The Supreme Court of South Carolina

AMENDED ADMINISTRATIVE ORDER

I FIND that the 2012-2013 General Appropriations Act (A. 288, H. 4813) granted the South Carolina Commission on Indigent Defense (SCCID) the authority to "retain, on a contractual basis, the services of attorneys qualified to handle civil and criminal court appointments, to be reimbursed in accordance with applicable provisos and statutes."

SCCID working in conjunction with the South Carolina Bar has established a framework for the implementation of a contract system to handle a significant number of indigent cases that were previously assigned to various attorneys in accordance with Rule 608, SCACR.

NOW, THEREFORE, pursuant to Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the procedures outlined herein are adopted for purposes of establishing a contract system for the handling of indigent cases in South Carolina.

1. SCCID with the assistance of the South Carolina Bar will provide notice to Bar members about the contract system and the procedures for applying for these contracts.

2. SCCID shall establish all policies, procedures and contract provisions as it deems appropriate for the implementation of the system including, but not limited to the selection and compensation of contract awardees. However, any attorney who receives or has received a public reprimand, definite suspension, or disbarment pursuant to Rule 413, SCACR, based on misrepresentation or misconduct related to the submission of expense or reimbursement claims in an indigent case is ineligible to serve as a contract awardee and receive contract appointments.

3. Because SCCID must work within certain budget constraints, SCCID will first proceed with contracts for civil appointment matters. The types of civil matters included are: abuse and neglect and termination of parental rights matters in Family Court, Post-Conviction Relief and Sexually Violent Predator matters in Common Pleas and Probate Court commitment cases. SCCID shall then proceed as expeditiously as possible with contracts for criminal appointments as funding will permit.

4. Due to budget constraints and the need to more accurately gauge the number of cases and cost of the program, certain counties have been selected for initial implementation. These counties were identified by SCCID, the SC Bar, and Court Administration after reviewing current Rule 608 appointment data, to include the number of appointments per attorney in a given county. While all counties are not included in the initial listing; the attorneys from those counties should still receive a significant benefit from the contract system. Counties which have traditionally provided Rule 608 support to other counties should see a significant reduction in the number of appointments they receive in those counties due to the contract system being implemented. Once counties are added for implementation they shall follow the procedures as established in this Order. The initial counties for implementation are as follows:

Aiken	Dillon	Marion
Anderson	Dorchester	Marlboro
Bamberg	Greenwood	Newberry
Barnwell	Horry	Oconee
Berkeley	Jasper	Pickens
Cherokee	Lancaster	Spartanburg
Chesterfield	Laurens	Sumter
Colleton	Lee	Williamsburg
Darlington	Lexington	

5. Once SCCID has selected the contract awardees and the contracts executed for services in the designated counties, SCCID will forward to the Clerk of Court the list of all contract attorneys for that county. SCCID will identify the type or types of cases that will be assigned to the contract attorney. The Clerk shall then establish four (4) separate lists, based on case type, from which appointments to indigent cases shall be made. Each Clerk shall maintain a separate list for Family Court matters (TPR and Abuse and Neglect), Post-Conviction Relief, Sexually

Violent Predator and Probate Court commitment matters. The Family Court list will not include juvenile delinquency matters as these matters will be addressed through the criminal contracts. The clerk shall arrange each list alphabetically and the appointments shall be made alphabetically down the list. SCCID contracts will establish the given caseload for each contract and SCCID will notify the Clerks as to the number of cases each attorney is permitted to handle.

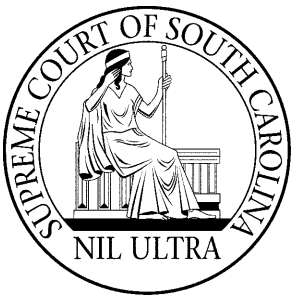
6. Clerks of Court shall only appoint Bar members who are under contract unless maximum caseloads have been reached by all contract attorneys. If the Clerk discovers or is notified that reasons exist for not appointing a contract attorney, such as a conflict of interest, and no other contract attorney is available for that county then the Clerk shall contact SCCID. SCCID will attempt to provide the name of another contract attorney to handle the matter. If no contract attorney is available the Clerk shall appoint an attorney from the county's Rule 608 list.

7. For those counties not under the contract system and in those counties wherein contract attorneys are unable to provide representation in all indigent cases, appointments shall continue to be provided in accordance with Rule 608. Therefore all Clerks of Court are hereby required to maintain current Rule 608 appointment lists in adherence with Rule 608, SCACR. Attorneys while under contract with SCCID shall be exempt from receiving any Rule 608 appointments and Clerks shall remove contract attorneys from their 608 lists. Attorneys when no longer under SCCID contract shall be returned to the Rule 608 list.

s/ Jean H. Toal C.J.

Jean Hoefer Toal, Chief Justice

Columbia, South Carolina
November 2, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
November 7, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Savannah Riverkeeper, South Carolina Coastal Conservation League, South Carolina Wildlife Federation, Conservation Voters of South Carolina, and the Savannah River Maritime Commission, Petitioners,

v.

The South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2012-209027

IN THE ORIGINAL JURISDICTION

Opinion No. 27182
Heard June 5, 2012 – Filed November 2, 2012

STATUTE CONSTRUED

C. Mitchell Brown and Allen Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, for Petitioner Savannah River Maritime Commission, Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert D. Cook, and Assistant Attorney General Parkin Hunter, all of Columbia, for Petitioner Savannah River Maritime Commission, Frank S. Holleman, III, James Blanding Holman, IV, Christopher Kaltman DeScherer, and Sally Corbette Newman, all of Southern

Environmental Law Center, of Charleston, for Petitioner Savannah Riverkeeper, et al.

Jacquelyn Sue Dickman and John Harleston , both of Columbia, for Respondent SCDHEC.

JUSTICE PLEICONES: Petitioners Savannah Riverkeeper, South Carolina Coastal Conservation League, South Carolina Wildlife Federation, and Conservation Voters of South Carolina (collectively, Conservation Groups) petitioned this Court to hear this matter in our original jurisdiction to determine whether the South Carolina Department of Health and Environmental Control (DHEC) acted illegally and usurped the authority of the Savannah River Maritime Commission (the Commission) when it negotiated an agreement with the U.S. Army Corps of Engineers (the Corps) and the Georgia Ports Authority (GPA) before issuing a 401 Water Quality Certification (the Certification or the 401 Certification) requested for the proposed Savannah Harbor Expansion Project (SHEP). The Court granted the petition. We find that DHEC's action contravened the plain language of S.C. Code Ann. § 54-6-10 (2007).

FACTS

The U.S. Army Corps of Engineers, Savannah District, initiated the Savannah Harbor Expansion Project in order to dredge and deepen the navigation channel in the Savannah River to facilitate its use by ocean-going vessels traveling to and from the Port of Savannah. Under Section 401 of the federal Clean Water Act, the Corps was required to seek certification from the appropriate South Carolina authority that the SHEP complied with state water quality standards.

The Corps applied to DHEC for the 401 Certification and a Construction in Navigable Waters permit (the Permit) on November 15, 2010, as well as for a Coastal Zone Management Act consistency determination. The Savannah River Maritime Commission, an entity created by S.C. Code Ann. § 54-6-10 (2007), submitted comments to DHEC opposing approval of the Corps's application for the Certification, Permit, and consistency determination. On September 30, 2011, DHEC issued a notice of decision proposing to deny the Certification because a staff assessment had determined that the SHEP did not meet South Carolina's water quality standards. The notice of decision appended the staff assessment.

Subsequently, DHEC staff, the Corps, and GPA negotiated and entered into an agreement (the Agreement) addressing the grounds for denial identified by DHEC staff as detailed in the assessment. On November 15, 2011, the DHEC Board issued the § 401 Certification, adopting the Agreement as part of the Certification. The § 401 Certification also served as approval of the Permit pursuant to 1 S.C. Code Ann Regs. 19-450.3(G) (2011) and 25A S.C. Code Ann. Regs. 61-101(A)(9) (Supp. 2011).[1] In December 2011, Conservation Groups and the Commission filed requests for contested case review with the Administrative Law Court (ALC), seeking review of the decision on both procedural and substantive grounds. That matter is pending in the ALC. In March 2012, Conservation Groups filed a Motion for Original Jurisdiction with this Court, asking the Court to rule on the question whether DHEC violated § 54-6-10 when it negotiated with and entered into an agreement with the Corps and GPA in the course of issuing the 401 Certification and in authorizing the Corps to conduct construction in navigable waters. DHEC consented to the request. This Court granted the petition. The Commission sought to intervene as a Respondent and was permitted to intervene as a Petitioner.

ISSUE

Did DHEC's action in issuing the 401 Certification contravene § 54-6-10?

DISCUSSION

I

Petitioners contend that DHEC contravened § 54-6-10 in two respects: when it negotiated and entered into the Agreement with the Corps and GPA that provided the basis for its issuance of the 401 Certification and when it effectively granted the Permit. We agree.

Section 54-6-10 establishes the Commission, in relevant part as follows:

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[1] When a § 401 Certification is issued, no separate permit for construction in navigable waters is required. Instead, the 401 Certification serves as the construction permit. Before DHEC may issue the permit, however, the staff reviewing the certification application is "required to coordinate with the Construction in Navigable Waters Permitting staff to insure" that the regulatory requirements for the construction permit are met. 1 S.C. Code Ann. Regs. 19-450.3(G).

> (A)[A] commission to be known as the Savannah River Maritime Commission is hereby established to represent this State in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels. The commission as an instrumentality of this State is empowered to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties in regard to the above which bind the State of South Carolina[.]
>
> . . .
>
> (F) Except as provided below, nothing in this section shall supersede the authority of other state agencies, departments, or instrumentalities including the Department of Natural Resources, the Department of Health and Environmental Control, or the State Ports Authority to exercise all powers, duties, and functions within their responsibilities as provided by law. However, on an interstate basis and specifically in regard to the State of Georgia, the responsibilities granted to the Savannah River Maritime Commission in this joint resolution supersede any other concurrent responsibilities of a particular state agency or department. Any requirements for permitting and constructing new terminal facilities on the Savannah River in Jasper County are declared not to be the responsibility of this commission, except as they may relate to this state's responsibility for the navigability or depth of the South Carolina portion of the Savannah River.

"The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget and Control Bd.*, 310 S.C. 210, 213 (1992). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 83, 533 S.E.2d 578, 581 (2000). "If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Id.*

The plain language of the statute gives the Commission the authority "to represent this State *in all matters* pertaining to the navigability, depth, dredging, wastewater and sludge disposal, *and related collateral issues* in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels." § 54-6-10(A) (emphasis added). The Commission is specifically "empowered to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties." *Id*.

Moreover, the Commission is given not only the authority but the "responsibility" to represent the state, a responsibility that "supersede[s] any other concurrent responsibilities of a particular state agency" to represent South Carolina in all matters pertaining to dredging of the Savannah River for navigation by ocean-going container and commerce vessels, and in related collateral issues. § 54-6-10(F). Given this language, we find the conclusion inescapable that the grant of authority was exclusive.

DHEC argues that the term "represent," interpreted in the context of the purpose of the Act, is limited to activities necessary for the development of the Jasper County terminal facilities, largely relying on the Act's title.[2] However, an inquiry into the

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[2] The title the Act reads as follows:

> A JOINT RESOLUTION TO DIRECT THE STATE PORTS AUTHORITY TO CONTINUE AND BRING TO ITS EARLIEST CONCLUSION THE CONDEMNATION ACTION IT HAS BEGUN INVOLVING APPROXIMATELY ONE THOUSAND EIGHT HUNDRED ACRES IN JASPER COUNTY NEEDED TO DEVELOP NEW TERMINAL FACILITIES; TO PROVIDE THAT THE POWER AND AUTHORITY OF JASPER COUNTY TO UNDERTAKE ANY CONDEMNATION ACTION REGARDING THIS APPROXIMATELY ONE THOUSAND EIGHT HUNDRED ACRES IN JASPER COUNTY OR ANY OTHER CONDEMNATION ACTION IN REGARD TO THE DEVELOPMENT OF TERMINAL FACILITIES IN JASPER COUNTY IS SUSPENDED FOR A PERIOD OF THREE YEARS FROM THE EFFECTIVE DATE OF THIS JOINT RESOLUTION; TO DIRECT THE STATE PORTS AUTHORITY TO CONTINUE AND COMPLETE CERTAIN OTHER ACTIONS BEGUN BEFORE THE EFFECTIVE DATE OF THIS JOINT RESOLUTION IN REGARD TO THESE NEW TERMINAL FACILITIES; TO DIRECT THE STATE PORTS AUTHORITY TO BEGIN SPECIFIC NEW UNDERTAKINGS WITHIN A STIPULATED TIME FRAME UPON FINAL CONCLUSION INCLUDING ALL APPEALS OF THE ABOVE

purpose of the Act arises only if the plain language is ambiguous. *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (title of statute "cannot undo or limit what the text makes plain"). In our view, there is no ambiguity in the text of § 54-6-10.

The Corps's proposed dredging of the Savannah River for purposes of navigation by ocean-going commerce and container vessels clearly implicates the statute's grant of responsibility and exclusive authority. Moreover, it was the impact of SHEP dredging in the South Carolina portion of the Savannah River that created the Corps's obligation to obtain the 401 Certification. Pursuant to § 54-6-10, the Commission has exclusive authority to represent the state in all matters pertaining to navigability and dredging of the Savannah River for use by ocean-going container and commerce vessels.

The plain language of § 54-6-10 gave the Savannah River Maritime Commission the responsibility and exclusive authority to represent South Carolina in all matters pertaining or collaterally related to dredging in the Savannah River for purposes of navigation by ocean-going container or commerce vessels, and 401 Certification for the SHEP fell within the scope of that authority. Thus, we find that DHEC acted in contravention of § 54-6-10 when it issued the 401 Certification.

II

The majority finds that DHEC "acted" for purposes of the state certification requirement of the Clean Water Act. This question is not at issue. Moreover, the Corps and GPA are not parties to this case. *See Spanish Wells Property Ass'n v. Board of Adjustment*, 295 S.C. 67, 367 S.E.2d 160 (1988) (rule that permittee is necessary party in appeal of action challenging issuance of building permit serves judicial economy by ensuring that permittee will be bound if permit approval is reversed); S.C. Const. art. I, § 22 (2009) ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; . . . nor shall he be

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CONDEMNATION ACTION, TO ESTABLISH THE SAVANNAH RIVER MARITIME COMMISSION AND PROVIDE FOR ITS MEMBERSHIP, FUNCTIONS, DUTIES, AND RESPONSIBILITIES, AND TO ESTABLISH THE JASPER COUNTY PORT FACILITY INFRASTRUCTURE FUND AND FOR THE USE OF MONIES IN THE FUND.

Act No. 56, 2007 Acts 181 (H.B. 3505).

deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review."); *Ross v. Medical University of South Carolina*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) ("We have interpreted [article I, section 22 of the South Carolina Constitution] as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved."); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972).

Likewise, the majority reaches the questions whether DHEC's final decision was rendered a nullity and whether the notice of proposed decision became a final agency decision even though these questions have not been raised to us and a necessary party, the permit applicant, is not before us. I would not reach these questions without affording the appropriate parties an opportunity to be heard, and thus do not join that portion of the majority opinion.

TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which BEATTY and HEARN, JJ., concur. KITTREDGE, J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I write for a majority of this Court in stating we could not agree more with Justice Pleicones's conclusion in Part I of his concurring and dissenting opinion that DHEC acted on the Certification requested for the SHEP.[3] However, we do not agree with Part II of his opinion. We take the analysis one step further and find that because the Board acted in contravention of section 54-6-10 of the South Carolina Code when it negotiated the Agreement with the Corps and the GPA before issuing the Certification requested for the SHEP, no deference is owed the DHEC Board's decision. Because the Board's decision incorporated the statutorily prohibited Agreement, we further hold that the staff denial of the Certification is now the final agency decision for purposes of contested case review. Consequently, the Certification is denied, and the contested case hearing pending in the ALC is moot. Moving forward, any activity, including any settlement negotiations, concerning the Certification must properly be directed to the Commission.

When undertaking contested case review, the ALC is the ultimate fact finder, and is not restricted by the findings of the administrative agency. *Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 207–08, 712 S.E.2d 428, 433 (2011); *see also Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (finding the ALC sits de novo in a contested case hearing).

