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# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 36**
**August 14, 2013**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

### PUBLISHED OPINIONS AND ORDERS



### UNPUBLISHED OPINIONS AND ORDERS



### PETITIONS – UNITED STATES SUPREME COURT

## PETITIONS FOR REHEARING

| | |
|---|---|
| 27229 - Lawton Limehouse, Sr. v. Paul Hulsey and Lawton Limehouse, Jr. v. Paul Hulsey | Denied 8/8/2013 |
| 27277 - Kriti Ripley, LLC v. Emerald Investments, LLC | Denied 8/8/2013 |
| 27284 - Bennett & Bennett v. Auto-Owners | Pending |
| 27285 - Darren Pollack v. Southern Wine | Pending |
| 27288 - Centex International v. SCDOR | Pending |

## The South Carolina Court of Appeals

### PUBLISHED OPINIONS



### UNPUBLISHED OPINIONS



### PETITIONS FOR REHEARING

| | |
|---|---|
| 5160-State v. Ashley Eugene Moore | Pending |
| 2013-UP-179-Dawn M. Pontious v. Diana L. Winters | Pending |
| 2013-UP-189-Thomas Torrence v. SCDC | Pending |
| 2013-UP-207-Jeremiah DiCapua v. Thomas D. Guest, Jr. | Pending |
| 2013-UP-209-State v. Michael Avery Humphrey | Pending |
| 2013-UP-218-Julian Ford, Jr., v. SCDC | Pending |
| 2013-UP-230-Andrew Marrs v. 1751, LLC d/b/a Saluda's | Pending |
| 2013-UP-233-Phillip Brown v. SCDPPP | Pending |
| 2013-UP-236-State v. Timothy Young | Pending |
| 2013-UP-241-Shirley Johnson v. Angela Lampley et al. | Pending |
| 2013-UP-243-State v. Daniel Rogers | Pending |
| 2013-UP-251-Betty Joe Floyd v. Ken Baker Used Cars | Pending |
| 2013-UP-256-Mell Woods v. Robert H. Breakfield | Pending |
| 2013-UP-257-Mell Woods v. Robert H. Breakfield | Pending |
| 2013-UP-266-Aubry Alexander v. The State | Pending |
| 2013-UP-272-James Bowers v. The State | Pending |
| 2013-UP-279-MRR Sandhills LLC v. Marlboro County | Pending |
| 2013-UP-283-State v. Bobby Alexander Gilbert | Pending |
| 2013-UP-286-State v. David Tyre | Pending |
| 2013-UP-288-State v. Brittany Johnson | Pending |
| 2013-UP-294- State v. Jason Husted | Pending |

2013-UP-296-Ralph Wayne Parsons v. John Wieland Homes Pending

2013-UP-297-Place on the Greene v. W.G.R.Q., LLC Pending

2013-UP-303-William Jeff Weekley v. John Lance Weekly, Jr. Pending

2013-UP-304-State v. Johnnie Gaskins Denied 08/06/13

2013-UP-310-Westside Meshekoff Family LP v. SCDOT Pending

2013-UP-311-Pee Dee Health Care, P.A. v. Estate of Hugh Thompson Denied 08/08/13

2013-UP-314-State v. John Peter Barnes Pending

2013-UP-317-State v. Antwan McMillian Pending

2013-UP-318-Employers Insurance of Wausau v. Eric Hansen Pending

2013-UP-322-A.M. Kelly Grove v. SCDHEC Pending

2013-UP-323-In the interest of Brandon M. Pending

2013-UP-326-State v. Gregory Wright Pending

2013-UP-327-Roper, LLC, v. Harris Teeter, Inc. et al. Pending

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4832-Crystal Pines v. Phillips Pending

4851-Davis v. KB Home of S.C. Pending

4872-State v. Kenneth Morris Pending

4880-Gordon v. Busbee Pending

4888-Pope v. Heritage Communities Pending

| | |
|---|---|
| 4895-King v. International Knife | Pending |
| 4898-Purser v. Owens | Pending |
| 4909-North American Rescue v. Richardson | Pending |
| 4923-Price v. Peachtree Electrical | Pending |
| 4926-Dinkins v. Lowe's Home Centers | Pending |
| 4933-Fettler v. Genter | Pending |
| 4934-State v. Rodney Galimore | Pending |
| 4935-Ranucci v. Crain | Pending |
| 4940-York Cty. and Nazareth Church v. SCHEC et al | Pending |
| 4941-State v. Bentley Collins | Granted 08/08/13 |
| 4942-State v. Jomar Antavis Robinson | Granted 08/07/13 |
| 4947-Ferguson Fire and Fabrication v. Preferred Fire Protection | Pending |
| 4953-Carmax Auto Superstores v. S.C. Dep't of Revenue | Pending |
| 4956-State v. Diamon D. Fripp | Pending |
| 4960-Justin O'Toole Lucey et al. v. Amy Meyer | Pending |
| 4964-State v. Alfred Adams | Pending |
| 4970-Carolina Convenience Stores et al. v. City of Spartanburg | Pending |
| 4973-Byrd v. Livingston | Pending |
| 4975-Greeneagle Inc. v. SCDHEC | Pending |
| 4979-Major v. City of Hartsville | Pending |
| 4982-Katie Green Buist v. Michael Scott Buist | Pending |

| | |
|---|---|
| 4989-Dennis N. Lambries v. Saluda County Council et al. | Pending |
| 4992-Gregory Ford v. Beaufort County Assessor | Pending |
| 4995-Keeter v. Alpine Towers International and Sexton | Pending |
| 4997-Allegro v. Emmett J. Scully | Pending |
| 5001-State v. Alonzo Craig Hawes | Pending |
| 5003-Earl Phillips as personal representative v. Brigitte Quick | Pending |
| 5006-J. Broach and M. Loomis v. E. Carter et al. | Pending |
| 5010-S.C. Dep't of Transportation v. Janell P. Revels et al. | Pending |
| 5011-SCDHEC v. Ann Dreher | Pending |
| 5013-Geneva Watson v. Xtra Mile Driver Training | Pending |
| 5016-The S.C. Public Interest Foundation v. Greenville Cty. et al. | Pending |
| 5017-State v. Christopher Manning | Pending |
| 5019-John Christopher Johnson v. Reginald C. Lloyd et al. | Pending |
| 5020-Ricky Rhame v. Charleston Cty. School District | Pending |
| 5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual | Pending |
| 5025-State v. Randy Vickery | Pending |
| 5031-State v. Demetrius Price | Pending |
| 5032-LeAndra Lewis v. L.B. Dynasty | Pending |
| 5033-State v. Derrick McDonald | Pending |
| 5034-State v. Richard Bill Niles, Jr. | Pending |
| 5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al. | Pending |

| | |
|---|---|
| 5041-Carolina First Bank v. BADD | Pending |
| 5044-State v. Gene Howard Vinson | Pending |
| 5052-State v. Michael Donahue | Pending |
| 5053-State v. Thomas E. Gilliland | Pending |
| 5055-Hazel Rivera v. Warren Newton | Pending |
| 5059-Kellie N. Burnette v. City of Greenville et al. | Pending |
| 5060-State v. Larry Bradley Brayboy | Pending |
| 5061-William Walde v. Association Ins. Co. | Pending |
| 5062-Duke Energy v. SCDHEC | Pending |
| 5065-Curiel v. Hampton Co. EMS | Pending |
| 5071-State v. Christopher Broadnax | Pending |
| 5072-Michael Cunningham v. Anderson County | Pending |
| 5074-Kevin Baugh v. Columbia Heart Clinic | Pending |
| 5077-Kirby L. Bishop et al. v. City of Columbia | Pending |
| 5078-Estate of Livingston v. Clyde Livingston | Pending |
| 5081-The Spriggs Group, P.C. v. Gene R. Slivka | Pending |
| 5082-Thomas Brown v. Peoplease Corp. | Pending |
| 5087-Willie Simmons v. SC Strong and Hartford | Pending |
| 5090-Independence National v. Buncombe Professional | Pending |
| 5092-Mark Edward Vail v. State | Pending |
| 5093-Diane Bass v. SCDSS | Pending |

| | |
|---|---|
| 5095-Town of Arcadia Lakes v. SCDHEC | Pending |
| 5097-State v. Francis Larmand | Pending |
| 5099-Roosevelt Simmons v. Berkeley Electric | Pending |
| 5101-James Judy v. Ronnie Judy | Pending |
| 5110-State v. Roger Bruce | Pending |
| 5112-Roger Walker v. Catherine Brooks | Pending |
| 5113-Regions Bank v. Williams Owens | Pending |
| 5116-Charles A. Hawkins v. Angela D. Hawkins | Pending |
| 5117-Loida Colonna v. Marlboro Park (2) | Pending |
| 5118-Gregory Smith v. D.R. Horton | Pending |
| 5119-State v. Brian Spears | Pending |
| 5121-State v. Jo Pradubsri | Pending |
| 5122-Ammie McNeil v. SCDC | Pending |
| 5125-State v. Anthony Marquese Martin | Pending |
| 5126-A. Chakrabarti v. City of Orangeburg | Pending |
| 2010-UP-356-State v. Darian K. Robinson | Pending |
| 2011-UP-052-Williamson v. Orangeburg | Pending |
| 2011-UP-108-Dippel v. Horry County | Pending |
| 2011-UP-109-Dippel v. Fowler | Pending |
| 2011-UP-199-Amy Davidson v. City of Beaufort | Pending |
| 2011-UP-400-McKinnedy v. SCDC | Pending |

| | |
|---|---|
| 2011-UP-447-Brad Johnson v. Lewis Hall | Pending |
| 2011-UP-475-State v. James Austin | Pending |
| 2011-UP-495-State v. Arthur Rivers | Pending |
| 2011-UP-502-Heath Hill v. SCDHEC and SCE&G | Pending |
| 2011-UP-558-State v. Tawanda Williams | Pending |
| 2011-UP-562-State v. Tarus Henry | Pending |
| 2012-UP-018-State v. Robert Phipps | Denied 08/08/13 |
| 2012-UP-030-Babaee v. Moisture Warranty Corp. | Pending |
| 2012-UP-058-State v. Andra Byron Jamison | Pending |
| 2012-UP-060-Austin v. Stone | Pending |
| 2012-UP-078-Seyed Tahaei v. Sherri Tahaei | Pending |
| 2012-UP-081-Hueble v. Vaughn | Pending |
| 2012-UP-089-State v. A. Williamson | Pending |
| 2012-UP-091-State v. Mike Salley | Pending |
| 2012-UP-152-State v. Kevin Shane Epting | Pending |
| 2012-UP-153-McCall v. Sandvik, Inc. | Pending |
| 2012-UP-203-State v. Dominic Leggette | Pending |
| 2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair | Pending |
| 2012-UP-218-State v. Adrian Eaglin | Pending |
| 2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club | Pending |
| 2012-UP-267-State v. James Craig White | Pending |

| | |
|---|---|
| 2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al. | Pending |
| 2012-UP-274-Passaloukas v. Bensch | Pending |
| 2012-UP-276-Regions Bank v. Stonebridge Development et al. | Pending |
| 2012-UP-278-State v. Hazard Cameron | Pending |
| 2012-UP-285-State v. Jacob M. Breda | Pending |
| 2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater | Pending |
| 2012-UP-290-State v. Eddie Simmons | Denied 08/08/13 |
| 2012-UP-292-Demetrius Ladson v. Harvest Hope | Pending |
| 2012-UP-295-Larry Edward Hendricks v. SCDC | Pending |
| 2012-UP-293-Clegg v. Lambrecht | Pending |
| 2012-UP-302-Maple v. Heritage Healthcare | Pending |
| 2012-UP-312-State v. Edward Twyman | Pending |
| 2012-UP-314-Grand Bees Development v. SCDHEC et al. | Pending |
| 2012-UP-321-James Tinsley v. State | Pending |
| 2012-UP-330-State v. Doyle Marion Garrett | Pending |
| 2012-UP-332-George Tomlin v. SCDPPPS | Pending |
| 2012-UP-348-State v. Jack Harrison, Jr. | Pending |
| 2012-UP-351-State v. Kevin J. Gilliard | Pending |
| 2012-UP-365-Patricia E. King v. Margie B. King | Pending |
| 2012-UP-404-McDonnell and Assoc v. First Citizens Bank | Pending |

| | |
|---|---|
| 2012-UP-432-State v. Bryant Kinloch | Pending |
| 2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al. | Pending |
| 2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al. | Pending |
| 2012-UP-462-J. Tennant v. Board of Zoning Appeals | Pending |
| 2012-UP-479-Elkachbendi v. Elkachbendi | Pending |
| 2012-UP-481-State v. John B. Campbell | Pending |
| 2012-UP-502-Hurst v. Board of Dentistry | Pending |
| 2012-UP-504-Palmetto Bank v. Cardwell | Pending |
| 2012-UP-552-Virginia A. Miles v. Waffle House | Pending |
| 2012-UP-561-State v. Joseph Lathan Kelly | Pending |
| 2012-UP-563-State v. Marion Bonds | Pending |
| 2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC | Pending |
| 2012-UP-573-State v. Kenneth S. Williams | Pending |
| 2012-UP-576-State v. Trevee J. Gethers | Pending |
| 2012-UP-577-State v. Marcus Addison | Pending |
| 2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway | Pending |
| 2012-UP-580-State v. Kendrick Dennis | Pending |
| 2012-UP-585-State v. Rushan Counts | Pending |
| 2012-UP-600-Karen Irby v. Augusta Lawson | Pending |
| 2012-UP-603-Fidelity Bank v. Cox Investment Group et al. | Pending |
| 2012-UP-608-SunTrust Mortgage v. Ostendorff | Pending |

| | |
|---|---|
| 2012-UP-616-State v. Jamel Dwayne Good | Pending |
| 2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety | Pending |
| 2012-UP-627-L. Mack v. American Spiral Weld Pipe | Pending |
| 2012-UP-647-State v. Danny Ryant | Pending |
| 2012-UP-654-State v. Marion Stewart | Pending |
| 2012-UP-658-Palmetto Citizens v. Butch Johnson | Pending |
| 2012-UP-663-Carlton Cantrell v. Aiken County | Pending |
| 2012-UP-674-SCDSS v. Devin B. | Pending |
| 2013-UP-007-Hoang Berry v. Stokes Import | Pending |
| 2013-UP-010-Neshen Mitchell v. Juan Marruffo | Pending |
| 2013-UP-014-Keller v. ING Financial Partners | Pending |
| 2013-UP-015-Travelers Property Casualty Co. v. Senn Freight | Pending |
| 2013-UP-020-State v. Jason Ray Franks | Pending |
| 2013-UP-034-Cark D. Thomas v. Bolus & Bolus | Pending |
| 2013-UP-037-Cary Graham v. Malcolm Babb | Pending |
| 2013-UP-056-Lippincott v. SCDEW | Pending |
| 2013-UP-058-State v. Bobby J. Barton | Pending |
| 2013-UP-062-State v. Christopher Stephens | Pending |
| 2013-UP-063-State v. Jimmy Lee Sessions | Pending |
| 2013-UP-066-Dudley Carpenter v. Charles Measter | Pending |
| 2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop. | Pending |

| | |
|---|---|
| 2013-UP-070-Loretta Springs v. Clemson University | Pending |
| 2013-UP-071-Maria McGaha v. Honeywell International | Pending |
| 2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson | Pending |
| 2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health | Pending |
| 2013-UP-082-Roosevelt Simmons v. Hattie Bailum | Pending |
| 2013-UP-084-Denise Bowen v. State Farm | Pending |
| 2013-UP-085-Brenda Peterson v. Hughie Peterson | Pending |
| 2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley | Pending |
| 2013-UP-095-Midlands Math v. Richland County School Dt. 1 | Pending |
| 2013-UP-110-State v. Demetrius Goodwin | Pending |
| 2013-UP-115-SCDSS v. Joy J. | Pending |
| 2013-UP-120-Jerome Wagner v. Robin Wagner | Pending |
| 2013-UP-125-Caroline LeGrande v. SCE&G | Pending |
| 2013-UP-127-Osmanski v. Watkins & Shepard Trucking | Pending |
| 2013-UP-133-James Dator v. State | Pending |
| 2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al. | Pending |
| 2013-UP-183-R. Russell v. DHEC and State Accident Fund | Pending |
| 2013-UP-199-Wheeler Tillman v. Samuel Tillman | Pending |
| 2013-UP-206-Adam Hill v. Henrietta Norman | Pending |
| 2013-UP-224-Katheryna Mulholland-Mertz v. Corie Crest | Pending |
| 2013-UP-232-Theresa Brown v. Janet Butcher | Pending |

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

Francina A. Bardsley, as Personal Representative of the Estate of Frederic William Bardsley, III, Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company, Defendants,

Of whom Government Employees Insurance Company is the Appellant.

Appellate Case No. 2012-206390

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Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

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Opinion No. 27295
Heard May 15, 2013 – Filed August 14, 2013

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**REVERSED**

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David L. Moore, Jr., of Nexsen Pruet, LLC, of Greenville, for Appellant.

William A. Coates, Carroll H. Roe, Jr. and Joseph O. Smith, all of Roe, Cassidy, Coates, & Price, PA, of Greenville, for Respondent.

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**JUSTICE HEARN:** A speeding car crashed into Respondent Francina Bardsley's home, traveling through the house, striking and killing her husband, Frederic Bardsley, and causing property damage. The liability coverage of the driver, John Ludwig, was exhausted in settlement of the wrongful death action, and we are now asked to consider the impact of the collateral source rule on underinsured motorist property damage coverage where the homeowners' policy has already paid for the property damage. We hold the collateral source rule does not apply and there is no underinsured motorist property damage coverage available, and accordingly, reverse.

## FACTUAL/PROCEDURAL BACKGROUND

After leaving a wedding reception, Ludwig drove a Maserati owned by his company, System Development Integration, Inc. (SDI), at speeds of 85 to 96 miles per hour down a road with a 35 miles per hour speed limit. His car left the road, went up an embankment and became airborne, crashed into the rear of the Bardsleys' residence approximately ten feet above the ground, and struck Frederic, resulting in his immediate death. The vehicle continued through the home, crashed through the front of the house, and came to rest in the front yard. Auto Owners Insurance Company and Hartford Casualty Insurance Company insured Ludwig and SDI for $3 million in liability coverage.[1]

The Bardsleys had $457,318.47 in homeowner's insurance coverage through State Farm. That policy provides: "If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss."

Additionally, the Bardsleys had automobile insurance through Government Employees Insurance Company (GEICO), which provided $300,000 in underinsured motorist (UIM) bodily injury coverage and $100,000 in UIM property damage coverage. The policy provides: "With respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property."

[1] Auto Owners provided $1 million in automobile liability coverage, and Hartford provided $2 million in umbrella liability coverage.

On behalf of her husband's estate, Francina settled a wrongful death claim with Auto Owners and Hartford. They agreed to pay the policy limits of $3 million, and she agreed to sign a covenant not to execute against Ludwig, SDI, Auto Owners, and Hartford, and to resolve State Farm's subrogation claim out of the settlement proceeds. The probate court approved the settlement in an order stating the $3 million dollar payment "is to be allocated 100% to the wrongful death claim as the parties stipulate there is no valid survival claim."

State Farm paid $127,813.49 to repair the Bardsleys' home, but claimed it was entitled to reimbursement for those expenses from the $3 million settlement pursuant to its subrogation right. GEICO paid out the full $300,000 in UIM bodily injury coverage in exchange for a covenant not to execute as to any bodily injury claim. However, GEICO refused to pay any amount under the UIM property damage coverage.

Francina filed the instant declaratory judgment action against GEICO and State Farm, alleging GEICO was obligated to pay her the $100,000 in UIM property damage coverage. She also alleged State Farm wrongfully claimed it was entitled to subrogation from the $3 million settlement because those funds were allocated solely to the wrongful death claim.

Francina later reached a settlement with State Farm whereby she paid $94,424.75 from the $3 million settlement and signed a covenant not to execute, and State Farm agreed its subrogation claim was satisfied. The covenant not to execute stated: "as a direct and proximate result of the Ludwig Incident, Plaintiff sustained $88,230.47 for damages to the Residence, $23,684.44 for damages to contents, and an additional $22,959.99 for loss of use and living expenses."

As to the remaining claim against GEICO, Francina and GEICO filed cross-motions for summary judgment. Francina asserted GEICO was obligated to pay her because the home sustained $127,813.49 in property damage and those claims were not paid out of the available insurance because State Farm was reimbursed from the settlement. She also argued the "other insurance" provision in the GEICO policy was void because it was contrary to the collateral source rule and public policy. GEICO argued the State Farm coverage had not been exhausted and thus, pursuant to the "other insurance" provision, GEICO's policy was excess to the State Farm coverage and there was no UIM property damage coverage available under the GEICO policy.

The circuit court granted summary judgment for Francina and ordered GEICO to pay Francina $100,000 for UIM property damage coverage. The court first found the "other insurance" provision was ambiguous. However, it did not state how the provision was ambiguous or provide any reasoning. The summary judgment order simply states: "GEICO's policy . . . when read as a whole, is ambiguous and contains conflicting terms." The court also held the "other insurance" provision violated the collateral source rule. Specifically, it found the State Farm policy was a collateral source which GEICO could not use to decrease its obligations and found there would be no double recovery because the wrongful death claim was settled for Auto Owners' and Hartford's policy limits despite being worth more. Finally, the court did not explicitly rule on the public policy argument, finding only that "GEICO's UIM rider *may* also contravene public policy since any exclusions inconsistent with the UIM statute are void." (emphasis added). GEICO appealed, and this Court certified the appeal for review pursuant to Rule 204(b), SCACR.

## ISSUES PRESENTED

I. Did the circuit court err in finding the GEICO policy ambiguous?

II. Did the circuit court err in finding the "other insurance" provision violates public policy?

III. Did the circuit court err in holding the collateral source rule renders the "other insurance" provision invalid?

## LAW/ANALYSIS

### I. AMBIGUITY

GEICO argues the circuit court erred in holding the "other insurance" provision ambiguous because the court failed to set forth more than one way it could be reasonably understood. Francina counters that a court does not have to set out alternative meanings of a provision in order to find it ambiguous and the ambiguity here is clear on the face of the provision and from the record. We hold the circuit court erred in finding the provision ambiguous.

Stated simply, "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 494 (Ct. App. 2004). "An ambiguous contract is one capable

of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). Accordingly, when a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient. Without more, an appellate court is unable to review the validity of a circuit court's conclusion that a provision is ambiguous.

Furthermore, Francina asserts the provision is ambiguous "on its face," because the policy does not define "other valid and collectible insurance," and due to a conflicting provision. We find the provision is not ambiguous on its face as there is nothing inherently unclear or confusing about the term "other valid and collectible insurance." It plainly means other insurance which is in effect and from which coverage is available. Setting aside the issue of State Farm's subrogation claim, Francina collected from State Farm, and thus, it cannot be disputed that the State Farm policy was other valid and collectible insurance.

The provision also is not ambiguous merely because its terms are undefined in the policy. It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning. *See, e.g., Dean v. Am. Fire & Cas. Co.,* 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967) ("When the language of an insurance contract is free from ambiguity, the words used must be taken and understood in their plain, ordinary and popular sense . . . ."). If policy language was rendered ambiguous simply because it was not defined, insurance policies would need to contain definitions for every word in order to avoid ambiguity, a requirement which would be absurd. To say that any word that is not defined is ambiguous is to ignore the utility of human language. We use words because they have commonly accepted meanings, and it is only when they are subject to more than one meaning as used in a particular policy that they may become ambiguous.

Finally, the provision is not rendered ambiguous by a conflicting provision. The policy contains an additional UIM provision which states "[t]here is no coverage for property damage if the insured has been compensated by insurance or otherwise," and Francina asserts that provision conflicts with the "other insurance" provision and renders it ambiguous. One interpretation of that provision would be that it bars any UIM property damage coverage under the policy where the insured receives *any* compensation from another source, even if that compensation did not

cover all of the insured's damages. Under that interpretation, it would conflict with the "other insurance" provision which states an insured has UIM property damage coverage to the extent her damages exceed the coverage available from other insurance. "[C]onflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). Thus, to the extent the two provisions conflict, in order to interpret the policy in favor of the insured, we would construe the policy in line with the "other insurance" provision, the provision more favorable to the insured. Therefore, the "other insurance" provision would remain in force, and the purportedly conflicting provision has no effect on the validity of the "other insurance" provision. Accordingly, we conclude the circuit court erred in finding the "other insurance" provision ambiguous.

## II. PUBLIC POLICY

GEICO also argues the circuit court erred in holding the "other insurance" provision violates public policy and therefore is invalid. The circuit court did not rule the provision contravened public policy, stating only that the provision "*may* also contravene public policy;" therefore, there is no ruling to appeal from. However, Francina argues this issue is an additional sustaining ground and asserts the "other insurance" provision is void as a matter of public policy because contrary to the legislative intent of the UIM statute, Section 38-77-160 of the South Carolina Code (2002). We therefore consider the issue, but find the "other insurance" provision does not violate public policy.

Section 38-77-160 requires that an insurer "offer . . . underinsured motorist coverage . . . ." An "underinsured motor vehicle" is statutorily defined as "a motor vehicle as to which there is bodily injury insurance liability . . . at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance . . . is less than the amount of the insureds' damages." S.C. Code § 38-77-30(15) (2002). Thus, UIM property damage coverage is not statutorily mandated, and the "other insurance" provision does not conflict with the public policy expressed in section 38-77-160.

Furthermore, the provision does not deprive the insured of any coverage for which she bargained, nor would it violate a State policy of providing coverage when an injured party's property damages exceed the liability limits of the at-fault motorist, assuming such policy existed. The "other insurance" provision does nothing more than make the GEICO UIM coverage secondary to other insurance

that covers the loss. It does not leave an insured without coverage. If an insured does not have any other insurance covering the property damage, the provision would have no effect and the GEICO UIM benefits would pay for the damages. If an insured has other insurance but it does not satisfy the entire loss, the GEICO UIM coverage would pay for all of the damages beyond those satisfied by the other insurance and up to the limit of the UIM coverage.

Francina also argues the provision violates public policy in that it would eliminate UIM coverage for property damage to a home caused by a vehicle because in South Carolina homeowner's insurance policies are "stated value" policies that insure the entire value of a home. This is immaterial to whether the provision violates public policy. So long as any damage to a home would be covered by some insurance, there is no harm in UIM property damage coverage not applying. Accordingly, we find the "other insurance" provision does not violate public policy.

