The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

ORDER

The South Carolina Bar has furnished the attached list of lawyers (including those holding a limited certificate to practice law) who have failed to pay their license fees for 2019. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by March 22, 2019.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James J.

Columbia, South Carolina
February 21, 2019

Members Who Have Not Paid 2019 License Fees

Anita E. Abercrombie
Abercrombie Law Firm, LLC
223 East Main Street, Suite 500
Rock Hill, SC 29730

David F. Black
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Robert Half Legal
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Columbia, SC 29201

Heather Elizabeth Brinson
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Charleston, SC 29407

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Houston, TX 77002

R. Steven Chandler
R. Steven Chandler, LLC
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Nelson S. Chase
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Carole Cox
Gwinnett County District Attorney's Ofc.
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Richmond, VA 23229

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Bluffton, SC 29910

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New York, NY 10025

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Stone Mountain, GA 30083

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JD White, Attorney at Law
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Whiteville, NC 28472

The Supreme Court of South Carolina

In the Matter of Christopher Cody, Petitioner.

Appellate Case No. 2019-000223

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 27, 2017, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a regular member of the Bar in good standing.

Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/Daniel E. Shearouse
CLERK

Columbia, South Carolina
February 22, 2019

The Supreme Court of South Carolina

In the Matter of Stephen A. Douglas, Petitioner.

Appellate Case No. 2019-000224

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 1, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

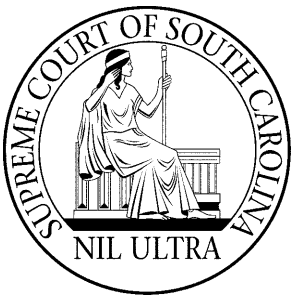
Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
February 22, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
February 27, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2018-UP-420-Mark Teseniar v. Fenwick Plantation	Denied 02/21/19
2018-UP-423-Wells Fargo Bank v. William Hudspeth	Denied 02/21/19
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2018-UP-437-State v. Marcus C. Johnson	Denied 02/15/19

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2018-UP-470-William R. Cook, III v. Benny R. Phillips Pending

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5601-Stoneledge v. IMK Dev. (Bostic Brothers)	Pending
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2018-UP-273-State v. Maurice A. Odom	Pending
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-349-Verma Tedder v. Darlington County	Granted 02/21/19

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jonathan L. B. Davis, Respondent.

Appellate Case No. 2018-002251

Opinion No. 27863
Submitted February 7, 2019 – Filed February 27, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Ericka M. Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Jonathan L.B. Davis, of Columbia, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension of not more than two years. We accept the Agreement and suspend respondent from the practice of law in this state for one year, retroactive to respondent's interim suspension.[1] The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension on September 7, 2017. *In re Davis*, 423 S.C. 475, 816 S.E.2d 542 (2017).

Facts

Matter I

In 2015, respondent was retained to represent a husband and wife (Complainants) in a Chapter 11 bankruptcy matter. Respondent had never handled a Chapter 11 bankruptcy case. Respondent filed a petition on Complainants' behalf; however, the United States Trustee pointed out multiple inaccuracies in the documents filed by respondent. Respondent acknowledged the errors and promptly amended the filings.

Forty-one days after filing the bankruptcy petition, respondent filed an application for employment as the primary attorney for Complainants. The bankruptcy court granted respondent's application but the delayed filing meant respondent was acting without the required authority for the first six weeks of the case in violation of the rules of the United States Bankruptcy Court.

Respondent did not have an active trust account at the time Complainants began paying respondent pursuant to a retainer agreement. Respondent deposited the retainer funds into his general operating account in violation of Rules 1.15(a) and 1.15(c), RPC, Rule 407, SCACR (safekeeping of client property). Respondent later opened a trust account and transferred the funds.

Respondent held Complainants' retainer, less disbursement for the filing fee and transcript cost, from the time it was paid prior to the filing of the petition until respondent filed his first fee application with the court. Because respondent was owed fees for *pre-petition* work, he was not a disinterested party, and the bankruptcy court disqualified him from representing Complainants. That fact also barred respondent from receiving any compensation whatsoever and required he disgorge the remaining balance of the retainer.

Matter II

In May 2013, respondent filed for relief on behalf of Complainant B pursuant to Chapter 13 of the United States Bankruptcy Code. In September 2013, Complainant B's vehicle was totaled in an accident, and Complainant B asked respondent to file various motions on her behalf related to her payment for the totaled vehicle and the purchase of a replacement. Despite Complainant B's calls

and emails, respondent failed to file the requested motions for over a month. Even after respondent finally filed a motion to incur debt, he had to amend the filing twice and failed to file any other pleadings addressing Complainant B's remaining issues.

A hearing was held in bankruptcy court to address Complainant B's concerns regarding respondent's failure to file the appropriate motions related to her totaled vehicle. At the hearing, the United States Trustee noted additional amendments to respondent's filings were needed before an amended bankruptcy plan could be confirmed. The court continued the hearing to ensure respondent filed all amended pleadings. Respondent filed an amended plan but failed to use the forms required by the court. A deficiency notice was issued. Days later, respondent filed the necessary amendments, but again failed to use the proper forms. Respondent was given ten days to cure the deficiency. Eleven days later, respondent filed the necessary amendments and an amended plan was confirmed days later.

Following a hearing on the United States Trustee's motions for review of respondent's conduct and sanctions, the bankruptcy court found respondent's conduct harmed Complainant B and ordered he return $2,900 in attorney's fees to her within ten days. Well over a month later, the bankruptcy court issued a rule to show cause due to respondent's failure to comply with the terms of the court's order. The bankruptcy court held respondent in civil contempt for his failure to comply.

ODC mailed respondent a notice of investigation requesting he respond within fifteen days. Respondent's response was received over a month later. ODC sent respondent a request for additional information; however, respondent failed to respond as required by Rule 19(b), RLDE, Rule 413, SCACR.

Matters III and IV

In December 2016 and April 2017, separate disciplinary investigations were initiated following complaints filed against respondent. The complaints were ultimately determined to be meritless; however, respondent failed to respond to ODC's notices of investigation within the required fifteen days. Approximately a

month after each notice, ODC issued *Treacy*[2] letters requesting a response to the notices of investigation. ODC received a response from respondent regarding one of the matters; however, respondent failed to respond to the second.

Matter V

In January 2017, respondent filed for relief on behalf of Client C pursuant to Chapter 7 of the United States Bankruptcy Code. Three days after filing, respondent was sent a deficiency notice because his filing was incomplete and he failed to provide an email address. Respondent was given ten days to cure the deficiency; however, he failed to do so.

Four days after filing the petition, the United States Trustee emailed respondent to request records of Client C's "pay advices" for the sixty days prior to the bankruptcy petition as required by 11 U.S.C. § 521, and copies of Client C's bank statements for the three months prior to the petition's filing. Despite the Trustee following up with respondent twice via email, respondent failed to respond or provide the requested materials. Further, a meeting of creditors had to be continued due to respondent's failure to provide copies of Client C's tax returns and bank statements prior to the meeting as required by federal statute.

In April 2017, Client C contacted the Trustee because she was unable to reach respondent after multiple attempts. The Trustee also attempted to reach respondent by telephone and email, but received no response. After her attempts to reach respondent proved unsuccessful, Client C filed a *pro se* motion to extend the time to file a reaffirmation agreement and financial management course certificates.

Thereafter, the Trustee filed a motion for review of respondent's conduct and a request for sanctions. Following a hearing, the bankruptcy court found respondent did not provide adequate representation and ordered respondent refund $400 to Client C on or before June 30, 2017.

ODC sent respondent a notice of investigation; however, he failed to respond to the notice within the required fifteen days. Approximately a month later, ODC issued a *Treacy* letter requesting a response to the notice of investigation. The certified

[2] *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

letter was returned unclaimed. Respondent failed to respond to the notice of investigation.

Matter VI

Respondent failed to appear to respond to questions under oath as directed by ODC in a notice to appear and subpoena. Both documents were sent via certified mail to respondent at his address on file in the Attorney Information System (AIS); however, the documents were returned to ODC as unclaimed. Additional attempts by SLED to serve respondent were unsuccessful.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct contained in Rule 407, SCACR: Rule 1.1 (competence), Rule 1.2 (scope of representation), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.15(a) (safekeeping client property), Rule 1.15(c) (keeping of unearned legal fees in trust account), Rule 3.4(c) (disobeying an obligation under the rules of a tribunal), Rule 8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority), Rule 8.4(a) (violating the Rules of Professional Conduct), and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Finally, respondent also admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We find respondent's misconduct warrants a definite suspension from the practice of law in this state for one year retroactive to September 7, 2017, the date of respondent's interim suspension. Accordingly, we accept the Agreement and suspend respondent for a period of one year, retroactive to his earlier interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC

and the Commission. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Additionally, prior to seeking reinstatement, respondent must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR, including completion of the Legal Ethics and Practice Program Ethics School within the preceding year.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fulton Casey Dale Cornwell,
Respondent.

Appellate Case No. 2018-001660

Opinion No. 27864
Submitted February 6, 2019 – Filed February 27, 2019

DISBARRED

John S. Nichols, Disciplinary Counsel, and Ericka McCants Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Fulton Casey Dale Cornwell, of Columbia, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a three-year suspension or disbarment. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension.[1] The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension on February 17, 2017. *In re Cornwell*, 419 S.C. 238, 797 S.E.2d 395 (2017).

Facts

Matter I

After being appointed to represent a client in a post-conviction relief (PCR) matter, respondent failed to keep his client reasonably informed of the status of the matter and failed to respond to reasonable requests for information.

Matters II, IV, VI, & VIII[2]

Respondent was appointed or retained to represent various clients in PCR matters. During respondent's representation of the clients in Matters II, IV, and VI, respondent failed to keep the clients reasonably informed as to status of their cases. In Matters VI and VIII, respondent failed to respond to the clients' reasonable requests for information.

Additionally, in Matters II, IV, and VIII, respondent failed to respond to the initial notices of investigation (NOI) and to the *Treacy*[3] letters from ODC seeking responses to the complaints.[4] In Matter VI, respondent initially failed to respond to the NOI but later filed a written response to the NOI upon a written inquiry from ODC.

Matter III

Although the underlying complaint in this matter was ultimately determined to be without merit, respondent failed to respond to the NOI.

Matter V

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[2] Respondent appeared before ODC and answered questions on the record as they related to Matters III, IV, V, VI, and VIII.

[3] *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

[4] Regarding Matter II, respondent called ODC about a different matter and ODC informed him that it was waiting for his response to this matter. Respondent stated he had not received a NOI or *Treacy* letter. ODC resent the NOI and received a response a week later.

In February 2013, respondent was appointed to represent a client in a PCR matter. Following an adverse ruling at an evidentiary hearing, the client mailed a letter seeking an appeal to an incorrect address for respondent. Respondent asserts he did not receive the client's letter. The client later mailed a letter to this Court requesting an appeal and attached a copy of the original letter that he sent to respondent. This Court forwarded a copy of the client's request to respondent. Respondent contends he first learned of the request for an appeal when he received this Court's letter. However, respondent did not contact the client or serve a notice of appeal.

Additionally, respondent did not respond to the NOI or to the *Treacy* letter from ODC seeking a response.

Matters VII & IX

Respondent was appointed to represent clients in PCR matters, but failed to respond to the clients' requests for information regarding their cases. Additionally, in Matter IX, respondent failed to keep the client reasonably informed as to the status of the case. Both clients' PCR actions were dismissed and they filed *pro se* notices of appeal.

After receiving the *pro se* notice of appeal in Matter VII, this Court mailed respondent a letter requesting the date on which respondent received written notice of the order of dismissal of the client's PCR matter. Respondent failed to respond. The Court then directed respondent to respond by January 15, 2016, and to include an explanation as to why he failed to respond initially. Respondent eventually responded to the Court's inquiries but failed to provide the date on which he received written notice of the dismissal of the client's PCR matter. The Court again requested the information and gave respondent ten days to respond. Respondent failed to respond to the Court's inquiry, and the Court dismissed the appeal without prejudice.

After receiving a *pro se* notice of appeal in Matter IX, this Court notified respondent and requested that he provide an explanation as required by Rule 243(c), SCACR. Respondent informed the Court that he had been relieved as counsel. After determining that respondent had not been relieved as counsel, the Court sent respondent another letter requesting he provide the required explanation. Respondent did not respond within the fifteen-day timeframe. Thereafter, the Court, by order dated September 22, 2016, requested respondent

provide a written explanation within ten days of the Court's order. On October 14, 2016, the Court received respondent's explanation, which it found insufficient under Rule 243(c), SCACR. The Court then required respondent to file a response that complied with *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006) (allowing counsel to inform the Court if counsel is unable to set forth an arguable basis for asserting the PCR court's determination was improper). Respondent did not respond within the ten-day timeframe. The Court relieved respondent as counsel and directed Appellate Defense to represent the client.

Matter X

Respondent was appointed to represent a client in a PCR matter, and a hearing was conducted on April 14, 2015. After the hearing, the client requested a copy of his PCR transcript from respondent and that an order be drafted regarding the hearing. Respondent did not respond to the client's requests.

ODC sent respondent a NOI, followed by a *Treacy* letter, to which respondent did not respond. Thereafter, ODC sent respondent a notice of additional allegations and requested a response within fifteen days. Respondent did not respond.[5]

Matter XI

In May 2016, respondent was retained to represent a client in a domestic relations action. Respondent failed to (1) adequately communicate with the client regarding the status of the case; (2) comply with reasonable requests for information; and (3) respond to the client's request for a refund of his fee after terminating respondent's representation. In response to the allegations, respondent asserts he did not return the fee because the case was a flat rate case and he had earned the fee. While respondent contends he drafted documents on the client's behalf, he never entered a notice of appearance on behalf of the client or filed any documents on the client's behalf.

Additionally, there was conflicting language in the fee agreement regarding when the fees were due to be paid by the client and when the fees would be treated as earned. The fee agreement also did not include language notifying the client that he might be entitled to a partial or full refund if the agreed-upon legal services were not provided.

[5] Respondent appeared before ODC and answered questions on the record.

Matter XII

In November 2015, BB&T informed ODC that a check was presented against insufficient funds on respondent's trust account. ODC mailed a NOI to respondent requesting the following: (1) a written response; (2) checks related to the overdraft; (3) copies of his bank statements; (4) documentation that funds were fully restored to the trust account; and (5) a complete copy of his trust account reconciliation. Respondent did not respond.

Thereafter, ODC sent respondent a *Treacy* letter via certified mail to his address on file with the Attorney Information System. However, the letter was returned as unclaimed. ODC later received a response, which failed to include the information requested in the NOI. ODC then subpoenaed BB&T for copies of respondent's bank statements relating to his trust account. Upon ODC's review of the statements, ODC discovered respondent's trust account contained withdrawals for several items made payable to cash as well as payments for personal expenses.

