The Supreme Court of South Carolina

In the Matter of John J. McConnell, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 21, 1987, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 6, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John J. McConnell, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 9, 2012

The Supreme Court of South Carolina

In the Matter of Sean David Armentrout, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2001, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, received January 31, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Sean David Armentrout shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

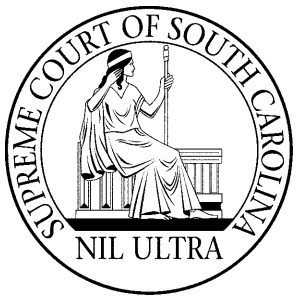
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 9, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 15, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4936-Mullarkey v. Mullarkey	Pending
2011-UP-425-State v. V. Ravenel	Pending
2011-UP-455-State v. J. Walker	Pending
2011-UP-517-McLean v. Drennan	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-530-Owens v. Thompson Const.	Pending
2011-UP-540-Vessell v. Knagenhjelm	Pending
2011-UP-558-State v. T. Williams	Pending
2011-UP-565-Griggs v. Ashley Towne	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2012-UP-003-In the matter of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Mitchell D.	Pending
2012-UP-025-Barnes v. Charter 1 Realty	Pending
2012-UP-026-In the matter of O. Williams	Pending
2012-UP-028-State v. McFadden	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-031-Cramer v. SCDC	Pending
2012-UP-047-State v. N. McGee	Pending
2012-UP-057-State v. Louis Gainey	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4592-Weston v. Kim's Dollar Store	Pending
4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Denied 02/09/12
4617-Poch v. Bayshore	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Denied 02/08/12
4685-Wachovia Bank v. Coffey, A	Pending
4687-State v. Taylor, S.	Pending
4691-State v. C. Brown	Pending
4699-Manios v. Nelson Mullins	Denied 01/11/12
4700-Wallace v. Day	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending

4732-Fletcher v. MUSC	Pending
4742-State v. Theodore Wills	Pending
4747-State v. A. Gibson	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4769-In the interest of Tracy B.	Granted 02/09/12
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4781-Banks v. St. Matthews Baptist Church	Granted 01/26/12
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4789-Harris v. USC	Denied 02/09/12
4790-Holly Woods Assoc. v. Hiller	Pending
4792-Curtis v. Blake	Pending
4798-State v. Orozco	Pending

4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4800-State v. Wallace	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending

4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4887-West v. Morehead	Pending
4889-Team IA v. Lucas	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4902-Kimmer v. Wright	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4902-Kimmer v. Wright	Pending
4907-Newton v. Zoning Board	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-352-State v. D. McKown	Pending

2010-UP-356-State v. Robinson	Pending
2010-UP-378-State v. Parker	Denied 01/11/12
2010-UP-382-Sheep Island Plantation v. Bar-Pen	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-427-State v. S. Barnes	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Denied 02/08/12
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-005-George v. Wendell	Denied 02/08/12
2011-UP-006-State v. Gallman	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-039-Chevrolet v. Azalea Motors	Pending
2011-UP-041-State v. L. Brown	Pending
2011-UP-052-Williamson v. Orangeburg	Pending

2011-UP-059-State v. R. Campbell	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-110-S. Jackson v. F. Jackson	Denied 02/08/12
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending
2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-130-SCDMV v. Brown	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending

2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending

2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-James v. State	Pending

2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William G. Mayer, Respondent.

Opinion No. 27093
Submitted January 17, 2012 – Filed February 15, 2012

PUBLIC REPRIMAND

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

William G. Mayer, of the Mayer Law Firm, LLC, of Laurens, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of either an admonition or public reprimand with the following conditions: 1) completion of the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program within six (6) months of the imposition of discipline and 2) payment of costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within sixty (60) days of the imposition of discipline. We accept the agreement, issue a public reprimand, and order respondent to comply with the two conditions set forth above.

The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent represented Client A's husband from July through October 2002. Client A's husband subsequently passed away.

Thereafter, respondent represented Client A in a criminal matter from March through July 2003. Respondent had a sexual relationship with Client A from late fall of 2003 through early spring 2004. He represented Client A again in a domestic action involving her children from June 2006 through February 2007.

Although respondent had no active cases with Client A while he was engaged in the sexual relationship, he did from time to time give her legal advice on a variety of matters. The Rules of Professional Conduct did not specifically identify a sexual relationship with a client as a conflict of interest until after respondent's sexual relationship with Client A ended;[1] however, respondent acknowledges that his conduct was prohibited by Rule 1.7, RPC, Rule 407, SCACR.

Matter II

Respondent's wife is a lawyer. Respondent's wife represented Client B in a personal injury case and obtained a settlement on Client B's behalf.

Respondent had a personal relationship with Client B. Client B asked respondent to act as trustee of her funds. Client B had an independent attorney draft a trust agreement naming respondent as trustee.

---

[1] See Rule 1.8(m), RPC.

Respondent's wife issued a series of checks payable to respondent on behalf of Client B totaling $17,600.00. Respondent did not consider his relationship with Client B to be attorney-client, but more like family; however, he acknowledges that, at a minimum, he had a fiduciary relationship with Client B and that he was bound by the Rules of Professional Conduct regarding the safekeeping of funds.

Respondent did not place Client B's funds in a trust account but, rather, negotiated the checks to cash and kept the cash in his office safe. Respondent represents he cashed the checks at Client B's request because she liked to come into the office and view the money.

Respondent used the funds to provide Client B with food, clothing, an apartment, and other personal necessities. Respondent did not maintain contemporaneous records of his disbursement of funds to and on behalf of Client B. Further, respondent admits that some of the payments were from his law firm operating account, rather than cash from the safe. Although respondent has demonstrated that he made payments to or on behalf of Client B equal to the amount of funds received on her behalf and that no funds were missing, he admits he did not comply with the requirements of Rule 417, SCACR.

In addition, respondent admits he loaned money to Client B. Although he charged no fees or interest or other consideration for the loan, he acknowledges it was improper for him to provide financial assistance to a client.

LAW

Respondent admits that, by his misconduct, he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7 (lawyer shall not represent client if the representation involves a concurrent conflict of interest; concurrent conflict of interest exists if there is significant risk that the representation of client will be materially limited by personal interest of lawyer); Rule 1.8(e) (lawyer shall not provide financial assistance to client); and Rule 1.15(a) (lawyer shall maintain client funds in an account; lawyer shall maintain

client funds separately from lawyer's personal funds). Respondent further admits he failed to comply with the financial recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Respondent shall 1) complete the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program within six (6) months of the date of this order and 2) pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter within sixty (60) days of the date of this order.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bentley Collins, Appellant.

Appeal From Dillon County
Paul M. Burch, Circuit Court Judge

Opinion No. 4941
Heard November 2, 2011 – Filed February 15, 2012

REVERSED AND REMANDED

Senior Appellate Defender Joseph L. Savitz, III, and Appellate Defender Susan Hackett, both of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliot, Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor William B. Rogers, Jr., of Bennettsville, for Respondent.

FEW, C.J.: Bentley Collins was convicted of involuntary manslaughter and three counts of owning a dangerous animal after his dogs killed a ten-year-old boy. Collins appeals the convictions claiming the trial court erred by (1) admitting seven autopsy photographs of the boy's partially eaten body and (2) denying his directed verdict motions as to both crimes. Because we find the trial court abused its discretion in admitting the photos, we reverse and remand for a new trial.

I. Facts

At around 7:00 p.m. on November 3, 2006, the boy's mother returned from a trip to find her son had not come home for dinner. After looking for him at neighbors' houses, she called the sheriff's department. The responding officers searched the neighborhood with her. They found the boy's body in Collins' yard surrounded by at least three dogs.[1] The boy's mother later testified "he was torn to pieces. Pieces."

Collins was indicted for involuntary manslaughter and three counts of owning a dangerous animal under the Regulation of Dangerous Animals Act. S.C. Code Ann. §§ 47-3-710 to -770 (Supp. 2011). After a jury convicted him of all charges, the trial court sentenced him to five years in prison, followed by five years of probation.[2]

II. Admissibility of the Photographs

The State offered into evidence ten photos of the boy's body. The photos were taken by a forensic pathologist before he performed an autopsy.

---

[1] Collins was not home at the time of the incident or when the officers and the boy's mother arrived.

[2] The specific sentences were five years for involuntary manslaughter and three years concurrent for two of the dangerous animal convictions. On the third dangerous animal conviction, the sentence was three years consecutive suspended on five years' probation and the payment of $8,000 in restitution to the boy's family for funeral expenses.

Collins objected to the admission of the photos under Rule 403, SCRE, arguing that the danger of unfair prejudice substantially outweighed their probative value. After a hearing outside of the jury's presence, the trial court admitted seven of the photos.

A. Standard of Review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). A trial court has particularly wide discretion in ruling on Rule 403 objections. See State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We . . . are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). We nevertheless hold that in this case the trial court abused its discretion.