However, as a general rule, "agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretation of those laws." *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct. App. 2008) (citation omitted). Thus, the reviewing tribunal will defer to the relevant administrative agency's decision unless there is a compelling reason to differ. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (holding the circuit court should have deferred to the Panel's decision because "there was no compelling reason to overrule the Panel's decision that the [regulation] governed"). An agency's interpretation of a statute or regulation that is

[3] Under the federal Clean Water Act, any entity commencing a project that will create a discharge into waters of the United States must apply for a state certification that the project will comply with that state's water quality standards. 33 U.S.C. § 1341(a)(1). However, if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)" the state certification requirement is waived. *Id.* It is undisputed that DHEC "acted" for purposes of the state certification requirement.

erroneous or controlled by an error of law presents a compelling reason not to defer to the agency's interpretation. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440–41, 581 S.E.2d 836, 838–39 (2003) (reversing the circuit court because the agency's conclusions in the case were affected by an error of law); *Sweat*, 379 S.C. at 385, 665 S.E.2d at 655 (finding the State was "not entitled to any deference in its interpretation because the plain language of [the statute at issue] refute[d] the State's position" and holding the Court was "free to read the statute based on its plain language without deference to the State's position"). Thus, where the plain language of the statute is contrary to the agency's interpretation, the agency's interpretation should be rejected. *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. In this case, DHEC has not followed the relevant law in issuing its final decision, as the Board erroneously believed it had the authority to enter into the Agreement with the Corps and the GPA prior to issuing its final decision. Therefore, compelling reasons obviate *any* deference to the Board's decision in this case. DHEC usurped the Commission's authority in settling with the Corps and the GPA before the final review conference in contravention of the express requirements of section 54-6-10. *See* S.C. Code Ann. § 54-6-10(A) (endowing the Commission with the exclusive power "to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Corps of Engineers, and other involved parties.").

Thus, we find the conditional staff denial of the Certification, which the Commission actively participated in formulating, is now the final agency decision for purposes of contested case review. *See* S.C. Code Ann. § 44-1-60(F) (Supp. 2011) ("If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant . . . may request a contested case hearing before the [ALC].").

For these reasons, Appellants' request for a contested case hearing currently pending in the ALC is moot, as the relief Appellants ultimately seek is the conditional denial of the Certification. *See Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.").

Therefore, we hold that the Certification is denied, and any future activity, including any negotiations concerning the Certification, must be directed to the Commission. *See* S.C. Code Ann. § 54-6-10(A).

BEATTY and HEARN, JJ., concur.

JUSTICE KITTREDGE: I would dismiss the grant of original jurisdiction as improvidently granted. I emphasize that I do not necessarily disagree with the Court's holding that the South Carolina Department of Health and Environmental Control (DHEC) violated section 54-6-10 when it issued the 401 Certification. I believe the Court is addressing the isolated legal question prematurely. Accordingly, I respectfully dissent. I submit three reasons for dissenting.

First, this matter involves more issues than simply the section 54-6-10 challenge, all of which are presently pending in the Administrative Law Court (ALC). The many pending issues are inextricably linked, and therefore the dispute should be heard as a whole and not in piecemeal fashion. By cherry-picking this one issue for resolution, the Court directs the final outcome without allowing the matter to be fully heard.

Second, the Court has even foreclosed a full consideration of the section 54-6-10 challenge. An amicus curiae brief was filed challenging the constitutionality of the Savannah River Maritime Commission. This brief was rejected by an order of the Court. In hindsight, I believe it was error to deviate from our standard practice of accepting amici briefs. I do not know whether the amicus brief raised a meritorious issue. But I do believe we have an obligation to consider an issue fully before making a decision.

Third, today's result in favor of what Justice Pleicones refers to as Conservation Groups may have unintended consequences, particularly regarding the 401 Certification. The action of DHEC resulting in the 401 Certification occurred within the one-year time period as required by federal law. Under the law, a state agency may approve or deny the application for a 401 Certification, but if it fails to "act" on the application within one year, the requirement for 401 Certification is waived. What is the effect of declaring DHEC's actions illegal? Further complicating the matter is the effect of the passage of 2012 Act No. 125, which provides:

> The General Assembly . . . suspends the authority of the South Carolina Department of Health and Environmental Control . . . for all decisions subsequent to 2007 related to all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a

> waterway for ocean-going container or commerce vessels, in particular the approval by the department of the application of the United States Army Corps of Engineers for a Construction in Navigable Waters Permit for the dredging of the South Carolina portion of the Savannah River, because the authority of the Savannah River Maritime Commission, hereinafter the Maritime Commission, superseded the responsibilities of the department for such approval, as established by Act 56 of 2007 . . . .

Does the legislature's suspension of all DHEC authority in this matter since 2007 impact the question of whether DHEC's 2011 action (DHEC staff **and** Board) has any efficacy in terms of constituting a timely action for 401 Certification purposes? Has the state of South Carolina, as a result of the Court's decision today, failed to act in a timely manner? Chief Justice Toal, for the majority of this Court, holds a timely action for 401 Certification purposes occurred through the DHEC "staff denial of the Certification." Yet the Chief Justice declares that the DHEC Board "acted in contravention of section 54-6-10." I cannot reconcile these positions, for I view them as mutually exclusive. I do not understand how the DHEC staff had legal authority to act, but the DHEC Board did not.[4]

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[4] The Chief Justice validates the authority of DHEC staff because the "Commission actively participated in formulating" the staff decision. The degree of the Maritime Commission's participation, which is a factual question, cannot be fully assessed based on the record before us. Venturing a guess on the limited record before us, it appears that the Maritime Commission's so-called active participation was nothing more than submitting comments to DHEC, just as other entities did. Even if I were inclined to accept a finding of "active participation," that finding would, nonetheless, be insufficient to satisfy the text of section 54-6-10. Subsection (A) empowers the Maritime Commission "to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties . . . which bind the State of South Carolina . . . ." Further, subsection (F) *expressly disempowers* DHEC from any role whatsoever. S.C. Code Ann. § 54-6-10(F) ("[O]n an interstate basis and specifically in regard to the State of Georgia, the responsibilities granted to the Savannah River Maritime Commission in this joint resolution supersede any other concurrent responsibilities of a particular state agency or department."). Therefore,

For these reasons, I believe the proper course is to stay our hand and let these many and interrelated issues be fully litigated before the ALC. Given that all parties trumpet the critical importance of this case to our state's environment and economy, I am concerned that the Court's decision today may ultimately have the regrettable effect of silencing South Carolina's voice in this matter of great public importance. In my judgment, we erred in accepting this single question in our original jurisdiction. Thus, I would dismiss the grant of original jurisdiction and allow the case to proceed in the normal course.

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the Maritime Commission's mere acquiescence with the action of the DHEC staff falls short of section 54-6-10 compliance.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Greenwood County Magistrate Walter Rutledge Martin, Respondent.

Appellate Case No. 2012-213049

Opinion No. 27183
Submitted October 16, 2012 – Filed November 7, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Assistant Disciplinary Counsel, for Office of Disciplinary Counsel, of Columbia.

Harvey MacLure Watson, III, of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RLDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand, admonition, or letter of caution. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

On March 7, 2012, respondent was presiding over bond court. One of the defendants before respondent questioned the bond respondent had set. Respondent

became upset with the defendant and asked the defendant whether he was calling respondent a liar. When the defendant responded, "[n]o, I'm not going anywhere," respondent replied, "[o]kay. Because I'll beat your ass if you call me a liar." Respondent immediately apologized to the defendant.

Respondent regrets his comment and offers, by way of mitigation, that the evening before the incident, his disabled three-year-old son awoke him at 2:00 a.m. and he was unable to go back to sleep for the rest of the night. Respondent submits that his comment is atypical of his courtroom demeanor and submits a 2009 letter from the South Carolina Bar's Judicial Qualifications Committee which found him well qualified in the area of judicial temperament.

Law

Respondent admits that by his conduct he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity and independence of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety in all of judges activities); Canon 2A (judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Canon 3B(4) (judge shall require order and decorum in proceedings before the judge). Respondent also admits he has violated the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.
BEATTY, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gene Tony Cooper, Petitioner.

Appellate Case No. 2010-152786

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 27184
Heard October 17, 2012 – Filed November 7, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Robert Michael Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia;

and Solicitor Donald V. Meyers, of Lexington, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the decision of the Court of Appeals in *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland, Petitioner,

v.

South Carolina Department of Transportation, Respondent.

Appellate Case No. 2010-178606

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Orangeburg County
George C. James, Jr., Circuit Court Judge

Opinion No. 27185
Heard March 7, 2012 – Filed November 7, 2012

AFFIRMED AS MODIFIED

J. Christopher Wilson, of Wilson, Luginbill & Kirkland, of Bamberg; Lee D. Cope, R. Alexander Murdaugh and Matthew V. Creech, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Petitioner.

Richard B. Ness and Norma Jett, both of Ness & Jett, of Bamberg, for Respondent.

JUSTICE HEARN: Tiffanie Rutland (Tiffanie) was killed when the car in which she was riding rolled over and fell on top of her after she was partially ejected. This case presents the novel issue of whether "pre-impact fear" should be recognized as a cognizable element of damages in a survival action. We granted a writ of certiorari to review the decision of the court of appeals that pre-impact fear is not compensable in this State. *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 85, 700 S.E.2d 451, 455 (Ct. App. 2010). Finding no evidence of conscious pain and suffering under the facts of this case, we reserve judgment on this question for another day and affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Tiffanie was riding in the back seat of a 1999 S-10 Chevrolet Blazer with her husband Clarence Rutland (Rutland) and their infant son when it hit accumulated water on the roadway. The driver of the Blazer, Joseph Bishop, lost control of the vehicle when it began to hydroplane, and it eventually flipped over into a nearby ditch. Tiffanie was partially ejected from the side window of the vehicle, which fell upon her when it overturned. Rutland was completely ejected through the back window of the Blazer, but he was able to walk back over to the vehicle after the accident. When he got there, he saw Tiffanie's head hanging out of the window. She made no noise and was cold and unresponsive, which lead him to believe she was already dead. Although a bystander told Rutland that Tiffanie still had a pulse, he did not believe him and assumed he just wanted Rutland to get out of the way.

Rutland settled with Bishop's insurance company for $30,000 and filed a wrongful death action against the South Carolina Department of Transportation (SCDOT) alleging negligent maintenance and repair of the stretch of highway where the accident occurred. He later amended his complaint to add General Motors (GM) as a defendant for its failure to equip

the Blazer's side windows with laminated glass instead of tempered glass. Rutland subsequently settled with GM for $275,000. Including the $30,000 from Bishop's insurance company, Rutland received a total of $305,000 in settlement monies, which Rutland and GM agreed to allocate as follows: $138,000 to conscious pain and suffering under the potential (but not yet filed) survival claim and $167,000 for wrongful death. Judge Diane Goodstein approved the settlement, noting that no survival action had ever been filed, but concluding "without making any factual findings" that "there exists some evidence, however slight, that [Tiffanie] survived the crash and consciously endured pain and suffering prior to her death." Judge Goodstein's order further clarified that SCDOT would still be allowed to "argue against the allocation or apportionment of the wrongful death and survival proceeds or findings herein, to which SCDOT does not stipulate . . . for purposes of setoff to which SCDOT may be entitled." Ultimately, Rutland never filed a survival claim against any party.

In the trial against SCDOT for wrongful death, the jury returned a verdict in the amount of $300,000. SCDOT subsequently made a motion for set-off, alleging that the entire amount of the settlement should be equitably reapportioned to the wrongful death action because there was no evidence to support the putative survival claim for which settlement funds were allocated. The trial court agreed and found that "there is not sufficient evidence from which a jury could have concluded Tiffanie Rutland experienced conscious pain and suffering of any kind before, during, or after the accident." This effectively rendered the verdict a zero dollar judgment.

Rutland appealed, arguing the trial court erred in failing to recognize Tiffanie's pre-impact fear as damages supporting the survival action and in reallocating the full amount of the settlement toward SCDOT's judgment. *Rutland*, 390 S.C. at 78, 700 S.E.2d at 451. The court of appeals affirmed, concluding that South Carolina does not recognize pre-impact fear as an element of damages and the reallocation of the settlement was proper. *Id.* at 85, 700 S.E.2d at 455. We granted certiorari to review the court of appeals' decision.

ISSUES PRESENTED

I. Did the court of appeals err in failing to recognize damages for pre-impact fear and in finding there was no evidence of conscious pain and suffering?

II. Did the court of appeals err in affirming the circuit court's equitable reallocation of settlement proceeds?

LAW/ANALYSIS

I. CONSCIOUS PAIN AND SUFFERING

Rutland first argues the court of appeals erred in finding there was no evidence Tiffanie experienced conscious pain and suffering.[1] In particular, Rutland argues we should recognize pre-impact fright or fear as a cognizable element of damages in a survival action.[2] Because we find no evidence of conscious pain or suffering either prior to or after impact, we disagree and reserve the novel question[3] of whether South Carolina should allow recovery for pre-impact fear for another day.

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[1] Because Rutland never brought a survival claim against any of the defendants, any direct evidence to support that claim would have been irrelevant in a wrongful death action. Nevertheless, he contends the record contains evidence to support a survival claim against GM sufficient to justify the settlement allocations and limit SCDOT's set-off to the $167,000 as allotted by GM and Rutland to the wrongful death claim.

[2] In a survival action, damages may be recovered for a decedent's conscious pain and suffering prior to death. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000). Rutland essentially argues that "pre-impact fear" should be incorporated as compensable "suffering" in a survival action.

[3] We clarify that to the extent the court of appeals concluded that the question of damages for pre-impact fear was resolved by *Hoskins v. King*, 676 F. Supp. 2d 441 (D.S.C. 2009), it was in error. The district court acknowledged

In urging us to recognize pre-impact fear damages, Rutland asserts the majority of jurisdictions addressing the issue have found pre-impact fear compensable and that South Carolina should follow suit. Generally speaking, those courts have determined the timing of the impact should not determine the availability of an award for damages pertaining to mental distress because it is illogical to bar recovery for pre-impact distress when one can recover for post-impact suffering. *E.g. Solomon v. Warren*, 540 F.2d 777, 793 (5th Cir. 1976) ("While in the garden variety of claims under survival statutes . . . fatal injuries sustained in automobile accidents and the like[,] the usual sequence is impact followed by pain and suffering, we are unable to discern any reason based on either law or logic for rejecting a claim because in this case as to at least the part of the suffering, this sequence was reversed."); *Lin v. McDonnell Douglas Corp.*, 574 F. Supp. 1407, 1416 (S.D.N.Y. 1983) ("In several cases it has been held that a decedent's estate may recover for the decedent's pain and suffering endured *after* the injury that led to his death. From this proposition, it is only a short step to the allowing of damages for a decedent's pain and suffering *before* the mortal blow and resulting from the apprehension of impending death.") (internal citations omitted), *rev'd in part on other grounds*, *Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d. Cir. 1991); *Monk v. Dial*, 441 S.E.2d 857, 859 (Ga. Ct. App. 1994) ("The fright, shock, and mental suffering experienced by an individual due to the wrongful acts of negligence will authorize a recovery where attended with physical injury. . . . [W]e find no requirement that the physical injury precede the mental pain and suffering.") (internal citations omitted); *Nelson v. Dolan*, 434 N.W.2d 25, 31 (Neb. 1989) ("[W]e are persuaded that there exists no sound legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's conscious postinjury pain and suffering and mental anguish and permitting such an estate to recover for the

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there was not direct support for this claim in South Carolina law and found the cases from other jurisdictions recognizing pre-impact fear were factually distinguishable. *Id.* at 451. Accordingly, this remains an open question in this State.

conscious prefatal-injury mental anguish resulting from the apprehension and fear of impending death.").

We decline, however, to decide the issue of whether to recognize pre-impact fear as an element of damages in a survival action given the lack of evidence in this record to support the claim. Rutland offers only a recount of his personal fears and apprehensions prior to impact as proof that Tiffanie must have felt them as well. The accident appears to have occurred quickly and the evidence suggests she died instantaneously. She therefore would have had little if any time to contemplate her demise. Furthermore, Rutland offers no other evidence of Tiffanie's pain and suffering. He himself testified that he knew Tiffanie was dead at the scene and that although he was told by a bystander that she had a pulse, he did not believe him. Additionally, even assuming she had a pulse, that fact alone is not evidence of conscious pain and suffering. Rutland further stated she was not responsive when he called her name nor did she react when he rubbed her head. Based on this evidence, a jury could not reasonably have concluded Tiffanie consciously experienced any pain or suffering prior to or after impact. Thus, Rutland has not adduced sufficient evidence even if we were to recognize pre-impact fear as an element of damages in a survival action.

II. EQUITABLE REALLOCATION

Rutland also argues that because there is sufficient evidence of conscious pain and suffering, the court of appeals erred in affirming the trial court's equitable reallocation of the settlement. We disagree.

A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action. *Welch v. Epstein*, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct. App. 2000). "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Id.* at 313, 536 S.E.2d at 425. Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is "almost universally held that there can be only one satisfaction for an

injury or wrong." *Truesdale v. S.C. Highway Dept.*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243. 329, S.E.2d 741 (1985).

