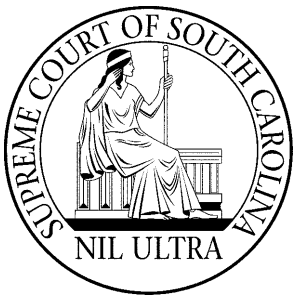

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
December 8, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stoneledge at Lake Keowee Owners' Association, Inc.; C. Dan Carson; Jeffrey J. Dauler; Joan W. Davenport; Michael Furnari; Donna Furnari; Jessy B. Grasso; Nancy E. Grasso; Robert P. Hayes; Lucy H. Hayes; Ty Hix; Jennifer D. Hix; Paul W. Hund, III; Ruth E. Isaac; Michael D. Plourde; Mary Lou Plourde; Carol C. Pope; Steven B. Taylor; Bette J. Taylor; and Robert White, Individually and on Behalf of all others similarly situated, Petitioners-Respondents,

v.

IMK Development Co., LLC; Larry D. Lollis; William Cox; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; and Rick Thoennes, Defendants,

Of Which Bostic Brothers Construction, Inc. is the Respondent-Petitioner.

Appellate Case No. 2019-000041

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28070
Heard October 14, 2020 – Filed December 8, 2021

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Robert T. Lyles Jr. and Lee Anne Walters, both of Lyles & Associates, LLC, of Charleston, for Petitioners-Respondents.

Alan R. Belcher Jr. and Elizabeth F. Wieters, both of Hall Booth Smith, P.C., of Mt. Pleasant, and Paul Trainor, of Hall Booth Smith, P.C., of Atlanta, GA, for Respondent-Petitioner.

JUSTICE JAMES: This appeal arises from a construction defect lawsuit involving waterfront townhomes on Lake Keowee in Oconee County. After a two-week trial, Petitioners-Respondents Stoneledge at Lake Keowee Owners' Association, Inc. (the HOA) received plaintiff's verdicts against several defendants, including Respondent-Petitioner Bostic Brothers Construction, Inc. (Bostic). Bostic and other defendants appealed, and in a pair of published opinions, the court of appeals affirmed in part and reversed in part. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) (hereinafter *Stoneledge I*); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018) (hereinafter *Stoneledge II*).

We granted several writs of certiorari to review the court of appeals' decisions. In this opinion, we review the court of appeals' opinion in *Stoneledge II*, which addressed Bostic's argument that the trial court erred in denying Bostic's motion for a directed verdict based on the statute of limitations. We respectfully disagree with Bostic and affirm the court of appeals on this issue. We are aware of the public policy informing the General Assembly's enactment of the three-year limitations period in section 15-3-530 of the South Carolina Code (2005); however, we are equally mindful of the public policy informing the General Assembly's enactment of the "discovery rule" set forth in section 15-3-535. Application of both the basic three-year limitations period and the discovery rule in any given case can present

factual issues for a jury to resolve.[1] As was the court of appeals, we are constrained by our standard of review and conclude that under the facts of this case, there was a jury issue as to whether the statute of limitations had expired by the time the action was commenced against Bostic.

In its petitions stemming from *Stoneledge I* and *Stoneledge II*, the HOA challenges the court of appeals' reversal of the trial court's decision to raise the three verdicts in favor of the HOA to $5,000,000 each. In their petitions stemming from *Stoneledge II*, the HOA and Bostic challenge the court of appeals' holding regarding setoff of prior settlements. Their setoff issues are inextricably intertwined with the setoff issues we addressed in our companion opinion reviewing *Stoneledge I*. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, Op. No. 28071 (S.C. Sup. Ct. filed December 8, 2021) (Howard Adv. Sh. No. 43 at 15). We incorporate herein all factual recitations, analyses, and holdings in that opinion.

Taking our holdings in our companion opinion into account, we (1) affirm the court of appeals as to the statute of limitations; (2) affirm the court of appeals' reversal of the trial court's decision to increase each verdict to $5,000,000; (3) affirm the court of appeals' holding that setoff was correctly applied to the breach of warranty award; (4) reverse the court of appeals' calculation of the final judgment amounts; and (5) remand for entry of judgment against Bostic on the negligence award in the amount of $858,066.17 and on the breach of warranty award in the amount of $85,806.62. These figures do not take into account any settlements received by the HOA during the pendency of this appeal.[2]

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[1] If the issue had been submitted to the jury, the jury could have found the limitations period applicable to Bostic had expired or the jury could have found it had not expired; however, Bostic did not argue the statute of limitations issue to the jury, nor did Bostic ask the trial court to instruct the jury on the issue. This is of no significance in this appeal because Bostic argues it was entitled to a directed verdict as a matter of law.

[2] Because our holding is dispositive of the statute of limitations issue, we decline to address the HOA's alternative arguments regarding equitable tolling. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stoneledge at Lake Keowee Owners' Association, Inc.; C. Dan Carson; Jeffrey J. Dauler; Joan W. Davenport; Michael Furnari; Donna Furnari; Jessy B. Grasso; Nancy E. Grasso; Robert P. Hayes; Lucy H. Hayes; Ty Hix; Jennifer D. Hix; Paul W. Hund, III; Ruth E. Isaac; Michael D. Plourde; Mary Lou Plourde; Carol C. Pope; Steven B. Taylor; Bette J. Taylor; and Robert White, Individually and on Behalf of all others similarly situated, Petitioners-Respondents,

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating; A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.; Southern Basements; Carl Catoe Construction, Inc.; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester

Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants,

Of Which Marick Home Builders, LLC and Rick Thoennes are the Respondents-Petitioners.

Appellate Case No. 2019-000038

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28071
Heard October 14, 2020 – Filed December 8, 2021

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Robert T. Lyles Jr. and Lee Anne Walters, both of Lyles & Associates, LLC, of Charleston, for Petitioners-Respondents.

Jason M. Imhoff, of Kenison Dudley & Crawford, LLC, of Greenville, for Respondents-Petitioners.

JUSTICE JAMES: This appeal stems from a construction defect lawsuit involving waterfront townhomes on Lake Keowee in Oconee County. After a two-week trial, Petitioners-Respondents Stoneledge at Lake Keowee Owners' Association, Inc. (the HOA) received plaintiff's verdicts against several defendants, including Respondents-Petitioners Marick Home Builders, LLC and Rick Thoennes. Marick Home Builders, Thoennes, and other defendants appealed, and in a pair of published opinions, the court of appeals affirmed in part and reversed in part. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) (hereinafter *Stoneledge I*); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018) (hereinafter *Stoneledge II*).

We granted several writs of certiorari to review the court of appeals' decisions. In this opinion, we review *Stoneledge I* and address the trial court's (1) jury charge, (2) denial of Marick's directed verdict motions, (3) finding of amalgamation, and (4) calculation of damages.[1] We affirm the court of appeals as to the jury charge and as to the trial court's denial of Marick's motions. We reverse the court of appeals as to amalgamation. We affirm in part and reverse in part the court of appeals as to the amount of the judgment in favor of the HOA and remand to the circuit court for final calculation and entry of judgment consistent with this opinion.

BACKGROUND

Immersion into the facts of this case and its knotty trial and appellate issues is not for the weary. In *Stoneledge I*, the court of appeals accurately summarized the pertinent facts and legal issues, but for easier reading, we will restate most of them. In 2002, Bostic Brothers Construction, Inc. (Bostic) began construction on a large luxury townhome project in Oconee County on Lake Keowee (Stoneledge). Construction of Stoneledge was divided into Phase I and Phase II. This litigation is limited to the thirty-seven units built during Phase I. Like other townhome communities, a homeowners' association would be responsible for maintaining the common areas and the exterior of the buildings. The stone-clad, waterfront

[1] To ensure a complete discussion of the calculation of damages in this case, we have addressed issues raised by the HOA and Bostic Brothers Construction, Inc. in their related appeal. We have issued a separate opinion addressing the other issues raised in that appeal. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, Op. No. 28070 (S.C. Sup. Ct. filed December 8, 2021) (Howard Adv. Sh. No. 43 at 11).

townhomes were marketed as "quality" construction and "maintenance free." A marketing brochure touted "pleasurable experiences all year long." Unfortunately for the homeowners, this turned out not to be the case.

Bostic was the original general contractor on the project and was a part-owner of the original development company, Keowee Townhouses, LLC. At the time, Bostic was a large construction company with several other projects throughout the Southeast. By late 2004, Bostic had problems finishing other jobs and ceased operations at Stoneledge; at that time, only a few Stoneledge units had been completed and sold. A homeowner compared Stoneledge to a "ghost town" and noted Bostic had completed the exteriors of the unsold units but had not finished the interiors before walking away. Stoneledge was on the brink of foreclosure.

In March 2005, Keowee Townhouses escaped foreclosure by selling the entire Stoneledge project, including the remaining twenty-five or so unfinished units in Phase I, to IMK Development Company, LLC. IMK is comprised of Integrys Keowee Development, LLC (IK) and Marick Home Builders, LLC (Marick). IK's members include William Cox and Larry Lollis. Marick's managing member and construction license holder is Rick Thoennes. IK provided the funding to complete construction, and Marick became the general contractor and completed Phase I.

Marick's site superintendent, Nathan Hornaday, testified he walked through the units shortly after IMK purchased the project to inspect for damage and to make a list of everything that needed to be fixed. He testified to the overall condition of the units and explained, "[M]ainly everything was finished except for, I think, two or three units. I'm not sure. And those units had all the exterior done. They didn't have sheetrock inside of them, but I believe -- I'm not sure, but I believe everything else was finished." Hornaday testified the exterior of the units, including the roofs, porches, decks, and siding, had been completed and that only two or three units needed doors installed. Hornaday testified Marick intended to fix all of the problems with the Phase I units.

Hornaday testified he pulled building permits needed to complete the unfinished units. The work description on a majority of the permits stated Marick was to "Complete Townhome from Rough-in Stage," but a few of the permits stated Marick was to "Complete Townhome from Foundation Stage." According to the permits, Marick estimated that the cost to complete the remaining units totaled more than $1.4 million. Marick worked to complete the unfinished units but also undertook repairs on some of the finished units. For example, Marick addressed a

variety of issues raised by Steven Taylor and Robert White, who owned finished townhomes, and contracted with a waterproofing company to apply a waterproof coating to all of the Phase I decks and porches.

IMK created the HOA in 2005, and the HOA board was comprised of IMK representatives—including Cox, Lollis, and Thoennes. A homeowner testified HOA board business was regularly conducted, but he noted there was not a lot of interaction between the board and the homeowners. IMK remained in control of the HOA board until September 2008, when IMK turned control of the board over to the homeowners. IMK sold Stoneledge to a new developer, S.D.I./Ludwig Corporation, LLC.

In late 2008 or early 2009, the homeowner-controlled HOA began receiving numerous requests for repairs of damage caused by water intrusion, and it did not take long for the HOA to realize it could not afford the repairs. The HOA paid to fix what it deemed "emergencies" and hired an engineering company to look deeper into the problems. Destructive testing revealed substantial water damage throughout Phase I. In May 2009, the HOA filed this action against a myriad of defendants, including developers, general contractors, subcontractors, and other individuals. The HOA asserted several causes of action, including the ones pertinent to this appeal: negligence, breach of the implied warranty of workmanlike service, breach of the implied warranty of habitability, and breach of fiduciary duty. Extensive discovery ensued, but the case finally made it to trial.

During the two-week trial, the defendants did not dispute the HOA's claim of faulty construction. All parties agreed the HOA's actual damages claim was limited to the cost of repair. The main disputes centered upon the scope and cost of those repairs and which defendants were responsible. [2]

Derek Hodgin, the HOA's forensic engineer, testified he found damage at every place he made a test cut. He testified water intrusion had caused extensive damage to roofs, windows, balconies, and foundations. He also testified the firewalls separating the units had been improperly installed. Hodgin testified the observations made by Marick when it took over the project triggered Marick's obligation as general contractor to perform a more thorough investigation to

[2] Bostic asserted a statute of limitations defense. That defense was addressed by the court of appeals in *Stoneledge II* and is the subject of our companion opinion in this case.

ascertain the source of the problems. Hodgin testified to a broad, extensive scope of repair. Bostic's expert, Richard Moore, presented a narrower, more surgical scope of repair. Estimators testified it would cost $6,309,197 to implement Hodgin's scope of repair and slightly less than $4,000,000 to implement Moore's scope of repair.

Many defendants settled before and during trial. When the jury began deliberations, the only remaining defendants were Bostic, Marick, IMK, IK, Thoennes, Cox, and Lollis. The jury returned verdicts for the HOA as follows:

- $3,000,000 for negligence against Bostic and IMK/Marick;
- $1,000,000 for breach of the implied warranty of workmanlike service against Bostic and Marick;
- $1,000,000 for breach of fiduciary duty against IMK, IK, Thoennes, Lollis, and Cox.

After the jury verdicts were read, counsel for the HOA expressed confusion and asked the trial court if the verdicts were "cumulative," and the trial court replied that it thought they were. Counsel for the defendants did not comment on this exchange, and no one, including the trial court, explained their understanding of what "cumulative" meant. As we will explain, this confusion could have been completely avoided if just one party had requested the trial court to order the jury to reform its verdicts to reflect the same award of actual damages for each cause of action.

The trial then proceeded to the damages apportionment phase as to the negligence and breach of warranty verdicts. After hearing brief arguments from counsel on apportionment, the jury allocated 60% of the negligence verdict against Bostic and 40% against IMK/Marick. The jury allocated 70% of the breach of implied warranty verdict against IMK/Marick[3] and 30% against Bostic.

[3] The implied warranty verdict form lists Bostic and Marick as the potentially liable defendants; however, the subsequent apportionment form lists Bostic and "IMK/Marick" for the implied warranty award. The record does not reveal why IMK was included on the apportionment form. In any event, IMK was dismissed from the action while the case was pending before the court of appeals.

The trial court issued a Form 4 order entering judgment against Bostic and IMK/Marick in amounts reflecting the apportionments. The order also entered judgment against the five breach of fiduciary duty defendants in the amount of $200,000 each (obviously a division of $1,000,000 by five). Thereafter, counsel for the HOA appropriately notified the trial court that the HOA had previously received $2,855,911.77 in settlements from other Phase I defendants.

The parties timely filed post-trial motions, and, upon motion of the HOA, the trial court amended the three verdicts to award $5,000,000 to the HOA for each cause of action, subject to the apportionment percentages. The trial court then calculated the setoff of prior settlements paid by other Phase I defendants.

Marick, Thoennes, and Bostic appealed,[4] and the court of appeals issued two published opinions: *Stoneledge I*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) and *Stoneledge II*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018). In *Stoneledge I*, the court of appeals reversed the trial court's decision to raise the three verdicts to $5,000,000 each, affirmed the trial court's denial of directed verdict motions, affirmed the trial court's "finding" of amalgamation, and adjusted the trial court's calculation of the final judgments. This Court granted cross-petitions for writs of certiorari arising from both *Stoneledge I* and *Stoneledge II*. This opinion is our review of *Stoneledge I*.

DISCUSSION

The parties argue the trial court erred in its: (1) jury charge, (2) denial of directed verdict motions, (3) finding of amalgamation, and (4) calculation of damages to be awarded on the three causes of action at issue.

A. Jury Charge

Marick argues the trial court erred by (1) not charging the jury that Marick could be held liable only for work it performed at Stoneledge and (2) charging the jury on breach of implied warranty of habitability. Marick contends the trial court's errors were prejudicial and require reversal. The court of appeals affirmed the trial court on those points and also rejected the HOA's preservation argument. *Stoneledge*

[4] IMK, IK, Lollis, and Cox also appealed, but the HOA's actions against them were dismissed during briefing at the court of appeals. The record does not reflect whether these dismissals arose from settlement or some other event.

I, 425 S.C. at 286-92, 821 S.E.2d at 514-17. We agree with the court of appeals' entire analysis and therefore affirm.

B. Directed Verdict

The court of appeals affirmed the trial court's denial of Marick's directed verdict motion as to the HOA's breach of implied warranty of workmanlike service claim and affirmed the trial court's denial of Marick's motion for a partial directed verdict on the negligence claim. *Id.* at 293-96, 821 S.E.2d at 518-20. Marick argues this was error. We agree with the court of appeals' analysis of these two issues and therefore affirm.

C. Amalgamation (Single Business Enterprise Theory)

Actions to pierce the corporate veil and to find a party responsible under the alter-ego theory lie in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). Likewise, an action to amalgamate parties lies in equity. *See Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 648, 817 S.E.2d 273, 277 (2018) (noting equitable principles govern the application of amalgamation). Therefore, our standard of review on this issue is de novo and allows us to find facts in accordance with our own view of the preponderance of the evidence. *Oskin*, 400 S.C. at 397, 735 S.E.2d at 463. Despite this broad standard of review, we are not required to disregard the trial court's findings of fact, and we are mindful the trial court sits in a better position to assess witness credibility. *Id.*

South Carolina first recognized the theory of amalgamation in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986), in which the court of appeals held "an amalgamation of corporate interests, entities, and activities . . . blur[red] the legal distinction between [three related] corporations and their activities . . . ." Since then, this Court and the court of appeals have discussed the theory on several occasions. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 340-41, 384 S.E.2d 730, 734 (1989); *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 604-05, 649 S.E.2d 135, 144 (Ct. App. 2007); *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 417-20, 717 S.E.2d 765, 772-73 (Ct. App. 2011); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 358-60; 725 S.E.2d 112, 117-18 (Ct. App. 2012). We recently formally recognized and refined this theory in *Pertuis*, where we referred to the amalgamation theory as "the single business enterprise theory." 423 S.C. at 651, 817 S.E.2d at 278. We will use those terms interchangeably in this opinion.

The parties have not raised this point, but the only decision made by the trial court regarding amalgamation was to deny Marick and Thoennes's directed verdict motion on that issue. The trial court never made a final ruling on the merits of the amalgamation claim, which was an equitable claim to be decided by the trial court, not by the jury. Even if the claim was to be decided by the jury, there was no jury charge, closing argument, verdict form, or jury verdict on amalgamation. During the post-trial motion stage, Marick and Thoennes argued only that the trial court erred in denying their motion for a directed verdict. In any event, for the duration of this appeal, the parties have treated the trial court's denial of the directed verdict motion as a final finding by the trial court on the merits, and the court of appeals treated it as such. Because the affected parties have treated the amalgamation claim as having been ruled upon on the merits, we will address the claim on the merits.

The HOA originally sued IMK, IK, Marick, Cox, Lollis, and Thoennes under the theories of amalgamation, alter ego, and piercing the corporate veil. However, at trial, the HOA conceded the theories of piercing the corporate veil and alter ego were not applicable and advised the trial court it was pursuing the theory of amalgamation as to IMK, Marick, and Thoennes. The trial court denied Marick and Thoennes's motion for a directed verdict on amalgamation, finding there was sufficient evidence of "self-dealing" to send that issue to the jury.

The court of appeals correctly noted the trial court conducted no analysis regarding the amalgamation of IMK, Marick, and Thoennes. *Stoneledge I*, 425 S.C. at 298, 821 S.E.2d at 520. Perhaps that is so because the trial court considered the issue only at the directed verdict stage and never decided the claim on the merits. Marick argues the court of appeals erred in affirming the trial court's amalgamation of Marick with IMK. Thoennes argues the court of appeals erred in affirming the trial court's amalgamation of him with IMK. Thoennes also argues there is no authority for the proposition that he, as an individual, can be amalgamated with a business entity such as IMK.[5] We agree with Marick and Thoennes.

In *Pertuis*, a restaurant manager was a minority shareholder in a corporation that owned the restaurant. 423 S.C. at 644, 817 S.E.2d at 275. The majority shareholders in this corporation owned shares in three other corporations. The restaurant manager claimed these three other corporations and the corporation that owned the restaurant were amalgamated into a single entity. The manager claimed

[5] Marick and Thoennes do not contest the trial court's amalgamation of their interests with one another.

this amalgamation entitled him to distributions from the three other corporations. We surveyed the law from several other jurisdictions and summarized the single business enterprise theory as follows:

> [W]here multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Id. at 652-53, 817 S.E.2d at 279. We acknowledged "corporations are often formed for the purpose of shielding shareholders from individual liability[,]" and we noted "there is nothing remotely nefarious in doing that." *Id.* at 655, 817 S.E.2d at 280. Thus, we held the single business enterprise theory requires more than just a showing that the various entities' operations are intertwined. For a court to combine different corporate entities into a single business enterprise, there must also be a showing of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. We cautioned, "[a]s with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy, and this doctrine 'is not to be applied without substantial reflection.'" *Id.* (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)). We made clear the burden of proof lies with the person seeking to prove the existence of a single business enterprise. *Id.*

IMK, a limited liability company, was created to hold title to Stoneledge. IMK's members were IK and Marick, each holding a 50% interest in IMK. IK's members were Lollis (20%), Cox (40%), and Tim Roberson (40%). Marick's members were Thoennes (50%) and Thoennes's son (50%). The following trial testimony provides greater insight into IMK's structure and how these entities and individuals conducted business.

Lollis testified he invested in Stoneledge at Roberson's behest. Lollis testified he was strictly an investor; he claimed he did not have any other involvement in IMK and was not familiar with IMK's day-to-day business. Lollis testified he did not know whether IK participated in the sale of Stoneledge units. Lollis acknowledged he received money from IMK's sale of units, and he testified he did not know

whether there was any money left in IMK when IMK sold Stoneledge to S.D.I./Ludwig in 2008. Lollis testified he (1) did not know who was on the IMK HOA board, (2) did not attend any HOA board meetings, and (3) received copies of the meeting minutes in the mail. He testified he became aware of the construction defects only after the lawsuit was filed.

Cox, a managing member of IK, testified IK was formed to provide the investment capital needed to purchase and fund the Stoneledge project. Regarding the relationship between Marick and IK, he testified "Marick Home Builders was to provide the construction at their cost, and IK provided the investment. And [IK] did the books for IMK. And the agreement was we would split the profits [from the sale of the units]." Cox testified a couple of the salespeople for IMK were not employees of IK but were housed in IK's offices and used IK's email. Cox testified Marick was in charge of supervising these "contract salespeople."

Cox testified he negotiated IMK's sale of Stoneledge to S.D.I./Ludwig. He testified that sometime before the sale, he learned Marick owed money to S.D.I./Ludwig and that Marick pledged its profits from Stoneledge as collateral. Cox testified IK sold S.D.I./Ludwig its interest in IMK for cash, plus a percentage of the gross sales price for any remaining unsold units. Cox testified the funds IMK received from the sale were disbursed to IK's members. Cox testified that shortly after the sale, IMK turned the HOA board over to the homeowners. Cox testified IMK was insolvent and did not have any money to satisfy a possible judgment in favor of the HOA.

Thoennes testified he was the managing member and held the construction license for Marick. He testified his son, Rick Thoennes III, was also a member of Marick. Thoennes summarized the relationship between IK and Marick, stating "[IK] put in money; I put in hard labor." He testified that before IMK purchased the project, he inspected the units to make sure the project would be a good investment. Thoennes testified Marick charged IMK for Marick's construction costs. He explained he would submit an invoice to IMK, IMK would write a check to Marick, and Marick would pay its suppliers, employees, and subcontractors. When asked whether Marick was responsible for the management of the Stoneledge sales team, Thoennes replied, "For the most part[.] IMK had some responsibility in that too. I mean, the sales was -- all had to be approved by IMK and what we were doing, and then sales materials and all of those things. So certainly IMK had some responsibility for the sales." Thoennes testified it was Marick's decision as to what work needed to be done on the Phase I units. Thoennes testified that when a unit

owner had an issue, the owner would not go through a "formal process" by bringing the issue to the IMK-run HOA board but would bring it directly to him or Hornaday. Thoennes acknowledged he was an HOA board member. Thoennes testified about his many roles at Stoneledge:

> It depends on which hat I had on on that particular day. I've been -- [counsel for the HOA] said I sold them. Somebody else said I built them, and somebody else said I'm a director on the board.
>
> . . . .
>
> So I guess it depends on which hat I had. You know, on some days I would go out and jump somebody's car, so I guess I was a mechanic too. But I just -- you know, I didn't have the pleasure of being able to say, I'm a director now. At seven o'clock, I'm a contractor. At eight o'clock, I'm a marketing person. I didn't have that luxury. . . . It was very informal.

Thoennes testified Marick shut down its business shortly after the Stoneledge project failed.

Some of the homeowners were confused about the distinctions between and the roles these companies and individuals played. Homeowner Taylor testified he made no distinction between IMK and Marick. Further, Homeowner White testified, "IMK, to me, in terms of the faces of the folks that were part of IMK were Rick Thoennes and his son and Tim Roberson." White testified it was not until "later on" that he realized IMK was a combination of IK and Marick.

In their directed verdict motion on the amalgamation issue, Marick and Thoennes argued against the HOA's "piercing the corporate veil, amalgamation, alter ego, throw everything up against the wall, they're-all-together-and-everything-should-stick analysis." Marick and Thoennes presented a detailed argument to the trial court as to why the theories of piercing the veil, alter ego, and amalgamation should not be applied in this case. The HOA conceded that the theories of piercing the corporate veil and alter ego were inapplicable to Marick and Thoennes but argued amalgamation was a viable theory. The trial court denied Marick and Thoennes's

motion for directed verdict on the amalgamation claim, stating there were factual issues for the jury to resolve.

In addressing the merits of the amalgamation claim, the court of appeals acknowledged this case was tried before our decision in *Pertuis* but found the trial court "failed to conduct any meaningful analysis supporting an amalgamation of interests." *Stoneledge I*, 425 S.C. at 298, 821 S.E.2d at 520. Nevertheless, the court of appeals affirmed the trial court in result, holding, "[O]ur review of the record reveals evidence of a unified operation between Marick and the amalgamated parties as well as evidence of self-dealing that resulted from a blending of their business enterprises." *Id.* The court of appeals found the "bad faith, abuse, fraud, wrongdoing, or injustice" requirement was met because Thoennes had "at least constructive knowledge of the pervasive construction defects . . . but was nevertheless directly involved in IMK and Marick's marketing and sale of the units." *Id.* at 299-300, 821 S.E.2d at 521. The court of appeals concluded, "Given that Marick's and IMK's profits were entirely dependent on IMK's ability to sell the units, their operations were clearly in pursuit of a common business purpose, albeit to the detriment of the HOA members." *Id.* at 300, 821 S.E.2d at 521.