B. Probative Value

Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). Probative value is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts or conditions." 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665

S.E.2d 201, 206 (Ct. App. 2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

Understanding the practical context of the trial of this case begins with the elements of the crimes charged. A person is guilty of owning a dangerous animal when the State proves (1) he owned or had custody or control of an animal; (2) he knew or reasonably should have known the animal had a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings; (3) the animal made an unprovoked attack; (4) the attack caused bodily injury to a human being; and (5) the attack occurred while the animal was unconfined on the owner's premises. S.C. Code Ann. §§ 47-3-710(A)(1)-(2)(a), (D); -720; -760(B) (Supp. 2011).

To convict a defendant of involuntary manslaughter, the State must prove one of the following: "(1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003).

On the dangerous animal charges in this case, the trial focused almost exclusively on issues relating to the second and third elements. Importantly, the fourth element—that the dogs' attack caused bodily injury to a human being—was never in dispute. In the hearing regarding admissibility of the photos, the State argued they would be important for the testimony of both the pathologist and the dog behavior expert. The State then explained how the photos were important, arguing only that they were probative of the third element. The State did not argue the photos were probative of any other element of the dangerous animal charges or any element of involuntary manslaughter.

The State thus argued the probative value of the photos was primarily to establish that the dogs' attack on the boy was unprovoked. The State's

theory on this point was that Collins underfed the dogs, and because the dogs were hungry, they became aggressive and attacked the boy for food. On appeal, the State makes two specific arguments as to how the photos support its theory: the pathologist needed the photos to explain that the dogs ate the boy, and the photos corroborate the testimony of its dog behavior expert.

As to the State's first argument, the photos do show that the dogs ate a significant portion of the boy's flesh. Prior to the introduction of the photos, however, the State presented convincing testimony to prove the same thing. The pathologist testified:

> There were extensive traumatic injuries consisting of loss of skin and soft tissue in a tearing fashion about the face, the ears, the eyes, the neck, the chest. There was loss of skin and soft tissue with exposure of the bones of both shoulders. Essentially, the humeral bone in the upper arm, both right and left, was exposed from the shoulder to the elbow.

The State also put the autopsy report into evidence prior to the photos. The pathologist testified to the contents of the report as follows:

> I described it as extensive traumatic injury, loss of skin to the face to include the nose, the ears and all soft tissues around the lips with exposure of the mandible, which is the lower jaw, teeth, and the underlying bony part of the skull. . . . The ears and nose were completely eaten away.

The State asked the pathologist what led him to conclude the ears and nose were "eaten away." He responded: "There was a virtual complete absence of the ear structures on the right side and just remnants, shredded remnants of skin and what were probably portions of the ear on the left. They were essentially gone." Finally, the pathologist said he normally does not take photos of an autopsy, but did so in this case because "[t]his autopsy showed tremendous traumatic injury to this young man. This degree of injury was [as] significant [a] traumatic injury as I've seen. I've never seen an attack by

animals of this type . . . ." Thus, before the photos were admitted, the pathologist's testimony conclusively established that the dogs ate the boy. The photos add very little to the jury's ability to understand the pathologist's testimony on this point.

The State's second argument relates to its dog behavior expert, who testified the dogs attacked the boy out of hunger, not provocation. The expert used photographs of the dogs to describe physical features that showed they were malnourished. The officers who responded to the scene testified there were no visible food bowls for the dogs. Based on this evidence, the dog behavior expert gave an opinion that the dogs attacked the boy because they were hungry.[3]

The State argues the photos corroborate the dog behavior expert's testimony and thus tend to prove the attack was unprovoked. However, the photos relate to the expert's opinion only to the extent they show the same fact testified to by the pathologist, that the dogs ate the boy. As discussed above, the photos add little to the pathologist's testimony. Moreover, the expert hardly mentioned the photos of the boy. The assistant solicitor asked this expert only one question regarding the photos: "Could you tell the jury what you found significant in reviewing those particular photos . . . as it relates to the level of aggression with the dogs[?]" The witness's response to the question did not relate the photos to his opinion or to how he arrived at it. Rather, the response highlights the unfair prejudice in the photos.

> Based on – in ten years going back on reports that I've noted on dog bites and dog attacks and deaths caused by dogs this is the worst case I've ever seen. I worked for the sheriff's office for over a decade, and I have never seen something so gruesome.

[3] The dog behavior expert also testified the dog bites on the lower part of the boy's body indicated "the dogs had bitten the ten-year-old in the legs taking him down first. . . . They would go for the legs first and take him down which shows from the bites and the tissue loss."

The photos add little to the jury's ability to understand the dog behavior expert's testimony.

Finally, we address the trial court's statement that the photos are probative of the cause of the boy's death. In explaining his ruling to admit the photos, the trial court stated "we've got to keep in mind . . . involuntary manslaughter, which involves cause of death." We find the photos add very little to the pathologist's ability to explain or the jury's ability to understand the cause of death. The pathologist testified the boy "died as a result of extensive traumatic injury secondary to being mauled by dogs." In particular, the pathologist testified the dogs "lacerated, basically transected the jugular vein on the left side." When the pathologist discussed the photos, however, he had already completed his explanation of the cause of death. The only mention the pathologist made of the cause of death during his discussion of the photos was his description of one of the photos as "an enlarged view showing the degree of injury to the left neck of this young man." As to that photo, he stated that the torn jugular vein was "very hard to see in this picture." Other than to discount the importance of the photos with this statement, the pathologist did not use any of them to explain the cause of death.

We agree that the photos have some probative value in helping the jury understand each of the three points argued by the State: (1) the pathologist's testimony that the dogs ate the boy, (2) the dog behavior expert's opinion that the dogs' attack on the boy was unprovoked, and (3) the pathologist's testimony that the dogs' attack in general and the torn jugular vein in particular caused the boy's death. However, the photos add little to the testimony of the witnesses on these three points. Referring to the supreme court's statement in Torres that "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts," the photos in this case are hardly "necessary." 390 S.C. at 623, 703 S.E.2d at 228.

More importantly, the issues the State argues the photos relate to are hardly "material." The three points argued by the State relate to the conduct of the dogs. As to the elements of the crimes, the focus of the trial should have been on Collins' conduct and whether his conduct was criminal in

nature. The conduct of the dogs is important, but only to the extent the dogs' conduct shows Collins' conduct. The photos are far removed from Collins' conduct, and even farther removed from whether Collins' conduct was criminal. The photos show the boy's body after the dogs attacked and killed him. The condition of the boy's body circumstantially shows the conduct of the dogs on the day of the attack—they ate the boy. From the conduct of eating the boy, the State argues the jury should infer the dogs were hungry, from which in turn the State argues the jury should infer that Collins starved them. At this point in the chain of inferences that the State asks the jury to draw from these photos, Collins has not violated the Dangerous Animals Act. At least two more steps are required. From the fact that he starved the dogs, the State argues Collins must have done so knowingly, and from this he reasonably should have known the dogs "had a propensity, tendency, or disposition to make an unprovoked attack" on a child to get food. In the practical context of the issues at stake in the trial of this case, these photos are of little significance.

For these reasons, we find the probative value of the photos is minimal.

C. The Danger of Unfair Prejudice

The probative value of the photos must be balanced against "the danger of unfair prejudice." Prejudice that is "unfair" is distinguished from the legitimate impact all evidence has on the outcome of a case. "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." Id. (quoting United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989)); see also United States v. Mohr, 318 F.3d 613, 619-20 (4th Cir. 2003) ("Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion . . . .").

Photographs pose a danger of unfair prejudice when they have "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (internal quotation marks omitted). This definition of unfair prejudice was taken originally from the Advisory Committee Notes to the formerly identical federal rule 403.[4] See State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (adopting the definition of unfair prejudice recited in the Notes of the Federal Rules Advisory Committee). Regarding this definition, the Supreme Court of the United States stated: "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case. See State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

The seven photos admitted are graphic and shocking. They depict a ten-year-old boy's body on an autopsy table after being partially eaten by dogs. The photos are in color. One photo provides an encompassing view of what remains of the boy's upper body. Three close-up photos show the remains of his face. The exposed skull and jaw bone are plainly visible in these photos. Two of these close-ups also show the exposed arm, shoulder, and rib bones, where the flesh was eaten away from the middle of his chest, across his shoulder and down to his elbow, on both sides. One photo shows the left side of the boy's face from the back, again with the exposed jaw bone visible. The remaining two photos are of the body from the waist down, showing his blood-stained shorts and the bite marks on his legs. The

[4] Rule 403 and other federal rules of evidence were amended on December 1, 2011, "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." Rule 403, FRE, advisory committee's note. The changes to Rule 403, FRE, are "stylistic only," with "no intent to change any result in any ruling on evidence admissibility." Id.

pathologist described what the photos show, but seeing the photos draws an intense emotional response and a level of sympathy for the dead child that does not come from the testimony. It is difficult to look at each photo, and the combined effect of all seven is disturbing. The photos that show what remains of the child's face are chilling. The danger of unfair prejudice of the admitted photos is extreme.