As previously discussed, we find no evidence that Tiffanie endured conscious pain and suffering, and we therefore agree with the court of appeals that the trial court acted within its discretion by reallocating the settlement funds to the wrongful death claim. Furthermore, the allocation consistently tracks our prior case law. The facts here closely resemble those of *Welch*.[4] In *Welch*, the decedent—who was in the hospital for back surgery—died of a massive pulmonary embolism following a respiratory arrest allegedly due to a narcotics overdose under the supervision of Dr. Epstein. 342 S.C. at 294, 536 S.E.2d at 416. Welch's personal representative settled with an unnamed defendant for $450,000 total, allocating $445,000 to the survival action and $5,000 to the wrongful death claim. *Id.* at 312, 536 S.E.2d at 425. The personal representative then proceeded to a jury trial against Dr. Epstein and received a verdict of $3,000,000 for wrongful death, $28,535.88 in the survival action—which was the amount of medical expenses incurred—and $3,900,000 in punitive damages. *Id.* at 287, 536 S.E.2d at 412. The trial court, however, granted Dr. Epstein's motion for set-off and reallocated the amount of the settlement to $28,535.88 for the survival action and $421,464.12 for the wrongful death claim. *Id.* at 312, 536 S.E.2d at 425. The court of appeals affirmed, noting that the decedent had slipped into a coma at the time of his respiratory arrest and never awoke from

[4] The dissent advocates overruling *Welch* and disallowing the reallocation of settlement proceeds between different causes of action. However, Rutland has not asked us to do so, nor did he petition to argue against precedent as required by Rule 217, SCACR. We decline, as we must, to entertain arguments not presented to us. *See Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

it; thus, there was no evidence he consciously suffered so the survival claim was properly limited to medical expenses. *Id.* at 313, 536 S.E.2d at 426.

Similarly, here there is no evidence showing Tiffanie experienced conscious pain and suffering which would support a survival claim. Instead, she appears to have died instantaneously. In the absence of any support for a survival action, we find the trial court properly reallocated that portion of the settlement to the wrongful death claim.

The dissent contends this reallocation produces inequitable results by effectively reducing the judgment against SCDOT to zero, a view we do not share. Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor. *See* 22 Am. Jur. 2d Damages § 27; *see also Haselden v. Davis*, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (noting the "central tenet of compensatory damages [that] awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more"). Where reallocation of damages furthers that policy, we do not believe the result is inequitable. Moreover, the fact that the amount awarded by the jury for the wrongful death action -- $300,000 -- essentially mirrors the settlement amount of $305,000 lends further support for our view that Rutland has been duly compensated for his damages. Furthermore, we note the court order approving the settlement expressly reserved the right for SCDOT to contest the allocation of the proceeds, indicating that both SCDOT and Rutland were aware that a reallocation may be made. Therefore, we find the trial court properly reallocated the settlement proceeds and set-off the judgment against SCDOT.

CONCLUSION

Based on the foregoing, we affirm the court of appeals' opinion finding no evidence of conscious pain and suffering and upholding the equitable reallocation of the settlement. However, we modify it to clarify that the issue of whether "pre-impact" fear is a compensable element of damages remains an open question in South Carolina.

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

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority in declining on this record to recognize pre-impact fear as an element of damages in a survival action. However, in my view, reallocation of a plaintiff's settlement agreement from one cause of action to another is not warranted. Thus, I would reverse the circuit court's reallocation of the settlement agreement that was set off in full against Rutland's judgment against SCDOT on this wrongful death action.

Wrongful death and survival actions are different claims for different injuries. *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 29-30, 81 S.E. 189, 189-90 (1914). In a wrongful death action, damages are for the benefit of the statutory heirs, and no damages are allowed for injuries to the decedent. *See id.* Evidence going only to the issue of the decedent's pain and suffering would be irrelevant and prejudicial and should not be admitted in an action only for wrongful death. In this case, Rutland sued SCDOT only on a wrongful death claim. Thus, it is hardly surprising that the record contains little evidence on the issue of the decedent's pre-impact fear.[5]

Prior to trial, Rutland settled his claims against GM and the at-fault driver, allocating a greater proportion of the proceeds to the wrongful death than to the survival action. Following trial, at which only a wrongful death action was tried against the remaining defendant, SCDOT, the circuit court granted SCDOT's motion to have the settlement proceeds reallocated wholly to the wrongful death action. The resulting setoff extinguished the entire judgment against SCDOT.

In my view, reallocation of the settlement proceeds was improper. In approving reallocation, the majority relies on *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The *Welch* court recognized the rule that "the reduction in the [plaintiff's] judgment must be from a settlement for the same cause of action." *Welch*, 342 S.C. at 313, 536 S.E.2d at 425. It nonetheless proceeded to expand this accepted setoff principle to allow a

[5] In *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), discussed infra, both the wrongful death and survival actions were tried.

court to disregard a plaintiff's pre-trial settlement agreement with a different tortfeasor and reallocate the settlement monies among various causes of action. Nothing in our precedents supports such a reallocation. I would overrule *Welch* to the extent it authorizes reallocation of settlement proceeds among different causes of action.[6]

Moreover, in my view equity is not served by a court's revision of a settlement agreement between the plaintiff and another tortfeasor. First, doing so essentially requires a plaintiff to defend to the court the viability of a claim she has not made. In my view, such a procedure violates the settled rule that the plaintiff may choose her defendant. *See Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010) (refusing to find the "firmly entrenched common law principle" of plaintiff's sole right to choose her defendant abrogated by the Tort Claims Act even when the result was to make a nonsettling defendant liable for a greater share of the damages).

Reallocating a settlement agreement may also inequitably reduce a plaintiff's recovery against at-fault defendants. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212-21 (1994), and sources cited therein (discussing possible inequities of setting off judgment by full amount of settlement rather than requiring a nonsettling defendant to pay its proportionate share of damages). This case serves as an example, in that the jury's verdict represented only its determination of the wrongful death damages to the decedent's family and not her own survival damages. It is impossible to divine from that verdict what verdict a jury would have returned on the decedent's own damages in a survival action, had one been brought.

[6] The majority places weight on the fact that Rutland and SCDOT were aware of the possibility of reallocation. I find this fact both unsurprising in light of the existence of *Welch* and irrelevant to my analysis. SCDOT was not a party to the settlement agreement between Rutland and GM, and the circuit court properly emphasized that SCDOT was bound by none of its terms.

The circuit court's ex post analysis also benefits from hindsight and disregards a variety of legitimate bases for the parties' ex ante decisions. *See McDermott*, *supra*. For example, the parties to the settlement agreement were able to bargain on the settlement amount in light of the unsettled law regarding pre-impact fear as an element of damages in a survival action.

Further, the result of reallocation in this case is that SCDOT, an at-fault defendant, is exempted from any payment to the decedent's statutory heirs. I see no equity in this result. *See Chester*, *supra*; *McDermott*, 511 U.S. at 219 ("The law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation."). Finally, the unfortunate effect of reallocation in a case such as this, where there is no suggestion of fraud or other wrongdoing by the plaintiff, is to discourage plaintiffs from settling and encourage joint tortfeasors to litigate, contrary to our strong public policy favoring settlement. *See Chester* 388 S.C. at 346, 698 S.E.2d at 560.

Thus, in my view, the trial court erred when it reallocated the settlement. I therefore respectfully dissent from that portion of the majority opinion approving reallocation of the settlement in favor of SCDOT.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Connie Carson, as Personal Representative of the Estate of Beryl Harvey, Appellant,

v.

CSX Transportation, Inc., Respondent.

Appeal from Bamberg County
Doyet A. Early III, Circuit Court Judge

Opinion No. 27186
Heard February 9, 2012 - Filed November 7, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Christopher Wilson, of Wilson, Luginbill & Kirkland, of Bamberg; John E. Parker, R. Alexander Murdaugh, William F. Barnes III, and Matthew V. Creech, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Appellant.

Elizabeth A. McLeod and Mark C. Wilby, both of Fulcher Hagler, of Augusta, Georgia; John C. Millberg, of Millberg Gordon & Stewart, of Raleigh, North Carolina, and Jonathan P. Harmon, of McGuire Woods, of Richmond, Virginia, for Respondent.

CHIEF JUSTICE TOAL: In this wrongful death and survival action involving a train collision, Connie Carson (Appellant), as personal representative

of the estate of Beryl Harvey, argues the circuit court erroneously excluded certain evidence, charged the jury, and permitted an inconsistent verdict in the survival action. We affirm the circuit court's evidentiary determinations and jury charge, but reverse the circuit court's decision denying Appellant's request for a new trial *nisi additur* and remand the survival action for a new trial absolute.

FACTS/ PROCEDURAL BACKGROUND

On May 30, 2004, at approximately 7:05 p.m., Frances Harvey (Ms. Harvey) was driving her son, Beryl Harvey (Decedent), to go fishing when she approached a grade crossing on Honeyford Road in Denmark, South Carolina. The crossing did not have lights or a crossbar, but was marked with crossbucks, a stop sign, and white stop lines and railroad markings on the pavement. Ms. Harvey testified that she stopped, looked left, turned and looked right, and slowly proceeded across the tracks after not seeing or hearing a train. She does not remember anything after proceeding forward. The engineer trainee who was operating the train testified that he noticed a tan van stop momentarily before pulling onto the crossing and stopping on the tracks. The train was travelling at approximately 46 miles per hour when it collided with Ms. Harvey's van. Decedent was a quadriplegic,[1] and was secured in his wheelchair in the rear of the van, facing the opposite direction of the oncoming train, when the van was hit by the train. Decedent was ejected from the van and was still alive when he landed in some briar and bushes near the train track. A witness to the scene testified he heard Decedent call out for his mother from the brush, and two other witnesses testified they heard Decedent moaning. Decedent died at the scene from blunt trauma to his head and chest.

Appellant filed a wrongful death action against both CSX and the South Carolina Department of Transportation (SCDOT) on February 21, 2006,[2] and then filed a survival action against both parties on May 25, 2006.[3] Appellant settled her claims against SCDOT prior to trial.

Appellant and CSX continued to trial before a jury. Central to Appellant's claim of negligence were the allegations that CSX failed to eliminate trees and vegetation that obstructed Ms. Harvey's view and that CSX failed to adequately

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[1] Decedent lost use of his legs and arms as a result of a diving accident at the age of 16.

[2] Appellant filed amended complaints in the wrongful death and survival actions against both parties in August of 2008.

[3] These actions were consolidated for trial.

sound its horn in compliance with South Carolina law and CSX's internal operating rules. Appellant offered evidence that at the time of the accident, the vegetation surrounding the Honeyford Road crossing did not accord with the specifications prescribed by CSX's internal crossing clearing program. CSX offered into evidence pictures of the scene, taken by an investigator working for the law firm representing Appellant days after the accident, which tended to show an unobstructed view of the tracks. CSX also offered the testimony of an eyewitness, who was stopped on the opposite side of the tracks as the train approached, that he could clearly see the train approaching.

Regarding the claim of an inadequate warning signal, Appellant argued that CSX was negligent per se for failing to comply with section 58-15-910 of the South Carolina Code, which mandates that a train begin to sound its whistle or horn at 1,500 feet from a road crossing and to continue whistling until the train crosses the intersection. S.C. Code Ann. § 58-15-910 (1976). Appellant additionally offered testimony regarding CSX's operating rule that the train horn must be sounded at the whistle post and be blown in two long blasts, followed by a short blast, followed by another long blast. The train that collided with Ms. Harvey's van was equipped with a data event recorder that revealed the train operator first sounded the horn at 1,347 feet from the crossing, and then blew the horn three additional times before striking Ms. Harvey's van. There was testimony that the duration of the horn blasts and the time between the horn blasts did not comply with CSX's operating rules. CSX offered the testimony of the eyewitness that the horn was very loud and that the engineer "sat down" on the horn as it approached the intersection and it did not stop until after the collision.

After seven days of trial before a jury, the jury returned a special verdict finding CSX forty percent negligent and Ms. Harvey sixty percent negligent. This fault allocation gave rise to a defense verdict on the Appellant's wrongful death claim. The jury found the damages in the survival action amounted to zero dollars. Appellant filed motions for judgment notwithstanding the verdict (JNOV), new trial absolute, and new trial *nisi additur*. The circuit court denied each of these motions. This action is before this Court pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the circuit court properly excluded all evidence related to SCDOT's pre-accident recommendation to install gates and lights at the crossing.

II. Whether the circuit court properly excluded all evidence related to post-accident vegetation cutting by CSX.

III. Whether the circuit court properly omitted the "particularly dangerous" language from section 56-5-2715 of the South Carolina Code when charging the jury on a driver's duty to stop.

IV. Whether Appellant is entitled to a new trial absolute or a new trial *nisi additur* due to the jury's finding of zero dollars in damages in the survival action.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663–64 (2006). The admission or exclusion of evidence, the decision of the circuit court as to particular jury instructions, and the denial of a motion for a new trial *nisi additur* are all actions within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) (admission of evidence); *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (jury charge); *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (*nisi additur*). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

ANALYSIS

I. Exclusion of Evidence Related to SCDOT's Pre-Accident Recommendation to Install Gates and Lights at the Crossing

On April 26, 2004, roughly a month before the accident, a diagnostic team with SCDOT evaluated the Honeyford Road crossing for the purpose of securing federal funding pursuant to section 130 of Title 23 to the United States Code (section 130) and recommended that gates and lights be installed using those funds. 23 U.S.C. § 130 (Supp. 2011). The circuit judge excluded from evidence any reference to this recommendation on three grounds: it was subject to the evidentiary privilege of section 409 of title 23 to the United States Code, 23 U.S.C.

§ 409 (Supp. 2011) (section 409), it is a subsequent remedial measure and therefore not admissible under Rule 407, SCRE, and its prejudicial value outweighed its probative value and should be excluded under Rule 403, SCRE. Appellant argues the circuit court erred on each of these grounds. We disagree.

Appellant sought to call Darrell Munn, a research engineer on SCDOT's diagnostic team that evaluated the Honeyford Road crossing, to testify about his observations of the Honeyford Road crossing and the resulting recommendation by the diagnostic team to install flashing lights and a crossbar. CSX objected to Munn's testimony on the ground it was inadmissible pursuant to section 409. Section 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections **130**, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds **shall not be subject to discovery or admitted into evidence in a Federal or State court** proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409 (emphasis added). The circuit judge sustained the objection, finding that the admission of Munn's testimony was preempted by this federal law and additionally, that Munn's testimony should be excluded on Rule 407 and 403, SCRE, grounds.

Appellant first argues that data collected for purposes of securing federal money under section 130 is not subject to evidentiary exclusion under section 409 because the United States Supreme Court in *Pierce County Washington v. Guillen*, 537 U.S. 129 (2003), held that section 409 only protects documents collected specifically for 23 U.S.C. § 152 purposes.[4] While the Supreme Court can be quoted as saying such, Appellant misconstrues the holding of *Pierce County*. In that case, the Court was determining the scope of section 409 protection where

[4] In 2005, Congress replaced section 409's cross-reference to 23 U.S.C. § 152 with 23 U.S.C. § 148.

data compiled for purposes of receiving federal money under 23 U.S.C. § 152 was at issue and where petitioner urged the Court to apply section 409 broadly to exclude data generated for purposes other than securing section 152 funds. *Pierce Cnty.*, 537 U.S. at 143. The Supreme Court in no way intended to read out section 409's reference to section 130, at issue in this case.

Appellant alternatively argues that Munn's testimony is not subject to section 409's evidentiary privilege because it protects only "reports, surveys, schedules, lists, or data compiled" during a safety planning evaluation and Munn's testimony about his observations and conclusions is not a document. We believe this hyper-technical reading of section 409 would render the statute meaningless.

The Supreme Court, in *Pierce County*, noted that the purpose of establishing the evidentiary privilege found in section 409 was to quell states' fears that "diligent efforts to identify roads eligible for aid under [federal highway safety programs] would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made." 537 U.S. at 133. The Supreme Court declined to adopt the narrow reading of section 409 urged by respondents in that case, stating:

> that reading would render the 1995 amendment to § 409 (changing the language from "compiled" to "compiled *or collected*") an exercise in futility. We have said before that, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." . . . [Respondent's] reading gives the amendment no "real and substantial effect" and, accordingly, cannot be the proper understanding of the statute.

Id. at 145 (internal citations omitted). The approach taken by the Supreme Court does not allow us to adopt Appellant's argument that section 409 excludes the documents containing data collected for purposes of securing federal highway safety funds, but not the testimony of mental impressions made when collecting that data.

Appellant cites *Bowman v. Norfolk Southern Railway Company*, No. 94-1204, 1995 WL 550079 (4th Cir. Sept. 15, 1995), to support its contention that CSX failed to meet its burden for establishing the elements of section 409, discussed *supra*. Because this case more aptly supports Appellant's contention that Munn's testimony is admissible in the face of section 409, we discuss it here.