Because Marick and Thoennes are the only parties appealing this issue, we do not address the trial court's "decision" to amalgamate IMK with IK, Cox, and Lollis. Our de novo review of the evidence compels us to hold the court of appeals erred in affirming the trial court's "decision" to amalgamate IMK, Marick, and Thoennes. *See Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 (explaining the single business enterprise theory should only be applied after *substantial reflection*). As we held in *Pertuis*, a party seeking to impose the existence of a single business enterprise must show both (1) the intertwining of the operations of the entities and (2) evidence of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions."[6] 423 S.C. at 655, 817 S.E.2d at 280-81.

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[6] In *Pertuis*, we adopted the reasoning of the Texas Supreme Court as to the single business enterprise theory. 423 S.C. at 655, 817 S.E.2d at 280. We noted the Texas Supreme Court has enumerated eight nonexclusive factors to be considered in determining whether constituent corporations have not been maintained as separate entities. *Id.* at 652, 817 S.E.2d at 279 n.5 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 450-51 (Tex. 2008)). However, as we clearly stated in *Pertuis*, the *Gladstrong* court cautioned "the limitation on liability afforded by the corporate structure can be ignored only when the corporate form has been used as

Specifically, we hold the HOA failed to prove "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions" sufficient to trigger the application of a single business enterprise between IMK, Marick, and Thoennes. The only evidence the court of appeals cited with regard to "bad faith, abuse, fraud, wrongdoing, or injustice" was:

> Thoennes, as Marick's principal and license holder, had at least constructive knowledge of the pervasive construction defects that plagued the project, but was nevertheless directly involved in IMK and Marick's marketing and sale of the units. Given that Marick's and IMK's profits were entirely dependent on IMK's ability to sell the units, their operations were clearly in pursuit of a common business purpose, albeit to the detriment of the HOA members.

Stoneledge I, 425 S.C. at 299-300, 821 S.E.2d at 521 (footnote omitted). Viewing the facts of this case with the requisite hesitancy to invade the LLC form, we do not believe these facts warrant the application of the single business enterprise theory. As noted above, in *Pertuis*, we held the single business enterprise theory requires more than just a showing that the various entities' operations are intertwined. A "common business purpose" is simply not enough. 423 S.C. at 653, 817 S.E.2d at 279. For a court to combine different business entities into a single business enterprise, there must also be a showing of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. The conduct of Marick, Thoennes, and IMK did not rise to this level. Like other methods of invading the corporate form, invocation of the single business enterprise theory should be reserved for drastic situations and is the rare exception, not the rule.

For the same reasons, we conclude the evidence does not support a finding of amalgamation of Thoennes with IMK. In addition, we conclude the single business enterprise theory is not to be used to amalgamate an individual with a company. The

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part of a basically unfair device to achieve an inequitable result." *Id.* (internal quotation marks omitted) (quoting *Gladstrong*, 275 S.W.3d at 451).

single business enterprise theory exists as an equitable remedy for plaintiffs whenever they have been wronged by business entities with blurred identities.[7]

Thus, under the facts of this case, we refuse to disregard the corporate form by amalgamating IMK, Marick, and Thoennes, and we therefore reverse the court of appeals on this issue. We express no opinion as to the viability of other methods of invading the LLC form in this case, such as veil piercing or alter ego.

D. Damages

All of the parties argue the court of appeals erred in some manner when it recalculated the trial court's damages award.

The HOA concedes it seeks recovery for a single element of damage—the cost to repair Phase I construction. No one disputes that point. The HOA argued to the jury that it was entitled to $6,309,197 in damages, corresponding to the amount testified to by its expert. All defendants argued the HOA was entitled to the amount

[7] Other jurisdictions have held the single business enterprise theory is confined to the imposition of "shared liability on entities that are affiliated with a defendant entity" and have refused to apply the theory "to impose liability on individual persons." David J. Marchitelli, Annotation, *Disregard of Separate Existence of Corporations Under Single Business Enterprise Theory*, 50 A.L.R. 7th Art. 2 § 24 (2020); *see Angotti & Reilly, Inc. v. Rincon Residential Towers LLC*, No. A140648, 2015 WL 7294458 (Cal. Ct. App. Nov. 19, 2015) (applying California law); *Manhattan Constr. Co. v. Phillips*, No. 1:09-cv-1917, 2012 WL 13001890 (N.D. Ga. Apr. 9, 2012), *aff'd sub nom. Manhattan Constr. Co. v. Place Properties LP*, 559 F. App'x 856 (11th Cir. 2014) (applying Georgia law); *Nussli US, LLC v. Nola Motorsports Host Comm., Inc.*, No. 15-2167, 2016 WL 4063823 (E.D. La. July 29, 2016) (applying Louisiana law); *Andretti Sports Mktg. La., LLC v. Nola Motorsports Host Comm., Inc.*, 147 F. Supp. 3d 537 (E.D. La. 2015) (applying Louisiana law); *Sun Triangle, Inc. v. Image Stores, Inc.*, No. 96-3877, 1998 WL 252158 (E.D. La. May 15, 1998) (applying Louisiana law); *Spurgeon v. Leleux*, No. 6:11-CV-01807, 2019 WL 138388 (W.D. La. Jan. 8, 2019) (applying Louisiana law); *Medve Energy Ventures LLC v. Warhorse Oil & Gas LLC*, No. 6:17-cv-01336, 2018 WL 7051038 (W.D. La. Nov. 21, 2018), *report and recommendation adopted*, 2019 WL 303122 (W.D. La. Jan. 17, 2019) (applying Louisiana law).

testified to by the defense expert—slightly less than $4,000,000. The jury awarded the HOA damages as follows:

- $3,000,000 for negligence against Bostic and IMK/Marick;

- $1,000,000 for breach of the implied warranty of workmanlike service against Bostic and Marick;

- $1,000,000 for breach of fiduciary duty against IMK, IK, Thoennes, Lollis, and Cox.

Immediately after these verdicts were read, the trial court sent the jury out in preparation for the apportionment phase of the trial. Counsel for the HOA and the trial court engaged in an exchange that is very important to our review of the trial court's reformation of the jury verdicts:

> **Counsel for the HOA:** I have a question about the verdict. And I was concerned about this occurring. I'm not sure, looking at the verdict, what the jury is awarding me.
>
> **Trial Court:** They're awarding you what you asked for because you asked for three separate verdicts. Oh, excuse me. I take that back. [Bostic's counsel] asked.
>
> **Counsel for the HOA:** Yes, sir, he did. And so it is a cumulative award against different defendants of five million dollars?
>
> **Trial Court:** Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want -- what is it? -- apportionment on this one and apportionment on that one.

There was no explanation of what the word "cumulative" meant. No one asked the trial court to question the jury about its intent behind awarding verdicts in separate amounts nor did anyone ask the trial court to resubmit the damages issue to the jury with the instruction that the dollar amount of damages for each cause of action must be the same.

The apportionment phase of the trial took place immediately thereafter. After jury argument from the parties, apportionment forms for the negligence and breach of warranty claims were submitted to the jury. As to negligence, the jury found IMK/Marick 40% responsible and found Bostic 60% responsible. As to breach of the implied warranty of workmanlike service, the jury found IMK/Marick[8] 70% responsible and found Bostic 30% responsible. The trial court entered a Form 4 order awarding judgment. The judgment totals on this initial Form 4 mirrored the above-stated verdicts on the three claims ($3,000,000 + $1,000,000 + $1,000,000).

The parties filed numerous timely post-trial motions. In the lead up to the hearing on the post-trial motions, the HOA informed the trial court it had previously received $2,855,911.77 in settlements from other Phase I defendants. No one disputes that amount.

In its post-trial motion, the HOA requested the trial court to reform the jury's verdict and to amend the initial Form 4 to reflect that the verdicts were "cumulative" by raising the negligence, breach of warranty, and breach of fiduciary duty awards to $5,000,000 each. The trial court entered a revised Form 4, raising each award to $5,000,000. The trial court then applied setoff to the negligence, breach of warranty, and breach of fiduciary duty awards and also applied apportionment to the negligence and breach of warranty awards. After setting off the $2,855,911.77 in settlements and applying apportionment to the negligence and breach of warranty awards, the trial court entered judgment on those two causes of action as follows: (1) as to negligence, $2,144,088.23 against Bostic and $857,635.29 against IMK/Marick and (2) as to breach of the implied warranty of workmanlike service, $2,144,088.23 against Marick and $643,226.47 against Bostic. As previously noted, the jury found Bostic 60% responsible for the damages awarded for negligence and found IMK/Marick 70% responsible for the damages awarded for breach of the implied warranty of workmanlike service. In calculating the foregoing figures, the trial court did not apply the apportionment statute to a defendant's share of liability when that defendant was found to be more than 50% responsible. *See* S.C. Code Ann. § 15-38-15(A) (Supp. 2020). However, the trial court did apply the statute to

[8] As we stated in footnote 3, the verdict form first completed by the jury lists "Marick" for the breach of warranty award. The subsequent apportionment form completed by the jury lists "IMK/Marick" for the apportionment of the implied warranty award. This discrepancy is inconsequential for two reasons. First, IMK is not a party to this appeal, and second, no one asked for it to be rectified.

a defendant's share of liability when that defendant was found to be less than 50% responsible.

As to the cause of action for breach of fiduciary duty, the trial court entered judgment on the revised Form 4 in the amounts of $2,144,088.23 against IMK; $2,144,088.23 against IK; $2,144,088.23 against Cox; $2,144,088.23 against Lollis; and $2,144,088.23 against Thoennes. This reflects the trial court's application of setoff, but not apportionment, to the breach of fiduciary duty claim.

The court of appeals reversed the trial court, substantially revising the trial court's computation of the various judgments. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 522-23.

1. "Cumulative" Verdict

The court of appeals reversed the trial court's decision to increase each judgment to $5,000,000, holding this invaded the province of the jury. *Id.* at 302, 821 S.E.2d at 522. We agree with the court of appeals on that point.

The HOA argues the court of appeals erred in not affirming "the cumulative verdict of a single damage." The HOA asserts its single damage was the cost to repair the units and that there was no evidence to support a finding of different actual damages for the three causes of action. The HOA contends "[t]he trial judge simply applied the jury's findings, based upon his extensive observation of the trial and the evidence presented, and correctly applied the jury's verdict—$5,000,000—as the cumulative award for a single damage, regardless of the cause of action." In support of its argument, the HOA cites a now-depublished opinion of the court of appeals, *Keeter v. Alpine Towers International, Inc.*, Op. No. 2012-UP-692 (S.C. Ct. App. filed June 27, 2012).[9]

[9] Normally, we would not consider arguments citing to an unpublished decision. However, *Keeter* was a published decision at the time of this trial, and a petition for certiorari was pending in this Court when the instant case was tried. The trial court and the parties relied upon *Keeter* when the instant case was tried; however, while the petition for certiorari was pending with this Court to review *Keeter*, the parties in *Keeter* submitted a joint motion to dismiss. Two years after this case was tried, the Court granted the parties' joint motion and ordered the court of appeals' opinion

In *Keeter*, the plaintiff was severely injured in a fall during a high school recreational field day. *Id.* at *1. The jury returned a verdict for the plaintiff against the lone defendant on three separate causes of action: (1) $500 in actual damages for strict liability; (2) $900,000 in actual damages and $160,000 in punitive damages for negligent design; and (3) $2,500,000 in actual damages and $950,000 in punitive damages for negligent training. Before the jury was dismissed, and upon request of the plaintiff, the trial court inquired of the jury whether it intended the three separate actual damages awards be added to result in a total award or whether it intended that the awards be separate for each cause of action. The forelady responded the jury intended for the awards to be "cumulative," or added together. The trial court asked the same question as to punitive damages, and the forelady responded in the same fashion. The defendant did not ask for further clarification. The court of appeals held that in the context that the plaintiff sought and could receive only one damages award for the same injury, the dialogue between the trial court and the forelady established the jury intended the damages awards for each cause of action be added together for a total award of $3,400,500 actual damages and $1,110,000 punitive damages. *Id*. at *12.

The HOA seizes upon its and the trial court's use of the word "cumulative" immediately after the jury was released to establish all parties agreed at that time that each of the three verdicts were actually $5,000,000. We disagree. In light of the parties' reliance during the trial upon *Keeter*, which, again, was a published decision at the time of this trial, it was reasonable for the defendants to conclude the trial court intended the breach of warranty and negligence verdicts against Bostic and IMK/Marick to be added together to amount to $4,000,000 and the breach of fiduciary duty verdicts against the remaining defendants to remain at $1,000,000.[10]

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to be depublished. *See Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014).

[10] The court of appeals also noted Marick's argument that the HOA should have been required to elect a remedy between the three causes of action. The court held Marick's argument was unpreserved because Marick did not object to the trial court's ruling that the awards were "cumulative." However, the court of appeals went on to hold that setoff should be applied proportionately to the three awards as to all defendants, including Marick. We agree with this method of setoff under the facts and posture of this case, and we conclude it moots Marick's election of remedies argument.

In the case before us, the parties agree the HOA sought and could receive only one actual damages award for each cause of action. However, no party asked the trial court to request the jury for any clarification of the verdicts. The HOA submits no authority to support the trial court's reformation of the jury's verdict without receiving the input of the jury and relies upon the trial court's "extensive observation of the trial and the evidence presented." *See Joiner v. Bevier*, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930) ("A jury's verdict should be upheld, when it is possible to do so, and carry into effect what was clearly the jury's intention. It is our duty to enforce a verdict, not to make it." (internal citation omitted)); *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004) ("[I]t is not for the trial court to say what it thinks the verdict should be."). Did the jury find the HOA proved damages of $5,000,000 for each cause of action, as the HOA claims? Perhaps, but perhaps not. Did the jury find the HOA proved damages of $4,000,000? Perhaps, but perhaps not. Absent further dialogue with the jury, there was simply no way for the trial court to tell without speculating what the jury intended.

The trial court erred in reforming the verdicts on its own, absent a request from a party to resubmit the case to the jury with instructions that the dollar amounts for each verdict had to be the same. *See Rhame v. City of Sumter*, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920) ("While the verdict is unusual, no effort was made to correct it before the jury had separated. His honor would have done so had he been requested to find out just what the jury meant, and had the verdict reformed."), *overruled on other grounds by Rourk v. Selvey*, 252 S.C. 25, 164 S.E.2d 909 (1968); *Anderson v. Aetna Cas. & Sur. Co.*, 175 S.C. 254, 282, 178 S.E. 819, 829 (1934) ("The law rather forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury." (quoting *Sanders v. Commonwealth Life Ins. Co. of Ky.*, 134 S.C. 435, 440, 132 S.E. 828, 830 (1926))); *Allegro, Inc. v. Scully*, 400 S.C. 33, 49, 733 S.E.2d 114, 123 n.9 (Ct. App. 2012) ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused.").

The court of appeals correctly held the trial court invaded the province of the jury by reforming the verdicts on its own. *Stoneledge I*, 425 S.C. at 302, 821 S.E.2d at 522. We hold the silence of the defendants in the face of the trial court's statement that the verdicts were "cumulative" was of no significance because, in light of *Keeter*, the term "cumulative" was subject to a different meaning from what the plaintiff and the trial court intended. It was entirely reasonable for defense counsel to take the trial court's comment as its conclusion that the verdicts would be added

together, as the verdicts were in *Keeter*. Because no party requested the trial court resubmit the verdict forms to the jury with instructions to make the verdicts consistent, we affirm the court of appeals' holding that the three verdicts must stand as delivered by the jury. We repeat that this entire problem and the appellate distress it has caused could have been avoided if just one party had requested the trial court to resubmit the verdicts to the jury with instructions to make them consistent.

We now turn to the application of setoff to the three verdicts.

2. Setoff

South Carolina courts have consistently held "there can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012) (quoting *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law."). "The right of setoff has existed under the common law for over 100 years." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015).

The Uniform Contribution Among Tortfeasors Act (the Act) "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). Section 15-38-50 of the Act codifies the principle of setoff for settlements paid by persons liable in tort to another:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to

> the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (2005).

a) Application of Setoff to the Breach of Fiduciary Duty Award

The trial court applied setoff to the breach of fiduciary duty award against Thoennes, but the court of appeals reversed concluding that because none of the defendants who settled with the HOA before and during trial were sued for breach of fiduciary duty, none of the settlement proceeds included damages directly resulting from breach of fiduciary duty. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 523. We agree setoff does not apply to the breach of fiduciary duty award, but we reach this conclusion for a different reason.

The HOA contends that because the damages it sought for each cause of action and because all the settlements it received were for the same injury—cost of repair—setoff applies to the breach of fiduciary duty award. Bostic, Marick, and Thoennes argue setoff should not apply to the breach of fiduciary duty award, citing subsection 15-38-20(G) of the Act, which provides, "This chapter does not apply to breaches of trust or of other fiduciary obligation." We agree with Bostic, Marick, and Thoennes.

As we noted above, "[t]he right of setoff has existed under the common law for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. We noted in *Rutland v. South Carolina Department of Transportation* that allowing a setoff "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 satisfaction for an injury or wrong.'" 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (quoting *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.C.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)). The provisions of subsection 15-38-20(G) prohibiting the application of setoff to a breach of fiduciary duty award are in derogation of this common law principle. We recently cited the settled rule that "[s]tatutes in derogation of the common law are to be strictly construed[,]" and "[u]nder this rule, a statute restricting the common law will not be

extended beyond the clear intent of the legislature." *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 201, 810 S.E.2d 848, 850 (2018) (internal quotation marks omitted) (quoting *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012)).

The Act is a part of Chapter 38. In fact, the Act is the only statutory scheme in Chapter 38. The Act governs the setoff of prior settlements paid by tortfeasors, and breach of fiduciary duty is a tort. Because subsection 15-38-20(G) of the Act provides Chapter 38 does not apply to breaches of trust or other fiduciary obligation, the General Assembly clearly intended Chapter 38 to prohibit the application of setoff to a breach of fiduciary duty award. Therefore, we hold the $1,000,000 breach of fiduciary duty award against Thoennes is not subject to setoff.

b) Application of Setoff to the Breach of Warranty Award

Bostic argues the court of appeals erred in holding setoff applies to the breach of warranty award. Bostic asserts that only the negligence award should be subject to setoff. Bostic contends setoff is only available for tort claims and because breach of warranty is a contract claim, setoff is inapplicable.

Bostic is correct that claims for negligence sound in tort and claims for breach of warranty generally sound in contract. Bostic is also correct that the Act discusses setoff in the context of tort claims. *See* § 15-38-50 (explaining setoff is available for "tortfeasors" who are "liable in tort"). The Act governs the setoff of prior settlements paid by those liable in tort, not those liable in contract. However, nothing in the Act prohibits the application of common law setoff to a claim founded in contract. *See Riley*, 414 S.C. at 195, 777 S.E.2d at 830 ("The right to setoff has existed at common law in South Carolina for over 100 years."). Therefore, setoff can be applied to the breach of warranty award.

c) Application of Setoff to the Negligence Award

All parties agree setoff applies to the negligence award. The parties disagree as to the setoff figures to be applied to calculate the final judgments. We make those calculations below in subsection D.4 (Judgment Amounts).

3. Apportionment

Subsection 15-38-15(A) of the Act provides for apportionment of liability among joint tortfeasors arising from tortious conduct:

> In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

S.C. Code Ann. § 15-38-15(A) (Supp. 2020). In this subsection, "the legislature abrogated pure joint and several liability for joint tortfeasors who are less than fifty percent at fault." *Smith v. Tiffany*, 419 S.C. 548, 552-53, 799 S.E.2d 479, 481 (2017).

As noted, breach of warranty claims generally sound in contract, not in tort, so the breach of warranty verdict was not subject to apportionment. However, at trial, the parties agreed the jury should apportion responsibility for the breach of warranty award between Bostic and Marick. Under subsection 15-38-15(A), Bostic is liable for the entire negligence verdict of $3,000,000, and Marick is liable for its apportioned share of $1,200,000. Marick is liable for the entire $1,000,000 breach of warranty verdict, and Bostic is liable for its apportioned share of $300,000. As we will now discuss, these amounts must be adjusted to take into account (1) pro rata allocation between the verdicts for these two causes of action and (2) setoff of the prior settlements.

4. Judgment Amounts

The jury awarded $3,000,000 for negligence; $1,000,000 for breach of the implied warranty of workmanlike service; and $1,000,000 for breach of fiduciary duty, for a total award of $5,000,000. The HOA received $2,855,911.77 in settlements from other Phase I defendants. Had the jury been instructed to return one consistent verdict of actual damages, the application of setoff and the calculation of the net judgments after apportionment would have been simple. However, we find it appropriate to apply a pro rata allocation of the $2,855,911.77 setoff to the negligence and breach of warranty verdicts. Of course, we must also take into account the apportionment percentages rendered by the jury.

The court of appeals correctly held—but, as discussed above, for the incorrect reason—that the breach of fiduciary duty verdict against Thoennes was not subject to setoff. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 523. The court of appeals also correctly held the $4,000,000 in combined verdicts against Bostic and Marick were subject to setoff in the amount of $2,855,911.77. *Id.* However, the court of appeals mistakenly concluded this calculation would leave a $2,144,088.23 net judgment to be allocated between the negligence and breach of warranty verdicts. *Id.* The correct figure is $1,144,088.23. The court of appeals correctly held "it would be proper to allocate three-fourths of the remaining judgment to the negligence cause of action and the remaining one-fourth to the [breach of warranty] cause of action." *Id.*

As noted above, during the apportionment phase, the jury found Bostic was 60% responsible for the negligence award, Marick was 40% responsible for the negligence award, Marick was 70% responsible for the breach of warranty award, and Bostic was 30% responsible for the breach of warranty award. Under subsection 15-38-15(A) of the Act, a defendant whose conduct is found to be less than fifty percent of the total fault is liable for only that percentage of the damages determined by the fact finder. Joint and several liability is assigned to defendants found liable for fifty percent or more of the damages. After applying the correct setoff, the apportionment percentages determined by the jury, and the apportionment statute, we hold the resulting judgments to be entered are as follows:

- Bostic: $858,066.17 for negligence (joint and several liability for prorated verdict after setoff) and $85,806.62 for breach of warranty (30% of prorated verdict after setoff)

- Marick: $286,022.06 for breach of warranty (joint and several liability for prorated verdict after setoff) and $343,226.47 for negligence (40% of prorated verdict after setoff)
- Thoennes: $1,000,000 for breach of fiduciary duty (no setoff applied)

These figures do not take into account the HOA's monetary settlements (if any) with IMK, IK, Cox, and Lollis during the pendency of this appeal.

CONCLUSION

Based on the foregoing, we affirm in part and reverse in part the court of appeals. We remand this matter for final calculation and entry of judgment consistent with our opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Greenville Bistro, LLC, a South Carolina Limited Liability Company, d/b/a Bucks Racks & Ribs, and Frontage Road Associates, Inc., a South Carolina Corporation, Respondents,

v.

Greenville County, a Political Subdivision of the State of South Carolina, and Will Lewis, in his Official Capacity as Sheriff of Greenville County, Appellants.

Appellate Case Nos. 2017-001747 and 2018-001393

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge
Perry H. Gravely, Circuit Court Judge

Opinion No. 28072
Heard November 17, 2020 – Filed December 8, 2021

REVERSED AND REMANDED

John R. Devlin Jr., of Devlin & Antley, P.A., of Greenville, and Scott D. Bergthold, of Law Office of Scott D. Bergthold, P.L.L.C., of Chattanooga, TN, for Appellants.

Oscar W. Bannister and Luke A. Burke, both of Bannister, Wyatt & Stalvey, LLC, of Greenville, and Luke Lirot, of Luke Charles Lirot, P.A., of Clearwater, FL, for Respondents.

JUSTICE JAMES: These two consolidated appeals filed by Greenville County arise from a zoning dispute between the County and Greenville Bistro, LLC, d/b/a Bucks Racks & Ribs. Greenville Bistro commenced this action against the County to enjoin the County from enforcing an ordinance to deny Greenville Bistro's desired method of operating Bucks Racks & Ribs, located at 805 Frontage Road in Greenville County. Citing other ordinances, the County counterclaimed and moved to enjoin Greenville Bistro from operating Bucks as a sexually oriented business. Both appeals concern the legality of Greenville Bistro operating Bucks as a restaurant with the added feature of scantily clad exotic dancers. The circuit court (Judge Stilwell) granted Greenville Bistro's motion for a temporary injunction, and the County appealed. While the County's appeal was pending, the circuit court (Judge Gravely) denied the County's motion for temporary injunctive relief, ruling that in light of the County's appeal it did not have jurisdiction to consider the County's motion. We reverse both rulings, dissolve the injunction granted to Greenville Bistro, and hold the County is entitled to injunctive relief. We remand to the circuit court for proceedings consistent with this opinion.

I.

These appeals primarily revolve around two Greenville County Ordinances: Ordinance No. 2673 and Ordinance No. 4869. Ordinance No. 2673 is no stranger to litigation and has been the subject of two land use decisions of this Court, *Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000), and *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). *Kenwood* involved 805 Frontage Road, the location of Bucks. Ordinance No. 4869 is new to the appellate scene. The ordinances referred to in this opinion are part of the Record on Appeal.

The current litigation began on May 23, 2017, when Greenville Bistro sued the County, seeking declaratory and injunctive relief against the County's attempts to enforce its Sexually Oriented Business Code, which was established in 1995 by Ordinance No. 2673 and amended in part in 2017 by Ordinance No. 4869. The County counterclaimed for injunctive relief, asking the circuit court to require Greenville Bistro to comply with Ordinance No. 2673 and other portions of the Greenville County Zoning Ordinance (Zoning Ordinance). On June 16, 2017, the circuit court held a hearing solely on Greenville Bistro's motion for injunctive relief, and by order dated July 17, the circuit court temporarily enjoined the County from

enforcing the provisions of Ordinance No. 4869 as to Greenville Bistro at the subject location. The County appealed the circuit court's order.

In March 2018, the circuit court held a hearing on the County's motion for injunctive relief. The County argued that although it was temporarily enjoined from enforcing Ordinance No. 4869, it was nevertheless entitled to temporary injunctive relief because Greenville Bistro was operating a sexually oriented business in violation of Ordinance No. 2673 and was operating a nightclub in violation of another portion of the Zoning Ordinance. The circuit court received testimony and heard argument, but without addressing the merits of the County's arguments, the circuit court ruled it did not have jurisdiction to rule on the County's motion because any grant of relief to the County would impact the County's pending appeal regarding Ordinance No. 4869.

II.

The applicable ordinances define numerous terms. Most pertinent to our resolution of these appeals are the terms "sexually oriented business," "adult cabaret," and "specified sexual activities." Other defined terms have less importance in light of our various holdings. These terms include "nudity," "semi-nude," and "nightclub."