In response, respondent asserted the trust account was set up only for the deposit of a settlement for one case and any additional deposits into the trust account were from earned fees. However, respondent admits he improperly used his trust account. Respondent cannot demonstrate that the funds in his trust account were handled properly because he did not maintain accurate records as required by the rules for financial recordkeeping.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5 (fees); Rule 1.15(a) (safeguarding client property); Rule 1.15(b) (commingling funds); Rule 1.15(c) (keeping of unearned legal fees in trust account); Rule 1.16 (declining or terminating representation); Rule 3.3(a) (making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer); Rule 3.4(c) (disobeying an obligation under the rules of a tribunal); Rule 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary investigation); Rule 8.1(b) (failing to respond to a demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent further admits he violated the following rules regarding Financial Recordkeeping, Rule 417, SCACR: Rule 1 (financial recordkeeping); Rule 2 (client trust account safeguards); Rule 3 (requiring Rule 1 records to be readily accessible to the lawyer); and Rule 6 (precluding cash withdrawals from trust accounts).

Respondent also admits his conduct constitutes grounds for discipline under the following provision of the RLDE: Rule 7(a)(1) ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We accept the Agreement and disbar respondent from the practice of law in this state. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of Gregory Alan Newell, Petitioner.

Appellate Case No. 2018-000444

ORDER

By opinion dated April 8, 2002, this Court suspended petitioner from the practice of law for nine months. *In re Newell*, 349 S.C. 40, 562, S.E.2d 308 (2002). Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. After referral to the Committee on Character and Fitness (the Committee), the Committee has filed a report and recommendation recommending the Court reinstate petitioner to the practice of law and require petitioner to enter into a repayment plan with the Commission on Lawyer Conduct (the Commission) in order to reimburse $12,500 the Lawyers' Fund for Client Protection paid on claims filed by petitioner's prior clients.

We find petitioner has met the requirements of Rule 33(f), RLDE. Accordingly, we grant the petition for reinstatement upon the condition that, within thirty (30) days from the date of this order, petitioner enter into a repayment plan with the Commission in order to reimburse the Lawyers' Fund for Client Protection for the $12,500 it paid on claims relating to petitioner. Failure to comply with the repayment plan may result in further sanctions and/or discipline.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 20, 2019

The Supreme Court of South Carolina

In the Matter of James L. Bell, Petitioner.

Appellate Case No. 2018-000941

ORDER

By opinion dated December 20, 2017, this Court suspended petitioner from the practice of law for nine months, retroactive to the date of his interim suspension. *In re Bell*, 421 S.C. 520, 809 S.E.2d 54 (2017).[1] Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. After referral to the Committee on Character and Fitness (the Committee), the Committee has filed a report and recommendation recommending the Court reinstate petitioner to the practice of law. We find petitioner has met the requirements of Rule 33(f), RLDE, Rule 413, SCACR. Accordingly, we grant the petition for reinstatement.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 20, 2019

[1] Petitioner was placed on interim suspension on November 18, 2016. *In re Bell*, 418 S.C. 398, 793 S.E.2d 314 (2016).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brad J. Walbeck and Lea Ann Adkins, individually and derivatively on behalf of The I'On Assembly, Inc., and I'On Assembly, Inc., Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC; and I'On Realty, LLC, Appellants.

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018
Withdrawn, Substituted and Refiled February 27, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain amenities to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper; (6) Appellants were entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by Appellants and, therefore, he failed to establish a claim under ILSA.

We affirm in part, reverse in part, and remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain amenities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey to Respondent I'On Assembly, Inc. (the HOA) the Community Dock and Creekside Park located on the civic lot on which the boat ramp was located (lot CV-6) in I'On Village but instead sold these amenities to a third party. Appellants, however, allege they promised to convey a "generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the amenities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the I'On

Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in I'On Village.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing amenities to be built during the first two phases of the development. Among the amenities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

The report also included the following notification:

> VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY SUCH FACILITIES WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY, OR ALL OF SUCH FACILITIES MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR MEMBERSHIP IN ANY SUCH PRIVATE CLUB IF

[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

> YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered and expected the Community Dock and Creekside Park listed in the 1998 Property Report to be located on lot CV-6—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events. It operated as a private club and hosted its first event circa 2003.

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, Thomas Graham disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contended. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know

[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6.[3] The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to certain common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the amenities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these amenities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, shall, upon completion of construction, be conveyed to [the HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to [the HOA] or its members." (emphasis added).

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that included the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the

modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of $1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act, Unjust Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. The complaint also alleged that Walbeck was bringing the action on behalf of himself and derivatively on the HOA's behalf. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011 pursuant to Rule 12(b)(6), SCRCP, asserting,

[4] Geoff is the son of Thomas and brother of Vince.

inter alia, Walbeck's claims were barred by the statute of limitations and Walbeck failed to satisfy the pleading requirements of Rule 23(b)(1), SCRCP, for a derivative action.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also added the HOA as a defendant and added an allegation that Appellants were amalgamated. On March 15, 2012, the circuit court issued an order denying Appellants' Rule 12(b)(6) motion to dismiss. On January 2, 2014, Respondents filed a Third Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also

denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Did Respondents properly file the derivative claims on the HOA's behalf?

2. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

3. Were Respondents' claims barred by the statute of limitations?

4. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

5. Did the circuit court err by declaring the Recreational Easement invalid?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by awarding attorney's fees to Walbeck?

8. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500

S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed derivative claims against Appellants pursuant to Rule 23(b)(1), SCRCP. We agree.

Rule 23(b)(1) addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the reasons for his failure to obtain the action or for not making the effort*. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

(emphases added). Further, the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations

within the complaint. *See McCormick v. England*, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").[5]

"The purpose of the demand requirement is to 'affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)) (alteration in original) (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533 (2009)). "Thus, the demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.'" *Kamen*, 500 U.S. at 101 (quoting *Daily Income Fund,* 464 U.S. at 530).

Here, Respondents' pleadings fall short of alleging facts indicating either an adequate demand by Walbeck or Adkins directed to the Board or the futility of making such a demand. The pleadings allege that "[s]everal I'On homeowners" repeatedly demanded the Board "to secure [the HOA] and its members the rights to the Creekside Park and Community Dock," including "unencumbered title, access, and use of" these amenities. The pleadings also include allegations that Walbeck and Adkins directed a demand to Appellants to convey title to these amenities to the HOA. However, the pleadings do not allege that either Walbeck or Adkins directed a demand to the Board to initiate litigation against Appellants to enforce the HOA's alleged rights and recover the disputed amenities.

Further, the pleadings do not adequately allege facts indicating that a demand of the Board would have been futile. The pleadings allege that additional demands would be futile because the Board failed to timely act to protect the rights of the HOA and its members and Appellants' conveyance of the Creekside Park and the Community Dock to Russo "evidences the Board's failure to secure the rights to" these amenities and "the futility of further demand." However, there are no allegations that a demand on the Board to initiate litigation to *recover* these amenities

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[5] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

would have been futile. Further, there are no allegations that the non-developer members of the Board were guilty of some wrongdoing that would give them an incentive to automatically reject such a demand or that Appellants had veto power over the Board such that they would prevent the Board from initiating litigation against them.

Based on the foregoing, we reverse the circuit court's ruling that Walbeck and Adkins properly filed derivative claims on the HOA's behalf.[6] We order the circuit court to dismiss these claims.

II. Fiduciary Duty

Even assuming the derivative claims were properly before the circuit court, we agree with Appellants that the circuit court erred in concluding Appellants had a fiduciary duty to convey title to the Creekside Park and Community Dock on lot CV-6 to the HOA.

Specifically, Appellants argue the circuit court erred in concluding that (1) a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members; and (2) a developer's failure to convey common areas to a homeowners association "is at least the equivalent of conveying them in 'substandard condition.'" As to the second conclusion, we agree that the circuit court erred. As both challenged conclusions concern questions of law, this court reviews them de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

Appellants maintain the circuit court confused the contractual duty to convey title allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C.

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[6] As we base our holding on the failure to meet the demand requirement of Rule 23, we decline to address Appellants' argument that Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is *bound to act in good faith and with due regard to the interests of the one imposing the confidence*." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added) (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. 251, 256–57, 562 S.E.2d 633, 637 (2002).

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents *because of their superior voting power*, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphases added).

Thus, rather than rejecting the existence of a fiduciary relationship arising from the developer's superior voting power, the court declined to hold that the developer's assessment determinations violated a fiduciary duty to the villa owners. *Id.* The court merely invoked the business judgment rule, which implicitly recognizes the obligation of the directors of a homeowners association to act in good faith: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of *bad faith*, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.* (emphasis added). This is compatible with the good faith requirement for fiduciaries: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act *in good faith* and with due regard to the interests of the one imposing the confidence." *Id.* (emphasis added) (quoting *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152). Therefore, we reject Appellants' argument that the business judgment rule precludes the existence of a fiduciary relationship between a developer in control of a homeowners association and the association's members.

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Declaration of Covenants, Conditions, and Restrictions (Covenants) provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording. The I'On Company also had the authority to

> disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], *in the*

> *sole judgment of* the [I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by the [HOA].

(emphasis added). At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[7] However, as in *Goddard*, Appellants' asserted restraint does not speak to the *existence* of a fiduciary relationship and the duty to act in good faith arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary relationship and declining to find a violation of a fiduciary duty by invoking the business judgment rule). Therefore, we reject Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary relationship.

Rather, we define Appellants' fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

292 S.C. at 599, 358 S.E.2d at 152.

Based on the foregoing, the circuit court did not err in concluding that a developer in control of a homeowners association may not make decisions that

[7] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

benefit the developer's own interest at the expense of the association and its members. This deduction logically flows from the above standards set forth in *Island Car Wash*, *Goddard*, and our supreme court's decision in *Concerned Dunes* adopting *Goddard*'s analysis.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a specific fiduciary duty *to convey title* to common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association. South Carolina precedent does not impose on developers a generic fiduciary duty to convey title to a subdivision's common areas to the homeowners association in every conceivable case. Rather, when reference to a particular subdivision's restrictive covenants resolves issues involving the common areas, those covenants control. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006) ("Where . . . issues involving the common area of a subdivision—as raised by the pleadings—are resolved by reference to the applicable restrictive covenants, those covenants control."). Here, the Covenants' definition of "Commons" is "Real Property and interests therein [that] the [HOA] owns *or otherwise holds possessory or use rights in* for the common use and enjoyment of Titleholders."[8] (emphasis added). Therefore, the Covenants do not require the HOA to hold an ownership interest in a common area.

Further, and of critical import, the 1998 Property Report included language notifying prospective homeowners that certain amenities in I'On Village "may be owned and operated by persons other than the [HOA]." The notification emphasized that there was no guarantee a homeowner would have access to these amenities because they could be operated as a private club for its members and guests. This language placed prospective HOA members on notice that they would be buying into a community that would likely be shared with non-HOA members.

In sum, the record in this case does not support the conclusion that Appellants had a fiduciary duty to convey to the HOA those specific amenities associated with the Creek Club on lot CV-6. Therefore, the circuit court's conclusion that Appellants breached their fiduciary duty to the HOA's members by failing to convey title to the disputed amenities was controlled by an error of law. Accordingly, we reverse the

[8] "Titleholder" is defined in the Covenants as "one or more persons who hold record title to any Real Property in I'On, other than persons who hold an interest merely as security for the performance of an obligation."

denial of Appellants' JNOV motion as to this claim. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.").

III. Statute of Limitations

Appellants assert that Walbeck's claims are time-barred because they accrued before December 22, 2007, which was exactly three years before Walbeck filed his initial complaint. With the exception of the breach of contract claim,[9] we agree. Appellants also assert that the HOA's claims, assuming they meet the standards for derivative claims, are time-barred because they accrued before February 7, 2009, which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Walbeck first asserted derivative claims in his initial complaint, but their derivative nature was not reflected in the case caption until Walbeck filed the Second Amended Complaint. Nonetheless, the derivative claims, other than breach of contract, are time-barred even if they were first filed with Walbeck's initial complaint.

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[10] applies to Respondents' negligent misrepresentation claims.[11] With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable

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[9] Appellants do not dispute the applicability of the twenty-year statute of limitations to Respondents' breach of contract claims because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

[10] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

[11] We decline to reach the question of when the breach of fiduciary duty claim accrued as we reverse the circuit court's ruling on the merits of this claim. *See supra* section II; *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

person of common knowledge and experience on *notice* that a claim against another party *might* exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court*.

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had claims against Appellants was August 5, 2009, the date Appellants sold the disputed amenities to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed amenities to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[12] Therefore,

[12] The 1998 Property Report stated,

at that time, Respondents knew or should have known they might have claims against Appellants. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had claims against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

As to the negligent misrepresentation claims, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
>
> . . .
>
> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.
>
> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other

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> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

> representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.
>
> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot.

Thus, as to the negligent misrepresentation claims, the question is when Walbeck, in his individual and representative capacity, knew or should have known that the representation purportedly inducing him and other HOA members to buy their lots, i.e., the statement in the 1998 Property Report indicating that title to certain amenities would be conveyed to the HOA **upon completion of construction**, was unfulfilled. By April 10, 2001, Appellants completed construction of the Community Dock and Creekside Park. By early November 2004, when Walbeck received information indicating the HOA might not own the Community Dock or Creekside Park, Walbeck should have known that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled. *See Dean*, 321 S.C. at 363–64, 468 S.E.2d at 647 (stating that the "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist" (second emphasis added)); *Bayle*, 344 S.C. at 126, 542 S.E.2d at 741 (stating that the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run").

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA might not have title to the Community Dock or the other amenities listed in the 1998 Property Report, such as Creekside Park. He could have deduced from this budget item alone that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled. Hence, Respondents'

negligent misrepresentation claims accrued no later than early November 2004 and expired no later than early November 2007.

Therefore, the only reasonable inference that can be drawn from the evidence is that Respondents' negligent misrepresentation claims accrued well before December 22, 2007. *See* § 15-3-535 (stating that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations.

> 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 [when] 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.

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372–73, 725 S.E.2d 112, 125–26 (Ct. App. 2012) (quoting *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 by Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Here, Walbeck has not presented evidence showing that he reasonably relied on the words or conduct of any representative of Appellants in allowing the limitations period for Respondents' negligent misrepresentation claims to expire in early November 2007. Therefore, the doctrine of equitable estoppel is not availing to Respondents.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there was only one reasonable inference from the evidence as to when Walbeck should have known Respondents might have claims against Appellants for the representation in the 1998 Property Report. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, Respondents' negligent misrepresentation claims accrued well before December 22, 2007, as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010, Respondents' negligent misrepresentation claims are barred by the statute of limitations. Accordingly, we reverse the denial of Appellants' JNOV motion as to these claims.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false

> representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claims, the question as to the ILSA claim is when Walbeck knew or should have known that the representation in the 1998 Property Report was unfulfilled. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known well before December 22, 2007, that the statement indicating title to the Community Dock and Creekside Park would be conveyed upon completion of construction was unfulfilled. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the denial of Appellants' JNOV motion as to this claim and order the circuit court to dismiss this claim as well as the negligent misrepresentation claims.[13]

IV. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the denial of Appellants' JNOV motion as to their counterclaim for abuse of process: *Pallares v. Seinar*, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process*'" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

V. Recreational Easement

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[13] Because this holding is dispositive of Walbeck's ILSA claim, we decline to address Appellants' argument that Walbeck did not rely on any representations made in the 1998 Property Report. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds specifically listed by the circuit court to support its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

In any event, we agree with the circuit court that the I'On Club's lack of title to lot CV-6 on the date the easement was executed was fatal to the easement's validity. Although Appellants argue they may rely on the doctrine of after-acquired property to ratify the Recreational Easement,[14] they do not cite any South Carolina authority for the proposition that this doctrine applies to the grant of an easement. Because our supreme court has not spoken on this precise issue, we decline to apply this doctrine to the Recreational Easement. Therefore, we affirm the circuit court's conclusion that the Recreational Easement was invalid.