## III. COLLATERAL SOURCE RULE

Finally, GEICO argues the circuit court erred in holding the collateral source rule renders the "other insurance" provision invalid. Francina contends the State Farm policy was a collateral source and thus, the collateral source rule bars GEICO from using the State Farm coverage to avoid making payments under its UIM coverage. We hold the collateral source rule does not affect the "other insurance" provision.

The collateral source rule provides that compensation which an injured party receives from a source wholly independent of a wrongdoer will not reduce the damages for which the wrongdoer is liable. *Citizens & S. Nat'l Bank of S.C. v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). The rule exists because

> reducing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.

22 Am. Jur. 2d *Damages* § 392 (citations omitted).

As an initial matter, it is indisputable that the State Farm coverage was a collateral source in regards to Ludwig. Ludwig was clearly the tortfeasor, and thus, the collateral source rule applies to him, and he could not reduce his liability by the amount of the State Farm coverage. However, the State Farm coverage is only collateral with respect to GEICO if the collateral source rule applies to GEICO.

GEICO asserts the collateral source rule only applies to wrongdoers, it is not a wrongdoer, and therefore, the rule cannot render its "other insurance" provision invalid. Francina counters that the collateral source rule applies to any party seeking to reduce obligations to a victim as a result of contributions made by others to the victim. In other words, she asserts the only requirement for the application of the collateral source rule is that the source is wholly independent of the wrongdoer.

We find this contention plainly contrary to our jurisprudence, which makes clear that the collateral source rule only applies to a "wrongdoer"/"tortfeasor." *See Gregory*, 320 S.C. at 92, 463 S.E.2d at 318 ("The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages *owed by the wrongdoer*." (emphasis added)); *Estate of Rattenni v. Grainger*, 298 S.C. 276, 277, 379 S.E.2d 890, 890 (1989) ("South Carolina has long followed the collateral source rule that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of damages *owed by the wrongdoer* to the injured party." (emphasis added)); *New Found. Baptist Church v. Davis*, 257 S.C. 443, 446, 186 S.E.2d 247, 249 (1972) ("[T]he 'collateral source rule' is that which holds that total or partial compensation for injury which an injured party receives from a collateral source, wholly independent of the wrongdoer, does not operate to lessen the damages recoverable *from the wrongdoer*." (emphasis added)); *Young v. Warr*, 252 S.C. 179, 197, 165 S.E.2d 797, 806 (1969) ("Under the 'collateral source rule' *a tort feasor* has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source." (emphasis added)). Therefore, contrary to Francina's assertions, the collateral source rule does not automatically apply to GEICO, but will only apply to GEICO if it is a "wrongdoer."

We believe our existing case law establishes that GEICO, as a UIM insurer, is not a wrongdoer. We have held that UIM benefits are a collateral source, and thus, because a source must be wholly independent of the wrongdoer to be a

collateral source, UIM insurance is wholly independent of the wrongdoer. *Rattenni*, 298 S.C. at 278, 379 S.E.2d at 890. Because UIM coverage is a source wholly independent of the wrongdoer, *a fortiori*, a UIM insurer is not a wrongdoer and the collateral source rule does not apply.

Furthermore, a source is wholly independent of the wrongdoer when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. *Gregory*, 320 S.C. at 92, 463 S.E.2d at 318; *Mount v. Sea Pines Co.*, 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct. App. 1999). Ludwig did not contribute to the GEICO policy, and any payments made from it would not be made on his behalf.

Moreover, we find applying the collateral source rule against GEICO as a UIM insurer is inappropriate because extending the collateral source rule to cover GEICO as a UIM insurer would not serve the policy behind the rule. As discussed, the purpose of the collateral source rule is to give the injured party the benefit of any windfall rather than allowing the tortfeasor to profit by his wrongful acts. Here, GEICO as a UIM insurer has not acted wrongly or tortiously towards Francina and would not experience a windfall by not having to pay the UIM property damage benefits. Whether GEICO does or does not have to pay UIM benefits does not affect Ludwig. Francina signed a covenant not to execute and settled with Ludwig. Thus, Ludwig was completely released from liability and any payment of UIM benefits GEICO may make cannot affect his now extinguished liability. Furthermore, even if Francina had not settled and Ludwig was subject to additional liability to her, because Ludwig is the tortfeasor to whom the collateral source rule applies and UIM coverage is a collateral source, Ludwig's liability would not be affected by any UIM payment. *See Rattenni*, 298 S.C. at 278, 379 S.E.2d at 890 (holding that the collateral source rule bars a tortfeasor from reducing his liability by the amount of any UIM payments made to a plaintiff). Therefore, the purpose of the collateral source rule would not be served by applying it in this situation. Instead, this is merely a contractual issue, and GEICO should be treated according to the terms of the contract.

Applying the collateral source rule to UIM insurers would also upset settled jurisprudence and create the distorted result of permitting tortfeasors to reduce their liability by the amount of any UIM payments made to a victim. To find that GEICO is a wrongdoer against whom the collateral source rule applies would presumably also mean reversal of *Rattenni* and the rule that UIM benefits are a collateral source. This is because by finding that GEICO is a wrongdoer, we

would be holding that UIM benefits are *not* wholly independent of the wrongdoer, and thus, they could no longer be a collateral source. Because UIM coverage would no longer be a collateral source, the collateral source rule would no longer bar a tortfeasor from reducing his liability by the amount of the UIM payments. The collateral source rule's purpose of ensuring that any windfall goes to the victim rather than the tortfeasor would thus be circumvented.

Finally, the fact that Francina settled State Farm's subrogation claim is immaterial to whether the collateral source rule applies. Francina stipulated that State Farm covered all of her property damage, but to satisfy State Farm's subrogation claim she used the proceeds of her settlement with Auto Owners and Hartford to reimburse it for part of those payments. Her settlement of the subrogation claim does not mean she did not receive coverage and payment for her property damages. She chose to settle the subrogation claim, when she could have pursued her declaratory judgment action against State Farm. She also could have refused to settle with Auto Owners and Hartford if they would not abandon the condition that she use the settlement proceeds to satisfy State Farm's subrogation claim.

Therefore, we conclude the collateral source rule does not apply to GEICO and does not render the "other insurance" provision void. Having found the provision valid, we now apply it and find it resolves this dispute. As this Court has recognized:

> One method insurance companies use to indicate whether they intend to provide primary, secondary, or other coverage is to include in their policies "other insurance" clauses that attempt to apportion liability among multiple insurers. An "excess" clause, the most common kind of "other insurance" clause, provides that a policy will cover only amounts exceeding the policy limits of other insurance covering the same risk to the same property.

*S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters Inc.*, 327 S.C. 207, 215, 489 S.E.2d 200, 204 (1997). Thus, by providing that "this insurance shall be excess over other valid and collectible insurance applicable to the damaged property," the GEICO policy's "other insurance" provision is an "excess" clause.

The State Farm policy provides: "If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the

proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss." This is a "'pro rata' clause, which provides that the insurer will pay its share of the loss in the proportion its policy limits relates to the aggregate liability coverage available." *Id.* at 211, 489 S.E.2d at 202.

When two policies insure the same risk and one policy contains a pro rata clause while the other contains an excess clause, the policy with the pro rata clause provides primary coverage and the policy with the excess clause provides excess coverage. *See, e.g., Am. Interinsurance Exch. v. Commercial Union Assurance Co.*, 605 F.2d 731, 736 (4th Cir. 1979) (holding that a policy with an excess clause was excess to a policy with a pro rata clause); 46 C.J.S. *Insurance* § 1543 ("Where two insurance policies afford coverage on a particular loss, and one contains a prorated clause as to the other insurance, while the other policy contains an excess clause, the policy containing the excess clause does not provide any coverage until the other policy is exhausted."). Therefore, GEICO's UIM property damage coverage is excess to the State Farm coverage, and because the State Farm policy limits were not exhausted, GEICO is not obligated to make any UIM property damage benefits payments to Francina.

## CONCLUSION

For the foregoing reasons, we reverse and order the entry of summary judgment for GEICO.

**TOAL, C.J., and KITTREDGE, J., concur. PLEICONES, J. and BEATTY, J., concurring in result only.**

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

The State, Respondent,

v.

Clarence Logan, Jr., Appellant.

Appellate Case No. 2011-194406

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Appeal From Charleston County
Roger M. Young, Circuit Court Judge

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Opinion No. 27296
Heard April 2, 2013 – Filed August 14, 2013

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**AFFIRMED**

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

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

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**CHIEF JUSTICE TOAL:** Clarence Logan (Appellant) challenges his conviction for attempted criminal sexual misconduct in the first degree (CSC-First). Appellant argues that the trial court erred in providing the circumstantial evidence charge this Court articulated in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997). According to Appellant, this charge is no longer valid in light of this Court's decisions in *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011). We affirm Appellant's conviction.

## FACTUAL/PROCEDURAL BACKGROUND

On May 10, 2010, the Charleston County Grand Jury indicted Appellant for attempted CSC-First in violation of section 16-3-652 of the South Carolina Code and "strong-arm" robbery (SAR) in violation of section 16-11-325 of the South Carolina Code.[1] S.C. Code Ann. §§ 16-3-652, 16-11-325 (2003). Appellant proceeded to trial on June 8, 2011.

At trial, Jarvia O'Neal testified that in the early morning of February 4, 2010, at approximately 1:45 a.m., O'Neal went to the Lovey Dovey, "a social club where you can eat crabs," with two friends, Andrea Bell and Virgil Washington. O'Neal testified that at some point during her visit Appellant approached her and made unwanted sexual advances. Appellant appeared heavily intoxicated. O'Neal rebuffed Appellant's advances, and then made her way to the restroom. As O'Neal entered the restroom, Appellant forced his way inside with her. According to O'Neal, Appellant proceeded to choke her, and attempted to sexually assault her. Appellant also punched O'Neal several times. O'Neal fought back in an attempt to fend off Appellant's attack. O'Neal then kicked Appellant between his legs, and was only then able to remove herself from the situation. During the attack, Appellant removed O'Neal's driver's license and twenty dollars from her purse. Appellant exited the restroom shortly after O'Neal kicked him, and O'Neal departed the restroom after Appellant. O'Neal testified that she did not notify police or go to the hospital immediately following the attack because she was afraid. Later, on the afternoon of February 4, O'Neal visited the hospital to receive

[1] "The common law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years." S.C. Code Ann. § 16-11-325 (2003); *see also State v. Brown*, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (2003) (holding that common-law robbery is essentially the commission of larceny with force).

treatment for her injuries. O'Neal provided the police with a statement during her hospital visit.

O'Neal then contacted Aaron Green, the Lovey Dovey's manager. Green informed O'Neal that while he did not personally know Appellant, he knew Appellant used the nickname "Blackout," and owned a blue Thunderbird. O'Neal supplied police with this information. O'Neal noticed a blue Thunderbird near her home on several occasions following the attack, and on at least one of those occasions, O'Neal recognized Appellant as the vehicle's driver. O'Neal notified police on each occasion. Police contacted O'Neal and asked her to choose Appellant's photograph out of a group of six photographs. O'Neal chose Appellant.[2]

Andrea Bell testified that O'Neal excused herself to the restroom at some point during their visit to the Lovey Dovey. Bell stated that a short time later she observed a "young" man, wearing a white t-shirt, walking away from the bathroom, and "pulling up his pants."[3] Bell then overheard someone inquire whether "something going [sic] on in the bathroom," prompting Bell to walk over to the restroom. Bell described O'Neal's demeanor, stating, "All I see was she was upset, and her face was swollen. Like I think it was her eye and her lip that were swollen." Bell testified that she could not identify Appellant as the man she observed coming out of the bathroom that night. Bell assisted O'Neal with her injuries, but did not discuss anything that might have happened between O'Neal and Appellant.

Virgil Washington testified that he knew O'Neal, but did not consider her a friend. Washington testified that on the night of the attack he merely provided transportation for O'Neal at the request of his friend, Aaron Green. According to Washington, he noticed a commotion near the restroom, and when O'Neal exited the restroom she "was highly upset." Washington also observed blood on O'Neal's face. O'Neal mentioned to Washington that Appellant hit her. Washington

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[2] Omar Faison, a North Charleston police officer at the time of the incident, testified that he presented O'Neal with pictures of six individuals with the same height, weight, and physical features, and that O'Neal identified Appellant without hesitation.

[3] At trial, Bell could not identify Appellant as the "young" man she observed that night.

testified that in addition to the blood on O'Neal's face, he later observed at least two cuts to her face.

Aaron Green testified that he observed Appellant and O'Neal conversing on the night of the incident. Later, Green observed Appellant and O'Neal exit from the same bathroom, and Appellant stated that he was looking for his cell phone. Green testified that O'Neal told him she and Appellant had a "confrontation," but that she did not want Green to notify police. Green stated he observed O'Neal's hair was "wild" and O'Neal had a bruise and some bleeding on her face. In the days following the incident, O'Neal disclosed to Green that Appellant attempted to sexually assault her, and Green provided O'Neal with a description of Appellant's vehicle.

Alex Gray, a patrolman with the North Charleston Police Department responded to Roper Hospital where O'Neal sought treatment following the attack. Gray testified that O'Neal had a black eye, a laceration across the bridge of her nose and the left side of her face, cuts on the inside of her mouth, and a knot on the right side of her head. Gray testified that O'Neal provided him with a description of the incident, as well as Appellant's nickname and physical description.[4] At the conclusion of the State's case, Appellant's trial counsel moved for a directed verdict, stating, "I would move for a directed verdict pursuant to I believe it's criminal Rule 19." The trial court denied Appellant's motion. Following Appellant's decision not to testify, the trial court discussed jury instructions with the parties. Appellant's trial counsel raised an objection touching on the trial court's proposed circumstantial evidence charge, stating:

> I have an objection to—I know it's not routine, but the now standard direct and circumstantial evidence charge, particularly the portion that says . . . the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. I think

[4] The State also presented the testimony of Marquise O'Neal and Rhonda Deveaux, O'Neal's family members. These witnesses testified that they observed a vehicle matching the description of Appellant's in the immediate vicinity of O'Neal's residence. Additionally, Craig McAlheney, an officer with the North Charleston Police Department testified that he responded to a telephone call from O'Neal. O'Neal explained to McAlheney that Appellant's vehicle drove in front of her house, and she provided McAlheney with a physical description of the driver, and what O'Neal believed to be the vehicle's license tag number.

> that after our Supreme Court opinion in *Bostick* that came out, I want to say, earlier this year where the Supreme Court said that the trial court should have directed a verdict because the case was entirely circumstantial, they appealed to four different pieces of circumstantial evidence . . . that line of cases, *Shropp*[5] and *Arnold* [361 S.C. 386, 605 S.E.2d 529 (2004)] and now *Bostick*, they are now dealing with this jury charge, so I guess what I'm asking is to argue against precedent to say that the standard charge, I think this is from *Ripon*[6] that says that the direct and circumstantial evidence are equally—

The trial court interrupted the argument, stating, "I'm not familiar with the exact case you're referring to, but I usually on—there is a difference when it comes to directed verdict between direct and circumstantial evidence." The trial court then acknowledged that circumstantial evidence had to be "substantial," and that he was not sure that "they," presumably this Court, "had changed that rule." Appellant's trial counsel responded:

> In case they want to, I have to give them the opportunity to do it, and I think the proposition—the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence is no longer valid.

The trial court denied the motion, and then delivered the following instruction regarding direct and circumstantial evidence:

> There are two types of evidence generally presented in a trial. There is direct evidence and circumstantial evidence. Direct evidence is testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness, and this is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances which indicate the existence of a fact, and this is evidence which immediately establishes collateral facts from which a main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction

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[5] Appellant's trial counsel appears to have been referring to *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984).

[6] Appellant's trial counsel appears to have been referring to *Grippon*.

> between the weight or value to be given either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than direct evidence. You should weigh all the evidence in this case, and, after weighing the testimony, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty.

The jury found Appellant guilty of attempted CSC-First but not guilty of SAR. The trial court sentenced Appellant to ten years' imprisonment. On June 15, 2011, Appellant's trial counsel filed a notice of appeal. This Court certified the case for review pursuant to Rule 204(b), SCACR.

## ISSUE PRESENTED

> Did the trial court err in providing a circumstantial evidence jury instruction consistent with this Court's holding in *Grippon*?

## STANDARD OF REVIEW

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).

## LAW/ANALYSIS

Appellant argues that this Court's decisions in *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011), invalidated the circumstantial evidence jury charge this Court articulated and approved in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), and *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2005). We disagree.

### *I. Appellant's Claim*

This Court's decisions in *Bostick* and *Odems* centered on whether the State presented substantial circumstantial evidence, so as to survive a directed verdict motion, that the defendant committed the crime charged.

In *Bostick*, the fire department arrived at the victim's house on a Sunday afternoon after her house caught fire. 392 S.C. at 136, 708 S.E.2d at 775. Firefighters discovered the victim's body in the house. *Id.* Although the victim had been struck in the head with a blunt force object, she ultimately expired as a result of carbon monoxide poisoning from the fire. *Id.* Two days later, investigators discovered the following items in a burn pile at a neighboring house belonging to Bostick's mother: two sets of car keys, toe nail clippers, pens, burned paper, a metal clasped ring of a purse, and a watch. *Id.* at 137, 708 S.E.2d at 775. All of these items belonged to the victim. *Id.* Investigators later determined that the person responsible for the fire at the victim's house used a heavy petroleum product, such as kerosene or diesel fuel. *Id.* Bostick's mother stated that she did not use either of these products in the burn pile. *Id.* Investigators interviewed Bostick, and asked for his clothing and shoes. *Id.* Blood was found on Bostick's jeans, but a DNA analysis proved inconclusive. *Id.*, 708 S.E.2d at 775–76 ("[T]he agent who reviewed the DNA analysis findings . . . testified that while ninety-nine percent of the population could be excluded as contributing to the sample, she was unable to determine whether the blood sample actually came from [the victim]."). However, a chemical analysis of Bostick's shoes revealed a fresh gasoline pattern. *Id.*, 708 S.E.2d at 776. Bostick moved for a directed verdict at the close of the State's case, which the trial court denied. *Id.*

Bostick argued on appeal that the evidence submitted did not constitute substantial circumstantial evidence necessary to submit the case to the jury. *Id.* at 138–39, 708 S.E.2d at 776. This Court agreed, and found that the State's evidence raised only a suspicion of Bostick's guilt. *Id.* at 141, 708 S.E.2d at 778.

In *Odems*, this Court addressed the same substantial circumstantial evidence issue. In that case, the defendant appealed his convictions for first degree burglary, grand larceny, criminal conspiracy, and malicious injury. *Odems*, 395 S.C. at 585, 720 S.E.2d at 50. At trial, the State relied solely on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located the defendant in the get-away vehicle with the burglars and the stolen goods; (2) the defendant fled from law enforcement; and (3) the defendant asked an uninvolved person to lie to authorities on his behalf. *Id.* at 588, 720 S.E.2d at 51. This Court found that even when viewed in the light most favorable to the State, the circumstantial evidence did not reasonably tend to prove the defendant's guilt. *Id.* The Court illustrated this point through an analogy to what is commonly referred to as the "traditional" circumstantial evidence *jury* charge:

> The traditional circumstantial evidence definition illustrates the deficiency in the State's evidence against [the defendant]. This definition provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:
>
> > Every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. Despite the Court's abandonment of the use of this particular definition as a jury charge in *State v. Cherry*, the definition illustrates the lack of evidence against [the defendant]. The State's key circumstantial evidence: (1) [The defendant's] location in the getaway car a relatively short time after the robbery; (2) [The defendant's] flight from law enforcement; and (3) [The defendant's] attempt to enlist the assistance of an uninvolved individual, do not point to his guilt for the crimes charged to the exclusion of every other reasonable hypothesis—namely, the notion that he did in fact join [the defendants] at a gas station following the crime.

*Id.* at 590–91, 720 S.E.2d at 52–53 (citing *State v. Hernandez*, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 2 (2009); *State v. Edwards*, 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by Cherry*, 361 S.C. at 595–606, 606 S.E.2d at 478–82).

Both *Bostick* and *Odems* analyzed the standard relied on by the trial court in assessing circumstantial evidence, and not the standard relied on by jurors as is the issue *sub judice*. *See, e.g., State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 ("It must be remembered, too, that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in . . . consideration of the accused's motion for a directed verdict."). Additionally, neither *Bostick* or *Odems* addresses the *Grippon* charge's validity. *See Bostick*, 392 S.C. at 142, 708 S.E.2d at 778 ("The evidence presented by the State raised, at most, a mere suspicion that Bostick committed this crime. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." (citation omitted)). In point of fact, the *Odems* opinion notes explicitly that

this Court abandoned the traditional circumstantial evidence charge, and that the Court referred to the charge merely as an illustration of the "deficiency in the State's evidence" against the defendant in that case. *See Odems*, 395 S.C. at 592, 720 S.E.2d at 53 ("The State asks this Court to uphold [the defendant's] convictions based on evidence which does not satisfy the standard adopted by this Court regarding the proof necessary in a circumstantial evidence case." (citing *Bostick*, *supra*, identifying fundamental opinions analyzing the circumstantial evidence standard)).[7]

Accordingly, the trial court did not err in providing a circumstantial evidence charge consistent with *Grippon*.[8]

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[7] *See also Hernandez*, 382 S.C. at 625 n.2, 677 S.E.2d at 605–06 n.2 ("Although in *State v. Cherry* . . . the Court abandoned [the traditional circumstantial evidence] charge and held that it may confuse a jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, *it nonetheless illustrates the lack of evidence* against Petitioners." (emphasis added)).

[8] Additionally, erroneous jury instructions are subject to a harmless error analysis. *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).

In the instant case, the trial court clearly instructed the jury regarding the reasonable doubt burden of proof, explaining:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty . . . . You

## *II. The Circumstantial Evidence Charge*

The objection raised by Appellant's trial counsel provides this Court with an opportunity to revisit our past discussions regarding the circumstantial evidence charge, and articulate for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the State's burden and the jury's responsibility.

This Court's circumstantial evidence jurisprudence centers primarily on the distinctions between direct and circumstantial evidence. Beginning with *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955), this Court recognized that the jury's evaluation of circumstantial evidence requires a particular and discrete instruction. In *Littlejohn*, the Court explained,

> [I]t is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

*Id.* (citing *State v. Kimbrell*, 191 S.C. 238, 242, 4 S.E.2d 121, 122 (1939)); *see Edwards*, 298 S.C. at 275, 379 S.E.2d at 889 (clarifying the proper standard trial

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> should weigh all the evidence in this case, and, after weighing the testimony, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty . . . . The burden of proof remains on the state to prove guilt beyond a reasonable doubt.

The trial court's jury instruction, as a whole, properly conveyed the applicable law. *State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007); *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. Thus, any conceivable error was harmless beyond a reasonable doubt.

courts should utilize in ruling on directed verdict motions in circumstantial evidence cases),[9] *abrogated by Cherry*, 361 S.C. at 601–02, 606 S.E.2d at 482.

However, in *Grippon*, the majority of the Court determined that once a trial court provides a proper reasonable doubt instruction, the jury need not be instructed regarding whether the circumstantial evidence proved the defendant's guilt to the exclusion of every reasonable hypothesis other than guilt. *Grippon*, 327 S.C. at 83–84, 489 S.E.2d at 464 (relying on *Holland v. United States*, 348 U.S. 121, 140 (1954); *United States v. Russell*, 971 F.2d 1098, 1108–09 (4th Cir. 1992), *cert. denied*, 506 U.S. 1066 (1993)).[10]

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[9] *Edwards v. South Carolina*, 493 U.S. 895 (1989) (denying petition for writ of certiorari to this Court).

[10] Several courts have followed the Supreme Court's reasoning and found a distinct circumstantial evidence charge unnecessary. *See, e.g.*, *Russell*, 971 F.2d at 1109 ("It is well settled that as long as a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt."); *Hebron v. Maryland*, 627 A.2d 1029, 1031–37 (Md. 1993) (holding that the proposition that a conviction based solely on circumstantial evidence cannot stand unless the circumstances are inconsistent with any reasonably hypothesis of innocence is a matter of the sufficiency of the evidence, rather than jury instruction); *North Carolina v. Adcock*, 310 S.E.2d 587, 607 (N.C. 1983) ("We hold that an instruction on circumstantial evidence to the effect that a conviction may not be based upon it unless the circumstances point to guilt and exclude to moral certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given."); *but see Mainor v. Georgia*, 387 S.E.2d 882, 884 n.2 (Ga. 1990) (holding the trial court did not err in providing a circumstantial evidence jury charge providing that circumstantial evidence must be "entirely consistent with the defendant's guilt"); *Brown v. Virginia*, 381 S.E.2d 225, 229–30 (Va. 1989) (explaining that the circumstances contemplated by the traditional circumstantial evidence charge are those proved and consistent with each other and the defendant's guilt); *West Virginia v. Bratcher*, 206 S.E.2d 408, 410 (W. Va. 1974) (holding the trial court erred in refusing to provide a circumstantial evidence charge and citing with approval precedent relying on the traditional circumstantial evidence charge).

Thus, the Court recommended that following a proper reasonable doubt instruction, the trial court instruct the jury as follows:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

*Id.* at 83–84, 489 S.E.2d at 464 (citing 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 12.04 (4th ed. 1992)).

Following *Grippon*, South Carolina trial courts utilized both the traditional circumstantial evidence charge and the *Grippon* charge.[11] However, in *Cherry*, this Court held that the traditional circumstantial evidence charge served to confuse juries by leading them to erroneously believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482. Thus, the Court held the *Grippon* language as "the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction." *Id.*

In the instant case, Appellant's trial counsel objected to the trial court's proposed use of the *Grippon* charge, specifically, that portion of the charge instructing that "the law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence." According to trial counsel, that proposition was "no longer valid."

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[11] Following *Grippon*, several of the Court's opinions appeared to retain the traditional circumstantial evidence charge as an alternative to the *Grippon* charge. *See State v. Graddick*, 345 S.C. 383, 388, 548 S.E.2d 210, 212 (2001) (upholding hybrid of traditional and *Grippon* charges); *State v. Needs*, 333 S.C. 134, 156 n.13, 508 S.E.2d 857, 868 n.13 (1998) (noting there are two appropriate ways to charge circumstantial evidence).

But, as observed in *Grippon*, the question is not whether circumstantial evidence carries the same probative weight as direct evidence, it clearly does. Instead, the pertinent inquiry is the proper means for evaluating circumstantial evidence and how the trial court may best instruct a jury as to its analytical responsibility. *Grippon*, 327 S.C. at 88, 489 S.E.2d at 466–67 (Toal, J. concurring). While direct and circumstantial evidence carry the same value, a jury cannot accurately analyze these two types of evidence using identical approaches.