D. Balancing Probative Value and Unfair Prejudice

We have noted that a trial court has particularly wide discretion in ruling on Rule 403 objections. Adams, 354 S.C. at 378, 580 S.E.2d at 794. In this case, however, we find the danger of unfair prejudice in these photographs substantially outweighs their probative value, and the trial court abused its discretion in ruling otherwise.

Our analysis depends heavily on the capacity of these photos to draw the jury's attention away from the elements of the crimes charged, which are framed to focus the jury primarily on the conduct of the defendant. Seeing the photos of the child's partially eaten body lying on the autopsy table prompts an intense emotional response. The photos evoke sympathy for the boy and also for his mother for what she must have endured when she saw her son in this condition in Collins' yard. Consequently, the photos have precisely the effect contemplated by the definition of unfair prejudice: "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Holder, 382 S.C. at 290, 676 S.E.2d at 697 (internal quotation marks omitted). As stated in Old Chief, the photos "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." In Old Chief, the improper ground for declaring guilt was the defendant's propensity to commit crimes. 519 U.S. at 180-81. Other courts have identified additional improper grounds, such as when the evidence "appeals to the jury's sympathies [or] arouses its sense of horror." United States v. Thompson, 359 F.3d 470, 479 (7th Cir. 2004) (internal quotation marks omitted).

These gruesome photos have an overwhelming capacity to lure the jury into declaring guilt on the emotional basis of sympathy for the boy and his mother and horror at the sight of the boy's body. This is the unfair prejudice

that substantially outweighs the probative value of the photos. We recognize that the photos add a visual element not present in the testimony of the witnesses. However, this visual element does far more to create a danger of unfair prejudice than it does to add probative value. These photos are beyond "the outer limits of what our law permits a jury to consider." See Torres, 390 S.C. at 624, 703 S.E.2d at 229. For this reason, we find the trial court abused its discretion in admitting the photos.[5]

E. The Probative Value of Corroboration

The State argues, however, that the photos corroborate the testimony of the pathologist and the dog behavior expert, and thus have sufficiently high probative value that it is not substantially outweighed by the danger of unfair prejudice. The State is correct that the extent to which an autopsy photograph corroborates other evidence or testimony increases its probative value. However, the probative value from a photograph's tendency to corroborate will vary depending on the facts of an individual case. In some cases, photographs that corroborate important testimony on issues significant to the case may have very high probative value. As we have already explained, however, the photos in this case have minimal probative value, even considering the limited extent to which they corroborate the testimony of the witnesses.

This conclusion is supported by our opinion in State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). In Jarrell, we stated: "A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial. 'If the photograph serves to corroborate testimony, it is not [an] abuse of discretion to admit it.'" 350 S.C. at 106, 564 S.E.2d at 371 (quoting State v. Rosemond, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999)). As our opinion in Jarrell indicates, however, the photographs admitted in that

[5] See Old Chief, 519 U.S. at 182-83 ("If an alternative [is] found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.").

case corroborated important testimony on significant issues to such an extent that their probative value was very high.

Jarrell was charged with homicide by child abuse, accessory before and after murder, criminal sexual conduct, and unlawful conduct towards a child. 350 S.C. at 95, 564 S.E.2d at 365. Like the photos in this case, the photographs admitted in Jarrell showed the extent of the child's injuries. Unlike this case, however, the child's injuries in Jarrell were essential to the State's ability to prove the crimes of homicide by child abuse, criminal sexual conduct, and unlawful conduct towards a child. This is because the elements of those crimes require the jury to focus on the effect the defendant's conduct had on the child. Thus, we placed importance on the fact that the Jarrell photographs "corroborated the testimony about the condition of the child." 350 S.C. at 106, 564 S.E.2d at 371. Further, the time of the child's death was an important issue in Jarrell. The fact that the baby had been dead long enough for rigor mortis to set in and decomposition to begin, as shown by the photographs, "corroborated the pathologist's testimony about the time of death" and "support[ed] the charge against Jarrell of accessory after the fact." Id.

Most importantly, the Jarrell photographs corroborated testimony supporting the State's theory of motive. Jarrell discussed the abuse and death of the child with inmates while she was in jail awaiting trial. "She . . . stated that she and Father planned to kill the baby . . . because the baby had an upcoming doctor's appointment and the abuse would be readily apparent to anyone examining the baby." 350 S.C. at 96, 564 S.E.2d at 366. We explained the significance of the photos to Jarrell's motive as follows:

> We agree that the photographs were necessary to corroborate the testimony presented at trial. A photograph displaying the anal injuries due to the sexual abuse corroborated both the pathologist's testimony regarding the extent of those injuries and the witnesses' testimony that Jarrell's motive for planning to kill the baby was because the sexual abuse was readily apparent.

350 S.C. at 106, 564 S.E.2d at 371.

The supreme court has also placed importance on the fact that autopsy photographs corroborate the testimony of witnesses. In Holder, the court stated: "'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" 382 S.C. at 290, 676 S.E.2d at 697 (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). Holder was also a homicide by child abuse case. Thus, as in Jarrell, the injuries to the child were critical to the State's ability to prove the elements of the crime. The supreme court explained: "The photographs corroborated the pathologist's testimony about the extensive bruising on the child, which was in various stages of healing, and showed that even internal organs manifest signs of bruising. This is particularly helpful to jurors who are unversed in medical matters." 382 S.C. at 290-91, 676 S.E.2d at 697. The photos also corroborated the pathologist's testimony refuting Holder's testimony.

> Although Holder testified she was unaware of any marks on her son prior to his death and thought he was suffering from simple food poisoning, it is abundantly clear from the extensive bruising on the child, which was in various stages of healing, and the torn internal organs, that he had been seriously injured. These photographs demonstrate that the damage to the child would have been difficult to ignore.

382 S.C. at 291, 676 S.E.2d at 697.

Because the photographs in Jarrell and Holder strongly corroborated important testimony on significant issues, the photographs were found to have very high probative value. The supreme court explained this in Holder: "We find the photographs clearly demonstrate the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone." 382 S.C. at 290, 676 S.E.2d at 697.

Depending on the facts of a specific case, there may be other ways in which evidence challenged under Rule 403 corroborates evidence. See

Black's Law Dictionary 636 (9th ed. 2009) ("[C]orroborating evidence" is "[e]vidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support)."). Trial courts should consider the corroborating effect of evidence when analyzing its probative value. However, the limited extent to which these photos corroborate the testimony of the witnesses does not significantly increase the minimal probative value of the photos. A photograph of the partially eaten body of a child is not necessary to demonstrate that the dogs killed the boy and ate a significant portion of his flesh. These facts are readily understood based on the pathologist's testimony alone. Thus, we disagree with the State that these photos sufficiently corroborate the testimony of the pathologist or the dog behavior expert such that the probative value of the photos is not substantially outweighed by the extreme danger of unfair prejudice.

F. Deference to the Trial Court's Analysis

The State also argues the trial court's exclusion of several photographs indicates it did exercise discretion, and we should not disturb that exercise. The State correctly points out that both the supreme court and this court have deferred to the judgment of the trial court when the record reveals the trial court actually exercised its discretion. See, e.g., Jarrell, 350 S.C. at 106, 564 S.E.2d at 371 ("Significantly, the trial court did not admit all the photographs, giving the State a choice between two photographs depicting the same injury. . . . [T]he trial court's exclusion of photographs demonstrates it exercised its discretion."); see also Torres, 390 S.C. at 624, 703 S.E.2d at 229 ("[T]he trial judge did exercise his discretion by excluding three of the State's photographs, ruling that they were duplicative and prejudicial.").

The record in this case, however, shows that the trial court did not independently analyze the probative value of the photos. Therefore, the trial court did not properly exercise its discretion. See State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) ("The failure to exercise discretion, however, is itself an abuse of discretion."). The State called the pathologist to testify during the admissibility hearing. The court began its examination of the pathologist by telling him the State wanted to admit the photos at issue because they were "necessary for you to explain your findings." The court then asked the pathologist to "confirm" whether or not

he "need[ed]" each photo. The pathologist answered the question in conclusory fashion: "Your honor, these would certainly enable me to describe the degree of injury and show the extent of it. . . . [T]hese I think would be very beneficial to explain exactly what happened to this young man." The court then asked the pathologist: "Are there some in there that we could pull out that are merely repetitious?" The pathologist identified three photos, which were not admitted. The court then stated:

> Okay, based on [the pathologist's] testimony [that] he needs it in his scientific explanation I'm allowing those in . . . .

After counsel for Collins and the State questioned the pathologist, the trial court ruled:

> It is an unusual case, however, we've got to keep in mind that we've got involuntary manslaughter which involves death, cause of death. You've got [the pathologist] here who is one of the best, and he's informed the Court that he needs it. All right. I'm standing by what I've done. I'm overruling the objections . . . .

