on questions of fact.'" (quoting § 1-23-380(5))); *id.* ("The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 360 S.C. 135, 144, 600 S.E.2d 80, 85 (Ct. App. 2004) (holding that under the "'substantial evidence' standard of review, the factual findings of the [administrative] agency are presumed correct and will be set aside only if unsupported by substantial evidence"); *id.* ("Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side, but is evidence [that], when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action.").

economic interests by burdening out-of-state competitors.'" *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)). "The 'common thread' among those cases in which the [United States Supreme] Court has found a [D]ormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *Id.* (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)).

In other words, two primary principles mark the boundaries of a State's authority to regulate interstate commerce. "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2091. When a state law discriminates on its face or has a discriminatory effect or purpose, the law must be "demonstrably justified by a valid factor unrelated to economic protectionism," and there must be an absence of "nondiscriminatory alternatives adequate to preserve the local interests at stake." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (quoting *New Energy*, 486 U.S. at 274 and *Chem. Waste Mgmt, Inc. v. Hunt*, 504 U.S. 334, 342 (1992)). On the other hand, "[s]tate laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Wayfair,* 138 S. Ct. at 2091 (second alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "Although subject to exceptions and variations, these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause." *Id.* (citations omitted).

Here, Carolinas argues that the ALC's application of South Carolina's CON law to the present case discriminates against interstate commerce in its purpose and effect. "[A] state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local." *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). In conducting the discrimination inquiry, a court should focus on discrimination against *interstate commerce*—not merely discrimination against the specific parties before it." *Colon Health Ctrs. of Am., LLC v. Hazel (Hazel I)*, 733 F.3d 535, 543 (4th Cir. 2013).

> Focusing exclusively on discrimination against individual firms . . . improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm

> may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial.

Id. Further, in applying the discrimination test, "[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States' 'authority under their general police powers to regulate matters of legitimate local concern.'" *Colon Health Ctrs. of Am., LLC v. Hazel (Hazel II)*, 813 F.3d 145, 152 (4th Cir. 2016) (quoting *Taylor*, 477 U.S. at 138). Moreover, "[t]he burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (second alteration in original) (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). In order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce." *Hazel II*, 813 F.3d at 153 (quoting *Hazel I*, 733 F.3d at 543).

Nonetheless, the Commerce Clause

> does not elevate free trade above all other values. As long as a State does not *needlessly* obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Taylor, 477 U.S. at 151 (emphasis added) (citation omitted) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). "The Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern." *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995) (citing *Hunt*, 432 U.S. at 350). "In addition, regulations that touch on safety are those that the Court has been most reluctant to invalidate." *Id.* (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978)). While "a bald assertion that laws are directed toward legitimate health and safety concerns is not enough to withstand a [D]ormant Commerce Clause challenge, . . . [courts] must give some deference to states' decisions regarding

health and safety." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526 (9th Cir. 2009) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997)).

South Carolina CON Law

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this [s]tate." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act, (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON, (3) the preparation and publication of a State Health Plan, and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services. Chapter II.A, 2004-2005 State Health Plan. Each region is further divided into service areas. *Id.* In the 2004-2005 State Health Plan, most service areas consist of individual counties, as is the case with York County.

DHEC may not issue a CON unless an application complies with the State Health Plan, Project Review Criteria, and other regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 (2011) (amended 2012) ("The proposal shall not be approved unless it is in compliance with the State Health Plan."). Further, there are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). The criteria are grouped under the following categories:

Need for the Proposed Project (Section 802.1 through 802.4)
Economic Consideration (Section 802.5 through 802.19)
Health System Resources (Section 802.20 through 802.25)
Site Suitability (Section 802.26 through 802.30)
Special Consideration (Section 802.31 through 802.33)

S.C. Code Ann. Regs. 61-15 § 801.1 (2011). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.I, 2004-2005 State Health Plan. "The relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." § 801.2 (2011). Further, "[t]he relative importance must be consistent for competing projects." *Id.*

When DHEC is considering *competing* applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). However, if neither application complies with these requirements, DHEC may not issue a CON. *Id.* Further, DHEC may refuse to issue a CON based on identified project review criteria and other regulations even if an application complies with the State Health Plan. *Id.*

In the present case, DHEC established the relative importance of the Project Review Criteria for the competing CON applications, "listing the most important criteria first, as follows:

Rank 1	Compliance with the State Plan (1)
Rank 2	Community Need Documentation (2a-2e)
	Distribution (Accessibility) (3a-3g)
	Distribution (22)
Rank 3	Projected Revenues (6a, 6b)
	Projected Expenses (7)
	Net Income (9)
	Financial Feasibility (15)
	Cost Containment (16a-16c)
	Efficiency (17)
Rank 4	Record of the Applicant (13a, 13b, 13d)
	Acceptability (4a-4c)
	Adverse Effects on Other Facilities (23a, 23b)

The ALC's Application of Project Review Criteria

1. Adverse Impact

Carolinas first challenges the ALC's application of criteria 16(c), 22, and 23(a).[5] With regard to these criteria, Carolinas argues the ALC's adverse impact analysis was one-sided and, thus, discriminatory. In other words, the ALC assessed whether awarding a CON to Carolinas would have an adverse impact on Piedmont without assessing whether awarding the CON to Piedmont would have an adverse impact on Carolinas. Carolinas maintains the purpose underlying the ALC's analysis was to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Criterion 16(c)

Criterion 16 is entitled "Cost Containment (Minimizing Costs)" and is grouped under the general category "Economic Consideration." §§ 801.1, 802.16. Criterion 16(c) states, "The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of *other* providers of similar services should be considered if the data are available." § 802.16 (emphasis added). Carolinas asserts (1) the ALC incorrectly included Criterion 16(c) in its adverse impact analysis and (2) the intent and effect of the ALC's application of this criterion was "to protect the local hospital's profitability from being harmed by a new market entrant."