Unlike direct evidence, evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence. *Cherry*, 361 S.C. at 603, 606 S.E.2d at 483 (Toal, C.J. dissenting); *cf.* 31A C.J.S. *Evidence* § 5 (2008) ("Direct evidence is evidence that proves the fact in dispute without inference or presumption."). Analysis of circumstantial evidence is plainly a more intellectual process. *Grippon*, 327 S.C. at 87–88, 489 S.E.2d at 466 (citing Irene Rosenberg & Yale Rosenberg, *"Perhaps What Ye Say Is Based Only On Conjecture"—Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev., 1371, 1412–13 (1995)). We have previously observed that this process requires two steps: "After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from that fact? Second, if so, is there any reasonable explanation other than guilt?" *Id.* at 87–88, 489 S.E.2d at 466. However, requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant. *See, e.g.*, *State v. Aleksey*, 343 S.C. 20, 26, 538 S.E.2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'"). Therefore, the circumstantial evidence instruction is best characterized as a construct requiring the State to prove its case beyond a reasonable doubt, while at the same time providing a framework for a "rational" and "cumulative" assessment for guiding the jury's consideration of circumstantial evidence. *See Grippon*, 327 S.C. at 87–88, 489 S.E.2d at 466 (citing Rosenberg, 31 Hous. L. Rev. at 1412–13).[12]

[12] For example, in *Cherry*, the State relied on the following evidence to prove that the defendant's guilt for possession with intent to distribute crack cocaine: (1) the defendant's presence in a vehicle located in a high crime area known for drugs; and (2) police recovered eight rocks of crack cocaine and $322.00, consisting primarily of $20 bills. *Cherry*, 361 S.C. at 604, 606 S.E.2d at 483. The

Trial courts should not be constrained from providing a jury charge encompassing the determinations critical for analyzing circumstantial evidence as it appears in some cases. Additionally, defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction. Thus, we hold that trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

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dissent noted that although it is inferable that the defendant intended to distribute crack cocaine, it is equally inferable that he did not:

> Possessing drugs in a high crime area "known for drugs" does not automatically make one a drug dealer. It is also reasonable that $322 in cash would be comprised of mostly [$20] bills. Moreover, it is reasonable to conclude that because [the defendant] did not have the requisite amount of crack cocaine on him to give rise to a permissive inference of distribution, he did not intend to distribute crack cocaine. Finally, that there were no drug paraphernalia in the car may or may not establish that [the defendant] was carrying the crack for his personal use.

*Id.* (Toal, C.J., dissenting). Thus, the dissent argued, the lack of direct evidence necessitated a more detailed framework for the jury's assessment:

> In sum, there is no direct evidence that [the defendant] intended to distribute crack cocaine. Therefore, even if each circumstance were proven beyond a reasonable doubt, jurors must still ask themselves, under the *Edwards* charge, whether there is any other reasonable conclusion other than guilt. Without this instruction, the jury does not know that this critical step in the reasoning process exists. In fact, the jury is without an analytical framework in which to evaluate the evidence. That the circumstances could lead a juror to make reasonable inferences either way highlights the importance of retaining the *Edwards* charge.

*Id.*

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

*Cf. Littlejohn*, 228 S.C. at 328, 89 S.E.2d at 926 (explaining the traditional circumstantial evidence charge); *Grippon*, 327 S.C. at 83–84, 489 S.E.2d at 463–64 (finding a circumstantial evidence jury instruction including "reasonable hypothesis" language unnecessary); *Cherry*, 361 S.C. at 600–02, 606 S.E.2d at 481–82 (holding the *Grippon* charge as the exclusive charge for circumstantial evidence cases). This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection.

Our *Grippon* and *Cherry* decisions commendably sought to remove confusion from the jury's consideration regarding the weight and value afforded to circumstantial evidence. However, at times, a separate framework is necessary to the jury's analysis of circumstantial evidence. Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant.

## CONCLUSION

For the foregoing reasons, Appellant's conviction is

**AFFIRMED.**

**HEARN, J. and BEATTY, J., concur. KITTREDGE, J., concurring in result in a separate opinion in which PLEICONES, J., concurs.**

**JUSTICE KITTREDGE**: I concur in result. I write separately because I would adhere to, and not overrule, *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), and *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2005).

The United States Supreme Court has held that there is no difference between direct and circumstantial evidence. *See Holland v. United States*, 348 U.S. 121, 140 (1954) (noting that circumstantial evidence is "intrinsically no different from testimonial evidence," for both instances require a jury "to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference," and in both instances, "the jury must use its experience with people and events in weighing the probabilities"). All of the federal courts and the vast majority of state courts have adopted *Holland*. The reasoning and rationale for following *Holland* was persuasively set forth by this Court in *Cherry*, and I see no basis for rejecting *Holland* and overruling *Grippon* and *Cherry*.

**PLEICONES, J., concurs.**

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

The State, Respondent,

v.

Karriem Provet, Petitioner.

Appellate Case No. 2011-192746

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

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Appeal From Greenville County
Carmen T. Mullen, Circuit Court Judge

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Opinion No. 27297
Heard June 19, 2013 – Filed August 14, 2013

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**AFFIRMED**

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Tricia A. Blanchette of Law Office of Tricia A. Blanchette, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Deputy Attorney General Deborah R.J. Shupe and Solicitor William Walter Wilkins, III, all of Columbia, for Respondent.

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**JUSTICE PLEICONES:** The Court granted certiorari to review a Court of Appeals opinion that affirmed the convictions and sentence of Karriem Provet (petitioner) for trafficking cocaine and resisting arrest. *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). On certiorari, petitioner argues the Court of Appeals erred when it affirmed the trial court's determination that reasonable suspicion existed to justify extension of a traffic stop and that petitioner voluntarily consented to the search of his vehicle. We affirm.

## FACTS

Corporal John Owens (Officer) is a 14-year veteran of the South Carolina Highway Patrol and 4-year veteran and supervisor of the upstate Aggressive Criminal Enforcement unit that targets drug trafficking and other serious crimes utilizing highway transportation. One evening in May 2002, while patrolling Interstate 85 in Greenville County, he stopped petitioner's vehicle for following another vehicle too closely and driving with a burned out tag light. He approached and asked petitioner for his driver's license and vehicle registration.

Officer testified that as petitioner produced those items, he observed that petitioner's hands were shaking excessively and his breathing was accelerated. Upon viewing the vehicle's registration, Officer discovered that the vehicle was registered to a third party. He asked petitioner to step out of and to the rear of the vehicle. Officer performed a pat-down search which did not yield any weapons.

As Officer prepared a warning citation, he asked petitioner where he was coming from, and petitioner answered that he had been visiting his girlfriend at a nearby Holiday Inn. However, Officer had observed petitioner's vehicle approach and pass the exit at which the only Holiday Inn in Greenville was located. Officer asked petitioner at what exit the Holiday Inn was located, and petitioner could not say. Officer asked whether petitioner had gone to another location after leaving the Holiday Inn, and petitioner denied having done so. In response to Officer's questions, petitioner explained that the vehicle belonged to a different girlfriend than the one he had been visiting in Greenville; that he had recently graduated from a technical college and did not yet have a job; and that he had been in Greenville for two days but without bringing luggage. Officer also testified that he observed petitioner use delay tactics. Officer called for a canine drug detection

unit. He then called dispatch to check on the status of petitioner's driver's license and the vehicle's registration.

Officer then approached petitioner's vehicle to check the vehicle identification number. While doing so, he observed several air fresheners and fast food bags, a cell phone, and some receipts, as well as a bag on the rear seat. The canine unit arrived before Officer received the dispatcher's return call regarding the status of petitioner's license and registration. When the dispatcher reported no problems with either of these items, Officer returned petitioner's license and registration and issued him a traffic warning citation.

Officer then asked for permission to search the vehicle, and petitioner assented. The officer handling the drug detection canine began preparing for the search. As he did so, petitioner fled the scene on foot but was apprehended. The drug detection canine alerted on the fast food bag, in which officers discovered a substance that field tested positive for and was later confirmed to be cocaine.

Petitioner moved to suppress the cocaine because it was obtained as a result of an illegal search. The trial court denied the motion. It found that the purpose of the traffic stop was complete when Officer asked for permission to search the vehicle, so that two detentions existed for purposes of the Fourth Amendment. It found the second detention justified by Officer's reasonable suspicion that petitioner was involved in criminal activity and found that petitioner voluntarily consented to the search of the vehicle. The jury returned a guilty verdict on charges of drug trafficking and resisting arrest, and the trial court sentenced petitioner to twenty-five years' imprisonment. The Court of Appeals affirmed. This Court granted certiorari. We now affirm the Court of Appeals, and clarify that off-topic questioning by a law enforcement officer during the course of a traffic stop does not constitute a separate seizure for purposes of the Fourth Amendment, so long as the off-topic questioning does not measurably extend the duration of the stop.

## ISSUES

1. Did the Court of Appeals err when it affirmed the trial court's finding the officer had reasonable suspicion to seize petitioner after the conclusion of a lawful traffic stop?
2. Did the Court of Appeals err when it affirmed the trial court's finding that petitioner voluntarily consented to the search of his vehicle?

## ANALYSIS

I. Lawfulness of seizure

Petitioner contends the Court of Appeals erred when it affirmed the trial court's finding that the traffic stop was not unreasonably prolonged and that Officer had reasonable suspicion to further detain petitioner. We disagree.

South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. *See State v. Brockman*, 339 S.C. 57, 64-66, 528 S.E.2d 661, 664-66 (2000). We affirm if there is any evidence to support the trial court's ruling. *Id*. at 66, 528 S.E.2d at 666.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A police officer may "stop and briefly detain a person for investigative purposes" if he "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' . . . ." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996) ("[T]he fact that an officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996) (internal brackets, ellipsis, and quotation marks omitted)).

Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop. *See Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977). A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist. *See United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998). The officer cannot avoid this rule by employing dilatory tactics. *See United States v. Jones*, 234 F.2d 234 (5th Cir. 2000) (driver's Fourth Amendment rights violated when, after dispatcher reported no problems and officer had completed warning citation except for obtaining the

driver's signature, officer deliberately delayed completing the stop for several more minutes until canine search unit arrived).

Notwithstanding that an officer may not lawfully extend the duration of a traffic stop in order to engage in off-topic questioning, this rule does not limit the scope of the officer's questions to the motorist during the traffic stop. As the United States Supreme Court has recently emphasized, "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333; *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) ("As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena [while detained as an occupant of a house being searched pursuant to a warrant] for her name, date and place of birth, or immigration status."); *United States v. Everett*, 601 F.3d 484, 490-91 (6th Cir. 2010) (explaining that in *Muehler v. Mena* the Supreme Court resolved in the negative a circuit split on the question whether asking a motorist questions unrelated to the circumstances justifying the traffic stop violated the Fourth Amendment).

The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure. *See Mimms*, 434 U.S. at 111-12 (finding "little question the officer was justified" in conducting pat-down search after officer asked motorist to exit vehicle and then observed bulge in motorists' jacket).

*a. Length of initial seizure*

The trial court held that the initial seizure concluded when Officer issued petitioner the warning citation and returned his license and registration. It held that the initial stop was concluded in a reasonable length of time. The Court of Appeals affirmed, reasoning that Officer's off-topic questions "did not unreasonably extend the traffic stop." We agree with the trial court and the Court of Appeals that ten minutes was a reasonable length of time for the initial traffic stop and that Officer's off-topic questions did not measurably extend the duration of the stop. *See Johnson*, *supra*.

Petitioner argues that because Officer had already indicated he intended to issue a warning ticket before he began the off-topic questioning, the

questions exceeded the scope of the traffic stop and so the seizure became unlawful, citing *State v. Rivera*, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009). In its opinion below, the Court of Appeals distinguished *Rivera* on its facts, pointing out that in *Rivera* the trunk was filled with luggage and there was no evidence of multiple air fresheners in the vehicle. It also noted that the *Rivera* court reviewed the trial court's suppression of the evidence under the deferential standard of review. We agree that *Rivera* is distinguishable from the present case on both bases.

We also note, however, that *Rivera* contains some statements that are misleading given the present state of Fourth Amendment law. The *Rivera* court reasoned that

> [The officer's] initial questioning, including where Respondents were coming from, how long they had been there, where they were going, and the purpose of their trip, was reasonable in that the questions tangentially related to the purpose of the traffic stop. Once [the officer] informed [the driver] he would receive a warning citation, however, the purpose of the stop ended and [the officer's] continued questioning concerning the transport of drugs on the interstate exceeded the scope of the stop. This amounted to a second and illegal detention unless [the officer] entertained a reasonable suspicion of illegal activity sufficient to warrant that detention.

*Id*. at 362, 682 S.E.2d at 310 (internal footnote omitted). This passage suggests that police questioning must have some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny. To the extent it does, it is incorrect. *See Johnson*, *supra*; *Mena*, *supra*. In addition, the *Rivera* court identified the officer's statement that he would issue a warning citation to the driver as the point in time at which the purpose of the stop ended without citing dilatory tactics by the officer. To the extent *Rivera* suggests that shifting the conversation to another topic marks the end of the lawful seizure even though the citation has not been issued, regardless whether such off-topic conversation measurably extends the duration of the initial seizure, it is also incorrect. *See Jones*, *supra*.

Although the rules implied by *Rivera* may have been reasonable extrapolations from earlier Fourth Amendment precedents,[1] they have now been clearly rejected by the United States Supreme Court. To the extent other South Carolina cases contain similar language, we note that language has likewise been superseded.

We also note that the proper inquiry is not whether an officer "unreasonably" extended the duration of the traffic stop with his off-topic questions but whether he "measurably" extended it. *See Johnson, supra*. This is a temporal inquiry, not a reasonableness inquiry.

*b. Reasonable suspicion*

Petitioner also argues that the Court of Appeals erred when it affirmed the trial court's finding that Officer had reasonable suspicion to detain petitioner in order to request to search his vehicle after the purpose of the traffic stop had been completed. We disagree.

Officer testified to petitioner's extreme nervousness evidenced by shaking hands and accelerated breathing. He testified that, based on his experience with other

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[1] See, for example, *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The *scope* of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, *the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion* in a short period of time." (emphasis added)). The United States Supreme Court directly addressed the import of *Royer*'s reference to least intrusive means a few years later, in *United States v. Sokolow*, 490 U.S. 1, 11 (1989), explaining,

> That statement . . . was directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions . . . . The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions . . . and it would require courts to indulge in unrealistic second-guessing.

motorists, petitioner's nervousness was excessive as compared with people pulled over who are not involved in criminal activities other than traffic-related infractions. He saw that petitioner's vehicle was registered to a third party, and petitioner's claims regarding his stay at the Greenville Holiday Inn and subsequent movements appeared to contradict Officer's direct observations. Petitioner also claimed to be unemployed yet appeared able to afford to stay at a hotel and buy large quantities of gas to drive a large vehicle. Officer also observed numerous air fresheners in the vehicle, which indicated to him a possibility that petitioner was seeking to mask odors from a police officer or canine drug detection unit. He also believed that the numerous fast food bags, receipts, and cell phone he observed in the vehicle were consistent with the tight schedule maintained by drug traffickers. Although on his second trip to the vehicle he observed a bag on the rear seat that could have been a luggage bag, petitioner had claimed he did not have luggage with him despite having stayed in Greenville for two days. Officer also testified he observed petitioner use delay tactics. Based on Officer's experience with drug trafficking interdiction, he suspected petitioner was involved in drug trafficking activity. We agree with the trial court and the Court of Appeals that Officer had a reasonable suspicion supported by articulable facts that criminal activity was afoot, justifying a second seizure. Moreover, because the record contains evidence that supports the trial court's finding, under our deferential standard of review we must affirm its finding.

Petitioner points out several factors that he contends were indicative of innocent travel: the address petitioner gave for his girlfriend was confirmed as a valid address; petitioner had no arrest record; and no negative information about the vehicle or petitioner was reported by the dispatcher. While we agree these facts could be found to weigh against Officer's reasonable suspicion, that determination was for the trial court, and we must affirm when any evidence in the record supports its finding. *Brockman, supra*.

Petitioner also argues that the Court of Appeals improperly distinguished *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010). We agree with the Court of Appeals' analysis in the opinion below that the totality of the circumstances in this case provides more objective, articulable facts to justify Officer's suspicion than were present in *Tindall*.

Petitioner further argues the entire process was tainted by Officer's mental determination at an early point in the traffic stop not to let petitioner go, citing *United States v. Foster*, 634 F.3d 243, 249 (4th Cir. 2011). *Foster* is inapposite,

because in that case the court concluded that objective grounds for reasonable suspicion did not exist. Only after determining that the objective test was not met did the *Foster* court proceed to a discussion of the government's abusive practices, rebuking its "attempt[] to spin these largely mundane acts into a web of deception" and its "post hoc rationalizations to validate those seizures that happen to turn up contraband" as well as the officer's state of mind. *Id*. at 249. The *Foster* court's comment that "although the reasonable suspicion standard is an objective test, [the officer's] initial comments to [the arrestee], 'Knowing you, you are up to something,' clearly belie his stated reasons for initiating the stop[,]" *id*., was not necessary to its decision and did not announce a new rule.

In any case, the proposition that the officer's subjective determinations could taint an objectively valid seizure has been expressly rejected by the United States Supreme Court. *Robinette*, *supra*.

II. Consent to search

Petitioner argues the Court of Appeals erred when it affirmed the trial court's finding that petitioner voluntarily consented to the search of his vehicle. We disagree.

We apply a deferential standard of review to the trial court's findings on issues of fact regarding the voluntariness of consent. *State v. Mattison*, 352 S.C. 577, 584-85, 575 S.E.2d 852 (2003).

A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search. *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). The existence of voluntary consent is determined from the totality of the circumstances. *Id*. When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary. *Id*. "A consent to search procured during an unlawful stop is invalid unless such consent is both voluntary *and* not an exploitation of the unlawful stop." *State v. Robinson*, 306 S.C. 399, 402, 412 S.E.2d 411, 414 (1991) (emphasis in original).

In this case, the trial court determined that petitioner's consent was voluntary because Officer had returned his driver's license and vehicle registration and had issued the warning citation. It also found no show of force constrained petitioner, since only two officers were present, the drug detection canine was confined in the

unmarked police vehicle, no guns were pointed, and no threatening tone was used. Considering the totality of the circumstances, we conclude the record supports the trial court's finding that petitioner voluntarily consented to the search.

Petitioner argues the Court of Appeals failed to recognize that the facts of *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005), are analogous to those of this case and that *Pichardo* mandates a different result. We disagree. In *Pichardo*, the officer completed the purpose of the traffic stop, returning the driver's and passenger's paperwork, telling them to have a good day, and turning away, before turning around again and asking to speak with them further. 367 S.C. at 92-93, 623 S.E.2d at 845. The officer then explained that the interstate was being used for trafficking of contraband and weapons and asked for consent to search the vehicle. *Id*. at 93, 623 S.E.2d at 845. The trial court suppressed the evidence obtained during the search, finding that the officer's questioning of the two men constituted a seizure rather than a consensual encounter and no reasonable suspicion existed to warrant it. *Id*. at 103-104, 623 S.E.2d at 850-51.

*Pichardo* is inapposite because it deals with consent obtained during an unlawful rather than a lawful seizure. Thus, in *Pichardo* the State was required to make a higher showing: that the consent was both voluntary and not an exploitation of the unlawful seizure. *Robinson*, *supra*. In this case, the trial court found Officer had reasonable suspicion for an additional seizure, and a higher showing is not required. Moreover, in *Pichardo* the trial court found the consent not voluntary, while the trial court in this case found the consent to be voluntary. The deferential standard of review therefore favors affirmance of opposing results.

Petitioner's reliance on *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), is misplaced for the same reasons. In that case the trial court found that the officer lacked probable cause for an additional seizure and that the subsequent consent was not voluntary. Thus, a higher showing was required in that case and the standard of review favored rather than disfavored the result desired by the defendant.

## CONCLUSION

The Court of Appeals correctly affirmed the trial court's findings that the traffic stop was not unlawfully extended, that Officer had reasonable suspicion for an additional seizure, and that petitioner's consent to search the vehicle was voluntary. However, we clarify that off-topic questioning does not constitute a separate

seizure for Fourth Amendment purposes so long as it does not measurably extend the duration of a lawful traffic stop.

**TOAL, C.J., KITTREDGE and HEARN, JJ., concur. BEATTY, J., concurring in result only.**

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

Cape Romain Contractors, Inc., Respondent,

v.

Wando E., LLC, and Sean Barnes, a/k/a Sean A. Barnes, Appellants.

Appellate Case No. 2011-197207

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Appeal from Berkeley County
Roger M. Young, Circuit Court Judge

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Opinion No. 27298
Heard April 16, 2013 – Filed August 14, 2013

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**REVERSED AND REMANDED**

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E. J. Westbrook and Catherine H. McElveen of Richardson Patrick Westbrook & Brickman, LLC, of Mt. Pleasant, for Appellants.

Albert A. Lacour, III, of Clawson & Staubes, LLC, of Charleston, for Respondent.

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**JUSTICE KITTREDGE:** This case arises from a construction dispute. The contract between the general contractor and subcontractor provided for arbitration pursuant to the Federal Arbitration Act. When a complaint was filed, Appellant Sean Barnes, the general contractor, and Appellant Wando E., the property owner, sought to enforce the construction contract's arbitration clause. The trial court

refused to compel arbitration on the basis that the contract did not sufficiently impact interstate commerce. We find the trial court erred in finding the parties' transaction had an insufficient nexus to interstate commerce and reverse.

## I.

Appellant Wando E., LLC, owns property along the Wando River in Berkeley County, South Carolina. Wando E. retained Appellant Sean Barnes to serve as the general contractor for the construction of a marina. Barnes, in turn, hired Respondent Cape Romain as a subcontractor for the project. Barnes and Cape Romain entered into a standard form contract (the Contract) promulgated by the American Institute of Architects.

Section 5.1 of the Contract requires an affirmative election among various methods of dispute resolution. Parties must select arbitration, litigation in court, or "other." Barnes and Cape Romain checked the box beside arbitration, selecting it as the binding method of dispute resolution for any subsequent claim. Specifically, article 21 of the Contract provides that all "[c]laims, disputes and other matters in question arising out of or relating to this Contract" shall be subject to arbitration. Further, section 19.2 of the Contract expressly provides that if arbitration is selected as the method of dispute resolution, the Federal Arbitration Act[1] (FAA) shall govern the arbitration process.

Several months into construction, the project engineer refused to certify further payments, raising concerns about certain angled pilings and misaligned dock sections.[2] Cape Romain insisted it had properly constructed the docks and contended that any defects were the result of improperly manufactured prefabricated dock sections. Cape Romain demanded payment of $158,413.14 and filed a mechanics' lien against the real property to secure that amount. Thereafter,

[1] 9 U.S.C. §§ 1-16 (2012).

[2] Pursuant to article 15 of the Contract, Cape Romain was not entitled to be paid until the project engineer certified the work was completed properly.

Cape Romain filed suit against Barnes and Wando E., seeking foreclosure of its mechanics' lien against Wando E. and alleging a breach of contract claim against Barnes.[3]

Appellants moved to dismiss and compel arbitration, arguing that because all of the claims relate to Cape Romain's performance under the Contract, the claims should be arbitrated. Cape Romain opposed dismissal and arbitration, arguing Wando E. was not a party to the Contract and, thus, may not compel arbitration and that the arbitration clause is not enforceable under the FAA because the transaction did not impact interstate commerce.

The trial court refused to dismiss the lawsuit or compel arbitration of any claim, finding performance of the Contract did not involve a sufficient impact on interstate commerce to "justify or trigger" application of the FAA. Further, the trial court found Wando E. could not enforce the arbitration agreement absent a showing of some special relationship to a contracting party. Appellants appealed, and the case was certified to this Court pursuant to Rule 204(b), SCACR. [4]

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[3] Cape Romain also alleged a quantum meruit claim in the alternative against both defendants.

[4] We summarily reject Cape Romain's contention that this matter is not immediately appealable. An order denying arbitration is immediately appealable. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34-35, 524 S.E.2d 839, 842 (Ct. Ap. 1999) (noting section 16 of the FAA explicitly provides for an appeal from an order denying a motion to compel arbitration and holding that "'an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration; [or] *refuses to compel arbitration* . . . is immediately appealable, even if interlocutory.'" (quoting *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991))). Regardless of how the motion was styled or captioned, Appellants requested only that arbitration be compelled. Focusing, as we must, on substance rather than nomenclature, because Appellants sought only the precise relief afforded under the FAA, we find the trial court's refusal to compel arbitration is immediately appealable. *See Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 698 (4th Cir. 2012) (citing *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012)) (noting that "the proper inquiry focuses on substance rather than nomenclature" and instructing

## II.

Appellants argue the trial court erred in finding the arbitration provisions of the Contract cannot be enforced because the parties' transaction did not involve interstate commerce. We agree.

We find arbitration pursuant to the FAA is proper because the underlying marina construction transaction falls within the purview of Congress's commerce power. "Generally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA." *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)). The United States Supreme Court "has previously described the [FAA]'s reach expansively as coinciding with that of the Commerce Clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995) (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987)). Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce. *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977).

Under the reach of the Commerce Clause, "Congress has authority to regulate (1) 'the use of the *channels* of interstate commerce,' (2) 'the *instrumentalities* of interstate commerce, or persons or things in interstate commerce . . .' and (3) 'those activities having a *substantial relation* to interstate commerce.'" *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). "Channels of commerce are 'the interstate transportation routes through which persons and goods move.'" *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005) (quoting *Morrison*, 529 U.S. at 613 n.5) (noting channels of interstate commerce include highways, railroads, navigable waterways, airspace, telecommunications networks and even national securities markets). "Instrumentalities of interstate commerce, by contrast, are the people and things

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courts to "look to whether a motion evidences a clear intention to seek enforcement of an arbitration clause rather than [to] whether it adhered to a specific form or explicitly referenced §§ 3 or 4 [of the FAA]"); *see also* S.C. Code § 15-48-200(a)(1) (providing for an appeal from an order denying an application to compel arbitration).

themselves moving in commerce . . . ." *Id*. at 1226 (identifying automobiles, airplanes, boats, shipments of goods, pagers, telephones and mobile phones as instrumentalities of interstate commerce).