Without evaluating the probative value of the photos, the trial court was unable to balance that probative value against the danger of unfair prejudice, as required by Rule 403. The trial court's failure to independently make that evaluation is particularly significant in this case because, as we discussed earlier, the pathologist's explanation of the importance of the photos does not withstand scrutiny. Moreover, while the pathologist is fully capable of understanding the importance of the photos to medical considerations such as cause of death, the pathologist is not the person charged with the responsibility of relating that importance to the legal issues in the case. The trial court is charged with that responsibility.

The danger of unfair prejudice is so high that it required little analysis. The probative value, on the other hand, required careful analysis. In Jarrell and Torres the appellate court deferred to the judgment of the trial court when

it admitted some autopsy photographs but excluded others. The deference in those cases, however, was not simply to the trial court's decision. Rather, the appellate court deferred to the trial court's analysis. We do not defer to the trial court's decision in this case because the record reflects it was not based on the court's own analysis.

III. Harmless Error

We have considered whether the admission of the photographs was harmless beyond a reasonable doubt. See State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) (declining to reverse for error under Rule 403 because the error was harmless). In making the determination that the error was not harmless, we have considered the fact that the other evidence of the condition of the child's body also has potential to cause a similar emotional reaction we find constitutes the unfair prejudice in these photographs. Thus, we have evaluated whether the additional emotional impact of the photographs over and above that caused by other evidence in the case is such that the erroneous admission of the photographs is harmless. Given the intense emotional reaction caused by viewing these photos, we cannot say that their admission into evidence was harmless beyond a reasonable doubt. Accordingly, we reverse the trial court's decision to admit the photos and remand for a new trial.

IV. Directed Verdict

Collins argues the trial court erred in denying his motions for directed verdict as to both crimes. We find evidence in the record to support each element of both crimes. Therefore, the trial court ruled correctly in denying Collins' motions for directed verdict. See State v. Phillips, 393 S.C. 407, 412, 712 S.E.2d 457, 459 (Ct. App. 2011) ("An appellate court may reverse the trial court's denial of a directed verdict motion only if no evidence supports the trial court's ruling.").

Accordingly, the decision of the trial court to admit the photos is **REVERSED** and the case is **REMANDED** for a new trial.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jomar Antavis Robinson, Appellant.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4942
Heard October 3, 2011 – Filed February 15, 2012

AFFIRMED

Appellate Defender Elizabeth Franklin-Best, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Attorney General Harold M. Coombs, and Solicitor Kevin Brackett, all of Columbia, for Respondent.

WILLIAMS, J.: Jomar Antavis Robinson (Robinson) was convicted of possession of crack cocaine with intent to distribute, possession of crack cocaine with intent to distribute within one-half mile of a public park, unlawful carrying of a pistol, possession of marijuana, and resisting arrest. The circuit court sentenced Robinson to life imprisonment. Robinson appeals, arguing the circuit court erred in (1) denying Robinson's motion to suppress drugs found as a result of an illegal search and seizure; and (2) allowing the State to qualify the Commander of the Drug Enforcement Unit as an expert witness. We affirm.

FACTS/PROCEDURAL HISTORY

On March 20, 2010, Sergeant Rayford Louis Ervin, Jr. (Ervin) with the York County Drug Enforcement Unit (the Drug Enforcement Unit) conducted surveillance of the Hall Street Apartments in response to numerous anonymous complaints of criminal activity in the area. Ervin stated he observed conduct consistent with drug transactions and called for back-up. Lieutenant James M. Ligon (Ligon) and Officer Brian Schettler (Schettler) with the Drug Enforcement Unit responded. Upon their arrival, Ervin informed the officers he observed an individual, wearing a black leather jacket, meeting vehicles that pulled into the parking lot, going up to the vehicles' windows for a short time, and then returning to the porch of an apartment.

Ligon and Schettler approached the porch and smelled a strong odor of marijuana. Of the five individuals on the porch, two men were wearing black jackets matching Ervin's description. Ligon and Schettler asked the men for their identification. Ligon noticed one of the individuals, later identified as Robinson, had a pistol hanging out of the right pocket of his jacket. Ligon told the two individuals he could smell marijuana and see Robinson's pistol, and he was going to conduct a Terry[1] search. As Robinson began to retreat, both Ligon and Robinson reached for Robinson's pistol, and a fight between Ligon and Robinson ensued. During the struggle, Robinson's jacket fell to the ground and Robinson fled the scene. Ligon pursued him, and after an

[1] Terry v. Ohio, 392 U.S. 1 (1968).

altercation, Ligon placed Robinson in handcuffs. Once Robinson was in custody, Schettler searched the inside of Robinson's jacket and found the pistol, a bag containing marijuana, and a bag containing crack cocaine.

A York County grand jury indicted Robinson for possession of crack cocaine with intent to distribute, possession of crack cocaine with intent to distribute within one-half mile of a public park, unlawful carrying of a pistol, possession of marijuana, and resisting arrest.

Robinson moved in limine to suppress the pistol, marijuana, and crack cocaine found in Robinson's pocket, arguing the contents of his jacket were the result of an illegal search. The circuit court denied this motion finding the search did not violate Robinson's Fourth Amendment rights; Robinson did not have an expectation of privacy on the porch; and the officers had reasonable suspicion to investigate. When the State introduced the pistol and crack cocaine into evidence during trial, Robinson timely objected. However, despite his motion in limine to suppress the marijuana, Robinson offered the bag of marijuana into evidence during the cross-examination of one of the State's witnesses as a trial strategy.[2]

The State called Commander Marvin Brown (Commander Brown) of the Drug Enforcement Unit as a witness. The State offered Commander Brown as an expert in "how crack cocaine is packaged, sold, the going price, the typical intoxicating dose, and the different habits between the typical addict, the user, and the typical drug dealer." Robinson objected, arguing Commander Brown was not qualified as an expert witness under Rule 702 of the South Carolina Rules of Evidence. After voir dire of Commander Brown, the circuit court concluded he was qualified to testify as an expert.

Following the State's case-in-chief, Robinson moved for a directed verdict. In addition, Robinson renewed his motion to suppress the evidence obtained from the search, but he specifically conceded the marijuana was admissible based on his introduction of the marijuana during trial. The court

[2] Robinson's attorney affirmed at trial he introduced the marijuana into evidence as a trial strategy.

denied Robinson's motions. Robinson was convicted of all charges and was subsequently sentenced to life imprisonment pursuant to section 17-25-45 of the South Carolina Code (Supp. 2010).[3] This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

LAW/ ANALYSIS

I. Motion to Suppress

Robinson argues the marijuana and cocaine were improperly admitted at trial because they were obtained in an unlawful manner. We disagree.

a. Marijuana

Robinson introduced the marijuana into evidence during his cross-examination of Ligon; therefore, he cannot now complain of its admission on

[3] Pursuant to section 17-25-45, upon conviction of possession of crack cocaine with intent to distribute within one-half mile of a public park:

> "[A] person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for: (1) a serious offense; (2) a most serious offense; (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or (4) any combination of the offenses listed in (1), (2), and (3) above."

appeal. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal); State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (holding a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (holding a defendant cannot complain about the admission of evidence on appeal when he opened the door to the introduction of that evidence).

b. Crack Cocaine

Robinson argues the circuit court erred in admitting the crack cocaine at trial when (1) he had a reasonable expectation of privacy on the porch; and (2) Ligon and Schettler entered without a warrant and in the absence of exigent circumstances. We disagree and address each argument in turn.

i. Expectation of Privacy

Robinson contends the search was in violation of his Fourth Amendment rights because he had an expectation of privacy on the porch. We disagree.

For Robinson to establish a Fourth Amendment violation, he must show a legitimate expectation of privacy on the porch. See State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) ("To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched."). "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." Id. (quoting Oliver v. U.S., 466 U.S. 170, 177 (1984)).

"A reasonable expectation of privacy exists in property being searched when the defendant has a relationship with the property or property owner."

State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct. App. 2004). While an overnight guest may have a reasonable expectation of privacy in the host's property, "a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy." Id.

Here, the circuit court found Robinson did not have the same expectation of privacy as he would have in his own home. Robinson did not live in the apartment connected to the porch or any apartment located in the Hall Street Apartment complex. Furthermore, there is no evidence he was an overnight guest or otherwise had a connection to the premises or apartment lessee to give him a reasonable expectation of privacy. Robinson failed to establish he had an expectation of not being discovered on the porch, nor did he ask the police to leave. See In the Matter of Brazen, 275 S.C. 436, 436, 272 S.E.2d 178, 178 (1980) (finding the defendant did not have a subjective expectation of privacy in an open garage when he had an opportunity to demonstrate an expectation of privacy or ask the police to leave, but instead did nothing). Therefore, Robinson failed to show he had a reasonable expectation of privacy on the porch.

ii. Reasonable Suspicion

Robinson also argues Ligon and Schettler violated his Fourth Amendment rights because they entered the porch without a warrant and in the absence of exigent circumstances. We disagree.