In its conclusions of law regarding adverse impact, the ALC stated, "The most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of the Project Review Criteria on adverse impact." The ALC identified Criterion 16(c) as being included in the adverse impact criteria, and explained its conclusion that Piedmont best met Criterion 16(c) as follows:

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated per unit cost per unit of services associated would increase. As a result, the operation of [Carolinas' proposed facility] would have an adverse effect on existing providers.

[5] §§ 802.16(c), .22, .23(a) (2011).

Carolinas is correct in its observation that Criterion 16(c) is not grouped together with the criteria entitled "Adverse Effects on Other Facilities," which falls under the general category of "Health System Resources." *See* S.C. Code Ann. Regs. 61-15 §§ 801.1, 802.23. However, the ALC was obviously aware of this when it recounted DHEC's establishment of the relative importance of the Project Review Criteria, which includes "Cost Containment (16a-16c)" in the group of the third-most-important criteria and "Adverse Effects on Other Facilities (23a, 23b)" in the group of the fourth-most-important criteria. Yet, when presented with the task of choosing "which applicant most fully complies with"[6] Criterion 16(c), the ALC focused on the second part of this criterion, which requires consideration of "the impact of the project upon the cost and charges of other providers of similar services." § 802.16. Here, the ALC determined Carolinas' proposed facility would have an adverse impact on the cost and charges of Piedmont's existing facility. Therefore, it was logical for the ALC to include its application of Criterion 16(c) within its discussion of adverse impact generally. Further, the protection of *existing* providers' patients from increased costs is an obvious objective of Criterion 16(c), which Carolinas does not challenge.

b. Criterion 22

Criterion 22 states, "The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." § 802.22. This criterion falls under the general category of Health System Resources. §§ 801.1, 802.22. Carolinas maintains the ALC concluded Piedmont best met Criterion 22 "because increased competition from [Carolinas' proposed facility] would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals." Carolinas argues the ALC applied Criterion 22 for the purpose of "protecting an existing local hospital from competition from a non-local hospital."

The ALC explained its conclusion that Piedmont best met Criterion 22 as follows:

> [T]he operation of [Carolinas' proposed facility] would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents

[6] § 44-7-210(C).

> of York County. Section 802.22 calls for an evaluation of the effect of the proposed facility or service not only on Piedmont but also on other healthcare providers. Letters from over forty (40) physicians to DHEC during its staff review as well as the testimony of . . . three physicians is compelling evidence that the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of [Carolinas' proposed facility].

Carolinas states that despite the ALC's reference to the adverse effects on physicians, the ALC's findings of fact "demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of [Carolinas' proposed facility] would affect Piedmont."

First, an adverse effect on Piedmont's existing facility alone would be sufficient to warrant the conclusion that Piedmont, rather than Carolinas, better meets Criterion 22 because of the specialized services the existing facility offers. In its findings of fact, the ALC stated, "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catheterization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." Notably, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

Further, the ALC's findings discussing the adverse impact on Piedmont that would result from physicians shifting their patient referrals from Piedmont's existing facility to Carolinas also referenced the likely adverse impact on physicians themselves. The ALC highlighted the testimony of a cardiology physician concerning the effect of awarding the CON to Carolinas:

> Dr. Singhi recognized the challenges that would exist if [Carolinas' proposed facility] was approved that would not permit his practice to maintain its present status (e.g.[,] *being able to refer and admit patients to any facility* [*of*] *his choosing at which he has privileges*). . . . If the Carolina Cardiology Physicians become employed by [Carolinas], Dr. Singhi acknowledged that [Carolinas] would expect his group to comply with the CPN physician

> network referral policy and transfer patients from Piedmont to [Carolinas'] facilities.

(emphasis added). The ALC also discussed the testimony of a pulmonologist illustrating the impact Carolinas' proposed facility would have on not only Piedmont's existing specialty services but also specialty physicians' ability to maintain their proficiency as to certain skills due to the decline in the demand for those skills. The ALC found that the "[l]oss or paring of Piedmont's specialty programs would be detrimental to York County citizens, *especially those living in the western, more rural part of the county farther away from [Carolinas'] specialty facilities in North Carolina*." (emphasis added). Again, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

The ALC properly identified the "existing distribution of the health service(s)," as required by Criterion 22, by referencing Piedmont and physician providers in York County. Further, the ALC properly considered the impact Carolinas' proposed facility would have on that distribution in order "to functionally balance the distribution to the target population." The ALC implicitly recognized that, in balancing the distribution of health system resources, DHEC may not ignore the needs of citizens in the western part of York County now being served by Piedmont and physicians practicing in that area.

c. Criterion 23(a)

Criterion 23 is entitled "Adverse Effects on Other Facilities" and falls under the general category of Health System Resources. §§ 801.1, 802.23. Criterion 23(a) states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services."