Here, despite noting the following facts, the trial court concluded the parties' transaction did not involve interstate commerce: (1) that certain raw materials used in constructing the marina originated in Ohio; (2) that Cape Romain transported the raw materials on its equipment and barges through the navigable waterways of the Charleston Harbor and up the Wando River to the project site; and (3) that the marina was constructed in navigable waterways under a permit issued by the Army Corps of Engineers. In analyzing the interstate commerce question solely as whether the Contract on its face reflected a "substantial relation to interstate commerce" and in finding the FAA was not triggered, the trial court relied upon *Timms v. Greene*[5] and *Matthews v. Fluor Corporation.*[6] This was error, for the proper analysis involves consideration of all three broad categories of activity within the purview of Congress's commerce power—use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). While the

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[5] 310 S.C. 469, 427 S.E.2d 642 (1993). We overrule *Timms* to the extent it determined the FAA did not apply because the contract *on its face* failed to demonstrate that the parties contemplated an interstate transaction. *See Muñoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001) (holding that although parties may not have contemplated an interstate transaction at the time of contract formation, if their contractual relationship in fact involves interstate commerce, then the FAA nonetheless applies); *see also Allied-Bruce*, 513 U.S. at 277-78 (rejecting the argument that the FAA applies only where the parties contemplated an interstate transaction and finding the FAA applies where an agreement that contains an arbitration provision, on the whole, evidences a transaction that in fact affected interstate commerce); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001) ("The [United States] Supreme Court utilizes a 'commerce in fact' test to determine if the transaction involves interstate commerce for the FAA to apply.").

[6] 312 S.C. 404, 440 S.E.2d 880 (1994), overruled by *Muñoz*, 343 S.C. at 539 n.3, 542 S.E.2d at 363 n.3.

transaction's effect on interstate commerce was by no means insubstantial, the parties' transaction plainly falls within the purview of Congress's commerce power as it extensively involves both the channels and the instrumentalities of interstate commerce.

We initially observe that the materials used in constructing the dock were instrumentalities of interstate commerce, as they were manufactured or fabricated in Ohio and transported to South Carolina to be used in constructing the marina. In addition, Cape Romain consulted with an out-of-state engineering and survey company in connection with the installation of the dock sections. This Court has previously held that incorporating out-of-state materials and consulting with out-of-state professionals in connection with a construction project are indicators of interstate commerce. *See Zabinski*, 346 S.C. at 594-95, 553 S.E.2d at 117-18 (utilization of out-of-state materials, contractors and investors implicates interstate commerce); *Episcopal Housing*, 269 S.C. at 640, 239 S.E.3d at 652 (use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (finding consultation with out-of-state technicians is an indicator of interstate commerce).

Regarding channels of interstate commerce, as noted, the construction site is located on the Wando River—i.e., within a channel of interstate commerce—as evidenced by the need for the Army Corps of Engineers to issue a federal permit before construction could begin.[7] Moreover, in performing its duties under the Contract, Cape Romain used barges to transport materials and equipment through various navigable waterways and as construction platforms adjacent to the marina site. Thus, the location of the construction site, the transportation of out-of-state materials through the channels of interstate commerce, and the use of barges and other instrumentalities of interstate commerce all support application of the FAA in this instance. *See United States v. Rands*, 389 U.S. 121, 122-23 (1967) ("The power to regulate commerce comprehends the control for that purpose, and to the

[7] The permit references federal regulations regarding the Department of the Army's regulatory authority over navigable waters and states the purpose of the project is to construct a marina to provide docking space for boats (instrumentalities of interstate commerce) and access to navigable waters (channels of interstate commerce).

extent necessary, of all the navigable waters of the United States."); *Ballinger*, 395 F.3d at 1226 (noting that shipments of goods and boats themselves are instrumentalities of interstate commerce); *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003) ("The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce.").

Even if we were to view this case only through the third category of the federal commerce power—regulation of activities having a substantial relation to interstate commerce—the record demonstrates that the activities implicated in this marine construction project bear on interstate commerce in a way sufficiently substantial to invoke the FAA. *See Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) ("Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent ' a general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way."). Particularly when the commercial aspects of this transaction are considered in the aggregate pursuant to *Citizens Bank v. Alafabco*, it is clear the trial court erred in finding the FAA did not apply.

Because the transaction did involve interstate commerce, we turn to the question of whether arbitration should be compelled under the Contract.

"Arbitration is contractual by nature . . . ." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *see also Towles*, 338 S.C.at 37, 524 S.E.2d at 843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."). "'There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.'" *Bradley v. Brentwood Homes, Inc*., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (quoting *Towles*, 338 S.C. at 37, 524 S.E.2d at 844). "This policy [favoring arbitration], as contained within the Act, 'requires courts to enforce the bargain of the parties to arbitrate.'" *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see also Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 ("'The FAA simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989))). "[C]ourts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* the

parties choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'" *Am. Exp. Co. v. Italian Colors Rest.*, No. 12-133, slip op., at 3 (U.S. filed June 20, 2013) (internal citations omitted). Thus, the FAA "does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in the parties' agreement.'" *Volt Info. Scis.*, 489 U.S. at 474-75 (quoting 9 U.S.C. § 4).

Section 19.2 of the Contract expressly invokes the FAA and such contractual provisions should be enforced in accordance with their unambiguous terms. *See Dean Witter*, 470 U.S. at 221 (noting that the "preeminent concern" in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce "rigorously" those terms upon which private parties have agreed); *Muñoz*, 343 S.C. at 538, 542 S.E.2d at 363-64 (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms). We hold it was error to refuse to compel arbitration.

Initially, we note Cape Romain has never challenged the arbitrability of the mechanics' lien claim—only the applicability of the FAA. Moreover, the issues involved in Cape Romain's mechanics' lien claim against Wando E. are completely dependent on the breach of contract dispute between Cape Romain and Barnes. *See Sea Pines Co. v. Kiawah Island Co.*, 268 S.C. 153, 159, 232 S.E.2d 501, 503 (1977) (observing that where no debt is owed under a construction contract, no mechanics' lien is proper); *Glidden Coatings & Resins v. Suitt Const. Co.*, 290 S.C. 240, 244, 349 S.E.2d 89, 91 (Ct. App. 1986) (finding the predicate for recovery under a mechanics' lien suit is the existence of an unpaid debt); *Blackwell v. Blackwell*, 289 S.C. 470, 472-73, 346 S.E.2d 731, 732-33 (Ct. App. 1986) (noting that a lien is valid only to the extent the underlying obligation it secures is valid); *Shelley Const. Co., Inc. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 26, 336 S.E.2d 488, 489 (Ct. App. 1985) (a mechanics' lien is given to secure payment of the debt due for labor performed or materials furnished during construction). Thus, we are able to determine "with positive assurance" that the mechanics' lien claim arises directly from the Contract and, therefore, is encompassed by the arbitration agreement. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered."); *Towles*, 338

S.C. at 41, 524 S.E.2d at 846 ("Therefore, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."). Accordingly, we hold the mechanics' lien claim must be arbitrated.[8]

As a final matter, the trial court found Wando E. could not compel arbitration because it was not a party or signatory to the Contract between Cape Romain and Barnes. While Wando E., as a non-contracting party, may lack standing to compel arbitration, Barnes certainly has standing to do so. Appellants are correct that, in any event, Wando E. could join arbitration, once compelled pursuant to Barnes' motion.

The Contract provides:

> **§ 21.6** Any party to an arbitration may include by joinder persons or entities *substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration* provided that the party sought to be joined consents in writing to such joinder. . . . .
>
> **§ 21.7** The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by

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[8] Our finding is not precluded by section 21.2 of the Contract, which addresses mechanics' lien claims and allows a party to "proceed in accordance with applicable law to comply with the lien notice or filing deadlines." *See* S.C. Code § 29-5-90 (lien must be filed within 90 days of ceasing to furnish labor or materials); S.C. Code § 29-5-120 (suit to enforce the lien must be commenced within six months after ceasing to furnish labor or materials or the lien is dissolved). Reading section 21.2 in conjunction with the Contract as a whole (particularly the balance of article 21), we find section 21.2 does not alter the agreement to arbitrate all "[c]laims disputes and other matters in question arising out of or relating to this Contract"; rather, section 21.2 merely creates a narrow exception permitting a party to preserve a mechanics' lien through timely filings. Indeed, nothing in the Contract excludes the mechanics' lien claim from the scope of the arbitration clause. To find otherwise would be to construe the Contract to defeat its very purpose: the resolution of all related disputes in one, agreed-upon forum—arbitration. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 ("[T]he range of issues that can be arbitrated is restricted by the terms of the agreement.").

> parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

(emphasis added).

Applying state-law principles of contract interpretation, we find as a matter of law that Wando E. is an entity who is "substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration." Therefore, under the unambiguous terms of the Contract between Barnes and Cape Romain, Wando E. may properly be joined as a party to the arbitration proceedings. *See Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 162, 588 S.E.2d 112, 115 (2003) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."); *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (noting "[t]he court's duty is 'limited to the interpretation of the contract made by the parties themselves'" (quoting *C.A.N. Enters. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988))).

**III.**

We therefore conclude the trial court erred in denying the motion to compel arbitration. Because arbitration will proceed, the trial court proceedings shall be stayed pending the outcome of arbitration. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) ("This stay-of-litigation provision is mandatory. A district court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview.").

**REVERSED AND REMANDED.**

**TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.**

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

Perrin Babb, Debbie Babb, Wayne Elstrom, Sarah Elstrom, Alan Jackson, and Kathy Jackson, Plaintiffs,

v.

Lee County Landfill SC, LLC, Defendant.

Appellate Case No. 2012-212741

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**CERTIFIED QUESTION**

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, Jr., United States District Judge

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Opinion No. 27299
Heard March 19, 2013 – Filed August 14, 2013

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**CERTIFIED QUESTION ANSWERED**

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Gary W. Poliakoff and Raymond P. Mullman, Jr., both of Poliakoff & Associates, P.A., of Spartanburg; John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia; William E. Hopkins, Jr., of Hopkins Law Firm, LLC, of Pawley's Island; and Richard H. Middleton, Jr., of The Middleton Firm, L.L.C., of Savannah, Georgia, all for Plaintiffs.

Kevin A. Dunlap, of Spartanburg, Pamela Baker, of Columbia, and Steven D. Weber, of Charlotte, North Carolina, all of Parker Poe Adams & Bernstein LLP; and William G. Beck, of Lathrop & Gage LLP, of Kansas City, Missouri, all for Defendant.

Amy Elizabeth Armstrong, of S.C. Environmental Law Project, of Pawley's Island, for Amicus Curiae Coastal Conservation League, South Carolina Wildlife Federation and Upstate Forever.

Elizabeth B. Parlow, of Ogletree, Deakins, Nash, Smoak & Stewart, PC, of Columbia, for Amicus Curiae National Solid Wastes Management Association, et al.

Ben A. Hagood, Jr., of Moore & VanAllen, PLLC, of Charleston, Mark T. Stancil, of Robbins, Russell, Engleert, Orseck, Untereiner & Sauber, LLP, of Washington, DC, for Amicus Curiae The Chamber of Commerce of the United States of America.

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**JUSTICE HEARN:** Brought in federal district court on claims arising from offensive odors migrating from a landfill onto the plaintiffs' properties, this case comes to this Court for the resolution of several issues of law. The certified questions herein require us to delve into the gray areas of common law, environmental torts. Specifically, we consider the measure of damages for trespass and nuisance claims, the requirement that a physical, tangible invasion occur for a trespass to arise, the existence of a negligence claim based on odors, and the requirement of expert testimony to establish the standard of care of a landfill operator.

## FACTUAL/PROCEDURAL HISTORY

The plaintiffs, six individuals residing near a landfill operated by defendant Lee County Landfill SC, LLC (the Landfill) in Bishopville, South Carolina, initiated this action seeking to recover for substantial interference with the use and

enjoyment of their property caused by odors emanating from the landfill. The plaintiffs asserted nuisance, trespass, and negligence claims based on the odors. Both before and during trial, the plaintiffs abandoned all claims for loss of use, diminution in property value, and personal injury, leaving only annoyance, discomfort, inconvenience, interference with enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility as their damages claims.

Following a trial, the jury awarded the plaintiffs actual or compensatory damages totaling $532,500 on their negligence, trespass, and nuisance claims, with three plaintiffs receiving $77,500 and three receiving $100,000. The jury also awarded each plaintiff $300,000 in punitive damages. The Landfill filed motions for judgment as a matter of law or alternatively for a new trial. After determining that South Carolina precedent was not clear on state law issues raised in the post-trial motions, the District Court certified five questions to this Court.

## CERTIFIED QUESTIONS

The five questions, as certified to this Court by the United States District Court for the District of South Carolina, read:

1. Under South Carolina law, when a plaintiff seeks recovery for a temporary trespass or nuisance (asserting claims for annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility and abandoning all claims for loss of use, diminution in value, and personal injury), are the damages limited to the lost rental value of the property?

2. Does South Carolina law recognize a cause of action for trespass solely from invisible odors rather than a physical invasion such as dust or water?

3. Is the maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action (temporary or permanent) the full market value of the plaintiffs' property where no claim for restoration or cleanup costs has been alleged?

4. When a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, may the plaintiff maintain an independent cause of action for negligence or is the plaintiff limited to remedies under trespass and nuisance?

5. If an independent cause of action for negligence exists under South Carolina law when a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, does the standard of care for a landfill operator and breach thereof need to be established through expert testimony?

## LAW/ANALYSIS

## I. TEMPORARY TRESPASS AND NUISANCE DAMAGES

The first question asks whether the lost rental value of property is the maximum amount of damages recoverable for a temporary trespass or nuisance.[1] While the Landfill argues that the temporary trespass and nuisance damages are limited to the lost rental value of the property, the plaintiffs argue that in addition to this measure of damages, they can also recover separate damages for annoyance, discomfort, and inconvenience. Specifically, the plaintiffs argue they can recover for "damages to the person incurred through the loss of enjoyment of the property." We answer this question in the affirmative, holding the damages recoverable for a temporary trespass or nuisance are limited to lost rental value.

From their earliest inception through the present day, the actions of trespass and nuisance have been limited to one's interest in property, rather than providing any protection to one's person. Trespass, as that term is used here,[2] arose from the

[1] The general concept of nuisance covers both public and private nuisances. Here, plaintiffs asserted only a private nuisance claim, and herein, the term "nuisance" is used solely to connote a private nuisance.

[2] While trespass may mean any "unlawful act committed against the person or property of another," and in that sense is the mother of all common law tort liability, we use it here in the form in which it is now generally used to mean an action to recover for an unlawful entry by another onto one's real property. *Black's Law Dictionary* 1541 (8th ed. 1999); *see also* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 361 (1951) (explaining trespass's role as the ancestor of modern torts). With the development of tort law over the intervening centuries, those other forms of trespass have become their own distinct causes of action with their own names.

medieval assize of novel disseisin[3] which was created for the protection of a landowner's interest in the exclusive possession of land. George E. Woodbine, *The Origins of the Action of Trespass*, 33 Yale L.J. 799, 807 (1924); *see also* Theodore F.T. Plucknett, *A Concise History of the Common Law* 369–70 (5th ed. 1956). Glanville, the great medieval legal scholar who was the first to comment upon the assize of novel disseisin, wrote that it existed to aid a person when another "unjustly and without a Judgment, has disseised another of his Freehold." R. Glanville, *The Treatise on the Laws and Customs of the Realm of England*, bk. XIII, ch. XXXII (John Beames trans. 1900). Thus, Glanville recognized the assize as limited to protection of one's property interests.

Developing from the assize of novel disseisin came the assize of nuisance, modern nuisance's medieval ancestor. *See* Restatement (Second) of Torts § 821D (1979); Bradford W. Wyche, *A Guide to the Common Law of Nuisance in South Carolina*, 45 S.C. L. Rev. 337, 340 (1994). The new writ also protected a landowner from interference with his rights in land and "closely resembled the modern cause of action for private nuisance, providing redress for interference with the use and enjoyment of plaintiff's land resulting from acts committed on the defendant's land." Jeff L. Lewin, *Boomer and the American Law of Nuisance*, 54 Alb. L. Rev. 189, 193 (1990); *see also* Restatement (Second) of Torts § 821D (stating that the assize of nuisance provided redress where there was an "indirect damage to the land or an interference with its use and enjoyment").

Blackstone, writing centuries later, described a trespass as a "species . . . of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments." 3 William Blackstone, *Commentaries* *209. He went on to describe a trespass as "an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property," and explained that the trespass cause of action protects a property owner's right to exclusive possession of his land. *Id.* Blackstone also wrote that a nuisance was a "real injur[y] to a man's lands and tenements," describing a private nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." *Id.* at *216. Thus, Blackstone recognized trespass and nuisance as actions protecting and limited to one's property rights.

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[3] "Disseisin" is "[t]he act of wrongfully depriving someone of the freehold possession of property." *Black's Law Dictionary* 506 (8th ed. 1999).

Arising from that common law heritage, under South Carolina law trespass and nuisance are limited to the protection of property interests. A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan v. Greenville Cnty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). A nuisance, trespass's counterpart, provides a remedy for invasions of a property owner's right to the use and enjoyment of his property. *Clark v. Greenville Cnty.*, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) ("Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" (quoting *Peden v. Furman Univ.*, 155 S.C. 1, 16, 151 S.E.2 907, 912 (1930))).

Furthermore, the Restatement (Second) of Torts bolsters this conclusion by recognizing that those causes of action are limited to one's property rights, stating that "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an interference with the interest in the private use and enjoyment of the land . . . ." Restatement (Second) of Torts § 821D (1979). It goes on to provide:

> "Interest in use and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using lands is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself. This interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability of land . . .

*Id.*

To the extent South Carolina's trespass and nuisance case law discusses annoyance, discomfort, interference with the enjoyment of property, loss of enjoyment of life, or interference with mental tranquility, those cases speak in terms of injury to one's property interest in the use and enjoyment of property. For example, in *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 86 S.E. 817 (1915), the plaintiff brought a nuisance action against a fertilizer plant near her home based on odors, dust, and small particles emanating from the plant. The Court held that

allegations the plaintiff's mother and sister lived with her and suffered annoyance and discomfort due to the plant were relevant only because they tended to show "the nature and extent of the plaintiff's damages, since she has the right to have them live with her and enjoy the comforts of her home." *Id.* at 449, 86 S.E. at 819. Thus, the Court found the annoyance and discomfort allegations were relevant because they went to the harm to the plaintiff's property interest in the use and enjoyment of her property.

In *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 48 S.E.2d 329 (1948), work at a nearby quarry vibrated the plaintiff's home, threw dust and dirt onto her property, and subjected the home's inhabitants to loud noises. *Id.* at 330, 48 S.E.2d at 498. The plaintiff brought a nuisance action against the quarry, and the quarry later appealed the trial court's denial of the motion to strike from the complaint allegations that the plaintiff and her family's comfort and health had been impaired by work at the quarry. *Id.* at 449, 48 S.E. at 330–31. The Court found no error and held that while the allegations concerning the plaintiff's family members would not *alone* support a verdict, the allegations were "proper for a full statement of the alleged damages to the plaintiff *as the owner of her home*." *Id.* at 499–500, 48 S.E.2d at 331 (emphasis added). Again, the Court found the allegations relevant only because they were tied to the plaintiff's property interest in the use and enjoyment of the property.

In *Lever v. Wilder Mobile Homes, Inc.*, 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984), the plaintiff brought a nuisance action alleging the defendant's sewage lagoon emitted offensive odors and leaked sewage into the plaintiff's fish pond, polluting the pond and killing his fish. The defendant appealed the denial of its motions for directed verdict and judgment notwithstanding the verdict. *Id.* at 454, 322 S.E.2d at 693. The court of appeals found evidence establishing a nuisance in the form of testimony that the plaintiff could no longer host family picnics or church groups on the property and could no longer garden there. *Id.* at 454, 322 S.E.2d at 694. That evidence was not considered because of the harm the plaintiff suffered personally, but because it represented a loss of use and enjoyment of the property, as shown by the court relating the alleged harm back to the ability to use and enjoy the property.

Thus, from their inception through to today, trespass and nuisance have been actions limited to the protection of one's property interests. They have never

served to protect against harms to one's person.[4] To permit plaintiffs to recover for annoyance and discomfort to their person as a component of trespass or nuisance damages, as opposed to as related to their property interests, would be to unhinge trespass and nuisance from the traditional property locus and transform them into personal injury causes of action. Not only would it represent a drastic expansion of trespass and nuisance beyond the realm of property, it would also represent a fundamental change in our tort law jurisprudence which does not permit recovery for sheer annoyance and discomfort. *See Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984) (declining to recognize a negligent infliction of emotional distress cause of action and holding that damages for emotional distress are generally not recoverable in a negligence action absent some physical manifestation). In short, allowing recovery for personal annoyance and discomfort under the guise of trespass and nuisance would be the stealth recognition of an entirely new tort.

The damages recoverable for trespass and nuisance being strictly limited to damages to one's property interests, the only proper measure of them is the value of the property. A well-known principle of property law is that property consists of a bundle of rights. The value of a piece of property is the value of all of the rights one obtains through ownership of the property. Thus, included in the value of property are the rights of exclusive possession and use and enjoyment protected by the trespass and nuisance causes of action respectively. To the extent those interests are harmed by a temporary trespass or nuisance, the harm would be reflected in the lost rental value of the property. *See S. Ry. Co. v. Routh*, 170 S.W. 520, 521 (Ky. Ct. App. 1914) (holding that in measuring the damages for a nuisance, "the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use. It is not, therefore, proper to permit a recovery both for the diminution in the value of the use and for annoyance and discomfort, which necessarily enter into and constitute a part of the diminution of such value. To do so is to allow a double recovery.").

[4] Rather, over time the common law developed numerous causes of action—for example, battery and negligence—to permit a plaintiff to recover for harm to his person. Of course, a trespass or nuisance plaintiff also has those causes of action available to him to recover for harm to his person in addition to harm to his land.

In other words, lost rental value includes the annoyance and discomfort experienced as the result of a temporary trespass or nuisance. The lost rental value of the property is the difference between the rental value absent the trespass or nuisance and the rental value with the trespass or nuisance. The rental value with the trespass or nuisance present would be less, in part, because a hypothetical renter would have to suffer the annoyance and discomfort of the nuisance or trespass. Thus, the lost rental value measures the monetary value of the harm to the property interest. Furthermore, because lost rental value includes damages caused by annoyance or discomfort, to permit a plaintiff to recover both the lost rental value plus an additional sum for annoyance and discomfort would be to permit a double recovery.

We have already recognized the lost rental value of property as the measure of and limit on damages for a temporary harm to property in our decision in *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971). There, the plaintiff asserted a negligence claim against the defendant for pumping gasoline into a creek behind the plaintiff's home which later ignited, setting the creek ablaze. *Id.* at 561, 183 S.E.2d at 439. At trial, the defendant was granted an involuntary nonsuit on the ground the plaintiff had not sustained any actual or physical damages. *Id*. at 561–62, 183 S.E.2d at 439. Reviewing the grant of involuntary nonsuit, the Court stated:

> The general rule is that in case of an injury of a permanent nature to real property, by the pollution of a stream, the proper measure of damages is the diminution of the market value by reason of that injury, or in other words, the difference between the value of the land before the injury and its value after the injury. Where the pollution of a stream results in a temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property caused by the pollution.

*Id.* at 569, 183 S.E.2d at 443. Thus, while not explicitly using the terms trespass or nuisance, the Court held that lost rental value is the proper measure of damages for a temporary harm to real property, which would include a temporary trespass or nuisance. *See also Ravan*, 315 S.C. at 465, 434 S.E.2d at 307 ("The measure of damages for permanent injury to real property by pollution, whether by nuisance, trespass, negligence, or inverse condemnation is the diminution in the market value of the property." (citing *Gray*, 256 S.C. at 569, 183 S.E.2d at 443)).

Contrary to the plaintiffs' assertions, the case of *Threatt v. Brewer Mining Co.*, 49 S.C. 95, 26 S.E. 970 (1897), does not establish otherwise. There, a farmer sued a neighboring mining operation for damage to the farmer's lands and odors from mining waste deposited into a waterway and from there onto the farmer's land. In the *Threatt* opinion, this Court wrote:

> [T]his plaintiff is entitled to have the defendant to pay him damages for thus ruining, for the time, at any rate, his fertile bottoms. In the measure of the damages to the plaintiff for the injuries to his thirty-five acres of bottom lands, the jury should be limited, in ascertaining his damages, to the difference in the value of the lands from 8th May, 1890, to the date plaintiff brought his suit. But in the assessment of his damages from having a tainted—bad smelling—deposit thrown upon his bottom lands and in his ditches, they (the jury) are not limited to the actual injury in the market value of those lands from 8th May, 1890, to the date, in May, 1893, when the suit was brought; but they may find a reasonable, just compensation by way of damages to the plaintiff for this matter. This deposit has a threefold injury—first, it destroys the fertility of the lands; second, by filling up the ditches, it causes water to stand upon other parts of the land; and, third, the deposits exhale noxious odors. For the first and second injuries, the verdict must be limited to the depreciation in the market value caused by the deposits from 8th May, 1890, to May, 1893. As to the third, the jury must estimate in dollars and cents what the bad odors from these deposits, between the same dates, may have damaged the plaintiff, if any such damage has occurred.

*Threatt*, 49 S.C. 95, 134, 26 S.E. 970, 983. We do not find that language to be controlling or even persuasive as to the issue before this Court. First, it states only that the jury may award damages in the amount the odors "damaged the plaintiff," but does not specify whether that means injury to the plaintiff's property interests or injury to the plaintiff's person. In other words, there is no clear holding that a party may recover for personal injury through a trespass or nuisance action. To the contrary, the opinion states that "[w]hat the plaintiff in the case at bar really seeks is to prevent the defenda[n]t, through its milling operations, from invading *his right to property*," and then goes on to describe each of the alleged damages, including the odors as an "element in this invasion of his right of property." *Id.* at 128, 26 S.E. at 981 (emphasis added). Furthermore, to the extent *Threatt* could be

read as holding that trespass and nuisance damages extend to personal injury and beyond lost rental value, we believe *Threatt* was wrongly decided and directly contradicts our more recent decision in *Gray*.

We now explicitly extend the holding in *Gray* to cover trespass and nuisance claims for the reasons previously stated. Accordingly, we answer the certified question in the affirmative, holding that the lost rental value of property is the sole measure of temporary trespass and nuisance damages.

## II. TRESPASS FROM INVISIBLE ODORS

The second certified question asks whether South Carolina law recognizes a cause of action for trespass solely from invisible odors, rather than from a physical invasion such as dust or water. The plaintiffs argue South Carolina has abandoned the traditional rule that a trespass requires an invasion of property by a physical, tangible thing, and thus, the Court should recognize odors as constituting a trespass. The Landfill argues for the traditional rule, asserting that odors, due to their intangibility, cannot constitute a trespass, but rather, only may give rise to a nuisance cause of action. We hold that South Carolina adheres to the traditional rule requiring an invasion by a physical, tangible thing for a trespass to exist, and accordingly, hold that odors cannot give rise to a trespass claim.