In *Bowman*, a South Carolina district court allowed a highway department official who had conducted a routine safety inspection of the railroad crossing at issue to testify about his findings, even though his written report was ruled inadmissible by the district court under section 409. *Id.* at *6. In evaluating the propriety of the district court's admission of the officer's testimony, the United States Court of Appeals for the Fourth Circuit recognized the general proposition that "witnesses should not be allowed to circumvent § 409 by testifying regarding the contents of an inadmissible report." *Id.* The Fourth Circuit noted that it reviews the court's admission of the testimony under an abuse of discretion standard, and then affirmed the admission upon the belief that the highway department official "simply used portions of the document to refresh his recollection about matters otherwise available to any lay witness who had observed the scene." *Id.*

We believe the Fourth Circuit intended *Bowman*, an unpublished opinion, to be a narrow holding. The bulk of national jurisprudence on this issue supports the circuit court's decision in this case to exclude Munn's testimony under the ambit of section 409. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992) (upholding the district court's exclusion of the testimony by the author of an excluded report because allowing that testimony would circumvent the purposes of the statute); *Powers v. CSC Transp., Inc.*, 177 F. Supp. 2d 1276, 1279–80 (S.D. Ala. 2001) ("It is well-settled that a plaintiff may not circumvent Section 409 by asking a witness to testify to matters the witness learned from documents protected by Section 409."); *Rodenboeck v. Norfolk & Wester Ry. Co.*, 983 F. Supp. 620, 623 (N.D. Ind. 1997) ("§409 encompasses not only grade crossing safety enhancement documents, but also any testimony about those documents."). Recognizing the policy underlying section 409, we find that any testimony about observations made while gathering data for purposes of securing the federal highway safety funds referenced in section 409 falls within the evidentiary privilege of section 409.

Alternatively, Appellant contends that CSX did not satisfy its burden to establish that the data compiled during the diagnostic team's site visit was for purpose of securing federal money under section 130. We disagree. Prior to trial, CSX filed a motion in limine arguing that any testimony regarding the recommendation to install gates and lights was inadmissible under section 409. CSX supported that argument with the deposition testimony of Munn that in making the site visit, the team followed the criteria set forth in federal regulations for purposes of receiving section 130 funds. Upon this showing, the judge invoked the evidentiary privilege of section 409 to exclude Munn's testimony. We believe CSX satisfied its burden by showing that SCDOT's diagnostic team made the April

26, 2004 site visit to evaluate its safety so that it could apply for federal funds under section 130. Therefore, we find the circuit court properly excluded Munn's testimony pursuant to section 409.

Appellant finally argues the circuit judge erred in excluding evidence of SCDOT's recommendation to install gates and lights on Rule 403 and 407, SCRE, grounds. Because we find the circuit judge properly excluded this evidence under section 409, we do not reach those issues. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (appellate court need not discuss remaining issues when determination of prior issue is dispositive).

II. Exclusion of Evidence Related to Post-Accident Vegetation Cutting

At trial, Appellant provided evidence that the vegetation bordering the tracks was not cut according to the specifications of CSX's internal crossing clearing program. CSX cut the vegetation according to this standard shortly after the accident, on July 19, 2004. The circuit judge's uniform directive throughout the trial was to exclude any evidence of subsequent remedial measures on Rule 403 and Rule 407, SCRE, grounds. Rule 407 of the South Carolina Rules of Evidence provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 407, SCRE.

The rationale underlying Rule 407 "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee's note.[5] In *Webb v. CSX Transportation, Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005), this Court

[5] Although there are minor differences between Rule 407 of the Federal Rules of Evidence and Rule 407, SCRE, the underlying policy of each is the same.

reversed and remanded a train collision case, in part, because of the erroneous admission of evidence of post-accident vegetation cutting. The *Webb* court rejected the narrow application of Rule 407 used in *Reiland v. Southland Equipment Service, Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998), and held, "Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose." *Webb*, 364 S.C. at 653, 615 S.E.2d at 448.

Appellant argues the circuit judge should have recognized the impeachment exception to Rule 407 to admit the evidence of subsequent remedial measures, and additionally argues that CSX waived its right to object to the admission of Exhibit 134. We disagree.

A. Impeachment of CSX's Position that the Sight Distance was Adequate

Appellant contends she should have been permitted to introduce evidence of post-accident cutting to impeach CSX's position that the available sight distance on May 30, 2004, was adequate and that the vegetation did not need to be cut. We disagree. Allowing a party to invoke the impeachment exception to Rule 407 in response to the opposing party's general defense against a negligence claim would swallow the rule. The Supreme Court of Illinois encountered a party propounding this same logic and stated:

> Just as evidence of subsequent remedial measures is not considered sufficiently probative to be admissible to prove prior negligence, that evidence is not admissible for impeachment where the sole value of the impeachment rests on that same impermissible inference of prior negligence.

Herzog v. Lexington Twp., 657 N.E.2d 926, 933 (Ill. 1995). Accordingly, it was not an abuse of discretion to exclude a photograph that depicted CSX's post-accident clearing of the vegetation along the Honeyford Road crossing simply because CSX maintained that the sight distance at the time of the accident was adequate.

B. Impeachment of Jack Cowan's Testimony

Along similar lines, Appellant contends evidence of post-accident vegetation clearing should have been admitted to impeach the testimony of Jack Cowan, a CSX engineer, that CSX has always cut the vegetation at its crossings, even prior to CSX's implementation of the crossing clearing program in 2001. Appellant sought to admit a photograph of the crossing taken after the vegetation was cleared according to CSX's updated policy to allow the jury to compare it to the photograph of the crossing taken days after the accident.

During cross-examination of Cowan, Appellant asked whether Cowan would be able to see a car approaching if vegetation had grown up around the crossing, to which Cowan replied that he had not encountered this problem since, in his forty year career with CSX, CSX always kept vegetation cut back. Cowan admitted that the way CSX cleared crossings had changed over the years, but that CSX had always implemented a program of cutting back vegetation at crossings.

CSX's general defense theory was that although the vegetation had not yet been cut in accord with the latest internal policies, the sight distance at the crossing was nevertheless adequate to allow a driver sufficient opportunity to see an approaching train. Cowan's testimony was consistent with this theory of defense. Additionally, CSX conceded that the vegetation was not cut in accord with its own policies. Evidence of subsequent remedial measures could not have impeached this concession. Appellant could have properly used this photograph as impeachment if, for example, Cowan had testified that at the time of the accident, the vegetation surrounding the crossing was cleared in accordance with CSX's internal policies. However, upon these facts, the photograph depicting post-accident vegetation clearing had no impeachment value, and therefore was properly excluded under Rule 407, SCRE.

C. Animation Expert's Handwritten Notes

On appeal, much has been made of the circuit judge's ruling that prohibited Appellant from referencing a portion of Gary Huett's notes during closing arguments—an exhibit introduced into evidence by CSX. After a thorough reading of the Record and due consideration, we uphold the circuit judge's determination to exclude reference to the portion of the notes not used at trial because these notes were not critical to refuting the negative cross-examination and arguments made by CSX's counsel. Additionally, reference to this portion of the notes would have

undermined, at the eleventh hour of trial, the circuit judge's consistent goal of excluding evidence of post-accident cutting.

CSX's Exhibit 134 originally consisted of five pages of hand-written notes that Appellant's expert, Gary Huett, took for purposes of creating an accident animation. Because the vegetation along the tracks was cut shortly after the accident, Huett relied, in part, on photogrammetry[6] to re-enact the accident scene, using photographs taken by Appellant's investigator, Donald Crews, days after the accident occurred. Exhibit 134 was introduced into evidence without objection. However, the exhibit was not seen by or published to the jury. The first page of Huett's notes stated,

> "DOA [date of accident]: . . . May 30, 2004
> Survey 2006
> Cut back since accident
> Poor quality photos after accident

A central issue at trial was a determination of the sight distance Ms. Harvey would have had at the point where she stopped behind the tracks. During CSX's cross-examination of Huett and another expert, Dr. Heathington, counsel made reference to the fourth page of Huett's notes that stated, "Performed my photogrammetric analysis . . . , then compared it to Don Crews' measurements at site. They lined up very well. His 1014' [feet] visib[ility] @ 70' [inches] past stop bar is consistent." CSX read this portion of the notes into evidence to refute the experts' claims that the sight distance may have been much less.

A key defense strategy of CSX was to undermine the reliability of the animation created by Huett. At closing argument, Appellant sought to refute several of CSX's attacks on the animation by stating that it was only necessary to create the animation because the vegetation along the sight line of the tracks had since been cut. Specifically, Appellant sought to introduce the first page of Huett's notes that made reference to the post-accident cutting. During closing argument, Appellant's counsel stated, "One thing I want to talk with you about is there was a lot of criticism of our deceptive animation. We had to do the animation. . . . This is Defendant's Exhibit 134." CSX promptly objected. In arguing against that

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[6] Photogrammetry is the process used to determine the geometric properties of an object from two-dimensional photographs based on height and elevation of other known points.

objection, Appellant's counsel stated, "we wanted to use Exhibit 134 to show that, in fact, he had to do an animation to get the distances because they had cut the crossing."[7]

The circuit judge sustained CSX's objection, stating:

> . . . We have ruled consistently through the trial that any subsequent—whether it's remedial or whatever it was—any subsequent cutting of the trees I was keeping out. I found it not to be relevant. I found it to violate 407 and 403, and when it was brought to our attention at the side bar during argument that document or exhibit in its entirety would have violated my prior rulings and that's the reason I precluded argument on it at the time. You're protected, Mr. Parker.

Appellant argues that CSX (1) waived its right to object to the use of Exhibit 134 when it introduced it into evidence, and (2) "opened the door" to reference of the full exhibit because it criticized Huett's animation as being inaccurate. Therefore, Appellant argues that reference to Huett's notes was necessary to explain that post-accident cutting necessitated Huett's reliance on photogrammetry. We disagree.

Over the course of this long and complex trial, the circuit judge was careful to exclude any reference to subsequent remedial measures, pursuant to Rules 403 and 407, SCRE.[8] It is clear from the circuit judge's response to CSX's objection that the admission of this portion of Huett's notes would have undermined this consistent directive at the final hour of trial. Appellant argues that CSX's failure "to make an objection at the time evidence is offered constitutes waiver of the right to object." *Cogdill v. Watson*, 289 S.C. 531, 538, 347 S.E.2d 126, 129 (Ct. App. 1986). However, as we view the Record, it is unclear whether the entirety of Huett's notes was placed into evidence. Moreover, even if we assumed it was, a court always has discretion to exclude evidence *sua sponte* if it believes it will mislead a jury or is unduly prejudicial. *See Carolina Home Builders, Inc. v.*

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[7] We note that even in the absence of post-accident clearing, it is common practice in train collision cases to create an animated re-enactment.

[8] For example, when Huett mentioned on the stand that some problematic bushes were no longer there, the circuit judge dismissed the jury and warned, "All right. Mr. Huett, we have gone to great lengths to try this case based solely on how this crossing scene appeared on the day in question . . . . Please do not make any additional references to what was not there in your analysis."

Armstrong Furnace Co., 259 S.C. 346, 357, 191 S.E.2d 774, 779 (1972) ("A motion to strike evidence admitted without objection is addressed to the sound discretion of the court."). In this instance, had CSX not objected to the admission of evidence of post-accident cutting, it is clear, based on the circuit judge's adamant directive to exclude such evidence, that he would have prohibited Appellant from bringing the evidence in through the back door. Therefore, we find that the circuit judge did not abuse his discretion in prohibiting Appellant from referencing the page of Huett's notes that disclosed the exact evidence he had consistently excluded at trial.

Further, we do not believe it was necessary to reveal information about the post-accident cutting to refute CSX's negative remarks about Huett's animation. As a defense strategy, CSX attempted to undermine the reliability of Huett's animation in several ways. During cross-examination, CSX questioned Huett about the animation's portrayal of the outside lighting, which looked "muddy," and the dimness of the train's headlight. CSX also opined that because of the skewed angle at which the train was approaching, it was unnecessary for Ms. Harvey to turn her head to the left a full 45 degrees to see the train because her peripheral vision should have alerted her of the approaching train at 549 feet when the animation depicted her looking straight ahead. CSX additionally questioned why the animation did not provide the sound of the horn blowing, especially during the extended period when the animation depicted a view of the opposite side of the tracks from which the train was approaching.[9] Also during cross-examination, and again at closing argument, CSX raised questions about the animation's depiction of Ms. Harvey's stop point and the time the animation devoted to her stopping and looking left, right, and then proceeding forward (20 seconds). Finally, CSX questioned why the animation did not allow a viewer to see when exactly the train came into view, but rather focused on the other side of the tracks at the time when the train should have become apparent. In sum, CSX's attacks focused on the animation's portrayal of the outside lighting, its lack of sound, the duration that the van stopped, the camera angle of the tracks as the train approached, and the manner in which it portrayed Ms. Harvey turning her head. Notably, CSX did not question Huett's use of photogrammetry or the accuracy of Huett's depiction of the vegetation bordering the tracks. Therefore, it was not necessary to reveal evidence of post-accident cutting to the jury to refute the assertions made by CSX's counsel.

[9] Appellant has not provided her animation as an exhibit, and therefore our ability to understand the reliability claims made by CSX is limited to the words exchanged at trial.

Accordingly, we find the circuit judge did not abuse his discretion in sustaining CSX's motion to limit reference to Huett's notes.

III. Jury Charge

Appellant next argues that the circuit judge committed reversible error by excluding the term "particularly dangerous highway crossing" when charging the jury on the statute that establishes a driver's duty to stop at railway crossings. We disagree.

Section 56-5-2715 of the South Carolina Code reads:

> The Department of Transportation . . . *may designate particularly dangerous highway grade crossings of railroads and erect stop sign thereat.* When such signs are erected, the driver of any vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care.

S.C. Code Ann. § 56-5-2715 (2006). In explaining Ms. Harvey's duty to stop under section 56-5-2715, the circuit judge omitted any reference to the emphasized language above. Although the colloquy during the charge conference does not elucidate the circuit judge's reasoning for striking that language, it appears the judge was merely searching for a statute that outlined the duty of drivers to stop at railway crossings, and the reference to a particularly dangerous railway crossing may have unnecessarily misled the jury into believing the Honeyford Road crossing was affirmatively designated as a particularly dangerous crossing.

We believe it was within the circuit judge's discretion to omit this particular statutory language because of its perceived irrelevance to the issue of CSX's negligence and because of the risk of confusing or misleading the jury. Therefore, we uphold the circuit judge's charge on section 56-5-2715.

IV. Survival Action Damages

Finally, Appellant argues she is entitled to a new trial absolute or a new trial *nisi additur* on the survival action because the circuit judge's jury charge led the jury to believe Ms. Harvey's negligence in the wrongful death action should be imputed to survival action damages. Therefore, Appellant claims, the circuit judge erred in denying Appellant's post-trial motions for JNOV, new trial absolute, or new trial *nisi additur*. We find that the jury's failure to award damages in the

survival action was inconsistent with its liability allocation and demonstrated a lack of understanding or confusion among the jurors. Therefore, we reverse the circuit court's denial of Appellant's motion for a new trial *nisi additur* and remand the survival action for a new trial absolute with respect to liability and damages.[10]

This Court recognizes an abuse of discretion standard for reviewing a circuit court's decision to deny a new trial *nisi additur*. *O'Neal v. Bowles*, 314 S.C. 525, 526–27, 431 S.E.2d 555, 556 (1993). It is within a trial judge's province to grant a new trial *nisi* if he finds the amount of the verdict to be merely inadequate or excessive. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). In reviewing the trial court's decision regarding a new trial *nisi*, "[t]his Court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Id.* "If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556 (citations omitted) (emphasis in original). Thus, "on appeal of the denial of a motion for a new trial *nisi*, this Court will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute." *Id.*

The evidence presented at trial established that Decedent experienced conscious pain and suffering before he died. A driver who witnessed the collision stated he saw Decedent lying in the brush and "[h]e looked like he was in a knot," and that "[h]e was hollering Mama[.]" Another witness to the scene stated that Decedent was thrown into some shallow bushes and she "could hear him you know groaning, moaning, pain, of course . . . ." A volunteer fireman who responded to the accident testified, "He was moaning and then I started—I heard him start gurgling some. I could tell he was in a lot of pain."