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that

[14] *See Richardson v. Atl. Coast Lumber Corp.*, 93 S.C. 254, 75 S.E. 371, 372 (1912) ("[I]f a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee." (*dictum*)).

an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[15] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*[16] and *Kincaid v. Landing Development Corp.*[17] as well as its own reference to the theory in *Kennedy v. Columbia Lumber & Manufacturing Co.*[18] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 655, 817 S.E.2d at 280. Notably, the court held, "the single business enterprise theory requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* Rather, "[c]ombining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe

[15] 423 S.C. 640, 817 S.E.2d 273 (2018).
[16] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).
[17] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).
[18] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

Here, even though there is evidence showing the various entities' operations are intertwined, there is no evidence of "bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions." *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 (emphasis added). Therefore, we reverse the circuit court's conclusion that Appellants were amalgamated.[19]

Appellants seek the remedy of a new trial because the circuit court's ruling relieved Respondents of the burden of establishing liability as to each individual Appellant and likewise relieved the jury members from their responsibility to evaluate the liability of each individual Appellant. Appellants also assert that the circuit court's instruction to the jury that Appellants were amalgamated suggested that Appellants had engaged in misconduct and the resulting prejudice requires a new trial. We agree and order the circuit court to conduct a new trial on Walbeck's breach of contract claim.

VII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

VIII. Attorney's Fees against Adkins

[19] We acknowledge that the circuit court did not have the benefit of the *Pertuis* decision when it ruled on this issue.

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party **reasonable** attorneys' fees, costs[,] and expenses **actually incurred**." (emphases added). The circuit court based its denial of the requested award on two grounds: (1) Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not"; and (2) while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw on the individual claims." In light of our holding that the derivative claims were not properly filed, the first ground no longer serves as a valid basis for the circuit court's ruling. However, the second ground remains a valid basis for declining to rule in favor of Appellants as the "prevailing party."

Moreover, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through the end of trial, it does not state that a corresponding amount of time and expenses were **actually generated** from Adkins' breach of contract claim or the addition of Adkins as a named plaintiff for the derivative claims. Further, counsel's attorney's fees affidavit is not in the record.

Based on the foregoing, Appellants have not shown that the amount of attorneys' fees and expenses they requested was either **reasonable** or **actually incurred**, as required by the fee-shifting provision in Adkins' lot purchase agreement. Therefore, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. We affirm in part and reverse in part the order denying Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. We reverse the order granting attorney's fees to Walbeck. Finally, we remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Levant Mealor, Appellant.

Appellate Case No. 2013-002752

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5590
Heard February 7, 2018 – Filed August 15, 2018
Withdrawn, Substituted, and Refiled February 27, 2019

AFFIRMED

Ryan Christopher Andrews, of Cobb, Dill & Hammett, LLC, of Mount Pleasant; and Chief Appellate Defender Robert Michael Dudek, of Columbia, both for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

KONDUROS, J.: Michael Levant Mealor (Mealor) appeals his conviction of trafficking methamphetamine in the amount of twenty-eight grams or more but less

than one hundred grams. He contends the trial court erred in permitting the introduction of logs from a national database of pseudoephedrine sales. He also argues the trial court erred in allowing testimony on the theoretical yield of methamphetamine from the amount of pseudoephedrine allegedly purchased by or for him. Additionally, Mealor maintains the trial court erred in denying his motion for a directed verdict. We affirm.

FACTS

John Ross, a volunteer reserve deputy for the Pickens County Sheriff's Office (the Office), monitored the National Precursor Log Exchange (NPLEx)[1] for the Office. Ross noticed a trend of individuals with the same address purchasing pseudoephedrine on the same day or within a few days of each other.[2] He suspected those individuals were "smurfing," which is the practice in which methamphetamine manufacturers will recruit others to purchase pseudoephedrine for them in exchange for money or drugs due to limits on how much pseudoephedrine a person can purchase.[3] Ross began monitoring those individuals' purchases and signed up to receive notifications in NPLEx for any attempted purchases by them. The Office also began surveilling those individuals.

In November 2011, officers received notice Mealor had purchased pseudoephedrine at a pharmacy. Officers went to the pharmacy and observed a car associated with the case parked at another pharmacy across the street. The officers waited and observed Cynthia Greenfield[4] exit the store. The officers then received a notification Greenfield had purchased pseudoephedrine. The officers followed the car anticipating the occupants might go to a hardware store to get supplies for making methamphetamine. However, the car instead drove toward the residence, traveling over forty miles per hour in a twenty-five-miles-per-hour speed limit

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[1] The NPLEx is an electronic database housing all pseudoephedrine purchases in twenty-nine states.

[2] Some of the individuals using that address were Mealor, Carol Denise Hayes (Hayes), and Brandon Hayes.

[3] Those limits in South Carolina are 3.6 grams per day, 9 grams per month, and 108 grams a year. *See* S.C. Code Ann. § 44-53-398(B)(2) (2018).

[4] Although some testimony indicates Greenfield and Mealor were "boyfriend and girlfriend," other testimony indicates they married shortly before their trial.

zone. The officers initiated a traffic stop for speeding. Amanda Hayes Hurley was driving and Daniel Ray Hurley, Mealor, and Greenfield were passengers along with infant children. Amanda had a suspended license, and the officers asked for her permission to search the vehicle, which she gave. The officers found two boxes of cold medicine containing pseudoephedrine—the same boxes for which the officers had received the earlier alerts.

In June 2012, officers arrested many of the individuals they believed were involved. On December 10, 2013, the grand jury indicted Mealor on one count of trafficking over one hundred grams of methamphetamine. Trial began on December 16, 2013, for Mealor, Greenfield,[5] and Hayes, who is Mealor's sister as well as Amanda's mother. Many witnesses testified about activities relating to methamphetamine occurring at a house owned by Louise Mealor—Mealor and Hayes's mother—and indicated Mealor, Greenfield, and Hayes all lived in the house. Other witnesses testified Jason Mealor —Hayes's son—and his then girlfriend, Melissa Wardlaw, also lived in the house.

Multiple witnesses[6] testified about buying medicines with pseudoephedrine to give to Mealor or Greenfield. Rebecca Crisp testified she gave pseudoephedrine she purchased to Hayes, who put it in the bedroom Mealor and Greenfield used. A few of those witnesses indicated they bought some of the pseudoephedrine to treat allergy or sinus problems for themselves, their children, or other family members. Several witnesses testified they would receive methamphetamine from Mealor or Greenfield after they gave them pseudoephedrine they bought. A few witnesses stated they received other drugs or money in return. One witness testified about going to various pharmacies with Mealor and Greenfield to buy pseudoephedrine. Many witnesses also testified about using methamphetamine with them or seeing it used at their home. Several witnesses testified about different supplies that are used in making methamphetamine, such as plastic bottles, batteries, ether, and big bottles of Coleman fuel. One witness indicated she asked Greenfield why she had so many plastic bottles and was told it was because Greenfield and Mealor could feel them expand unlike with glass. Some witnesses also testified the place had a

[5] Greenfield also appealed to this court.

[6] Each witness had a trafficking methamphetamine charge pending against him or her. They all testified they had not been promised anything in exchange for their testimony.

toxic or strong smell. One witness indicated Greenfield told her "the less [you] know, the better off [she] was" when she asked about the smell. Some witnesses testified Greenfield and Mealor told them they were going to make methamphetamine so it would be a cleaner product than what they were buying as well as cheaper. Angela Armstrong testified she knew Mealor and Greenfield would be making methamphetamine out of the pseudoephedrine she gave them because they told her they were. Wardlaw testified Greenfield and Mealor told her they could make methamphetamine. Thomas Rooney testified he saw Mealor and Greenfield making methamphetamine in their bedroom in the house several times. Rooney stated the process of making methamphetamine has a strong smell and causes the place where it is being manufactured to become "really smoky." He indicated he had seen Mealor and Greenfield shaking plastic drink bottles to make the methamphetamine. Billy Miller testified that when he gave Mealor and Greenfield the pseudoephedrine they told him they were going to make methamphetamine out of it.

The State presented testimony from Paul Forst, a business data analyst employed by Appriss, the company that maintains the NPLEx database. He indicated he was the records custodian for the logs. Over objections, the State introduced the NPLEx record for each of the defendants on trial and the witnesses and others charged with the same offenses. The NPLEx record for Mealor shows he purchased 69.36 grams and was blocked from purchasing it seven times for a total of thirty-seven attempts during 2011. The NPLEx record for Greenfield shows she purchased 68.64 grams and was blocked from purchasing it an additional five times for a total of thirty-four attempts in the same time period.

Captain Chad Brooks with the Office also testified. He provided he had been involved in the seizure of close to two hundred methamphetamine labs. He indicated he had manufactured methamphetamine once in a lab setting. He stated he was trained how to calculate the yield that could be produced from a particular amount of pseudoephedrine.[7] Captain Brooks testified 92% was about the highest

[7] All three defendants objected when the State first asked Captain Brooks about his training on calculating the yield of methamphetamine from pseudoephedrine. The State questioned Caption Brooks specifically on his qualifications. The trial court overruled the objection, finding it was not necessary for the witness to have certain degrees and that it went to credibility as opposed to admissibility. Mealor then

yield one could obtain and 40 to 50% is the lowest yield amount one could obtain "assuming it doesn't flash fire and assuming you['re] successful." He indicated 40% was the "worst case scenario." The yield percentage depends on a lot of factors such as how long one waited for the extraction to occur and spillage. He testified the things normally observed at a home lab are sulfuric acid (drain cleaner), coffee filters, funnels, bottles, Xylene, ether, starter fluid cans, cut batteries, medication blister packs, and burn piles. He testified the labs are "very portable and easy to dispose of." He also testified producing methamphetamine creates a distinct smell. Captain Brooks testified on cross-examination he did not find any methamphetamine manufacturing equipment at the scene or on any of the defendants.

At the close of the State's case, Greenfield moved for a directed verdict and Mealor joined in that motion. They contended only one witness testified he saw Greenfield and Mealor make methamphetamine. They asserted because trafficking requires at least ten grams of methamphetamine and the State presented no evidence of any particular amount of methamphetamine, the State's case was speculative. Mealor also argued that assuming a 40% yield from the pseudoephedrine witnesses indicated they gave him and Greenfield, the result would be sixty-three grams of methamphetamine, which was less than the charge for which they were on trial—trafficking one hundred grams. The trial court denied the motion for a directed verdict on trafficking under one hundred grams but took under advisement trafficking over one hundred grams.

Mealor and Greenfield both testified in their own defense. They both stated all of the pseudoephedrine they bought was to treat their allergy and sinus problems. They both indicated they had a problem with others stealing some of the pseudoephedrine they bought. Mealor testified he had been using Sudafed since he was thirteen years old due to his doctor's recommendation at the time. He also provided he did not have a way to get to the store, so he would buy pseudoephedrine whenever someone drove him to the store. He agreed that

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voir dired Captain Brooks. The trial court qualified him as an expert and stated that it did not know what Captain Brooks's testimony would entail because the court had not yet heard it. Once Captain Brooks started testifying about possible yield, Greenfield renewed the objection, stating "[i]t's, basically, chemistry testimony." Mealor joined the renewal, which the trial court overruled.

according to the NPLEx records, he bought 69.36 grams of pseudoephedrine in 2011, which was under the limit of 108 grams that one person could legally buy in one year. Greenfield admitted to attempting to buy pseudoephedrine thirty-four times in 2011, including the times she was blocked for being over the monthly limit.

Mealor explained on cross-examination he and Greenfield often purchased pseudoephedrine at the same store around the same time because they "stayed together all the time. [They] never left each other's side." He contended the fact he bought pseudoephedrine at the same pharmacy or a nearby pharmacy within a short period of time (i.e. thirty minutes) of many of the witnesses was a coincidence. Greenfield asserted the same. Greenfield also testified she bought pseudoephedrine from several different pharmacies because she had prescriptions for medications at various pharmacies. Both Greenfield and Mealor asserted that during the time period at issue, they did not live at the address where the State alleged the methamphetamine was being made. They both indicated Jason and Wardlaw lived there. Instead, Greenfield and Mealor along with Greenfield's daughter, Julie Williams, contended they lived at Williams's home to help care for her while she was pregnant. However, Greenfield admitted that at times they would stay at the house in question for periods of several nights.

At the close of the defendants' case, Mealor and Greenfield renewed their motions for a directed verdict on the charge of trafficking over one hundred grams of methamphetamine. The State asserted the amount of the pseudoephedrine purchases the witnesses testified they gave Mealor combined with his own purchases amounted to a total of 161 grams of pseudoephedrine. The State provided the amount of the witness's pseudoephedrine purchases they testified they gave Greenfield combined with her own purchases amounted to a total of 182 grams of pseudoephedrine. The State indicted Mealor's amount did not include Greenfield's purchases and vice versa. Greenfield and Mealor disputed these figures. Greenfield alleged the witnesses testified they gave Mealor or Greenfield 80 grams of their purchases whereas Mealor asserted it was 132 grams, not including the amounts they purchased themselves.

The trial court denied the motion, finding when taking the light most favorable to the State as the nonmoving party, the yield used to calculate the possible amount produced would be the highest yield possible and because the defendants agreed

with the amount of pseudoephedrine the witnesses testified they gave the defendants, the possible produced methamphetamine would be above one hundred grams. The court also found that because the statute makes it illegal to conspire to manufacture methamphetamine, the numbers could be used in the aggregate and not necessarily allotted to the defendant to whom the witness testified they gave the pseudoephedrine. The trial court determined the jury could find credible the testimony the yield could be 92%. The State requested to amend the indictment to trafficking between twenty-eight and one hundred grams, given the evidence presented, which the trial court granted.

During closing arguments, the State posited the witnesses testified they gave 164.64 grams of pseudoephedrine to Mealor during 2011. The State asserted when combined with the amount his NPLEx record indicates Mealor purchased himself, this amounted to 243 grams. For Greenfield, the State contended the witnesses gave her 179.76 grams, which it alleged amounted to 248 grams when combined with the amount her NPLEx record showed she purchased. The State argued that when Captain Brooks's lowest yield of 40% was applied to those amounts, the amount of methamphetamine produced was 65 grams for Mealor only accounting for the 164 grams given to him and about 100 grams of methamphetamine when the amount of pseudoephedrine he purchased himself was added.

The jury convicted Mealor and Greenfield of trafficking twenty-eight grams or more but less than one hundred grams of methamphetamine. The trial court sentenced them each to nine years' imprisonment.[8] This appeal followed.[9]

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[8] The jury found Hayes guilty of criminal conspiracy. The trial court sentenced her to three years' imprisonment.