We first note the relevant distinctions between the trespass and nuisance causes of action which presumably give rise to the plaintiffs' arguments that intangible intrusions should be sufficient to constitute a trespass. First, recovery under a nuisance claim requires proof of actual and substantial injury, whereas trespass entitles a plaintiff to nominal damages even in the absence of any actual injury. *See Green Tree Servicing, LLC v. Williams*, 377 S.C. 179, 184, 659 S.E.2d 193, 195–96 (Ct. App. 2008). Also, in order to rise to the level of an actionable nuisance, the interference or inconvenience must be unreasonable. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963). The unreasonableness requirement reflects the unavoidable reality that persons must suffer some inconvenience and annoyance from their neighbors for modern life to carry on. *Id.* For trespass, there is no requirement of unreasonableness. Rather, any trespass, however small and insignificant, gives rise to an actionable claim. *Green Tree*, 377 S.C. at 184, 659 S.E.2d at 195–96.

This Court has yet to consider the tangible versus intangible distinction for trespass actions, but the plaintiffs assert the court of appeals held in *Ravan* that

South Carolina no longer requires that an item be tangible in order to give rise to a trespass action. We find the *Ravan* decision contains no holding in relation to trespass by intangible things. There, the court of appeals affirmed a trial court's grant of a directed verdict for defendants on a trespass cause of action. *Ravan*, 315 S.C. at 465, 434 S.E.2d at 307. The court found there was no evidence the defendants' entry onto the plaintiffs' property was unauthorized, and thus, the trial court correctly granted a directed verdict on the claim. *Id.* at 464, 434 S.E.2d at 306. The opinion noted, anecdotally, "there is a trend in environmental law to recognize that the infiltration of contaminants onto a plaintiff's property constitutes as much an invasion of his possessory interest as the cutting of a tree on his property." *Id.* at 463, 434 S.E.2d at 306. Not only was that statement mere dicta in relation to the court's holding, the court merely noted the "trend" without claiming to adopt it. *See id.*

The traditional common law rule, the dimensional test, provides that a trespass only exists where the invasion of land occurs through a physical, tangible object. *See Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. Ct. App. 1999). Under that rule, intangible matter or energy, such as smoke, noise, light, and vibration, are insufficient to constitute a trespass. *Id.*; Larry D. Scheafer, Annotation, *Recovery in Trespass for Injury to Land Caused by Airborne Pollutants*, 2 A.L.R. 4th 1054 (discussing the traditional rule). More specifically, under that rule, courts have held that odors do not give rise to a trespass cause of action because they are intangible. *See, e.g.*, *Brockman v. Barton Brands, Ltd.*, No. 3:06-CV-332-H, 2009 WL 4252914, at *5 (W.D. Ky. Nov. 25, 2009) ("The odors . . . which are visibly undetectable and transient, are not sufficient to state a claim for trespass, because a trespass only occurs when an object or thing enters a person's property and interferes with his or her possession or control."); *Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 438–39 (Iowa 1942) (holding that the odors from a sewage treatment plant would not give rise to a trespass action); *Wendinger v. Frost Farms, Inc.*, 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) ("Because odors do not interfere with the exclusive possession of land, an allegation that a confined-animal feeding operation emits invasive odors does not state a claim for trespass.").

In reaction to modern science's understanding of microscopic and atomic particles, a divergent line of decisions have discarded the dimensional test and permitted recovery for trespass without regard to whether the intrusion was by a tangible object, but rather by considering the nature of the interest harmed.

Scheafer, *supra* (citing cases). The first seminal case in this line of decisions was *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959). There, the plaintiffs brought a trespass action against an aluminum smelter for fluoride gases and microscopic particulates they alleged the smelter emitted, which traveled through the air and settled on the plaintiffs' property. *Id.* at 791. The trial court entered a directed verdict for the plaintiffs, and the defendant appealed the trial court's ruling that the plaintiffs stated a trespass cause of action. *Id.* Dispensing with the dimensional test, the Oregon Supreme Court held the intrusion of fluoride was a trespass despite its intangible nature. *Id.* at 797. The court reasoned that while the fluoride particles were individually minute and invisible, each particle that entered the plaintiffs' property was a physical intrusion, and but for their size, would undoubtedly give rise to a trespass action. *Id.* at 792. The court also noted cases finding intrusions by very small objects constituted a trespass, citing cases in which shot from a gun, particles of molten lead, spray from a cooling tower, and soot were held to be a trespass. *Id.* at 793. Additionally, the court cited cases in which vibrations of the soil and concussion of the air created a trespass. *Id.* The court then concluded that drawing a line between tangible and intangible intrusions had become arbitrary in light of modern science, writing:

> It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E=mc^2$ has taught us that mass and energy are equivalents and that our concept of 'things' must be reframed.

*Id.* In light of those considerations, the court held the determination of whether an invasion of the right to exclusive possession occurred, and thus whether a trespass occurred, is best determined by consideration of the energy and force of the thing intruding upon a plaintiff's land. *Id.* at 794.

Tellingly, the *Martin* court then found it necessary to immediately backpedal in order to constrain the expansion of trespass liability created by discarding the dimensional test. The court recognized that trespass imposes strict liability upon a trespasser regardless of whether the trespass caused any damages, and thus, the court's new test created the potential for manufacturers to be held liable for even

the smallest intrusions. *Id.* at 796. The court also recognized that not all intrusions upon one's property are so great as to interfere with the right to exclusive possession. *Id.* at 794–95. Accordingly, the court imposed a substantiality test to distinguish trespassory intrusions from non-trespassory intrusions, holding that an in order to constitute a trespass, an intrusion must be of sufficiently substantial force and energy as to interfere with the right to exclusive possession. *Id.* The court also held that consideration of the plaintiff's use of his property is relevant to whether a trespass exists, with some uses of one's property being ones "the law does not wish to protect . . . from an invasion," and thus incapable of giving rise to a trespass cause of action. *Id.* at 794. Summarizing this new conception of trespass, the court wrote that it is "composed of components which include the character (including the magnitude) of the defendant's conduct in causing an intrusion and the character (including the magnitude) of the harm visited on the plaintiff in interfering with his interest in the exclusive possession of the premises." *Id.* at 795–96. However, as the court acknowledged, these modifications caused the trespass and nuisance causes of action to "coalesce." *Id.* at 795.

The next seminal decision in the divergent line was *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523 (Ala. 1979), where the plaintiffs sued a lead smelter for lead and sulfoxide emissions they alleged settled on and damaged their property. *Id.* at 525–26. After a discussion of *Martin*, the court noted that in adopting the *Martin* holding it "might appear, at first blush, . . . that every property owner in this State would have a cause of action against any neighboring industry which emitted particulate matter into the atmosphere, or even a passing motorist, whose exhaust emissions come to rest upon another's property." *Id.* at 529. However, the court found that *Martin*'s substantiality requirement obviates that concern. *Id.* Adopting the *Martin* rejection of the dimensional test, the court set forth a two-tiered concept of trespass. Where a trespass is "direct," as formerly required for a trespass to exist and including physical, tangible intrusions, there is no substantiality requirement and nominal damages may be awarded. *Id.* However, where the intrusion is indirect, including where the intrusion is intangible, the intrusion constitutes a trespass only if the plaintiff can show: "1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in

an invasion of plaintiff's possessory interest; and 4) substantial damages to the Res." *Id.*[5]

However, we find persuasive the Michigan Court of Appeals' rejection of this divergent line of decisions in *Adams v. Cleveland-Cliffs Iron Co*. There, the court adhered to the dimensional test, holding that intangible invasions are properly characterized as giving rise to nuisance or negligence actions and cannot give rise to a trespass action. *Adams*, 602 N.W.2d at 222. The court first noted that courts rejecting the dimensional test have been troubled by the principle that nominal damages are available for trespass, and in order to avoid "subjecting manufacturing plants to potential liability to every landowner on whose parcel some incidental residue of industrial activity might come to rest, these courts have grafted onto the law of trespass a requirement of actual and substantial damages." *Id.* at 221. But in adopting the substantiality requirement, those courts transmute the trespass cause of action into the nuisance cause of action. *Id.* The court went on to explain that "[w]here the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance." *Id.* at 222. Finally, the court found that the substantiality requirement inherent in the divergent view endangers the sanctity of the right to exclusive possession, explaining: "The law should not require a property owner to justify exercising the right to exclude. To countenance the erosion of presumed damages in cases of trespass is to endanger the right of exclusion itself." *Id.* at 221. Accordingly, the court concluded it would retain the dimensional test because it safeguards "genuine claims of trespass and keep[s] the line between the torts of trespass and nuisance from fading into a wavering and uncertain ambiguity." *Id.* at 223 (internal quotation omitted).

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[5] While rendered irrelevant by our holding herein, it is worth noting the *Borland* court explicitly stated that even after dispensing with the dimensional test and adopting the *Martin* rule, "[t]he classic cases of the barking dog, the neighboring bawdy house, noise, smoke, fumes, or *obnoxious odors* generally invoke the doctrine of the law of nuisance," rather than trespass, because "[t]hese intrusions do not typically result in any actionable damages to the Res; the injury caused by such acts usually results in a diminution of the use value of the property causally related to the harmful conduct made the basis of the claim." *Id.* at 530 (emphasis added).

We acknowledge that the dimensional test is an imperfect rule. It does not comport with modern science's understanding of matter and the relationship between matter and energy. However, we question whether any rule can perfectly distinguish between those things that intrude upon the right to exclusive possession of land and those that do not. The right to exclusive possession is an artificial construct incapable of precise definition or measurement and thus, defies the creation of a perfect rule to measure intrusions upon it.

Imperfections also plague the divergent line of decisions rejecting the dimensional test and their new form of trespass. The initial imperfection and that from which the others arise is that trespass is a strict liability theory under which a plaintiff may collect nominal damages for any intrusion regardless of whether it caused harm. The dimensional test traditionally stood as a bulwark excluding from trespass those intrusions not substantial enough to affect the right to exclusive possession. Without the dimensional test, even the most ephemeral intrusion—the exhaust from a passing car, the sound waves from neighbors talking, or even a sneeze that carry onto one's land—would constitute a trespass and an entitlement to at least nominal damages. In order to avoid that absurd result and the arresting effect it would have on modern life, those courts rejecting the dimensional test are compelled to adopt a substantiality requirement to distinguish between those intrusions substantial enough to constitute a trespass and those too insubstantial to do so.

Lacking a perfect measure of when one's right to exclusive possession has been infringed and comparing the merits and demerits of the dimensional test and the divergent view with its substantiality requirement, we conclude the dimensional test is superior to the divergent view. First, adoption of the substantiality requirement would seriously undermine the protection afforded the important right of exclusive possession, whereas the dimensional test maintains the strict liability protection afforded that right. Property is commonly conceptualized as a bundle of rights, and among the rights some are particularly fundamental and as such receive greater protection than others. For example, because human society cannot function without persons experiencing some reduction in the use and enjoyment of their property due to others' use of nearby property, nuisance law only protects landowners against substantial harm from others using their property unreasonably. However, the right of exclusive possession is fundamental. Without it, other rights in the bundle would be rendered nearly worthless. For example, one's ability to use and enjoy property would be severely curtailed by

others being permitted to come onto the property freely and do as they please. Accordingly, the common law has traditionally accorded absolute protection to the right of exclusive possession through trespass's provision of liability and damages for any trespass, no matter how insignificant. The divergent view's imposition of a substantiality requirement as an element of trespass removes the former strict protection of the right of exclusive possession and transforms trespass into nuisance. We believe the distinction between trespass and nuisance is important due to the extra protection needed for the right of exclusive possession. The dimensional test, while not perfect, provides a workable rule that roughly tracks the line between those things that interfere with the right to exclusive possession, and thus, are a trespass, and those that merely interfere with the right to use and enjoyment, and thus, are a nuisance.

Furthermore, the dimensional test possesses the virtues of clarity, ease of implementation, and ability to serve as a guide for future conduct. The substantiality requirement is a fact-specific, case-by-case rule, whereas the dimensional test, as applied to different intrusions over time, yields a stable rule as to what rises to the level of a trespass. Thus, the dimensionality test gives members of the public some idea of what constitutes a trespass and enables them to conform their conduct to the standard. The substantiality test would leave them uncertain as to whether they would be liable in trespass for certain actions. The rule would thus result in inefficient behavior because persons would forego some legally permissible and socially and economically beneficial activities due to uncertainty as to whether the activities would constitute a trespass under the substantiality test. *See* Issac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 262–64 (1974) (discussing the social costs and economic inefficiencies imposed by imprecise legal standards).

Finally, as previously discussed, the divergent view would transform trespass into nuisance. Nuisance already exists to remedy substantial harms to property, and thus, the divergent view leaves property owners with less, rather than more, protection of their property rights.

For these reasons, we answer this question in the negative. South Carolina does not recognize a trespass cause of action for invisible odors. Rather, South Carolina hews to the traditional dimensional test and only recognizes intrusions by physical, tangible things as capable of constituting a trespass.

## III. MAXIMUM RECOVERABLE DAMAGES FOR TRESPASS OR NUISANCE

The third certified question asks whether the damages for any trespass or nuisance action, temporary or permanent, are limited to the full market value of the plaintiff's property where no claim for restoration or cleanup costs were alleged. This question is related to the first question dealing with whether damages for temporary trespass and nuisance are limited to lost rental value, and the reasoning employed there applies with equal force here. Thus, for the reasons stated in regards to question one and having already held that the damages for temporary trespass or nuisance are limited to lost rental value, we hold that the damages for permanent trespass or nuisance in South Carolina are limited to the full market value of the property.

## IV. NEGLIGENCE CAUSE OF ACTION FOR OFFENSIVE ODORS

The fourth question asks whether a negligence cause of action may arise from a plaintiff's contact with offensive odors created by a defendant. We hold that while it may be possible for a plaintiff to recover in negligence for offensive odors, we stress that such a claim would have to satisfy the elements of negligence like any other claim, and the mere offensive *smell* of odors would not be enough.

To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages. *Sherrill v. Southern Bell Tel. & Tel. Co.*, 260 S.C. 494, 499, 197 S.E.2d 283, 285 (1973). Generally, under South Carolina law, the damages element requires a plaintiff to establish physical injury or property damage. Damages for emotional or mental suffering are typically not recoverable, unless there is some physical manifestation of the emotional distress. *See Dooley*, 283 S.C. 372, 322 S.E.2d 669 (declining to recognize a negligent infliction of emotional distress cause of action and holding that damages for emotional distress are generally not recoverable in a negligence action absent some physical manifestation). Thus, the mere annoyance, inconvenience, or discomfort a plaintiff may suffer from offensive odors is not sufficient to establish a negligence claim. Accordingly, we answer this question in the affirmative, but hold that a negligence claim based on offensive odors is subject to the same standard elements as any other negligence claim, including the limited damages upon which a negligence claim may be premised.

## V. STANDARD OF CARE

Finally, the fifth question asks, assuming a plaintiff can make out a negligence cause of action based on offensive odors that have migrated from a neighbor's landfill onto the plaintiff's property, must the standard of care for a landfill operator and breach thereof be established through expert testimony. The determination of whether expert testimony is required is a fact-specific inquiry that can only be made on a case-by-case basis, and due to the posture of this case and the limited record before this Court, we can do no more than state the guidelines to be applied in particular cases.

The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required. *See Green v. Lilliewood*, 272 S.C. 186, 192–93, 249 S.E.2d 910, 913 (1978). Conversely, where a lay person can comprehend and determine an issue without the assistance of an expert, expert testimony is not required. *See O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 349, 638 S.E.2d 96, 101 (Ct. App. 2006) ("[E]xpert testimony is not necessary to prove negligence or causation so long as lay persons possess the knowledge and skill to determine the matter at issue." (quoting F. Patrick Hubbard & Robert L. Felix, *The Law of South Carolina Torts* 167 (2d ed. 1997))). Deciding what is within the knowledge of a lay jury and what requires expert testimony depends on the particular facts of the case, including the complexity and technical nature of the evidence to be presented and the trial judge's understanding of a lay person's knowledge. *See Sharpe v. S.C. Dep't of Mental Health*, 292 S.C. 11, 14, 354 S.E.2d 778, 780 (Ct. App. 1987) ("The application of the common knowledge exception to the requirement of expert testimony in proving negligence depends on the particular facts of a case."). Ultimately, due to the fact-specific nature of the determination, it is a question that must be left within the discretion of the trial judge.

## CONCLUSION

For the reasons stated, we answer the certified questions as follows. As to question one, we hold the damages recoverable for a temporary trespass or nuisance claim are limited to the lost rental value of the property. As to question two, we hold a trespass exists only when an intrusion is made by a physical, tangible thing. As to question three, we hold the damages recoverable for a

permanent trespass or nuisance claim are limited to the full market value of the property. As to question four, while we recognize that a negligence claim based on offensive odors is possible, we stress that such a claim would have to satisfy all the elements of negligence like any other negligence claim. Finally, as to question five, we are unable to make a definitive determination as to whether establishing the standard of care of a landfill operator in regards to offensive odors requires expert testimony, but offer the guidelines for making such a determination and entrust that determination to the discretion of the trial judge.

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

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

Crouch Construction Company, Inc., Appellant,

v.

Bryan Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC, Respondents,

v.

GS2 Engineering and Environmental Consultants, Inc., Gist, Inc., Third Party Defendants.

Appellate Case No. 2011-195510

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Appeal from Lexington County
R. Ferrell Cothran, Jr., Circuit Court Judge

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Opinion No. 27300
Heard April 17, 2013 – Filed August 14, 2013

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**REVERSED AND REMANDED**

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Jean P. Derrick, of Lexington, for Appellant.

Gary A. Pickren, of Rogers Townsend & Thomas, PC, of Columbia, and Stephan V. Futeral, of Futeral & Nelson, LLC, of Mt. Pleasant, for Respondents.

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**JUSTICE KITTREDGE:** This is a direct appeal from an order of the circuit court vacating an arbitration award on the ground of the arbitrator's "evident partiality." S.C. Code § 15-48-130(a)(2) (2005). We reverse.

**I.**

This dispute arises from the construction of a commercial building in West Columbia, South Carolina. Before the undeveloped property was purchased, Respondent Bryan Causey hired GS2 Engineering and Environmental Consulting, Inc. (GS2) to perform an engineering analysis of the soils on the property to determine whether the land was suitable for construction. Following inspections and testing, GS2's engineering report indicated that the soils within a certain proximity of the surface were unsuitable and had to be removed and replaced with suitable soils.[1] Causey formed Causey Consulting, LLC (Causey Consulting) of which he is the sole member, and thereafter Causey Consulting purchased the property for the purpose of constructing the commercial building. Appellant Crouch Construction Company was retained as the general contractor. Based on GS2's initial report, the construction contract allowed $25,000 for "site work" to be conducted, which represented only a small part of the total contract amount of $616,538.

The parties' dispute began over the amount of unsuitable soils excavated from the building site. During construction, it became apparent that more unsuitable soil needed to be removed than was initially anticipated, and the removal of additional soil increased the cost of the project. The construction project was substantially completed by December 2008 and was occupied by Respondent Celebrations of Columbia, LLC, of which Causey is also a member.

When Appellant did not receive final payment for the work, it filed a mechanic's lien and a suit to foreclose the lien in March 2009, claiming a balance due under the construction contract in the amount of $114,158. Respondents denied any debt

[1] GS2's engineering report also included recommendations as to the optimum moisture content and the density to which the replacement fill material should be compacted.

to Appellant and raised various counterclaims seeking $296,018 in damages for incomplete and faulty construction work.[2]

In March 2010, the circuit court ordered arbitration pursuant to an arbitration clause in the construction contract. The parties agreed for attorney James Bruner of Bruner Powell Wall & Mullins, LLC, of Columbia, to serve as the arbitrator, and arbitration was conducted November 2-4, 2010. The arbitrator determined Appellant was owed $68,160 under the contract, plus interest, attorney's fees and costs.[3] Although two engineers from GS2—George Sembos and Chad Bruorton—testified as Appellant's fact and expert witnesses during the arbitration hearings, GS2 was not a party to the arbitration proceedings.

On February 3, 2011, Respondents filed their first motion to vacate the award, seeking to have it set aside based on several unfavorable evidentiary rulings and general allegations that the arbitrator manifestly disregarded the law. A hearing was conducted on February 14, 2011. At the conclusion of the hearing, the circuit court instructed the parties that it would deny Respondents' motion to vacate and instructed Appellant's counsel to prepare an order confirming the arbitration award. However, before an order was entered, Respondents learned "by happenstance" that an engineer employed by GS2, Jayson Floyd, was the brother of one of the arbitrator's law partners, Joey Floyd. As a result, on March 20, 2011, Respondents filed a supplemental motion to vacate the arbitration award, reiterating their previous arguments and raising several new claims, including that the arbitrator's failure to disclose his law partner's familial relationship with an employee of GS2 amounted to "evident partiality," requiring the award to be set aside.

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[2] Essentially, Respondents claimed the building's foundation was settling. Respondents sought to recover the $211,996 spent installing stabilization piers.

[3] In calculating the amount of the award, the arbitrator specifically found that Appellant's subcontractors had over-excavated approximately 1700 cubic yards of soil and that the outstanding contract balance must be reduced to remove charges for that unnecessary work. In addition, the arbitrator made several other reductions and adjustments reducing the amount sought by Appellant. However, Respondents were not awarded any offset based on the arbitrator's determination that the foundation was not settling.

The circuit court granted the motion to vacate the arbitration award, finding the arbitrator had a duty to discover and disclose his law partner's familial relationship with a GS2 employee and that the arbitrator's failure to do so was tantamount to evident partiality. In finding vacatur was warranted, the circuit court held the relevant legal standard for analyzing claims of evident partiality under section 15-48-130 is not the language of the statute itself, but rather, is the standard set forth in the South Carolina Code of Ethics for Arbitrators, which requires disclosure of any relationship that "might reasonably create an appearance of partiality or bias."[4] The circuit court concluded that the undisclosed relationship was "clearly the type of relationship" that created an appearance of partiality and, therefore, the award should be set aside. As an alternative holding, the circuit court found that, even if the "appearance of bias" standard was not applicable and the appropriate legal standard was that of the Fourth Circuit Court of Appeals in *ANR Coal Co. v. Cogentrix of North Carolina*,[5] Respondents met their burden of proving evident partiality. In so finding, the circuit court noted the existence of the undisclosed relationship and several unfavorable evidentiary rulings and vacated the arbitration award, concluding that, on the whole, the arbitrator's conduct demonstrated evident partiality in favor of Appellants.

Following the circuit court's denial of Appellant's motion to alter or amend, this appeal followed. The matter was certified to this Court pursuant to Rule 204(b), SCACR.

## II.

The circuit court's adoption of a legal standard for evaluating claims of evident partiality under section 15-48-130 is a question of law which we review de novo. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo."); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.").

Nevertheless, "'[g]enerally, an arbitration award is conclusive and courts will refuse to review the merits of an award.'" *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting *Gissel v. Hart*, 382 S.C. 235, 241, 676

[4] *Code of Ethics for Arbitrators* Canon II A(2), App. A, SCADRR.
[5] 173 F.3d 493 (4th Cir. 1999).

S.E.2d 320, 323 (2009)). "An award will be vacated only under narrow, limited circumstances." *Id.* "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring). In reviewing arbitration awards, "the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). "The reasons for this are not hard to identify." *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 700 (2d Cir. 1978). "There is an obvious possibility . . . that 'a suspicious or disgruntled party can seize' upon an undisclosed relationship 'as a pretext for invalidating the award.'" *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring)). Thus, we seek to discourage "the losing party to every arbitration" from "conduct[ing] a background investigation of each of the arbitrators in an effort to uncover evidence" to have the arbitration award set aside. *Merit Ins. Co.*, 714 F.2d at 683.

## III.

Appellant argues the circuit court applied an incorrect legal standard and erred in setting aside the arbitration award based on a finding that the arbitrator breached an ethical duty to discover and disclose that his law partner's brother was employed at GS2 at the time of the arbitration proceedings. We agree.

The South Carolina Code of Ethics for Arbitrators requires arbitrators to disclose the existence of interests or relationships that are likely to affect their impartiality or suggest that they are biased against one party or favorable to another. *Code of Ethics for Arbitrators* Canon II, App. A, SCADRR. However, an arbitrator is not required to provide the parties with "his complete and unexpurgated business biography" or "disclose interest[s] or relationships that are merely 'trivial.'" *Id.* at n.2. Before arbitration, the arbitrator initially ran a conflicts check through his law firm's database for each of the *parties*. That conflict check revealed no material interest or relationship, and thus, no disclosure was made. Subsequently, a few weeks before arbitration, the parties submitted witness lists, which the arbitrator reviewed to ensure he personally had no interest or relationship which would need to be disclosed.[6] Once again, no material interest was discovered, and no

[6] The same seven GS2 employees were named on both Appellant's and Respondents' potential witness lists.

disclosure was made. Although GS2's engineering recommendations related to the crux of the parties' construction dispute, there is no indication in the record of any direct social, professional or financial connection between the arbitrator and Jayson Floyd or any other GS2 employee at any time.

The circuit court improperly conflated a purported breach of the South Carolina Code of Ethics for Arbitrators with a factual showing that justifies setting aside an arbitration award. While an arbitrator's failure to disclose a material conflict of interest may constitute an ethical violation, the issue of whether such nondisclosure is unethical is separate and distinct from the issue of whether an arbitration award must be vacated due to evident partiality. To have an award set aside, it is not enough merely to aver that an arbitrator violated the Code of Ethics without any showing that the complained-of violation "created a substantial danger of an unjust result." *Merit Ins. Co.*, 714 F.2d at 682-83. *See ANR Coal*, 173 F.3d at 499 (finding that an arbitrator's failure to disclose in violation of the arbitration rules does not, in and of itself, constitute an independent basis for vacatur); *Merit Ins. Co.*, 714 F.2d at 680 ("[E]ven if the [arbitrator's] failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially. Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity . . . ."). Thus, mindful of the limited scope of judicial review of arbitration awards, we must discern the proper legal standard for evaluating claims of evident partiality.

In this case, the circumstances in which the arbitration award may be set aside are controlled by the South Carolina Uniform Arbitration Act[7] (SCUAA), which provides four[8] grounds for vacatur.[9] At issue here is the provision allowing an

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[7] S.C. Code §§ 15-48-10 to -240 (2005).