While charging the jury, the circuit judge initially stated that if the jury found Ms. Harvey to be more than fifty percent negligent, "that would be the end of it." Appellant objected and after some back and forth about whether Decedent's father's share of survival damages abated at his death (in the presence of the jury),

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[10] We note that section 15-33-125 of the South Carolina prohibits this Court from directing a new trial on damages under these circumstances. *See* S.C. Code Ann. § 15-35-125 (Supp. 2011) ("Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages."); *Stokes v. Denmark Emerg. Med. Servs.*, 315 S.C. 263, 433 S.E.2d 850 (1993) (upholding the constitutionality of section 15-33-125).

the circuit judge amended the verdict form to instruct the jury to "[m]ake no adjustment for the percentage of negligence assigned to Defendant or Frances Harvey." Still, the jury appeared to be unclear about the effect of finding Ms. Harvey's negligence to be greater than CSX's. During deliberation, the jury sent in the question, "If we answer yes to number six [Ms. Harvey's negligence being greater than fifty percent], do we have to award any amount on number eight? Number eight being, of course, conscious pain—survival action." The circuit judge answered, "The answer is, yes, if you find [Decedent] suffered conscious pain and suffering, no, if you find that [Decedent] did not suffer any conscious pain and suffering." Although the jury found CSX to be forty percent negligent in causing the accident, the jury found the damages for conscious pain and suffering and funeral expenses amounted to zero dollars. It is evident to us that the jury was confused in rendering its damages award. Aside from Appellant's clear showing at trial that Decedent experienced conscious pain and suffering before his death, Appellant presented funeral and burial receipts representing expenses in excess of $7,000. Therefore, the award of zero dollars in damages was not "merely inadequate," but was legally incorrect.

In South Carolina, a survival action is governed by statute. S.C. Code Ann. § 15-5-90 (1995). Unlike damages in a wrongful death action, which are for the benefit of the decedent's family, damages in a survival action are for the benefit of the decedent's estate. F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 706 (4th ed. 2011). Thus, a survival claim may only be filed by the personal representative of the decedent's estate. *Id.* Accordingly, the personal representative stands in the shoes of the decedent, and may bring any cause of action the decedent could have brought in his life. *Id.* at 705. Therefore, in determining survival action damages, a court or jury should only consider the entitlement of the estate, not the identification of its beneficiaries. Accordingly, we note that Ms. Harvey's status as a beneficiary cannot be used to impute her comparative negligence to the estate.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's exclusion of evidence and its jury charge, but reverse the denial of Appellant's motion for new trial *nisi additur* on the survival action, and remand for a new trial absolute in the survival action.

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

JUSTICE PLEICONES: I concur but write separately to express my different view on several issues.

First, I agree that we may not reverse the trial court's ruling that witness Munn could not be called to testify to the SCDOT's April 2004 recommendation that active traffic devices be installed at the Honeyford Road Crossing because such testimony is barred by 23 U.S.C. § 409 (Supp. 2011). As I read the record, appellant called Munn solely to have him testify that "On April 24, a month prior to this collision, that SCDOT did an evaluation [and] recommended that gates and lights be installed at the crossing."

The majority holds, however, not only that the SCDOT team's recommendation was properly excluded, but also that Munn could not "testify about his observations of the Honeyford Road Crossing . . . ." In my opinion, no issue regarding Munn's ability to testify to his observations is properly before the Court as appellant never sought to elicit this type of evidence from Munn at trial. It is well-settled that an appellant cannot change or add to the arguments he made at trial on appeal. *E.g.*, *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002). Had appellant in fact called Munn to testify to his observations, I would find the trial judge's denial of that request to be reversible error.

In my opinion, nothing in either 23 U.S.C. § 409 or *Pierce County Washington v. Guillen*, 537 U.S. 129 (2003), prohibits an individual who compiled or collected data or who participated in the creation of "reports, surveys, schedules, or lists" for the purposes identified in § 409 from testifying as a fact witness. I agree that testimony of the contents of such reports, surveys, schedules, lists, compilations, or collections or the admission into evidence of these documents is prohibited. In *Bowman v. Norfolk Southern Railway Co.*, 1995 WL 550079 (4th Cir. Sept. 15, 1995), the official who had inspected the railroad crossing and produced a § 409 report was allowed to testify as a "lay witness" who had observed the scene, even being permitted to refresh his recollection by reference to the report. In *Harrison v. Burlington Northern R. Co.*, 965 F.2d 155 (7th Cir. 1992), the actual investigative report and recommendations were excluded, as were witnesses called to testify to the contents of these documents. In *Powers v.*

CXS Transp., Inc., 177 F.Supp.2d 1276 (S.D. Ala. 2001), the court specifically stated, "It is well settled that a plaintiff may not circumvent Section 409 by asking a witness to testify to matters the witness learned from documents protected by Section 409 . . . on the other hand, knowledge gained by the witness independently of material protected by Section 409 is not protected. *E.g.*, *Rodenbeck v. Norfolk & Western Railway Co.*, 982 F. Supp. 620, 625 (N.D. Ind. 1997); *Palacios v. Louisiana & Delta Railroad Inc.*, 740 So.2d 95, 102 (La. 1999)." *Id*. at 1280. In short, I am unable to identify any authority for the proposition that § 409 prevents an individual from testifying as a fact witness to his observations. Were this issue before us, I would find reversible error in this ruling.

As I read the record, it is clear that Exhibit 134 was admitted into evidence without objection. Insofar as I am aware, an attorney is permitted to argue the evidence and its inferences in her closing argument, but I agree with the majority that appellant did not show prejudice from this error. *See*, *e.g.*, *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006).

Further, I would find no error in the trial judge's redaction of § 56-5-2715 in his charge. Whether CSX was negligent in maintaining the sight lines at the Honeyford Road Crossing is independent of the DOT's determination of the type of warning signal to be used at the crossing. *Compare*, *e.g.*, *Doremus v. Atlantic Coast Line R. Co.*, 242 S.C. 123, 130 S.E.2d 370 (1963) (common law duty of railroads to give such signals as may be reasonably necessary is independent of statutorily required signals). Like the majority, I find no error in this statutory charge. *E.g.*, *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) (reversible error to give confusing jury instructions).

Finally, while it is unnecessary to address appellant's contention that the trial court erred in denying her request for a new trial *nisi additur* or new trial absolute in the survival action in light of the holding that the confusing survival damages jury instruction mandates reversal, I would take this opportunity to remind the bench and bar that there is no procedure whereby an appellate court can order a *nisi* as a remedy. This is so since the denial of a *nisi* motion is a matter wholly within the trial court's discretion, and its ruling is not subject to appellate review. *E.g.*, *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969). Where a *nisi* has been denied, the only new trial

relief an appellate court may grant is a new trial absolute, and then only if it finds the jury's verdict is either grossly inadequate or so excessive as to indicate passion, prejudice, or caprice. *Id.*; *see also O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

For the reasons given above, I concur with the majority's decision to affirm the wrongful death appeal and reverse and remand the survival appeal for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert W. Oskin, Glenn Small, and Freddie Kanos,
Appellants,

v.

Stephen Mark Johnson, Michael Brown, Joan Conner Brown and J. Conner, LLC, Respondents.

Appellate Case No. 2010-164046

Appeal from Horry County
Cynthia Graham Howe, Master-in-Equity

Opinion No. 27187
Heard February 22, 2012 – Filed November 7, 2012

AFFIRMED

Michael J. Anzelmo, of Columbia, and Mark Andrew Brunty, of Myrtle Beach, for Appellants.

C. Scott Masel, Danny Villacarlos Butler, and Henrietta U. Golding, all of Myrtle Beach, for Respondents.

CHIEF JUSTICE TOAL: Robert W. Oskin, Glenn Small, and Freddie Kanos (collectively "Appellants" or individually by last name) contest the Master-in-Equity's ruling that the assignment of a note and mortgage on a Myrtle Beach property did not violate the South Carolina Fraudulent Conveyance Statute, S.C. Code Ann. § 27-23-10 (2007) (hereinafter the Statute of Elizabeth), and that a payment made to South Carolina Bank & Trust (SCB&T) did not result in a pay-off of the amount due under the note and mortgage. We affirm.

FACTS/ PROCEDURAL BACKGROUND

On April 27, 2005, Oskin entered into a contract to broker the sale of Wild Wing Plantation and Golf Course on behalf of Respondent Stephen Mark Johnson (Johnson). The contract obligated Johnson to pay Oskin a finder's fee in the amount of $1 million upon closing. Oskin found a buyer for the property, and the deal was closed on December 15, 2005. Johnson, however, failed to pay the finder's fee, and Oskin brought suit successfully obtaining a judgment against Johnson on December 8, 2008, for breach of contract.

While the breach of contract action was pending, Johnson approached his uncle, Respondent Michael D. Brown (M. Brown), about jointly purchasing an oceanfront lot and home located in Myrtle Beach, South Carolina. On November 30, 2006, Johnson and M. Brown co-signed a $3.5 million promissory note to jointly purchase the property. The term of the note was two years, and it provided for interest-only payments for the first twenty-three months, with a final balloon payment of the entire amount due on November 30, 2008. Title to the property was conveyed to M. Brown and Johnson as tenants in common. In addition to the SCB&T mortgage, the property was later encumbered in April 2007 by a second mortgage lien in favor of Ameris Bank in the amount of $500,000.[1]

Initially, Johnson made the monthly interest-only payments on the SCB&T note until early 2008 when he could no longer afford to make the payments, at which time M. Brown paid the remaining monthly payments. With the due date on the balloon payment approaching, in October 2008, M. Brown contacted Wachovia Bank (Wachovia) to refinance the SCB&T loan. Because of the Myrtle Beach property's low appraisal value, Wachovia refused to issue the loan unless it was

[1] The debt to Ameris Bank remained outstanding at the time of trial.

secured with marketable securities worth $3.5 million. In early November 2008, M. Brown approached SCB&T in an attempt to reduce the note balance, but the effort ended in failure.

M. Brown was faced with the following dilemma. M. Brown's nephew was financially unable to pay off the $3.5 million loan they had obtained to buy a house in Myrtle Beach. Because of the recession, the house was appraised at $2.5 to $2.6 million, about $1 million less than the debt. M. Brown was a co-owner and co-obligor on this note. If the note was declared in default and the bank foreclosed, the sale of the Myrtle Beach home would not be sufficient to satisfy the outstanding debt. M. Brown and his wife, Joan Conner Brown, each had extensive security holdings. However, the stock market was also depressed by the economic crisis, and a sale of securities would be at below-value prices.

On November 20, 2008, Joan Conner Brown formed J. Conner, LLC (J. Conner). She used this LLC to obtain the Wachovia loan, which would be used to pay off the debt owed to SCB&T without having to liquidate any of her and her husband's assets. On December 18, 2009, Wachovia approved the loan to J. Conner in the amount of $3.5 million. J. Conner, whose only member was Joan Brown, used the loan proceeds it obtained from Wachovia to purchase the note and mortgage from SCB&T. Wachovia's loan to J. Conner was personally guaranteed by Joan and M. Brown and secured by five investment accounts owned by M. Brown and one by Joan Brown. Joan Brown, on behalf of J. Conner, signed the Certificate of Resolution to Borrow and the Promissory Note. Both Joan and M. Brown jointly signed the Security Agreement. To complete the transaction, Wachovia wired $3.5 million to SCB&T, and M. Brown paid the remaining $44,303.31 due to SCB&T by writing a personal check. After receiving full payment for the purchase of the note, SCB&T assigned the note and mortgage to J. Conner on December 30, 2008.

The assignment of the SCB&T note and mortgage to J. Conner allowed J. Conner to assume SCB&T's priority status as lien creditor. Ameris Bank's $500,000 lien on the property and Oskin's $1,036,000 judgments[2] against Johnson continued to be subordinate to the first lien for $3.5 million obtained by J. Conner.

The parties dispute the motive for the formation of J. Conner and the subsequent assignment of the note. Respondents maintain that they formed J. Conner to enable Joan Brown and her husband to obtain the Wachovia loan and avoid foreclosure without having to liquidate any assets since the SCB&T note was becoming due and the appraised value of the property was less than the amount borrowed. In contrast, Appellants assert that "[t]he only reason J. Conner existed was because [M. Brown] was obligated under the note and mortgage and wanted to avoid the Oskin judgment against Johnson."[3] Appellants claim the transfer between SCB&T and J. Conner was fraudulent under the Statute of Elizabeth. Additionally, Appellants attempt to pierce the corporate veil by asserting that M. Brown is the alter-ego of J. Conner.

After a bench trial, the Horry County Master ruled against Appellants on all claims, holding: (i) the Statute of Elizabeth did not apply to the assignment of the note and mortgage because M. Brown and J. Conner were never indebted to Appellants, and (ii) even if applicable, the assignment of the note and mortgage did not violate the Statute of Elizabeth because no injustice or fraud was perpetrated on Appellants as a result of the assignment. In addition, the Master held that (iii) the

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[2] In addition, to the $1 million judgment, Oskin also became the holder of a Confession of Judgment in the amount of $36,000 executed by Johnson in favor of David B. O'Connell. Oskin purchased the Confession of Judgment from O'Connell for $500 on November 4, 2009, approximately seven months after the Complaint was filed.

[3] Appellants allege that J. Conner was formed "as stated by Michael Brown, to protect his property asset from the Oskin judgment." Going directly to the testimony cited, the Record is unclear whether M. Brown actually stated this. When M. Brown was asked whether the "SCB&T note [ ] prompted borrower to seek legal advice in dealing with the *outstanding liens*" to protect his asset, M. Brown answered, "yes." However, "outstanding liens" might refer to the mortgage on the property owed to SCB&T rather than to the Oskin judgment as Appellants allege.

payments to SCB&T for the assignment did not result in a pay-off of the note nor the satisfaction of the mortgage because M. Brown was not the alter-ego of J. Conner and due to a future advances clause, (iv) and even if the payments to SCB&T resulted in a pay-off of the note, M. Brown was equitably subrogated to Johnson's interest in the property to the extent of the monies paid by M. Brown in excess of his one-half share of the obligations on the note. After the Master denied Appellants' Rule 59, SCRCP, motion, Appellants filed a timely appeal. This case is before this Court pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the assignment of the note was a fraudulent conveyance in violation of the Statute of Elizabeth.

II. Whether the payment to SCB&T resulted in a pay-off of the note and satisfaction of the mortgage.

STANDARD OF REVIEW

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth.[4] *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) (citations

[4] Appellants and Respondents relied on dicta in *Future Group, II v. Nationsbank*, 324 S.C. 89, 97 n.6, 478 S.E.2d 45, 49 n.6 (1996), to conclude the evidentiary standard for a fraudulent conveyance under the Statute of Elizabeth is a preponderance of the evidence standard. *Future Group* stated in a footnote, "This cause of action is an equitable one and on appeal this Court will find facts in accordance with its own view of the preponderance of the evidence." *Id.* Nevertheless, our decisions superseding and preceding *Future Group* have held that a clear and convincing evidentiary standard applies to fraudulent conveyances under the Statute of Elizabeth, and we reaffirm that standard here. *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) (citations omitted); *Gardner v. Kirven,* 184 S.C. 37, 41, 191 S.E. 814, 816 (1937) ("The law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony.").

omitted). An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Future Group, II*, 324 S.C. at 97 n.6, 478 S.E.2d at 49 n.6; S.C. Const. art. V, § 5.

An action to pierce the corporate veil under an alter-ego theory also lies in equity. *Mid-South Mgmt. Co., Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 596, 649 S.E.2d 135, 140 (Ct. App. 2007) (citations omitted). Here, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). However, an appellate court is not required to disregard the findings of fact by the trial court nor ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. *Id.*

ANALYSIS

I. Statute of Elizabeth

Appellants claim the assignment of the note was a fraudulent conveyance in violation of the Statute of Elizabeth. We disagree.

The Statute of Elizabeth provides:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A) (2007).

In interpreting this statute, this Court has held conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Future Group, II*, 324 S.C. 89, 96, 478 S.E.2d 45, 48–49 (citations omitted); *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975) (citations omitted).

It is undisputed that valuable consideration was paid for the transfer of the note and mortgage in this case. Appellants contend that the purpose and the

fraudulent intent of M. Brown was to "structure a transaction relating to the SCB&T note mortgage in order to protect [M. Brown's] interest in the property from being affected by Oskin's judgments against Johnson and to preclude Appellants from executing against the property." We disagree.

The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land.[5] *McDaniel*, 265 S.C. at 242-43, 217 S.E.2d at 775-76 (requiring that the grantor must have an intent to defraud). Here, the grantor who transferred an equitable interest in land to J. Connor was SCB&T, not M. Brown. There are no allegations that SCB&T intended to defraud appellants, and we see no basis for applying the Statute of Elizabeth.[6]

Thus, we hold Appellants failed to establish by clear and convincing evidence that the grantor, SCB&T, transferred the note and mortgage with intent to defraud Appellants.[7] *Windsor Props.*, 331 S.C. at 471, 498 S.E.2d at 860.

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[5] Even where it is shown that the grantor has fraudulent intent, to "annul for fraud a deed based upon value consideration [under the Statute of Elizabeth], it must not only be shown that the grantor intended to hinder, delay or defraud creditors, but it must also appear that the grantee participated in such fraudulent act." *McDaniel*, 265 S.C. at 242-43, 217 S.E.2d at 775-76.