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Taylor, 388 S.C. 101, 109, 694 S.E.2d 60, 64 (Ct. App. 2010) (quoting State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999)). "'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting U.S. v. Cortez, 449 U.S. 411, 418 (1981)). In determining whether

reasonable suspicion exists, the totality of the circumstances should be evaluated. State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009). While anonymous tips do not supply the indicia of reliability to establish reasonable suspicion, an "anonymous tip can provide the basis of an investigatory stop if the officer conducting the stop verifies the tip's reliability by observing the suspect engaged in criminal activity." Taylor, 388 S.C. at 114, 694 S.E.2d at 66. The officer's experience and intuition is an additional factor to consider in determining whether reasonable suspicion exists. Id. at 116, 694 S.E.2d at 68.

Here, the circuit court held:

> [T]aking the totality of the circumstances, the officer's knowledge about the area, what had been reasonably observed, that there were anonymous tips, the police officers investigation and observing the area, . . . the drug transactions [that] were going on in the parking lot based on an officer's knowledge of what drug transactions look like in those situations, . . . they are going there simply to determine the identification of the people who are there, . . . heightened by the fact that they smelled the green marijuana, and heightened by the fact that they saw a weapon hanging out of the defendant's pocket. So all of that, taking the totality of the circumstances they would have reasonable suspicion to investigate further and to pat down the defendant . . . .

Ligon and Schettler testified to specific and articulable facts to show they had reasonable suspicion that criminal activity was afoot. Based on Ervin's observation of conduct consistent with drug transactions, Ligon and Schettler approached the porch, and Ligon asked for Robinson's identification. Ligon and Schettler both testified this was a consensual encounter, and Robinson could have terminated the encounter at any time. See State v. Foster, 269 S.C. 373, 380, 237 S.E.2d 589, 592 (1977) (holding

an officer's request to see identification does not constitute a seizure within the meaning of the Fourth Amendment). The fact that the officers smelled marijuana as they approached the porch reasonably heightened their suspicion. See State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) (holding the court recognizes there is an "indisputable nexus between drugs and guns" to justify a frisk for weapons when an officer has reasonable suspicion that drugs are present) (internal citation omitted). When Schettler saw the pistol hanging out of Robinson's jacket pocket, he had reasonable suspicion to frisk Robinson for weapons. We find the police had reasonable suspicion to stop Robinson, and thus did not violate his Fourth Amendment rights.

Accordingly, we affirm the circuit court's denial of Robinson's motion to suppress the crack cocaine.

II. Expert Witness Qualification

Robinson next argues the circuit court erred in qualifying Commander Brown as an expert witness. We disagree.

A person is competent as an expert when he or she has acquired knowledge, skill, or experience so that he or she is better able than the jury to form an opinion on the subject matter. Rule 702, SCRE; see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'") (internal citation omitted). "An expert is not limited to any class of persons acting professionally." Id. at 252, 487 S.E.2d at 598 (internal citation omitted). "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). However, defects in the amount or quality of

education or experience go to the weight of the expert's testimony and not its admissibility. State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990).

Robinson questioned Commander Brown regarding writings, publications, and experience in the area of narcotics enforcement. Commander Brown indicated he wrote an article in a national magazine for the United States Attorney's Office detailing how the Drug Enforcement Unit was organized. He testified he teaches three classes: search and seizure, asset forfeiture, and basic narcotics. In addition, Commander Brown makes an annual appearance as a guest instructor at a commander's school for the United States Attorney's Office regarding drug enforcement and drug trends. Commander Brown testified he was the narcotics supervisor for over twenty years. Further, he stated he worked on the first crack cocaine case in York County and has observed crack cocaine "evolve as to how it's packaged and sold throughout the years, especially . . . in York County." Moreover, Commander Brown stated he had been qualified more than six times as an expert in previous state court criminal cases in "how cocaine is packaged, sold, the going price, the typical intoxicating dose." Commander Brown also affirmed that he has been qualified as an expert in federal court twice on the same subject matter.

We find Commander Brown's thirty years of experience in narcotics enforcement coupled with his involvement in hundreds of crack cocaine cases sufficient to qualify him as an expert on this topic. See State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) ("There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge.").

Moreover, because the qualification of Commander Brown did not require the jury to give his testimony any greater weight than that given to a lay witness, Robinson did not suffer any prejudice from Commander Brown's

expert qualification. See State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009) (finding a defendant was not prejudiced by the witness's expert qualification because the fact that the witness was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness); State v. White, 382 S.C. 265, 271, 676 S.E.2d 684, 687 (2009) (finding the circuit court properly instructed the jury to give the expert witness's testimony "such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify at this trial"); State v. Commander, 384 S.C. 66, 75, 681 S.E.2d 31, 35 (Ct. App. 2009) ("As with any witness, the jury is free to accept or reject the testimony of an expert witness.") (internal citation omitted).

The State offered Commander Brown's testimony to advise the jury as to how crack cocaine was sold and packaged, which is information not commonly known to the average juror. Further, this information would aid the jury in determining whether Robinson intended to distribute the crack cocaine or only possessed the crack cocaine for personal use. Therefore, the circuit court did not abuse its discretion in qualifying Commander Brown as an expert witness.

CONCLUSION

Accordingly, the circuit court's rulings are

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Magnolia North Property
Owners' Association, Inc., Respondent,

v.

Heritage Communities, Inc.,
Heritage Magnolia North, Inc.,
and BuildStar Corporation, Appellants.

Appeal From Horry County
Clifton Newman, Circuit Court Judge

Opinion No. 4943
Heard December 5, 2011 – Filed February 15, 2012

AFFIRMED

C. Mitchell Brown and A. Mattison Bogan, of Columbia; Stephen L. Brown and Jeffrey J. Wiseman, of Charleston, for Appellants.

John P. Henry and Philip C. Thompson, of Conway, for Respondent.

GEATHERS, J.: Appellants, Heritage Communities, Inc. (HCI), Heritage Magnolia North, Inc. (HMNI), and BuildStar Corporation (BuildStar) (collectively, Appellants), seek review of the jury's verdict in this construction defect action.[1] Appellants assign error to the trial court's: (1) finding of an amalgamation of Appellants' corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities; (2) admitting evidence of construction defects at other HCI projects; (3) instructing the jury regarding actual and punitive damages; (4) granting of a directed verdict for Respondent Magnolia North Property Owners' Association, Inc. (the POA) on its claims for negligence and breach of the warranty of workmanlike services; (5) denying Appellants' motions for a directed verdict and a judgment notwithstanding the verdict (JNOV); and (6) upholding the jury's punitive damages award. We affirm.

FACTS/PROCEDURAL HISTORY

Construction on Magnolia North, a condominium complex in Horry County, began in 1998; as of March 2000, HCI had sold 41 or more units.[2] On January 29, 2001, HCI filed for protection under Chapter 11 of the United States Bankruptcy Code. Twenty-one buildings, each with 12, 13, or 15 units, had been completed by the time HCI turned over control of the POA to the unit owners on September 9, 2002. At this time, some of the development's roads, as well as four buildings and four pools, were incomplete. Another developer completed the construction of the four buildings, and the POA completed the construction of the roads and pools.

---

[1] This court recently issued an opinion in a similar action against Heritage Communities, Inc. and BuildStar Corporation brought by the property owners' association at the Riverwalk development in Myrtle Beach. See Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011).

[2] HCI was the parent corporation of both HMNI (the seller) and BuildStar (the general contractor responsible for supervising all construction). Prior to the construction, HCI and BuildStar developed numerous other properties in Horry County, South Carolina.

On May 28, 2003, the POA filed this action against Appellants alleging defects in the construction of Magnolia North. The POA's eighth Amended Complaint included the following causes of action: (1) negligence; (2) breach of express warranty; (3) breach of the warranty of workmanlike services against BuildStar; and (4) breach of fiduciary duty against HCI and HMNI.

The case went to trial on May 11, 2009.[3] After the close of the POA's evidence, the trial court directed a verdict for HCI on the express warranty cause of action. At the close of all evidence, the trial court granted the POA's motions for a directed verdict as to liability on the causes of action for negligence and breach of the warranty of workmanlike services. The jury returned a verdict in favor of the POA for $6.5 million in actual damages and $2 million in punitive damages.

On May 29, 2009, Appellants filed the following post-trial motions: (1) motion for a new trial based on the thirteenth juror doctrine; (2) motion for a JNOV; (3) motion for a new trial absolute; (4) motion for a new trial nisi remittitur; and (5) motion to set aside the punitive damages verdict. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in ruling that Appellants' entities were amalgamated?

II. Did the trial court err in admitting evidence of construction defects at other Heritage projects?

III. Did the trial court err in instructing the jury (1) it must award the POA damages proximately caused by the negligent construction, and (2) if it found the POA entitled to recover punitive damages, it would have a duty to include such damages in its verdict?

[3] Prior to trial, HCI went out of business.

IV. Did the trial court err in granting a directed verdict for the POA on its causes of action for negligence and breach of the warranty of workmanlike services?

V. Did the trial court err in denying Appellants' motions for a directed verdict and JNOV?

VI. Did the trial court err in upholding the jury's punitive damages award?

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law." Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989). A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the finding. Id.