A. Ordinance No. 2673

Since it was enacted in 1995, Ordinance No. 2673 has regulated the location of sexually oriented businesses in Greenville County. Under this ordinance, all sexually oriented businesses must be located in an S-1 zoning district. Further, these businesses are prohibited from operating within 1,500 feet of certain properties—such as residences, churches, and child-care facilities. A "sexually oriented business" includes an "adult cabaret," which is defined in Ordinance No. 2673 as "a nightclub, bar, restaurant, or similar commercial establishment which regularly features[,]" in pertinent part, "[l]ive performances which are characterized by . . . 'specified sexual activities' . . . ." The term "specified sexual activities" is defined in pertinent part in Ordinance No. 2673 as any of the following:

> (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
> (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; [or]
> (c) Masturbation, actual or simulated.

The preamble to Ordinance No. 2673 explains that before adopting the ordinance, the County considered multiple studies throughout the country highlighting the numerous negative effects sexually oriented businesses have on nearby residents and property values. The stated purpose of the ordinance was to address "the quality of life and property values of the residents of Greenville County, and at the same time preserve the First Amendment rights of those who would wish to express themselves through adult-oriented entertainment establishments . . . ."

Thereafter, in *Harkins*, several sexually oriented businesses challenged the constitutionality of Ordinance No. 2673. We held the ordinance's strict permitting requirements were unconstitutional, but we upheld the ordinance's regulation of the location of sexually oriented businesses. 340 S.C. at 621, 533 S.E.2d at 894; *id.* at 614, 533 S.E.2d at 890 ("[S]exually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication."). However, legal disputes continued. Because the parties relate some of their arguments to prior rulings, and with the hope that protracted litigation can be avoided in the future, we review those rulings.

B. Platinum Plus's Permanent Injunction and the 2002 Consent Order

Elephant, Inc., d/b/a Platinum Plus, Kenwood Enterprises, Inc., and Kenwood Gaines (collectively, Platinum Plus) preceded Greenville Bistro as tenant of 805 Frontage Road. After *Harkins* upheld Ordinance No. 2673's location restrictions in 2000, the County sued several adult businesses, including Platinum Plus, seeking to permanently enjoin them from operating sexually oriented businesses in prohibited areas. The County was granted a permanent injunction prohibiting Platinum Plus from operating a sexually oriented business at 805 Frontage Road, as the premises were "within 1,500 feet of a church, the boundary of residential districts, the property lines of lots devoted primarily to residential use, and a family oriented recreation facility." Platinum Plus appealed, and three years after *Harkins*, we affirmed the circuit court's issuance of the permanent injunction in *Kenwood*. We held, in part, that Ordinance No. 2673 survived First Amendment scrutiny. 353 S.C. at 168-71, 577 S.E.2d at 433-35.

While the *Kenwood* litigation was pending, Platinum Plus filed an action for declaratory relief against the County requesting a declaration of the meaning of "nudity" and "semi-nude" as defined by Ordinance No. 2673. Because Ordinance No. 2673 prohibits people from appearing in a "state of nudity" at the subject property, Platinum Plus attempted to comply with the ordinance by presenting entertainers it claimed were merely "semi-nude."

Platinum Plus and the County resolved the declaratory judgment action by consent order (the 2002 Consent Order). Among other things, Platinum Plus agreed that neither it nor its successors and assigns would operate a sexually oriented business at the property or allow any person to engage in the above-defined "specified sexual activities" while on the premises.

C. The State's Nuisance Action Against Platinum Plus

Platinum Plus continued operation at 805 Frontage Road. In 2015, the Greenville County Solicitor, on behalf of the State, filed a nuisance action against Elephant, Inc. and its principal, Gregory Kenwood Gaines, pursuant to South Carolina Code section 15-43-10, et seq. Greenville County was not a party to this litigation. Prior to trial, the parties entered into a consent order (the 2015 Consent Order), in which Platinum Plus agreed the Solicitor had sufficient evidence for a court to find Platinum Plus constituted a public nuisance. Platinum Plus agreed to close its business for six months, reopen subject to extensive monitoring, and pay a substantial fine. The 2015 Consent Order also expressly incorporated and reaffirmed the terms and conditions of the 2002 Consent Order.

In 2016—only a few months after Platinum Plus reopened—the Solicitor filed a verified petition seeking contempt findings against Platinum Plus for violations of the 2015 Consent Order. This petition resulted in another order being entered on the caption of the 2015 nuisance action. In that order (filed July 27, 2016), the circuit court ruled the Solicitor presented sufficient evidence of violations of the 2015 Consent Order to justify a finding of criminal and/or civil contempt. The circuit court imposed monetary sanctions, shuttered Platinum Plus's business operations for an additional six months, and extended the mandatory monitoring requirements. The defendants appealed, and the court of appeals affirmed. *State v. Elephant, Inc.*, 2019-UP-290 (S.C. Ct. App. filed Aug. 14, 2019).

D. Greenville Bistro Leases the Property

Platinum Plus abandoned the property shortly after being shut down for the second time. On December 5, 2016, Frontage Road Associates—the owner of the property—moved for the circuit court to release the property from all orders pertaining to Platinum Plus because Frontage Road had entered into a new lease agreement with Greenville Bistro. Frontage Road submitted an affidavit from Jason C. Mohney, the principal of Greenville Bistro, who swore Platinum Plus and Greenville Bistro were unconnected and "completely separate" businesses.

In early 2017, and again under the 2015 nuisance action caption, Frontage Road moved pursuant to section 15-43-80 of the South Carolina Code to have the property released from the 2002 Consent Order and the 2015 Consent Order. Frontage Road argued Platinum Plus had abandoned the premises, thereby abating any nuisance arising from its activities on the premises. Again, Greenville County was not a party to the nuisance action. In its February 10, 2017 order releasing the property from the restrictions, the circuit court noted, "Greenville Bistro, LLC is seeking to commence operations of a similar business as Platinum Plus in the location." The circuit court found there was no connection between Platinum Plus and Greenville Bistro, and the circuit court cautioned, "[I]n the event that Greenville Bistro, or any other adult entertainment venue, commences operating at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected." That same day, Greenville Bistro filed a commercial zoning application with the County to open a restaurant at the property.

E. The County Adopts Ordinance No. 4869

On February 21, 2017, the County adopted Ordinance No. 4869 to amend a small portion of the Sexually Oriented Business Code. The amendment changed the definition of "adult cabaret" to include businesses that regularly feature persons appearing in a "state of semi-nudity." Ordinance No. 4869 also included a new definition of "semi-nude."

> (13) *Semi-nude* or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

As noted above, Ordinance No. 2673 classified adult cabarets as those establishments regularly featuring, among other things, persons appearing in a "state of nudity." Therefore, Ordinance No. 4869, by extending the classification of adult cabarets to establishments featuring persons appearing in a "state of semi-nudity," placed a greater restriction upon Greenville Bistro's desired business model and the business model Platinum Plus was informed it could legally employ under the 2002 Consent Order.

Importantly, however, the adoption of Ordinance No. 4869 did not disturb other classifications of adult cabarets as set forth in Ordinance No. 2673. Specifically, as we noted above in section II.A., and as we will discuss below in section III.B., a prohibited "adult cabaret" includes an establishment that regularly features live performances characterized by "specified sexual activities." Adult cabarets are not permitted in the location where Bucks operates.

The day after Ordinance No. 4869 was enacted, the County approved Greenville Bistro's commercial zoning application to operate a restaurant. On February 24, 2017, the County wrote Mr. Mohney of Greenville Bistro a letter to discuss "the possible operation of a business at [the property]" and to provide Greenville Bistro with some information regarding the ordinances and zoning regulations in play. The County informed Greenville Bistro the property is located in an S-1 zoning district and that Ordinance Nos. 2673 and 4869 apply. The County also explained the ordinances require sexually oriented businesses—and an adult cabaret is a sexually oriented business—to be at least 1,500 feet from certain properties.

F. Greenville Bistro Opens Bucks Racks & Ribs

On March 27, 2017, the County issued Greenville Bistro a certificate of use and occupancy to operate a restaurant at the property. Greenville Bistro opened Bucks Racks & Ribs, but not long after, the County suspected Bucks was operating as an adult cabaret in violation of Ordinance Nos. 2673 and 4869. Following a May 12, 2017 inspection, the County issued two citations to Greenville Bistro. The County also issued Greenville Bistro an "Official Notice" in which the County declared, "The Certificate of Occupancy is for a restaurant and does not have live entertainment. All patrons/personnel must be properly clothed. No swimsuits etc. The use of the structure is for a restaurant only. Cease all use for live entertainment."

As summarized below in section III.B., the record contains testimony from a private investigator and two undercover Greenville County Sheriff's deputies who visited the property on later dates and detailed their experiences at Bucks. The testimony included descriptions of the lap dances[1] the witnesses paid for and

[1] "Lap dancing" is defined as the "sexually stimulating erotic writhing and rubbing of a woman's posterior against the lap of a seated, male customer." Richard A. Spears, *McGraw-Hill's Dictionary of American Slang and Colloquial Expressions* 211 (4th ed. 2006).

received, and the testimony included their observations of the interactions between the dancers and other patrons.

G. The Current Litigation

Greenville Bistro commenced the instant action against the County in May 2017, seeking declaratory and injunctive relief. Greenville Bistro argued injunctive relief was appropriate for two reasons: (1) the County was violating the 2002 Consent Order and (2) Ordinance No. 4869 violates Greenville Bistro's right to free speech. The County answered Greenville Bistro's complaint and counterclaimed for injunctive relief of its own on June 14, 2017. The County argued it was entitled to injunctive relief because Greenville Bistro was illegally operating (1) a sexually oriented business and (2) a nightclub in an S-1 zoning district.

On June 16, 2017, the circuit court (Judge Stilwell) heard Greenville Bistro's motion for a temporary injunction but continued the County's motion. The circuit court issued an order temporarily enjoining the County from enforcing Ordinance No. 4869 against Greenville Bistro. The County appealed to the court of appeals in 2017.

On March 13, 2018, the circuit court (Judge Gravely) convened a hearing on the County's pending motion for injunctive relief, received testimony, but ruled it did not have jurisdiction to rule on the County's motion because any grant of such relief would impact the County's pending appeal regarding Ordinance No. 4869. The County appealed this ruling to the court of appeals in 2018. In 2020, upon request of the court of appeals, this Court accepted a transfer of both appeals. This opinion resolves both appeals.

III.

The issues are as follows:

(1) Did the circuit court err in granting Greenville Bistro's motion for temporary injunctive relief as to Ordinance No. 4869?

(2) Did the circuit court err in refusing to rule upon the County's motion for temporary injunctive relief as to Ordinance No. 2673, and if so, is the County entitled to temporary injunctive relief?

A. The County's Appeal of the Circuit Court's Grant of Injunctive Relief to Greenville Bistro as to Ordinance No. 4869

The County argues the circuit court erred in temporarily enjoining enforcement of Ordinance No. 4869. We agree.

"The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). "An abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support." *Id.*

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). "The facts alleged must be sufficient to support a temporary injunction and the injunction must be reasonably necessary to protect the rights of the moving party." *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007). "The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009).

"Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.* at 51, 674 S.E.2d at 508. We hold Greenville Bistro did not establish it was likely to succeed on the merits of its claim.

1. The Circuit Court Hearing

The circuit court heard Greenville Bistro's motion for temporary injunctive relief in June 2017. In spite of Mr. Mohney's affidavit swearing on behalf of Greenville Bistro that Greenville Bistro and Platinum Plus were completely separate entities, Greenville Bistro argued to the circuit court that it was a successor corporation to Platinum Plus and that the County was violating the previous court orders concerning the property (especially the 2002 Consent Order). Greenville Bistro argued the prior court orders define the legally acceptable business model that can be employed at the property. Greenville Bistro argued the County's adoption of Ordinance No. 4869 effectively vitiated the 2002 Consent Order. Greenville Bistro argued, "We want to operate the same business that was granted the rights given to the predecessor under the 2002 order."

Greenville Bistro also argued the pertinent ordinances violate its First Amendment rights. Finally, Greenville Bistro claimed enforcement of Ordinance No. 4869 would be inequitable because the timing of the County's adoption of the ordinance was highly suspect. On that point, Greenville Bistro argued the County did not consider adopting Ordinance No. 4869 until after Greenville Bistro leased the property, applied for a liquor license, and began the process of becoming a supposed successor to Platinum Plus under the 2002 Consent Order.

2. The Circuit Court's July 2017 Order

Citing Mr. Mohney's affidavit, the circuit court rejected Greenville Bistro's argument that it was a successor business to Platinum Plus. However, the circuit court temporarily enjoined the County from enforcing Ordinance No. 4869 against Greenville Bistro. The circuit court—in cursory fashion—addressed the necessary elements to be satisfied before issuing a temporary injunction.

Regarding the element of irreparable harm, the circuit court found, "[Greenville Bistro] may have a complaint as to the adaption [sic] of Ordinance 4869 soon after the issuance of the February 2017 Order. In keeping with established law, [Greenville Bistro] would suffer irreparable harm if the subject ordinance abridges its constitutional freedom of expression." When discussing Greenville Bistro's likelihood of success on the merits, the circuit court—without explanation—found, "Greenville Bistro has met its burden with respect to the issue of enforcement of Ordinance 4869. . . . The Court's decision is based solely on the moving party's alleged facts without regard to the ultimate merits of the case." When discussing whether Greenville Bistro had an adequate remedy at law, the circuit court found, "With regard to the enforcement of Ordinance 4869, [Greenville Bistro has] no adequate remedy at law because [the County's] efforts to regulate [Greenville Bistro's] business threaten [Greenville Bistro] with the loss of constitutionally protected rights and freedoms."

3. Analysis

Because injunctive relief is a drastic remedy, a lower court must clearly communicate the reasoning behind its decision to issue an injunction. *See* Rule 65(d), SCRCP ("Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."). It is difficult to tell whether the circuit court based its finding of likelihood of success on the merits upon constitutional grounds, equitable grounds or both. We will address both points.

a. Did Greenville Bistro establish a likelihood of success on the merits of its First Amendment claim?

"A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue." *Curtis v. State*, 345 S.C. 557, 577, 549 S.E.2d 591, 601 (2001). "In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made." *Id.* at 576, 549 S.E.2d at 601. "When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Id.* "However, when a plaintiff's prima facie case depends on an allegation that a statute [is] unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction." *Id.*

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Like other legislative enactments, this Court affords "ordinances regulating sexually oriented businesses a presumption of constitutionality which the attacking party has the burden of overcoming." *Harkins*, 340 S.C. at 621, 533 S.E.2d at 894; *Centaur, Inc. v. Richland Cnty.*, 301 S.C. 374, 377, 392 S.E.2d 165, 167 (1990) ("Our decisions have generally applied [a presumption of constitutionality] even when an ordinance is challenged on First Amendment grounds."); *Rothschild v. Richland Cnty. Bd. of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992).

Greenville Bistro argues any presumption of constitutionality afforded to Ordinance No. 4869 under South Carolina law is inappropriate because it brought a federal civil rights claim pursuant to 42 U.S.C. § 1983,[2] which Greenville Bistro

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983. Pursuant to *Howlett v. Rose*, 496 U.S. 356, 367 (1990), the circuit court has concurrent jurisdiction with the United States District Court over Greenville Bistro's federal civil rights claim.

claims triggered the application of federal law and invoked the circuit court's concurrent federal jurisdiction. Greenville Bistro cites *Schad* in support of its argument that Ordinance No. 4869 should be presumed unconstitutional. 452 U.S. at 67 (Blackmun, J., concurring) ("[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment."); *see Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1352 (9th Cir. 1985) ("Regardless of the weight the trial court chose to afford to Adultworld's evidence of lack of relocation sites, where a plaintiff makes a prima facie showing of infringement of First Amendment rights, the presumption of validity of a zoning ordinance disappears."); *Messiah Baptist Church v. Cnty. of Jefferson*, 859 F.2d 820, 833 (10th Cir. 1988) (McKay, J., dissenting); *Nat'l Ass'n for Advancement of Colored People v. City of Philadelphia*, 834 F.3d 435, 443 (3d Cir. 2016); *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 160 (3d Cir. 1997); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1551 (7th Cir. 1986).

Regardless of whether the ordinance is presumptively constitutional (under the South Carolina line of cases) or presumptively unconstitutional (under the federal line of cases), we hold Greenville Bistro has not established it is likely to succeed on the merits of its claim that Ordinance No. 4869 is an unconstitutional violation of its right to freedom of speech and expression.

"As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). First Amendment protections extend to non-obscene, sexually explicit material. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 69-71 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). However, "nude dancing is only marginally of First Amendment value and only within the outer ambit of the First Amendment's protection." *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 744 (4th Cir. 2010) (internal quotation marks and citations omitted).

It is well-settled that sexually oriented businesses can have negative secondary effects on their surrounding communities. *See Young*, 427 U.S. at 68-69. Zoning restrictions are often implemented to balance the free speech concerns with the regulation of secondary effects. *Harkins*, 340 S.C. at 613, 533 S.E.2d at 889-90. In *Harkins*, we explained:

> Zoning laws that have the effect of restricting freedom of expression without regard to the content of the speech are referred to as "content neutral" laws. Zoning ordinances merely restricting the location of

> adult businesses without banning them altogether are considered content neutral as long as they are based on their prevention of the harmful secondary effects the Supreme Court has noted these sexually oriented businesses may cause. Since these zoning laws are considered content neutral, they are evaluated as "time, place, and manner" regulations for purposes of determining their validity under the First Amendment. Permissible time, place, and manner restrictions are justified by a substantial governmental interest unrelated to free speech and allow[] for adequate alternative avenues of communication of the sexually explicit material. Therefore, sexually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication.

Id. at 613-14, 533 S.E.2d at 890 (internal citations omitted); *see Centaur, Inc.*, 301 S.C. at 379-80, 392 S.E.2d at 168-69. As discussed above, this Court has previously upheld the constitutionality of location restrictions imposed upon sexually oriented businesses by Ordinance No. 2673. *See Harkins*, 340 S.C. at 620-21, 533 S.E.2d at 893; *Kenwood*, 353 S.C. at 168-71, 577 S.E.2d at 433-35.

We hold Ordinance No. 4869 is a valid "time, place, and manner" regulation because it serves the substantial governmental interest of preventing harmful secondary effects and provides reasonable alternative avenues of communication for adult businesses. Like Ordinance No. 2673—discussed in *Harkins* and *Kenwood*—Ordinance 4869 does not constitute an outright ban on expression; instead, it functions as an amendment to the ordinance regulating the location of sexually oriented businesses. Ordinance No. 4869 amended Ordinance 2673's definition of an adult cabaret to include establishments that regularly feature persons appearing in a "state of semi-nudity." Ordinance 4869 also revised the definition of "semi-nude." These were permissible actions by the County.

In enacting Ordinance No. 4869, the County reaffirmed the findings set forth in Ordinance No. 2673, explaining the purpose of the Sexually Oriented Business Code is to regulate sexually oriented businesses—not to impose limitations or restrictions on the content of communicative materials but to promote the health, safety, morals, and general welfare of Greenville County citizens. *See Evans*, 612 F.3d at 742 ("[W]hile the government must 'fairly support' its policy, it need not settle the matter beyond debate or produce an exhaustive evidentiary demonstration." (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002))). Ordinance 4869 highlighted the numerous negative effects associated with sexually oriented businesses and stated:

> Each of the foregoing negative secondary effects constitutes a harm which the County continues to have a substantial government interest in preventing and/or abating. . . . Additionally, the county's interest in regulating adult entertainment establishments extends to preventing future secondary effects of either current or future adult entertainment establishments that may locate in the county.

Further, Ordinance No. 4869 does not regulate sexually oriented businesses out of existence because the County provides reasonable alternative avenues of communication. The County's GIS Division Manager testified that although a sexually oriented business is prohibited from operating at this particular location, there are 89 zoned parcels and thousands of unzoned parcels that meet the location requirements for sexually oriented businesses in the County. *See Renton*, 475 U.S. at 54 ("[T]he First Amendment requires only that [the city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city[.]"); *Harkins*, 340 S.C. at 621, 533 S.E.2d at 893 ("Since the trial court found that nine S-1 sites are available for relocation, more than enough S-1 properties exist where six Adult Businesses could relocate.").

Other courts have upheld time, place, and manner ordinances with very similar, if not identical, definitions of semi-nudity. *See MJJG Rest. LLC v. Horry Cnty.*, 102 F. Supp. 3d 770, 778 n.6 (D.S.C. 2015); *Richland Bookmart, Inc. v. Knox Cnty.*, 555 F.3d 512, 519 (6th Cir. 2009); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 731 n.4 (Ga. 2015); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 294-95 (6th Cir. 2008).

Therefore, to the extent the circuit court's ruling was based on its conclusion that Ordinance No. 4869 is likely an unconstitutional infringement of Greenville Bistro's First Amendment rights, we hold the grant of injunctive relief was error, as Greenville Bistro failed to prove it would likely succeed on the merits of its First Amendment claim.[3]

[3] We need not consider whether Greenville Bistro established the elements of irreparable harm or inadequate remedy at law. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

b. Did Greenville Bistro establish Ordinance No. 4869 is likely invalid because of the County's allegedly inequitable adoption of that ordinance?

Greenville Bistro argues the circuit court's ruling regarding the likelihood of success on the merits was not only based on constitutional grounds, but also on the ground that Ordinance No. 4869 was likely invalid for equitable reasons. The circuit court's order can be interpreted as Greenville Bistro contends. When discussing the procedural history of the case, the circuit court explained:

> That [February 2017] Order simply allows Greenville Bistro to open and operate a "similar business" to that of the former tenant. . . . Twelve days after [the circuit court] entered its Order that had the effect of allowing Greenville Bistro to open and operate, the County adopted Ordinance 4869, which purports to amend the definition of an adult cabaret to regulate establishments offering "semi-nude" entertainment. Once Greenville Bistro commenced its operations, [the County] believed those operations were in violation of various County regulations and ordinances and began to enforce those regulations against [Greenville Bistro].

When addressing whether Greenville Bistro suffered irreparable harm, the circuit court stated, "[Greenville Bistro], however, may have a complaint as to the adaption [sic] of Ordinance 4869 soon after the issuance of the February 2017 Order."

To the extent the circuit court based its conclusion that there was a likelihood of success on the merits arising from the inequitable timing of the adoption of Ordinance No. 4869, the circuit court plainly erred in two respects. The first point of error centers upon the circuit court's mischaracterization of the February 2017 order (concluding the nuisance claim brought by the State against Elephant, Inc.) as binding upon the County. That characterization is clearly erroneous as the County was not a party to the nuisance litigation. In spite of this clear fact, Greenville Bistro argues in its brief that "Greenville County acted inequitably by entering into a Consent Order permitting a 'similar business' to operate at the subject location and then vitiating that Consent Order by passing Ordinance 4869." We flatly reject that argument, as the County was not a party to the nuisance litigation resulting in that consent order.

The second point of the circuit court's error centers upon its finding that "[The February 2017] Order simply allows Greenville Bistro to open and operate a 'similar business' to that of [Platinum Plus]." We disagree. Nothing in the February 2017

order allows anything of the sort. The February 2017 order merely notes that Greenville Bistro, a new tenant with no connection to Platinum Plus, "is seeking to commence operations of a similar business as Platinum Plus in the location."

Greenville Bistro has not demonstrated that it would likely succeed on the merits of its claim that the County inequitably adopted Ordinance No. 4869. Indeed, there is a "familiar principle of constitutional law that [the] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[4] *See Renton*, 475 U.S. at 48.

In *D.G. Restaurant Corp. v. City of Myrtle Beach*, the Myrtle Beach city council, in response to the anticipated establishment of a topless nightclub within the city, adopted an ordinance prohibiting a business from displaying nudity within 500 feet of certain areas. 953 F.2d 140, 141 (4th Cir. 1991). The district court ruled the ordinance was intended to prevent the business from opening and operating, and was "attempting to restrict the message purveyed by topless entertainment[,]" thus rendering the ordinance a content-based violation of the First Amendment. *Id.* at 143. The Fourth Circuit reversed, holding the ordinance was not an unconstitutional regulation of the plaintiff's intended message but was rather a legitimate attempt to regulate physical conduct for some other important governmental purpose. The Fourth Circuit noted, "That it took D.G. Restaurant's announced plans to spur the city to this realization does not in any way impute illicit or unconstitutional motives to the Myrtle Beach city council." *Id.* at 146. The fact that a sexually oriented business has prompted ensuing regulation does not mean the regulation is targeted at the "eradication of any erotic message" the business may convey. *Id.*

Similarly, in *Cricket Store 17, LLC v. City of Columbia*, Taboo—a sexually oriented business—received its business license from the City of Columbia and opened a small retail store. 97 F. Supp. 3d 737, 742 (D.S.C. 2015), *aff'd*, 676 F. App'x 162 (4th Cir. 2017). One month after Taboo opened, Columbia amended its sexually oriented business ordinance, which prohibited Taboo from operating at its current location. Since Taboo was an existing nonconforming business, it was given two years to operate to allow it to recoup investment and relocation expenses. At the end of the amortization period, Taboo sued to set aside the ordinance on First Amendment free speech grounds.

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[4] *But see United States v. O'Brien*, 391 U.S. 367, 383-84 & n.30 (1968) (noting that courts should look at legislators' actual motives in determining whether a statute is a bill of attainder).

The district court granted summary judgment to the City of Columbia, upholding the ordinance as a valid time, place, and manner regulation. The district court rejected Taboo's argument regarding the suspect timing of the enactment of the ordinance. The district court explained, "[T]he fact that Taboo's opening spurred the City into action is not controlling, as this does not demonstrate that a ban on Taboo's erotic message was a motive for the ordinances." *Id.* at 746.

The circuit court erred in concluding Greenville Bistro was entitled to a temporary injunction on the ground that the timing of the adoption of Ordinance No. 4869 was suspect. Greenville Bistro did not establish it was likely to succeed on the merits of this claim.[5]

c. Is Greenville Bistro a Successor Entity to Platinum Plus?

Greenville Bistro claims the 2002 Consent Order between the County and Platinum Plus allows it to operate Bucks under its current business model because it is a successor entity to Platinum Plus. Greenville Bistro argued to the circuit court, "We want to operate the same business that was granted the rights given to the predecessor under the 2002 order." This argument is flatly meritless and was correctly rejected by the circuit court. Greenville Bistro is not a successor entity to Platinum Plus.

For the foregoing reasons, we reverse the circuit court's grant of a temporary injunction to Greenville Bistro, and we dissolve the injunction.