[6] Even assuming arguendo that we set aside the conveyance from SCB&T to J. Conner as fraudulent under the Statute of Elizabeth, Appellants' priority would not change. If this Court were to set aside the conveyance as fraudulent, then the conveyance would be treated as if it never occurred. Thus, SCB&T would continue to hold the note, and Appellants would remain in their position of third priority, behind Ameris Bank. *See generally Windsor Properties*, 331 S.C. at 471, 498 S.E.2d at 860; *Future Group, II*, 324 S.C. at 98, 478 S.E.2d at 49; *Gardner*, 184 S.C. at 41, 191 S.E. at 816. At oral argument, Appellants urged that if this Court sets aside the conveyance, their priority would improve. Appellants reach that end by arguing the SCB&T note would be paid off by the Wachovia loan—the same loan that was lent solely for the purpose of the allegedly fraudulent conveyance. Appellants cite no authorities to support this Court rearranging the priorities of the parties in such a matter. We find Appellants' position is untenable because, in effect, Appellants want to set aside a conveyance as fraudulent, but also benefit from the alleged fraud.

[7] Because this is not an intra-family transfer, the burden of proof is on Appellants

II. Pay-off of Principal Amount Due

The Master found the mortgage was not satisfied because (1) J. Conner is not the alter-ego of the mortgage guarantor, M. Brown; (2) that assuming arguendo that J. Conner is the alter-ego of M. Brown, a future advances clause still precludes a finding that the $3.5 million payment to SCB&T constitutes a pay-off of the note and satisfaction of the mortgage; (3) and even if the payments to SCB&T results in a "pay-off" of the note, Brown's rights and priority would be the same as that of SCB&T before the assignment under equitable subrogation. We agree that the mortgage is not satisfied. J. Conner is not the alter-ego of M. Brown because Appellants have failed to prove that J. Conner was created by fraud, injustice, or in contravention of public policy. Based on this finding, we deem it unnecessary to reach the issue of the future advances clause and equitable subrogation. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).[8]

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rather than Respondents. *See* n. 7, *supra*.

[8] We do not reach the issue of the future advances clause, and we do not decide whether the mortgage here is a valid open-ended mortgage. However, in cases dealing with valid open-ended mortgages, lest our silence be taken for agreement, we do not concur with the dissent's position that a future advances clause "has no practical effect" if "SCB&T has made no future advances . . . . and there is nothing for the future advances clause to secure." *Central Production*'s statements that "the mortgage did not die" and that it remained "dormant but viable" means plainly that the mortgage is not satisfied even if there is "no debt for it to secure." *Cent. Prod. Credit Ass'n v. Page*, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977). To hold otherwise would be contrary to section 29-3-50 of the South Carolina Code, legislative intent, and the express language of *Central Production*. *Id.*; S.C. Code Ann. § 29-3-50 (2007) ("There is nothing express or implied, in the statute to infer that it was the intent of the legislature that the mortgage be dead once *there is no debt momentarily existing* . . . . A holding that an open-end mortgage dies when there is currently *no debt for it to secure*, would severely limit its beneficial use and defeat the legislative intent.") (emphasis added). Grounds available for lines of credit (future advances in modern parlance) are commonly secured by mortgages. Quite often, the line of credit will sit unused for a considerable period of time. The fact that there is no current credit balance does not discharge the

Alter-Ego

Appellants attempt to pierce the corporate veil by contending that J. Conner is the alter-ego of M. Brown, and any payments made by J. Conner to SCB&T, in effect, were payments made by M. Brown resulting in the payoff of the note and satisfaction of the mortgage. We disagree.

An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby. *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. *Id.* (citation omitted). This theory does not apply, however, in the absence of fraud, injustice, or contravention of public policy. *Id.* (citations omitted).

We find that even under a preponderance of the evidence standard, the recognition of J. Conner as an entity would not promote fraud, injustice, or contravene public policy. *Id.* Appellants fail to satisfy the required elements of fraud. *See First State Savings & Loan v. Phelps*, 299 S.C. 441, 446–47, 385 S.E.2d 821, 824 (1989) (listing nine elements of fraud). The evidence does not demonstrate any false material representation on Respondents' part, and Joan

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mortgage or the right to draw on the line of credit. Consequently, if the mortgage does not die, then it is not satisfied and thus, has a "practical effect" when the issue of whether a mortgage is satisfied is at stake. *Id.* As to whether the rule stated in *Central Production* promotes "absurdity," we note that the rule has been a bedrock and standard of the mortgage industry for decades. There is no evidence that it has undermined consumer protection or destabilized the industry. To the contrary:

> Mortgages to secure future advances serve a socially and economically desirable purpose . . . . The mortgagor saves interest on the surplus until ready to use it. He also avoids the expense and inconvenience of refinancing the mortgage so as to include the additional needed sum, or, in the alternative, of executing a second and later mortgage for each new advance, with the attendant expenses.

Cent. Prod., 268 S.C. at 7, 231 S.E.2d at 213.

Brown and her husband have no legal or fiduciary relationship with Appellants. *Id.* In addition, no injustice or contravention of public policy resulted from Joan Brown's control of J. Conner. Joan Brown's purpose in creating J. Conner was to secure her and her husband's bona fide claim rather than to defraud Appellants. In the face of collapsing property prices, below-value prices for securities, and an impending balloon payment, Joan Brown and her husband did what was natural to protect their bona fide interest in their property without having to liquidate assets.[9] As with any other wise consumers or investors, they are free to utilize a legal mechanism to protect their own financial interests. There is no inequity or fraud in this instance where the priorities of Appellants do not change, and Appellants are left no worse off than had SCB&T foreclosed on the property.[10] We are cognizant

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[9] The Record shows that M. Brown and his wife had other reasons beyond Oskin's judgment to structure the transaction as they did. The term of the note was two years, and it provided for interest-only payments for the first twenty-three months, with a final balloon payment due on November 30, 2008. As this due date approached, the value of the property plummeted from $3.5 million to $2.5–2.6 million in the midst of the mortgage foreclosure crisis. Appellants claimed during oral argument that foreclosure is a "red herring," noting that M. Brown never contemplated allowing the property to go into foreclosure. This misses the point. M. Brown had to pay the impending balloon payment somehow whether it was through liquidating assets he owned or through obtaining a loan from a financial institution, or he would face the prospect of foreclosure (whether he contemplated it or not). M. Brown chose not to liquidate any of his own assets and persuaded his wife to form J. Conner to obtain the Wachovia loan. As Jim Boyd and John Lee Scott, respectively bankers from SCB&T and Wachovia Bank, testified, rather than constituting fraud, it was "common business practice" to form an LLC for the purpose of purchasing, holding, and enforcing negotiable instruments.

[10] Prior to the assignment, Appellants' judgments were subordinate to the $3.5 million SCB&T first mortgage and the $500,000 second mortgage to Ameris Bank. Due to the low appraisal value and the large mortgage owed, Brown's property was "under water." If the assignment had not occurred, the Browns chose not to liquidate any of their assets, and SCB&T had foreclosed on the note and mortgage, Appellants' interest in the property would have been extinguished because SCB&T had priority. There is no inequity or fraud if the priorities of Appellants do not change. In seeking to set aside the conveyance, we believe Appellants seek a superior priority that they were never guaranteed or necessarily entitled to.

of the fact that entities can use legal mechanisms to achieve fraudulent ends,[11] but weighing the totality of the evidence, we find the preponderance of the evidence does not support Appellants' allegations of fraud, injustice, or contravention of public policy in the face of the Browns' action to protect their bona fide interest in their property.

Thus, we refuse to pierce the corporate veil, and Appellants' alter-ego claim necessarily fails. *See Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980) (Rejecting the alter-ego theory because "'piercing the corporate veil' is not a doctrine to be applied without substantial reflection.").

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

PLEICONES and BEATTY, JJ., concur. HEARN, J., concurring in part and dissenting in part in a separate opinion. KITTREDGE, J., writing a separate opinion.

[11] *Matthews v. Montgomery*, 193 S.C. 118, 131, 7 S.E.2d 841, 847 (1940).

JUSTICE HEARN: Respectfully, I concur in part and dissent in part. While I ultimately agree with the majority that the Statute of Elizabeth cannot be invoked to set aside this assignment, I believe the majority adopts too narrow a view of the statute in the process. Furthermore, I disagree with the majority's conclusion that Robert Oskin, Glenn Small, and Freddie Kanos (collectively, Appellants), have not shown that J. Conner, LLC was the alter-ego of Michael Brown. I would therefore hold that J. Conner's payment to South Carolina Bank and Trust (SCB&T) satisfied the note and mortgage.

I

I first turn to the facts and structure of the transaction under review. Appellants are various holders of judgments against Stephen Mark Johnson. Before Appellants reduced their claims to judgments, Johnson purchased ocean-front property in Myrtle Beach, South Carolina, for $3.5 million. Because Johnson was unable to obtain the necessary financing to purchase the property on his own, Brown, who is Johnson's uncle, agreed to co-sign a note from SCB&T and purchase the property jointly. The term of the note was two years, and the note provided for interest-only payments for the first twenty-three months followed by a final balloon payment. In connection with the note, Brown and Johnson granted SCB&T a first mortgage.[12]

Shortly before the final balloon payment became due, Brown approached SCB&T to inquire about assigning the note and mortgage to him. SCB&T informed Brown that such a transaction was not possible because it would amount to a payoff of the note and nothing would remain to assign. SCB&T also refused to extend the note's term. Out of options, Brown's wife, Joan Conner Brown, formed J. Conner, a limited liability company of which she is the only member, for the sole purpose of acquiring and holding SCB&T's note and mortgage. To accomplish this, J. Conner obtained a $3.5 million loan from Wachovia Bank and used the proceeds to purchase the note and mortgage from SCB&T; title to the property remained in Johnson and Brown. By virtue of this transaction, J. Conner stepped into the shoes of SCB&T and assumed its superior priority position with respect to the property.

[12] The property was later encumbered by a $500,000 second mortgage in favor of Ameris Bank, which also attached prior to Appellants' judgments. This debt remained outstanding at the time of trial.

By the time Appellants obtained judgments against Johnson, he was insolvent save for this property. However, so long as J. Conner has priority over Appellants, they effectively are precluded from forcing a judicial sale of the property to satisfy their judgments.[13] Seeking a set-aside of the assignment, or a finding that J. Conner was Brown's alter-ego and J. Conner's payment to SCB&T therefore satisfied the note and mortgage, Appellants filed the instant declaratory judgment action against Brown, Joan Conner Brown, Johnson, and J. Conner (collectively, Respondents).

II

In my opinion, the majority errs by holding we can look only to the intent of a grantor when determining whether the Statue of Elizabeth would set aside a conveyance. While I agree that the vast majority of cases will involve an unscrupulous grantor, I do not believe that we are required to only examine his intent. Instead, I would review the transaction as a whole for whether it was designed to defraud another. Nevertheless, even under this standard I do not believe Appellants have met their burden.

As a threshold matter, I will quickly dispense with Respondents' first argument that the Statute of Elizabeth is inapplicable because it only concerns those in a debtor-creditor relationship. Our codification of the Statute of Elizabeth provides, in pertinent part:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . or other profit or charge[14] out of the same . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud *creditors and others* of their just and lawful . . . debts . . . must be deemed and taken . . . to be clearly and utterly void, frustrate

[13] This is a matter of simple mathematics. At the time of the assignment, the property's value was between $2.5 and $2.6 million. The principal on the note, however, was approximately $3.5 million when it was assigned to J. Conner, and Brown and Johnson have made no payments on it. Thus, even assuming the property fetched its full market value at a judgment sale, every penny of the proceeds would go towards paying off this note and a deficiency would still remain. Nothing would be left for Appellants.

[14] A "charge" in this context means "[a]n encumbrance, lien, or claim." Black's Law Dictionary 97 (3d pocket ed. 2006).

> and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10 (2007) (footnote and emphasis added). In *Lebowitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987), we expressly held that a debtor-creditor relationship is not necessary to trigger the statute based on the language that it applies to "creditors [*and*] *others*." *Id.* at 52, 358 S.E.2d at 700. Although I acknowledge that some of our other cases have referred to a debtor-creditor relationship, they are unremarkable because they actually did involve a debtor and a creditor. Nothing in our jurisprudence undermines the validity of *Lebowitz*, and the plain statutory language underpinning that decision has not changed. Respondents' argument therefore is meritless.

The majority holds that the applicability of the Statute of Elizabeth turns on the grantor's intent and not the general intent behind the transaction. This holding, however, suffers from the same flaws as Respondents' first argument. First, the statute contains no such limitation. Instead, it only refers to the intent of the transaction itself, not the specific intent of the grantor. *See* S.C. Code Ann. § 27-23-10 ("Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . or other profit or charge out of the same . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful . . . debts . . . ."). Second, just as with *Lebowitz*, the fact that some of our cases discuss the intent of the grantor does not mean his intent controls. Those cases merely demonstrate that the grantor's intent was an issue in them. Instead, it is the language of the statute which controls.

I am wary of judicially engrafting a limitation onto a statute rather than according the statute its plain meaning, especially when doing so has the very real potential to thwart its purpose. *See Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009) ("In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature."). It has long been the rule that "[t]he statute 13th of Elizabeth,[15] protecting creditors and others from fraudulent conveyances, is to be construed liberally in favor of the class of persons designed to be protected from fraud." *Gibson v. Love*, 4 Fla. 217, 217 (1851) (emphasis

[15] This particular Statute of Elizabeth is commonly referred to as the Statute of 13 (or 13th) Elizabeth because it was enacted during the thirteenth year of Queen Elizabeth I's reign. 13 Eliz. 1, c 5.

removed, footnote added); *see also Duncan v. Freeman*, 110 S.E. 5, 6 (Ga. 1921) ("Although the statute is strict, and even penal, the courts have given a liberal construction to its provisions."). Under the majority's interpretation, an individual can goad an innocent grantor into conveying an interest in property to defraud another with impunity. Despite being the sort of transaction the Statute of Elizabeth was designed to remedy, the majority sanctions it simply because the person perpetrating the fraud was not the grantor. I can see no defensible reason why the very ill sought to be prevented by the Statute of Elizabeth should be perpetuated by virtue of such an unsupported technicality.

I am also not persuaded by Respondents' assertion that Appellants' claim is not viable because the assignment in question was accomplished by legal means and is a common business practice. The facial legality of the conveyance should have no bearing on whether it was intended to defraud another. Suggesting otherwise ignores the reality that entities can use perfectly legal transactions to achieve nefarious ends. Indeed, we have already rejected this very argument:

> If the elements necessary to set aside a transfer for fraud are shown, the legality in other respects of the means by which the design is accomplished affords no defence [sic]. It is the fraudulent purpose and the injurious result, not the form of the transaction nor the illegality or irregularity of the instrument, or the means used for its accomplishment, which render such transactions voidable at the instance of a person injured thereby.

Matthews v. Montgomery, 193 S.C. 118, 131, 7 S.E.2d 841, 847 (1940). I accordingly would place no weight on the fact that, on its face, the assignment may have been common business practice and legal.

As to whether Brown actually intended to defraud Appellants or hinder the collection of their judgments, I agree with the majority that Appellants have not met their burden. The heart of Appellants' contention is that Respondents structured the transaction in such a way that a $3.5 million lien with priority over Appellants' judgments would remain on the property. If this result was accomplished, Appellants would, for all intents and purposes, be precluded from collecting. Conversely, if this lien was extinguished and Appellants forced a sale of the property, Brown would lose most of his investment in a multi-million dollar asset. Thus, the only way Brown could secure his own interest in the property was to ensure Appellants could not execute.

Respondents counter by contending the assignment was done to secure J. Conner's "[b]ona fide claims . . . as purchaser of the $3.5 million note and mortgage from SCB&T." This position is untenable, however, because J. Conner only obtained its interest in the note and mortgage through the allegedly fraudulent assignment. In other words, J. Conner had no interest to protect until the assignment took place. Respondents' reliance on *McDaniel v. Allen*, 265 S.C. 237, 217 S.E.2d 773 (1975), to support their contention therefore is unavailing. In *McDaniel*, we found the conveyance of property from husband to wife was not done to defraud the husband's creditors but instead to protect the wife's bona fide interest in the subject property because *she already had one*. *See id.* at 241-44, 217 S.E.2d at 775-76. J. Conner, in contrast, had no interest it could protect prior to the assignment.

Yet there is evidence that the note and mortgage were assigned to J. Conner in order to protect Brown's investment in the face of a slumping real estate market, not to defraud Appellants. The thrust of the argument is that it is not fiscally responsible to make the SCB&T balloon payment of approximately $3.5 million for an asset worth $2.5-$2.6 million, particularly when Brown would have to suffer further losses when liquidating the assets necessary to complete the payoff. Thus, extending the term of the note by assigning it to a holder simply insulates Brown from the drop in the property's value precipitated by the general decline in the real estate market. However, the transaction undeniably had the concomitant effect of preventing Appellants from collecting on their judgments, and the distinction between protecting one's interest in property in a down market and insulating it from a judgment is tenuous and fraught with precarious implications for judgment holders like Appellants. Still, while I am troubled by many aspects of the assignment, I cannot conclude that Appellants have shown the requisite intent by clear and convincing evidence.[16] I therefore concur in the result reached by the majority on this issue.