Carolinas argues the ALC focused solely on the adverse financial impact that Carolinas' proposed facility would have on Piedmont's existing facility, and the "sole purpose and practical effect of the ALC's ruling in this regard was to protect Piedmont's market share from competition." While the ALC did not address the increased accessibility offered by Carolinas' proposed facility in its conclusions of law concerning Criterion 23(a), the ALC recognized the increased accessibility offered by *both* Carolinas' and Piedmont's respective proposed facilities in its findings of fact. Nevertheless, the ALC found Piedmont's proposed 100-bed facility would provide superior accessibility to meet the rapid population growth in northern

York County. The ALC further found Carolinas would provide inferior accessibility to medically underserved patients due to the restrictions York County physicians in the CPN had placed on accepting these patients.[7] Therefore, the Amended Final Order as a whole reflects the ALC's proper balancing of the impact of Carolinas' proposed facility on the occupancy rates of Piedmont's existing facility against the increased accessibility offered by Carolinas' proposed facility as required by Criterion 23(a).

Based on the foregoing, the ALC properly applied Project Review Criteria 16(c), 22, and 23(a) without any discriminatory purpose. We acknowledge that the proper application of these criteria in any case may have the effect of protecting competing providers who already *have a presence* in the service area, but this particular group of providers is not limited to in-state interests.[8] *See Hazel II,* 813 F.3d at 154 ("The [D]ormant Commerce Clause is exclusively designed to address the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005))); *id.* (rejecting the appellants' argument that Virginia's CON requirement "discriminates in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms" because "incumbency bias in this context is not a surrogate for the 'negative[ ] impact [on] interstate commerce' with which the [D]ormant Commerce Clause is concerned" (first and second alterations in original) (quoting *Hazel I*, 733 F.3d at 543)). We find nothing in the record showing a discriminatory effect on interstate commerce from the proper application of these

[7] The ALC highlighted the evidence showing that those CPN primary care practices representing eighty percent of the York County patient referrals to Carolinas' facilities were either "not accepting new uninsured, Medicaid, or Medicare patients" or were "not accepting new uninsured patients unless the patient paid in advance [seventy] percent of a new patient charge" ranging from $290 to $800. Approximately nineteen months later, these practices were "still not scheduling appointments for new Medicaid or Medicare patients." Further, Carolinas' records showed "relatively low percentages of Medicaid and uninsured care by" York County CPN physicians. Recognizing that the CPN primary care physicians "would function as the gatekeepers for" Carolinas' proposed Fort Mill facility, the ALC stated, "If the flow of medically underserved patients into [the CPN] primary care offices is restricted, the referrals and ultimate admissions of those individuals into [Carolinas' proposed Fort Mill facility] would be restricted as well." Carolinas has not challenged these findings of fact.

[8] *For example*, Carolinas owns and manages Roper Hospital in Charleston and, thus, has an existing presence in the corresponding service area.

criteria. *See id.* at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record showing that the ALC's application of these criteria places an undue burden on interstate commerce. *See id.* at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[ ] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." (quoting *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 805 (6th Cir. 2005)). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

2. Need

Carolinas next challenges the ALC's application of criteria 2(a), 2(b), 2(c), and 2(e).[9] With regard to these criteria, Carolinas argues (1) the ALC applied these criteria to reduce patient outmigration to North Carolina, which discriminates against, and burdens, interstate commerce, (2) the ALC's application of these criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," and (3) the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility and Piedmont's resulting superior ability to accommodate population growth—Carolinas contends that it could not lawfully transfer beds from its North Carolina facilities pursuant to the Bed Transfer Provision of the 2004-2005 State Health Plan—and this advantage discriminates against out-of-state hospital systems. We will address these arguments in turn. But first, we will set forth the pertinent provisions in Criterion 2.

Criterion 2 is entitled "Community Need Documentation" and falls under the general category of "Need for the Proposed Project." §§ 801.1, 802.2. Criterion 2 states, in pertinent part,

> a. The target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable).
>
> b. Projections of anticipated population changes should be reasonable and based upon accepted demographic or

[9] §§ 802.2(a), (b), (c), (e) (2011). Subpart (d) of Criterion 2, which addresses the reduction, relocation, or elimination of a facility or service, does not apply to either CON application in the present case. *See* § 802.2(d) (2011).

> statistical methodologies, with assumptions and methodologies clearly presented in the application. The applicant must use population statistics consistent with those generated by the state demographer, State Budget and Control Board.
>
> c. The proposed project should provide services that meet an identified (documented) need of the target population. The assumptions and methods used to determine the level of need should be specified in the application and based on a reasonable approach as judged by the reviewing body. Any deviation from the population projection used in the South Carolina Health Plan should be explained.
>
> . . . .
>
> e. Current and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service.

§§ 802.2.

As to the ALC's application of these criteria, Carolinas first argues the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.