[9] After Mealor filed his appeal and obtained the transcript, he moved to have the record reconstructed due to alleged errors and omissions. This court granted the motion on June 1, 2015, and remanded the cases to the trial court to reconstruct the record. The trial court and trial attorneys convened and attempted to supplement the missing portions of the record. After the trial court determined they had satisfactorily reconstructed the record, Mealor's appellate counsel asked for an order stating the record could not be reconstructed. The trial court denied that request, finding the record had been successfully reconstructed. Mealor appealed that denial to this court on March 9, 2016. On July 22, 2016, Mealor requested to

LAW/ANALYSIS

I. NPLEx Logs

Mealor argues the trial court erred in admitting the NPLEx logs into evidence because the records (1) did not meet the business records exception to hearsay, (2) lacked a foundation, and (3) violated Rule 403, SCRE. We disagree and address each argument in turn.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

A. Business Records Exception to Hearsay

Mealor contends the NPLEx logs did not meet the business records exception to hearsay. He asserts the logs are only created in anticipation of litigation. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. According to Rule 801(a), SCRE, "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Further, "[a] 'declarant' is a person who makes a statement." Rule 801(b), SCRE.

According to the business records exception to the rule against hearsay, evidence is not excluded by the hearsay rule if it is:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made

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drop his appeal regarding the reconstruction of the record. This court granted that motion on August 17, 2016, and this appeal proceeded.

> at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . .

Rule 803(6), SCRE; *see also* S.C. Code Ann. § 19-5-510 (2014) ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.").

While South Carolina has not addressed whether NPLEx logs meet the business records exception to hearsay, many other jurisdictions have examined if these or similar logs can be admitted into evidence. The Fifth Circuit Court of Appeals has addressed the admission of these logs in depth. Specifically, that court found "the pseudoephedrine purchase logs were business records for the purposes of Federal Rule of Evidence 803(6)[[10]][—]admissible under the exception to the hearsay rule via the affidavits certifying their status." *United States v. Towns*, 718 F.3d 404, 407 (5th Cir. 2013).

In *Towns*, the defendant contended, as Mealor does here, the logs "were prepared with a law enforcement purpose in mind and are only kept because . . . a [state] statute mandates their existence; the pharmacies do not (and actually cannot) use the records for day-to-day business activities. Thus[,] they were not kept in the ordinary course of business." *Id.* at 407-08. However, the court determined "the undue focus on the law enforcement purpose of the records has little to do with whether they are business records under the Federal Rules of Evidence. What

[10] South Carolina's Rule 803(6) differs slightly from the federal rule to be consistent with state law. *See* Rule 803 note, SCRE.

matters is that they were kept in the ordinary course of business." *Id.* at 408. The court noted, "It is not uncommon for a business to perform certain tasks that it would not otherwise undertake in order to fulfill governmental regulations. This does not mean those records are not kept in the ordinary course of business." *Id.* (citation omitted). The court ultimately held, "The regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." *Id.* (footnote omitted).

The *Towns* court further explained, "The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime." *Id.* at 411. "The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. . . . [T]he purchase logs were not prepared specifically and solely for use at trial . . . ." *Id.*

Similarly, the Seventh Circuit Court of Appeals has also looked at this issue and noted, "NPLE[x] logs are regularly maintained and updated each time an individual purchases an over-the-counter cold medicine that includes pseudoephedrine." *United States v. Lynn*, 851 F.3d 786, 793 (7th Cir. 2017). That court noted, "[S]tate regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses. *Id.*

The Sixth Circuit Court of Appeals has looked at the admission of similar logs. That court determined, "[T]he . . . reports at issue in this case were not made to prove the guilt or innocence of any particular individual, nor were they created for solely evidentiary purposes." *United States v. Collins*, 799 F.3d 554, 586 (6th Cir. 2015). The court further explained, "Although law enforcement officers may use [the] records to track pseudoephedrine purchases, the . . . system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions." *Id.* The court concluded "it is improbable that a pharmacy employee running a standard identification check of a customer would

have anticipated that the records of that transaction would later be used against these particular defendants at trial." *Id.*

The Eighth Circuit has also noted that "pseudoephedrine logs . . . kept in the ordinary course of business pursuant to [state] law . . . are business records under Federal Rule of Evidence 803(6)." *United States v. Mashek*, 606 F.3d 922, 930 (8th Cir. 2010). Moreover, the Indiana Court of Appeals has explained, "[A]lthough NPLEx records may occasionally be used to establish or prove some fact at trial, that is not the main purpose of the NPLEx records." *Montgomery v. State*, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014). "[T]he main purpose of the NPLEx records is to enable the [National Association of Drug Diversion Investigators (NADDI)] to track and regulate the sale of non-prescription . . . pseudoephedrine. Accordingly, the main purpose of the NPLEx records is not to establish or prove some fact at trial." *Id.*

South Carolina statute mandates the steps retailers of pseudoephedrine must take when completing a purchase. S.C. Code Ann. § 44-53-398(D) (2018). Specifically, it provides:

> (1) A retailer selling nonprescription products containing . . . pseudoephedrine . . . shall require the purchaser to produce a government issued photo identification showing the date of birth of the person and require the purchaser to sign an electronic log showing the date and time of the transaction, the person's name and address, the type, issuing governmental entity, identification number, and the amount of the compound, mixture, or preparation. The retailer shall determine that the name entered in the log corresponds to the name on the identification and that the date and time entered are correct and shall enter in the log the name of the product and the quantity sold. . . .
>
> (2) Before completing a sale of a product regulated by this section, the retailer electronically shall transmit the information entered in the log to a data collection system provided by the [NADDI], or a successor or similar

> entity. The system must collect this data in real time and generate a stop sale alert if the sale would result in a violation of subsection (B) or a federal quantity restriction, which must be assessed on the basis of sales or purchases made in any state to the extent that information is available in the data collection system.

Id.

We agree with the above cited jurisdictions and find NPLEx logs are not created for litigation purposes and are admissible under the business records exception to the rule against hearsay. Forst, the records custodian employed by Appriss—the company that maintains the NPLEx database—testified all South Carolina pharmacies were required to report to NPLEx starting on January 1, 2011. The NPLEx records were created to comply with state statutes, not to investigate a specific case or individual. Thus, we find the trial court correctly did not abuse its discretion in finding the NPLEx records fall under the business record exception to hearsay.

B. Foundation

Mealor also maintains contends a proper foundation was not laid to admit the NPLEx logs. He contends testimony from the specific individual employees who sold pseudoephedrine to Mealor or his codefendants was required, one pharmacist did not testify with certainty as to which database she entered the data, and no information was presented regarding the date the NPLEx logs were requested. We disagree.

This court has held that before the trial court may admit a business record into evidence, a qualified witness must "lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510." *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015). *Black's Law Dictionary* defines "laying a foundation" as "[i]ntroducing evidence of certain facts needed to render later evidence relevant, material, or competent." *Laying a Foundation*, *Black's Law Dictionary* (10th ed. 2014). "'[F]oundation' is simply a loose term for preliminary questions designed to establish that evidence is admissible." *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir.

2001)). Our court has noted "[t]he Uniform Business Records as Evidence Act . . . contains prerequisites to admission of the record." *State v. Sarvis*, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994). In *Sarvis*, this court did not admit into evidence one page of a document because the custodian of the records testified she had no knowledge of the "program [referenced on that page of the document] and no further foundation was presented to establish the manner in which the records were prepared." *Id.* This court concluded "[t]he requirements of the statute were not satisfied[;] therefore[,] the document was properly excluded." *Id.*

The Fifth Circuit also dealt with foundation arguments in *Towns* similar to the ones Mealor makes here. 718 F.3d at 407-08. The court found "the affidavit of a record custodian is sufficient to lay the foundation for a business record," explaining, "There is . . . no need to have individual cashiers from each of the pharmacies testify. The drug purchases of specific individuals on some date years prior could never be remembered anyway; this is the genesis of the business records exception." *Id.* at 410. "What is more important—and actually required—is the testimony of the custodian who ensures such records are free from adulteration after the fact." *Id.* (footnote omitted).

The *Towns* court further noted: "[A]ny claim concerning the records' accuracy is not the province of Rule 803(6). . . . [The defendant] was free to make arguments at trial that he was not the actual purchaser of the drugs, but accuracy does not control admissibility." *Id.* The court explained, "The purchase logs comprised records of a regularly conducted activity, which were made at or near the time of the purchase by individuals whose job duties entailed making those records." *Id.* Ultimately, the court held, "Because this information was certified by the records custodians' affidavits and there was no evidence of untrustworthiness in the record-keeping procedures, the pseudoephedrine purchase logs are admissible business records." *Id.*

Mealor's reasons in support of his argument the NPLEx logs lacked a foundation for the admission are in essence contentions the State did not meet specific elements of Rule 803(6) for admitting evidence as a business records exception. Here, three pharmacists from area pharmacies testified as to the procedure for when a person purchases pseudoephedrine from their stores, which includes scanning the barcode of the purchaser's government issued identification card through the NPLEx system. They provided their pharmacies require training for

using the system. Mealor points to the fact that these witnesses did not testify as to observing a particular purchase by Mealor or the others involved here. We agree with the *Towns* court "[t]here is . . . no need to have individual cashiers from each of the pharmacies testify. The drug purchases of specific individuals on some date years prior could never be remembered anyway; this is the genesis of the business records exception." *Id.* Additionally, Mealor notes that one of the witnesses testified the database she entered the data into was a government database. However, Forst explained all South Carolina pharmacies are required to report the sales to the NPLEX system. As Forst is the records custodian, and the NPLEx logs were admitted during his testimony, the fact that one pharmacist did not identify the exact database does not affect the trustworthiness and reliability of the NPLEx logs.

Rule 803(6) states the necessary information is "shown by the testimony of the custodian." Here, Forst, the records custodian, indicated he had access to the records that Appriss maintains and controls. He explained the procedure the pharmacies used to check identification for purchasers. He stated the data was "stored in a secured data warehouse in a database" and Appriss has "a redundant system as a backup stored in another facility." He provided "[t]he only people that have access to them are individuals that work with the product at Appriss and the records are also available to law enforcement by law. They can access them through a web portal that we provide for law enforcement, that once they are vetted and receive an account, then they can access and search the records." He responded affirmatively when asked if the "records are kept in your ordinary course of business." The testimony by Forst, the records custodian, provided exactly the information Rule 803(6) requires. *See Towns*, 718 F.3d at 410 ("What is more important—and actually required—is the testimony of the custodian who ensures such records are free from adulteration after the fact." (footnote omitted)).

Further, Mealor contends the NPLEx logs lacked foundation because the State presented no information regarding the date the NPLEx logs were requested. When the State sought to admit the NPLEx logs at trial, Mealor objected to the fact they did not reference what date range was requested to be printed out but acknowledged the records specified the date each purchase occurred. The timing aspect of Rule 803(6) states the record must be "made at or near the time" of the events. *See Towns*, 718 F.3d at 410 ("The purchase logs comprised records of a regularly conducted activity, which were made at or near the time of the purchase

by individuals whose job duties entailed making those records."). The pharmacists who testified provided how they entered the information as to who was purchasing the pseudoephedrine *at the time the purchase was being made*. Forst explained that within a second of when a pharmacy inputs the purchaser's information, that information is sent to Appriss to ensure the purchaser would not be exceeding any of the limits for purchasing pseudoephedrine. Mealor's contention the State did not provide the date range for which the records were requested is not the timing aspect Rule 803(6) requires.[11] Therefore, the trial court did not err in finding the State had laid a foundation for the NPLEx logs. Accordingly, the trial court did not abuse its discretion in admitting the NPLEx logs into evidence.[12]

II. Expert Testimony

Mealor asserts the trial court erred in allowing Captain Brooks's testimony regarding the theoretical yield of methamphetamine from the amount of pseudoephedrine available. He contends Captain Brooks did not have the expertise

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[11] Mealor's argument at trial about a lack of foundation that dealt with timing of the records seems to vary slightly from that issue raised on appeal. At trial, the issue was the records did not address which date range was entered into the computer system to produce the documents presented at trial. Mealor stated, "Those documents have no date range of purchase. . . . I don't know what was requested. It's not on the face of the document." Whereas on appeal, Mealor's argument stated "the NPLE[x] logs did not contain the date in which the records were requested nor was any evidence offered as to when such requests were made." To the extent Mealor is raising a different argument on appeal, that argument would be unpreserved. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding that when a defendant objects on one basis at trial but argues a different basis for the objection on appeal, the issue is not preserved for review). However, regardless of which of the two specific arguments regarding timing is being made, neither of these issues concern the actual timing aspect required by Rule 803(6).

[12] Mealor also argues the admission of the NPLEx logs violated Rule 403, SCRE. We find this argument unpreserved because none of the defendants objected to the NPLEx logs on this basis. *See Haselden*, 353 S.C. at 196, 577 S.E.2d at 448 (determining that when a defendant objects on one basis at trial but argues a different basis for the objection on appeal, the issue is not preserved for review).

to testify as to the yield amount because he had no training in chemistry. Mealor further maintains the trial court erred in finding the testimony reliable. We disagree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion." *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). The trial court does not abuse its discretion in qualifying experts and allowing their testimony as long as the witnesses have "acquired by study or practical experience such knowledge of the subject matter of [their] testimony as would enable [them] to give guidance and assistance to the jury in resolving a factual issue [that] is beyond the scope of the jury's good judgment and common knowledge." *State v. Anderson*, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014) (quoting *State v. Goode*, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991)).

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[] may testify thereto in the form of an opinion or otherwise." "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "'Th[e] language [in Rule 702] makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony.'" *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). "'Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope.' Reliability is a central feature of Rule 702 admissibility . . . . " *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 147).

However, "the reliability of a witness's testimony is not a pre[]requisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). "The expertise, [the] reliability, and the ability

of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony." *Id.* at 388, 728 S.E.2d at 474-75. "[A]ll expert testimony, not just scientific expert testimony, must be vetted for its reliability prior to its admission at trial." *Id.* at 388, 728 S.E.2d at 474.

"The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." *White*, 382 S.C. at 273, 676 S.E.2d at 688. "Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." *Id.* "Courts are often presented with challenges on both fronts[—]qualifications and reliability. The party offering the expert must establish that [the] witness has the necessary qualifications in terms of 'knowledge, skill, experience, training[,] or education.'" *Id.* (quoting Rule 702, SCRE). "With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications." *Id.* "It is in this latter context that the trial court properly concludes that 'defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility.'" *Id.* at 273-74, 676 S.E.2d at 688 (quoting *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990)). "Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility." *Id.* at 274, 676 S.E.2d at 688.

"The admissibility of *scientific* evidence depends upon 'the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.'" *State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991) (emphasis added by court) (quoting *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). "Scientific evidence is admissible under Rule 702, SCRE," when "(1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable . . . ; and (4) the probative value of the evidence outweighs its prejudicial effect." *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001). The trial court must use the following factors to determine the reliability of scientific testimony: "(1) the publications and peer review of the technique; (2)

prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)). "However, these factors 'serve no useful analytical purpose' for nonscientific evidence. In those cases, we have declined to offer any specific factors for the circuit court to consider due to 'the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence.'" *Id.* at 74-75, 735 S.E.2d at 655-56 (quoting *White*, 382 S.C. at 274, 676 S.E.2d at 688).