B. The County's Appeal of the Circuit Court's Denial of Temporary Injunctive Relief to the County

By the time the circuit court convened a hearing of the County's motion for temporary injunctive relief in March 2018, the County's appeal of the July 2017 order enjoining its enforcement of Ordinance No. 4869 was several months old. The County explained to the circuit court that it was not seeking relief under Ordinance No. 4869 but was instead seeking relief under separate ordinance provisions. The County presented testimony as summarized below. The circuit court declined to address the merits of the County's argument, finding the crux of the County's motion involved issues already on appeal. Citing Rules 205 and 241 of the South Carolina Appellate Court Rules, the circuit court concluded that ruling on the motion would interfere with the court of appeals' exclusive jurisdiction. We disagree with the

[5] We need not address the elements of irreparable harm and inadequate remedy at law. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

circuit court and hold it had jurisdiction to rule upon the County's motion. We also hold the County is entitled to temporary injunctive relief.

1. Jurisdiction

We first address Greenville Bistro's argument that because the County did not specifically identify the jurisdictional question as an issue on appeal in its brief, the issue is unpreserved. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). We disagree with Greenville Bistro. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments."). The County's brief primarily addresses the merits of its claim for injunctive relief, but the brief contains argument against the circuit court's jurisdictional ruling. The brief sufficiently ensures the Court does not have to "grope in the dark" to find the County's jurisdictional argument. *See Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.").

Turning to the merits of the jurisdictional issue, Rule 205, SCACR, explains the effect an appeal has on a lower court's jurisdiction:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR (emphasis added); *see* Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532-34, 787 S.E.2d 485, 493-94 (2016); *Tillman v. Oakes*, 398 S.C. 245, 254-56, 728 S.E.2d 45, 50-51 (Ct. App. 2012).

As extensively discussed above, the circuit court order granting Greenville Bistro's motion for injunctive relief centered upon the constitutionality of the "semi-nudity" provision in Ordinance No. 4869 and the allegedly suspect timing of the

adoption of that ordinance. Importantly, in addition to enjoining enforcement of Ordinance No. 4869, the circuit court ruled, "Greenville Bistro must comply with any and all applicable laws or ordinances existing at the time of issuance of the February 9, 2017 Consent Order." To that end, the County's motion for injunctive relief was based upon the grounds that Greenville Bistro was violating three different ordinance provisions. First, the County argued Greenville Bistro violated Ordinance No. 2673 because Bucks was a sexually oriented business, specifically an adult cabaret, in which persons are regularly featured with bare female breasts and buttocks. The County asserted pasties and small bikini bottoms are insufficient forms of coverage to avoid the ordinance's definition of "nudity." Second, the County argued Greenville Bistro violated Ordinance No. 2673 because Bucks regularly features live performances that are characterized by "specified sexual activities," which include "fondling or other erotic touching" and "simulated sex acts," as referenced in the testimony summarized below. The County argues this placed Bucks in the category of a prohibited "adult cabaret." Third, the County argued Greenville Bistro violated section 6.1 of the Zoning Ordinance because Bucks was illegally operating as a "nightclub."

The circuit court erred in ruling it did not have jurisdiction to address the merits of the County's motion for temporary injunctive relief. The circuit court's determination of whether the County was entitled to injunctive relief for the three foregoing reasons was not a matter affected by an appellate court's resolution of the validity of Ordinance No. 4869. None of the County's grounds for injunctive relief involve the content of Ordinance No. 4869, specifically its provisions concerning "state of semi-nudity" or "semi-nude."

2. Testimony at Hearing

Private investigator Steven Smith testified during the 2018 hearing that he visited Bucks, paid a cover charge, and walked into the main room, where there were five to seven dancers performing on stage showing their bare breasts (with "pasties" covering their nipples) and their buttocks covered by small bikini bottoms or thongs. Smith testified the dancers "simulated intercourse" and provocatively touched their breasts, buttocks, and vaginal areas. Smith testified patrons would walk up to the stage where dancers would put their crotches and buttocks in the patrons' faces. He testified the dancers were also giving patrons lap dances where there was "grinding" and "gyration," which Smith described as "motioning as if [the dancer and patron] were having sex." Smith testified the dancers would put their bare breasts and bare buttocks in the patrons' faces during lap dances. Private investigator Donald

Johnson, who worked with Smith, testified he also visited Bucks. His testimony largely mirrored that of Smith.

An undercover investigator from the Greenville County Sheriff's Office testified about his visits to Bucks. He testified that on the first night, after he paid a cover charge and sat down at a table with two other investigators, two female dancers immediately greeted them. He testified the dancers gave the two other investigators private dances and tried to talk the three of them into going into the Champagne Room for $850. He testified that after he declined the Champagne Room invitation, the two dancers gave him a "double private dance." He testified the dancers were "grinding" on him and allowed him to touch their bare breasts and exposed buttocks. He described these lap dances as "simulated sexual intercourse." He testified about his very similar observations when he and the other investigators returned the next night, including the additional lap dances they received in the Champagne Room.

3. Merits of the County's claim for temporary injunctive relief

At this point, we must decide whether we should address the merits of the County's claim for temporary injunctive relief or whether we should remand this issue to the circuit court. Ordinarily, a remand would be in order if there are fact-driven questions as to whether the moving party has established a likelihood of success on the merits, an inadequate remedy at law, and irreparable harm. However, we have held that these considerations do not apply when a city seeks an injunction to enforce an ordinance. *See City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000) ("In order for a city to get an injunction for a zoning violation [it] must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance.").

A county may obtain injunctive relief to prevent violations of its ordinances. *See* S.C. Code Ann. § 6-29-950 (2004). Also, Article 13 of the Zoning Ordinance in this case provides the County may seek injunctive relief to enforce the provisions of the ordinance. The records in both appeals include the facts relevant to whether the County is entitled to a temporary injunction, so a remand is not warranted. The County contends several zoning violations entitle it to injunctive relief. We agree with the County that, at this stage, the County has presented sufficient proof that Bucks illegally operates in this location as an "adult cabaret."

Ordinance No. 2673 regulates the operation of sexually oriented businesses in the County. Although Ordinance No. 2673 allows sexually oriented businesses to operate within an S-1 district, those businesses cannot operate within 1,500 feet of, among other things, residential districts, churches, or licensed daycare facilities.

Bucks is in an S-1 district and falls within that 1,500-foot location restriction, so the question becomes whether Bucks is, as the County argues, a sexually oriented business. The ordinance lists eight types of businesses that are classified as sexually oriented businesses—one of which is an "adult cabaret." The ordinance defines an "adult cabaret," in pertinent part, as "a nightclub, bar, restaurant, or similar commercial establishment which regularly features . . . [l]ive performances which are characterized by . . . 'specified sexual activities' . . . ." As noted above, "specified sexual activities" are defined in the ordinance to include: "(1) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; (2) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; and (3) masturbation, actual or simulated."

The County has presented sufficient proof at this stage that Bucks illegally operates as an adult cabaret because it features live performances characterized by "specified sexual activities." The testimony of the private investigators and undercover deputy prove multiple instances of "specified sexual activities" occurring at Bucks: (1) the dancers "simulated intercourse" while dancing and provocatively touched their breasts, buttocks, and vaginal areas; (2) the dancers placed their breasts, crotches, and buttocks in patrons' faces, which constitute "sex acts, normal or perverted"; (3) the dancers simulated intercourse by giving lap dances, during which they would grind on patrons' crotches and allow patrons to touch and fondle their breasts and buttocks; and (4) the dancers "simulated masturbation" by touching and fondling their vaginal areas. The County is entitled to temporary injunctive relief on this basis.[6]

Conclusion

We reverse the circuit court's grant of injunctive relief to Greenville Bistro and dissolve that injunction. We reverse the circuit court's ruling that it did not have jurisdiction to rule upon the County's motion for injunctive relief. We hold the County has established it is entitled to temporary injunctive relief. We remand to the circuit court with instructions to enter the temporary injunction and to proceed with all haste to the resolution of this case on the merits.

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[6] We need not consider whether Bucks illegally operates as a "nightclub" or whether the dancers' activities violate the "nudity" or "semi-nudity" provisions of the ordinances. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pickens County, Respondent,

v.

South Carolina Department of Health and Environmental Control and MRR Pickens, LLC, Petitioners.

Appellate Case No. 2020-000448

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 28073
Heard May 25, 2021 – Filed December 8, 2021

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Chad N. Johnston, of Willoughby & Hoefer, PA, of Columbia; R. Walker Humphrey II, of Willoughby & Hoefer, PA, of Charleston; Robert F. Goings and Jessica L. Gooding, both of Goings Law Firm, LLC, of Columbia; Jessica J.O. King, of Williams Mullen, of Columbia; Etta R. Linen and Karen C. Ratigan, both of South Carolina Department of Health and Environmental Control, of Columbia, for Petitioners.

Gary W. Poliakoff, of Poliakoff & Assoc., PA, of Spartanburg; Amy E. Armstrong, of South Carolina Environmental Law Project, of Pawleys Island; and Michael G. Corley, of South Carolina Environmental Law Project, of Greenville, for Respondent.

JUSTICE JAMES: Pickens County sought a contested case hearing in the administrative law court (ALC) to challenge a landfill permit modification issued to MRR Pickens, LLC (MRR) by the South Carolina Department of Health and Environmental Control (DHEC). The ALC dismissed the County's challenge, finding the County failed to timely request DHEC to conduct a final review of the decision to issue the permit modification. The court of appeals reversed and remanded to the ALC for further proceedings. *Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, 429 S.C. 92, 837 S.E.2d 743 (Ct. App. 2020). We affirm the court of appeals in part, vacate in part, and remand to the ALC for proceedings consistent with this opinion.

I.

Before discussing the events giving rise to this appeal, we reference statutory and regulatory provisions pertinent to this case.

Subsection 44-1-60(E)(1) of the South Carolina Code (2018) requires DHEC to provide notice of its permitting decisions as follows: "Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." Subsection 44-1-60(E)(2) sets forth the time frame within which a party must seek a final review conference with DHEC following a permitting decision. These provisions apply to all DHEC permitting decisions, not just those involving landfills.

DHEC regulations set forth additional notice requirements DHEC must follow when making certain landfill permit decisions. In pertinent part, the regulations require DHEC to follow a comprehensive public notice and comment procedure when making decisions related to permit applications for major modifications to Class Two and Class Three landfills. *See* S.C. Code Ann. Regs. 61-107.19, pt. I, D.2.c-g (2008). The public notice and comment provisions do not apply to minor modifications. "Minor modification" and "major modification" are defined as follows:

> a. "Minor modification" means a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change; and,
>
> b. "Major modification" means a change that substantially alters the facility or its operations, e.g., tonnage increase above 25%, any volumetric capacity increase, alternate designs that vary from the design prescribed in this regulation.

S.C. Code Ann. Regs. 61-107.19, pt. I, B.48.

DHEC regulations place landfills into one of three classes depending upon the chemical and physical properties of the wastes disposed in the landfill. *See* S.C. Code Ann. Regs. 61-107.19, pt. I, A.1. Class Two landfills accept the wastes listed in Appendix I of Regulation 61-107.19. These wastes include materials such as brush and limbs, rock, masonry blocks, dry paint cans, glass, pipes, and plaster. Class Two landfills may also accept other wastes approved by DHEC on a case-by-case basis. S.C. Code Ann. Regs. 61-107.19, pt. IV, A.1. Class Three landfills may accept more harmful wastes, such as "municipal solid waste, industrial solid waste, sewage sludge, nonhazardous municipal solid waste incinerator ash and other nonhazardous waste." S.C. Code Ann. Regs. 61-107.19, pt. V, subpart A, 258.1.a. Class One landfills are not pertinent to this case.

II.

In 2007, MRR and the County entered into agreements authorizing MRR to construct and operate a Class Two landfill (the Landfill) in Pickens County. In 2008, DHEC issued a solid waste permit (the 2008 Permit) to MRR for the Landfill. The 2008 Permit specified the Landfill was a Class Two landfill and authorized MRR to operate the Landfill—which has never been constructed—in a manner consistent with the agreements MRR and the County executed. The County did not request in writing to be notified as an "affected person" of future decisions relating to the 2008 Permit. *See* S.C. Code Ann. § 44-1-60(E)(1) (quoted above). Consequently, DHEC was not required to mail notice of future modifications to the 2008 Permit to the County.

In 2015, MRR applied to DHEC for a "minor permit modification." According to the application, MRR requested the option to install a liner and associated leachate collection system for a portion of the Landfill. Liners are safety features designed to prevent waste from escaping a landfill. Liners are required in Class Three landfills, but they are not required in Class Two landfills. *See* S.C. Code

Ann. Regs. 61-107.19, pt. V, subpart D, 258.40.a.2. On August 10, 2015, DHEC granted the requested modification (the Permit Modification) to the 2008 Permit.

Had DHEC classified the Permit Modification as a major modification, it would have been required to follow the public notice and comment provisions set forth in Regulation 61-107.19. However, because DHEC classified the modification as minor, and because the County did not request in writing to be notified of future decisions affecting the 2008 Permit, DHEC simply mailed the Permit Modification to MRR on August 10, 2015.

The County claims it did not learn of the Permit Modification until December 2015 when it heard from "sources other than MRR" that MRR might be changing the Landfill's design to prepare it to accept coal ash. DHEC informed the County of the Permit Modification in a December 15, 2015 meeting, and DHEC emailed a copy of the Permit Modification to the County on January 11, 2016.

On March 23, 2016, the County requested the DHEC Board to conduct a final review of the decision to issue the Permit Modification. The DHEC Board declined the request, and the County filed a request for a contested case hearing in the ALC. MRR and DHEC moved to dismiss the County's challenge, claiming the County's March 23, 2016 request was untimely. *See* S.C. Code Ann. § 44-1-60(E)(2) (providing a DHEC staff decision becomes final fifteen days after the decision is mailed to the applicant, unless a written request for final review is filed with DHEC).

The ALC granted the motions to dismiss, concluding the County's request for final review was untimely. The ALC noted the County's March 23, 2016 request for final review "was filed 226 days after the [Permit Modification] was issued, 99 days after the meeting where the decision was discussed with the County [in December 2015], and 72 days after the decision was emailed to the County [in January 2016]." Citing subsection 44-1-60(E)(2), the ALC found dismissal was warranted because the County failed to request final review within fifteen days of learning of the Permit Modification.

The court of appeals reversed and remanded, holding the ALC erred in dismissing the County's challenge without first determining whether DHEC (1) misclassified the Permit Modification and (2) failed to comply with applicable notice and comment requirements. *Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, 429 S.C. 92, 837 S.E.2d 743 (Ct. App. 2020). The court of appeals also made factual findings to which MRR and DHEC take exception. We granted MRR and DHEC a writ of certiorari to review the court of appeals' opinion.

III.

A.

MRR and DHEC argue that because the County had actual notice of the Permit Modification in December 2015 and January 2016 but did not request final review until March 23, 2016, the County's challenge was not timely. MRR and DHEC therefore contend the ALC correctly ruled it did not have to reach the issue of whether DHEC misclassified the Permit Modification and whether DHEC failed to provide public notice. MRR and DHEC assert subsection 44-1-60(E)(2) requires this result. Subsection 44-1-60(E)(2) sets forth the time frame within which a party must seek a final review conference with DHEC following a permitting decision:

> The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

S.C. Code Ann. § 44-1-60(E)(2).

The court of appeals rejected MRR and DHEC's argument that the County's actual notice of the Permit Modification in December 2015 and January 2016 triggered the fifteen-day limitations period set forth in subsection 44-1-60(E)(2). *Pickens Cnty.*, 429 S.C. at 104-05, 837 S.E.2d at 749-50. We agree with the court of appeals on this point and affirm its analysis of our opinion in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control* (*SCCCL*), 390 S.C. 418, 702 S.E.2d 246 (2010). In *SCCCL*, we considered whether receipt of actual notice impacts the time frame within which a party may seek final review with DHEC. The South Carolina Coastal Conservation League (the League) filed a request for final review within fifteen days of learning DHEC had issued permits to the permit applicants but more than fifteen days after DHEC had mailed notice to the applicants. The League argued the fifteen-day time period began when it received actual notice of DHEC's decision. We disagreed with the League, holding the "clear and unambiguous language" of subsection 44-1-60(E)(2) precluded the League's interpretation. *Id.* at 426, 702 S.E.2d at 250-51.[1] We stated, "[h]ad the legislature intended for the time period to begin running from

[1] When *SCCCL* was decided, the provisions of subsections 44-1-60(E)(1) and -60(E)(2) were contained in a single subsection, 44-1-60(E). To avoid confusion, we refer to the statutory provisions as they are currently codified.

the date a party receives notice of the decision, the statute would have been drafted accordingly." *Id.* at 426, 702 S.E.2d at 251. Thus, while we went on to hold the League's request was timely for a different reason, we rejected the notion that actual notice triggers the limitations period for requesting final review.

MRR and DHEC claim our refusal to adopt an actual notice rule in the instant case will allow parties to "sit on their rights" and bring dilatory challenges long after they learn of permit decisions. However, we agree with the court of appeals that "nothing in § 44-1-60 suggests the fifteen day period for appealing a DHEC staff decision begins to run upon a party's simply learning of a permit action." *Pickens Cnty.*, 429 S.C. at 105, 837 S.E.2d at 750. As we noted in *SCCCL*, the General Assembly chose not to include an actual notice trigger when it enacted the statutory provisions governing the procedure for bringing a contested case before the ALC. *See* S.C. Code Ann. § 44-1-60(A)-(J). We have no authority to inject into the statute an actual notice trigger of the fifteen-day limitations period, as that would disturb the legislatively prescribed procedure for appealing permitting decisions. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . . .").

B.

Because the ALC found the County's request for final review untimely under subsection 44-1-60(E)(2), the ALC did not rule upon the issue of whether DHEC properly classified the Permit Modification as a minor modification. The court of appeals correctly reversed the ALC on this point when it held the ALC should have determined whether DHEC properly classified the Permit Modification before ruling upon the statutory timeliness of the County's challenge. *See Pickens Cnty.*, 429 S.C. at 102-03, 837 S.E.2d at 748 (noting "the ALC failed to undertake the prerequisite analysis of whether [the fifteen-day limitations period in subsection 44-1-60(E)(2)] appl[ies]" due to DHEC's alleged misclassification of the Permit Modification).

MRR and DHEC argue the court of appeals erred in reversing the ALC's statutory timeliness ruling, but they contend that if there must first be a determination as to whether DHEC misclassified the Permit Modification, the ALC, not the court of appeals, should make that determination in the first instance. We agree with MRR and DHEC. The ALC, not the appellate court, acts as the finder of fact when reviewing permitting decisions in contested case hearings. *Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) (stating the role of a reviewing court is to reverse or modify the ALC if its "findings of fact are not supported by substantial evidence"); *Brown v. S.C. Dep't of Health & Env't*

Control, 348 S.C. 507, 521-22, 560 S.E.2d 410, 417-18 (2002) (remanding an issue to the ALC where the ALC's initial decision contained "*no* factual findings" because "the lack of any findings or any discussion of the law on [a] matter prevents a reviewing body from evaluating the decision").

We note the following from the court of appeals' opinion:

> DHEC's own representative has admitted the Permit Modification meets the regulatory definition of a major modification. Thus, we find DHEC's labeling of the Permit Modification as minor denied contemporaneous notice and participation opportunities that DHEC's own regulations required be provided to both the public and the adjacent Neighboring Property Owners. Accordingly, the ALC erred in dismissing the County's challenge to the DHEC permitting decision as untimely because DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill.

Pickens Cnty., 429 S.C. at 105, 837 S.E.2d at 750. The ALC expressly refused to make any findings as to whether the County was entitled to notice and as to whether the Permit Modification was major or minor. While we have held the ALC erred in not deciding whether the modification was major or minor, it was not for the court of appeals to make these findings of fact; therefore, we vacate this portion of the court of appeals' opinion. We also vacate other portions of the opinion that can be construed to make factual findings. These include, but are not limited to, the finding that coal ash qualifies as a "special waste" under South Carolina law, *id.* at 100 n.11, 837 S.E.2d at 747 n.11; "misrepresentations" supposedly made by MRR to the County and its Planning Commission as to "the nature of its plan for the landfill facility and operation," *id.* at 96, 837 S.E.2d at 745; and purported admissions made by Kent Coleman of DHEC in separate litigation commenced by MRR against the County and some members of the Planning Commission, *id.* at 98-100, 837 S.E.2d at 746-47. These factual findings made by the court of appeals may turn out to be entirely true, but the factual record before the ALC was incomplete, and the ALC chose not to allow the record to be developed on these and other points.

C.

The ALC must determine on remand whether DHEC properly classified the Permit Modification as a minor modification. Only after resolving that question can the ALC determine whether the County's request for a contested case hearing was untimely under subsection 44-1-60(E)(2). On remand, the parties may conduct discovery on relevant issues, and the ALC should consider the County's request to

intervene on behalf of the neighboring landowners. If the ALC upholds DHEC's classification of the Permit Modification and concludes DHEC complied with all notice requirements, the fifteen-day limitations period began running on August 10, 2015, and the County's challenge should be dismissed. If the ALC determines the Permit Modification was major and DHEC did not fulfill its notice requirements, then the fifteen-day limitations period has not started.

IV.

Finally, though not pertinent to our holding, we note several concessions made by MRR and DHEC during oral argument before this Court. Counsel for MRR conceded that the Landfill could not accept coal ash—or any other waste not listed in Appendix I to Regulation 61-107.19—without additional approval from DHEC. Specifically, counsel for MRR and DHEC explained MRR would have to follow DHEC's "waste characterization" process before accepting any new waste. *See* S.C. Code Ann. Regs. 61-107.19, pt. I, C. Regarding notice, counsel for DHEC stated the County has written a letter to DHEC and "specifically asked to know anything that happens with the MRR landfill." Counsel for MRR stated the County would receive "notice of our request for a characterization of new waste," and counsel for DHEC stated the County would be notified of any decision authorizing MRR to dispose of coal ash or other wastes not listed in Appendix I in the Landfill. Counsel for MRR and DHEC both acknowledged that a law passed in 2016 requires coal ash to be placed in a Class Three landfill, subject to a few exceptions. *See* S.C. Code Ann. § 58-27-255(A) (Supp. 2020) (providing that coal ash "must be placed in a commercial Class 3 solid waste management landfill" unless the coal ash is "(1) located contiguous with the electric generating unit; (2) intended to be beneficially reused; (3) placed into beneficial reuse; or (4) placed in an appropriate landfill which meets the standards of the Department of Health and Environmental Control Regulation 61-107, and that is owned or operated by the entity that produced the electricity which resulted in the coal combustion residuals").

Conclusion

We vacate the portions of the court of appeals' opinion referenced above. In all other respects, we affirm the court of appeals. We remand this matter to the ALC for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kelvin Jones, Petitioner.

Appellate Case No. 2020-000653

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28074
Heard September 22, 2021 – Filed December 8, 2021

AFFIRMED IN RESULT

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

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

JUSTICE HEARN: In this case, we revisit and refine our preservation rules in the context of pretrial criminal hearings. Arguing that a drug raid of his home violated

the Fourth Amendment, Petitioner Kelvin Jones appeals his convictions for trafficking cocaine and possession with intent to distribute cocaine within the proximity of a school. Jones's pretrial motion to suppress was denied and he was convicted following a jury trial. The court of appeals affirmed on the basis the issue was not preserved for appellate review.[1] We hold Jones's argument as to the search warrant is preserved but fails on the merits. Accordingly, we affirm in result the court of appeals' opinion and take this opportunity to clarify our issue preservation rules with respect to pre-trial rulings of constitutional dimension.

FACTUAL/PROCEDURAL BACKGROUND

The investigation into Jones began in April of 2010 when police received complaints of "short-term traffic" frequenting his home on Morgan Street in Aiken. Acting on these tips, the Aiken Department of Public Works was enlisted to conduct a trash pull at Jones's residence. Jones's garbage was collected on its regular trash day and transmitted to the police to be searched. Several items tending to show criminal activity were discovered: twisted and torn baggies, emptied cigar tubes for marijuana use, and burnt remains of cigars that contained leafy green materials that were subsequently confirmed to be marijuana. Based on this evidence, investigators then obtained a search warrant from a magistrate.

Prior to executing the warrant, investigators conducted surveillance from an undercover vehicle parked across the street from Jones's residence. Marty Sawyer, a Captain with the Aiken Department of Public Safety, watched as a man named Ricky Lloyd walked to the door, knocked, and left upon hearing no reply. A few minutes later, Jones and a few others, including Lloyd, approached the residence and went inside together. Jones entered, wearing a heavy blue backpack. Soon thereafter, investigators executed the warrant by breaching the home after announcing their presence. Once inside, investigators seized over a kilogram of cocaine, a pickle jar containing marijuana, more than $5,000 of cash in mostly $20 bills, a Smith & Wesson handgun, and a small amount of ecstasy.[2]

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[1] The court of appeals also decided the case on three ancillary grounds, but this Court only granted certiorari as to issue preservation.

[2] When investigators entered the residence, the blue backpack containing cocaine was found under the couch and Lloyd was discovered attempting to flush his cocaine down the toilet.

At a preliminary hearing, Judge Dickson heard arguments on two defense motions—a motion for change of venue which was granted[3] and a motion to suppress the contents of the search based on an alleged violation of the Fourth Amendment. The circuit court judge disagreed, upholding the search warrant as proper.

The case was subsequently transferred to Dorchester County, where Judge McIntosh presided over the trial. Jones pled guilty to the possession of ecstasy charge and proceeded to trial for the remaining charges of trafficking cocaine and possession of cocaine with intent to distribute within the proximity of a school.

Immediately prior to trial, Jones's counsel renewed his objections to the denial of the motion to suppress by stating, "as you're aware, we will be renewing our objection . . . especially as it relates to the suppression issue." A new suppression hearing was not conducted and the trial judge stated he would "uphold" the prior ruling. During trial, Jones's counsel inconsistently objected to evidence recovered during the raid.[4] At the close of the State's case, Jones's counsel again renewed his objections, which were denied by the trial judge. The jury then convicted Jones of both charges, and the trial court sentenced him to the mandatory minimum of 25 years for the trafficking charge, 10 years on the possession with intent to distribute within the proximity of a school charge, and one year for the possession of ecstasy charge, all to be served concurrently. The court of appeals affirmed in an unpublished decision, holding Jones's objections to the search were not preserved for appellate review. This Court granted Jones's petition for certiorari on the issue of error preservation, and the parties briefed both that issue and the merits of the search.

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[3] Coincidentally, the Solicitor for the Second Circuit, Strom Thurmond, Jr., and one of his assistant solicitors were on a "ride along" with Sawyer when the search occurred.

[4] For example, just before the jury was seated, Jones's counsel renewed his objections to the raid evidence. However, during Officer Sawyer's direct examination, Jones's counsel did not object to testimony about this same raid and the evidence gathered during it. Jones's counsel did not object when the drugs, money, and gun were admitted into evidence, but mentioned his objection again at the close of all the evidence.