Patient outmigration data is typically used in the CON application process to demonstrate the need for an additional provider or service in a particular service area, and the outmigration from one service area to another usually occurs intrastate. In other words, need can be shown by evidence of residents traveling to a provider located outside the service area. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 578, 595 S.E.2d 851, 853 (Ct. App. 2004) (stating evidence considered by the ALC "undisputedly related to core issues addressed during [DHEC's staff review] hearing"); *id.* at 578 n.2, 595 S.E.2d at 853 n.2 (identifying two core issues in DHEC's staff review hearing as the need for the proposed outpatient surgical center and the project's adverse impact on existing providers and listing 1997 outmigration data compiled by the Budget and Control Board as among the evidence that "dealt squarely with the issues before the [ALC]"). While some of these residents may live in close proximity to a provider outside the

service area, many would experience a significant reduction in travel time by the addition of a service or provider within the service area.

Therefore, the goal of reducing outmigration reflects a legitimate concern regarding patient travel time, which obviously can affect health outcomes in an emergency. While the reduction of outmigration may reduce patient travel to a neighboring state when the service area happens to border another state, the very purpose of this case is the issuance of a CON to build a hospital to be located in *South Carolina*. Therefore, the analysis must focus on participation in South Carolina's healthcare market rather than "the flow of patients in interstate commerce" as suggested by Carolinas. Further, reduction of patient travel to a neighboring state does not limit participation in South Carolina's healthcare market to only those providers with in-state interests. *See Hazel II,* 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)).

As to community need, presumably, either Piedmont's proposed facility or Carolinas' proposed facility would meet the need for sixty-four more general hospital beds in York County. However, the ALC's analysis of which proposal would best meet community need as set forth in criteria 2(a), 2(b), 2(c), and 2(e) was more complex:

> In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of the outmigration, which are detailed in the relevant Findings of Fact and are incorporated herein, reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of [its proposed facility] would strengthen the capacity of existing York County providers to meet those needs. For these reasons, Piedmont best meets § 802.2(a, b, c, e).

The ALC also concluded,

> One of the principal differences between the applicants is that the approval of [Carolinas' proposed facility] would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of [Piedmont's proposed facility] will ensure that high quality services continue to be provided and added within York County.

The ALC's unchallenged findings of fact support these conclusions. The ALC found outmigration would continue if Carolinas' proposed facility was built in Fort Mill because Carolinas would refer its Fort Mill patients needing specialty care to one of Carolinas' North Carolina facilities providing these types of services rather than to Piedmont's existing facility in Rock Hill.[10] The ALC also found that if Carolinas' proposed facility was built in Fort Mill, Carolinas would further reduce Piedmont's market share, thereby reducing the volume necessary for Piedmont's continued provision of its specialty services to residents of Rock Hill and western York County.[11] Piedmont had already lost a significant volume of complex cases

---

[10] Carolinas' proposed Fort Mill facility would provide only primary and secondary care. One of Piedmont's experts, Joel Grice, testified that even if the competing CON applicant had been a provider's hospital offering specialty services and located within South Carolina but outside of York County, outmigration from York County would still be a concern.

[11] In its reply brief, Carolinas argues, "The ALC's ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis." Carolinas also alleges "Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON." Carolinas' allegations are simply unfounded. Piedmont presented the testimony of Arun Adlakha, M.D., who had requested Piedmont to acquire an instrument that would allow him to perform navigational bronchoscopies. Piedmont acquired the instrument, which was the first of its kind in the greater Charlotte area. When it was

from 2005 to 2011, forcing one of its physicians to terminate use of a new invasive technology acquired by Piedmont in 2009, due to the referral patterns of physicians aligned with Carolinas. In contrast, Piedmont's proposed facility in Fort Mill would strengthen Piedmont's ability to serve residents "throughout York County by increasing the number of patients treated at Piedmont's Rock Hill facility."

While Carolinas would have the court believe the ALC was simply looking out for Piedmont's bottom line, the ALC was looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont's existing facility provides to York County residents who do not live in the more affluent northern part of the county. These objectives are consistent with the Project Review Criteria, which Carolinas has not challenged, and serve as an additional justification for the goal of reducing outmigration.

As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. As we previously stated, the proper application of the Project Review Criteria may have the effect of protecting competing providers who already have a presence in the service area, but this particular group of providers is not limited to in-state interests.

Carolinas next argues the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility when Carolinas could not lawfully transfer beds from its North Carolina facilities and this advantage discriminates against "out-of-state hospital systems." However, even if Piedmont had not proposed to transfer beds from its Rock Hill facility, the ALC's findings support its conclusion that Piedmont best meets criteria 2(a, b, c, e)—these findings indicate Piedmont's proposed facility would better preserve the quality of care and the larger complement of services that Piedmont's Rock Hill facility provides to York County residents who live in Rock Hill or the western, rural part of the county. Therefore, the ALC's approval of Piedmont's proposed bed transfer does not constitute reversible error. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

---

first placed in operation, Dr. Adlakha performed enough procedures to maintain his proficiency. However, after the patient volume for this service significantly declined, Dr. Adlakha decided "to terminate the use of the instrument as he found it 'very difficult to maintain [his] proficiency and justify keeping it for so long.'" Dr. Adlakha attributed the decrease in patient volume to CPN's referral practices.