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[16] The majority indicates that even if the conveyance was set aside under the Statute of Elizabeth, the error would be harmless because Appellants' priority would not change. I respectfully disagree because while SCB&T would now be the holder of the note, the majority ignores Brown's unequivocal testimony that foreclosure "was never an option" and he was "going to make sure [SCB&T] got paid." Hence, Brown would not suffer foreclosure and the SCB&T note would be paid off in full. With the $3.5 million lien with first priority out of the picture, Appellants would be in a position to realistically recover. Thus, any error in our decision cannot possibly be harmless beyond a reasonable doubt. *See Wells v.*

III

However, I do not join in the majority's conclusion that J. Conner was not Brown's alter-ego.[17] An alter-ego claim "requires a showing of total domination and control of one entity by another." *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). "Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity." *Id.* Regardless, "this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice." *Id.*; *see also Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980) (holding that the alter-ego theory should be used only when retaining separate "personalities would promote fraud, wrong, or injustice or contravene public policy").

Turning to the first part of the analysis, J. Conner's operating agreement expressly states its purpose is "to acquire that certain note and mortgage currently held by South Carolina Bank and Trust, N.A. from Michael D[.] Brown and Stephen Mark Johnson and secured by that certain mortgage of the same date." True to this purpose, the note and mortgage are the only assets of J. Conner. Moreover, Brown testified that J. Conner never would have been organized but for the need to assign the note away from SCB&T. In fact, J. Conner was created right after SCB&T rebuffed Brown's attempt to assign the note to himself. J. Conner therefore exists solely to do what Brown himself could not do: hold the note.[18]

Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict.").

[17] The alter-ego theory is a means of piercing the corporate veil. *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008). Piercing the corporate veil of an LLC has not yet been recognized in this State, however. Nevertheless, because neither the majority, the parties, nor the master raise this question, I will discuss Appellants' alter-ego claim assuming *arguendo* it applies.

[18] Respondents also argue Appellants' alter-ego claim fails because J. Conner's only member is Brown's wife and, incredibly, she is "an independent woman." Respondents' ascription of relevance to any independence Joan Conner Brown may have had is specious. Even if she did have the financial and personal wherewithal to be independent, that is irrelevant because J. Conner was formed solely to protect one of Brown's assets, not one of hers. Moreover, it completely ignores the fact

As to whether this arrangement would promote fraud or injustice, the fact that Appellants may have failed to prove intent to defraud or hinder by clear and convincing evidence has no bearing on whether they have shown fraud or injustice by a preponderance of the evidence, as required here. *See Mid-S. Mgmt. Co. v. Sherwood Dev. Corp*, 374 S.C. 588, 596, 649 S.E.2d 135, 140 (Ct. App. 2007) (applying preponderance of the evidence standard to veil piercing claim). Although the evidence may not be clear and convincing, I believe the preponderance of the evidence shows J. Conner was formed to ensure a $3.5 million lien retained first priority on the property. This would keep Appellants from forcing a sale of it and thereby prevent Brown from losing his investment. This orchestrated effort to prevent the collection of valid judgments is a clear injustice. Moreover, as explained above, Appellants' priority was affected by the assignment and it is of no moment that the means used were facially legal or a common business practice.

For those reasons, I would hold that J. Conner was the alter-ego of Brown. Thus, J. Conner's payment to SCB&T was, in actuality, a payment by Brown. As a co-obligor of the note, this payment should have satisfied it. *See* S.C. Code Ann. § 36-3-602(b) (Supp. 2011). There still remains a question, however, of whether Brown also would have been able to satisfy the *mortgage* due to a future advances clause in it. The mortgage Brown and Johnson granted SCB&T provides, "The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument." Relying on our decision in *Central Production Credit Ass'n v. Page*, 268 S.C. 1, 231 S.E.2d 210 (1977), Respondents argue the mere presence of a future advances clause precludes a finding that the mortgage is satisfied and prevents Appellants from collecting on their debts. I do not believe the future advances clause has any bearing on this case.

In *Central Production*, we held that a future advances clause meant "the mortgage did not die" once the initial debt was discharged, and thus it remains "dormant but viable." *Id*. at 8, 231 S.E.2d at 214. Accordingly, the mortgage in question was able to secure funds loaned after the debtor paid off the original debt in full. *Id.* Here, SCB&T has made no future advances. Hence, at this point in time, there is nothing for the future advances clause to secure. Unless and until

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that a wife, irrespective of her own assets, has an interest in her husband's financial well-being.

SCB&T loans additional funds, the clause simply has no practical effect even though the mortgage technically is not satisfied. This is so because while SCB&T may have first priority, it is entitled to no money and therefore just steps out of Appellants' way if they foreclose on their judgment liens. A future advances clause can only reduce the amount available for other creditors when a lender actually loans money under the clause and there is an outstanding balance at the time of sale. Because that has yet to happen here, any failure to satisfy the mortgage due to the future advances clause has no bearing on the present case.

Although the majority professes to not reach this question, it strenuously disagrees that such a mortgage has no effect. The majority's theme is that my conclusion is contrary to *Central Production* and the statute specifically permitting these clauses, Section 29-3-50 of the South Carolina Code (2007). However, in my opinion, *Central Production* was correctly decided and remains good law, and these clauses are an essential tool for many business and individuals. However, that does not change the fact that a dormant-yet-viable mortgage which *secures nothing* has no practical effect when the property is sold. Nothing in either *Central Production* or section 29-3-50 says otherwise. By giving the clause efficacy in these situations, a debtor can maintain a zero-balance mortgage with a future advances clause on property in order to completely prevent junior lienholders from ever collecting.[19] In my view, the absurdity of concluding a dormant mortgage which secures no debt reduces the amount available for junior creditors is obvious. I cannot in good conscience join in such a result, especially under our equity jurisdiction.

In any event, the majority erroneously overlooks the fact that the future advances clause cannot apply here due to the terms of the agreement. SCB&T's mortgage secures "the existing indebtedness under the Note and any future advances made under this Security Instrument." The agreement further provides,

[19] For example, take the majority's illustration of an unused line of credit, presumably secured by a first lien on certain property. If the debtor owes no money under it and it sits unused, then there is nothing to collect. Heretofore, upon foreclosure of a junior lien this secured party would step up to the plate, take nothing (because that is what he is owed), and then move aside for the other creditors. Beginning today, however, that same secured party who is entitled to absolutely nothing can stand in the way of everyone else. An astute debtor therefore can simply take out a line of credit, never draw on it, and shut out all junior lienors.

however, that "[u]pon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument." The parties therefore have contractually limited the scope of the future advances clause, and it is not the open-ended agreement examined in *Central Production*. *See id.* at 6, 231 S.E.2d at 212–13 (reciting mortgage provisions examined). Because J. Conner was Brown's alter-ego, Brown paid the existing indebtedness in full. Additionally, no evidence exists of any future advances made under the mortgage by SCB&T. Thus, all sums secured by the mortgage have been paid and the mortgage by its terms has been satisfied.

IV

For the foregoing reasons, although I disagree with the majority's limitation on the Statute of Elizabeth, I agree that we should not set aside the assignment because Appellants have not shown intent to defraud or hinder by clear and convincing evidence. However, I would find J. Conner was the alter-ego of Brown, and therefore J. Conner's payment to SCB&T satisfied the note and the mortgage. I accordingly would affirm as modified in part and reverse in part.

JUSTICE KITTREDGE: I join section II of Justice Hearn's part concurrence, part dissent. I otherwise join the majority opinion, including the result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Savannah Bank, N.A., Respondent,

v.

Alphonse Stalliard; Oldfield Club; and Oldfield Community Association, Inc., Defendants, of whom Alphonse Stalliard is the Appellant.

Appellate Case No. 2011-195508

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

Opinion No. 27188
Heard September 19, 2012 – Filed November 7, 2012

AFFIRMED

Michael W. Mogil, of Hilton Head Island, for Appellant.

Curtis Lee Coltrane of Hilton Head Island, for Respondent.

CHIEF JUSTICE TOAL: The Savannah Bank, N.A., (Bank) seeks to foreclose on a property owned by Alphonse Stalliard, Appellant. Appellant argues that he should not be held liable for a loan closed by a person acting on his behalf under a power of attorney. Appellant alleges, *inter alia*, that Bank did not conduct reasonable due diligence and did not verify Appellant's ability to pay. He filed a motion seeking additional time for discovery. The master-in-equity (the master) denied the motion and ruled in Bank's favor. Appellant now appeals this decision

arguing that summary judgment was improper and that the master should have permitted additional time for discovery. We affirm.

FACTS/ PROCEDURAL BACKGROUND

Appellant, a New York investor, was 26 years old when he purchased property located at 10 Indigo Plantation Drive in Beaufort County, South Carolina (the Hilton Head Property) to "build a house, sell a house, make a profit."

Appellant's ill-fated investment began when a friend introduced him to Steve Corba. Corba informed Appellant about real estate opportunities in Hilton Head, South Carolina, and convinced Appellant to borrow money to invest in development of such properties. Through Corba, Appellant hired Sally Gardocki, an attorney in Hilton Head, and gave her a power of attorney to obtain financing for the Hilton Head Property. On August 23, 2007, Gardocki executed and delivered a written promissory note on Appellant's behalf to obtain a $1.6 million loan from Bank. Appellant would later claim that Gardocki acted beyond the scope of her power of attorney in obtaining the loan. However, Appellant acknowledged that when he signed a document entitled, "Limited Power of Attorney," he understood that Gardocki "would proceed with the closing on the property." He also admitted that Gardocki sent him the file containing relevant loan documents after the closing, and that he reviewed the files without raising any objections. In addition, Gardocki testified that she made Appellant "aware of the form and content of the closing documents . . ., and he approved the same and authorized the closing. Appellant only raised concerns about the transaction when he realized the "the property wouldn't sell." He now claims that the income and tax information provided on his loan application were false, and Bank should have denied him the loan.

After closing the loan, Appellant used the proceeds to construct a residence on the Hilton Head Property. Blair Witkowski, who was also introduced to Appellant through Corba, coordinated the construction of the house with Appellant's apparent knowledge and approval. Once built, the Hilton Head Property failed to sell, and Appellant sought a loan modification because he could not afford his monthly mortgage payments.

On May 6, 2008, Appellant executed and delivered a loan modification, which was recorded on June 27, 2008. Appellant defaulted on his obligations under the loan modification, and Bank provided Appellant with a notice of default and the right to cure. Appellant did not cure the default, and on August 24, 2009,

Bank sought to enforce the note and foreclose on the mortgage. On May 14, 2010, a consent order was entered that bifurcated the trial of the mortgage foreclosure action and Bank's claim for a deficiency judgment. The trial of the foreclosure was held on June 25, 2010, and resulted in an Order of Judgment and Foreclosure in the amount of $1,834,504.41. On August 2, 2010, the subject property was thereafter sold to Bank at a foreclosure sale for $650,000.

On November 10, 2010, the parties entered into a consent scheduling order, requiring Appellant and Bank to complete discovery by February 15, 2011. On March 15, 2011, Bank filed its motion for summary judgment. On May 2, 2011, after the deadline for discovery had passed, Appellant filed a motion seeking additional time for discovery and continuance of bank's motion. The master denied Appellant's request, and on June 2, 2011, granted summary judgment to Bank. Appellant filed a timely appeal, and this Court certified this case pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the master correctly granted summary judgment in determining whether Bank was negligent in processing Appellant's loan application and verifying his ability to pay.

II. Whether the master correctly denied Appellant's motion seeking to extend the time for discovery and to continue Bank's motion for summary judgment

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* 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." *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence. *Id.* at 330–31, 673 S.E.2d at 803.

ANALYSIS

I. Negligence

Appellant claims summary judgment was inappropriate because the bank was negligent in processing and discovering false information about Appellant's income contained in the loan application, which would have made Appellant ineligible for a loan. We disagree.

Negligence is the breach of a duty of care owed to the plaintiff by the defendant. *Bell v. Atl. Coast Line R.R. Co.*, 202 S.C. 160, 181, 24 S.E.2d 177, 186 (1943); *Crawford v. Atl. Coast Line R.R. Co.*, 179 S.C. 264, 270, 184 S.E. 569, 571 (1936). To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; (3) a negligent act or omission resulted in damages to the plaintiff; and (4) that damages proximately resulted from the breach of duty. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); *Kleckley v. Nw. Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000). In determining whether a particular act is negligent, the test depends on what a person of ordinary reason and prudence would do under those circumstances at that time and place. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

As an initial matter, we must determine whether Bank owes Appellant a duty of care in the processing of a loan application. We find Bank does not owe Appellant a duty of care under these facts. In *Citizens & Southern National Bank of South Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994), this Court held the bank did not owe a duty to tell the guarantor of a loan that his liability was for the entire loan amount. We explained, "The law does not impose a duty on the bank to explain to an individual what [she] could learn from simply reading the document." Similarly in *Regions Bank v. Schmauch*, 354 S.C. 648, 668–70, 582 S.E.2d 432, 442–44 (Ct. App. 2003), the court of appeals upheld the dismissal of a negligence claim against the bank because the appellant in that case had the opportunity to read the documents she signed, and in not doing so, failed to exercise reasonable diligence in protecting her own interests.

In the instant case, Appellant admitted that Gardocki, his attorney, sent him the file containing the relevant loan documents, and that he reviewed the files without raising objections. Appellant's admission was corroborated by Gardocki who testified:

> Mr. Stalliard was made aware of the form and content of the closing documents, including but not limited to the Note, Mortgage and HUD-1 Closing Statement, and Alphonse Stalliard approved the same and authorized the closing.
>
> . . . .
>
> At no time since then has Alphonse Stalliard ever contacted me and raised any question, issue or complaint concerning the form or content of the closing documents . . . or the mortgage loan through [Bank].

Indeed, Appellant only perceived problems with the transaction when he realized the "the property wouldn't sell." Furthermore, the master found that Appellant expressly ratified the loan he obtained on August 23, 2007, by executing and delivering the loan modification agreement on May 6, 2008.[1] Appellant had many opportunities to correct false information submitted to Bank by persons he authorized, and he failed to do so. We find under these factual circumstances, Bank does not owe Appellant a duty of care.[2] *Lanford*, 313 S.C. at 545, 443 S.E.2d at 551; *Regions Bank*, 354 S.C. at 668–70, 582 S.E.2d at 442–44.

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[1] The loan modification contains the following express affirmation of the validity of the debt owing from Appellant to Bank:

> WHEREAS, Borrower is justly indebted unto lender as evidenced by a Promissory Note dated AUGUST 23, 2007, in the original principal sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars ($1,600,000.00), which Note bears interest at the original rate of SIX AND SEVEN TENTHS percent (6.700%) per annum and which Note provides for payment in full on SEPTEMBER 1, 2031 . . . .

[2] Even if we had held that Bank owed Appellant a duty of care, it would be questionable whether Appellant can prove causation under these circumstances. The Record demonstrates that Appellant had many opportunities to correct false information submitted on his behalf by persons authorized by him under a valid power of attorney, and he failed to do so. Consequently, Appellant, rather than Bank, appears to be the cause-in-fact and proximate cause of his own harm.

Thus, the master properly granted summary judgment on the issue of negligence.[3]

II. Denial of Motion to Enlarge

Appellant argues that the master should have granted Appellant's motion to enlarge the time for discovery and continue Bank's summary judgment motion. We disagree.

In this case, the deadline for discovery was February 15, 2011. On March 15, 2011, Bank filed and served its Motion for Summary Judgment. On May 2, 2011, more than two months after the discovery deadline had passed, Appellant moved to extend the time for discovery and to continue Bank's summary judgment motion.

The Record indicates that Appellant had ample time during discovery to uncover evidence and speak with any potential witnesses from Bank. If Appellant believed he did not have sufficient time, Appellant should have promptly filed a motion seeking additional discovery time. Instead, Appellant waited until after Bank filed a summary judgment motion and two months after the deadline for discovery expired to request an extension. In addition, Appellant did not provide affidavits to support allegations he made in requesting a discovery extension or submit an affidavit stating why he was unable to obtain such affidavits. *See* Rule 56(e), (f), SCRCP.[4]

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[3] When discussing negligence, Appellant also accused Bank in a conclusory manner of having unclean hands and behaving unconscionably. We deem such conclusory and unsupported claims abandoned. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). Furthermore, even if the issues are preserved, the Record does not support Appellant's allegations that the Bank had unclean hands or acted unconscionably.

[4] Rule 56(e), SCRCP provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or

Thus, we hold that the master properly denied Appellant's motion.