STANDARD OF REVIEW

As to the validity of a search warrant, we have noted that "[a] magistrate's determination of probable cause to search is entitled to substantial deference…on review." *State v. Crane*, 296 S.C. 336, 339, 372 S.E.2d 587, 588 (1988). We reverse the denial of a motion to suppress, only upon a finding of clear error. *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).

LAW/ANALYSIS

In order for an issue to be preserved for appellate review, a party must make a "contemporaneous objection that is ruled upon by the trial court." *State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final. *See State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. *Id.* at 156, 679 S.E.2d at 175. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling. *See also State v. Mueller*, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) (holding that pretrial motions are generally not final orders because "the evidence developed during trial may warrant a change in the ruling"). While *Mueller* remains good law, we believe a different approach is warranted where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review.

Here, the pretrial evidentiary ruling was rendered following a full hearing on Jones's motion to suppress. Both sides submitted briefs, presented testimony to the court, and argued their respective positions. Just before trial, although defense counsel noted his continuing disagreement with the prior denial of his motion to suppress, no new hearing was held, and, during trial, no new facts arose which would have justified another hearing on the matter. While there is no question the trial judge

could have changed the prior ruling on the motion to suppress based upon new matter coming to light, requiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of "gotcha," where form is elevated over substance. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); and *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021). Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. *See Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Their purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress. Therefore, we hold that Jones's objection to the denial of his motion to suppress was preserved for appellate review.

In the interest of judicial economy and because both sides briefed the issue of the viability of the search warrant, we now proceed to the merits. Being faithful to our deferential standard, we affirm the circuit court's decision to uphold the search warrant.

In order for a search to violate the Fourth Amendment, it must be an arbitrary invasion by government actors. *See Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967). "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). For a search to be unreasonable, generally it must lack probable cause. *See State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). Further, "[p]robable cause, we have often told litigants, is not a high bar . . . ." *See Kaley v. United States*, 571 U.S. 320, 338 (2014) (explaining further that probable cause is defined as a "fair probability" upon which "reasonable and prudent people . . . act").

In *State v. Kinloch*, this Court held that short-term traffic and subsequent surveillance constituted probable cause for the issuance of a warrant. *See* 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014). Similarly, in *State v. Rutledge*, the court of appeals affirmed the magistrate's probable cause finding after reviewing a tip of drug sales combined with a trash pull that yielded marijuana. *See* 373 S.C. 312, 315, 644 S.E.2d 789, 791 (Ct. App. 2007). Even if distinguishable, the facts of Jones's case are *more* supportive of a probable cause finding, not less. Not only did the trash pull

at Jones's home yield marijuana residue, but also baggies indicative of narcotics resale, which was consistent with and corroborated by the tips of short-term traffic. Thus, the magistrate's issuance of the search warrant was supported by probable cause.

Accordingly, we **AFFIRM IN RESULT.**

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Victoria Lorraine Sanchez, Appellant.

Appellate Case No. 2018-002163

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5875
Heard October 12, 2021 – Filed December 8, 2021

REVERSED AND REMANDED

Appellate Defender Adam Sinclair Ruffin, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

THOMAS, J.: Victoria Lorraine Sanchez appeals her convictions for trafficking more than twenty-eight grams of heroin and unlawful conduct toward a child, arguing, *inter alia*, the trial court erred in refusing to charge her requested circumstantial evidence jury charge. We reverse and remand.

FACTS

During a pretrial motion to suppress, Andrew Reese testified he was working as a deputy on a narcotics interdiction team for the Greenville County Sheriff's Office (GCSO) and was responsible for locating and seizing narcotics and other illegal items being transported on the interstate. On June 28, 2017, the interdiction team received a tip from the Department of Homeland Security identifying a silver Kia Sorrento that had been observed at a suspected drug location in Atlanta and was headed north on I-85. Reese stopped Sanchez's silver Kia after she crossed lane lines and was too-closely following a tractor trailer as she was traveling north on I-85.

Reese approached the vehicle and Sanchez handed him her Texas identification card, insurance documentation insuring Rigoberto Guzman, Jr., registration information in another man's name, a bill of sale indicating a sale of the vehicle from Edwin Campos to Sanchez, and an offer to purchase a 2014 Chrysler for $4,900. Sanchez told Reese she was buying the vehicle from her cousin and had put down a $4,000 deposit. Reese began questioning Sanchez, who told him she left Laredo, Texas, for Atlanta, stayed a week with family, and was traveling to New Jersey to visit family for two weeks. She also stated a child in the vehicle was her child and her other two children were in Texas with her boyfriend. According to Reese's dash camera video, Reese asked Sanchez to exit the vehicle approximately three-and-a-half minutes into the stop. Approximately twelve minutes into the stop, Reese asked for consent and handed Sanchez warning tickets. Sanchez consented to the search. Reese described Sanchez as calm throughout the process. By the time Reese handed Sanchez the warnings, Deputy Wasserman and Deputy David Harrison, Jr., both also of the GCSO, had arrived, having been requested by Reese to assist in the search.

Reese testified he first searched the front seat area, including Sanchez's purse, and then moved to search the luggage in the trunk of the car. Harrison testified he had seventeen years of experience in highway patrol, thirteen of which were on the interdiction team. Based on his training, the tip, and Reese's suspicions, Harrison suspected the vehicle might contain an "aftermarket hidden compartment." Harrison testified that on a small SUV like the Kia, he typically looked on the floorboard, underneath the vehicle, and on the floor above the gas tank. In this

case, Harrison looked underneath the vehicle and noticed the exhaust and gas tank were lower than they should have been. He also noticed unusual, elongated bolts that were freshly painted black, whereas the remainder of the undercarriage was grimy. Harrison noticed the welding on the bolts was not factory welding. Harrison concluded the vehicle had a hidden compartment.

Harrison retrieved a crowbar, removed the backseat, and looked at the cover for the fuel pump. When he touched it to pull it open, a screw popped off. The screw contained traces of silicone indicating it had been cut off and glued onto the panel lid to make it appear as if it was in use. Packages of what tested to be heroin were inside the compartment. The trial court watched the video of the stop and search and denied Sanchez's motion to suppress the heroin.

During trial, Reese and Harrison similarly testified to the tip, stop, and search. Reese additionally testified that while Sanchez was being booked into the detention center, she admitted she had a $20 bill with cocaine residue on it in her bra. The heroin found in the vehicle, estimated at a street value of $1.73 million, was admitted over Sanchez's renewed objection. Reese admitted he never investigated the seller of the vehicle despite the seller's address on the bill of sale and further admitted he did not test the hidden compartment for fingerprints.

Sanchez moved for directed verdicts, arguing there was insufficient evidence of her knowledge that the vehicle contained heroin. The trial court denied the motions. Sanchez also requested the circumstantial evidence jury charge approved in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). The trial court denied the request. Sanchez was convicted and sentenced to thirty-two years imprisonment for trafficking in heroin and ten years concurrent for unlawful conduct toward a child. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, we review the decisions of the trial court only for errors of law." *State v. Gilmore*, 396 S.C. 72, 77, 719 S.E.2d 688, 690 (Ct. App. 2011). "Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). In our review, "this [c]ourt is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009).

LAW/ANALYSIS

Sanchez argues the trial court erred in refusing to give her requested circumstantial evidence jury charge. We agree.

Trafficking in heroin is defined as:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of: . . . heroin . . . is guilty of a felony which is known as "trafficking in illegal drugs . . . ."

S.C. Code Ann. § 44-53-370(e)(3) (2018). The trafficking statute "specifically requires a person act 'knowingly.'" *State v. Taylor*, 323 S.C. 162, 165, 473 S.E.2d 817, 818 (Ct. App. 1996) (addressing a previous version of the trafficking statute). A "defendant's knowledge and possession [of illegal substances] may be inferred." *State v. Heath*, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two." *Logan*, 405 S.C. at 99, 747 S.E.2d at 452.

In *Logan*, our supreme court reconsidered the circumstantial evidence jury instruction given in criminal trials. 405 S.C. at 90−100, 747 S.E.2d at 448−53. The court mandated a new circumstantial evidence jury charge, "when so requested by the defendant[,]" containing the following language:

> There are two types of evidence which are generally presented during a trial—direct evidence and

> circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, *to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt*. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

Id. at 99, 747 S.E.2d at 452 (emphasis added). "When requested, the *Logan* charge must be given in cases based in whole or part on circumstantial evidence." *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020).

An erroneous failure to give the *Logan* charge upon request must be prejudicial to the defendant; thus, the appellate court must apply the harmless error analysis. *Id.* at 371, 845 S.E.2d at 502; *see State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909–10 (2015) (explaining a harmless error analysis looks at the prejudicial nature of the error to determine if it reasonably affected the result of the trial). Previewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

As previously stated, our supreme court in *Herndon* stated that "the *Logan* charge must be given in cases based in whole or part on circumstantial evidence." *Herndon*, 430 S.C. at 371, 845 S.E.2d at 501. The State's case against the defendant in *Herndon* was "almost exclusively circumstantial." *Id.* at 373, 845 S.E.2d at 502. In applying the harmless error test, the court noted it "must be

careful not to weigh the evidence." *Id.* at 373 n.6, 845 S.E.2d at 502 n.6. In *State v. Dent*, this court likewise found the trial court erred in refusing to give the *Logan* charge upon request. 434 S.C. 357, 362−63, 863 S.E.2d 478, 481 (Ct. App. 2021), *reh'g denied*, Oct. 18, 2021. In determining the error was not harmless, this court in *Dent* relied in part on the fact that "[t]here was no physical evidence, and the State spent substantial time in summation explaining to the jury that the case was 'about circumstantial evidence.'" *Id.* at 363, 863 S.E.2d at 481.

In this case, Sanchez requested the *Logan* charge. The court denied the request and charged the following:

> There are two types of evidence which are generally presented during a trial: direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.
>
> Circumstantial evidence is proof of the chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.
>
> The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

The trial court's charge neglected to include the language from *Logan*, "to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." *Logan*, 405 S.C. at 99, 747 S.E.2d at

452. Based on the omission of the mandatory language in *Logan*, and after a review of the trial court's instructions as a whole, we agree with Sanchez that the trial court erred in refusing to give the *Logan* charge upon her request, and Sanchez was prejudiced by the error. *See Dent*, 434 S.C. at 362, 863 S.E.2d at 480−81 ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." (quoting *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003))).

Similar to *Herndon*, the evidence of Sanchez's knowledge of the drugs was largely circumstantial. The State's witness admitted there was no investigation of the seller of the vehicle or tests on the hidden compartment. Furthermore, there was no direct evidence of Sanchez's knowledge of the hidden compartment or drugs. As in *Dent*, the State spent a significant portion of its closing argument on circumstantial evidence. We find the trial court erred in failing to grant Sanchez's request to charge the jury with the *Logan* instruction on circumstantial evidence. In addition, we find the error was not harmless.

CONCLUSION

Based on the foregoing, Sanchez's convictions are

REVERSED AND REMANDED.[1]

HUFF and GEATHERS, JJ., concur.

[1] Because this finding is dispositive, we decline to address Sanchez's remaining issues on appeal. *See State v. Hepburn*, 406 S.C. 416, 428 n.14, 753 S.E.2d 402, 408 n.14 (2013) (declining to review remaining issues when a determination of a prior issue was dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Annette Oakley, Appellant.

v.

Beaufort County Assessor, Respondent.

Appellate Case No. 2018-002153

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

Opinion No. 5876
Submitted November 1, 2021 – Filed December 8, 2021

AFFIRMED

Curtis Lee Coltrane, of Coltrane & Wilkins, LLC, of Hilton Head Island, for Appellant.

Stephen P. Hughes and Catherine Laird Floeder, both of Howell, Gibson & Hughes, PA, of Beaufort, for Respondent.

HEWITT, J.: This case concerns the four percent assessment for owner-occupied residential property, commonly called the homestead exemption. J. Annette Oakley appeals the Administrative Law Court's (the ALC's) order granting the Beaufort County Assessor's (the Assessor's) motion for summary judgment. The ALC held Oakley does not qualify for the homestead exemption because her husband resides in Tennessee. We agree and affirm.

FACTS

The ALC heard this case on cross-motions for summary judgment and stipulated facts. At all times relevant to this action, Oakley was the sole owner of a house on Hilton Head Island. She was a citizen and resident of Beaufort County and occupied the property as her primary legal residence.

Oakley timely applied for the 2017 tax year, seeking the homestead exemption under section 12-43-220(c)(1) of the South Carolina Code. Oakley did not claim the homestead exemption on any real property during that tax year.

Oakley's application disclosed that her husband was a citizen and resident of Tennessee. The parties stipulated Husband did not reside on Hilton Head at any point during 2017 or at the time of Oakley's homestead exemption application.[1] Oakley and Husband have never sought or obtained a legal separation, partial or complete termination of their marital relationship, or any property or marital settlement.

The Assessor denied Oakley's application for the homestead exemption. Oakley sought review in the ALC. After a hearing, the ALC granted the Assessor's motion for summary judgment. This appeal followed.

ANALYSIS

Oakley argues Husband did not reside with her and therefore was not a member of her household under the plain language of the statute and what she claims is the common meaning of household. *See Household*, *Black's Law Dictionary* (10th ed. 2014) (defining "household" as "[a] family living together" and "[a] group of people who dwell under the same roof"). We respectfully disagree.

The points of contention in this case are the subsections addressing the certification a taxpayer must file in his or her application for the homestead exemption. Section 12-43-220(c)(2)(ii) requires a taxpayer to validate:

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[1] Still, Oakley admitted Husband "is in South Carolina a good bit, [] pays a substantial amount of real estate taxes, [and] has a business, etc."

> (A) the residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that neither I, *nor any member of my household*, claim to be a legal resident of a jurisdiction other than South Carolina for any purpose; and
>
> (B) that neither I, *nor a member of my household*, claim the special assessment ratio allowed by this section on another residence.

S.C. Code Ann. § 12-43-220(c)(2)(ii) (2014) (emphases added). A subsequent subsection provides:

> For purposes of subitem (ii)(B) of this item, "a member of my household" means:
>
> (A) the owner-occupant's spouse, except when that spouse is legally separated from the owner-occupant . . . .

S.C. Code Ann. § 12-43-220(c)(2)(iii)(A) (2014).

Oakley's argument relies on a verbatim reading of these subsections, or more precisely, on a verbatim reading of the subsection defining "member of my household." She points to the language explaining the definition applies to part (B)—the requirement that neither she nor anyone in her household claim the exemption on another residence—and argues that the definition *only* applies there. As she sees it, the definition does not apply to part A's requirement that neither she nor anyone in her household claim to be a legal resident of another jurisdiction.

The ALC found the statute was ambiguous because when read literally, "member of my household" was expressly defined for part B but not expressly defined for part A. Regardless of whether one characterizes the statute as ambiguous, we do not read statutes literally. We begin with the text, but the ultimate goal is to determine the General Assembly's intent. *See Branch v. City of Myrtle Beach*, 340 S.C. 405, 410, 532 S.E.2d 289, 292 (2000) ("Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.").

The statute uses precisely the same term of art in part A and part B—member of my household—but only explicitly defines the term as to part B. When read word for word, it is admittedly unclear whether the General Assembly intended for homeowners to apply the definition to part A as well as part B. But any blurs become clear when one considers the statute's purpose, its history, general rules for reading statutes, and the statute's subsequent history.

First, the purpose. We cannot think of any reason the General Assembly would want "member of my household" to have two different meanings in the context of the certification a taxpayer must execute when applying for the homestead exemption. In part A, the General Assembly expressed an intention that all members of the taxpayer's household reside in South Carolina. If we read the statutory definition of household members to apply only to whether someone claims the homestead exemption on another South Carolina property, Oakley would have that subsection—part B—be the only subsection with any practical effect.

Second, the legislative history. The General Assembly amended these subsections in 2012. Before those amendments, the term "member of my household" appeared *only* in part B, not in part A. *See* S.C. Code Ann. § 12-43-220(c)(2)(ii) (Supp. 2011). That version of the statute required a taxpayer to certify:

> (A) the residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that I do not claim to be a legal resident of a jurisdiction other than South Carolina for any purpose; and
>
> (B) that neither I nor any other member of my household is residing in or occupying any other residence which I or any member of my immediate family has qualified for the special assessment ratio allowed by this section.

Id. The 2012 amendments added the phrase "member of my household" to part A. *See* Act No. 179, 2012 S.C. Acts 1743, 1746-47 (§§ 3.A, 3.B). While the General Assembly did not amend the definitional subsection to specifically include the newly modified part A, the General Assembly likely did not intend different definitions for the very same term that was used elsewhere in the very same taxpayer certification. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("[Our supreme

c]ourt has interpreted statutes in accord with legislative intent despite contrary literal meaning in cases where there has been an oversight by the legislature that is clearly in conflict with the overall intent of the statute . . . .").

The third basis for our decision is like the second and relies on general rules for reading statutes. The term "member of my household" or a derivative thereof appears multiple times throughout section 12-43-220. In addition to the previously mentioned uses in subsections (c)(2)(ii)(A), (c)(2)(ii)(B), and (c)(2)(iii)(A), subsection (c)(2)(v)(B) makes use of a derivative once and subsection (c)(8) makes use of a derivative twice. *See* S.C. Code Ann. § 12-43-220(c)(2)(v)(B), (c)(8) (2014). The ALC found the General Assembly, through its repeated use of the phrase, chose to employ a term of art and intended the term would have a consistent meaning throughout the statute. We agree with the ALC's reasoning, as it closely follows the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986)). This is bolstered by the fact that "tax exemption statutes are strictly construed against the taxpayer." *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981).

Finally, in 2021, the General Assembly revised the definition of "member of my household" to explicitly encompass an owner occupant's spouse for the entirety of subsection (c)(2)(ii) instead of just part B. *See* Act No. 56, 2021 S.C. Acts ___, ___ (§§ 1.A, 1.B). We acknowledge that changes to statutes often indicate the General Assembly wished to alter the law's meaning. Still, applying that principle in Oakley's favor would lead us directly into conflict with the principles outlined above: the statute's purpose, its history, the rule that parts of a statute should be given effect, and the rule that common terms used throughout a statute are read to have a common meaning.

For these reasons, we hold the ALC correctly granted the Assessor's motion for summary judgment.

AFFIRMED.[2]

KONDUROS and HILL, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Travis Hines, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002632

ON WRIT OF CERTIORARI

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

Opinion No. 5877
Heard April 13, 2021 – Filed December 8, 2021

AFFIRMED

Clarence Rauch Wise, of Greenwood, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Michael Jacob Neubauer, both of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Travis Hines (Petitioner) appeals the denial of his PCR application as to his guilty plea for distribution of heroin, third offense. He contends he did not waive his right to

counsel with a full understanding of his rights and the consequences of self-representation. Petitioner also maintains the PCR court erroneously found the State "turned over all evidence as [it] received it" because the State did not allow Petitioner to view video evidence that allegedly depicted him involved in a controlled drug purchase. We affirm.

FACTS/PROCEDURAL HISTORY

A grand jury indicted Petitioner for distribution of heroin. At a December 15, 2015 hearing, the State informed the circuit court Petitioner "was previously before the [c]ourt last term to enter . . . a [guilty] plea . . . . He informed the [c]ourt at that time that he was unhappy with [his attorney, Chris] Wellborn[,] as his counsel. So this hearing has been scheduled on . . . a motion to relieve counsel . . . ." Petitioner confirmed he wanted to relieve Wellborn and that he was "prepared to go forward without a lawyer." Petitioner clarified, however, that he intended to hire another attorney. The State indicated it planned to serve Petitioner with notice of its intent to seek a life without parole (LWOP) sentence immediately after the hearing, and it planned to call Petitioner's case for trial the following month. Petitioner stated he understood his case would be called for trial the following month and still wanted to relieve Wellborn. The circuit court relieved Wellborn as Petitioner's counsel. Petitioner acknowledged he originally had a court-appointed attorney before hiring Wellborn. The circuit court stated, "[Y]ou have been through two lawyers. The [c]ourt would not appoint you any more lawyers." The court then stated:

> At some point if you don't have an attorney I will have to go through and warn you in detail about representing yourself because that will be . . . what you are left with. If you have not hired an attorney by [next month], . . . we'll go over and make sure [you] understand your right about representing yourself.

Petitioner responded, "Okay." The State served Petitioner with its intent to seek an LWOP sentence and stated a fifteen-year plea offer would expire "at the conclusion of this [c]ourt term." The State explained Petitioner was eligible for an LWOP sentence due to prior convictions for distribution of ecstasy within proximity of a school and distribution of cocaine within proximity of a park.

A plea waiver form, signed by Petitioner on December 15, 2015, the same day as the hearing, informed Petitioner of his right to an attorney. It stated, "I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger in my representing myself." Petitioner initialed next to the warning. At a December 17, 2017 plea hearing, Petitioner appeared pro se. The State confirmed Petitioner was pleading guilty to distribution of heroin, third offense, "a statutory felony that carries with it no less than ten years [and] up to thirty years and a possibility of a fine up to [f]ifty thousand dollars." The State also noted Petitioner's charge was "a serious offense." The State indicated it was dismissing "an accompanying proximity charge" and Petitioner was pleading to a negotiated sentence of fourteen years' imprisonment. The State declared that after speaking with Petitioner following the December 15 hearing, it "ha[d] no doubt in [Petitioner's] intelligence or his understanding of the proceedings." The State informed the plea court Petitioner "indicated . . . he wishe[d] to proceed on his own." The plea court and Petitioner had the following exchange:

> [The court]: [Petitioner], how old are you?
>
> [Petitioner]: Twenty-nine.
>
> [The court]: How far did you go in school?
>
> [Petitioner]: I'm in college right now.
>
> . . . .
>
> [The court]: What do you do -- Do you have a job too?
>
> [Petitioner]: Yes, sir.
>
> [The court]: What do you do?
>
> [Petitioner]: I'm an electrician's helper.
>
> [The court]: You have a right to have an attorney represent you in regard to this charge[,] and if you cannot afford one[,] the State would be required to appoint an attorney to

represent you within some limits. That is[,] you would be appointed an attorney to represent you if you wish. If you could not afford one[,] the limitation being that you are assigned an attorney and that would be your attorney. It[']s dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you. Do you understand that?

[Petitioner]: Yes, sir.

[The court]: Do you wish to have an attorney in regard to this charge or give up that right?

[Petitioner]: I give up that right.

[The court]: I find [Petitioner] has freely[,] voluntarily[,] knowingly[,] and intelligently[,] understanding the benefits of counsel and the danger of self[-]representation[,] exercise[d] his right to proceed pro s[]e.

The plea court informed Petitioner of the charge against him, its potential sentence, and the consequences of the charge being classified as "serious." Petitioner stated he understood and wished to plead guilty. Similarly, Petitioner stated he understood his trial-related rights and wished to waive them by pleading guilty. The plea court accepted Petitioner's plea and the negotiated sentence. Petitioner pled guilty to distribution of heroin, third offense, and the plea court sentenced him to a negotiated sentence of fourteen years' imprisonment.

Petitioner did not directly appeal; however, he filed an application for PCR. At his PCR hearing, Petitioner explained that at his first plea hearing, the court would not accept his plea because he stated he was not satisfied with Wellborn's representation. He added, "I never really wanted to fire him but when the [court] asked me that[,] that's what happened." Petitioner testified,

> We never had a hearing after that to ask me why I didn't want him to be my lawyer or anything like that. The next time I was in court[,] all I knew is I was relieving Mr. Wellborn and I was going pro se. I never wanted to go pro se. I said I was going to get a lawyer. So obviously I didn't want to proceed pro se. I know nothing about the law.

Petitioner asserted he attempted to hire another attorney but was unable to do so because his trial date was approaching and the amount of time was insufficient for the attorney to prepare for trial. He stated he then decided to plead guilty because he could not prepare for trial himself and his plea offer would soon expire. Petitioner testified he had discussed with the State that he "didn't want to go to jail for a long time" and "had kids." He testified the State "scratched out the [fifteen] and put [fourteen] and said that's the best I can do for you." When asked what he understood about proceeding without an attorney, Petitioner answered, "Nothing really. I just knew if I didn't go ahead and take the plea they were going to give me [LWOP]." Petitioner alleged he was not made aware of the dangers of proceeding without counsel. Specifically, Petitioner stated the plea court did not make him aware of his right to a direct appeal and did not question him as to if he actually wanted to proceed pro se and why he did not have a lawyer. Petitioner asserted that if the PCR court granted his application, he "would definitely go to trial," despite his exposure to an LWOP sentence.

Petitioner testified he did not review his discovery materials with Wellborn. He stated, "Really we were waiting on the video tape. That's all it was. We were waiting on the video tape. We couldn't take a plea." Petitioner testified he and Wellborn discussed waiting to view the video before deciding whether to plead guilty. He stated he hired Wellborn in April 2015, but the State did not allow Wellborn to view the video until November 2015. Petitioner stated he "learned [from Wellborn] that [he] was on the video but . . . there was basically no drug transaction." According to Petitioner, the video depicted him "doing something with a plastic bag." He added, "It looked like I probably was messing with drugs." Petitioner testified Wellborn informed him "[he] never gave anybody anything on the tape," but Wellborn nonetheless told him he "looked like [he] was guilty" and advised him to plead guilty.

Wellborn testified he told Petitioner that if the video did not depict a drug sale, that would be a potential defense. He stated he did not feel comfortable or believe it was appropriate to advise Petitioner to plead guilty without first viewing the video. Wellborn explained that when he began representing Petitioner in July 2015, the State's plea offer contemplated a ten-year sentence. However, the State increased the sentence to eighteen years the following month and informed Wellborn no information regarding the informant would be released until Petitioner rejected the plea offer. Wellborn testified the State did not provide "the drug report" to him until October 23, 2015. Similarly, the State only allowed Wellborn to view the video in November 2015, after he signed a protective order to conceal the identity of the confidential informant used in the controlled drug purchase. According to Wellborn, the video depicted an individual entering Petitioner's home, followed by the audio of a discussion between the individual and Petitioner. Wellborn stated:

> I think there was a decent chance that jurors hearing the sound would believe that [the] discussion was related to drugs and transactions related to drugs[,] and [Petitioner] was at a table doing something that if the informant testified -- and we expected the informant to testify if [Petitioner] went to trial -- the informant would say he was packaging up drugs[.]

Wellborn testified Petitioner could be seen in a portion of the video "fiddling with a package." He further testified that because the video was of a controlled purchase, "it would not be an extraordinary circumstantial leap to connect the dots and suggest that [Petitioner] had given the informant the drugs."