Further, the ALC also took into account the capacity to expand, i.e., "shell space," that each respective proposed facility would possess in order to accommodate population growth. The ALC concluded Piedmont had the superior capacity to expand, and Carolinas has not presented any authorities or evidence indicating it was unfairly prevented from competing with Piedmont on this basis.

Based on the foregoing, the ALC properly applied Project Review Criteria 2(a), 2(b), 2(c), and 2(e) without any discriminatory purpose. Further, there is nothing in the record of this case showing that the ALC's application of these criteria has a discriminatory effect on interstate commerce. *See Hazel I*, 733 F.3d at 546 (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Hazel II*, 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record supporting Carolinas' argument that the ALC's application of these criteria places an undue burden on interstate commerce. *See Hazel II*, 813 F.3d at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[ ] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." (quoting *Robinson*, 403 F.3d at 805). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

3. Efficiency

Criterion 17 is entitled "Efficiency" and falls under the general category of "Economic Consideration." §§ 801.1, 802.17. Criterion 17 states, "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services[,] and fostering economies of scale or size." § 802.17. The ALC concluded, "Piedmont better satisfies this criterion because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will [Piedmont's proposed facility's] 100 beds better accommodate future growth, [Piedmont's proposed facility] is better designed for expansion than is [Carolinas' proposed facility]."

As with criteria 2(a, b, c, e), Carolinas argues the ALC's application of Criterion 17 provided Piedmont with an unfair advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility. However, Piedmont's bed transfer proposal was not the sole reason for the ALC's determination

that Piedmont best met Criterion 17. The ALC also concluded Piedmont's proposed facility was better designed for expansion than Carolinas' proposed facility, and this factor alone allows Piedmont to best meet Criterion 17.

Again, Carolinas does not challenge the constitutionality of any of the Project Review Criteria or the purposes of the CON Act served by these criteria. We find no discriminatory purpose behind the ALC's thoughtful and correct application of these criteria to the complex facts of this case. Further, there is nothing in the record showing that the ALC's application of these criteria has a discriminatory effect on interstate commerce. *See Hazel I*, 733 F.3d at 546 (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Hazel II*, 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record showing that the ALC's application of these criteria places an undue burden on interstate commerce. *See Hazel II*, 813 F.3d at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[ ] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." (quoting *Robinson*, 403 F.3d at 805). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.[12]

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

---

[12] Carolinas also argues the ALC erred in failing to conduct the proper Dormant Commerce Clause analysis because the ALC stated, "The same plan, criteri[a,] and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers." Carolinas asserts that this is the incorrect standard for a Dormant Commerce Clause analysis. Because the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria without any discriminatory purpose or effect, we find no reversible error. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842 ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Aaron Scott Young, Jr., Appellant.

Appellate Case No. 2015-000508

Appeal From Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 5592
Heard June 6, 2018 – Filed August 22, 2018

AFFIRMED

Jennifer Kirk Dunlap and Frederick Elliotte Quinn, both of Parker Poe Adams & Bernstein, LLP, of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Margaret Graham Boykin, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

HUFF, J.: Aaron Young, Jr. appeals his convictions of murder and attempted murder. On appeal, Young, Jr. argues the trial court erred in denying: (1) his motion for a directed verdict on the murder charge because the State's mutual

combat theory was not supported by South Carolina law or the evidence at trial; (2) his request for a jury charge on the end of mutual combat; and (3) his motion for a directed verdict on the attempted murder charge. We affirm.

FACTS AND PROCEDURAL HISTORY

In October 2014, Young, Jr. was indicted for the murder of Khalil Singleton (Victim) and the attempted murder of Tyrone Robinson. The indictment arose out of a September 1, 2012 conflict between Young, Jr. and Robinson, which culminated in the death of Victim, a minor who was playing outside on a trampoline during the incident. The State's theory of prosecution was that Young, Jr. engaged in mutual combat with Robinson and thereby caused Victim's death.[1]

Prior to trial, Young, Jr. moved to quash the murder indictment, arguing mutual combat is not a criminal offense in South Carolina. Young, Jr. further argued the doctrine of transferred intent does not apply in the context of mutual combat. The trial court deferred ruling on the motion until it could "get some sensible legal theory on one side of that issue or another which makes the transferred intent doctrine applicable in mutual combat."

Jontu Singleton testified he met with Robinson on the afternoon of the incident at a house in Hilton Head. The two men decided to drive Robinson's car to the Youngs' residence. When Robinson and Singleton arrived at the house, Young, Sr. and Young, Jr. were both outside. Robinson exited his vehicle carrying a .38 caliber revolver and began yelling at Young, Jr. Young, Sr. saw the gun and immediately began to struggle with Robinson. Robinson fired the gun during the struggle, and Young, Sr. backed away; Robinson proceeded to fire one or two more shots at the ground. Robinson then returned to his vehicle and sped away; Singleton remained with the Youngs. Immediately after Robinson fled the yard, the Youngs went into their house and retrieved a semi-automatic pistol and ammunition. The Youngs and Singleton then entered Young, Sr.'s gray pickup truck and began to search for Robinson. Young, Sr. drove the truck, and Young, Jr. assembled the pistol in the passenger seat. The three men drove around their neighborhood for approximately ten minutes, but they could not find Robinson. Singleton then exited the vehicle and left the area.