[8] Although it is not pertinent to our analysis, we acknowledge that an arbitration award also may be vacated based upon the non-statutory ground of manifest disregard of the law. *See C-Sculptures*, 403 S.C.at 56, 742 S.E.2d at 360 ("[A]n arbitrator's manifest disregard of the law, as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it.").

[9] Appellant now argues the provisions of the Federal Arbitration Act (FAA) are

arbitration award to be set aside where there was "evident partiality by an arbitrator appointed as a neutral . . . prejudicing the rights of any party." S.C. Code § 15-48-130(a)(2). We have no South Carolina precedent construing this standard. Although there are some differences between the language of the SCUAA and the Federal Arbitration Act (FAA),[10] both provide for an arbitration award to be vacated upon a showing of "evident partiality." *See* 9 U.S.C. § 10(a)(2) (an arbitration award may be vacated upon the application of any party "where there was evident partiality or corruption in the arbitrators"). Given the absence of state-law precedent interpreting section 15-48-130(a)(2), we find it is appropriate in this instance to look to federal interpretations of the FAA's "evident partiality" standard for guidance in interpreting the South Carolina statute.

The plain language of section 15-48-130(a)(2) requires a party to show partiality that is "evident"—namely, that which is "direct, definite, and capable of demonstration." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998) (construing the FAA's analogous "evident partiality" provision). "The word 'evident' suggests that the statute requires more than a vague appearance of bias." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013). "[T]he arbitrator's bias must be sufficiently obvious that a reasonable person would

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controlling because the underlying construction contract involved interstate commerce. However, Respondents' motion to vacate and the circuit court's order vacating the arbitration award both rely upon the "evident partiality" standard in section 15-48-130(a)(2) of the South Carolina Code—not the FAA—and Appellant failed to raise this issue below. Accordingly, it is not preserved for appellate review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))). Moreover, the presence of interstate commerce does not affect the applicability of state law here. *See Joseph v. Advest, Inc.*, 906 A.2d 1205, 1209-11 (Pa. Super. Ct. 2006) (finding state law applies even in the presence of interstate commerce so long as the particular provision of state law "does not conflict with the FAA's purpose of expeditious resolution of legal matters through arbitration"). Thus, our review concerns only the application of section 15-48-130 of the South Carolina Code.

[10] 9 U.S.C. §§ 1-16 (2012).

easily recognize it." *Id*. Therefore, to come within the statute's "strong language" requiring a showing of "evident partiality," the undisclosed facts must be "powerfully suggestive of bias." *Merit Ins. Co*., 714 F.2d at 681.

Notwithstanding the "strong language" of section 15-48-130(a)(2) requiring arbitral bias to be "evident," the circuit court found the proper legal standard for evaluating claims of evident partiality was whether the undisclosed facts might "create an appearance of partiality or bias." [11] This was error, for the analysis must begin with the language of the section 15-48-130(a)(2), and particularly the requirement that an arbitrator's partiality be "evident." *See State v. Whitesides*, 397 S.C. 313, 317, 725 S.E.2d 487, 489 (2012) (citing *Mid–State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)) (noting "[t]he words of [a] statute must be given their ordinary meaning "); *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) ("[A] court must abide by the plain meaning of the words of a statute."). Plainly, the word "evident" requires a party to show something "more than a vague appearance of bias." *Freeman*, 709 F.3d at 253 (distinguishing the legal standard embodied in the phrase "evident partiality" from the federal judicial standard requiring recusal

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[11] In so finding, the circuit court relied heavily upon *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). *Schmitz* represents a departure from prior cases decided by the Ninth Circuit Court of Appeals. *See, e.g*., *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("The party alleging evident partiality must establish specific facts which indicate improper motives on the part of the [arbitrator]. The appearance of impropriety, standing alone, is insufficient."). As noted by the Fifth Circuit Court of Appeals, as to the "appearance of bias" legal standard, "*Schmitz* is an outlier." *Positive Software Solutions, Inc. v. New Century Mortg. Corp*., 476 F.3d 278, 283 (5th Cir. 2007) (finding *Schmitz* constitutes an unwarranted extension of the language of *Commonwealth Coatings* and noting that, "[i]ronically, *Schmitz*'s 'mere appearance' standard would make it easier for a losing party to challenge an arbitration award for nondisclosure than for actual bias"). Respondents urge this Court to follow the circuit court in relying upon *Schmitz* and adopting a standard that allows an evident partiality finding on the mere "appearance of bias" and "an impression of possible bias." For the reasons discussed in this opinion, we reject *Schmitz* and the appearance-of-bias standard urged by Respondents and adopted by the circuit court.

"if a judge's impartiality might reasonably be questioned" (internal quotations omitted)). Thus, the language of section 15-48-130(a)(2) requires us to reject the appearance-of-bias standard applied by the circuit court. Further, although various courts may articulate slightly different formulations, our research reveals that a clear majority of courts reject the appearance-of-bias standard.[12]

Thus, consistent with the majority of courts, we reject the appearance-of-bias standard and find the approach that best comports with the language of section 15-48-130(a)(2) is that which requires the party seeking vacatur to "demonstrate 'that a reasonable person would have to conclude that an arbitrator was partial to the other

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[12] *See, e.g., Freeman*, 709 F.3d at 253 ("An arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side. The conclusion of bias must be ineluctable, the favorable treatment unilateral."); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) ("Unlike a judge, who can be disqualified in any proceeding in which his impartiality *might* reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side." (internal quotations and citations omitted)); *Positive Software Solutions*, 476 F.3d at 283 (noting that "evident partiality means more than a mere appearance of bias" and holding "in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding."); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) ("[T]he alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative, . . . [and] the mere appearance of bias or partiality is not enough to set aside an arbitration award."); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) ("[T]o invalidate an arbitration award on the grounds of bias, the challenging party must show that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."); *Morelite Construction Corp. v. NYC Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984) (noting the appearance-of-bias standard was so low that it effectively invalidated many of the goals of arbitration, including the benefit that arbitrators are generally knowledgeable about the field and have countless business relationships in that field, many of which would meet the appearance-of-bias standard, along with the goals of efficiency and cost minimization, both of which would be seriously undermined if disgruntled parties seek to invalidate the award in every case).

party to the arbitration.'" *ANR Coal Co. v. Cogentrix of North Carolina*, 173 F.3d 493 (4th Cir. 1999) (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 129 (4th Cir. 1995)) (applying the standard established in *Morelite Const. Corp. v. NYC Dist. Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984)).

"The evident-partiality standard is, at its core, directed to the question of [arbitrator] bias." *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 73 (2d Cir. 2012). "The party asserting bias 'must establish *specific facts* that indicate improper motives on the part of an arbitrator.'" *Freeman*, 709 F.3d at 252 (emphasis added) (quoting *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993)). "The movant carries a heavy burden in order to meet this onerous standard." *ANR Coal*, 173 F.3d at 501 (internal quotations and citations omitted). "In inquiring whether that burden has been satisfied, the court 'employs a case-by-case approach in preference to dogmatic rigidity.'" *Scandinavian*, 668 F.3d at 72 (quoting *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004)). "A conclusion of partiality can be inferred 'from objective facts inconsistent with impartiality.'" *Id*. (quoting *Pitta v. Hotel Ass'n of NYC*, 806 F.2d 419, 423 n.2 (2d Cir. 1986)).

"A court should examine four factors to determine if a claimant has demonstrated evident partiality: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding." *ANR Coal*, 173 F.3d at 500 (citing *Consolidation Coal*, 48 F.3d at 130). "When considering each factor, the court should determine whether the asserted bias is 'direct, definite and capable of demonstration rather than remote, uncertain or speculative' and whether the facts are sufficient to indicate 'improper motives on the part of the arbitrator.'" *Id*. (quoting *Consolidation Coal*, 48 F.3d at 129). "A party need not prove that the arbitrator, in fact, had improper motives." *Id*. "To do so would make the standard for evident partiality equivalent to proving actual bias." *Id*. at 500-01. "But a party seeking vacatur must put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." *Id*. at 501.

Additionally, "the Code [of Ethics] provides no basis for vacatur." *Id*. at 499 n.4. "Nor does an arbitrator have some general 'enhanced duty' to investigate." *Id*. Of

course, an arbitrator's failure to investigate material facts may be probative of evident partiality, but it is not dispositive of the issue. *Id*. "[M]ere nondisclosure does not in itself justify vacatur." *Id.* at 500-01. In nondisclosure situations, "[t]he question is whether the *facts* that were not disclosed suggest a material conflict of interest." *Scandinavian*, 668 F.3d at 77.

"[F]or a relationship to be material, and therefore require disclosure, it must be such that a reasonable person would have to conclude that an arbitrator who failed to disclose it was partial to one side." *Id.* at 76 (internal citations and quotations omitted). In doing so, courts "must focus on the question of how strongly that [undisclosed] relationship tends to indicate the possibility of bias in favor of or against one party, and not on how closely that relationship appears to relate to the facts of the arbitration." *Id*. at 75. "[E]ven if a particular relationship might be thought to be relevant to the arbitration at issue, that relationship will nevertheless not constitute a material conflict of interest if it does not itself tend to show that the arbitrator might be predisposed in favor of one (or more) of the parties." *Id*. at 75-76 (internal citation and quotations omitted).

We now examine the *ANR Coal* factors alongside the findings of the circuit court, beginning with the factors concerning the nature and extent of the relationship and the directness of the undisclosed relationship to the arbitration proceedings. In finding Respondents proved evident partiality, the circuit court acknowledged that GS2 was not a party to the arbitration. However, because the underlying dispute was centered around GS2's performance as a subcontractor and representatives of GS2 served as Appellant's expert witnesses during arbitration, the circuit court concluded that "the arbitrator had a personal interest in avoiding an award that impugned the professional integrity of the company managed by his law partner's brother." This finding is wholly unsupported by any objective fact in the record.

The facts here do not give rise to any objective finding of partiality. It is uncontroverted the arbitrator was unaware of the undisclosed relationship until several months after the arbitration award was made. In any event, the mere existence of this relationship alone does not establish bias and cannot, without more, demonstrate evident partiality, notwithstanding the fact that it may appear to relate to the facts of the arbitration. *See Scandinavian*, 668 F.3d at 75 (noting the analysis does not turn on whether the undisclosed relationship "appears to relate to the facts of the arbitration"); *ANR Coal*, 173 F.3d at 500-01 ("[M]ere nondisclosure does not in itself justify vacatur."). Although it would have been preferable for the arbitrator to have discovered and disclosed the relationship, under these facts,

vacatur was not required. Regarding the connection of the relationship to the arbitration, as previously noted, GS2 was not a party to the arbitration proceedings and the arbitrator has no direct relationship with Jayson Floyd, the GS2 employee. The undisclosed relationship is tenuous and remote, and we find the failure to disclose it is not "inconsistent with impartiality." *Scandinavian*, 668 F.3d at 72.

Further, the challenge in *ANR Coal* involved the arbitrator's relationship to a *party* to the arbitration—not merely to an entity that is a third-party defendant in the underlying litigation and employs several factual and expert witnesses who testified during the proceedings. While an arbitrator's undisclosed relationship with a non-party witness may, in an appropriate case, serve as the basis for a finding of evident partiality, the probability of bias must be objectively demonstrated.

Lastly, as to "the proximity in time between the relationship and the arbitration proceeding," there is evidence in the record that Jayson Floyd was employed by GS2 before and during the time of the arbitration proceedings. However, Jayson Floyd was not employed by GS2 during the time GS2 performed work on the construction project. Indeed, the project was substantially complete by December 2008, and Jayson Floyd was not hired by GS2 until August 2009. Moreover, we reiterate the uncontroverted fact that based on the record before us the arbitrator was *unaware of the relationship* at the time the award was rendered. Thus, it would be unreasonable for this Court to assume that the arbitrator reached his decision as a result of some sort of predisposition in favor of GS2; we therefore decline to do so. *See Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107, 112 (D.D.C. 1976) ("When the existence of a potentially prejudicial relationship is not known to an arbitrator, there is no possible way in which the relationship can affect his decision.").

Respondents have not met their burden of showing specific facts, directly or circumstantially, which demonstrate the arbitrator acted in a partial or biased manner. *See ANR Coal*, 173 F.3d at 501 (citing *U.S. Wrestling Fed'n v. Wrestling Div. of AAU, Inc*., 605 F.2d 313 (7th Cir. 1979)) (holding an arbitrator's connection with a non-party did not constitute evident partiality even though the non-party had a relationship with a party to the arbitration); *Cook Indus., Inc. v. C Itoh & Co.*, 449 F.2d 106 (2nd Cir. 1971) (upholding arbitration award even though one arbitrator was an employee of a company who had a major supply contract with a party to the arbitration). Just as the Fourth Circuit observed in *ANR Coal*, "it is

difficult to understand how the facts of this case demonstrate any 'personal interest' on [the arbitrator]'s part." *ANR Coal*, 173 F.3d at 502.

The circuit court misapprehended the burden of proof by seemingly requiring Appellant to disprove evident partiality, yet the circuit court's erroneous burden of proof allocation is one that naturally flows from an "appearance of bias" and "an impression of possible bias" standard. The burden of proof lies with the party seeking to have the arbitration award set aside. Here, instead of establishing specific facts indicating the arbitrator's bias or improper motives, Respondents simply showed that the arbitrator failed to disclose that one of his law partners has a brother who is employed by GS2.[13] From this remote and attenuated relationship, Respondents embarked on a campaign of nefarious speculation.

Evident partiality, as a statutory ground to vacate an arbitration award, requires a strong and objective showing of probable arbitrator bias. No case we have discovered in research or briefs has vacated an arbitration award for nondisclosure of such an obscure, tenuous relationship as the one here. *See ANR Coal*, 173 F.3d at 502 (finding the arbitrator's failure to disclose attenuated connections between his law firm and a party did not constitute evident partiality and did not permit nullification of the arbitration award, even if it violated AAA's arbitration rules); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir 1996) (finding no evident partiality demonstrated by fact that the arbitrator's former law firm had represented the prevailing party in matters unrelated to the arbitration); *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1139 (M.D. Fla. 1987) (where the brother of the arbitrator's law partner was once the personal attorney of a witness to the arbitration proceeding, the arbitration award was not vacated as the claimed basis was "remote, uncertain and speculative claim of bias, not enough to establish evident partiality"); *Sofia Shipping Co., Ltd. v. Amoco Transp. Co.*, 628 F. Supp. 116, 122 (S.D.N.Y. 1986) (finding that the arbitrator's failure to disclose his relationship with an employee and witness for the plaintiff, without specific proof of bias, did not show evident partiality and stating "[t]he fact that there is an overlap in the relations of the individuals involved does not in itself provide

[13] We do appreciate that proof of bias will rarely be obvious and straightforward. The proof may often be circumstantial, with reliance on reasonable inferences. But a mere appearance of bias is not enough. A circuit court, of course, has the discretion to grant discovery where warranted. In this case, Respondents did not seek to conduct discovery.

grounds for vacating an award"); *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 42 (Neb. 1993) (rejecting evident partiality claim where the arbitrator had a lawsuit pending against employer of party's expert witness and noting district court's factual finding that arbitrator had no duty to disclose the lawsuit and arbitrator's "interest, if any was de minimis"). Therefore, we conclude the circuit court's decision to set aside the arbitration award under these circumstances constitutes reversible error.

However, in so holding, we caution that:

> We do not in any way wish to demean the importance of timely and full disclosure by arbitrators. Disclosure not only enhances the actual and apparent fairness of the arbitral process, but it helps to ensure that that process will be final, rather than extended by proceedings like this one. We again reiterate Justice White's observation that it is far better for a potential conflict of interest "to be disclosed at the outset" than for it to "come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award."

*Scandinavian*, 668 F.3d at 78 (quoting *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring)).

An arbitrator's duty to disclose all material information is an important one, critical to ensure the fundamental fairness of the arbitral proceedings. However, given the strong showing required to set aside an award and the weighty policy goals in favor of arbitration, the facts of this case simply do not justify vacatur under section 15-48-130(a)(2).

## IV.

The evidence compels only one conclusion—the arbitrator was not evidently partial towards GS2 or either party. While the evident partiality standard certainly has efficacy, it should not be invoked where, as here, the showing of partiality is nothing more than mere speculation. We reverse and remand to the circuit court for confirmation of the arbitration award.

**REVERSED AND REMANDED.**

**TOAL, C.J., BEATTY, J., and Acting Justices James E. Moore and D. Craig Brown, concur.**

# THE STATE OF SOUTH CAROLINA
# In The Supreme Court

In the Matter of Allan Riley Holmes, Jr., Respondent.

Appellate Case No. 2013-001481

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Opinion No. 27301
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## DEFINITE SUSPENSION

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Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Allan R. Holmes, of Gibbs & Holmes, of Charleston, for Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine months to three years, with conditions. Respondent requests that the suspension be imposed retroactively to January 25, 2012, the date he was placed on interim suspension.[1] We accept the Agreement and suspend respondent from the practice of law in this state for nine months, subject to certain conditions. The facts, as set forth in the Agreement, are as follows.

[1] *In re Holmes*, 396 S.C. 597, 723 S.E.2d 809 (2012)(respondent placed on interim suspension after being arrested and charged with possession with intent to distribute heroin).

## Facts

Respondent was arrested on December 27, 2011, and was charged with possession with intent to distribute heroin. Although the criminal charge was conditionally dismissed, respondent admits he was in possession of 1.4 grams of heroin and was an active user of illegal drugs at the time of his arrest.[2]

By way of affidavit, respondent states he recognizes he has suffered from addiction for a long time and that complete abstinence from alcohol and illegal drugs is the key to his success. Respondent has undergone detoxification and completed residential treatment programs as well as an intensive outpatient treatment program. The medical director of one of these programs has submitted an affidavit lending his support to respondent and respondent's return to the practice of law. Respondent states he regularly attends and actively participates in Alcoholics Anonymous (AA), and his AA sponsor, by way of affidavit, has also stated he supports respondent and respondent's return to the practice of law. In addition, respondent states he abstains from alcohol and drug use and has submitted to frequent drug tests over the last year and a half, the results of which have all been negative.

Respondent states he recognizes the seriousness of his offense and the gravity of his current situation and realizes, in hindsight, that this experience, though difficult, has been positive, as it has allowed him to address his addiction and to assist others who are suffering from addictive illnesses. However, respondent emphasizes his addictive illness is no excuse for his misconduct, for which he accepts full responsibility. Respondent also accepts responsibility for the fact that his misconduct has harmed the public perception of the legal profession. Respondent has submitted the affidavits of a number of established members of the South Carolina Bar who state they support respondent and his return to the legal profession.

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[2] In his affidavit, respondent states he was actively addicted to opiate painkillers, primarily oxycodone, and had begun using heroin during the month prior to his arrest when he could not obtain oxycodone. Appellant explains he has a long history of addictive illness, and this was a culmination of years of alcohol and drug use.

## Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 8.4(c)(it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude). Respondent also admits he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5)(it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

## Conclusion

We hereby accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for nine months, retroactive to January 25, 2012, the date of his interim suspension. In addition, respondent shall 1) enter into and fully comply with a contract with Lawyers Helping Lawyers (LHL), beginning with the date of this opinion, and upon reinstatement, renew the contract for three years; 2) fully comply with appropriate treatment for his addiction for three years from the date of reinstatement; 3) for three years from the date of reinstatement, submit three reports to the Commission on Lawyer Conduct (CLC) each quarter, including an affidavit of compliance with the terms of his LHL contract and with the recommendations of his treatment provider, a statement from his LHL monitor regarding respondent's compliance with the LHL contract, and a report of respondent's diagnosis, treatment compliance, and prognosis from respondent's treatment provider; 4) after the three year period, have his progress and compliance reviewed by an investigative panel of the CLC to determine whether the LHL contract and reporting requirements should be renewed, and if so, for how long; and 5) upon reinstatement, limit his practice to working for a law firm or other organization for at least one year and if at the conclusion of that year he desires to become a solo practitioner, he will be permitted to do so only upon the approval of an investigative panel of the CLC. Within fifteen days of the date

of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

**DEFINITE SUSPENSION.**

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

# The Supreme Court of South Carolina

In the Matter of Brian N. Davis, Respondent.

Appellate Case No. 2013-001687

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ORDER

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The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Gretchen B. Gleason, pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

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

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

August 12, 2013

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

J. Scott Kunst, Appellant,

v.

David Loree, Respondent.

Appellate Case No. 2011-199507

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Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

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Opinion No. 5163
Heard May 9, 2013 – Filed August 14, 2013

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**REVERSED AND REMANDED**

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J. Scott Kunst, pro se, of Simpsonville.

T. S. Stern, Jr. and Violet Elizabeth Wright, both of Covington Patrick Hagins Stern & Lewis, P.A., of Greenville, for Respondent.

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**WILLIAMS, J.:** J. Scott Kunst appeals the circuit court's grant of summary judgment on his defamation cause of action against David Loree. On appeal, Kunst argues the circuit court improperly applied the doctrine of collateral estoppel when dismissing his defamation claim. We reverse and remand.

## FACTS/PROCEDURAL HISTORY

This case arises out of the construction of a lake home on Lake Keowee in Pickens County, South Carolina. Richard and Barbara Gaby ("the Gabys") hired Kunstwerke Corporation ("Kunstwerke") to construct a residence in the Reserve on Lake Keowee. Kunst is the sole owner of Kunstwerke.

In early 2006, disputes arose when the Gabys began to suspect Kunst was not paying subcontractors for completed work on their lake home. The Gabys instructed an employee, David Loree, to investigate their suspicions. Loree contacted a number of subcontractors and vendors who worked on the Gabys' lake home and questioned them about whether they had been paid. From this investigation, Loree concluded that, although the Gabys made timely payments to Kunst, Kunst failed to make the proper payments to the subcontractors and vendors. Loree also concluded that Kunst overcharged the Gabys for work provided by certain subcontractors.

On May 3, 2006, the Gabys brought suit (the "Gaby Action") against Kunstwerke and Kunst, individually, alleging breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, conversion, and violation of the South Carolina Unfair Trade Practices Act. The defendants failed to timely answer the Gabys' complaint, and the Gabys filed a motion for entry of default. On June 20, 2006, the circuit court issued an order of default. Thereafter, Kunst and Kunstwerke filed a motion for relief from default, claiming their failure to respond was excusable and that meritorious defenses existed. On December 7, 2006, the circuit court heard arguments on this motion and denied relief from the default.

On March 13, 2007, the circuit court held a hearing to determine damages in the Gaby Action. The Gabys presented testimony from four witnesses at this damages hearing, including testimony from Loree. Kunstwerke's counsel and Kunst, who proceeded pro se, were allowed to extensively cross-examine each of these witnesses. On May 16, 2007, the circuit court entered an order finding the Gabys had "presented sufficient evidence to establish their claims fully." The order states the circuit court "start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted." The circuit court awarded the Gabys

$353,993.91 in actual damages, $70,798 in punitive damages, and $35,807.41 in attorney's fees and costs.[1]

On December 19, 2006, shortly after the motion for relief from default was denied, Kunst brought the current action against the Gabys and Loree, alleging defamation, tortious interference, and intention infliction of emotional distress. In his complaint, Kunst alleged the Gabys and Loree damaged his reputation and the reputation of Kunstwerke during their investigation leading up to the Gaby Action.

On April 14, 2007, the circuit court issued an order dismissing Kunst's causes of action against the Gabys on the basis that these causes of action were compulsory counterclaims under Rule 13(a), SCRCP, that should have been brought in the Gaby Action and were therefore barred under the doctrine of collateral estoppel.[2] As a result of this April 2007 order, the only causes of action remaining were those against Loree. On March 9, 2009, the circuit court issued an order granting Loree summary judgment on Kunst's tortious interference and intentional infliction of emotional distress claims. Kunst's defamation claim against Loree was the sole remaining cause of action.

On October 19, 2010, the circuit court issued an order dismissing Kunst's defamation claim against Loree. In dismissing this cause of action, the circuit court reasoned that truth is an absolute defense to defamation and "[t]he issue of the truth of the statements allegedly made by Loree was necessary to support the prior judgment and damages in the [Gaby Action]." Accordingly, the circuit court found the veracity of Loree's statements had been "actually litigated" during the Gaby Action and, therefore, the doctrine of collateral estoppel barred Kunst from relitigating this matter.

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[1] Following this order, Kunst appealed the circuit court's denial of his motion for relief from default and the award of damages to this court. This court affirmed the circuit court's denial of Kunst's motion for relief from default and award of actual and punitive damages. *See Gaby v. Kunstwerke Corp.*, Op. No. 2009-UP-028 (S.C. Ct. App. filed Jan. 9, 2009). Kunst then sought a writ of certiorari from our supreme court, which was denied on June 10, 2010.

[2] Kunst does not appeal this order in the instant appeal.

On November 12, 2010, Kunst filed a lengthy motion "to reconsider or amend," arguing, in part, that the circuit court deviated from South Carolina case law in applying collateral estoppel to a default judgment. This appeal followed.

## STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) provides a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). To withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Id.* at 330, 673 S.E.2d at 803.

## LAW/ANALYSIS

Kunst argues the circuit court erred in granting summary judgment by applying the doctrine of collateral estoppel based upon the default judgment rendered against him in the Gaby Action. We agree.

Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to

previously litigate the issues." *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008).

In *State v. Bacote,* our supreme court stated:

> We have previously adopted the general rule of collateral estoppel as set forth in the Restatement (Second) of *Judgments* § 27 (1982) in *South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). Section 27 states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." *See also Palm v. General Painting Co., Inc.,* 302 S.C. 372, 396 S.E.2d 361 (1990) (citations omitted) ("Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues 'actually and necessarily litigated in the first suit.'").
>
> In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation. 50 C.J.S. *Judgments* § 797 (1997).

331 S.C. 328, 330-31, 503 S.E.2d 161, 162-63 (1998).

In *Bacote*, a defendant charged with driving under the influence moved to suppress evidence regarding his refusal to take a breath test. *Id.* at 329, 503 S.E.2d at 162. Prior to his trial, an administrative hearing was held to determine whether the defendant's license would be automatically suspended under section 56-5-2950 of the South Carolina Code. *Id.* The arresting officer failed to appear at this hearing and, as a result, the hearing officer rescinded the defendant's suspension. *Id.* At trial, the circuit court granted the defendant's motion to suppress, finding the State was collaterally estopped from introducing evidence of his refusal to take a breath test based upon the rescission of his license suspension at the administrative hearing. *Id.* The State appealed, and the court of appeals reversed. *Id.* The supreme court agreed and held that an administrative license revocation proceeding

does not preclude litigation of the same issues in ensuing criminal prosecution. *Id.* at 331, 503 S.E.2d at 163.