Ryan Newkirk, the solicitor who prosecuted Petitioner's case, testified his office's policy was "generally not to release the video of a confidential informant in a drug case unless the defendant is then willing to not accept an offer from the State, especially in cases where the life of the confidential informant could be in danger." He stated protecting the informant in Petitioner's case "was incredib[ly] important" because previously Petitioner had been convicted of intimidating a witness and also charged with murder. Newkirk explained he sent Wellborn "still shots of the video" before ultimately allowing him to view the video.

In its order, the PCR court found Wellborn's testimony "credible and persuasive on all matters." It also found Petitioner failed to prove the State committed

prosecutorial misconduct by refusing to disclose discovery materials.

The PCR court also found Petitioner was aware of his right to counsel. It stated:

> [T]he plea [court] inquired [about Petitioner's] age and educational background where [Petitioner] stated he was twenty-nine years old, still in college, and worked as an electrician's helper. It is clear [Petitioner] was aware of the nature of the crimes and potential penalties as the plea [court] informed him of this and he was previously served with the State's notice to seek [an LWOP sentence] before negotiating a plea deal with [the State]. This [c]ourt finds that the plea court conducted a proper [*Faretta*[1]] hearing, after which the plea court found [Petitioner] freely, voluntarily, knowingly, and intelligently understood the benefits of counsel and the dangers of self-representation and exercised his right to proceed *pro se*.

Accordingly, the PCR court found Petitioner failed to prove "he was not properly advised of his right to counsel and self-representation." The PCR court denied the application for PCR. Petitioner filed a petition for a writ of certiorari, which this court granted.

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "Our standard of review in PCR cases depends on the specific issue before us." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id.* However, "[w]e do not defer to a PCR court's rulings on questions of law." *Id.* "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.* (quoting *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "On review of a PCR court's resolution of procedural questions arising

[1] *Faretta v. California*, 422 U.S. 806 (1975).

under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard." *Id.* at 92, 805 S.E.2d at 571. "This court gives great deference to the PCR court's findings on matters of credibility." *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016).

LAW/ANALYSIS

I. Prosecutorial Misconduct

Petitioner argues the PCR court erred in failing to find the State committed misconduct by refusing to show Petitioner the video unless he proceeded to trial. Petitioner asserts he was required to plead guilty before having the opportunity to review the video and he did not waive his right to review the video. He maintains the PCR court erroneously found the State "turned over all evidence as [it] received it" because the State did not allow Petitioner to view video evidence that allegedly depicted him involved in a controlled drug purchase. He avers the State forced him to either accept a plea offer without viewing the video or view it and face an LWOP sentence at trial, which he argues was improper and constituted prosecutorial misconduct. Petitioner contends he could not have made an informed decision about whether to plead guilty without viewing the video and as a result, his guilty plea was not freely and voluntarily given. We disagree.

"A defendant who pleads guilty usually may not later raise independent claims of constitutional violations." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). "However, 'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.'" *Id.* (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)). "When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary." *Id.* "Accordingly, [a PCR applicant] may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady*[2] violation." *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324.

> A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

> demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

Id. (footnote omitted).

In *Hyman v. State*, the petitioner argued "because he was not provided the opportunity to view the videotape recording of the drug transaction forming the basis of his convictions, he did not enter his guilty plea freely, voluntarily, and knowingly, and as a result, his counsel was ineffective." 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018). However, the supreme court disagreed "[t]o the extent Petitioner [was] argu[ing], pursuant to *Brady* . . . , that a criminal defendant may never enter a plea voluntarily without the State first disclosing all of the evidence in its possession." *Id.* at 45, 723 S.E.2d at 380. The court held no *Brady* violation had occurred in the case and explained:

> Petitioner cannot satisfy any of the factors delineated in *Gibson* to establish a *Brady* violation with respect to the videotape. Tantamount to any *Brady* claim is the withholding of evidence. Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel. Therefore, in order to find that this action amounts to impermissible suppression under *Brady*, we must first assume that the Constitution requires disclosure of *Brady* evidence to a criminal defendant *personally*. We are unwilling to make that sweeping assumption, and find that disclosure to defense counsel was satisfactory under the present circumstances. Further, because we deem the manner of disclosure appropriate, Petitioner cannot satisfy the materiality prong of *Brady*. *See Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) ("Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different *had the evidence been disclosed to the defense.*" (emphasis added) . . .)[, *abrogated on other grounds by Smalls*, 422

> S.C. at 181 n.2, 810 S.E.2d at 839 n.2]. Finally, Petitioner has not proven that the videotape was favorable to him. By all accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence at issue is *inculpatory*, *Brady* is inapplicable.

Hyman, 397 S.C. at 45-47, 723 S.E.2d at 380-81.

Additionally, in *Hyman*, the supreme court disagreed with the petitioner's argument that "because he was not permitted to watch the videotape personally in violation of Rule 5 of the South Carolina Rules of Criminal Procedure, counsel was ineffective." *Id.* at 47, 723 S.E.2d at 381. The court held:

> Rule 5 permits inspection of evidence in the State's possession "which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant" upon request by the defendant. Rule 5(a)(1)(C), SCRCrP.
>
> Compliance with Rule 5 is a fact-based inquiry. Under the present facts, the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. Plea negotiations were ongoing until the day before jury selection, and there is no indication that the State would have withheld the videotape if a full trial on the merits followed. In fact, the identity of the informant had been disclosed to the defense by the time Petitioner pleaded guilty, removing any remaining impediment to Petitioner's access to the videotape in time for his trial. We note that, in cases involving a confidential informant, a criminal defendant's interest in access to certain evidence must be weighed against the State's interest in

> protecting the identity and safety of the informant. *See State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 614-15 (2003) ("Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances." (internal citations omitted)). Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.
>
> Accordingly, it cannot be said that defense counsel acted unreasonably in failing to seek to compel disclosure of the videotape to defendant personally under the facts of this case.

Hyman, 397 S.C. at 47-48, 723 S.E.2d at 381 (alterations by court).

The State argues the PCR court correctly denied Petitioner's claim that the State committed prosecutorial misconduct by making his plea contingent on Petitioner not viewing the video of the drug buy in order to protect the confidential informant because the State properly provided still photographs from the video to Petitioner and after Petitioner's counsel signed a protection order, allowed counsel to view the video and relay a summary of the video to Petitioner during plea negotiations.[3]

[3] Petitioner references a 2004 Memorandum from the then Chief Justice of the South Carolina Supreme Court, Jean Hoefer Toal, to support his argument that the State's practice here violated the Rules of Professional Conduct, Rule 3.4, RPC,

We affirm the PCR court's denial of relief on Petitioner's claim of prosecutorial misconduct because Petitioner failed to show the State violated *Brady* by prohibiting him from viewing the video. First, no evidence here supports an argument that the video was in any way exculpatory. *See Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (providing "the evidence [must be] favorable to the accused" for its nondisclosure to constitute a *Brady* violation). Wellborn testified the video depicted an individual entering Petitioner's home, followed by the audio of a discussion between an individual and Petitioner that a jury would likely believe "was related to drugs and transactions related to drugs." He stated Petitioner could also be seen on the video "fiddling with a package." Wellborn believed the informant would have testified at Petitioner's trial that Petitioner was "packaging up drugs" in the video. Additionally, Petitioner admitted the video depicted him "doing something with a plastic bag," adding, "It looked like I probably was messing with drugs." Accordingly, the video was not favorable to Petitioner and did not implicate *Brady*. *See Hyman*, 397 S.C. at 47, 723 S.E.2d at 381 ("Petitioner has not proven that the videotape was favorable to him. By all

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Rule 407, SCACR. *See* Rule 3.4, RPC, Rule 407, SCACR ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."). However, this memorandum was not included in the Appendix. Petitioner additionally cites a Utah criminal procedure rule. *See* Utah R. Crim. P. 16(b) ("The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure."); *see also* Utah R. Crim. P. 16(a) ("Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which the prosecutor has knowledge: . . . (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense."). In Petitioner's reply brief, he asserts he did not cite *Brady* in his Petitioner's brief because no attorney for Petitioner knows if a *Brady* violation has occurred due to the fact that no attorney for Petitioner has seen the complete video and Petitioner's argument here is that the State failed to comply with Rule 5, SCRCP.

accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence at issue is *inculpatory*, *Brady* is inapplicable.").

Moreover, the State allowed Wellborn to view the video.[4] As a result, the State did not refuse to disclose the evidence, another necessary element of a *Brady* claim. *See Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (providing evidence must be "suppressed by the prosecution" to support a *Brady* violation claim); *Hyman*, 397 S.C. at 46, 723 S.E.2d at 381 ("[I]t is undisputed that the solicitor disclosed the videotape to defense counsel. Therefore, in order to find that this action amounts to impermissible suppression under *Brady*, we must first assume that the Constitution requires disclosure of *Brady* evidence to a criminal defendant *personally*. We are unwilling to make that sweeping assumption, and find that disclosure to defense counsel was satisfactory under the present circumstances.") Accordingly, we affirm as to this issue.

II. Waiver of Right to Counsel

Petitioner contends the PCR court erred in not finding the plea court failed to establish he was adequately informed of the dangers of self-representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established such issues were only dealt with in a pro forma fashion. Petitioner argues he did not waive his right to counsel with a full understanding of his rights and the consequences of self-representation. He asserts

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[4] Petitioner asserts Wellborn only saw the portion of the video the State deemed relevant. He points to Wellborn's testimony at the PCR hearing that the State told him it would "prepare relevant portions of the video for [him] to watch." The State contends Wellborn testified he viewed "the video." The PCR court's order quoted the State's email that it would "prepare the relevant portions of the video" and found Wellborn "testified he viewed the video." Petitioner did not argue to the PCR court that because Wellborn only saw a portion of the video, he could not know if the omitted portions of the video were exculpatory. A point not raised in a PCR application or at the PCR hearing is not proper for review on appeal. *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983). "In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). The video was not admitted into evidence at the PCR court or submitted to this court.

the plea court did not inquire about the circumstances under which his counsel was relieved or adequately warn him of the dangers of self-representation. Petitioner also asserts the State coerced his waiver of counsel by declaring its intent to seek an LWOP sentence at trial and refusing to allow him to review all the evidence against him. As a result, Petitioner argues he did not knowingly and voluntarily waive his right to counsel. We disagree.

"A defendant in a criminal case 'has the right to the assistance of counsel.'" *Osbey v. State*, 425 S.C. 615, 618, 825 S.E.2d 48, 50 (2019) (quoting *State v. Justus*, 392 S.C. 416, 419, 709 S.E.2d 668, 670 (2011)). "In *Faretta*, the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment." *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 491 (2018). "In order to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently[,] and voluntarily." *Id.*

> Although a defendant need not himself have the skill and experience of a lawyer in order [to] competently and intelligently . . . choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Faretta, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). "In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial." *Gardner v. State*, 351 S.C. 407, 412, 570 S.E.2d 184, 186 (2002).

In *Iowa v. Tovar*, the Supreme Court addressed "the extent to which a trial [court], before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation." 541 U.S. 77, 81 (2004). The Court considered whether, as the Iowa supreme court found, a court must specifically (1) advise a defendant that waiving counsel risks overlooking potential defenses and (2) admonish the defendant that by waiving counsel he would lose an independent

opinion about whether pleading guilty was wise. *Id.* It held the Sixth Amendment did not require either warning, reasoning "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 81. The Court explained:

> We have not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

Id. at 88.

Under South Carolina case law,

> To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. In the absence of a specific inquiry by the trial [court] addressing the disadvantages of a *pro se* defense as required by the second *Faretta* prong, this [c]ourt will look to the record to determine whether [the] petitioner had sufficient background or was apprised of his rights by some other source.

Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990).

In *State v. Bryant*, the probation revocation court and Bryant had the following exchange regarding Bryant's right to counsel:

> Q: Do you understand that you have a right to have a lawyer represent you in connection with these proceedings?

A: Yes, sir.

Q: Do you wish for the court to inquire as to whether you would be entitled to a court appointed lawyer or do you wish to go forward today?

A: I want to go forward.

Q: Okay. Do you understand that an attorney may be of benefit to you, for example, there may be things I need to be told that you do not know to tell me, and that if you talk with a lawyer you and the lawyer would learn these things, do you understand that?

A: Yes, sir.

Q: Understanding that, do you still wish to waive your right to counsel and go forward?

A: Yes, sir.

Q: Alright. At any[ ]time before I make a determination in this matter, if you desire to talk to a lawyer all you have to do is tell me and I'll stand aside and give you a chance to talk to a lawyer, do you understand?

A: Yes, sir.

383 S.C. 410, 416, 680 S.E.2d 11, 14 (Ct. App. 2009). This court found the above "colloquy adequately informed Bryant of her right to counsel and informed Bryant of the benefits of retaining counsel. Further, the probation court indicated Bryant could invoke her Sixth Amendment right at any point prior to a final ruling." *Id.* This court noted "the probation court did not expressly address the dangers and disadvantages of appearing pro se as required by *Faretta*." *Id.* Ultimately, however, this court found Bryant validly waived her right to counsel because she

"had both a sufficient background and was apprised of her rights by some other source."[5] *Id.* at 417, 680 S.E.2d at 15.

"The extent of inquiries made by the trial [court] . . . is not conclusive." *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). "While a specific inquiry by the trial [court] expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial [court]'s advice but rather the defendant's understanding." *Id.* "If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Id.*

> When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

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[5] The court based that finding on "Bryant's previous experience in the criminal justice system, her previous representation by counsel, [a] signed Probation Notice [informing her she could have an attorney represent her and that there are dangers and disadvantages to self-representation], and the probation court's colloquy with her." *Bryant*, 383 S.C. at 417, 680 S.E.2d at 14-15.

Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

In *Wroten*, the supreme court found "the [plea court] made no specific inquiry to determine whether [the] petitioner made his choice to proceed *pro se* 'with eyes open.'" 301 S.C. at 294, 391 S.E.2d at 576. The court noted the petitioner "was forty-five years old at the time of his plea and had a fifth-grade education." *Id.* at 295, 391 S.E.2d at 576. The petitioner contacted a public defender after his bond hearing but never heard back from the attorney, and on the day of his plea, "the attorney did not have time to speak with him." *Id.* at 295, 391 S.E.2d at 576-77. When asked whether he wanted an attorney, the petitioner replied that he did not know what to do, and his prior experience with the court consisted of one other guilty plea. *See id.* at 295, 391 S.E.2d at 577. The supreme court found "the record . . . d[id] not demonstrate [the] petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel." *Id.* It reversed the PCR court's denial of relief and remanded for a new trial. *Id.*

In *Prince*, the supreme court similarly reversed the PCR court's denial of relief, finding "the record d[id] not demonstrate petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se*." 301 S.C. at 424, 392 S.E.2d at 463. The court noted Prince "was twenty-two years old at the time of his plea," "was a high-school graduate [with] some college education," "had previously pleaded guilty to armed robbery," "was mentally disturbed at the time of his plea," and "exhibited little understanding of criminal proceedings" at his PCR hearing. *Id.*

In *Gardner*, the supreme court found "the plea [court] did not give [the p]etitioner any warning about the dangers of proceeding *pro se*. [It] did not inform him of the nature of the charges or of the possible penalties." 351 S.C. at 413, 570 S.E.2d at 187. The court noted the petitioner had "a [twelfth-]grade education, and he had been represented by counsel on a previous charge to which he pled guilty. He also had a private attorney when he was first charged. However, the record [gave] no indication this attorney explained to him the dangers of self-representation." *Id.* The court further observed the plea court "did not advise [the p]etitioner of the crucial elements of the charged offenses, or of the possible penalties if the recommended sentence was not accepted by the [court]. In addition, the [court] did not ask questions to ensure [the p]etitioner's understanding of the consequences

of his plea." *Id.* at 414, 570 S.E.2d at 187. The supreme court determined the petitioner did not knowingly and intelligently waive his right to counsel, and it reversed the denial of PCR and remanded for a new trial. *Id.* at 410, 413-14, 570 S.E.2d at 185, 187.

Here, Petitioner's waiver of counsel was voluntary and not coerced by the State, as Petitioner argues. *See Samuel*, 422 S.C. at 602, 813 S.E.2d at 491 ("In order to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently[,] *and voluntarily*." (emphasis added)). Petitioner was represented at his first plea hearing, at which he informed the plea court he was dissatisfied with Wellborn. Several days later, Petitioner reappeared in court and although intending to hire another attorney, affirmed he was "prepared to go forward without a lawyer." Soon thereafter, Petitioner "g[a]ve up [his] right" to an attorney, pled guilty, and received a fourteen-year sentence. At his PCR hearing, Petitioner claimed he decided to plead guilty because his plea offer would soon expire and after being unable to hire another attorney, he could not prepare for trial himself. However, Petitioner voluntarily chose both to remove Wellborn as his counsel and to take advantage of the State's plea offer, which reduced his sentence exposure from LWOP to fourteen years' imprisonment. Consequently, the State's decision to seek an LWOP sentence at trial and its handling of Petitioner's discovery materials did not coerce him into waiving his right to counsel or pleading guilty.

Next, Petitioner's waiver of counsel was knowingly and intelligently made. *See Samuel*, 422 S.C. at 602, 813 S.E.2d at 491 (noting a defendant's request to proceed pro se must also be made knowingly and intelligently). In *Gardner*, a PCR action that followed a guilty plea, our supreme court stated, "According to the United States Supreme Court, in order to waive the right to counsel, the accused must be (1) advised of his right to counsel *and* (2) adequately warned of the dangers of self-representation." 351 S.C. at 411, 570 S.E.2d at 186. The supreme court recently reaffirmed this requirement in another PCR case following a guilty plea. *See Osbey*, 425 S.C. at 619, 825 S.E.2d at 50 ("For a knowing and intelligent waiver to occur, the defendant must be '(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.'" (quoting *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463)).

In *Tovar*, which followed a guilty plea and was decided in 2004—after *Gardner* but before *Osbey*—the Court held two specific warnings required by the Iowa Supreme Court were not "mandated by the Sixth Amendment," adding that "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." 541 U.S. at 81. This information is more limited than *Faretta's* requirements of warning against proceeding pro se and that a defendant "be made aware of the dangers and disadvantages of self-representation." 422 U.S. at 835. However, the circumstances in this case demonstrate either standard was met.

Under *Tovar*, which limited the duty of a plea court when warning a defendant of the dangers of self-representation in a collateral attack of the guilty plea, Petitioner's waiver was valid. 541 U.S. at 81. Here, the plea court informed Petitioner of the charge against him, its potential sentence, and the consequences of the charge being classified as "serious." It also informed Petitioner he had the right "to have an attorney represent [him]." *See id.* ("The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."). The plea court further warned Petitioner, "It[']s dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you."[6] We find, under the circumstances of this case, the plea court's warning was sufficient to satisfy the Sixth Amendment, and Petitioner "made an informed choice to proceed *pro se* . . . with 'eyes open.'" *Gardner*, 351 S.C. at 412, 570 S.E.2d at 186.

Moreover, Petitioner's background also weighs in favor of his understanding the dangers of self-representation. *See Prince*, 301 S.C. at 424, 392 S.E.2d at 463 ("In the absence of [sufficient warnings of the dangers of self-representation] . . . , this [c]ourt will look to the record to determine whether [the] petitioner had sufficient background or was apprised of his rights by some other source."). Here, Petitioner was twenty-nine years old, in college, and nothing indicates he suffered from any physical or mental health issues. *See Gardner*, 351 S.C. at 412, 570 S.E.2d at 186

[6] Petitioner also signed a plea waiver form that warned, "I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger in my representing myself."

(providing that some of the factors courts consider are "the accused's age, educational background, and physical and mental health"). He was previously charged with murder and convicted of distribution of ecstasy within proximity of a school, distribution of cocaine within proximity of a park, and intimidating a witness. *See id.* (stating courts also consider "whether the accused was previously involved in criminal trials"). Petitioner was aware of the nature of his charges and the possible penalty, and Wellborn represented him until two days prior to his guilty plea. *See id.* at 412-13, 570 S.E.2d at 186-87 (noting courts can look at "whether the accused knew the nature of the charge(s) and of the possible penalties" and "whether the accused was represented by counsel before trial"). Petitioner testified at his PCR hearing he decided to plead guilty before the State's plea offer expired; thus, he was not "attempting to delay or manipulate the proceedings." *Id.* at 413, 570 S.E.2d at 187. Wellborn also testified at the PCR hearing he told Petitioner if the State's video evidence did not depict a drug sale, it would be a potential defense. *See id.* (providing courts also examine "whether the accused knew of legal challenges he could raise in defense to the charge(s) against him").

Additionally, Petitioner's colloquy prior to his waiver of counsel did not entirely consist of *pro forma* questions; instead, the plea court inquired about Petitioner's age, education, and employment and explained "the State would be required to appoint an attorney to represent" him if he could not afford one. *See id.* (finding courts consider "whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions"); *State v. Cash*, 309 S.C. 40, 46, 419 S.E.2d 811, 814-15 (Ct. App. 1992) (stating "the exchange between the [court] and Cash did not consist merely of *pro forma* answers to *pro forma* questions" because the court "explained that a lawyer would be appointed for Cash if he could not afford one"; "inquired about Cash's age and educational background, about the teachers he had in prison, and about the amount of time he had spent in prison"; "stressed that Cash could be sentenced to thirty years" for the indicted offense; and asked Cash why he did not want an attorney to represent him).

Finally, as stated above, Petitioner's plea was not coerced. *See Cash*, 309 S.C. at 43, 419 S.E.2d at 813 (noting courts consider "whether the accused's waiver resulted from either coercion or mistreatment"). Although the appendix contains no evidence of a warning to Petitioner that "he would be required to comply with the rules of procedure at trial" or that Wellborn "explained to him the dangers of

self-representation," and the plea court did not appoint stand-by counsel, the majority of the above factors weigh toward a finding that Petitioner's background was sufficient for him to be aware of the dangers of self-representation. *See Gardner*, 351 S.C. at 413, 570 S.E.2d at 187. *Compare Osbey*, 425 S.C. at 620-21, 825 S.E.2d at 51 (finding two prior convictions and prior violations of probation and parole were "an insufficient basis on which to find Osbey actually understood the dangers of self-representation"), *with Bryant*, 383 S.C. at 417, 680 S.E.2d at 15 ("Based on Bryant's previous experience in the criminal justice system, her previous representation by counsel, the signed Probation Notice, and the probation court's colloquy with her, we believe Bryant had both a sufficient background and was apprised of her rights by some other source."), *and Cash*, 309 S.C. at 43-46, 419 S.E.2d at 813-15 (finding Cash's background was sufficient because he was forty-six years old; spent thirty-four years in prison; completed the equivalent of six years in college; was not mentally or physically impaired; had previous experience with criminal proceedings, including a prior pro se appearance at a *habeas corpus* hearing; understood the nature of the charge and the possible penalty; had not been previously represented by counsel in the case but appreciated the difficulty of his case; was not attempting to delay or manipulate the proceedings; had stand-by counsel; knew he had to comply with procedural rules; was aware of potential defenses; did not engage in a merely *pro forma* colloquy with the court; and did not waive counsel due to coercion or mistreatment), *and State v. McLauren*, 349 S.C. 488, 495-96, 563 S.E.2d 346, 349-50 (Ct. App. 2002) (finding McLauren's background was sufficient when he was a mature man with both formal and informal education; the record contained no evidence of any physical or mental impairment; he had participated in his own previous criminal proceedings and was involved in the criminal proceedings of other individuals at the correctional facility where he was held; he knew the nature of the charge he faced; although he was not represented by an attorney before trial and appeared pro se at his arraignment, the court assigned an attorney to assist him during the trial if he needed, who sat at the defense table with him; nothing indicated he was attempting to delay or manipulate the proceedings as he made a motion for a speedy trial and trial began a few months after his arraignment; he knew to comply with procedural rules and had at least some familiarity with the rules—he made motions, called several witnesses, and objected to questions; he knew of legal challenges he could raise in defense to the charges against him—he argued a novel theory of law; and no evidence indicated his waiver resulted from coercion or mistreatment—he expressly stated he wanted to represent himself and would waive his right to an attorney).

Based on the foregoing, we affirm as to this issue.

CONCLUSION

The PCR court's denial of Petitioner's application for PCR is

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gregg Pickrell, Appellant.

Appellate Case No. 2018-001139

Appeal From Kershaw County
Alison Renee Lee, Circuit Court Judge
William A. McKinnon, Circuit Court Judge

Opinion No. 5878
Heard February 10, 2021 – Filed December 8, 2021

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

HUFF, J.: Appellant, Gregg Pickrell, appeals from her murder conviction. She first asserts the immunity hearing court erred in denying her immunity from prosecution. She further maintains the trial court erred in allowing certain testimony from two law enforcement officers. Because we find the record supports the immunity hearing court's determination that Appellant failed to show

by a preponderance of the evidence that she was entitled to immunity from prosecution, and we further find no reversible error in the admission of the challenged testimony, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was indicted for murder in the death of Robert Lamont "Monty" Demary (Victim), who was sometimes employed by Appellant and with whom Appellant was engaged in a sexual relationship. It is undisputed that Appellant shot Victim in her home on the morning of September 11, 2014. However, Appellant maintained she was immune from prosecution pursuant to the Protection of Persons and Property Act (the Act).[1] Following an immunity hearing, Judge Alison Renee Lee denied Appellant immunity from prosecution. Appellant was thereafter tried by a jury before Judge William A. McKinnon, was convicted as charged, and was sentenced to thirty-five years' imprisonment.

A. Appellant's Statements to Law Enforcement[2]

Within hours of Victim's shooting, Appellant gave two statements to law enforcement. In her first interview by Kershaw County Sheriff's Investigator Rick DeVors—in the presence of then-victim's advocate, Karen DeVors—Appellant indicated Victim came to her farm house the night before, arriving by cab between 10:00 and 11:30 p.m. She explained that Victim was previously employed by her and the two began a sexual relationship in 2008, which Appellant maintained resulted in six years of physical abuse perpetrated by Victim. Appellant, a horse trainer, described a particular previous instance of abuse she suffered at Victim's hands when she took Victim and another employee, Tyrone Pearson, to Louisiana for a horse race. The police responded to the racetrack as a result of that incident, and Appellant "put [Victim] in jail" over the matter, where he stayed for sixty days for committing assault and domestic battery against her.

Appellant stated that on the night before the shooting Victim contacted her wanting money. She told him she would put the money in an envelope in the mailbox and he could "get [his] cab, and take [his] money." The next thing she knew, Victim

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[1] S.C. Code Ann. §§ 16-11-410 to 450 (2015).