Charlese Mitchell, Robinson's neighbor, testified she was home alone on the day of the incident and heard several rounds of gunshots around 4:00 p.m. After the

[1] It is undisputed that Robinson fired the shot that killed Victim.

gunfire stopped, Robinson came to her door "hyped up" and carrying a gun. Robinson entered Mitchell's trailer and stated "those [people were] shooting at me." At that time, Tyrone Delaney, Mitchell's fiancé, came home and spoke with Robinson for no more than ten minutes. Delaney told Robinson to leave, and shortly after Robinson left, Mitchell and Delaney heard another series of rapid gunfire. Mitchell testified that she saw Young, Sr. and a passenger she could not identify speeding down the road in a gray truck when she went outside to tell her son and stepsons to come inside the trailer. After retuning indoors with her children, Mitchell heard three final gunshots followed by screaming. Mitchell went outside to see Victim lying on the ground.

Delaney testified he observed the Youngs' gray truck speeding out of Mitchell's neighborhood at approximately 4:00 p.m. When Delaney arrived at Mitchell's trailer, Robinson explained he and the occupants of the truck had exchanged gunfire. At that point, Delaney asked Robinson to leave. Shortly after Robinson left, Delaney heard a burst of semi-automatic gunfire, and he and Mitchell brought their children inside. A few minutes later, Delaney heard three more gunshots, of a different type than the semi-automatic shots. When the gunfire ceased, Delaney heard Victim screaming for help.

The State also published Young, Jr.'s police interview to the jury. In his interview, Young, Jr. stated, "The first time we caught [Robinson] … the [pistol] wouldn't shoot. It wouldn't shoot." Young, Jr. continued, "It didn't go down like we wanted it to. If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing [because] it was a dead[-end] road…. But the [pistol] just wouldn't go off." Later in the interview, when an investigator asked Young, Jr. who he was shooting at, he indicated Robinson was his target.

Young, Jr. did not testify in his own defense, and the jury found him guilty of both charges. The trial court sentenced Young, Jr. to concurrent terms of thirty years' imprisonment. This appeal followed.

DIRECTED VERDICT - MUTUAL COMBAT THEORY

First, Young, Jr. argues the trial court erred in denying his motion for directed verdict because South Carolina law does not support a murder conviction under a mutual combat theory. Young, Jr. asserts South Carolina does not recognize mutual combat as a basis for a murder conviction, and the law of mutual combat is only a limitation on self-defense.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

> When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, "[t]he trial [court] is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."

State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127). "On appeal from the denial of a directed verdict, this [c]ourt must view the evidence in the light most favorable to the State." *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). "If there [was] any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [this court] must find the case was properly submitted to the jury." *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006).

"The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). To constitute mutual combat, there must exist a mutual intent and willingness to fight. *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). The intent to fight may be manifested by the acts and conduct of the parties and the circumstances surrounding and leading up to the combat. *Id*., 196 S.E.2d at 495-96. In addition, there must be an antecedent agreement to fight, which may be shown by evidence establishing a pre-existing dispute or ill will between the combatants. *See Taylor*, 356 S.C. at 233-34, 589 S.E.2d at 4-5. Finally, the combatants must be armed and know the other party is armed. *Id*., 589 S.E.2d at 4-5.

In *State v. Andrews*, our supreme court upheld a jury charge which stated, "[W]here two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter." 73 S.C. 257, 260, 53 S.E.2d 423, 424 (1906).

In *State v. Brown*, our supreme court relied on the doctrine of mutual combat to uphold the manslaughter convictions of multiple defendants. 108 S.C. 490, 95 S.E.2d 61 (1918). In *Brown*, approximately ten men engaged in a fight and as a result, one of the combatants died from knife wounds. *Id*. at 494, 95 S.E.2d at 62. At least five of the combatants were charged with murder in relation to the fight. *Id*. at 490, 95 S.E.2d at 62. On appeal, three defendants argued the trial court erred in charging the jury that all combatants could be convicted under a theory of mutual combat. *Id*. at 493, 95 S.E.2d at 61. The supreme court affirmed the convictions and approved the following jury charge:

> That every one is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not. And regardless of whether he was on one side or the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences.

Id. at 499, 95 S.E.2d at 63.

In *State v. Mathis*, a defendant was indicted for murder. 174 S.C. 344, 345, 177 S.E.2d 318, 318 (1934). The evidence showed "the [defendant] and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and fired upon the other." *Id*. at 348, 177 S.E.2d at 319. The State proceeded on the theory of mutual combat, and the trial court instructed the jury on the law of mutual combat. *Id*. On appeal, our supreme court found there was no error because the evidence surrounding the mutual combat "justified a verdict of premeditated murder." *Id*. at 348-49, 177 S.E.2d at 319.

Although we acknowledge the doctrine of mutual combat has "fallen out of common use in recent years," we find South Carolina law still recognizes mutual combat as a basis for a murder charge. *See Taylor*, 356 S.C. at 231, 589 S.E.2d at 3. Our supreme court has repeatedly recognized mutual combat as a basis for a murder charge. *See Andrews*, 73 S.C. at 260, 53 S.E. at 424 (upholding jury instructions stating "where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be

done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter."); *Mathis*, 174 S.C. at 348-49, 177 S.E.2d at 319 (holding a murder charge was proper where evidence showed the defendant and the deceased engaged in mutual combat). Specifically, in *Brown*, our supreme court upheld a trial court's ruling that multiple defendants involved in mutual combat could be charged with murder for the death of a participating party. 108 S.C. at 499, 95 S.E.2d at 63. Based on the foregoing, we find the trial court did not err in finding mutual combat a viable theory of prosecution for the murder charge.