LAW/ANALYSIS

I. Amalgamation

Appellants maintain the trial court erred in ruling that their entities were amalgamated because (1) a court cannot disregard the corporate form when the requirements for "piercing the corporate veil" have not been met, and (2) the concept of amalgamation does not apply to the facts of this case. We disagree.

In Kincaid v. Landing Development Corp., 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued the court should have directed a verdict in its favor

because it was merely the marketing and sales company. Id. at 96, 344 S.E.2d at 874. In addition to sharing owners, the three companies shared a location. Id. Furthermore, the management company was the entity called to remedy problems. Id. Finally, the company's letterhead identified the management company as, "A Development, Construction, Sales, and Property Management Company." Id. This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." Id. (quoting the trial court); see Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597-605, 649 S.E.2d 135, 140-44 (Ct. App. 2007) (discussing Kincaid as one of three theories raised for holding a parent corporation liable in place of a subsidiary; i.e.: (1) piercing the corporate veil; (2) alter-ego or instrumentality theory; and (3) the amalgamation of interests or blurred identity theory).

Here, the trial court concluded that the facts of the instant case closely paralleled the facts in Kincaid. The trial court further concluded that the piercing of the corporate veil analysis did not apply to this case. The trial court stated: "The evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation[s] and their activities."

The evidence supports the trial court's ruling. Gwyn Hardister, chief operating officer and president of HCI, testified HCI was the parent corporation of HMNI and BuildStar. The other officers of HCI were Roger Van Wie and Jack Green. Van Wie also oversaw BuildStar, the general contractor supervising the construction at Magnolia North. Separate corporations were created for each HCI development for the purpose of operating as "cost centers," thereby containing each development's expenses and oversight as it applied to property management and construction cost allocation.[4] All of these corporations shared officers, directors, office space, and a phone number with HCI. HMNI, the corporation HCI created to operate as a cost center for Magnolia North, created the POA; its officers

[4] HCI developments included Magnolia Place, Riverwalk, The Gardens, Azalea Lakes, Avian Forest, and Magnolia North.

were also officers for HCI. HCI officers controlled the POA until September 9, 2002, when the unit owners were given control of the POA.

Hardister testified it could be assumed that the employees of BuildStar were also the employees of HCI. At the first annual meeting of the POA, Van Wie acknowledged construction problems and represented that the problems would be corrected. Moreover, the warranty manual distributed to the unit owners upon purchase was entitled: "Heritage Communities, Inc. Limited Warranty Manual," and it identified HCI as the corporation extending the warranty.

Therefore, as in Kincaid,[5] this case involves several indicia of an amalgamation of interests between HCI, HMNI, and BuildStar. The corporations shared a location, telephone number, board members, officers, and employees. In its warranty, HCI held itself out to the homeowners as the corporation responsible for construction defects. In light of these indicia, the trial court's ruling that Appellants' entities were amalgamated is supported by the law and the evidence.

II. Other Heritage Projects

Appellants assert that this court should order a new trial because the trial court allowed the POA to repeatedly present evidence of construction defects at other Heritage projects. Appellants argue that the admission of this evidence violated Rule 404 of the South Carolina Rules of Evidence as well as the limitation on admission of similar events evidence set forth in Whaley v. CSX Transportation, Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). We disagree.

Rule 404(b), SCRE states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. In Whaley, our supreme court recognized that similar acts are admissible if they tend to prove or disprove

[5] This court reached the same conclusion in Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011).

some fact in dispute. See Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010) (discussing Whaley). Evidence of similar acts has the potential to be exceedingly prejudicial. Branham, 390 S.C. at 230, 701 S.E.2d at 19. Accordingly, a plaintiff must present facts showing the other acts were substantially similar to the event at issue. Whaley, 362 S.C. at 483, 609 S.E.2d at 300. Further, other acts may be admissible for the purpose of establishing the facts necessary to prove entitlement to punitive damages. Judy v. Judy, 384 S.C. 634, 642-43, 682 S.E.2d 836, 840-41 (Ct. App. 2009), aff'd on other grounds, 393 S.C. 160, 712 S.E.2d 408 (2011) (affirming when the trial court admitted evidence of a similar prior lawsuit). The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. Whaley, 362 S.C. at 483, 609 S.E.2d at 300 (applying the abuse of discretion standard of review to the admissibility of evidence of similar accidents).

In the present case, Gwyn Hardister, HCI's chief operating officer and president, testified that after his first month of employment with HCI, it became apparent that Magnolia Place had issues with water intrusion, including window leaks, and water issues on the decks and breezeways, before construction had begun at Magnolia North. Hardister admitted that the construction defects were virtually identical across all developments. Other testimony setting forth the details of defects in projects other than Magnolia North supports Hardister's admission. Drew Brown, the POA's expert in general contracting, estimating, and building diagnostics, testified that he investigated other HCI projects that used the engineered wood trim, just as Magnolia North did, and that the trim was inherently defective as an exterior trim. He also stated that, as with Magnolia North, there was improper flashing and a lack of engineered sealant joints in the other projects. Additionally, three of the other projects used the same brand of windows as Magnolia North, and Brown tested several of these windows at the four projects. Brown indicated that he tested the windows in over 20 units, and they consistently failed to meet the water intrusion resistance requirement that the labeling had represented.

Brown also found sheathing damage beneath the windows and improper weight bearing of lintels at window heads in Magnolia Place and in other HCI projects.[6] Other defects common to Magnolia Place and the other projects were improper sloping on bricks, improper waterproofing, improper installation of trim products, and improper installation of brick veneer.

Based on the foregoing, the construction defects at the other HCI developments were substantially similar to those experienced by Magnolia North. Further, the evidence is admissible to prove many of the elements required for a punitive damages award. See Mitchell v. Fortis Ins. Co., 385 S.C. 570, 584-89, 686 S.E.2d 176, 183-86 (2009) (listing guideposts to consider in conducting a review of a punitive damages award)[7]; Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (listing factors to consider in conducting a review of punitive damages).[8] The evidence was relevant to the Mitchell element of the reprehensibility of the defendant's

[6] A lintel is a horizontal architectural member spanning and usually carrying the load above an opening. Merriam-Webster's Collegiate Dictionary at 725 (11th ed. 2003).

[7] The Mitchell guideposts are: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm to the plaintiff and the amount of the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Mitchell, 385 S.C. at 584-89, 686 S.E.2d at 183-86. In Mitchell, our supreme court announced that its previous opinion in Gamble remained relevant to the post-judgment due process analysis only insofar as it added substance to the guideposts in BMW of North America v. Gore, 517 U.S. 559 (1996) and adopted in Mitchell. The supreme court decided Mitchell on September 14, 2009, after the trial court had already conducted a punitive damages review in the present case.

[8] The Gamble factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) existence of similar past conduct; (5) likelihood of deterring the defendant or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354.

conduct and the Gamble elements of the duration of the conduct, Appellants' awareness, and similar past conduct. For example, HCI was aware of water issues in other projects as early as 1998, before construction on Magnolia North had begun.

In sum, the trial court did not abuse its discretion in admitting the challenged evidence.

III. Jury Instructions

Appellants maintain they should receive a new trial because the trial court gave the jury two erroneous instructions regarding: (1) actual damages on the POA's negligence claim; and (2) punitive damages. We address each of these issues in turn.

a. Standard for Jury Instructions

The trial court is required to charge only the current and correct law of South Carolina. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, this court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497-98, 514 S.E.2d 570, 575 (1999). A jury charge that is substantially correct and covers the law does not require reversal. Id. at 496, 514 S.E.2d at 574.

b. Actual Damages on Negligence Claim

Appellants maintain the trial court instructed the jury that it had granted a directed verdict to the POA on its negligence claim, and, therefore, the jury must award the POA damages on this claim. Appellants argue the trial court improperly gave the jury the impression it had already determined the POA had established proximate cause. We disagree with Appellants' interpretation of the trial court's jury instruction.

At the close of evidence, the trial court directed verdicts for the POA on their claims for negligence and breach of warranty of workmanlike services. As to the negligence claim, the trial court instructed the jury, in pertinent part:

> Now I charge you that as a matter of law, I have determined that the defendants were negligent and breached the implied warranty of workmanlike services in the construction of these condominiums and as a result of [sic] you must award the plaintiff property owners['] association damages proximately caused by the negligent construction.

(emphasis added).

Appellants argue the trial court's inclusion of the phrase "proximately caused by the negligent construction" following its statement that the jury must award damages did not remedy the error. We disagree. The trial court's statement sufficiently qualified the requirement to award damages by describing the damages as those "proximately caused by the negligent construction." See Stevens v. Allen 342 S.C. 47, 51, 536 S.E.2d 663, 665 (2000) (setting forth the prerequisites to an award of damages on a negligence claim).