[2] Appellant's statements were introduced as evidence in both the immunity hearing and the trial.

was on her porch, at which time she offered him a drink and they ate dinner. According to Appellant, Victim threw her against a desk prior to them eating dinner, there was a verbal argument during dinner, and there was another "altercation" after dinner. Victim passed out in a chair after dinner, and Appellant then got into bed. Victim later joined Appellant in bed and they engaged in sex. When they awoke around 6:45 a.m., Victim wanted to have sex again. However, Appellant's mother was expected to be at her house soon, and Appellant told Victim she needed to get him out of there. Victim was mad about not engaging in more sex and, upon discovering he was missing one of his earrings, he "had a fit" and began swearing. Appellant told Victim the earring had to be in the bed, but Victim, who had a bad temper, said something about Appellant stealing the earring and said, "I'm going to kill you." Appellant explained that she always kept a gun in a drawer by a boom box right outside the bedroom door. She described Victim as being "[f]urious about the earring," and stated that when he was like that he "does this sort of build-up" and he "inflates." Victim told Appellant, "If I cannot find this earring, I'm going to come and fucking kill you." Appellant told him she would find the earring for him, but he said, "No, . . . I'm going to find this earring. I'm going to da-da-da-da-da . . . ." Appellant then stated as follows:

> [A]nd the next thing I knew, he, he, turned at me, and then he said, ["]I'm going to, I'm going to come and kill you,["] and then he turned to the bed, and he was looking . . . in the bed for the earring, and I thought, You know what? I'm going to get the gun, and I'm going to point it at him, and I'm going to say, ["]Monty, just come on . . . .
>
> Come on.["] And it's the first time I've ever done that because I've always been afraid to even call 911. . . .
>
> And he said, ["]I'm going to find this earring, and I'm going to fucking kill you, Gregg. I'm going to fucking kill you.["] And the next thing I knew, I, I just, I just shot the gun. I shot the damn gun. I shot the damn gun. Oh my God. And when I saw that he was — — he went down, I thought, Oh, my God, I've hit this guy. And I went and got my phone, and I called 911 right off the bat with the gun in my hand.

When Investigator DeVors asked her what about this time made her pull the trigger, she stated she had been so close to death so many times at Victim's hands. Investigator DeVors again asked what was different about this time and she replied, "I just can't take any more beating . . . and the terrible things he said about my mother, who's helped him, and I just can't take it anymore." She further stated, "[I]t's been six years of — — I just don't, I don't want to get hurt anymore."

Appellant reiterated that she told Victim they needed to go because she had things to do with the horses and her mother was coming over to her house. She explained that she offered to find the earring and get it to him, but Victim "just kind of went like this at me, and he said, [']No, I'm going to find my earring . . . . [a]nd when I do, I'm going to do you.[']" Appellant stated Victim was referring to "the sex" he had previously been denied. The following colloquy then occurred:

> [Appellant]: And he said, ["]I'm going to do you, and then I'm going to kill you. I'm going to do you, and I'm going to kill you. I'm going to find my fucking earring.["] I said, I will find the earring. And he started doing this, and he started this and that, and it's just — —
>
> [DeVors]: Tell me what happened. So he's doing this. He's bowing up at you. What do you do? What's your next move?
>
> [Appellant]: I went and got the gun.
>
> [DeVors]: Okay
>
> [Appellant]: And I thought, I'm going to point the gun at him, and I'm going to say, Monty, let's go. Let's go. And — —
>
> [DeVors]: But that's what you're thinking. This is your plan: I'm going to . . . get him out [of] here because I'm going to point this gun at him. I'm going to get him out of here.
>
> [Appellant]: And you're going to get out of here.

[DeVors]: Okay. What actually happened?

[Appellant]: I didn't want him to get the gun from me.

[DeVors]: Right.

[Appellant]: Because I knew that either I would be destroyed — —

[DeVors]: Mm-hmm — —

[Appellant]: — — or whipped to death with the gun or something.

[DeVors]: Yeah. Okay.

[Appellant]: I mean, you know, . . . he's got this movie thing going, you know, and anyway, I — — when he — — he went something like this, and I just, I just pulled the — — I pulled the trigger.

[DeVors]: Okay. When you . . . pulled the trigger, the gun went off. Do you know where it hit him?

[Appellant]: No.

[DeVors]: What, what happened next?

[Appellant]: He went down.

[DeVors]: Okay.

[Appellant]: And I said, ["]Oh, my God, Gregg, what have you done? What have you done?["] And I thought

— — it was like with Dan,[3] when Dan went down, I went straight and called 911 and said, ["]Please come out here and send, send the ambulance.["]

[DeVors]: Mm-hmm.

[Appellant]: And I said the same thing this morning. I said, ["]Please send an ambulance. I've just shot someone.["] And I had no idea.

According to Appellant, the Louisiana incident was the basis for the big fight the two had the night before Victim's death. She stated that Victim "couldn't stop beating me over the fact I put him in jail . . . six years ago." Appellant's attorney arrived at the Sheriff's Office and asked for some time with his client, at which time Appellant's interview with Investigator DeVors concluded.

Appellant's second interview was conducted that same day by Investigator Rick Bailey in the presence of Appellant's attorney after her attorney told Investigator Bailey they had more information to share. Appellant expounded on the Louisiana incident and indicated that after Appellant returned from Louisiana toward the end of 2008, she contacted the Kershaw County's victim advocate, told her what happened, and stated she wanted the matter on file. Appellant described Victim as very volatile, and stated it was "like a switch would go off if you said something." Investigator Bailey asked Appellant about what occurred the previous night. She stated Victim wanted money, he got a cab, and she left money in the mailbox—as she had done in the past when Victim would make drunken threats against her and her property if she did not give him money. The next thing she knew, Victim showed up at her house, and she offered him a drink and dinner. She stated that Victim had a drink, and there was an altercation—during which she was thrown on a desk, Victim held her down, and she was "thrashed around."

Investigator Bailey asked Appellant what the situation was that morning up to the point of the shooting. Appellant explained that her mother was supposed to be coming over at 9:00 a.m. to help feed and vaccinate the horses, and Victim asked

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[3] Appellant explained early in the interview that Dan was her partner—with whom she had moved to South Carolina—who shot himself within six months of their moving here.

her about taking him into town. When she told him she needed to call her mother, Victim suggested she "make up some excuse." Appellant decided to drive Victim in the truck over to her mother's while making sure her mother did not see him in order to disguise the fact that Victim had been at her home, as her mother did not want Victim on the property. However, Victim was missing an earring, and he began cussing about it. Appellant suggested the earring was in the bed, and Victim went into the bedroom. Appellant started looking for the earring too but told Victim she needed to "get [him] out of [there]." When she told Victim she would find the earring, he told her, "No, I'm going to find my earring." Appellant continued to press Victim and told him they had to leave "right now." Appellant stated Victim would "do this [thing]" where he would "puff," and he would "swell-up" and "get this glazed look in his eye." She told him, "Come on, I'll get the damn earring; let's go." Victim told her, "I'm going to find this earring, and I'm going to fucking kill you."

Appellant stated she had moved the gun from her bedroom over to a bureau where she had a boom box because Victim had previously known where the gun was. She then stated as follows:

> And I came out when he was looking how he was looking and threatening and on and on and on, tearing the bed apart [be]cause he wanted to find a damn earring. And . . . I thought, You know what? I'm going to get the gun, and I'm going to point it at him . . . which is the first time I've ever done that . . . and I'm going to say, ["]Look, let's go.["] But I didn't want to get close to him because I was afraid that, if I got close to him, he would take the gun.

Appellant told Investigator Bailey she was standing in the doorway when she pulled the trigger. She agreed with the investigator when he summarized that she went out of the room because they were arguing and she retrieved the gun from the bureau. She stated she pointed the gun at him, and Victim "started this," and she said, "[']Monty, look, just let's go. . . . Come on; let's go.['] And the way he looked, it looked like he was going to come after me." When asked if Victim made any advances toward her or said anything while she had the gun pointed at him, she replied, "He said, [']You're not shooting — — like, You're not fucking shooting me.['] And then he started like this, and I pulled the trigger." Investigator

Bailey then asked, "So he actually lunged at you?" Appellant replied, "He moved like this to come, but, you know, it's a small space there." The interview continued:

> [Bailey]: So you were in the room, and he was getting pretty belligerent and stating what he was going to do, so you went and retrieved the gun, came back into the room. Like I said, it's a short distance. I mean it's not like you traveled a great distance. You came into the room and pointed it at him.
>
> [Appellant]: Mm-hmm.
>
> [Bailey]: And the best you can remember is that he was making comments that you weren't — — you're not going to shoot me and things like that, and he actually moved like — —
>
> [Appellant]: Mm-hmm.
>
> [Bailey]: — — it looked like he was coming towards you. Okay. Like I said, I'm trying to understand, and I apologize if I'm rehashing stuff.

Appellant stated that after the shot went off, she ran because she had no idea what happened. Appellant agreed with Investigator Bailey that she pointed the gun at Victim and he "kind of swelled up again and said, [']You're not going to shoot me[']" and that Victim "kind of leaned forward" toward Appellant, at which point she fired the gun and automatically turned and ran. Appellant said she then dialed 911 and told them "I've shot someone."

When asked "What was the deciding factor in you taking action today," Appellant stated, "I thought that was the end for me." Asked what made her feel that way, she said, "It was all night, all night. And wake up, and, you know, he, he'd want sex." She continued, "This morning it was that way. It was just, I mean, I want sex, and I don't care if you don't want sex." Appellant clarified, however, that she could not say he ever raped her, and it was just rough sex.

Investigator Bailey asked Appellant if she had frustration with Victim about his physical abuse of her the previous night or if she was apprehensive about her mother finding out Victim had spent the night at Appellant's home. Appellant stated that "frustrated" was not the word, and it was more that she was embarrassed that she was with him again and she was demoralized, but she was not "pointing the gun to do that." The investigator asked, if her intent was not to harm Victim, why had she retrieved the gun and pointed it at him. She replied, "I want you out of here. Let's go. Come on. Let's go," explaining Victim "would never take no for an answer." She said she was trying to get Victim out before her mother arrived, and she "just wanted him out of there." Appellant formulated what she was going to tell her mother to delay their meeting and told Victim her plan, but an hour later Victim was still there wanting his back rubbed. She agreed to rub his back, but told him they had to get him out before her mother arrived. Victim got dressed, but then "got pissed" because his earring was missing. Appellant agreed that she was frustrated with how Victim had behaved, and that's when she retrieved the gun, but her intent was not to harm Victim. Investigator Bailey asked, "I'm assuming your intent was that that was a motivating factor to get him out, was to pull a weapon. What happened that made you pull the trigger?" Appellant replied that "it just happened," and that she was "going to turn and run," but then she thought, "I'm going to have to ditch this gun because he's going to get this gun from me." At this point, her attorney interrupted the next question to discuss Appellant going to the hospital to have her injuries checked. After further discussion on that matter, the interview concluded.

B. The Immunity Hearing

Appellant filed a Motion for Immunity from Prosecution and a Motion to Dismiss pursuant to the Act. On January 26-27, 2017, Judge Lee held an immunity hearing, during which she clearly stated that the burden was on Appellant to establish her entitlement to immunity by a preponderance of the evidence. Appellant allowed that she was proceeding solely under section 16-11-440(C) of the Act.

Appellant testified she shot Victim the morning of September 11, 2014, because "[he] was going to kill me, and he was going to kill my mother." She testified to the events leading up to the shooting, stating that Victim arrived at her house by taxi at about 10:00 p.m. on September 10, 2014, and he was very agitated when he arrived. She described an altercation that night during which he grabbed her hair

and threw her into a door and another when he "thrust" himself at Appellant, "smash[ing her] onto [a] desk." Later in the morning, Victim came into the bedroom and demanded sex. Appellant testified she had a urinary tract infection at the time and she screamed in agony from the sex, "beg[ing] him," but Victim forced himself on her for hours, even though she told Victim "no" to having sex.

Appellant was expecting her mother—who did not approve of Victim—to arrive at 9:00 a.m. to feed the horses and give vaccinations. As Appellant was in the bathroom, Victim told her to hurry up because he was ready to leave; however, she then heard a loud commotion and discovered Victim hit her wind chimes and knocked a plate holding fruits and vegetables to the floor. Appellant asked what was wrong, and Victim said he could not "find his fucking earring." Appellant told him she would find it, but they needed to leave because her mother was about to arrive. Victim replied that he was going to find his earring before he left the house. Appellant again told him she would find it and would let him know once she had. She continued to plead with him to leave before her mother arrived, but Victim kept saying he was going to find the earring. Victim went back into the bedroom and Appellant followed him. She described Victim as being in a "frenzy over this earring," and stated that as she continued to plead and beg him to go, he "thrust [her] face-first into [a] trunk," causing an indentation in her cheek. Appellant stated that she started to cry because of the pain and, as she tried to get up, Victim kicked her in her back. She testified that she was pulling herself toward the door on her stomach when Victim grabbed her ankle and yanked her back toward him. She kept struggling, and Victim was yelling, "spewing . . . profane words about [her] and [her] mother." Appellant stated she was saying to herself that she was going to die and thinking she needed to protect herself and save herself and she had to "get through this." Appellant had a bureau located one step from the doorway that held a boom box, and behind the boom box was a gun. She "was struggling on [her] belly," and she pulled herself up and retrieved the gun. She stated she was in the doorway crying, and with her back having been kicked and her equilibrium off, she leaned her back on the doorway and pointed the gun. She shot Victim once, and then she ran, grabbed her cell phone, went out the door, and called 911.

Appellant testified that immediately preceding the discharge of the firearm, Victim was screaming profanities and obscenities, which turned into "terrorizing threats of [']I'm going to finish you off, you fucking whore, and I'm going to take your mother out and then I'm going to . . . light this place up.[']" Appellant stated

Victim saw her with the gun and said, "[Y]ou wouldn't fucking fire that. You wouldn't fucking shoot it. You wouldn't shoot me." He then moved, and Appellant fired. When asked why she shot Victim, Appellant replied, "He was going to kill me. He was going to kill my mother." Appellant's medical records from her visit to the hospital on September, 11, 2014, were admitted into evidence.[4]

Appellant admitted on cross-examination that she did not tell investigators that she told Victim "no" to having sex. She also acknowledged she did not tell the investigators anything about Victim grabbing her by the hair and thrusting her head into the door the night before the shooting. Additionally, she agreed there was nothing in her statement about Victim kicking her in the back and throwing her into a trunk the morning she shot him. Appellant acknowledged she told investigators she was thinking she would get the gun to point it at Victim and tell him, "let's go," that she was standing in the doorway and left the room because she and Victim were arguing, she retrieved the gun from the bureau and came back, but she did not say anything about an assault in between any of that. When asked if Victim lunged at her, Appellant stated that he did not.

Dr. Janice Edwards Ross, a forensic pathologist who performed an autopsy on Victim, testified Victim suffered from a single gunshot wound that entered his left mid-back. Based upon her experience, Dr. Ross opined that if Victim was standing straight up, the gun would have had to be positioned below his back and slightly to his left. If "the shooter was in a standing position, shooting straight," Victim would have to have been "bent over slightly such that the bullet would go in the back and then go straight through," but if Victim "stands back up, it looks like it's going upward." Dr. Ross agreed that, at any rate, Victim's back would have been to the shooter. She also opined, based upon the lack of powder or stippling, the gun was two or more feet away from the back of Victim.

Judge Lee issued an order denying Appellant immunity from prosecution. In particular, she determined Appellant was not entitled to immunity under section 16-11-440(C) of the South Carolina Code (2015) because she was not being

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[4] The record shows Appellant presented with vertebral tenderness of the mid T spine, as well as bruises on her left forearm and right scapular area. She was also given medication for a urinary tract infection (UTI), and pain medication for soft tissue injuries.

attacked by Victim or meeting force with force when she shot him. She found the only evidence of Appellant being under attack or meeting force with force was from her own self-serving testimony, and determined Appellant provided conflicting statements on this matter. Judge Lee noted the testimony of the pathologist supported Appellant's statement that Victim was looking for his earring at the time Appellant shot him. She observed that Victim was shot in the back, and the testimony of the pathologist indicated from the trajectory of the bullet that Victim was bent over and facing away from Appellant. Additionally, Judge Lee found "no credible evidence" that it was reasonable for Appellant to believe deadly force was necessary to prevent death or great bodily injury to herself or another or to prevent the commission of a violent crime, again finding the only evidence of such was Appellant's self-serving testimony during the immunity hearing, which was not included in her statements to law enforcement. Judge Lee concluded—based upon Appellant's testimony, her conflicting law enforcement statements, and the forensic evidence presented—Appellant failed to prove by a preponderance of the evidence that it was reasonable for her to believe the use of deadly force was necessary to prevent death or great bodily injury to herself or another or to prevent the commission of a violent crime.

Additionally, Judge Lee determined Appellant was not entitled to immunity under the Act because she could not prove by a preponderance of the evidence the three elements of self-defense necessary in an immunity matter.[5] First, Judge Lee found Appellant was not without fault in bringing on the difficulty because she brought a loaded weapon into the situation when Victim was not assaulting her, or even facing her, when she retrieved the weapon. Second, she found, other than Appellant's inconsistent and self-serving statements, there was "no credible

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[5] In addressing whether Appellant could prove self-defense, Judge Lee cited *State v. Curry* for the proposition "that when reviewing whether a defendant should be granted immunity under section 16-11-440(C), the trial court 'must necessarily consider the elements of self-defense,'" with the exception of the duty to retreat. 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). She then quoted from *Curry* that a "claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *Id.* at 372, 752 S.E.2d at 267. However, Judge Lee immediately followed that statement with, "Therefore, this Court must evaluate whether [Appellant] has proven by a preponderance of the evidence that she acted in self-defense when she shot . . . [V]ictim."

evidence" Appellant was in actual imminent danger of losing her life or sustaining serious bodily injury at the time of the shooting or that a reasonably prudent person of ordinary firmness and courage would have believed such when she shot Victim. Rather, her statements to law enforcement and her testimony indicated she was motivated to get Victim to leave her house before her mother arrived. Judge Lee also found there was no evidence that any belief of Appellant that she feared being hurt or killed was reasonable since Victim was unarmed, he was shot in the back from a distance of at least two feet, Victim had no defensive wounds, and Appellant gave inconsistent statements about whether Victim even saw her with the gun. Judge Lee concluded there was a question of fact as to whether Appellant was in imminent danger of losing her life or sustaining great bodily injury or whether her belief of such was reasonable, and Appellant could not "prove all of the elements of self-defense (except the duty to retreat) by a preponderance of the evidence."

C. The Trial

At trial, the State presented evidence that on September 11, 2014, officers responded to Appellant's residence for a shooting incident where they encountered Appellant outside with her mother and found Victim in a small bedroom, unresponsive and with no weapons around him. EMS personnel arrived at the scene and asked Appellant if she had any injuries, but Appellant stated she was fine and refused transport. The coroner also responded to the scene, where he found Victim deceased in a back bedroom. Victim was sitting on the floor, face up and propped against a bed.

Dr. Ross, who was qualified as an expert in forensic pathology, again testified on behalf of the State. She noted she found a bullet entrance wound to the left back of Victim's body, and the bullet was found on the right side of Victim's chest underneath his skin. Dr. Ross noted "bullets go straight" and testified, "[T]his bullet went from the back towards the front, from the left towards the right, and slightly upward." She did not find any stippling, which told her the end of the gun was two feet or further away from Victim's back. When asked, based upon her training and experience, what she found in regard to the position of Victim, Dr. Ross stated as follows: "[L]ike I say, bullets go straight. So, it was going left to right, back to front, and slightly upward. Now, if [the shooter] is in a standing position, that might mean that . . . [V]ictim was bent, bent over somewhat. That, that's one scenario." Asked what another scenario might be, Dr. Ross stated,

"Well, [Victim] could be lying down on the ground face down, and the shooter could be above him shooting." Dr. Ross found no other significant injuries or defensive wounds on Victim.

On cross-examination, Dr. Ross acknowledged she had said that bullets travel straight and agreed that there were several conceivable scenarios as to how the entrance wound could have occurred. She indicated she would not be able to say whether Victim was moving at the time he was shot. On redirect examination, the solicitor referred to defense counsel's query regarding "different scenarios as far as . . . [V]ictim being shot and could they turn" and then asked whether that changed where the entrance wound was on Victim. Dr. Ross replied that it did not and that "the direction of the wound just mean[t] that the muzzle of the gun was in the back of . . . [V]ictim, slightly to his left," and that the entrance wound was in Victim's back, "[m]oving towards [his] front."

The State also presented the testimony of Victim's friend, Stephanie Owen, who stated that she was supposed to pick Victim up on September 11, 2014, to take him to look for a job. She received two texts from him that morning—around "8:20 something" and "8:30 something"—asking her if she was off work. She texted Victim back about ten minutes later but never received an answer.

SLED Agent Dawn Claycomb stated she and her partner responded to a request by the Kershaw County Sheriff's Office for crime scene assistance on this matter. Agent Claycomb testified concerning the layout of Appellant's home, as well as items found and things she observed at the scene. In particular, she noted she saw Victim's body in a sitting position leaning against the bed, located approximately ten feet from the bedroom door. Agent Claycomb also testified regarding the location of a cartridge casing found in Appellant's home and possible implications concerning that location.

Investigator DeVors also testified during the trial concerning his involvement with the case, including his interview of Appellant. A redacted version of Investigator DeVors' interview of Appellant was then played for the jury. The investigator testified that although he attempted to get a direct answer from Appellant as to why she pulled the trigger when she shot Victim, he was not able to do so. At the time he interviewed Appellant, he was not aware Victim had been shot in the back. Karen DeVors testified at the trial that she sat in on the interview of Appellant by

Investigator DeVors, took photographs of Appellant's injuries, and transported Appellant to the hospital that afternoon due to her injuries.

Investigator Bailey testified at trial that, after arriving at the scene, he was tasked with going back to the office and interviewing Appellant. When he arrived there, Appellant was being interviewed by Investigator DeVors. After Appellant's attorney arrived and spoke with Appellant, Investigator Bailey conducted another interview of Appellant. At that time, Investigator Bailey had information that there had been an argument and Victim had been shot in the back. He also observed at the scene that Victim was in a seated position facing the door. Investigator Bailey's interview of Appellant was played for the jury, after which the solicitor questioned the investigator about the interview. When asked about the portion of the interview regarding why Appellant pulled the trigger when she did, Investigator Bailey expressed his concern with Appellant's answers, explaining Appellant's version of Victim coming at her did not match the bullet entry wound on Victim.

Toni Campbell, a charge nurse working in the emergency department at Kershaw County Medical Center, testified she took a history from Appellant after she arrived at the hospital on September 11, 2014. Appellant told her she had been physically assaulted the night before by a person with whom she had an on again, off again relationship that had been violent in the past; she had been thrown onto a desk, choked, and thrown into a wall; this all occurred between the hours of midnight and 4:30 to 5:00 a.m.; and she had consensual sex that night, but the assailant became angry about his inability to complete the act and began to get aggressive, leading to battery. Appellant complained of pain in the face, neck, and mid-to-upper spine and was found to have soft tissue swelling, but she had no significant injury. She did not complain about a UTI, but a urinalysis performed based upon her complaint of back pain revealed an incidental finding of a UTI. No rape protocol was performed because Appellant was questioned multiple times and adamantly stated that she was not sexually assaulted and that the sex was consensual. A CAT scan performed on her head, face and neck was unremarkable, except for a questionable nasal fracture. The nurse testified that such a notation could indicate an old injury, soft tissue swelling, or an abnormality in bone structure that could have resulted from a series of assaults to the face.

SLED Agent James Green, who was qualified as an expert in the field of firearms and tool mark identification, testified the bullet recovered from Victim and the

cartridge case recovered from the scene were both fired from the pistol found at the scene. When asked by the solicitor about the ejection pattern on this particular firearm, Agent Green replied that it was not an examination performed at SLED due to all of the variables involved. However, he explained, as a general rule, ejection would be to the back and the right for most semi-automatic pistols with an ejector on the left side of the firearm, as was the case with this particular pistol. Nonetheless, he clarified that because this pistol had "a tip-up barrel and the slide [was] open on both sides, [there was] no telling where it [would] go." Agent Green also observed that he had personally shot a firearm like the one involved here, and the cartridges had gone forward, backward, over his left shoulder and over his right shoulder, "[s]o there [was] really no way of telling which way it [would] go once [it was] fired."

Investigator Miles Taylor—the on-call investigator on September 11, 2014, who was assigned this case—testified that he did not initially see the injury to Victim while at the scene but, when the coroner manipulated the body, he observed blood on the back of Victim's shirt. When his shirt was pulled up, there was a wound in Victim's back, but no exit wound was found on his chest. Once he completed his investigation, Investigator Taylor made a decision to charge Appellant after considering the interviews of Appellant conducted by Investigators DeVors and Bailey, the autopsy report, information concerning the trajectory of the bullet, the fact that Appellant stated she was the shooter and the reasons behind it—or the lack thereof. Investigator Taylor testified he was not able to substantiate the statements Appellant made during her interviews based upon the evidence he had. The solicitor asked the investigator if, after reviewing the autopsy report and Appellant's interviews, he had concerns about the information provided. Defense counsel objected to the form of the question as leading, which the trial court overruled. When asked again if he had any concerns about the information Appellant provided to Investigators DeVors and Bailey, he replied that he had concern regarding Victim being shot in the back, noting the information Appellant was providing was not consistent "as to what she was telling one investigator versus another one about how this occurred." Investigator Taylor further explained his concern was that Appellant told Investigator Bailey that Victim lunged at her, but "the autopsy results [were] totally opposite of what [she was] stating."

ISSUES

1. Did the immunity hearing court err in denying Appellant immunity (1) as a matter of law by ruling immunity had to be denied when there was conflicting evidence or (2) by determining Appellant was not entitled to immunity based upon the preponderance of the evidence?

2. Did the trial court err in admitting improper lay testimony of a Kershaw County Sheriff's Office investigator relaying his difficulty in understanding how Appellant could state that Victim lunged at her when she shot him given that Victim had been shot in the back?

3. Did the trial court err in admitting impermissible testimony from a SLED agent concerning the possible location of the shooter based upon the location of a cartridge case?

LAW/ANALYSIS

A. Immunity from Prosecution

Appellant asserts, because she proved that she was entitled to immunity by a preponderance of the evidence, this court should issue an order granting her immunity outright. In the alternative, she contends she should be granted a new immunity hearing because Judge Lee erred as a matter of law by ruling conflicting evidence mandated immunity be denied. She further asserts she is entitled to a new immunity hearing based upon erroneous determinations made by Judge Lee, including (1) the judge's ruling that Appellant was at fault in bringing on the difficulty because she introduced a loaded weapon into the situation; (2) the judge's incorrect finding of fact that Appellant did not seek protection from Victim by use of the Louisiana order of protection; and (3) the judge's determination that Appellant's testimony regarding her fear of getting hurt was not reasonable since this matter involved domestic violence. We disagree.