Second, Young, Jr. argues the trial court "erroneously further complicated matters" by combining the issue of transferred intent with the theory of mutual combat. Unlike the victims in *Andrews*, *Mathis*, and *Brown*, here, Victim was an innocent bystander rather than a combatant, and thus, Young, Jr. asserts he cannot be held criminally responsible because Robinson fired the fatal shot.

We find the trial court did not err in applying the doctrine of transferred intent to Young, Jr.'s case. It is undisputed Robinson fired the final three shots at the Youngs as they fled his neighborhood for the final time; one of those three shots fatally struck Victim. Because Robinson fired at Young, Jr. with the intent to kill, this intent transferred to Victim. Thus, Robinson was criminally responsible for Victim's death under the doctrine of transferred intent. *See e.g.*, *State v. Horne*, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984) ("If there was malice in [the actor's] heart . . . it matters not whether he killed his intended victim or a third person through mistake. . . . [T]he actor's intent to kill his intended victim is said to be transferred to his actual victim."). Furthermore, under the theory of mutual combat, all combatants are deemed "equally responsible for the natural consequences" of their actions during combat, and all may be held equally guilty of murder when a combatant dies, regardless of which combatant fired the fatal shot. *See Brown*, 108 S.C. at 499, 95 S.E.2d at 63. Therefore, despite the fact that Victim was a bystander rather than a combatant, we find Young, Jr. could still be found guilty for Victim's death as a "natural consequence" of the combat with Robinson. This is especially true under the instant facts because Young, Jr. admitted to police that he knew children were bystanders during the combat; specifically, Young, Jr. stated, "I saw the [children playing on the] trampoline and all. . . . In order to ride up the road, you [have to] pass by the children." The Youngs chased Robinson into his neighborhood while firing shots, including shots from the semi-automatic weapon Young, Jr. retrieved and assembled for use in the pursuit. Robinson fired his shots at the Youngs as they fled when Young, Jr.'s weapon jammed—after Young. Jr.'s rapid firing of some twenty shots to "swiss cheese" Robinson's car. Accordingly, we find the trial court did not err in allowing

the State to proceed under the theory of mutual combat even where Young, Jr. did not fire the shot that killed Victim, a bystander.

Finally, Young, Jr. argues no evidence at trial supported a finding of mutual combat. Here, Young, Jr. asserts there was no mutual agreement or willingness to fight, but rather a string of shootings over the course of approximately one hour, in which Young, Jr. and Robinson never engaged in combat at the same time. We find the State presented direct and substantial circumstantial evidence of each of the necessary elements of mutual combat. *See Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648 ("If there [was] any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [this court] must find the case was properly submitted to the jury.").

To constitute mutual combat, there must exist a mutual intent and willingness to fight. *See Graham*, 260 S.C. at 450, 196 S.E.2d at 495. The intent to fight may be manifested by the acts and conduct of the parties and the circumstances surrounding and leading up to the combat. *Id*. at 450, 196 S.E.2d at 495-96. We find there was evidence of a mutual intent and willingness to fight. Robinson first fired two or three shots at the Youngs' feet, and the Youngs retrieved a weapon and gave chase. Although Young, Jr. did not shoot Robinson during the conflict, he did shoot Robinson's parked vehicle approximately twenty times. Moreover, Robinson admitted to Mitchell and Delaney that he shot back at the Youngs as they pursued him in their vehicle. Robinson also fired the final three shots at the Youngs' vehicle as they fled the neighborhood for the final time. Based on these circumstances, we find there was evidence showing Robinson and Young, Jr. had a mutual intent to engage in combat.

In addition, there must be an antecedent agreement to fight, which may be shown by evidence establishing a pre-existing dispute or ill will between the combatants. *See Taylor*, 356 S.C. at 233-34, 589 S.E.2d at 4-5. In the police interview, Young, Jr. explained he and Robinson did not like each other and had been involved in numerous previous altercations. Young, Jr. specifically recalled that Robinson attempted to kill him a few days prior to the instant conflict. Viewing Young, Jr.'s admissions in a light most favorable to the State, we find this second element satisfied.

Finally, the combatants must be armed and know the other party is armed. *Id*. Here, the evidence showed both Young, Jr. and Robinson were armed and knew the other to be armed. Singleton testified Robinson carried a .38 caliber revolver, which he shot at the Youngs' feet. Soon after, Young, Jr. retrieved a semi-

automatic pistol and ammunition. Mitchell and Delaney each testified Robinson excitedly told them that he and the Youngs exchanged gunfire as the Youngs drove their truck around in search of Robinson. Young, Jr. admitted he was armed with the semi-automatic pistol when he cornered Robinson on a dead-end road and later shot Robinson's vehicle. Young, Jr. further stated he was aware Robinson fired three shots in his direction as the Youngs fled the scene for the final time. Viewing this testimony in a light most favorable to the State, we find this third element satisfied.