"Nevertheless, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable." *Id.* at 75, 735 S.E.2d at 656. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." *White*, 382 S.C. at 274, 676 S.E.2d at 688 (footnote omitted). Our supreme court "ha[s] declined to set a general test for nonscientific testimony due to the multitude of challenges [that] may arise. Thus, this evidence must be evaluated on an ad hoc basis." *Graves*, 401 S.C. at 75, 735 S.E.2d at 656 (looking at other jurisdictions' decisions when assessing the reliability of testimony based on a particular method that had not previously been assessed in South Carolina). In cases involving nonscientific expert testimony, the supreme court has not required a greater foundation or applied the *Jones* test. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 372.

Although South Carolina has not discussed the expertise required to testify about the yield of methamphetamine from pseudoephedrine, others jurisdictions have. The Appellate Court of Illinois has held: "Differences in methamphetamine yield simply do not involve novel science; they involve personal applications of well[-]known and commonly accepted scientific procedures." *People v. Wilke*, 854 N.E.2d 275, 282 (Ill. App. Ct. 2006). That court also explained: "It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine. Not even defendant contests this fact. Given such acceptance of the underlying method, a *Frye*[13]

[13] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), provided the standard in federal cases for admitting scientific evidence until the Federal Rules of Evidence

hearing is not required in the instant case." *Id.* at 281. The court found the defendant was "mistak[ing] a credibility issue for an admissibility issue." *Id.* at 282. In another case, that court determined trial counsel did not err in failing to challenge under the *Frye* test the admissibility of the method of calculating methamphetamine weight from pseudoephedrine noting, "Defendant's own expert testified that the procedures to produce methamphetamine 'are very similar to other

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superseded it. *See State v. Dinkins*, 319 S.C. 415, 418 n.3, 462 S.E.2d 59, 60 n.3 (1995) ("[T]he United States Supreme Court recently held the adoption of the Federal Rules of Evidence superseded the *Frye* test."); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." (footnote omitted)).

"Rule 702 of the Federal Rules of Evidence is identical to Rule 702 of the South Carolina Rules of Evidence . . . ." *In re Robert R.*, 340 S.C. 242, 246, 531 S.E.2d 301, 303 (Ct. App. 2000). "Although our supreme court in *Council* declined to adopt the [federal] *Daubert* standard, instead selecting an approach based on both the South Carolina Rules of Evidence and prior South Carolina case law, at least one observer has noted that the two standards are 'very similar.'" *Id.* at 247 n.3, 531 S.E.2d at 303 n.3 (quoting G. Ross Anderson, Jr., *Evidence Eggshells—A New Walk for Experts*, The Bulletin, Fall 1999, at 7, 9). "While many of *Jones*'s progeny borrow principles from *Daubert*'s predecessor, . . . our courts never adopted the *Frye* standard completely in favor of *Jones*'s more liberal approach." *State v. Morgan*, 326 S.C. 503, 509 n.2, 485 S.E.2d 112, 115 n.2 (Ct. App. 1997) (citing *State v. Ford*, 301 S.C. 485, 488, 392 S.E.2d 781, 783 (1990) ("South Carolina, however, has never specifically adopted the *Frye* test and has employed a *less restrictive* standard in regard to the admissibility of scientific evidence." (emphasis added))), *overruled by White*, 382 S.C. at 273, 676 S.E.2d at 688 ("We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.").

chemical procedures. There is nothing unique about them. This is simple chemistry.'" *People v. Dorsey*, 839 N.E.2d 1104, 1109 (Ill. App. Ct. 2005). In *Wilke*, the Appellate Court of Illinois also noted "[t]he 'science' . . . involves the chemistry behind converting pseudoephedrine to methamphetamine. . . . Any arguments about defendant's particular ability to apply the chemistry . . . raise an issue of evidentiary weight." 854 N.E.2d at 281. The court concluded, "Arguments about different yields stemming from different laboratory conditions are simply misplaced in this context. Defendant is certainly entitled to raise such matters, but the appropriate time for doing so is during cross-examination of the State's expert (or direct examination of a defense expert) . . . ." *Id.* at 282. A concurrence by a judge on the Appellate Court of Illinois has also examined the conversion formula: "[I]t is abundantly clear that a formula exists for the conversion of precursor material into a quantity of methamphetamine. That formula is commonly accepted by the scientific community and, in essence, is operable by the application of mathematics." *Dorsey*, 839 N.E.2d at 1110 (Appleton, J., concurring).

In a case from the Court of Appeals of Indiana involving a methamphetamine conviction, a judge concurred "to address the issues with determining generally the amount of methamphetamine that is involved in the manufacturing in a particular case." *Harmon v. State*, 971 N.E.2d 674, 683 (Ind. Ct. App. 2012) (Vaidik, J., concurring). The judge noted one method "to determine the actual weight of the methamphetamine produced" is to "us[e] a conversion ratio based on the amount of . . . pseudoephedrine that is present." *Id.* The judge found that method to be a "more appropriate method," explaining: "This method uses a scientifically determined formula to calculate how much methamphetamine would be produced based on the amount of . . . pseudoephedrine that is used in manufacturing. Using a conversion ratio allows for a reliable measure of the weight of the drug that will be produced . . . ." *Id.* at 684. The judge observed: "Other jurisdictions around the country have adopted this method, and expert witnesses are employed to apply the conversion ratio due to its case-by-case variability." *Id.*

> It is essential that an expert witness be present at trial to testify to the conversion ratio and how it applies in each case. . . . [A] conversion ratio between . . . pseudoephedrine to methamphetamine can be used, but it can change "depending on the cooking process, on

> whether pill binders are stripped from the . . . pseudoephedrine, and on the person who is 'cooking' the methamphetamine." With so many ingredients involved in the manufacturing of methamphetamine and so many different factors that can alter how those ingredients affect the yield, determining yield is not a task that should be undertaken by a lay person. When the difference of such a small amount can have such a profound effect on a potential sentence, the trial court needs to be sure that the yield is accurate.

Harmon, 971 N.E.2d at 685 (quoting *Halferty v. State*, 930 N.E.2d 1149, 1153 (Ind. Ct. App. 2010)).

The Indiana Supreme Court has "reject[ed] a one-size-fits-all method of showing final yield because manufacturing techniques and ingredients vary from lab to lab, and the form in which law enforcement officers discover an intermediate product may not allow for uniform scientific analysis." *Buelna v. State*, 20 N.E.3d 137, 147 (Ind. 2014). That court found an acceptable method to show the weight of the final yield was to use a conversion ratio based on the amount of pseudoephedrine used by the manufacturer as "long as the State can also establish that a defendant used a sufficient amount of precursors to successfully convert . . . pseudoephedrine into methamphetamine[] and had the capability and skill to do so." *Id.*

A concurrence in one of the cases from the Appellate Court of Illinois noted, "The only variables in the formula are the skill of the 'cookers,' the equipment used by them, and the location of the production." *Dorsey*, 839 N.E.2d at 1110 (Appleton, J., concurring). That judge explained, "It is these variables that produce the plethora of different conversion ratios of raw material to product—ranging from .92 to .40—seen by this court as well as other state and federal courts throughout the country." *Id.*

In the present case, Captain Brooks testified he had attended a "clandestine meth lab training school." He stated he was "certified through the [Drug Enforcement Agency (DEA)] as what they call a site safety officer at labs sites and also clandestine lab certified." Captain Brooks provided he had been involved in thousands of methamphetamine investigations, as well as "[h]igh level trafficking

conspiracies surrounded by methamphetamine." He noted he had "been involved in the seizure of probably close to 200 methamphetamine labs." He also indicated he had manufactured methamphetamine in a controlled setting. Captain Brooks described "[i]n the clandestine lab training, [he] went to the [South Carolina Law Enforcement Division (SLED)] lab and manufactured methamphetamines from start to finish the lab, in the controlled setting." He indicated he had been trained about the various methods with which one can make the methamphetamine. He also provided he was trained how to determine the yield of methamphetamine from the amount of precursor elements. He explained, "It's, basically, a mathematical equation. By taking the grams of [p]seudoephedrine that are introduced into the lab . . . ."

The trial court did not abuse its discretion in qualifying Captain Brooks as an expert and allowing him to testify as to the possible yield of methamphetamine from the pseudoephedrine available. Captain Brooks had more knowledge about manufacturing methamphetamine and calculating methamphetamine yield than the jury would have as common knowledge, and his testimony assisted the jury in understanding how methamphetamine labs operate—this is all that Rule 702 requires. Mealor argued that from "research on the [i]nternet," the experts disagreed on the actual conversion measurements but did not provide any sources. He argued the "yield is [a]ffected by the way [it is] cooked, by who cooks it, by what's done with it." He contended "it would be completely inappropriate to expect a police officer who is trained in investigative techniques regarding this with no more than a high school education in chemistry as an expert." However, Captain Brooks explained those factors are what caused a range of yields instead of a specific percentage that would be the yield in any situation. Captain Brooks did not develop the calculation; he simply utilized it as he was trained. As numerous courts have held, this is a widely accepted calculation. Accordingly, the trial court did not abuse its discretion in qualifying Captain Brooks as an expert due to his training and experience and allowing him to testify as to the theoretical yield.

III. Directed Verdict

Mealor maintains the trial court erred in denying his motion for a directed verdict because the State did not present direct or substantial circumstantial evidence of his guilt. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Venters*, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). Additionally, an appellate court must find a case was properly submitted to the jury "if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused." *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648. The trial court should submit a case "to the jury when the evidence is circumstantial 'if there is any substantial evidence [that] reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "[T]he trial court should grant a [defendant's] directed verdict motion when the evidence presented merely raises a suspicion of guilt." *Id.* at 142, 708 S.E.2d at 778. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013). "[W]hen the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial [court] is concerned with the existence or non-existence of evidence, not with its weight." *State v. Pearson*, 415 S.C. 463, 469, 783 S.E.2d 802, 805 (2016).

"[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). During the *jury*'s review, "every circumstance relied upon by the [S]tate [must] be proven beyond a reasonable doubt[] and . . . all of the circumstances so proven [must] be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." *Id.* (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). During the consideration of a directed verdict motion, the *trial court* must view the evidence in the light most favorable to the State and submit the case to the jury if any substantial evidence "reasonably tends to prove the guilt of the accused" or if any substantial evidence exists "from which his guilt may be fairly and logically deduced." *Id.* at 236-37, 781 S.E.2d at 354 (emphasis added) (quoting *Littlejohn*,

228 S.C. at 329, 89 S.E.2d at 926). "Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness." *Id*. at 237, 781 S.E.2d at 354. "Accordingly, in ruling on a directed verdict motion whe[n] the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.*

Section 44-53-375(C) of the South Carolina Code (2018) provides:

> A person who knowingly sells, manufactures, delivers, [or] purchases, . . . or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, [or] purchase, . . . or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine . . . is guilty of a felony which is known as "trafficking in methamphetamine" . . . .

The appropriate sentence upon conviction varies according to the range of grams of the substance. In this case, the State ultimately asserted Mealor manufactured or attempted to manufacture "twenty-eight grams or more, but less than one hundred grams." § 44-53-375(C)(2).[14]

Our supreme court has recently discussed whether testimony regarding the theoretical maximum yield of methamphetamine from pseudoephedrine provides sufficient evidence of quantity to survive a motion for a directed verdict. *See State v. Cain*, 419 S.C. 24, 795 S.E.2d 846 (2017). In that case, the supreme court reversed the trial court's denial of the defendant's motion for a directed verdict. *Id.*

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[14] The trial court denied the motion for a directed verdict on trafficking under one hundred grams but initially took under advisement trafficking over one hundred grams. Later, after the defendants renewed their motions, the State requested to amend the indictment to between twenty-eight and one hundred grams, given the evidence presented, which the trial court granted.

at 37, 795 S.E.2d at 853. Law enforcement had not found methamphetamine but had found evidence of ingredients used to manufacture methamphetamine, including empty packages that once contained 19.2 grams of pseudoephedrine. *Id.* at 27, 795 S.E.2d at 848. The defendant was tried for trafficking ten grams or more of methamphetamine. *Id.* On appeal, the defendant argued the expert's "testimony is insufficient because it proves only the theoretical quantity of drugs a person could have produced at maximum efficiency; it does not prove the quantity [the defendant] could realistically have intended to manufacture." *Id.* at 28-29, 795 S.E.2d at 848. The defendant further maintained "[w]ithout evidence showing [he] could actually have produced ten grams or more of methamphetamine with the equipment and ingredients he had at his disposal, . . . the trial court erred in denying his motion for directed verdict." *Id.* at 29, 795 S.E.2d at 848-49.

In *Cain*, the expert "described the equipment and ingredients found at the scene, and how [the defendant] would have used them in the 'one pot'[15] method of manufacturing methamphetamine. . . . [The expert] testified [the defendant]'s method did not take place under laboratory conditions, and admitted that calling his operation a 'meth lab' was a 'misuse of the word lab.'" *Id.* at 29, 795 S.E.2d at 849. The State questioned the expert on the quantity of methamphetamine the method utilized by the defendant could produce, specifically how much methamphetamine the amount of pseudoephedrine would produce with various yields starting at a 100% yield, which was under ideal laboratory conditions, and decreasing to a 65% yield, which would produce 11.48 grams. *Id.* at 29-30, 795 S.E.2d at 849. The supreme court found "[t]his testimony was the only evidence the State offered as to the quantity involved in [the defendant]'s alleged trafficking in methamphetamine." *Id.* at 30, 795 S.E.2d at 849.

The supreme court determined:

> [The expert]'s testimony proves it was theoretically possible to manufacture 17.67 grams of methamphetamine from 19.2 grams of pseudoephedrine if the process was conducted at one hundred percent

[15] Captain Brooks testified shake and bake and one pot are the same method. He also indicated the other two most common methods are red phosphorous or "red fee" and the birch or "Nazi" method.

> efficiency. However, [the expert] specifically acknowledged the quantity of 17.67 grams was calculated on the assumptions of "ideal laboratory conditions" with "pure products" used by a "trained chemist." [The expert] admitted [the defendant] did not have ideal laboratory conditions, and the State offered no evidence [the defendant] even knew how to manufacture methamphetamine. There is no other evidence in the record to support the validity of [the expert]'s assumptions. [The expert]'s testimony also proves the quantity of methamphetamine [the defendant] could have manufactured at various lower levels of efficiency. However, [the expert]'s testimony provides no basis for calculating the level of efficiency [the defendant] could actually have reached under the circumstances that existed in the house. In fact, [the defendant]'s counsel specifically asked [the expert] on cross[-]examination, "There's no way to tell, from what you had there, how much [the defendants] were actually getting from their work?" [The expert] replied, "No, sir."

Id. at 31, 795 S.E.2d at 850.