Because the challenged jury instruction accurately reflected all elements required to be established for a damages award on the POA's negligence claim, the trial court did not commit error in giving its charge. See Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (stating a jury charge that is substantially correct does not require reversal).

c. Punitive Damages

Appellants contend their due process rights were violated by the trial court's instruction advising the jury it had a duty to award punitive damages

if it found the plaintiff entitled to such. Appellants argue it no longer is appropriate for South Carolina to require the imposition of punitive damages after the jury determines the plaintiff's entitlement because a judicial evaluation of a punitive damages award is required, pursuant to State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) and Mitchell v. Fortis Insurance Co., 385 S.C. 570, 584-89, 686 S.E.2d 176, 183-86 (2009). We disagree.

Appellants challenge the following portion of the trial court's jury instruction on punitive damages:

> If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances.

(emphasis added).

This court has previously held that in South Carolina, the award of punitive damages does not rest in the jury's discretion, but is recoverable as a matter of right. Broom v. Se. Highway Contracting Co., 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986), abrogated on other grounds, Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) (citing Sample v. Gulf Ref. Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937)). In Sample, our supreme court held there was no error in charging the jury that it would have a duty to award punitive damages if it found that the plaintiff's rights "had been consciously, willfully, and recklessly violated." 183 S.C. at 410, 191 S.E. at 214. In that case, the court stated:

> [U]nder the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as vindication of [a] private right, and when under proper allegations a

> plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages.

Id. at 410, 191 S.E. at 214 (emphasis added). Appellants argue Broom and Sample are no longer controlling in light of the concerns expressed in Campbell and Mitchell. We disagree.

In Campbell, the United States Supreme Court acknowledged the existence of procedural and substantive constitutional limitations on punitive damages awards. 538 U.S. at 416. It explained: "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Id. (citations omitted); see also BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (holding that the Alabama Supreme Court's post-verdict review ensured that punitive damage awards were not grossly out of proportion to the severity of the offense and had some understandable relationship to compensatory damages). In this context, Campbell primarily addressed the excessiveness of punitive damages awards, and it imposed limits on whether to include any punitive damages in a verdict only to the extent that the conduct on which the award is based does not have a nexus to the plaintiff's harm or is not sufficiently reprehensible to justify such an award. Id. at 419, 422-23. Otherwise, states retain discretion over the imposition of punitive damages. Id. at 416 ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.") (citations omitted).

In Mitchell, our state supreme court implemented the constitutional limitations set forth in Campbell, Gore, and Haslip. The Mitchell opinion confirmed that Gore and Haslip addressed the excessiveness of punitive

damages awards and that Campbell prohibited any punitive damages award for conduct unrelated to the plaintiff's harm or conduct that was insufficiently reprehensible. 385 S.C. at 584-86, 686 S.E.2d at 183-84. Further, in Campbell, the United States Supreme Court stated:

> [P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Campbell, 538 U.S. at 419. This language dovetails with Sample's requirement that "when . . . a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages." 183 S.C. at 410, 191 S.E. at 214 (emphasis added).

In other words, only after the jury has evaluated the evidence and concluded the plaintiff is entitled to punitive damages does it become the jury's "duty" to impose such damages on the defendant. This is precisely what the trial court in the present case instructed: "If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances." This instruction communicated to the jury that it had the discretion to determine the POA's entitlement to punitive damages; and, if entitlement were so determined, the duty to award punitive damages.

Appellants argue that Haslip prohibits states from requiring the imposition of punitive damages. We do not interpret Haslip as Appellants suggest. First, in Haslip, the issue of whether states may require the imposition of punitive damages was not squarely before the Court. Rather, the Court in Haslip analyzed the adequacy of Alabama's method for assessing punitive damage awards, which included a jury instruction explaining the nature, purpose, and basis for the award; a post-trial review enabling the trial court to scrutinize the award; and an appellate review process ensuring that

the award was reasonable and rational. 499 U.S. at 19-23. Rather than expressing a need to increase the jury's discretion in the imposition of punitive damages, the Haslip opinion expressed a need to limit the jury's discretion:

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> . . .
>
> As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Id. at 19 (citations omitted) (emphasis added). Thus, Appellants' interpretation of Haslip is unfounded. The Court did not prohibit states from requiring the jury to impose punitive damages after evaluating the evidence and determining the plaintiff's entitlement.

In Campbell, which post-dates Haslip, the United States Supreme Court clearly recognized the discretion of the state to establish policies on punitive damages, within the constitutional limits of excessiveness and arbitrariness. Campbell, 538 U.S. at 416. South Carolina imposes a duty on the jury to award punitive damages only after it determines the plaintiff is entitled to such an award based on its characterization of the conduct harming the

plaintiff as willful, wanton, malicious, or reckless. Therefore, the dictum in Haslip, on which Appellants rely, cannot justify a departure from South Carolina precedent on the jury's duty to award punitive damages upon the determination of entitlement. See Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("[T]he trial court is required to charge only the current and correct law of South Carolina.").

Based on the foregoing, the trial court's punitive damages instruction as a whole falls within the limits of due process and does not constitute reversible error.

IV. Directed Verdict

Appellants assert the trial court should not have directed a verdict for the POA on its claims for negligence and breach of warranty of workmanlike services. Appellants argue the trial court misconstrued counsel's acknowledgment that defects existed as an admission that Appellants were "negligent as to, and were the proximate cause of, all of the alleged defects." Appellants further argue: (1) the factual issues as to whether certain defective conditions existed, and the extent of such defects, should have been left for the jury to decide; and (2) these factual issues go to the question of liability. We disagree.

In ruling on motions for directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006).

In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached

the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). Further, to establish a claim for breach of the implied warranty of workmanlike services, the plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner. Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008) (holding that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner).

Here, there was overwhelming evidence of Appellants' failure to meet the industry standard of care in several aspects. Viewing the trial in its entirety, Appellants merely contested the extent of damages. The POA's and Appellants' experts testified to conflicting estimates of the extent of the damages. The reports differed primarily in the scope of work necessary to repair the defects and the cost of the repairs. Gwyn Hardister, HCI's chief operating officer and president, also acknowledged the construction problems.

Further, during opening arguments, Appellants' counsel conceded liability. As to Appellants' argument that their counsel acknowledged only some, and not all, of the alleged defects, the existence and extent of specific defects bear on the issue of damages proximately caused by Appellants' negligence. An admission of counsel or evidence supporting less than all of the complaint's specifications of negligent conduct is sufficient to support a directed verdict for the POA. Cf. Deason v. Southern Ry. Co., 142 S.C. 328, 336, 140 S.E. 575, 577 (1927) ("The Code requires the construction of pleadings in aid of substantial justice, and it is the rule that the proof of one specification of negligence and wantonness will entitle plaintiff to a verdict, if the jury sees that a case has been made out."). Appellants claim that our supreme court's opinion in Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 612 S.E.2d 695 (2005), requires an evidentiary showing or admission that the defendant was negligent as to each and every specification in the complaint before the trial court may direct a verdict for the plaintiff as

to the defendant's breach of the duty of due care. We find Appellants' assertion misapprehends the Guffey opinion.

In Guffey, our supreme court held: "A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability. On review, we will affirm a directed verdict [for the defendant] where there is no evidence on any one element of the alleged cause of action." 364 S.C. at 163, 612 S.E.2d at 697 (citation omitted) (emphasis added). The court was referring to the required showing of duty, breach, causation, and damages to establish a cause of action for negligence. The court further held the trial judge properly granted a directed verdict for the defendant on one of the complaint's specifications of negligence, i.e., that a hospital was negligent in giving aftercare instructions that conflicted with the emergency room physician's instructions, because there was no evidence the conflicting instructions proximately caused the decedent's death. 364 S.C. at 164, 612 S.E.2d at 697.

Appellants also argue the trial court erred in granting a directed verdict on the claims for negligence and breach of warranty of workmanlike services because BuildStar, as the general contractor, was not responsible for the work performed by its subcontractors. This argument has no merit. Although a general contractor is not automatically responsible for the negligence of a subcontractor, a builder who undertakes to supervise the construction of a building has a duty to exercise reasonable care. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008) (rejecting the argument that a general contractor is automatically responsible for the negligence of a subcontractor, but approving jury instructions that included the law imposing a duty on a general contractor to use due care in supervising a subcontractor).

Based on the foregoing, the trial court properly directed a verdict for the POA on its causes of action for negligence and breach of warranty of workmanlike services.

V. Appellants' Directed Verdict Motion

Appellants contend the trial court erred in denying their motions for a directed verdict and JNOV on all of the POA's causes of action. Appellants argue: (1) they were not equitably estopped from asserting the statute of limitations as a defense; and (2) the POA failed to establish damages as to its claims. Appellants also contend the trial court erred in denying their directed verdict and JNOV motions as to negligence and punitive damages because the POA failed to establish: (1) each Appellant violated its respective standard of care; and (2) punitive damages by clear and convincing evidence as to each Appellant. We disagree.

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

In the instant matter, the trial court held

> I find that equitable tolling applies and that based on when the suit was filed and the property turned over to the homeowners['] association that the, the defense is estopped from raising the statute of limitations defense . . . .