Accordingly, because the doctrine of mutual combat is a proper basis for a murder charge and the State presented substantial circumstantial evidence showing Young, Jr. engaged in mutual combat, we find the trial court properly submitted the case to the jury. *See Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648 ("If there [was] any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [this court] must find the case was properly submitted to the jury.").

JURY CHARGE - END OF MUTUAL COMBAT

Young, Jr. argues the trial court erred in denying his request for a jury charge on the end of mutual combat. Young, Jr. asserts the evidence at trial supported such a charge because Young, Jr. fled the scene after shooting Robinson's vehicle, and the jury could have found this ended the mutual combat. We disagree.

> Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self defense . . . unless, before the homicide is committed, *he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary* . . . .

Graham, 260 S.C. at 451, 196 S.E.2d at 495-96 (emphasis added) (quoting 40 C.J.S. Homicide § 122, p. 496).

We find the trial court did not abuse its discretion in declining to charge the jury on the end of mutual combat. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion.").

First, the evidence did not show Young, Jr. withdrew from the conflict and in good faith declined further conflict. Young, Jr. and Robinson engaged in a shoot-and-flee conflict that began when Robinson fired several shots at the ground in the Youngs' yard. The conflict continued as the Youngs drove around two neighborhoods searching for Robinson. Over the course of the search, Young, Jr. cornered Robinson on a dead-end road but did not shoot him because Young, Jr.'s weapon jammed; Young, Jr. also shot Robinson's unoccupied vehicle over twenty times while Robinson hid nearby. Moreover, both Mitchell and Delaney testified Robinson excitedly told them he shot back at the Youngs during this time period. Furthermore, Young, Jr. admitted in his police interview that he intended to continue the conflict, stating, "[Robinson] knew we were [going to] come back for him. He already knew. I know he knew…. He know[s] me. I don't play like that." Young, Jr. further told Young, Sr. to "turn around" after hearing Robinson fire the final three shots toward their vehicle. Based on the unique nature of the shoot-and-flee conflict Young, Jr. and Robinson engaged in, we find the evidence did not show Young, Jr. withdrew from the combat by fleeing the neighborhood before Robinson fired the fatal shots.

Second, no evidence suggested Young, Jr. made his withdrawal known to Robinson, either by word or act. Here, no evidence showed Young, Jr. and Robinson communicated verbally at any point in the conflict after the initial encounter in the Youngs' yard. Moreover, because we find the combat did not end when Young, Jr. fled the scene after shooting Robinson's unoccupied vehicle, we similarly find Young, Jr.'s act of fleeing before Robinson fired the fatal shots did not make known to Robinson any intent to withdraw.

Because the evidence did not show Young, Jr. withdrew from the combat in good faith or make any withdrawal known to Robinson, we find a charge on the end of mutual combat was not warranted. *See State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("The law to be charged must be determined from the evidence presented at trial."). Accordingly, we find no abuse of discretion by the trial court.

DIRECTED VERDICT - ATTEMPTED MURDER

Young, Jr. argues the trial court erred in denying his motion for a directed verdict on the attempted murder charge. Young, Jr. asserts the State failed to produce substantial circumstantial evidence showing he attempted to murder Robinson. Specifically, Young, Jr. asserts the evidence at trial showed Robinson was not

present when Young, Jr. shot Robinson's car, and there was no evidence Young, Jr. ever pointed his gun at or tried to shoot Robinson. Young, Jr. therefore concludes the trial court should have granted his motion for a directed verdict. We disagree.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *McHoney*, 344 S.C. at 97, 544 S.E.2d at 36. In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

The trial court properly denied Young, Jr.'s motion for a directed verdict on the attempted murder charge because the State presented substantial circumstantial evidence demonstrating Young, Jr.'s guilt. *See State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999) ("On appeal from the denial of a directed verdict, this [c]ourt must view the evidence in the light most favorable to the State."); *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648 ("If there [was] any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [this court] must find the case was properly submitted to the jury.").

Here, Singleton testified after Robinson first fired his revolver at the ground near the Youngs, the Youngs went into their house and retrieved a semi-automatic pistol. Thereafter, Singleton and the Youngs drove around their neighborhood searching for Robinson, and Young, Jr. assembled the pistol during the search. Mitchell testified Robinson came to her door and excitedly told her the Youngs were shooting at him. Delaney also testified Robinson told him about an exchange of gun fire with the Youngs. Moreover, the State published Young, Jr.'s police interview to the jury. In the interview, Young, Jr. explained, "The first time we caught [Robinson] … the [pistol] wouldn't shoot. It wouldn't shoot." Young, Jr. continued, "It didn't go down like we wanted it to. If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing [because] it was a dead[-end] road…. But the [pistol] just wouldn't go off." Young, Jr. also clarified Robinson was his intended target. Viewing this evidence in the light most favorable to the State, we find there was substantial circumstantial evidence tending to prove Young, Jr. attempted to murder Robinson. *See Lollis*, 343 S.C. at 584, 541 S.E.2d at 256 ("When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial [court] is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (quoting Mitchell, 341 S.C. at 409,

535 S.E.2d at 127)). Thus, we find the trial court properly denied Young, Jr.'s motion for a directed verdict.

CONCLUSION

Accordingly, Young Jr.'s convictions are

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.