In deciding *Cain*, the supreme court examined an Eighth Circuit Court of Appeals case, *United States v. Eide*, 297 F.3d 701 (8th Cir. 2002). *Cain*, 419 S.C. at 31-33, 795 S.E.2d at 850-51. The *Cain* court noted, "In *Eide*, after rejecting the government's evidence of theoretical maximum yield, the Eighth Circuit focused on the expert's explanation of 'the particular methamphetamine manufacturing processes' the defendant used, and her testimony 'that his lithium ammonia reduction process was capable of producing a 40 to 50 percent yield.'" *Cain*, 419 S.C. at 32, 795 S.E.2d at 850-51 (quoting *Eide*, 297 F.3d at 705). The *Eide* court stated, "This yield would have resulted in producing 10.1 to 12.6 grams of actual methamphetamine." *Cain*, 419 S.C. at 32, 795 S.E.2d at 851 (quoting *Eide*, 297 F.3d at 704). The *Eide* court affirmed the conviction finding, "The particularized nature of [the expert]'s testimony, combined with additional evidence suggesting that [the defendant] was experienced in the manufacture of methamphetamine, were sufficient for a jury to find beyond a reasonable doubt that [the defendant]

was a good cook capable of producing a 40 to 50 percent yield." *Cain*, 419 S.C. at 32-33, 795 S.E.2d at 851 (quoting *Eide*, 297 F.3d at 705). However, the *Cain* court distinguished *Eide* determining, "Unlike the expert testimony in *Eide*, [the expert]'s testimony provided the jury no basis on which to determine how much methamphetamine [the defendant] could actually have produced." *Cain*, 419 S.C. at 33, 795 S.E.2d at 851. The court found, "If [the defendant] were a 'good cook' like [the defendant in *Eide*], 'capable of producing a . . . 50 percent yield,' he would have manufactured 8.83 grams of methamphetamine, and thus, he could not be guilty of trafficking." *Cain*, 419 S.C. at 33, 795 S.E.2d at 851.

In *Eide*, the Eighth Circuit explained, "Estimating the amount a clandestine lab is capable of manufacturing may be determined from the quantity of the precursor chemicals seized together with expert testimony about their conversion to methamphetamine." 297 F.3d at 705. "Quantity yield figures should not be calculated without regard for the particular capabilities of a defendant and the drug manufacturing site." *Id.*

The Eighth Circuit further noted:

> The jury also heard testimony from police, [Division of Narcotics Enforcement (DNE)] officers, and [the defendant]'s family members indicating that he was heavily involved in the manufacture of methamphetamine. Police and DNE officers testified to the large amount of evidence gathered at [the defendant]'s residence that was consistent with the production of methamphetamine manufacturing, including cans of engine starting fluid, muriatic acid, liquid propane tanks, lithium camera batteries, crushed pseudoephedrine, rags smelling of anhydrous ammonia, scales, plastic baggies, and the sludge-like substance containing trace amounts of methamphetamine. The jury heard [the defendant]'s half[-]sister testify about suspicious objects she had seen in his lab, including a couple of bags of white powder, coffee filters[,] and the apple juice jar, and [the defendant]'s former wife testified that she had smelled chemicals coming from the

> basement and had seen coffee filters and a blender with white powder.

Id. at 705-06.

Ultimately, the *Eide* court determined the prosecution presented sufficient evidence the defendant had attempted to manufacture five or more grams of methamphetamine, noting, "The combined effect of [the expert]'s particularized testimony and the strong and detailed circumstantial evidence linking [the defendant] to the manufacture of methamphetamine were enough for the jury to conclude that [the expert]'s calculations were an accurate estimate of [the defendant]'s manufacturing capabilities." *Id.* at 706.

"Congress responded to growing concerns about a 'methamphetamine epidemic in America,' *United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (quoting H.R. Rep. 106-878, at 22 (Sept. 21, 2000)), by" replacing "the individualized determination of how much of a controlled substance certain chemicals would yield" for sentencing in federal methamphetamine cases, with conversion ratios for "'the quantity of controlled substance that could reasonably have been manufactured . . . determined by using a table of manufacturing conversion ratios for . . . pseudoephedrine, *which table shall be established by the Sentencing Commission based on scientific, law enforcement, and other data the Sentencing Commission considers appropriate*.' Pub. L. No. 106-310, § 3651(b), 114 Stat. 1238-39 (2000)." *United States v. Martin*, 438 F.3d 621, 624-25 (6th Cir. 2006) (emphasis added by court). "These tables adopt a 50% conversion ratio for pseudoephedrine, such that [two] grams of the chemical is equivalent to [one] gram of methamphetamine." *Id.* at 625. "In adopting the 50% conversion ratio for pseudoephedrine, the Commission relied on a report promulgated by the DEA's Office of Diversion Control that was published on the website of the Office of National Drug Control Policy (ONDCP)." *Id.* "That report 'indicate[d] that the actual yield of methamphetamine from . . . pseudoephedrine is typically in the range of 50 to 75[%].'" *Id.* (alteration by court) (quoting Proposed Amendments to the Sentencing Guidelines, 66 Fed. Reg. 7962, 7965 (Jan. 26, 2001)) (citing U.S. Sentencing Guidelines, App. C, Amendment 611 ("This yield is based on information provided by the [DEA] that the typical yield of these substances for clandestine laboratories is 50 to 75[%].")); *see also United States v. Stacy*, 769 F.3d 969, 977 (7th Cir. 2014) (holding that although the defendant argued "the

50% ratio [w]as meant to 'approximate the amount of pure methamphetamine that a high-grade laboratory could produce[,]' . . . the Commission based its ratio on a report from the [DEA] about the typical yield rate *in clandestine laboratories*").

In a Seventh Circuit case, "[t]he experts . . . testified that although an 80-85% yield *might* be possible with a clandestine laboratory, yields in the range of 40%-60% were *more probable*. This data is confirmed by the Iowa study, which [the defendant] introduced at sentencing." *United States v. Eschman*, 227 F.3d 886, 890 (7th Cir. 2000). In another case from the Appellate Court of Illinois, a police officer qualified as an expert in the manufacturing of methamphetamine "stated some jurisdictions use an 80% to 90% yield rate, but his office arrived at a 60% yield because 'it was the most lenient[,] giving the most margin for error and the most leniency towards the suspect.'" *People v. Reatherford*, 802 N.E.2d 340, 346-47 (Ill. App. Ct. 2003) (alteration by court).

In *Martin*, the defendant argued "expert testimony in reported federal court opinions and by DEA personnel before Congress conflicts with the Commission's choice of 50% as the appropriate conversion ratio for pseudoephedrine." *Id.* at 636. The *Martin* court noted "the sources that [the defendant] cites reveal that, although yield rates are at times as low as 15%, they can also be as high as 85%." *Id.* The court determined "[t]hese sources—among them the so-called 'Iowa Study' and expert testimony by a DEA chemist in *Eschman*, 227 F.3d at 889—therefore reflect a 'difference of opinion in the scientific community' as to yield rates." *Martin*, 438 F.3d at 636. The court held, "A yield rate of 50%, moreover, is not just a reasonable middle ground between two extremes, but is also borne out by cases predating the Act—cases in which this court endorsed the 50% rate as a valid approximation." *Id.*

In a Court of Appeals of Indiana case, the court found the State had not presented sufficient evidence the defendant had manufactured three grams of methamphetamine. *Halferty*, 930 N.E.2d at 1153. In that case, an officer "testified that '*in general*,' the conversion ratio between . . . pseudoephedrine to methamphetamine was '*usually* right around 70, 80[%].'" *Id.* "When questioned about the term 'usually,' [the officer] testified that the ratio can change depending on the cooking process, on whether pill binders are stripped from the . . . pseudoephedrine, and on the person who is 'cooking' the methamphetamine." *Id.* The officer also acknowledged "depending on the cook, the ratio of . . .

pseudoephedrine to methamphetamine can 'fall below 50[%].'" *Id.* The court noted "[c]ooking the [amount] of . . . pseudoephedrine at a yield of fifty percent would create . . . an amount . . . less than three grams. [The officer] also testified that the conversion ratio was 'in general,' 'usually,' or 'about' seventy to eighty percent." *Id.* at 1154. The court determined, "The use of these terms does not constitute proof beyond a reasonable doubt. Without the proof of three grams, a conviction for Class A felony dealing in methamphetamine cannot stand." *Id.*

Another Court of Appeals of Indiana case similarly found "the use of the term 'could' b[y] a testifying police officer is, in and of itself, not proof beyond a reasonable doubt that [the defendant] manufactured three or more grams of meth." *Fancil v. State*, 966 N.E.2d 700, 707 (Ind. Ct. App. 2012). The court noted "the State argue[d] that this case is distinguishable from *Halferty* because [it] presented evidence that [the defendant] ha[d] the skill and experience to produce an efficient conversion yield." *Id.* Additionally, "[t]he State contend[ed] that [the defendant] only had to achieve a conversion ratio of twenty percent, not the fifty percent considered in *Halferty*, 930 N.E.2d at 1154, in order to produce three grams of meth from fifteen grams of pseudophedrine." *Id.* The court disagreed with the State's arguments, finding "[a]lthough the State did present evidence that [the defendant] had been manufacturing meth for a number of months and possessed a degree of skill, [the officer's] testimony did not address a specific conversion ratio for [the defendant] in light of his capability and the materials present at his residence." *Id.* (citation omitted). "Moreover, although [the defendant] only needed to be able to convert at a rate of twenty percent to produce the three grams, the State cannot rely on the low conversion ratio from *Halferty* that was not in evidence in this case." *Id.*

In the present case, unlike *Cain* in which the State presented no testimony by anyone that the defendants had actually produced methamphetamine, the State presented multiple witnesses who testified Greenfield and Mealor provided them with methamphetamine they had produced. Rooney testified he observed activities related to the manufacturing of methamphetamine at the residence. He indicated he recognized the smell of making methamphetamine. He provided he saw Greenfield and Mealor shaking plastic drink bottles. He testified he saw Greenfield and Mealor making methamphetamine there "[q]uite a few" times. He also observed big containers of Coleman fuel, which they used in the manufacturing. He also saw cut open batteries. He testified he saw Greenfield and

Mealor making methamphetamine in their bedroom. Miller testified he did not see them make methamphetamine but they told them they would be making it when he gave them the pseudoephedrine. Several witnesses testified they gave Mealor pseudoephedrine in exchange for methamphetamine. Amanda testified Mealor and Greenfield would give her money to purchase pseudoephedrine for them, and she would keep the change.

Captain Brooks testified 40 to 50% is the lowest yield percentage of methamphetamine one could possibly get from pseudoephedrine. He indicated that was the worst case scenario. He testified sulfuric acid (drain cleaner), coffee filters, funnels, bottles, Xylene, ether, starter fluid, cut batteries, medication blister packs, and burn piles are all things normally observed at a lab. Several witnesses placed these things at the house in question.

The trial court did not err in denying the motion for a directed verdict. Viewing the facts in the light most favorable to the State, the State presented evidence from which the jury could find Mealor manufactured or attempted to manufacture over twenty-eight grams of methamphetamine. Many witnesses testified Mealor and Greenfield gave them methamphetamine in return for pseudoephedrine. Accordingly, the records contain evidence they were able to actually produce methamphetamine. Further, witnesses also testified one of the reasons Mealor and Greenfield started manufacturing methamphetamine was because they believed they could produce it at a lesser cost than buying it. Captain Brooks testified the worst case scenario yield was 40%. Applying a 40% yield to the amount of pseudoephedrine Mealor and Greenfield were given, according to the testimony the State presented, the amount of grams of methamphetamine would be over twenty-eight grams. Several witnesses testified Mealor or Greenfield would give them methamphetamine in the amount of $20 or $40 at a time.[16] While Captain Brooks's testimony indicates a person attempting to make methamphetamine could end up with no methamphetamine due to flash fire, that person would still have been attempting to produce some amount of methamphetamine. Here, many witnesses

[16] "In the case of methamphetamine, an individual user can purchase the drug in quantities as small as one gram." *State v. Bramme*, 64 P.3d 60, 64 (Wash. Ct. App. 2003). A detective "testified that the smallest unit of methamphetamine sold is one gram. Most users buy 1.8 grams—a 'teener'—or two teeners for personal use." *State v. Zunker*, 48 P.3d 344, 347 (Wash. Ct. App. 2002).

testified that Mealor and Greenfield gave them methamphetamine after they had made it, demonstrating they were successful. Although we do not have specific testimony that Greenfield or Mealor was a "good cook," we do have testimony they successfully produced methamphetamine. Accordingly, the trial court did not err in denying the directed verdict motion.

CONCLUSION

The trial court did not abuse its discretion in admitting into evidence the NPLEx logs or Captain Brooks's testimony on the theoretical yield. Further, the trial court did not err in denying Mealor's motion for a directed verdict. Accordingly, the trial court is

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Citizens for Quality Rural Living, Inc., Appellant,

v.

Greenville County Planning Commission and RMDC, Inc., Respondents.

Appellate Case No. 2017-000170

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

Opinion No. 5629
Heard October 10, 2018 – Filed February 27, 2019

REVERSED AND REMANDED

Barbara Faith Martzin, of B. Faith Martzin, PC, of Greenville, for Appellant.

William A. Coates, of Roe Cassidy Coates & Price, PA, of Greenville, for Respondent RMDC, Inc.

H. Dean Campbell, Jr. and Jeffrey D. Wile, both of Greenville, for Respondent Greenville County Planning Commission.

GEATHERS, J.: Appellant Citizens for Quality Rural Living, Inc. challenges the circuit court's order dismissing its declaratory judgment action and its appeal from

a decision of Respondent Greenville County Planning Commission (Commission) approving the subdivision proposal of Respondent RMDC, Inc. (Developer). Appellant argues the circuit court erred by concluding that Appellant had no standing to appeal the Commission's decision or to file its declaratory judgment action. We reverse and remand to the circuit court for a determination on the merits of Appellant's issues.

FACTS/PROCEDURAL HISTORY

In August 2016, Developer submitted to the Commission an application for preliminary approval of a proposal for a subdivision to be named "Copperleaf" near Woodside Road, South Shirley Road, and McKelvey Road in an unzoned area of Greenville County. This submission followed three previous unsuccessful submissions for the same subdivision.[1] According to the Commission, the August 2016 proposal called for a tract of 82.17 acres to be subdivided into 95 residential lots.

At the Commission's August 2016 meeting, several of Appellant's members, including those who own property and live in the immediate vicinity of the proposed subdivision, spoke in opposition to the proposal. They expressed concern over traffic hazards and other environmental problems that could result from the subdivision as well as the incompatibility of the subdivision with the surrounding rural community. Developer's engineer and the County's Planning Department staff also addressed the Commission at this meeting. By voice vote, the Commission accepted the recommendation of the Planning Department staff to approve Developer's proposal, and the county's Subdivision Administrator noted this approval in a letter dated August 29, 2016.