We address the theories of equitable tolling and equitable estoppel in turn.

a. Equitable Tolling

The POA's claims are governed by a three-year statute of limitations. See S.C. Code Ann. § 15-3-530 (2005) (establishing three years as the limitation for filing an action on a contract, obligation, or liability, except those provided for in section 15-3-520). Appellants maintain that the statute began to run on March 8, 2000, the date of the POA's first meeting. Thus, they argue, the statute expired prior to the filing of this action on May 28, 2003. We agree with the trial court's ruling that equitable tolling is justified in this case.

In Hooper v. Ebenezer Senior Services and Rehabilitation Center, our supreme court stated:

> Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.
>
> The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.
>
> It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.
>
> . . .

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009) (citations and quotation marks omitted) (emphasis added). Unlike equitable estoppel, equitable tolling does not require a showing that the defendant has made a misrepresentation to the plaintiff. See Hooper, 386 S.C. at 115, 687 S.E.2d at 32 ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it.").

In the present case, the POA board consisted of Appellants' officers until the date of "turnover," September 9, 2002. We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during this period. Further, after the property owners gained control over the POA, they exercised due diligence by filing this action on May 28, 2003, approximately eight months after assuming control. Therefore, we affirm the trial court's ruling on this issue.

b. Equitable Estoppel

The law on equitable estoppel also supports the trial court's ruling. In South Carolina,

> [a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct.
>
> The doctrine is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was

> caused by his opponent's intentional misrepresentation; but deceit is not an essential element of estoppel. It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue. Some courts hold that repairs by a defendant may toll the statute of limitations. One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.

Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218-19, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds, Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (citations and quotation marks omitted) (emphasis added).

Here, until the turnover, Appellants assured the unit owners the construction defects would be repaired, and, as a result, the owners were justified in relying on those assurances. At the time these representations were made, a reasonable owner could have believed that it would be counter-productive to file suit before giving Appellants the opportunity to honor the representations, especially given Appellants' efforts to make some repairs. Therefore, the trial court properly held that Appellants were equitably estopped from asserting the statute of limitations as a defense.

c. Statute of Limitations as to Breach of Fiduciary Duty

Appellants argue that the trial court erred in its conclusions regarding equitable tolling and equitable estoppel, and, as a result, the trial court should have granted Appellants' motion for a directed verdict on the ground of the statute of limitations. However, the POA asserts that, even if neither equitable tolling nor equitable estoppel apply to this case, the statute of limitations did not begin to run on the breach of fiduciary duty claim until HCI turned over its control of the POA to the owners on September 9, 2002, because this was the date that the breach occurred. We agree.

In Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., our supreme court held:

> [T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas.

349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002) (emphasis added). Therefore, in the present case, the breach occurred on September 9, 2002, the date HCI turned over control of the POA to the unit owners. Because the POA filed its breach of fiduciary duty claim approximately eight months later, the three-year statute of limitations had not yet expired. See S.C. Code Ann. § 15-3-530 (2005) (establishing three years as the limitation for filing an action on a contract, obligation, or liability, except those provided for in section 15-3-520).

d. Damages

Appellants also assert the POA failed to establish its damages as to any of its claims. We disagree.

To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). However, "proof with mathematical certainty of the amount of loss or damage is not required." Id. The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss. Piggy Park Enter., Inc. v. Schofield, 251 S.C. 385, 391-92, 162 S.E.2d 705, 708 (1968).

Here, the POA's expert in building diagnostics testified that in his investigation of buildings, he often finds hidden damages. He also testified that it is common for buildings like those at Magnolia North to look great on the outside, but to reveal rot "when you peel the onion[.]" Further, the POA's expert in estimating construction repair testified that usually, hidden damage in condominium projects is approximately twenty percent of the contract price, and he had included a hidden damage allowance in his estimate to repair Magnolia North.[9] This evidence provides a sufficiently reasonable basis of computation of damages to support the trial court's submission of

[9] Appellants argue this expert's estimate of hidden damage was speculative because his past experience in assessing hidden damage included some buildings with stucco siding, while Magnolia North's buildings had Hardie Plank siding above a brick veneer. However, the fact that this expert's past experience with assessing hidden damages included buildings with stucco siding would go to the weight of the evidence rather than its existence. Cf. Dep't of Transp. v. Rogers, 259 S.E.2d 775 (N.C. Ct. App. 1979) (holding that there was no error in admitting into evidence the testimony of the defendant's expert regarding the value of the defendant's condemned property because the fact that the expert had not observed the property at the time of the taking went to the weight given his testimony by the jury).

damages to the jury. See May v. Hopkinson, 289 S.C. 549, 559, 347 S.E.2d 508, 514 (Ct. App. 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems).

Appellants also argue that as to the breach of fiduciary duty claim, the POA failed to offer evidence of its damages at the time of the transfer of control. In response, the POA contends the construction defects in question existed at the time of the transfer of control. We agree with the POA that the evidence of construction defects, combined with Prime South's estimate for repair costs, was sufficient to allow the jury to determine the resulting damages from Appellants' breach of fiduciary duty.

> [T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas.

Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002) (emphasis added). Therefore, Prime South's estimate for repair costs properly included the current cost to repair the construction defects.

Appellants further maintain that general maintenance items were improperly included in the damages total, citing Jennifer Harmon's testimony regarding the amount the POA spent on repairs after the turnover of control

to the unit owners.[10] However, any mistaken inclusion of general maintenance items in Harmon's repair records does not detract from the strength of other evidence of damages. Chris Cooper estimated the total cost of repairs, not including an owners' contingency or contract administration fee, as $7,793,468. After the owners' contingency and contract administration fee were added, the total contract price was $9,310,902. Id. The POA also sought reimbursement for the total amount it had to spend on repairs since the transfer of control from Appellants to the unit owners. Jennifer Harmon testified this amount was over $500,000. However, the jury awarded the POA only $6,500,000 in actual damages. Thus, even if Harmon's repair records included some general maintenance items, there was sufficient evidence of other damages to support the $6.5 million award for actual damages.

Based on the foregoing, the trial court properly denied Appellants' directed verdict and JNOV motions.[11]

VI. Punitive Damages Award

Finally, Appellants contend the admission of evidence of defects at HCI projects other than Magnolia North violated their due process rights because it resulted in the imposition of punitive damages based on alleged harm to non-parties to this litigation. Appellants also argue the punitive damages award was inconsistent with the guidelines established in Gamble v.

---

[10] Jennifer Harmon worked for the Noble Company, which managed the Magnolia North property for the POA.

[11] Appellants also argue (1) the POA failed to establish that each Appellant violated its respective standard of care, and (2) the jury's award of punitive damages was not based on individualized determinations that clear and convincing evidence supported such damages against each Appellant. Because the trial court did not err in finding Appellants' entities were amalgamated, it is unnecessary to address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), and Mitchell v. Fortis Insurance Co., 385 S.C. 570, 584-89, 686 S.E.2d 176, 183-86 (2009).[12]

a. Non-parties

Appellants contend the admission of evidence of defects at HCI projects other than Magnolia North violated their due process rights because it resulted in the imposition of punitive damages based on alleged harm to non-parties to this litigation. We need not address this issue because we have previously determined the trial court properly admitted evidence of defects at other HCI developments.[13] See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

b. Gamble/Mitchell factors

Appellants maintain that the Gamble and Mitchell factors require the award in this case to be set aside. In particular, Appellants argue (1) the award of punitive damages has no deterrent effect because Appellants went out of business prior to the commencement of this litigation, and (2) Appellants have no ability to pay punitive damages.

Assuming, arguendo, the lack of a deterrent effect on Appellants, neither this consideration nor the absence of evidence of Appellants' ability to pay punitive damages precludes such an award if the trial court's findings on other relevant factors are sufficient to uphold the award. See Miller v. City of W. Columbia, 322 S.C. 224, 231-32, 471 S.E.2d 683, 687-88 (1996) (rejecting Appellant's argument that the trial court erred in failing to strike the

[12] See supra n. 7 & n. 8.

[13] As stated earlier in this opinion, the evidence of other HCI projects was relevant to the Gamble elements of the duration of the conduct, Appellants' awareness, and similar past conduct. For example, HCI was aware of water issues in other projects as early as 1998, before construction on Magnolia North had begun.

punitive damages award because the record did not establish that he had an ability to pay and holding the trial court was not required to make specific findings of fact for each Gamble factor); id. at 232, 471 S.E.2d at 687 ("[E]ven if the record did not establish that [Appellant] . . . had an ability to pay, the judge's findings on the remaining factors are sufficient to uphold the jury's award of punitive damages."). Here, the trial court conducted a post-trial review of the punitive damages award using the factors outlined in Gamble and Mitchell and properly set forth its findings on the record. Considering the factors in both Gamble and Mitchell, the evidence supports the trial court's post-trial review of the punitive damages award.

Based on the foregoing, the trial court properly upheld the jury's punitive damages award.

CONCLUSION

Accordingly, the jury's verdict is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.