As noted, Appellant proceeded solely under section 16-11-440(C) of the Act, which provides as follows:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, *if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime . . . .*

S.C. Code Ann. §16-11-440(C) (2015) (emphasis added).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review." *Curry*, 406 S.C. at 370, 752 S.E.2d at 266. "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity" which "includes all elements of self-defense, save the duty to retreat." *Id.* at 371, 752 S.E.2d at 266. "[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *Id.* at 372, 752 S.E.2d at 267. "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567-68 (2019) (quoting *Curry*, 406 S.C. at 371, 752 S.E.2d at 266).

> To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. Section 16-11-440(C) provides the movant has no duty to retreat if, at the time of the attack, he was in a place where he has a legal right to be.

Id. at 449, 827 S.E.2d at 568 (citations omitted). Notably, "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Id.* at 451, 827 S.E.2d at 569.

After review of the evidence presented at the immunity hearing and Judge Lee's order, we find no error in the denial of immunity to Appellant. First, we recognize the immunity hearing court's recitation of the language from *Curry*—that a "claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution"—may lead one to question whether the judge erroneously applied the standard by finding immunity improper when there is conflicting evidence. 406 S.C. at 372, 752 S.E.2d at 267. However, this statement was immediately followed with the judge's recognition that she was tasked with evaluating whether Appellant proved by the preponderance of the evidence that she acted in self-defense when she shot Victim. Further, a review of the order shows Judge Lee recognized she was required to determine whether Appellant could meet her burden of establishing she was entitled to immunity by a preponderance of the evidence, acknowledging the same numerous times throughout the order. A thorough review of the order convinces us Judge Lee applied the appropriate standard and did not rely upon a conflict in the evidence as a basis to automatically deny immunity. Rather, Judge Lee was well aware of, and correctly applied, the proper standard, weighing the evidence and determining Appellant failed to prove she was entitled to immunity based upon the preponderance of that evidence.

As to Appellant's arguments that Judge Lee made erroneous findings and that she successfully proved she was entitled to immunity by a preponderance of evidence, we find there is evidence to support Judge Lee's determination that Appellant was not entitled to immunity under the Act because she could not prove the necessary element (1) that she either actually believed she was in imminent danger of losing her life or sustaining serious bodily injury—and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (2) that she actually was in such imminent danger and the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save herself from serious bodily harm or losing her life when she shot Victim. *See Cervantes-Pavon*, 426 S.C. at 449, 827 S.E.2d at 568 ("To warrant immunity, a movant must show . . . he actually believed he was in

imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief . . . [or] that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death."); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat."); *id.* at 372, 752 S.E.2d at 267 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence."). Specifically, the evidence supports Judge Lee's determination that "other than [Appellant's] inconsistent and self-serving statements, there [wa]s no credible evidence that [Appellant] was in actual imminent danger[,]" or that she reasonably believed that she was in actual imminent danger, "of losing her life or sustaining serious bodily injury at the time of the shooting or that a reasonably prudent person of ordinary firmness and courage would have believed such when she shot [Victim]." *Cf. Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569 (reversing the circuit court's denial of immunity under the Act, in spite of the State's contention there was evidence from the immunity hearing to support the court's ruling, when our supreme court was "unable to discern a legally correct basis on which the court relied").

As noted by Judge Lee, Appellant's statements to law enforcement indicated she was motivated to retrieve the gun and point it at Victim by her desire to get Victim to leave the house before her mother arrived. Further, Appellant's story changed in significant respects between her statements to law enforcement and her testimony at the immunity hearing. In her statement to Investigator Bailey, Appellant indicated that Victim moved toward her before she pulled the trigger, and she did not disagree with Investigator Bailey when he characterized her statement to him concerning Victim lunging at or coming toward her before she shot him. However, at the immunity hearing, Appellant specifically denied that Victim lunged at her. Additionally, in her statements to the investigators, Appellant only discussed a physical assault by Victim the night before. In the hearing, she testified that when Victim was searching for his earring and she was asking him to leave that morning before the shooting, Victim thrust her face-first into a trunk and, as she tried to get up, he kicked her in her back, grabbed her ankle and yanked her back toward him. Appellant's account also changed inasmuch as she continuously asserted to law

enforcement that the sex she engaged in with Victim was consensual, but at the hearing stated she told Victim "no" to having sex. Notably, although both investigators continually sought information about what caused Appellant to pull the trigger when she did, Appellant never told them that Victim was assaulting her just before that moment and that she feared for her life, as she testified during the immunity hearing. Rather, she indicated to the investigators that she retrieved the weapon in order to persuade Victim to leave the house and she pulled the trigger when she became fearful that he might take the gun from her and because she was tired of being hurt by him.

Based upon a review of Appellant's statements, her immunity hearing testimony, the forensic evidence submitted at the hearing, and other evidence from the hearing showing Victim was texting someone else to obtain a ride that morning, we find evidence in the record supports Judge Lee's determination that Appellant failed to meet her burden of proof by the preponderance of a evidence. Our deferential standard of review requires us to uphold Judge Lee's factual findings if there is evidence to support the same. *See State v. Manning*, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) ("We review immunity determinations under an abuse of discretion standard."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014)); *Curry*, 406 S.C. at 370, 752 S.E.2d at 266 ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *Douglas*, 411 S.C. at 316, 768 S.E.2d at 238 ("[T]he appellate court 'does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence.'" (quoting *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009))); *State v. Scott*, 424 S.C. 463, 476, 819 S.E.2d 116, 122 (2018) (Hearn, J., dissenting) (recognizing the appellate court's "limited lens when reviewing a circuit court's factual findings from an immunity hearing under the [Act]"). Accordingly, we hold Judge Lee did not abuse her discretion in denying Appellant immunity from prosecution under the Act.

B. Investigator Bailey's Testimony

The following colloquy occurred during Investigator Bailey's[6] testimony regarding Appellant's statement to law enforcement concerning why Appellant pulled the trigger when she did:

> [Solicitor]: And you asked her several times why she pulled the trigger?
>
> [Bailey]: Uh-huh.
>
> . . .
>
> [Solicitor]: Why did you ask her so many times?
>
> [Bailey]: I was trying to determine why she pulled the trigger. What would have made her do that. Was she in fear or was there something going on, was he coming after her. I wanted to know why she pulled the trigger.
>
> [Solicitor]: And did she ever at all tell you that she was in the midst of being assaulted when she shot [sic] the trigger?
>
> [Bailey]: One thing that concerned me, and I wasn't there to make a determination on guilt or innocence, was she, in the video, I think you may have seen, she said, ["]He kind of came at me like that.["] The thing that bothered me about that was I had already been told the point of impact of the bullet, and it didn't match up.
>
> [Solicitor]: What do you mean it didn't match up?

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[6] Although Appellant indicates in her brief that she is challenging Investigator DeVors' testimony, it is clear from her argument and the testimony in the record she is actually challenging that of Investigator Bailey.

[Bailey]: I found it hard to believe if he was coming at her - -

[Defense Counsel]: Objection, Your Honor. Asking for a conclusion.

[Solicitor]: I'm asking for his conclusion, not an evidentiary — —

[The Court]: Tell me what your objection is.

. . . .

[Defense Counsel]: He was about ready to give a conclusion based on what he has heard as to why she may have shot him. We can talk about facts, but now why he's being able to shoot — — or why she, I'm sorry, is being able to shoot. It is a conclusion on his part.

[The Court]: Ask the question one more time.

[Solicitor]: I asked why — — he stated that there was some concern or he kept asking about the trigger. And I asked him why was there a difference . . . . My question was something to the effect of, Why did you — — was there a concern that there was — — what she said about going at him and he was explaining that, why that was a concern to him. That was it.

[The Court]: I'm going to allow the question.

[Solicitor]: You can go ahead.

[Bailey]: I'm sorry. During the interview, I wanted to get as much detail as [to] what happened that led up to the event of actually pulling the trigger. Her response was that he pulled up and he kind of lunged at her. She

> never said, ["]He came at me,["] but she motioned that he kind of lunged towards her.
>
> Prior to the interview, I had knowledge that the deceased had been — — actually, the point of impact of the bullet was in the back. I had trouble understanding how if he was lunging forward how he was shot in the back.

No further objection was raised to Investigator Bailey's answer, and the solicitor then turned the witness over to the defense, whereupon the following colloquy immediately occurred between Investigator Bailey and defense counsel:

> [Defense Counsel]: Is it your contention that he has to be charging at her to shoot him?
>
> [Bailey]: That wasn't my contention. I was — —
>
> [Defense Counsel]: I'm asking you that question. Give us your opinion on that, sir.
>
> [Bailey]: I find it hard to believe that I was told that he was lunging at her, but he was shot in the back. That's where I had the issue.

Appellant asserts the trial court erred in allowing the investigator to "opine he did not understand how [A]ppellant could state that [Victim] lunged at her when she shot him, [when Victim] was shot in the back, since this was improper lay opinion that went beyond the investigator's duties as a fact finder, [when] he was not an expert qualified to give opinion testimony, and it directly attacked [A]ppellant's self-defense case." She argues, pursuant to our rules of evidence, a lay witness is only allowed to testify to matters within his personal knowledge and may not offer opinion testimony that requires special knowledge, skill, experience, or training. Appellant contends that "[d]efense counsel correctly objected that [Investigator] Bailey should not be allowed to give a conclusion or opinion about *how* the shooting occurred" as he was purely a fact witness, not an expert witness. (emphasis added). She maintains Investigator Bailey's testimony that he found it difficult to believe Victim was coming toward Appellant when he was shot in the

back went to the heart of her self-defense claim, which was the ultimate issue to be decided by the jury, and amounted to improper opinion testimony.

"A common distinction between expert witnesses and lay witnesses is that most lay witnesses do not state 'opinions.'" *State v. Gibbs*, 431 S.C. 313, 321, 847 S.E.2d 495, 499 (Ct. App. 2020), *cert. granted*, S.C. Sup. Ct. order dated June 18, 2021. "Even so, the evidentiary rules allow a lay witness to offer an opinion if certain criteria are met." *Id.* Our rule of evidence concerning lay testimony provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE.

First, we question whether the issue raised on appeal is properly preserved for our review. A review of Investigator Bailey's testimony in this matter shows the solicitor questioned him regarding his interview of Appellant and any statements she made regarding why she pulled the trigger at the moment she did. The solicitor specifically asked the investigator whether Appellant ever told him that she was in the midst of being assaulted when she pulled the trigger. No objection was made to this question. Investigator Bailey responded that Appellant's statement to him in this regard concerned him because Appellant indicated Victim had come at her and he was aware of the point of impact of the bullet, which did not "match up." The solicitor then asked what the investigator meant by it not matching up, and defense counsel objected when Investigator Bailey began to reply, "I found it hard to believe if he was coming at her — —," on the basis that it was "[a]sking for a conclusion." The trial court sought clarification as to the basis of the objection and defense counsel stated, "He was about ready to give a conclusion based on what he has heard as to *why* she may have shot him. We can talk about facts, but now why he's being able to shoot - - or *why she*, I'm sorry, *is being able to shoot*. It is a conclusion on his part." (emphases added). Thus, defense counsel's objection was that the witness was getting ready to state "why" Appellant shot Victim. On appeal, Appellant asserts error in the trial court

permitting Investigator Bailey to give a conclusion or opinion about "how" the shooting occurred—not "why" as argued to the trial court—noting Bailey stated he had trouble understanding how Victim "could have been lunging forward towards [A]ppellant when he was shot in the back." Defense counsel never raised any argument concerning evidentiary Rule 701, the propriety of lay testimony, or the inadmissibility of Investigator Bailey's "opinion" that it was difficult to reconcile Appellant's statement concerning Victim coming at her with the knowledge that Victim had been shot in the back. *See State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); *id.* at 38, 698 S.E.2d at 242 ("Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments."); *State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (explaining that an issue is unpreserved if a defendant argues one ground at trial and a different ground on appeal). Based upon the argument made at trial, we simply cannot conclude the contention raised on appeal—that the complained of testimony of Investigator Bailey amounted to improper lay testimony—was clearly presented to the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.").

However, even assuming defense counsel's objection sufficiently preserved the issue, we disagree with Appellant's assertion that Investigator Bailey's testimony constituted improper lay testimony. The investigator's answer did not offer a conclusion about either why or how Appellant may have shot Victim. Rather, it answered the solicitor's question of why Appellant's interview statements regarding what was occurring at the time she pulled the trigger raised a concern for the investigator. Thus, Investigator Bailey simply conveyed his perception that Appellant was indicating in her statement that Victim was coming toward her when Victim was shot, which caused him concern based upon his knowledge that Victim was shot in the back. This did not require specialized knowledge, skill, experience or training. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."); *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 281,

826 S.E.2d 609, 619 (2019) (finding the officers' testimony based upon their perceptions of their interactions with an individual complaining of theft "did not require special knowledge, skill, experience, or training [] and did not stray into the realm of expert testimony"); Rule 704, SCRE ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

Further, we find any error in the admission of this testimony from Investigator Bailey was harmless, as it was cumulative to other un-objected to testimony. First, immediately after this testimony on direct examination, defense counsel questioned Investigator Bailey as to whether he was contending Victim had to be charging at Appellant in order for her to shoot him. Investigator Bailey indicated that was not his contention, clarifying he found it hard to believe that he was told by Appellant that Victim was lunging at her given the fact that Victim was shot in the back, and he maintained that was "where [he] had the issue." Notably, defense counsel did not raise any objection nor request the answer be stricken from the record. Additionally, the record shows the solicitor asked another law enforcement officer—Investigator Taylor—whether, after reviewing the autopsy report and Appellant's interviews, he had a concern about the information provided by Appellant.[7] Investigator Taylor answered in the affirmative, explaining Victim had been shot in the back, the information Appellant provided in her interview was not consistent between the two investigator's interviews, and—as to her interview with Investigator Bailey in particular—Appellant indicated Victim had lunged at her, but "the autopsy results [were] totally opposite of what [she was] saying." Because Investigator Bailey's direct examination testimony complained of on appeal is cumulative to his cross-examination testimony, as well as to Investigator Taylor's testimony, Appellant cannot show prejudice from the admission of Investigator Bailey's testimony in this regard, and any possible error is harmless. *See State v. Brewer*, 411 S.C. 401, 409, 768 S.E.2d 656, 660 (2015) ("The admission of improper evidence is harmless [when] it is merely cumulative to other evidence." (quoting *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989))); *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for [an appellate court] to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."); *State v. Byers*, 392 S.C. 438, 448, 710

[7] Defense counsel did object to this question, but only on the basis that it was a leading question. The trial court overruled that objection, and Appellant does not challenge this ruling on appeal.

S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of the trial." (quoting *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990))).

C. Agent Claycomb's Testimony

Agent Claycomb testified concerning the layout of Appellant's home and her observations of the scene, specifically noting a cartridge case was located in a laundry basket sitting on top of a trunk that was near the door in the bedroom. The agent stated that she did not find anything that would indicate "where the shooter was." When asked about the cartridge case in particular, she stated, "[W]e can't necessarily tell where the shooter was located" as the gun may have a right or left ejection, and the location of the cartridge case would not "necessarily give us the exact location of the shooter." However, Agent Claycomb then testified, "It could allow you to eliminate areas that the shooter may have been or give you an idea of a location the shooter may have been." The following colloquy thereafter occurred:

> [Solicitor]: In this case, the [cartridge case] was found right by the doorway, I believe you said?
>
> [Claycomb]: Correct. Right when you walk in the bedroom door, there was — — the first small chest in a laundry basket.
>
> [Solicitor]: So what did that eliminate for you as to where the shooting would have occurred?
>
> [Agent Claycomb]: Well, saying — —
>
> [Defense Counsel]: Your Honor, I object to the fact — — I believe it's outside the scope of her — — I believe they have an expert coming in to talk about that. I believe this would be outside the scope of — — if we're talking about trajectory and — —

> [Solicitor]: I'm not. I didn't ask trajectory. I literally asked what places did it eliminate the shooting could have come from.
>
> [Defense Counsel]: But that would be based on the trajectory.
>
> [Solicitor]: Well, if I can lead her, then I can ask the specific question.
>
> [Defense Counsel]: No, Your honor. The rules don't allow it.
>
> [The Court]: Just limit it to the [cartridge case]. I'm going to allow the question.
>
> [Solicitor]: What areas did it eliminate that the shooting could have happened at?
>
> [Agent Claycomb]: Within the bedroom, saying that if the cartridge case was not moved or tampered with at that point.
>
> [Solicitor]: And all I meant was, in other words, it didn't happen in the living room?
>
> [Agent Claycomb]: Correct. If you would find the cartridge case in the bedroom, yeah, it would not occur in the living room had it not been touched or moved, anything like that.

Appellant contends the trial court erred in allowing Agent Claycomb to testify that she eliminated the shooting from happening "within the bedroom" or "in the living room" since the agent was not an expert and her impermissible lay testimony was highly prejudicial, as it was intended to convey to the jury that the shooting did not occur as Appellant told law enforcement. Conceding that this testimony by Agent Claycomb was "very confusing," Appellant maintains the motive for the question

and answer was clearly to show the shooting—as deduced from the agent's view of the forensic evidence—did not match Appellant's version.

After a thorough review of the record, we find any error in the admission of Agent Claycomb's testimony in this regard was harmless. First, the testimony elicited from the agent in this matter was confusing and somewhat contradictory. Agent Claycomb undermined her own statement that she did not find anything that would indicate where the shooter was and she could not "necessarily tell where the shooter was located" by testifying she could eliminate areas where the shooting occurred. Then, when she was allowed to answer the solicitor's question concerning what areas could be eliminated from where the shooting occurred, it appears she misunderstood the question and stated "within the bedroom." It appears Agent Claycomb may have thought the question asked was what areas were *not* eliminated by the location of the cartridge casing and the solicitor—recognizing the confusion over the question—attempted to clarify the matter by asking, "And all I meant was, in other words, it didn't happen in the living room?" On this point, Agent Claycomb agreed with the solicitor, assuming the cartridge case had not been moved.

Further, the testimony of Agent Claycomb concerning any significance of the location of the fired cartridge casing was refuted by the testimony of SLED Agent Green, a forensic firearm examiner who was qualified as an expert in the fields of firearms and tool mark identification. Agent Green testified that SLED did not perform ejection pattern tests for cartridges, noting all the variables involved that could not be replicated. He then stated, based on the specific characteristics of the firearm used to shoot Victim, there was no way to tell where the ejected cartridge case would go. Thus, Agent Green's expert testimony effectively refuted Agent Claycomb's lay testimony regarding the significance of the location of the cartridge in regard to the location of the shooter. Finally, we agree with the State that the testimony complained of on appeal was insignificant and irrelevant to any critical issue in dispute. Given the confusing and conflicting nature of Agent Claycomb's testimony, we disagree with Appellant's assertion that it conveyed to the jury that the shooting did not occur as Appellant told law enforcement. The only evidence submitted at the trial concerning where Appellant was specifically located when she shot Victim was in Appellant's statement to law enforcement. Appellant told Investigator Bailey that she stood in the doorway of the bedroom when she pulled the trigger. Other than the confusing testimony of Agent Claycomb inexplicably indicating the shooting would have been eliminated from occurring "[w]ithin the

bedroom,"—which is likely attributed to a misunderstanding of the question—there is nothing in the record to suggest the State disputed where Appellant was standing when she shot Victim. Rather, the only evidence presented by the State concerning the location of the shooter as related to Victim at the time of the shooting was Appellant's statement to Investigator Bailey that she was in the doorway when she shot Victim, Agent Claycomb's testimony that Victim was located approximately ten feet from the bedroom door, and the pathologist's testimony that the gun used to shoot Victim was a distance of at least two feet away from Victim when he was shot. In short, in view of the confusing and contradictory nature of Agent Claycomb's testimony and the fact that it was corrected by Agent Green, we do not believe Agent Claycomb's testimony in this regard suggested to the jury that the shooting did not occur in the location Appellant had conveyed to law enforcement. Further, because the location of the shooter was not in issue, we fail to see how Agent Claycomb's testimony in this regard prejudiced Appellant. *See Taylor*, 333 S.C. at 172, 508 S.E.2d at 876 ("[I]n order for [an appellate court] to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."); *State v. Reyes*, 432 S.C. 394, 405-06, 853 S.E.2d 334, 340 (2020) ("Some errors—when considered in the context of the facts of a particular case—are so insignificant and inconsequential they do not require reversal of a conviction."); *id.* at 406, 853 S.E.2d at 340 ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985))); *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) ("[When] a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.").

CONCLUSION

For the foregoing reasons, Appellant's conviction is affirmed.

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tammy Jordan, Respondent,

v.

The Hartford Financial Group, Inc., Resurgent Capital Services, Employer, Interstate Contact Cleaning Services, Inc. Third Party Tortfeasor,

Of which The Hartford Financial Group, Inc. is the Appellant.

Appellate Case No. 2019-001190

Appeal From The Workers' Compensation Commission

Opinion No. 5879
Submitted November 1, 2021 – Filed December 8, 2021

REVERSED AND REMANDED

Stephen Thomas Anderson, of Jordan Law Center, LLC, of Greenville, for Appellant.

Richard L. Patton, of Patton Law Firm, of Greenville, for Respondent.

HILL, J.: This worker's compensation matter began when Hartford Financial Group, Inc. sought to enforce a lien against a settlement received by Tammy Jordan. A single commissioner denied Hartford's motion, and Hartford appealed to the full

commission. A Form 31 Briefing Schedule and Notice of Appellate Hearing was served on all parties April 12, 2019. The Form advised that Appellant's brief was due on May 12, 2019, and that Regulation 67-705(A) required Appellant to file a brief. The Form further stated that Respondent "may" file a brief within fifteen days of service of Appellant's brief. The Form did not state that an appeal could be dismissed for failure to timely file a brief. The Form was captioned "*Sherman Financial v. Tammy A. Jordan*" and does not identify who the Appellants or Respondents are.

Upon receiving the Form 31, Hartford's counsel asked his paralegal to log the relevant dates on his calendar. The paralegal mistakenly thought Hartford was the Respondent and accidentally calendared that its brief was due on May 27, 2019.

On May 23, 2019, the commission dismissed Hartford's appeal for failure to file its brief by May 12. The next day, Hartford's counsel moved to reinstate its appeal. The motion, which included the paralegal's affidavit explaining the mix-up, asked the commission to reinstate the appeal for good cause due to the "honest human mistake." On June 17, 2019, the commission, without explanation, denied Hartford's motion to reinstate. Hartford now appeals to us. We reverse, reinstate the appeal and remand so Hartford's appeal may proceed.

I.

A. *Standard of Review*

Our standard of review of a decision of the South Carolina Workers' Compensation Commission is the familiar one established by § 1-23-380(5), which, as relevant here, allows us to "reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5) (2008).

Using this yardstick, we must consider how the commission's denial of Hartford's motion to reinstate measures up. The commission is free to reinstate an appeal for "good cause," a term the regulations do not further define. *See* S.C. Code Ann. Regs. 67-705(H)(4) (2012).

B. *Good Cause*

Why the commission did not deem Hartford's miscalendaring good cause is a mystery, for the Form Order does not mention the phrase or cite the controlling regulation. We cannot determine if the commission recognized it had the discretion to consider Hartford's all too human blunder to be sufficient good cause to allow its appeal to march on. *See State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (abuse of discretion occurs "when the trial court is vested with discretion, but the ruling reveals no discretion was exercised."); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."). The good cause standard exists to ensure the interests of justice are protected even when a party missteps, so a harmless procedural foot fault does not spring a trap door that mindlessly jettisons innocent parties out of court, regardless of the circumstances.

Rules are rules, and due dates matter. The rule of good cause is also a rule. A tribunal cannot strictly enforce due dates but ignore good cause. When that happens, the decision has left discretion's range and wandered into the arbitrary. An agency decision is arbitrary within the meaning of § 1-23-380(5)(f) "if it is without a rational basis, is based . . . not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Daufuskie Island Util. Co. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019) (citations omitted). The American tradition of rule of law has recognized from its earliest days that a "motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (Marshall, C.J.); *see also Martin v. Franklin Cap. Corp*., 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.").

We have held that an Administrative Law Judge acted arbitrarily by dismissing an appeal when a party's lawyer did not appear for court due to a calendar mishap. *See Mictronics, Inc. v. S.C. Dep't of Rev.*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) ("We find no evidence in the record that the mistake was anything but a good faith error, as shown by [counsel's] explanation coupled with his speed in asking the ALJ for rehearing."). We have also held good cause exists to set aside a

default granted because the answer was received one day late. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) ("[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief."). These cases recognize, as we do again today, that the practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene.

To be sure, miscalendaring is not always good cause. But a reflexive refusal to consider that a calendaring mistake could be good cause is an abuse of discretion. Some decisions have refused to find the neglect of a party's lawyer or agent in forwarding a summons or other time-triggering paperwork sufficient good cause to set aside a default, but those cases dealt with degrees of carelessness and periods of inattention far greater than we have here, and none tossed a party out of court for not timely filing a brief at a later stage of a perfected case. *See, e.g.*, *Campbell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020); *Dixon v. Besco Eng'g, Inc*., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). It bears mention that these decisions also illustrate how, rather than resolving a case, a trial court's inflexibility in applying procedural rules can inspire appeals resulting in awkward showdowns at the farthest ends of discretion's range.

We also point out the commission has been less than consistent in dealing with motions to reinstate dismissed appeals. *See Matute v. Palmetto Health Baptist*, 391 S.C. 291, 705 S.E.2d 472 (Ct.App.2011) (affirming the commission's reinstatement of appeal based on good cause where party claimed it never received order of single commissioner). Administrative agencies may insist upon strict compliance with filing deadlines, but to survive a challenge of arbitrariness, they must act consistently and with a rationale that reflects the appropriate discretionary factors were considered and touched upon. The touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps. *See S.C. Ins. Co. v. James C. Greene & Co*., 290 S.C. 171, 188, 348 S.E.2d 617, 626 (Ct. App. 1986) ("The law, however, is not merely an exercise of judicial power through the mechanical manipulation of rules; it is an organic body of principles rooted in reason, ethics, and human experience. The reason for a rule must control the application of the rule[.]").

We therefore hold the commission's summary denial of Hartford's motion to reinstate without rational analysis of the good cause standard was arbitrary and an abuse of discretion. We reinstate the appeal and remand so the appeal may proceed.

REVERSED AND REMANDED. [1]

KONDUROS and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.