Appellant sought review of the Commission's decision in the circuit court, attaching to its Notice of Appeal a complaint entitled, "Appeal and Request for Declaratory Relief," with exhibits. In the complaint, Appellant set forth its grounds for appeal as well as a separate "Request for Declaratory Relief." Developer filed a motion to dismiss Appellant's complaint on the grounds that Appellant had no standing to appeal the Commission's decision and the complaint failed to state a claim on which relief could be granted. In its supporting memorandum, Developer

[1] None of Developer's applications identify the owner of the property. Appellant has identified the property's owner as a registered Florida corporation, which the Commission admits, but there is no other identifying information in the record. It is unclear whether Developer has an ownership interest in the property.

asserted that Section 6-29-1150 of the South Carolina Code (Supp. 2015) allowed only a property owner whose land is the subject of a commission decision to appeal the decision.[2]

After conducting a motions hearing, the circuit court issued a Form 4 order stating, "Court grants [Developer's] Motion to Dismiss due to Appellant's lack of standing in this matter." The circuit court denied Appellant's motion for reconsideration pursuant to Rule 59(e), SCRCP, in a Form 4 order as well, giving no reason for the denial. This appeal followed.

ISSUES ON APPEAL[3]

1. Did Appellant have standing under section 6-29-1150 to appeal the Commission's decision to the circuit court?

2. Did Appellant have standing under the Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to -140 (2005), to seek the circuit court's declaration that the Commission had discretionary authority to reject a staff recommendation?

STANDARD OF REVIEW

Statutory Interpretation

"An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. California v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

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[2] For the purpose of brevity throughout this opinion, we will refer to a property owner whose land is the subject of a commission decision as simply a "property owner" or "property owners" in plural form, not to be confused with any other owner of property in the vicinity.

[3] We need not reach the issues of the public importance exception to standing and whether the Greenville County Land Development Regulations conferred standing on Appellant as we reverse the Commission's decision on the other two grounds raised by Appellant. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

Declaratory Judgment

"The decision to grant a declaratory judgment is a matter [that] rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse."[4] *Eargle v. Horry Cty.*, 344 S.C. 449, 453, 545 S.E.2d 276, 279 (2001) (quoting *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820 (1995)). "An abuse of discretion occurs [when] the trial court is controlled by an error of law or [when] the [c]ourt's order is based on factual conclusions without evidentiary support." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000).

LAW/ANALYSIS

I. Appellate Standing

Appellant argues it had standing to appeal the Commission's decision to the circuit court under section 6-29-1150(D) because the statute's language does not limit the class of permissible appellants to only property owners. We agree.

"The right of appeal does not exist in every case[] and can only be claimed under some constitutional or statutory provision conferring such right." *Turner v. Joseph Walker Sch. Dist. No. 9*, 215 S.C. 472, 476, 56 S.E.2d 243, 244 (1949) (quoting *Whipper v. Talbird*, 32 S.C. 1, 10 S.E. 578 (1890)). "[N]o appeal is to be allowed from an inferior or special tribunal, except in cases where it is expressly granted by law." *Sasser v. S.C. Democratic Party*, 277 S.C. 67, 69, 282 S.E.2d 602, 603 (1981).

Here, Appellant does not argue that a constitutional provision confers on it a right of appeal from the Commission to the circuit court. Rather, Appellant asserts it has standing under section 6-29-1150. Developer and the Commission argue that

[4] Once the circuit court has granted a declaratory judgment, the standard of review for the content of the judgment "is . . . determined by the nature of the underlying issue" as "[d]eclaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). As we previously stated, the circuit court in the present case did not grant a declaratory judgment but rather dismissed the action along with the appeal from the Commission's decision.

section 6-29-1150 restricts potential appellants to only property owners. Section 6-29-1150 states in its entirety:

> (A) The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval. Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval. Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats with all documentation required by the land development regulations is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement.
>
> (B) A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, the developer must be notified in writing of the actions taken.
>
> (C) Staff action, if authorized,[5] to approve or disapprove a land development plan may be appealed to the planning commission by **any party in interest**. The planning commission must act on the appeal within sixty days, and the action of the planning commission is final.

[5] It is unclear from the record whether Greenville County has authorized its Planning Department staff to make approval decisions or whether there existed a formal staff approval from which Appellant could appeal to the Commission. However, it appears that the Commission held regular meetings and acted on recommendations of the Planning Department staff. In any event, the Commission conceded during oral arguments that section 6-29-1150 grants standing to any party in interest to appear before the Commission.

> (D)(1) An appeal from the decision of the planning commission **must** be taken to the circuit court within thirty days after **actual notice of the decision**.
>
> (2) A **property owner** whose land is the subject of a decision of the planning commission **may** appeal by filing a notice of appeal with the circuit court **accompanied by a request for pre-litigation mediation** in accordance with Section 6-29-1155.
>
> A notice of appeal and request for pre-litigation mediation **must** be filed within thirty days after **the decision of the board is mailed**.
>
> (3) Any filing of an appeal from a particular planning commission decision pursuant to the provisions of this chapter must be given a single docket number, and the **appellant** must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).
>
> (4) When an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. Nothing in this subsection prohibits a **property owner** from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

(emphases added).

"The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011).

> Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citation omitted). Further, "[t]he intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994).

A statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). "We therefore should not concentrate on isolated phrases within the statute." *Id.* "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* "In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008)).

The **plain language** of section 6-29-1150 as a whole provides Appellant the right to appeal the Commission's decision to the circuit court. First, subsection (C) allows "any party in interest" to appeal staff action to the planning commission. This language clearly contemplates an organization such as Appellant.[6] In turn, subsection (D)(1) allows this class of persons to appeal a commission decision to the

[6] *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (defining a real party in interest for purposes of standing as "a party with a real, material, or substantial interest in the outcome of the litigation" (quoting *Hill v. S.C. Dep't of Health & Envtl. Control,* 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010))). Notably, the parties agree that Appellant had standing to appear before the Commission during its August 2016 meeting. In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity of the proposed subdivision.

circuit court. From this class of appellants, subsection (D)(2) carves out the subclass of property owners and gives this subclass the option of seeking pre-litigation mediation in addition to an appeal.

Further, subsection (D) as a whole gives different treatment to the larger class of appellants and the subclass of property owners who seek pre-litigation mediation. Under subpart (1), the larger class of appellants have thirty days after **receiving actual notice** of a commission decision to file an appeal to the circuit court; the use of the word "must" indicates that the appellant must file within the designated deadline in order to invoke the circuit court's appellate jurisdiction. On the other hand, subpart (2) uses the word "may" to indicate that a property owner has the option of adding a request for pre-litigation mediation to his notice of appeal, and if he takes advantage of this option, he must file the notice of appeal and the mediation request within thirty days after the Commission's decision is **mailed** in order to invoke the circuit court's appellate jurisdiction. If the owner of the subject property does not opt to request pre-litigation mediation, he would be subject to the more liberal deadline in subpart (1).

Based on the foregoing, the larger class of appellants, i.e., "any party in interest," is not diminished due to the reference to property owners in subsection (D)(2), which simply gives property owners the option to seek pre-litigation mediation.

The legislative intent to allow any party in interest to appeal a planning commission decision is also apparent from the language in subparts (3) and (4) to subsection (D). Subpart (3) uses the term "appellant," rather than property owner, in addressing the circuit court's appellate filing fee, while subpart (4) uses the term "property owner" when addressing the right to a jury trial "of any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking," which only a property owner would seek. Therefore, the language throughout all of subsection (D) shows that the legislature contemplated a larger class of appellants with a subclass of property owners.

This plain reading of section 6-29-1150 is consistent with the legislative history of section 6-29-1150. *See CFRE,* 395 S.C. at 74, 716 S.E.2d at 881 ("[W]e read the statute as a whole and in a manner consonant and in harmony with its purpose."). Section 6-29-1150 is part of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310 to -1640 (2004 & Supp. 2018). The purpose of this Act was to consolidate "existing

planning enabling legislation [and] to update existing legislative acts."[7] Subsection (D) was not part of section 6-29-1150 until June 2, 2003, when the legislature enacted the South Carolina Land Use Dispute Resolution Act (LUDRA).

The General Assembly enacted LUDRA for the purpose of improving and expediting the adjudicatory process for property owners who wish to file a claim for a purported regulatory taking. Bradford W. Wyche, *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183, 196–97 (2003). LUDRA amends the South Carolina Local Government Comprehensive Planning Enabling Act of 1994

> by allowing a property owner whose land is the subject of a decision by the board of zoning appeals, board of architectural review or planning commission to file a notice of appeal with the circuit court, accompanied by "a request for pre-litigation mediation." The request must be granted, and the government entity must be represented at the mediation. A non-owner may be granted leave to intervene in the mediation if the person has a "substantial interest" in the decision of the local entity.

Id. at 197 (quoting S.C. Code Ann. §§ 6-29-820(B)(2) (Supp. 2003); 6-29-900(B)(2); and 6-29-1150(D)(2) (footnotes omitted)). Hence, LUDRA amended existing provisions governing appeals from a board of zoning appeals (section 6-29-820), a board of architectural review (section 6-29-900), and a planning commission (6-29-1150) by adding the option for pre-litigation mediation. LUDRA also added a new provision immediately following each of these appeal provisions to address the specific procedures for pre-litigation mediation, i.e., section 6-29-825 (immediately following section 6-29-820), section 6-29-915 (immediately following section 6-29-900), and section 6-29-1155 (immediately following 6-29-1150).

As to planning commission decisions, LUDRA amended section 6-29-1150 by adding subsection (D). Critically, the language in subsection (D)(1), i.e., "An appeal from the decision of the planning commission must be taken to the circuit

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[7] *See* 1994 Act No. 355 (setting forth the Act's purpose in its introduction); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) (stating that it is appropriate "to consider the title or caption of an act in aid of construction to show the intent of the legislature" (citing *Lindsay v. Southern Farm Bureau Casualty Ins. Co.*, 258 S.C. 272, 188 S.E.2d 374 (1972))).

court within thirty days after actual notice of the decision," previously appeared as the last sentence in subsection (C) (prior to LUDRA's amendment):

> Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by **any party in interest**. The planning commission shall act on the appeal within sixty days and the action of the planning commission is final. **An appeal from the decision of the planning commission may be taken to circuit court within thirty days after actual notice of the decision**.

§ 6-29-1150(C) (2004) (emphases added). When former subsection (C) is viewed as a whole, it is logical that the last sentence did not specify who had standing to appeal a planning commission decision because the class of permissible appellants, "any party in interest," was already established in the first sentence of subsection (C) providing for appeals from staff action to the commission.

Further, moving the last sentence of former subsection (C) to current subsection (D)(1) and changing the term "may" to "must" were the only meaningful changes LUDRA made to this particular appeal provision.[8] Thus, both before and after the enactment of LUDRA, there was no language in the appeal provision limiting the class of appellants to property owners. Rather, section 6-29-1150, as amended by LUDRA, continued to expressly confer standing to appeal to the circuit court to any party in interest. LUDRA also added the new material appearing in (D)(2) – (4) to allow pre-litigation mediation and otherwise improve the process for a landowner's takings claim.

It is clear that the purpose of amending section 6-29-1150 to accommodate a property owner's takings claim did not require limiting the class of all appellants to property owners, and, again, there is nothing in the language of the amended statute to so limit this class. Otherwise, the reference to property owners would have seemingly been added to subpart (1). In fact, the only meaningful change in the language that formerly appeared in subsection (C) and now appears in (D)(1) was from "may" to "must," indicating that the class of those who are authorized to appeal a commission decision was not diminished by LUDRA. If the legislature had desired to diminish the class when it amended the statute in 2003, it would have explicitly done so by referencing property owners in subpart (1). It did not. *See Johnson*, 396

[8] The only other change was adding the article "the" to "circuit court."

S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute."). Instead, it retained the larger class of appellants in subpart (1), with its own deadline, while adding subpart (2), with its own distinct deadline, for the subclass of property owners who wish to request pre-litigation mediation.

In its brief, Developer argues that in LUDRA, the legislature drew a distinction between appeals from a zoning board and appeals from a planning commission by allowing appeals from a zoning board decision by a "person who may have a substantial interest in" the decision (section 6-29-820) while declining to expressly authorize anyone other than a property owner to appeal in section 6-29-1150(D). However, the standing provision in section 6-29-820 was in place before LUDRA was enacted. Further, prior to the enactment of LUDRA in 2003, the provision in section 6-29-1150 allowing an appeal to circuit court, then located in subsection (C), **did not specifically mention property owners**. Following Developer's logic, even property owners did not have standing to appeal prior to LUDRA's enactment, which would render the appeal language meaningless due to the lack of standing for any class of persons wishing to appeal. Such a result is unacceptable. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

In fact, LUDRA also added the language found in subsection (D)(2), specifically mentioning property owners, to sections 6-29-820 and 6-29-900 (governing appeals from decisions of boards of zoning appeals and boards of architectural review). *See* 2003 Act No. 39, §§ 3, 8 (amending sections 6-29-820 and 6-29-900 to allow property owners the option of adding a request for pre-litigation mediation to the notice of appeal). Both of these statutes included an appellate standing provision *before* LUDRA amended these statutes in 2003, and the **addition** of LUDRA's pre-litigation mediation option for property owners did not result in a corresponding reduction in the class of possible appellants in these statutes—the appellate standing provisions in both statutes remained intact.

Therefore, it is unlikely that in enacting LUDRA, the legislature intended to diminish the class of potential appellants seeking review of a planning commission decision when it added the pre-litigation mediation option for property owners to

section 6-29-1150. Rather, it left the existing provisions in all three statutes intact. This harmonizes with LUDRA's purpose of merely improving the process for property owners who wish to file a claim for a purported regulatory taking. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992))).

Such an interpretation is also consistent with the legislature's express authorization of local land development regulation to further "the harmonious, orderly, and progressive development of land" within South Carolina's municipalities and counties as required by "[t]he public health, safety, economy, good order, appearance, convenience, morals, and general welfare." S.C. Code Ann. § 6-29-1120 (2004); *see CFRE,* 395 S.C. at 74, 716 S.E.2d at 881 ("[S]ections [that] are part of the same general statutory law must be construed together and each one given effect." (quoting *S.C. State Ports Auth.*, 368 S.C. at 398, 629 S.E.2d at 629)). Among the purposes for which local land development regulation is authorized are "to assure the adequate provision of safe and convenient traffic access and circulation . . . in and through new land developments" and "to assure . . . the wise and timely development of new areas . . . in harmony with the comprehensive plans of municipalities and counties." § 6-29-1120. It would defeat these very purposes to deny affected persons the right to appeal a commission decision to the circuit court. Therefore, such an interpretation of section 6-29-1150 cannot prevail. *See Sweat*, 386 S.C. at 351, 688 S.E.2d at 575 ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *Long*, 363 S.C. at 364, 610 S.E.2d at 811 ("The legislature is presumed to intend that its statutes accomplish something.").

Based on the foregoing, section 6-29-1150, through the combined force of the plain language in subsections (C) and (D), expressly grants any party in interest, such as Appellant, standing to appeal a commission decision to the circuit court.

II. Declaratory Judgment Act

Appellant maintains that it had standing to file its declaratory judgment action with the circuit court pursuant to the Declaratory Judgment Act to seek a uniform standard for the Commission's application of the Comprehensive Land Use Plan. We agree.