In reaching this conclusion, the supreme court first found that "[i]n the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." *Id.* The supreme court went on to state, "Even had the issue actually been litigated, we hold collateral estoppel does not apply to issues decided at administrative hearings held pursuant to § 56-5-2950." *Id.* In support of this alternative ground, the court relied upon two exceptions to the general rule regarding issue preclusion. *Id.* at 331-32, 503 S.E.2d at 163 (relying upon the fairness and public policy exceptions found in section 28 of the Restatement (Second) of Judgments).

In the instant case, the circuit court found *Bacote* was distinguishable from the facts of the current case and, thus, did not apply. The circuit court also found that language in *Bacote* regarding the application of default judgments to the doctrine of collateral estoppel was dicta and thus not controlling. Following out-of-state precedent, the circuit court determined that the doctrine of collateral estoppel could be applied "in default cases as to matters essential to the [prior] judgment." We disagree and hold South Carolina jurisprudence overwhelmingly supports the position that the doctrine of collateral estoppel cannot be applied to default judgments to preclude subsequent litigation.

First, we find the circuit court erred in interpreting *Bacote* in its order granting summary judgment. The circuit court found the language in *Bacote* addressing the application of collateral estoppel to default judgments was dicta, as opposed to controlling precedent. We disagree and read *Bacote* as offering two separate but equally viable grounds. *See Bacote*, 331 S.C. at 331, 503 S.E.2d at 163 ("*Even had the issue actually been litigated*, we hold collateral estoppel does not apply [to the current action]." (emphasis added)).

Both federal courts and other state courts have interpreted *Bacote* as establishing the rule that default judgments cannot be used to preclude subsequent litigation under the doctrine of collateral estoppel. *See In re Springhart*, 450 B.R. 725, 727 (Bankr. S.D. Ohio 2011) ("After reviewing the doctrine of collateral estoppel or issue preclusion, as adopted in South Carolina, the court concludes that the default judgment and order awarding damages cannot be afforded preclusive effect . . . .

First, South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated."); *Powell v. Lane*, 289 S.W.3d 440, 451 (Ark. 2008) (Wills, J., dissenting) (citing *Bacote* as an example of state law which "adhere[s] to the general rule" that default judgments cannot be used under the doctrine of collateral estoppel).

Additionally, South Carolina jurisprudence regarding collateral estoppel strongly supports the position in *Bacote*. South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel. *See, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rule set forth in the Restatement for offensive use of collateral estoppel); *Beall v. Doe*, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984) ("[A] fair rule regarding the application of issue preclusion in subsequent litigation with different parties is the rule recently formulated by the American Law Institute [in the Restatement (Second) of Judgments]."). The Restatement takes the position that default judgments have not been "actually litigated," and therefore cannot be used as the basis for collateral estoppel in subsequent actions. *See* Restatement (Second) of Judgments § 27 cmt. e (1982) ("In the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action."). Some courts have applied the doctrine of collateral estoppel in default cases as to matters that are essential to the judgment. *See, e.g., In re Byard*, 47 B.R. 700, 706 (Bankr. M.D. Tenn. 1985) (finding that, under Kansas law, a default judgment would preclude relitigation of issues "determined and necessary" to that judgment). However, the Restatement's position is the view taken by the majority of the courts throughout our nation. *See Powell*, 289 S.W.3d at 450 (Wills, J., dissenting) (stating that the "majority view" is that default judgments cannot serve as the basis for collateral estoppel); 50 C.J.S. *Judgments* § 1049 (2013) ("Although a party against whom a default judgment is entered certainly had an opportunity to litigate, *most courts* have concluded that an opportunity to litigate should not be given the same effect as actual litigation . . . ." (emphasis added)).

Second, we find the circuit court erred in holding that *Bacote* and the current case were factually distinguishable. The circuit court found that, unlike *Bacote* in which the State did not participate in the administrative hearing resulting in default, Kunst actively took part in the damages hearing in the Gaby Action. The

circuit court determined this participation in the damages hearing afforded him a "full and fair opportunity to be heard." We disagree.

Some courts adhering to the general rule that default judgments cannot be used to establish collateral estoppel have recognized an exception when a party extensively participated in litigation. *See, e.g., In re Ragucci*, 433 B.R. 889, 985 (Bankr. M.D. Fla. 2010) ("[When] a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently [chose] not to do so, it is not an abuse of discretion to apply the doctrine of collateral estoppel to prevent further litigation of the issues resolved by the default judgment in the prior action." (alterations and internal quotation marks omitted)); *Insituform Techs., Inc. v. AMerik Supplies, Inc.*, 850 F. Supp. 2d 1336, 1362 (N.D. Ga. 2012) (finding when a defendant has substantially participated in a lawsuit and "is defaulted as a sanction for dilatory or obstructive conduct," the "actually litigated" requirement is met, and it is within the court's discretion to apply collateral estoppel). However, this exception has not been recognized under South Carolina case law.

Further, we find this exception would not apply to the facts of this case. Although Kunst participated in the damages hearing by cross-examining witnesses called by the Gabys, it appears he was not afforded the opportunity to testify or to call witnesses to testify on his behalf. Kunst was also not allowed to participate in any discovery on this matter. In addition, because Kunst was in default, the circuit court "start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted." Accordingly, we hold Kunst was not presented with a fair opportunity to "actually litigate" the veracity of Loree's alleged statements to others.

Accordingly, we hold the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met. Therefore, we find the circuit court erred in ruling Kunst's defamation claim was precluded under the doctrine of collateral estoppel based upon the default judgment rendered in the Gaby Action.[3] Accordingly, we reverse the circuit court's grant of summary judgment on Kunst's defamation claim.

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[3] Kunst raises several additional arguments on appeal. However, because we find his first issue dispositive of this appeal, we decline to address his remaining issues.

**CONCLUSION**

Based on the foregoing, the circuit court's order granting summary judgment is

**REVERSED AND REMANDED.**

**HUFF and KONDUROS, JJ., concur.**

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*See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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

The State, Respondent,

v.

Darren Scott, Appellant.

Appellate Case No. 2011-190428

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Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

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Opinion No. 5164
Heard May 15, 2013 – Filed August 14, 2013

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**AFFIRMED**

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Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander, both of Columbia, for Appellant.

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

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**GEATHERS, J.:** Darren Gerome Scott (Appellant) appeals his convictions of three counts of a lewd act upon a child and one count of second degree criminal sexual conduct with a minor. Appellant argues the trial court improperly admitted evidence of prior abuse allegations (bad act evidence) against Appellant to show the existence of a common scheme or plan. Specifically, Appellant argues the

proffered testimony was: (1) not sufficiently similar to the crimes charged; and (2) too remote and, thus, the probative value was substantially outweighed by the danger of unfair prejudice. We disagree and affirm.

## FACTS/PROCEDURAL HISTORY

This case involved four victims (Victims), as well as two witnesses (404(b) Witnesses[1]) who testified to prior bad acts of Appellant. The trial court, finding each 404(b) Witness's testimony was sufficiently similar to the crimes charged and that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, admitted the evidence to prove the existence of a common scheme or plan. Because Appellant now challenges the admission of the 404(b) Witnesses' testimony, as their testimony related to the alleged abuse of *each* of the *four* victims, a somewhat extended factual review is essential to a fair appraisal of Appellant's challenge.

Three sisters (then-nineteen-year-old Victim 1, seventeen-year-old Victim 2, and sixteen-year-old Victim 3) participated in a youth dance team at a church in Greenville, South Carolina. At the team's weekly meetings, the group's members danced, listened to worship music, and prayed. The center's art director also regularly talked to the dancers about issues pertinent to adolescent social development. At the November 24, 2008 meeting, the art director spoke about appropriate social media usage; this discourse prompted a male dancer to share with the team that he was a victim of sexual abuse.

Although the boy's disclosure did not pertain to Appellant in any way, Victim 1, Victim 2, and Victim 3 reacted to the boy's disclosure with "an explosion of tears, sobbing, [and] wheezing." It was then "very obvious [to the art director] that something else was going on, and that it needed to be addressed immediately." The art director privately encouraged the sisters to talk to someone they trusted.

As the three sisters drove home,[2] they discussed the necessity of coming forward about previously experiencing their biological father's (Appellant's) sexually-

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[1] Rule 404(b), SCRE.

[2] Victim 1, Victim 2, and Victim 3 did not live with Appellant when Appellant allegedly abused them. These three Victims lived with their mother, Beverlyn,

abusive conduct, in view of the fact that their eight-year-old half-sister (Victim 4) was living with Appellant.[3] Shortly thereafter, Victim 1 contacted the art director and disclosed to her the long-term sexual abuse the sisters experienced. The art director alerted the church's risk management department, which contacted the county's sheriff and department of social services. The ensuing investigations resulted in the State's indictment of Appellant for three counts of lewd act upon a minor (Victims 1, 3, and 4), one count of second-degree criminal sexual conduct with a minor (Victim 2), and two counts of first-degree criminal sexual conduct with a minor (Victims 2 and 4).

At the trial's outset, the State moved to admit the testimony of the two 404(b) Witnesses. These witnesses claimed that Appellant sexually abused them in 1987, when the witnesses were approximately eight years old. Thus, the alleged prior bad acts occurred approximately eleven years before Appellant allegedly first abused then-eight-year-old Victim 1.[4]

The State argued this testimony: (1) was relevant; (2) demonstrated that Appellant abused the witnesses in "ways that are strikingly similar to the [crimes charged]," and that such similarities outweighed the dissimilarities; and (3) the probative value was not substantially outweighed by the danger of unfair prejudice.

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who had previously divorced Appellant; however, they often spent weekends with Appellant at his residence.

[3] While Victim 4 was Appellant's biological child, she did not share a biological mother with Victims 1, 2, and 3. When Victim 4's mother was incarcerated in 2002, Victim 4 moved in with Appellant and Appellant's then-girlfriend. Although the mother of Victim 4 reacquired physical custody in 2004, after completing her prison sentence, Victim 4 subsequently returned to Appellant's home.

[4] Each 404(b) Witness alleged that Appellant abused her in 1987. Thus, an eleven to twenty year time period exists between the bad acts (1987) and the charged crimes (1998-2007/2008). While there were no allegations of any abuse occurring in the decade following the 404(b) Witnesses' 1988 disclosure, the alleged resumption of sexual abuse directly correlates with Appellant's oldest daughter reaching the age of eight (the same age as the 404(b) Witnesses when Appellant allegedly abused them).

Appellant objected, primarily referencing the temporal remoteness of the prior allegations of abuse to the charged crimes.[5]

After reviewing the State's related brief, the trial judge stated he would allow the 404(b) Witnesses to testify, but only after the Victims testified, thus allowing another opportunity to ensure the bad act testimony would demonstrate substantial similarity to the Victims' given testimony. The trial judge then found the testimony would be relevant and proceeded to address the evidence's similarity to the charged crimes, citing the Solicitor's argument that "some nine different elements" of similarity existed:

> From what's been set forth as proposed testimony, I think there's a great similarity between the instances to show that there would be a common scheme or plan . . . , I think by a clear and convincing standard . . . there is sufficient proof . . . . I think that the similarity is, certainly, close enough there as far as the absence of other Defendants, the location, the ages, the developmental stages of the victims throughout each of these alleged incidents . . . [and] that [Appellant] would be in a position of authority . . . . I think the probative value is stronger and the evidence should be allowed to show . . . a common scheme . . . .

The trial judge agreed to reexamine this pre-trial ruling immediately prior to the 404(b) Witnesses offering their testimony.

Thereafter, the trial commenced and all four Victims testified about the nature and circumstances of the sexual abuse they collectively endured.[6] Victim 1, who was twenty-one years old at the time of trial, testified that Appellant: sexually abused her every time she spent the night with him, while under his supervision at his apartment or at Appellant's sister's (her aunt's) home; began abusing her when she

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[5] Each Victim's allegations related to conduct occurring as follows: Victim 1, 1998-2002; Victim 2, 1999-2004; Victim 3, 2006; and Victim 4, 2004-2007.

[6] The testimony of Victims 1, 2, and 3 was not limited to abuse that each child personally experienced; each of these Victims also testified about how Appellant abused her sister(s).

was around eight years old; inappropriately touched the Victims every time they spent the night with him; insisted upon bathing all of the Victims, despite the fact that each one was capable of bathing herself; consistently rubbed lotion on each Victim after bathing them, concentrating on each one's buttocks and genital areas; put each Victim to bed one at a time, whereby Appellant would lay on each Victim's bed, place that child on top of him, and would then bounce that child up and down with his hips;[7] played hide and seek with all of the Victims, whereby the children would hide and upon Appellant finding specifically, Victim 2, he would place his face on her genitals while the other Victims remained hidden;[8] and laughed when a child would see him inappropriately touching another child.

Victim 2, who was nineteen years old at the time of trial, also testified about the nature and circumstances of the alleged abuse. She testified that Appellant: sexually abused her every time she spent the night with him, while under his supervision at his apartment or at Appellant's sister's house; began sexually abusing her when she was around nine years old; would tell her how to get in the tub and begin washing her, despite Victim 2 asserting, "No, I can wash myself;" "would start rubbing lotion on [her genitals and buttocks];" would watch the children shower;[9] removed her clothing while she was sleeping; placed his hands inside her pants while she watched television and would rub her skin; and stopped abusing her when she was around fifteen years old.

Victim 3 was sixteen years old at the time of the trial and testified that Appellant: sexually abused her frequently while she was under his supervision at his apartment or at Appellant's sister's house; began sexually abusing her when she was around eight years old; would wash her, even though Victim 3 "knew [she] could do it by [her]self" and would tell Appellant she didn't need his help; "would rub [lotion] all over [their] bodies;" would rub his fingers inside and outside of her

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[7] The Victims consistently referred to this conduct as "hunching."

[8] Victim 1 testified that in one instance of the "game," Appellant placed his face on the genitals of Victim 2, while the other Victims remained hidden. Victim 3 also testified that this incident occurred.

[9] According to Victim 2, Appellant also abused Victim 4 at bath time. Victim 2 testified that while she was showering, Victim 4 pulled back the curtain and stared at her, just like Appellant did. When Victim 2 demanded, "Where did you get that from?," Victim 4 responded, "Daddy, he would look at me and touch me while I was in the shower . . . ." The testimony of Victim 3 corroborated this event.

underwear; would play hide and seek with the Victims, whereby all Victims would hide and, upon Appellant finding specifically, Victim 2, Appellant would place his face on the genitals of Victim 2 while the other children remained hidden; would place a Victim on his hips, and "make [her] go up and down;" made her touch his genitals and would "laugh" when she resisted; would "laugh" after an incident of abuse; stopped abusing her when she was around fourteen years-old.

Victim 4, who was ten years old at the time of trial, testified that Appellant: sexually abused her at his apartment; inappropriately touched her prior to bedtime; and would often inappropriately touch her while she watched television.

After all four Victims testified, the prosecution again moved to present the 404(b) Witnesses. After recognizing Appellant's renewed and continuing objection, the trial judge allowed both 404(b) Witnesses to testify.

April, who was one of the 404(b) Witnesses, was thirty years old at the time of trial. She testified that in the late 1980s, she often spent the night with her older, then-nineteen-year-old cousin, Beverlyn, who was Appellant's then-live-in girlfriend and, in due course, the mother of Victims 1, 2, and 3. April attested that during her visits Appellant: would dry her off when she got out of the shower, "tak[ing] his time when he got to [her genitals]," despite her ability to dry herself; rubbed lotion on her entire body; played hide and seek with her, whereby she was often separated for long periods of time alone with Appellant; and crawled into bed with her, placed his hand beneath her underwear, and rubbed her genitals. April testified this abuse occurred when she was around seven or eight years old.

The other 404(b) Witness was thirty-year-old Deidra, a cousin of April. Deidra testified that when she was approximately seven or eight years old, she often accompanied April to the home of Beverlyn and Appellant. Deidra testified that during one overnight visit, Appellant: touched her breasts and genitals while she watched television; "laughed" after inappropriately touching her breasts and genitals, as if the contact was by accident; and laid back, placed her on top of his crotch, and proceeded to move her up and down.

The jury ultimately convicted Appellant of three counts of a lewd act upon a child (Victims 1, 3, and 4) and one count of second degree criminal sexual conduct with a minor (Victim 2). These convictions resulted in consecutive prison sentences of 90 months, 90 months, 90 months, and 110 months, respectively.

## ISSUES ON APPEAL

Did the trial court err in allowing the 404(b) Witnesses to testify because this evidence: (I) was not sufficiently similar to the crimes charged; and (II) was too temporally remote and its probative value was substantially outweighed by the danger of unfair prejudice?

## STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

## LAW/ANALYSIS

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, . . . determine whether the proffered evidence is relevant." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; *see State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia*, the existence of a common scheme or plan. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

After full consideration of this jurisprudence, we find the trial court did not abuse its discretion in admitting the testimony of both 404(b) Witnesses. This evidence

(I) demonstrated a common scheme or plan and (II) its probative value was not substantially outweighed by the danger of unfair prejudice.[10]

## I. A Common Scheme Or Plan Existed.

Although evidence of other crimes, wrongs, or acts is inadmissible to prove bad character and, in turn, action in conformity therewith, such evidence may be admissible to show a common scheme or plan. Rule 404(b), SCRE; *State v. Taylor*, 399 S.C. 51, 59, 731 S.E.2d 596, 600-01 (Ct. App. 2012). In order for bad act evidence to be admissible for this limited purpose, the trial court must find that the evidence (A) is clear and convincing and (B) bears a close degree of similarity to the crimes charged. *Clasby*, 385 S.C. at 155, 682 S.E.2d at 895-96.

### A. *The Bad Act Evidence Was Clear and Convincing.*

"'If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.'" *Id.* at 155, 682 S.E.2d at 895 (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)). In reviewing whether evidence of other bad acts is clear and convincing, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *Id.*

When the State first moved to admit the bad act evidence in the instant matter, the trial judge specifically found, "by the clear and convincing standard that [he] was required to [apply] -- there is sufficient proof." The trial judge based this pre-trial determination upon the positions stated by counsel during a related hearing and within submitted written motions and a brief. Furthermore, the actual proffered 404(b) testimony was very specific and appeared credible. In light of this support within the record and the deference afforded to a trial judge's findings in this regard, the trial judge did not err in finding the bad act evidence was clear and convincing. *Id.* (holding a trial judge's finding that evidence of other bad acts is clear and convincing is binding, unless clearly erroneous).

### B. *A "Close Degree Of Similarity" Existed Between the Crimes Charged and the Bad Acts.*

[10] Appellant never argued the bad act testimony was not relevant.

While Appellant's brief argues that the bad act evidence was "not sufficiently similar" under Rule 404(b) and, therefore, should have been excluded, Appellant did not directly raise this argument at trial. After jury qualification, but immediately prior to opening arguments, the Solicitor moved to admit the bad act testimony, arguing this testimony was relevant, clear and convincing, sufficiently similar, and that its probative value was not substantially outweighed by the danger of unfair prejudice. The trial judge agreed with each of the Solicitor's contentions and even noted that the bad act evidence was "great[ly] similar[]." Appellant's attorney immediately took exception:

> [*N*]*otwithstanding any similarities*, [the alleged bad acts] go back to 1987. . . . [M]y position is that because of the -- *remoteness is the main thing* . . . . [T]he prejudicial effect of allowing evidence as a whole would substantially outweigh its probative value and *would be unfair to the Defendant and highly prejudicial*. (emphases added)

Thus, it appears Appellant did not base this objection on a lack of similarity; rather, Appellant argued temporal remoteness rendered the evidence excludable pursuant to Rule 403. Moreover, when the trial judge again considered the issue immediately prior to the 404(b) Witnesses taking the stand, the trial judge again asked if Appellant had any objection. Appellant responded, "[n]othing, other than [the earlier] objection continues." Therefore, it is questionable whether Appellant preserved his argument that the bad act evidence was not sufficiently similar to the crimes charged. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention). Nonetheless, we address the merits of Appellant's argument. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (stating it is "good practice . . . to reach the merits of an issue when error preservation is doubtful").

Despite Appellant's contention to the contrary, the bad act evidence bore the requisite degree of similarity. Evidence of other crimes or wrongs is admissible to show a common scheme or plan when such evidence has a "close degree of similarity" to the crimes charged. *Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278; *see* Rule 404(b), SCRE (allowing evidence of a bad act to demonstrate a common scheme or plan). A close degree of similarity exists when the "similarities

outweigh the dissimilarities." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278. In conducting this similarity review, a trial court "should consider all relevant factors." *Taylor*, 399 S.C. at 59, 731 S.E.2d at 601 (citing *Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278). Additionally, in the context of a sexual abuse case, the following factors are pertinent: (1) the age of the victims at the time of abuse; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence. *Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278; *Taylor*, 399 S.C. at 59-60, 731 S.E.2d at 601. When a review of all pertinent factors establishes a "close degree of similarity," no further analysis is necessary; the evidence is admissible. *Wallace*, 384 S.C. at 434, 683 S.E.2d at 278. Finally, in making this similarity determination, focus is upon whether each particular proffer of bad act evidence is sufficiently similar to the crimes charged, not whether multiple proffers are sufficiently similar to each other. *See id.* at 433-34, 683 S.E.2d at 278 (holding bad act evidence must be sufficiently similar to the crimes charged).

We now apply these principles to determine whether the testimony of each 404(b) Witness was sufficiently similar to the crimes charged, such that the evidence was admissible as evidence of a common scheme or plan. As to 404(b) Witness April, the following similarities existed between her testimony and the crimes charged:

- The child was approximately eight years old when first abused;
- Abuse occurred when the child was under Appellant's physical custody and control and when Appellant was the only adult present;
- Abuse occurred when the child spent the night at Appellant's residence while visiting a relative;
- Abuse occurred at bath time; Appellant *insisted* upon washing the child, despite the child being able to do this alone; Appellant focused upon washing child's genitals; Appellant rubbed lotion over child's entire body after bath time;
- Abuse occurred while Appellant played "hide and seek" with the children; whereby one child was separated for an extended period;
- Abuse occurred when Appellant climbed into bed with the child and placed his hands in the child's panties and rubbed her genitals.

In contrast to the many similarities, only a couple of dissimilarities existed. Such dissimilarities include the facts that April was, unlike the Victims, not blood-

related to Appellant; that Appellant did not place April on his lap and thrust her up and down, like he did with the Victims; and that April alleged a single incident of abuse. Although we recognize that these points of distinction do exist, we find the trial court did not abuse its discretion in determining these distinctions were insufficient to outweigh the many other similarities.

First, although April was not blood-related to Appellant, April was related to Appellant's then-live-in-girlfriend, Beverlyn. This effectively afforded Appellant an opportunity to abuse that was nearly identical to the circumstances surrounding the Victims' allegations—a child staying overnight at Appellant's residence to visit with a relative. Thus, any distinction based upon the reason for the abused child's visit, whether to spend time with Appellant, as in the Victims' cases, or to visit a cousin (Beverlyn), as in April's situation, lacks merit. Second, although April did not allege that Appellant abused her in each of the ways in which Victims were allegedly abused by Appellant, the *vast majority* of April's specific allegations directly align with those of the Victims: abuse occurred at bath time, along with the inappropriate application of lotion; abuse occurred in the child's bed just prior to bedtime; the abuse included nefarious versions of "hide-and-seek;" the abuse occurred when the child was approximately eight years old; and the abuse occurred during overnight visits to a relative's home. Thus, the similarity of April's testimony to the crimes charged outweighed the dissimilarities and the evidence complied with Rule 404(b). *See Wallace*, 384 S.C. at 433, 683 S.E.2d at 278 (stating the requisite "close degree of similarity" exists when the "similarities outweigh the dissimilarities").

As to 404(b) Witness Deidra, the following similarities existed between her testimony and the crimes charged:

- The child was approximately eight years old when first abused;
- Abuse occurred when the child was under Appellant's physical custody and control and when Appellant was the only adult present;
- Abuse occurred while the child spent the night at Appellant's residence;
- Abuse occurred while the child watched television with Appellant;
- Appellant initially acted as if his improper touching was by accident;
- Appellant placed the child over his crotch and thrust the child up and down.

While the dissimilarities include the facts that Deidra was not blood-related to Appellant, that no bath time or bedtime abuse occurred, and that Appellant did not participate in a game of hide-and-seek to improperly touch Deidra, the similarities, many of which were quite peculiar, still outweigh these dissimilarities. In fact, the *vast majority* of Deidra's specific allegations directly align with those of the Victims: the abuse occurred when spending the night at Appellant's residence while visiting with a relative;[11] abuse occurred when Appellant placed a child over his crotch and thrust her up and down; abuse occurred when Appellant inappropriately touched a child under her clothes while the child watched television; Appellant would laugh after inappropriately touching the child, as if the physical contact was accidental; and the abuse occurred when the child was approximately eight years old. Accordingly, Deidra's testimony also evinced a "close degree of similarity." *See id.* (holding a "close degree of similarity" exists when the "similarities outweigh the dissimilarities").

In summation, because the ages of both 404(b) Witnesses at the time of their alleged abuse, the locations and situations where these witnesses alleged Appellant abused them, and the nature and specific types of abuse alleged by these witnesses were profoundly similar to the Victims' allegations, the similarities outweigh the dissimilarities. Thus, the trial court did not err in finding the close degree of similarity required to admit evidence under Rule 404(b) existed.

## II. Temporal Remoteness and the 403 Balancing Test.

As Appellant's brief initially frames this issue on appeal, "the [trial] court erred by admitting the [404(b)] testimony [because] the alleged sexual acts were very remote." Thus, Appellant posits that due to remoteness alone, the bad act evidence was inadmissible. Appellant's brief, however, further develops this contention, arguing the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the 404(b) evidence was "too remote" in time.[12]

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[11] Deidra was a cousin of April, who was a cousin of Appellant's then-live-in-girlfriend, Beverlyn. Thus, Appellant had an attenuated familial tie to Deidra.

[12] Appellant argues, "[due to extreme remoteness,] even if . . . sufficient similarities [exist,] if ever there was a case where the evidence should have been excluded because its probative value was substantially outweighed by its unduly prejudicial effect, it was in this case."

Thus, Appellant potentially raises two temporal remoteness issues: Whether admission of bad act evidence occurring some eleven to twenty years prior to the crimes charged (A) is an independent basis for error; and (B) constituted error because the temporal remoteness diminished the evidence's probative value, such that it was substantially outweighed by the danger of unfair prejudice.