CONCLUSION

For the foregoing reasons, we affirm the master's grant of summary judgment.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

> as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(emphasis added). If the party opposing the motion for summary judgment cannot provide affidavits to justify his opposition, he must submit an affidavit providing reasons why such affidavit cannot be obtained. Rule 56(f), SCRCP. In opposing summary judgment and requesting an extension, Appellant presented allegations unsupported by an affidavit. Specifically, Appellant claims his counsel contacted an unidentified material witness, said to be previously unavailable. Based on a telephone interview with this material witness, Appellant's counsel learned of additional information and potential witnesses who worked for Bank, who might be useful in testifying about what Bank did to verify information contained on the loan application.

The Supreme Court of South Carolina

In the Matter of Spartanburg County Magistrate Keith Allen Sherlin, Respondent.

Appellate Case No. 2012-213051

ORDER

By order dated May 7, 2012, the Court placed respondent on interim suspension. *In the Matter of Sherlin,* 398 S.C. 112, 727 S.E.2d 739 (2012). The Court lifts respondent's interim suspension.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

October 31, 2012

The Supreme Court of South Carolina

In the Matter of Amelia Holt Lorenz, Respondent.

Appellate Case No. 2012-213288

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) 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 an attorney to protect the interests of respondent's clients 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 A. Todd Darwin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Darwin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Darwin 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 A. Todd Darwin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that A. Todd Darwin, Esquire, has been duly appointed by this

Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Darwin's office.

Mr. Darwin'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

November 1, 2012

The Supreme Court of South Carolina

In the Matter of Derwin Thomas Brannon, Respondent.

Appellate Case No. 2012-212600

ORDER

On July 13, 2009, the Court definitely suspended respondent from the practice of law for one (1) year, retroactive to April 30, 2008, the date of his interim suspension. *In the Matter of Brannon*, 383 S.C. 374, 680 S.E.2d 776 (2009).[1] After a hearing on his Petition for Reinstatement, the Committee on Character and Fitness (the Committee) filed a Report and Recommendation recommending respondent be reinstated subject to certain conditions, including, among others: 1) completion of the South Carolina Bar's Advertising and Trust Account School and Legal Ethics and Practice Program School within one (1) year of reinstatement, 2) execution of a restitution agreement with the Commission on Lawyer Conduct (the Commission) to repay $7,792.24 to the Lawyers' Fund for Client Protection (Lawyers' Fund), and 3) paying $11,000 to former client Lisa G. Lewis in restitution within one year of the Court's decision on reinstatement. *See* May 9, 2011, Report and Recommendation. Respondent filed no exceptions to the Committee's Report and Recommendation.

On June 23, 2011, the Court issued an order granting respondent's Petition for Reinstatement subject to the same conditions proposed by the Committee. The order specified:

1) within one (1) year of the date of this order, respondent shall attend and complete the South Carolina Bar's Advertising and Trust Account School and Legal Ethics and Practice Program School and provide the Commission with evidence of completion of the programs;

[1] *In the Matter of Brannon*, 377 S.C. 474, 661 S.E.2d 98 (2008).

2) within sixty (60) days of the date of this order, respondent shall enter into a restitution agreement with the Commission agreeing to repay the Lawyers' Fund for Client Protection (Lawyers' Fund) $7,792.24 for claims paid on his behalf; and

3) within one year of the date of this order, respondent shall repay $11,000.00 to former client Lisa G. Lewis.

See June 23, 2011, order.

ODC has filed a Petition to Issue Rule to Show Cause pursuant to Rule 5(b)(7), RLDE, Rule 413, SCACR, alleging respondent failed to comply with the Court's June 23, 2011, order by: 1) failing to provide the Commission with evidence of completion of the South Carolina Bar's Advertising and Trust Account School and Legal Ethics and Practice Program School by June 23, 2012; 2) failing to enter into a restitution agreement with the Commission to repay the Lawyers' Fund $7,792.24; and 3) failing to repay $11,000.00 to former client Lisa G. Lewis by June 23, 2012. ODC petitions the Court to require respondent to show cause why he should not be held in civil and criminal contempt of Court for failing to comply with the terms of the order reinstating him to the practice of law.

Respondent filed a return admitting he failed to comply with the terms of the Court's order reinstating him to the practice of law. He states he has been working and living in Africa since September 3, 2011, and has been unable to pay the ordered restitution. Regarding his failure to attend the Advertising and Trust Account School and Legal Ethics and Practice Program School, respondent requests "an online option or some other prepackaged course offerings that I can complete while overseas."

We decline to issue the Rule to Show Cause. We rescind that portion of the June 23, 2011, order reinstating respondent to the practice of law. Respondent shall not file a Petition for Reinstatement until he has fulfilled all of the requirements set forth in the Court's June 23, 2011, order including: 1) attending and completing the South Carolina Bar's Advertising and Trust Account School and Legal Ethics and Practice Program School and providing the Commission with evidence of completion of the programs; 2) entering into a restitution agreement with the Commission agreeing to repay the Lawyers' Fund $7,792.24; and 3) repaying $11,000.00 to former client Lisa G. Lewis. Respondent's Petition for

Reinstatement shall be referred to the Committee for a hearing and issuance of a Report and Recommendation.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

November 2, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennette Canteen, Appellant,

v.

McLeod Regional Medical Center and Palmetto Hospital Trust Services, Ltd., Respondent.

Appellate Case No. 2010-156546

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5047
Heard September 10, 2012 – Filed November 7, 2012

REVERSED AND REMANDED

Edward L. Graham, of Graham Law Firm, PA, of Florence, for Appellant.

Walter Hilton Barefoot, of Turner Padget Graham & Laney, PA, of Florence, and R. Hawthorne Barrett, of Turner Padget Graham & Laney, PA, of Columbia, for Respondent.

LOCKEMY, J.: Jennette Canteen appeals from the circuit court's order affirming the Workers' Compensation Commission's Appellate Panel's (Appellate Panel) finding that she did not suffer a brain injury. Canteen argues the circuit court erred by (1) failing to find Canteen suffered from an asymptomatic Chiari I Malformation prior to July 2, 2001; (2) failing to find Canteen's injury aggravated her previously asymptomatic Chiari I Malformation; (3) finding no medical doctor

provided evidence Canteen suffered a physical brain injury and disregarding the medical doctors' evidence; (4) disregarding evidence of Canteen's physical brain damage from herself and three neuropsychologists; (5) finding Dr. Kenneth Kammer's testimony concerning brain damage was equivocal; (6) failing to affirm the single commissioner's finding that evidence proved Canteen's physical brain damage was causally related to Canteen's work injury, (7) finding substantial evidence supported the Appellate Panel's decision; and (8) failing to affirm the single commissioner's award of lifetime compensation and lifetime medical care. We reverse and remand to the Appellate Panel.

FACTS/PROCEDURAL BACKGROUND

Canteen was working as a nurse at McLeod Regional Medical Center (McLeod) when she fell in the operating room on July 2, 2001. As a result of the fall, Canteen claimed she injured her right knee, right leg, cervical spine, head, brain, right arm, and right wrist. Canteen also claimed she suffered from mental injuries, psychological problems, exacerbation of a Chiari I Malformation, hemiparesis following Chiari I Malformation surgery, and bladder incontinence.

Although Canteen returned to work after the fall, she claimed she was unable to perform all of her duties, leading to her resignation. Sometime after the accident, Canteen claimed she began having headaches and experienced a "clicking" sound when she moved her head. In February 2003, neurosurgeon Dr. Kenneth Kammer diagnosed Canteen with a Chiari I Malformation, a condition in which the "cerebellar tonsils protrude down through the foramen magnum into the cervical spinal canal." Dr. Kammer testified Canteen's fall exacerbated her previously asymptomatic Chiari I Malformation, making it symptomatic. However, evidence was also presented from two other doctors that disputed the Chiari I Malformation diagnosis. Drs. Samuel McCown and Byron Bailey reviewed Canteen's MRIs and testified they did not believe she suffered from a Chiari I Malformation. Dr. Kammer recommended decompression surgery on Canteen's brain, which he performed in July 2003. Following surgery, in February 2004, Canteen was evaluated by neurologist Dr. Gero Kragh who opined that Canteen had a Chiari I Malformation that was aggravated by her fall at work.

In July 2004, Canteen filed a Form 50 claiming she was totally and permanently disabled with physical brain damage; thus, she was entitled to lifetime compensation and medical care. According to Canteen, following surgery, she regained full range of motion in her neck. However, Canteen testified she had post-operative paralysis in her right side that eventually improved, leaving her with

residual weakness and numbness in her right hand and foot. Canteen also testified she has difficulty with fine motor skills and suffers from gait and balance problems. Additionally, Canteen testified she has cognitive difficulties, which affect her concentration, comprehension, problem solving, multi-tasking, and memory abilities. According to Canteen, she has difficulty reading, driving, and handling household chores and the activities of daily living. She also testified she has difficulty making eye contact and hears voices that are not present.

Dr. Kammer testified Canteen did not sustain any brain damage as a result of the surgery. Neuropsychologist Dr. Randy Waid also evaluated Canteen and opined that Canteen's fall "caused an asymptomatic Chiari Malformation to become symptomatic," and she suffered "physical injury to the brain." Dr. Waid opined that Canteen's symptoms were "a direct result of the fall that rendered her Chiari [M]alformation symptomatic." Additionally, psychologist Dr. Robert Brabham determined Canteen experienced a permanent physical injury to her brain when she fell at work. Dr. Brabham opined that most of Canteen's "noted inconsistencies" are "brain-injury related rather than from feigning or malingering, as might be questioned." Dr. Kragh found Canteen's "neurologic compromise [] resulted from an exacerbation of her pre-morbidly existent [Chiari I Malformation] and was a recognized risk factor in the decompression of such malformation."

McLeod admitted the injuries to Canteen's right knee and cervical spine; however, it denied Canteen had a Chiari I Malformation. On September 12, 2005, after a hearing, the single commissioner granted Canteen all of her requested relief and concluded Canteen suffered a brain injury. Specifically, the single commissioner determined Canteen's accident caused her pre-existing Chiari I Malformation to become symptomatic. The single commissioner found Canteen was totally and permanently disabled and determined she was entitled to lifetime compensation and care. McLeod appealed only the single commissioner's findings that Canteen suffered a brain injury and that the accident triggered her Chiari I Malformation symptoms. On June 26, 2006, the Appellate Panel reversed the single commissioner's findings concerning Canteen's brain injury and remanded the case to the single commissioner for a determination of permanency to body parts other than Canteen's brain.

Canteen appealed the brain injury finding to the circuit court prior to the proceedings before the single commissioner regarding the remanded issues. McLeod filed a motion to dismiss based on lack of subject matter jurisdiction, arguing the appeal was interlocutory because the Appellate Panel had remanded the case to the single commissioner for further proceedings. *See Canteen v.*

McLeod Reg'l Med. Ctr., 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) *overruled by Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010). On January 3, 2007, the circuit court granted McLeod's motion to dismiss, concluding the court did not have jurisdiction, and dismissed the appeal without prejudice. Thereafter, Canteen appealed the circuit court's order to this Court. In a July 15, 2009 opinion, this Court reversed the circuit court's order dismissing Canteen's appeal and remanded to the circuit court for a determination on Canteen's brain injury. *See id.* On remand, the circuit court affirmed the Appellate Panel, finding substantial evidence supported the Appellate Panel's determination that Canteen did not suffer a brain injury as a result of her work accident. The circuit court also determined substantial medical evidence existed that Canteen did not suffer from a Chiari I Malformation and, in the alternative, if Canteen did have a Chiari I Malformation, she did not suffer brain damage as a result of the accident. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not "substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions." *Broughton v. S. of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. *Id.*

LAW/ANALYSIS

I. Chiari I Malformation

Canteen argues the circuit court erred in failing to find (1) she suffered from a pre-existing Chiari I Malformation and (2) her fall at work aggravated her previously asymptomatic Chiari I Malformation.

The single commissioner determined Canteen had an asymptomatic Chiari I Malformation, and her fall in 2001 triggered her Chiari I Malformation symptoms. The single commissioner noted Canteen suffered additional symptoms after surgery and found she had physical brain damage. Subsequently, the Appellate Panel, in its order, noted the existence of a Chiari I Malformation was an issue on appeal. However, the Appellate Panel did not make a specific finding regarding the existence of a Chiari I Malformation. Instead, the Appellate Panel determined only that the evidence did not support a finding that Canteen suffered a brain injury. The Appellate Panel made no reference to Canteen's alleged Chiari I Malformation in its findings of fact.

Canteen argues the Appellate Panel's failure to expressly reverse the single commissioner's determination that she suffered from a Chiari I Malformation was an affirmation of the single commissioner's finding by implication. McLeod maintains the Appellant Panel's use of the term "brain injury" included the specific condition of a Chiari I Malformation. We find the Appellate Panel's order is unclear whether in reversing the single commissioner's finding that Canteen suffered a brain injury, the Appellate Panel also reversed the single commissioner's findings that Canteen suffered from a Chiari I Malformation.

On appeal, the circuit court was charged with determining whether substantial evidence supported the Appellate Panel's findings of fact or whether an error of law affected its order. *See Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). However, the circuit court improperly weighed the evidence and made its own factual determinations as to whether Canteen suffered from a pre-existing Chiari I Malformation and if her fall aggravated that Chiari I Malformation. Accordingly, we reverse the circuit court and remand to the Appellate Panel to determine whether Canteen suffered from a Chiari I Malformation and, if so, whether that Chiari I Malformation was aggravated by her fall.

II. Evidence of Brain Injury

Canteen argues the circuit court erred in failing to find the Appellate Panel erred in (1) finding "no medical doctor provided evidence [Canteen] suffered a physical brain injury" and (2) disregarding evidence from Canteen and three neuropsychologists regarding Canteen's brain damage.

The Appellate Panel found "[t]he greater weight of the evidence does not support a finding that [Canteen] suffered a brain injury," and it noted that "[n]o medical doctor provided evidence [Canteen] suffered a physical brain injury." The circuit court determined Dr. Kammer's testimony, which was that Canteen did not sustain any brain damage as a result of the surgery, constituted substantial evidence to support the Appellate Panel's finding of no brain injury. The circuit court did not find, as the Appellate Panel did, that there was *no* evidence of brain injury. Rather, the circuit court noted it was within the Appellate Panel's authority to accept the testimony of Dr. Krammer over the testimony of Drs. Kragh, Waid, and Brabham.

This court's review is limited to determining whether the Appellate Panel's decision is unsupported by substantial evidence or controlled by an error of law. *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). We find the Appellate Panel's order is insufficient to enable a meaningful review. The findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). Pursuant to the APA,

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

S.C. Code Ann. § 1-23-350 (2005).

Here, the Appellate Panel failed to detail any of the evidence presented to the Commission. The Appellate Panel's findings simply indicate it rejected Canteen's brain injury claim because no evidence supported a finding that she suffered any brain damage. The record, however, contains conflicting evidence on this issue.

In light of the various facts and issues presented by this case, the Appellate Panel's findings are insufficient to permit this court to ascertain whether evidence supported the Appellate Panel's findings and whether the law was correctly applied.[1] Accordingly, we remand to the Appellate Panel to weigh the evidence and determine whether Canteen suffered a brain injury.

III. "Equivocal" Testimony

Canteen argues the circuit court erred in failing to find the Appellate Panel erred in finding Dr. Kammer's testimony regarding brain damage was "equivocal."

Regarding Canteen's brain injury claim, the Appellate Panel determined: "The greater weight of the evidence does not support a finding that [Canteen] suffered a brain injury. Dr. Kammer's testimony from the hearing is equivocal." The Appellate Panel failed to cite any evidence to support its "equivocal" finding. Canteen argues the single commissioner correctly believed Dr. Kammer's testimony that she suffered from a pre-existing Chiari I Malformation that was aggravated by her fall, but disregarded Dr. Kammer's testimony that she did not suffer brain damage as a result of decompression surgery. Canteen maintains the Appellate Panel erred in rejecting Dr. Kammer's testimony as "equivocal" when his testimony was neither uncertain nor subject to multiple interpretations.

The Appellate Panel failed to sufficiently support its "equivocal" finding in its order, and therefore, we instruct the Appellate Panel to cite evidence supporting its position on remand.

IV. Causal Relationship

Canteen argues the circuit court erred in failing to affirm the single commissioner's finding that evidence proved Canteen's brain damage was causally related to her work injury.

Regarding Canteen's brain injury claim, the Appellate Panel determined: "The greater weight of medical evidence does not show a causal relationship." It is

[1] Because the Appellate Panel's order was insufficient, we need not address whether substantial evidence supports the Appellate Panel's findings. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

unclear whether the Appellate Panel found there was no causal relationship between the fall and Canteen's alleged brain injury, or between the decompression surgery and Canteen's alleged brain injury. On remand, the Appellate Panel should clarify its finding with supporting evidence.

V. Lifetime Compensation and Medical Care

Canteen argues the circuit court erred in failing to affirm the single commissioner's award of lifetime compensation and lifetime medical care. Based upon our decision to remand to the Appellate Panel for reconsideration, we need not address this issue. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Panel is

REVERSED AND REMANDED.

SHORT and KONDUROS, JJ., concur.