A. *Temporal Remoteness Is Not Dispositive.*

As to the first argument, a trial court does not necessarily err when it admits testimony about a bad act occurring many years before the crimes charged. *See State v. Tutton*, 354 S.C. 319, 332, n.5, 580 S.E.2d 186, 193 n.5 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) ("That the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of [the victim], is not alone dispositive."). In fact, evidence of bad acts occurring many years before the charged crime is often admissible to demonstrate a common scheme or plan. *See State v. Hallman*, 298 S.C. 172, 174-75, 379 S.E.2d 115, 116-17 (1989) (holding the trial court properly admitted evidence of a bad act that occurred seven years prior to the charged crime); *Blanton*, 316 S.C. at 33, 446 S.E.2d at 440 (holding the trial court properly admitted testimony regarding a bad act that occurred seven to eight years before the crime charged); *cf. State v. Hubner*, 362 S.C. 572, 584-87, 608 S.E.2d 463, 469-70 (Ct. App. 2005) (finding prior bad act evidence occurring some fourteen years prior to the crime charged was improperly admitted because the evidence's probative value did not outweigh the evidence's prejudicial effect), *rev'd*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009) (reversing the court of appeals, in light of *Wallace*, 384 S.C. 428, 683 S.E.2d 275). In view of these cases and the language of Rule 404(b), courts have considered temporal remoteness in determining whether admission is proper, but there exists no set time limit beyond which a prior bad act is simply, *per se*, too remote. *Compare* Rule 404(b), SCRE (allowing "[e]vidence of other crimes, wrongs, or acts" to show "the existence of a common scheme or plan," without imposing any temporal restrictions), *with* Rule 609(a) and (b), SCRE (generally prohibiting the admission of prior convictions to attack witness credibility if more than ten years elapsed since the date of conviction or release from confinement). Thus, the trial court did not err in admitting the bad act evidence, simply because the evidence was purportedly too temporally remote.

Nonetheless, Appellant cites *State v. Fonseca* for the proposition that even a two-year gap between a prior bad act and the crime charged could render the evidence of the prior bad act inadmissible, because it was simply too "remote." 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009) ("The State provides no compelling argument of any similarities between the two occurrences, or any argument to overcome the fact that the incidents are remote in time." (footnote omitted)); *see State v. Fonseca*, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011) ("Finding no error in the Court of Appeals' [*Fonseca*] decision, we adopt it as our own and therefore AFFIRM."). Although the *Fonseca* opinion, as adopted by our supreme court, incorporated the phrase "remote in time" within its analysis, the ultimate determination that the trial court erred in admitting the evidence was based upon the bad act evidence's dissimilarity to the crime charged. In *Fonseca*, two separate incidents of abuse were alleged by a single victim against a single perpetrator; a two-year gap existed between the first incident (the bad act) and the second incident (the crime charged). *Fonseca*, 383 S.C. at 643-45, 681 S.E.2d at 2-3. Because little similarity existed between the bad act and the charged offense, and because there was no continuous, illicit conduct, the court held the State failed to show that the "remote" allegations were sufficiently similar. *Id.* at 649, 681 S.E.2d at 5. Thus, *Fonseca's* holding was based upon the lack of similarity between the two "remote" events, rather than upon the relatively short, two-year period of time between them.

B. *The Probative Value Was Not Substantially Outweighed By the Danger Of Unfair Prejudice.*

Even when bad act evidence is sufficiently similar to the crimes charged, a trial court may, nonetheless, exclude the evidence when its probative value is substantially outweighed by the danger of unfair prejudice. *See Gillian*, 373 S.C. at 611, 646 S.E.2d at 877; *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (citation omitted).

Because "the result [of this Rule 403 Balancing Test] will generally turn on the facts of each case," it "must be based on the entire record." *Clasby*, 385 S.C. at 156, 682 S.E.2d at 896. In the instant matter, remoteness is a fundamental fact at issue within the record and, therefore, remoteness is pertinent to determining total

probative value. *See id.* (requiring the balancing test of Rule 403 to consider all facts within the record). Additionally, this Rule 403 analysis must reconsider the similarities and dissimilarities in determining total probative value, including a reduction in probative value predicated upon remoteness, and, in turn, whether the probative value is outweighed by the danger of unfair prejudice. *See Taylor*, 399 S.C. at 61, 731 S.E.2d at 601-02 ("We are cognizant of the prejudicial effect of admitting evidence of [bad acts] based upon the degree of similarity with the charged crime."); *id* (reconsidering the similarities to determine probative value); *id.* (weighing probative value against the danger of unfair prejudice). Therefore, even though we have already considered, pursuant to Rule 404(b), whether the similarities outweighed the dissimilarities, we must now reconsider the similarities and dissimilarities, as well as temporal remoteness and other factors, pursuant to Rule 403, to ascertain total probative value and, subsequently, to compare this total probative value to the danger of unfair prejudice. *See Clasby*, 385 S.C. at 156, 682 S.E.2d at 896 (reconsidering the entire record to ascertain probative value and, subsequently, comparing the evidence's probative value to the danger of unfair prejudice); *Taylor*, 399 S.C. at 61, 731 S.E.2d at 601-02 (reconsidering the similarities of bad act evidence to determine probative value and, subsequently, comparing this probative value to the danger of unfair prejudice); *see also* Rule 403, SCRE (requiring a court to determine probative value and to subsequently compare the evidence's probative value to the danger of unfair prejudice).

For the following three reasons, the total probative value of the bad act evidence in the instant matter was great and, as a result, not substantially outweighed by the danger of unfair prejudice. First, the similarities were not only numerous, but an extremely high level of continuity existed between both 404(b) Witnesses' testimony and between all four Victims' testimony. Second, a high level of continuity extended to even the most specific acts of abuse. Third, the trial judge's findings related to the temporal remoteness issue were specific and well-supported.

As to the first reason, the similarities between the bad act testimony and the Victims' allegations were not only numerous—at least nine similarities existed—many similarities also existed between the two 404(b) Witnesses' testimonies and between *all four* Victims' allegations. Such continuity is highly probative.

For instance, much of 404(b) Witness April's testimony coincided with the Victims' specific allegations: abuse occurred when she spent the night at Appellant's residence; abuse occurred when Appellant was the only supervising

adult; abuse occurred at bath time; Appellant would dry her off after a bath, focusing on her buttocks and genitalia, despite her being self-sufficient; Appellant rubbed lotion on her entire body; Appellant played hide and seek, whereby one child was separated from the other(s) for an extended period of time; Appellant climbed into her bed and placed his hands in her panties and rubbed her genitals; and abuse first occurred when she was approximately eight years old. Because these similarities were shared between the four Victims' collective testimony and April's testimony, the evidence was highly probative.

Consistently, much of Deidra's testimony also coincided with the Victims' specific allegations: abuse occurred when she spent the night at Appellant's residence; abuse occurred when Appellant was the only supervising adult; abuse occurred while she watched television with Appellant, whereby Appellant touched child's genitals, buttocks, and breasts, both over and under child's clothes; Appellant placed her over his crotch and proceeded to move her up and down (the Victims consistently referred to this as "hunching"); and abuse occurred when she was approximately eight years old. Thus, the sheer number of similarities, as well as the high incidence of overlap between both 404(b) Witnesses' testimony and the collective Victims' testimony, carries great probative weight.

We fully acknowledge that 404(b) Witness Deidra did not experience the bath time assaults that April and the Victims suffered, that 404(b) Witness April did not experience the "hunching" that Deidra and the Victims suffered, and that these dissimilarities do somewhat diminish probative value. However, these few dissimilarities do not result in the danger of unfair prejudice substantially outweighing the immense probative value that still remains. Further, any dissimilarity between 404(b) Witness April's testimony and 404(b) Witness Deidra's testimony is not the focus of the inquiry. *See Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278 (holding bad act evidence must be sufficiently similar *to the crimes charged*). Rather, each 404(b) Witness's testimony must be sufficiently similar to the crimes related to the Victim's allegations. Here, the testimony of each 404(b) Witness was remarkably similar *to the crimes charged*, despite the fact that each 404(b) Witness's testimony was distinguishable from the other.

Regarding the second reason why the probative value was not substantially outweighed by the danger of unfair prejudice, the bad act testimony was not only similar to the Victims' allegations, it relied upon a high level of specificity that

extended to even the most peculiar conduct alleged by Victims, such as the bath time assaults, followed by area-focused drying and full-body lotioning, "hunching," laughing following an incident of abuse, and a perverse version of hide-and-seek. This high level of specificity regarding very peculiar conduct further increases the already great probative weight.

As to the final reason, the trial judge's findings regarding the temporal remoteness issue were specific and well-supported. The trial judge specifically found that the "probative value is stronger and the evidence should be allowed to show . . . a common scheme" and that the witnesses appeared credible. In fact, the Victims "had never spoken to the [404(b) Witnesses] about what happened to them," and the two 404(b) Witnesses had never spoken to each other about what occurred. Thus, considering this absence of communication, the numerous similarities that existed between the bad acts and the Victims' allegations, and the trial judge's on-the-record consideration of the potential for unfair prejudice, ample support exists to negate Appellant's argument that the amount of time between the bad acts and the crimes charged diminished probative value, such that the total probative value was substantially outweighed by the existing danger of unfair prejudice.

Based upon these three conclusions, the probative value of the 404(b) Witness testimony was not substantially outweighed by the danger of unfair prejudice. Accordingly, this bad act evidence did not have an undue tendency to suggest a decision on an improper basis. Therefore, the trial court did not err in admitting this evidence.

## CONCLUSION

The trial court did not abuse its discretion in admitting evidence of Appellant's bad acts, occurring some eleven to twenty years prior to the crimes charged. The related testimony (I) was sufficiently similar to the crime charged; and (II) was neither too remote nor was the evidence's probative value substantially outweighed by the danger of unfair prejudice. Appellant's convictions are

**AFFIRMED.**

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

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

Bonnie L. McKinney, f/k/a Bonnie L. Pedery,
Respondent,

v.

Frank J. Pedery, Appellant.

Appellate Case No. 2011-200487

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Appeal From Greenville County
Billy A. Tunstall, Jr., Family Court Judge

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Opinion No. 5165
Heard May 9, 2013 – Filed August 14, 2013

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**AFFIRMED**

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Kenneth C. Porter, of Porter & Rosenfeld, of Greenville, for Appellant.

Kim R. Varner, of Varner & Segura, and J. Falkner Wilkes, both of Greenville, for Respondent.

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**WILLIAMS, J.:** In this appeal from the family court, Frank Pedery (Husband) claims the family court improperly terminated Bonnie McKinney's (Wife) requirement to pay Husband permanent periodic alimony when the court found that Husband continuously cohabitated with his paramour in contravention of section 20-3-130(B)(1) of the South Carolina Code (Supp. 2012). In addition, Husband

contends the family court erred in failing to award Husband attorney's fees. We affirm.

## FACTS

Husband and Wife divorced on May 3, 2006. In the family court's final order, it approved an agreement entered into by Husband and Wife, wherein Wife agreed to pay Husband $1,500 per month in permanent periodic alimony. Three years later, Wife sought a modification or termination of her alimony obligation based on a substantial change of circumstances, which included the following: (1) a decrease in Wife's income by 40%; (2) a deterioration in Wife's health; (3) Husband's continued cohabitation with his paramour; and (4) an increase in Husband's income by virtue of Husband's live-in paramour.

At the hearing on May 11, 2011, Wife called several witnesses to testify on her behalf. Tim Greaves, a licensed private investigator, testified in support of Wife's allegations that Husband was cohabitating with his live-in paramour, Cynthia Hamby. Greaves stated he monitored Husband's house twice a day for a period of seven months starting in January 2009. Greaves stated that Hamby lived in Husband's house. Greaves testified Hamby would commute to Duncan, South Carolina, every Monday morning and remain in Duncan until Wednesday afternoon, at which time she would return to Husband's house. While in Duncan, Hamby cared for her grandchildren.

Greaves also observed the interior of Husband's house during this time[1] and stated Hamby's toiletries[2] occupied the bathroom and her clothing filled a substantial portion of the master bedroom closet. Greaves observed the couple spending significant time together outside Husband's house and stated Husband would pay for their groceries. He also testified that Husband and Hamby listed their status as "engaged" on Facebook prior to Wife filing her complaint but immediately changed it to "in a relationship" once litigation commenced.

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[1] During litigation, Husband placed his house on the market. Greaves saw the interior of Husband's house when it was for sale.

[2] Greaves testified he observed numerous female products, including: a woman's wig, hand lotion, curlers, hair products, make-up, feminine hygiene products, fingernail polish, mirrors, and hair bows.

When questioned about Husband's living arrangements, Wife stated she received a phone call from Husband's mother in January 2009. At that point, Wife began driving by their former marital home almost every day. During this time, she observed Hamby's vehicle parked outside Husband's house Wednesday through Monday mornings, which prompted her to hire a private investigator.

In response, Husband testified Hamby only stayed overnight on the weekends but lived with her son in Duncan throughout the week. When questioned as to why Hamby's clothing and toiletries were throughout Husband's house, he stated Hamby kept articles in both his house and her son's house because she traveled back and forth between the two houses. Husband admitted Hamby currently had her own key to his house as well as a key to Husband's car but claimed he gave them to her when he was hospitalized earlier that year. He also stated that, in the past, he would purchase their groceries, but now Hamby helps buy groceries and contributes by driving Husband around and helping clean the house. Regarding the parties' finances, Husband stated he was unemployed and was currently receiving full-time disability. Without alimony, Husband testified he would be unable to support himself.

William Hall and Clarence Sharpe also corroborated Wife's claim that her alimony should be reduced or terminated. Hall, a direct competitor with Wife in the trucking insurance industry, stated that beginning in 2008, the competition to insure trucks increased dramatically because many trucking companies were going out of business, which forced those in their industry to cut insurance rates and become much less profitable. Sharpe, Wife's manager, testified similarly. Sharpe stated that the increase in competition caused insurance rates, and correspondingly, commissions for selling policies, to fall dramatically. In addition, their company decreased the premium payouts by 5% to employees. Although Sharpe did not testify to Wife's decrease in salary, he stated his salary had decreased by 50% in the previous three to four years on account of the economy.

In support of Wife's claims, she testified that at the time of the parties' divorce, she netted approximately $14,000 per month. However, her income started to decrease in 2007 because of the economic downturn. Specifically, Wife showed her yearly earnings were as follows: $230,121 in 2007; $191,700 in 2008; $128,871 in 2009; and $119,605 in 2010. Wife also stated that her health had declined since she and Husband divorced and highlighted her issues with diabetes, high blood pressure, arthritis, osteoporosis, and lupus.

After considering all the testimony and evidence, the family court issued an order on August 26, 2011. In its order, the family court recounted the witnesses' testimonies at the hearing and concluded Wife was entitled to have her alimony obligation terminated. Citing to section 20-3-130(B) of the South Carolina Code, the family court terminated alimony, finding Husband, as the supported spouse, resided with a romantic partner on a continuous basis for greater than ninety days. Despite Hamby's absence from their residence to care for her grandchildren, the family court determined Husband and Hamby continuously resided together for the requisite ninety days. Specifically, the family court found Hamby's trips to Duncan to care for her grandchildren were akin to out-of-town travel for work and could not be used to circumvent the intent of the statute. Although Husband claimed Hamby maintained a separate residence in Duncan, the family court noted she never removed any of her personal property from Husband's house. The family court also found Husband's testimony was not wholly credible. As a result of the foregoing, the family court terminated Husband's alimony and declined to award either party attorney's fees. This appeal followed.

## STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55. However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact. *Id.* at 387-88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55.

## LAW/ANALYSIS

### 1. Termination of Alimony

Husband first contends that the family court improperly terminated Wife's alimony obligation. We disagree.

#### a. Two-Issue Rule

In Wife's brief, she claims this court should affirm the family court's decision outright because Husband failed to appeal the family court's alternative rulings. Specifically, Wife contends the family court found Wife's decreased income and deteriorating health were substantial changes in circumstances sufficient to merit termination of Wife's alimony obligation pursuant to section 20-3-130(B)(1) of the South Carolina Code. We disagree.

Pursuant to the two-issue rule, "whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Although we agree that Wife's decrease in income and health issues could constitute a substantial change in circumstances, based on our review of the order, we find the family court did not rule on these issues. The order devotes several pages to recounting the testimony of Wife and her witnesses as it relates to Wife's income, the economic downturn that affected her income, and Wife's health issues. In addition, Wife's complaint clearly sets forth these grounds as reasons to decrease or terminate her alimony obligation to Husband. However, the family court never found these circumstances merited termination of Wife's alimony obligation. Instead, the family court's findings were solely limited to whether Husband and Hamby continuously cohabitated as defined by section 20-3-130. Moreover, Husband specifically requested the family court rule on these issues in his Rule 59(e), SCRCP, motion, which the family court denied without a hearing or separate order. As such, we hold the two-issue rule does not bar consideration of Husband's argument on appeal.

**b. On the Merits**

Section 20-3-130(B)(1) provides that permanent alimony and support shall terminate "on the remarriage or continued cohabitation of the supported spouse." Unless otherwise agreed to in writing,

> "continued cohabitation" means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

§ 20-3-130(B). The supreme court further defined "resides with" in the context of continued cohabitation as "the requirement that the supported spouse *live under the same roof* as the person with whom they are romantically involved for at least ninety consecutive days." *Strickland v. Strickland*, 375 S.C. 76, 89, 650 S.E.2d 465, 472 (2007) (emphasis added).[3]

Husband concedes he and Hamby are involved in a romantic relationship. However, Husband claims Hamby does not live with Husband and her routine weekend stays and occasional overnight visits are not equivalent to continued cohabitation, particularly when Wife presented no evidence the two periodically

[3] We note that in *Strickland*, the supreme court defined "continued cohabitation" in the context of section 20-3-150 of the South Carolina Code (Supp. 2012) as when the supported former spouse "resides with" another person in a romantic relationship for a period of ninety or more consecutive days. 375 S.C. at 89, 650 S.E.2d at 472. Section 20-3-150 provides for the segregation of allowances between the supported spouse and his or her children and states that permanent alimony and support requirements of a supporting spouse will terminate "upon the remarriage or continued cohabitation of the supported spouse." Because the family court terminated Husband's alimony under section 20-3-130 and the definition of "continued cohabitation" is the same in sections 20-3-130 and 20-3-150, we reference only section 20-3-130 for purposes of this appeal.

separated to circumvent the ninety-day requirement of section 20-3-130. We disagree and find Wife presented sufficient evidence to terminate Husband's alimony.

Wife's private investigator testified Hamby and Husband behaved as husband and wife. The investigator observed Hamby and Husband spending five out of seven nights every week together at Husband's house for a period of at least seven months. We find the private investigator's extensive documentation and testimony regarding Husband and Hamby's living arrangements support our conclusion that they shared a home on a continuous and uninterrupted basis for substantially longer than ninety days. Although both parties agree Hamby left Husband's house every week to care for her grandchildren, we hold Hamby's departure was more akin to a temporary absence for out-of-town travel than it was to routine separation based on separate residences. Further, for the reasons set forth below, we disagree with the dissent's view that Hamby's caring for her grandchildren prevented a finding of continued residence for at least ninety consecutive days as required by section 20-1-130.[4]

Wife submitted evidence Hamby kept all of her personal belongings at Husband's residence, including her clothing, undergarments, shoes, and toiletries. Husband's testimony that Hamby only packed an "overnight" bag when she traveled to Duncan to care for her grandchildren lends support for the conclusion that Hamby "lived under the same roof" as Husband. Further, Husband admitted that he gave Hamby an engagement ring and that Hamby's relationship status was listed as "engaged" on Facebook prior to Wife filing for termination of alimony. We are not persuaded by Husband subsequently referring to Hamby's engagement ring as a

[4] The dissent also notes that Wife failed to show Hamby's caring for her grandchildren was an intentional attempt to evade the statute's ninety-day requirement. Because we find Wife established Hamby and Husband continuously cohabited for a period greater than ninety days, neither the family court nor this court need reach the issue of whether Husband and Hamby intentionally separated to circumvent the statute. *See* § 20-1-130(B) ("The court may [also] determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of *less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement*.") (emphasis added).

"friendship ring"[5] or by Hamby changing her relationship status from "engaged" to "in a relationship" immediately following Wife's initiation of this action. Rather, this is evidence of Husband's attempt to downplay their relationship and living arrangements, which we find unconvincing.

While Husband cites to several cases in which our courts found the moving party failed to establish the supported spouse continually cohabitated with another person as contemplated by section 20-3-130, we find each of these cases readily distinguishable from the instant case. *See Eason v. Eason*, 384 S.C. 473, 482, 682 S.E.2d 804, 808 (2009) (finding no bar to alimony when ex-wife and boyfriend may have resided together for periods of two to four weeks but never for a continuous period of ninety days and several witnesses testified ex-wife stayed with them during the ninety days and did not want to stay with boyfriend on a full-time basis); *Biggins v. Burdette*, 392 S.C. 241, 245-46, 708 S.E.2d 237, 239 (Ct. App. 2011), (finding termination of alimony not warranted when boyfriend maintained his own residence, kept most of his personal belongings at his residence, and routinely left when visitors stayed with supported spouse); *Fiddie v. Fiddie*, 384 S.C. 120, 126, 681 S.E.2d 42, 45 (Ct. App. 2009) (holding ex-wife did not continually cohabitate with a man when she lived with him sometimes but also stayed with her sister and friend several days each month so as to not "wear out her welcome"); *Feldman v. Feldman*, 380 S.C. 538, 544, 670 S.E.2d 669, 671-72 (Ct. App. 2008) (affirming family court's finding of no continued cohabitation when ex-wife and boyfriend were not observed living together for ninety days and when ex-wife's friends and family testified she lived alone); *Semken v. Semken*, 379 S.C. 71, 77, 664 S.E.2d 493, 497 (Ct. App. 2008) (reversing family court's termination of alimony because evidence did not demonstrate ex-wife and boyfriend lived under the same roof for ninety consecutive days).

Additionally, to conclude the parties did not continuously cohabitate for at least ninety consecutive days because of Hamby's routine travel to care for her grandchildren in Duncan would run afoul of the legislative intent underpinning this section. To interpret this section as Husband advances would allow *any* break in the ninety days to defeat a continuous cohabitation argument, rendering this section virtually unenforceable. For example, any time a paramour and supported

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[5] Husband also called it a "friendship ring." Counsel for Wife asked, "Did you buy [Hamby] a wedding ring? Engagement ring?" Hamby responded, "Yes. It's a friendship ring."

spouse are briefly away from each other, whether it be for an out-of-town work trip, an overnight hospital stay, or for a weekend vacation, the family court would be prohibited from applying this section. We do not believe the Legislature intended for such a result. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention."); *cf. Gasque v. Gasque*, 246 S.C. 423, 427, 143 S.E.2d 811, 812 (1965) (concluding a husband's temporary absence from South Carolina solely because of his employment did not render him a nonresident within the meaning of the divorce laws in the absence of clear proof of an intent to abandon his old residence and acquire a new one). Rather, the dispositive question is whether the paramour and supported spouse continuously *reside* together for the requisite ninety-day period such that the family court could conclude they are "living under the same roof" for purposes of section 20-3-130. *See generally* S.C. Code Ann. § 59-112-10 (2004) ("The word 'residence' or 'reside' shall mean continuous and permanent physical presence within this State, provided, that temporary absences for short periods of time shall not affect the establishment of a residence."); S.C. Code Ann. § 63-9-30 (2010) ("'South Carolina resident' means a person who has established a true, fixed principal residence and place of habitation in this State, and who intends to remain or expects to return upon leaving without establishing residence in another state. Temporary absences for short periods of time do not affect the establishment of residency."); S.C. Code Ann. § 63-17-2910 (2010) ("'Home state' means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period."). Given the aforementioned facts, we find Husband and Hamby's living arrangements, despite Hamby's temporary absences, amount to "continued cohabitation" under section 20-3-130. Accordingly, we affirm the family court's decision to terminate Wife's alimony obligation on this ground.

**2. Attorney's Fees**

Next, Husband contends the family court erred when it failed to award him attorney's fees. We disagree.

An award of attorney's fees and costs is a discretionary matter not to be overturned absent an abuse of discretion by the family court. *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). To award attorney's fees, the family court should consider several factors, including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. *E.D.M. v. T.A.M*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

The family court denied both parties' requests for attorney's fees on the grounds that Wife prevailed in the action.[6] We find the family court properly exercised its discretion. Although Wife has the superior ability to pay attorney's fees, Husband's conduct brought the parties into court. We find it would be inequitable to require Wife to pay his fees in this instance, particularly when she prevailed on the merits. Additionally, Wife incurred greater fees and costs in bringing this action and was earning substantially less on the date of the hearing than when the parties divorced. Furthermore, Husband receives monthly disability income, and although the termination of alimony will cause his income to decrease, he has failed to prove he will be unable to pay his fees. *See Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983) (finding party requesting attorney's fees has burden to prove entitlement to fees and costs). Accordingly, we affirm the family court's decision on this issue.

**CONCLUSION**

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

**AFFIRMED.**

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[6] We note the family court should have made specific findings of fact on the record relating to each factor from *E.D.M.* *See Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 534-35 (Ct. App. 1998) (citing Rule 26(a), SCRFC, and highlighting requirement of family court to make specific findings of fact on the record about each of the required factors from *E.D.M.*, but noting the appellate court may make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient). However, because Husband never raised this deficiency in his brief, and our review of the facts based on the preponderance of the evidence leads us to the same conclusion, we find it is appropriate to affirm the family court's denial of attorney's fees.

**HUFF, J., concurs.**

**KONDUROS, J., dissenting:** Respectfully, I disagree with the majority regarding the termination of Husband's alimony on the basis of continued cohabitation with Hamby. According to the plain language of the statute, Wife must demonstrate by a preponderance of the evidence Husband and Hamby resided together for a period of at least ninety consecutive days or establish they separated with the intent to circumvent the ninety-day requirement. *See* S.C. Code Ann. § 20-3-130(B) (Supp. 2012). In this case, the record establishes Hamby lived with her son prior to her becoming romantically involved with Husband. After that, the record shows that for a period of time, she spent approximately four to five nights per week at Husband's home and the remaining nights at her son's home, where she had her own room and aided in caring for her grandchildren. This was a regular occurrence every week, demonstrating the normal course of the parties' relationship. Caring for her grandchildren was an activity Hamby engaged in prior to her relationship with Husband and was not shown to be an evasive response to the statute, which requires a showing of intent. Therefore, in my opinion, the preponderance of the evidence does not support a finding that Husband and Hamby continually resided together for a period of at least ninety consecutive days or that Husband and Hamby separated to avoid the termination of his alimony. Furthermore, I would remand the decision of attorney's fees to the family court for reconsideration, factoring in Husband's prevailing on the continued cohabitation issue.