The purpose of the Declaratory Judgment Act (the Act) "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered." S.C. Code Ann. § 15-53-130 (2005). Further, the Act provides,

> Any person interested under a deed, will, written contract or other writings constituting a contract **or whose rights, status or other legal relations are affected by** a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (2005) (emphasis added). Moreover, the Act gives courts of record the power to "declare rights, status and other legal relations **whether or not further relief is or could be claimed**" and confers on such declarations "the force and effect of a final judgment or decree." S.C. Code Ann. § 15-53-20 (2005) (emphasis added). The Act also states that the general power conferred on the circuit court under section 15-53-20 "in any proceeding when declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty" is not limited by the enumeration of specific powers in sections 15-53-30 to -50. S.C. Code Ann. § 15-53-60 (2005).

Here, Appellant attached to its Notice of Appeal a complaint that includes a separate request for declaratory relief. Paragraph 53 of the complaint states that Appellant has standing to request a Declaratory Judgment pursuant to the Act based on "the members' interests being adversely affected by the decision of the Planning Commission." Paragraph 54 requests the circuit court to make a finding that the Commission

> has authority to and should take into consideration the Comprehensive Land Use plans, Future Land Use Maps, and [the] purposes and intent of the Land Development Regulations, all as adopted by Greenville County Council, when making decisions regarding subdivisions in unzoned areas of the County, that the [Commission] is not bound to "rubber stamp" the decisions of the Planning Department staff . . . and may consider . . . [South Carolina

> Department of Transportation (SCDOT)] design standards for road development . . . .

In light of this request, section 15-53-30 confers standing on Appellant because Appellant qualifies as "[a]ny person . . . whose rights, status or other legal relations are affected by" local legislation, namely, the Greenville County Land Development Regulations. *See* § 6-29-1150(A) ("The land development regulations adopted by the governing authority must include a specific **procedure** for the submission **and approval or disapproval** by the planning commission or designated staff." (emphases added)).

As such, Appellant "may have determined any question of construction or validity arising under" these regulations, namely, whether they give discretionary authority to the Commission to overrule a staff recommendation.[9] Some of Appellant's members own or reside on contiguous property or property in the vicinity of the proposed subdivision and will be impacted by the additional traffic generated by the subdivision. Therefore, Appellant's rights are affected by the Commission's application of these regulations in evaluating a staff recommendation. Further, section 15-53-60 confers standing on Appellant because the specific ruling Appellant seeks would remove the uncertainty concerning the Commission's discretionary authority.

Here, it is unclear whether the circuit court's one-sentence order actually encompassed Appellant's request for declaratory relief: "Court grants [Developer's] Motion to Dismiss due to Appellant's lack of standing in this matter."[10] The record reflects that the primary focus in the proceedings before the circuit court was on

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[9] We find this question as presented in Appellant's declaratory judgment complaint is fairly encompassed by the broader argument presented in Appellant's brief, i.e., that Appellant had standing under the Declaratory Judgment Act to seek a uniform standard for the Commission's application of the Comprehensive Land Use Plan. *See Greer v. McFadden*, 295 S.C. 14, 17–18, 366 S.E.2d 263, 265 (Ct. App. 1988) ("When this Court construes an exception, it will make its construction as liberal as the language will allow, in order to decide the question involved, unless it is satisfied that the statement has misled the respondent to his prejudice.").

[10] In its Rule 59(e) motion, Appellant sought the circuit court's ruling on the question of whether Appellant had standing under the Declaratory Judgment Act to seek a uniform standard for the Commission's application of the Comprehensive Land Use Plan. However, the circuit court denied Appellant's Rule 59(e) motion in a Form 4 order, giving no reason for the denial.

Appellant's standing to appeal the Commission's decision pursuant to section 6-29-1150. Hence, while the circuit court's summary order had the effect of dismissing Appellant's declaratory judgment action, it demonstrates that the court failed to exercise any discretion to evaluate Appellant's request for a declaratory judgment. *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("A failure to exercise discretion amounts to an abuse of that discretion."); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the [circuit court] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) ("A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion."). Further, to the extent the circuit court intended to encompass within its ruling Appellant's declaratory judgment action, the ruling is based on an error of law because sections 15-53-30 and -60 confer standing on Appellant. *See Pic-A-Flick*, 340 S.C. at 282, 531 S.E.2d at 521 ("An abuse of discretion occurs where the trial court is controlled by an error of law . . . .").

CONCLUSION

Based on the foregoing, we reverse the circuit court's order dismissing Appellant's declaratory judgment action and its appeal from the Commission's decision and remand to the circuit court for a determination on the merits of Appellant's issues.

REVERSED AND REMANDED.

LOCKEMY, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

John Kenneth Massey, Jr., Respondent.

Appellate Case No. 2015-000431

Appeal From York County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5630
Submitted June 1, 2018 – Filed February 27, 2019

AFFIRMED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Megan Harrigan Jameson, of Columbia; and Solicitor Kevin S. Brackett, of York, all for Appellant.

Appellate Defender David Alexander, of Columbia, for Respondent.

MCDONALD, J.: The State challenges the circuit court's pre-trial dismissal of John Kenneth Massey, Jr.'s first-degree burglary indictment, arguing the circuit court lacked authority to quash the indictment because evidence existed to support the charge. We affirm.

Facts and Procedural History

Kristopher Callahan (Victim) used a building on his uncle's property in Rock Hill for storage. Victim lived with his parents next door to the property; his parents' home is approximately forty-five feet away from the storage building.

Massey was arrested following the theft of a four-wheeler from the storage building. The York County grand jury indicted Massey for criminal conspiracy, first-degree burglary, and grand larceny. The first-degree burglary indictment alleged Massey entered "the outbuilding appurtenant to and within 200 yards of the dwelling of [Victim]." However, the grand jury later issued an amended indictment, which simply stated Massey entered "the dwelling of [Victim]."

Massey moved to quash the first-degree burglary indictment, arguing the storage building was not appurtenant to Victim's residence because it was on a separate parcel of land, and it was used for Victim's business, not as a dwelling.

Victim testified the land in the area was "family land," once owned by his grandfather, who gave his parents five acres to build the home in which Victim resides. Victim claimed his mother inherited the surrounding property upon her grandfather's death, but it was never titled in her name because "it's just family land. There's no need to change the land over. So we just left it in the farm name, which is . . . my uncle, Bill."

Although Victim runs a business from the family property, he testified he did not use the storage building for business operations, stating, "I operate a waterproofing and grading company . . . . We meet there at the—at the land in the mornings. And from there we, you know, go off to our jobs." Victim explained that the sign for "Callahan Waterproofing & Construction" listing his business's contact information on the exterior of the storage building was "to just, you know, display [his] name." Although Victim admitted he used the building to "work on stuff" related to his business, he claimed the tools do not leave the storage building when he goes to a job site. Victim further testified he and his father primarily use the storage building for belongings such as four-wheelers, boats, and tools.

The State argued the storage building was appurtenant to the family dwelling because it was within two hundred feet of Victim's residence. Under the State's theory, Uncle Bill's ownership of the land was irrelevant because burglary is a crime against possession and habitation, not ownership.

The circuit court granted Massey's motion to quash the indictment, noting Victim did not own either parcel of land or the storage building bearing the name of his business. The circuit court explained that although the storage building was in close proximity to Victim's parents' home, it was on a separate piece of property and titled in someone else's name. The court elaborated, "that building is an outbuilding. It's a—looks like a butler building to me. And [] has a sundry of things in it. And I just don't believe it's appurtenant to the residence owned by the victim's parents, factually." Thus, the proper charge was not burglary first, but burglary second.

The State subsequently moved to set aside the quashing of the first-degree burglary indictment; the circuit court denied the State's motion.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Pulley*, 423 S.C. 371, 376-77, 815 S.E.2d 461, 464 (2018) (quoting *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* However, "[q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

Law and Analysis

The State argues the circuit court erred in dismissing the first-degree burglary indictment because it alleged the necessary elements of first-degree burglary and sufficiently apprised Massey of the allegations he would face at trial. Under the State's theory, the Building's "appurtenance to" Victim's residence, satisfied the "dwelling" requirement of the first-degree burglary statute. *See* S.C. Code Ann. § 16-11-311 (2015). We disagree.

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311 (2015).

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

S.C. Code Ann. § 16-11-10 (2015). The Code further defines a "dwelling" as "the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person." S.C. Code Ann. § 16-11-310 (2015).

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "[A] court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *Id.* (citation omitted). "The text of a statute is considered the best evidence of the legislative intent or will, and the courts are bound to give effect to the expressed intent of the legislature." *State v. Ramsey*, 409 S.C. 206, 209, 762 S.E.2d 15, 17 (2014).

"Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 (citation omitted).

The South Carolina Code does not define "appurtenant" for the purposes of first-degree burglary. Black's Law Dictionary defines appurtenant as "[a]nnexed to a more important thing." *Appurtenant*, Black's Law Dictionary (10th ed. 2014). Annex is defined as "[s]omething that is attached to something else, such as a document to a report or an addition to a building." *Annex*, Black's Law Dictionary (10th ed. 2014).

In discussing the common law offense of burglary, our supreme court has explained:

> It was long ago held in this State that "a house to be parcel of the mansion-house, must be somehow connected with or contributory to it, such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a distinct use."

State v. Evans, 18 S.C. 137, 140 (1882) (quoting *State v. Ginns*, 10 S.C.L. (1 Nott & McC.) 583, 585 (1819)).

Initially, we note the State argues for the first time on appeal that the circuit court lacked authority to quash the indictment. When Massey moved to quash the indictment, the State argued it did not matter that Victim's uncle owned the storage building parcel because burglary is a crime of possession, not a crime of ownership. The State did *not* argue that the circuit court lacked authority to quash the indictment. Therefore, we find this argument unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Applying the plain language of section 16-11-10 establishes that the storage building is not a dwelling for the purposes of our first-degree burglary statute. To fall under the first-degree burglary statute, a structure must be within 200 yards of

a dwelling *and* appurtenant to it. S.C. Code Ann. § 16-11-10; *see also Evans*, 18 S.C. at 139 (finding a burglary indictment insufficient when it failed to allege a gin house, within the curtilage of a dwelling, was both within 200 yards of the dwelling *and* appurtenant to it). We find a storage building unattached to a residence and located on a separate parcel of land is not "usually considered as a necessary appendage of a dwelling-house." *Evans*, 18 S.C. at 140. The storage building here is separate from Victim's dwelling and "appropriated to another and a distinct use"—as reflected by the commercial signage and Victim's storage of his business tools there. Further, as there was no evidence that the storage building was used as a dwelling or was in any way "annexed to" or "attached to" the home, the circuit court correctly quashed Massey's first-degree burglary indictment.

Conclusion

The decision of the circuit court is

AFFIRMED.[1]

HUFF and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Heather Elizabeth Sims, Appellant.

Appellate Case No. 2016-001385

Appeal From Horry County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5631
Heard December 4, 2018 – Filed February 27, 2019

REVERSED

L. Morgan Martin, of Law Offices of L. Morgan Martin, P.A., and Benjamin Alexander Hyman, of The Hyman Law Group, P.A., both of Conway; and Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

GEATHERS, J.: Heather Sims appeals her conviction of voluntary manslaughter for which she was sentenced to twenty-five years' imprisonment, suspended to ten years' imprisonment and five years' probation. Sims argues the circuit court erred in instructing the jury on voluntary manslaughter. We reverse.

I. FACTS

The facts of the instant case are tragic for the individuals and the families involved. At 6:16 p.m. on August 11, 2013, authorities in Conway responded to a 911 call from Heather Sims, who claimed to have shot her husband, David, after he charged at her with a knife. First responders arrived on scene at 6:36 p.m.[1] Upon entering the house, first responders found Sims in the bathroom performing CPR on David, but David was already deceased. Sims was taken to the hospital for her injuries, which included three lacerations on her arm and a puncture wound to her stomach. In the bathroom, Officers found a 9mm Ruger handgun on the vanity and a paring knife in David's right hand. Officers also determined that David had suffered a single gunshot wound to the chest. Sims was indicted for murder on August 22, 2013.

A. The State's Case

From the beginning, the State's case centered on the theory that the killing was a premeditated murder motivated by financial gain. First, the State presented evidence to show that Sims gave inconsistent accounts of what happened.

To show Sims had a financial motive for killing David, the State offered evidence that David had been issued a life insurance policy on July 23, 2013. David's policy was valued at $750,000 and listed Sims as the beneficiary. Additionally, the State offered into evidence text messages between Sims and David from May 2013 in which Sims asked David to look into getting a life insurance policy.

The State theorized that Sims had taken steps to cover up a premeditated murder. First, the State alleged that Sims altered the scene of the crime. The State offered evidence that some of the blood on the floor had been wiped. Officer Cestare testified that while listening to the 911 call he heard Sims's father telling her to both

[1] There is a fire station approximately 200-300 yards from the scene, but EMS was staging for roughly twenty minutes as they waited for a police officer to arrive and clear the house.

"stop wiping" and to "wipe the blood from the door." The State also alleged that Sims placed the knife in David's hand after she shot him. The State offered evidence that David was holding the knife "upside down"[2] and the crime scene investigator testified that when a light was shined obliquely on the blade, there appeared to be a latent fingerprint.[3] Additionally, the State had an expert in blood spatter analysis testify that if David had been holding the knife, the motion of reaching for his gunshot wound would have left more blood on his palm or the tops of his fingers.

Consistent with its cover-up theory, the State alleged that Sims hid David's phone and later wiped the memory. Officers testified that they only removed one cell phone from the residence and that David's phone could not be found.[4] The State then offered evidence that Sims called AT&T asking how to bypass David's lock code and access his phone. Sims eventually restored the phone to factory settings, erasing the memory. Sims's father ultimately turned the phone over to police on August 15, 2013, claiming the phone had been in a drawer at Sims's residence. This drawer was the same drawer police searched on the night of the shooting.

The State also presented evidence suggesting Sims's wounds were self-inflicted. The State offered Dr. Werner Spitz as an expert in forensic pathology. Dr. Spitz testified that the wounds on Sims's arm were superficial and "meticulously drawn very carefully, very slowly on her skin." Dr. Spitz also indicated the positions of the wounds were inconsistent with defensive wounds and that Sims's arm exhibited a faint hesitation mark. Dr. Spitz testified that the puncture wound was also self-inflicted, claiming it was deliberately superficial so as not to penetrate the interior of her body. Dr. Spitz opined that the puncture wound was produced with the tip of the knife, claiming the hospital described the wound as being "less than a quarter of an inch." However, on cross examination, Dr. Spitz indicated he did not need to read Sims's CT scan because he "took for granted that what they told [him] in the medical record was correct," but conceded the depth of the wound was not

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[2] David was holding the knife in his right hand with his thumb near the blade and the sharp side of the blade facing towards him.

[3] However, the investigator also testified that the latent print was not detailed enough for further testing.

[4] The investigator and Officer Cestare both testified to finding a drawer of old phones. However, neither of them documented the phones or took photographs of the contents of the drawer. Sims later testified that David's phone was in this same drawer when police searched the house.

indicated in the medical records. Additionally, the State presented testimony indicating Sims did not have any bruising on her arms on the night of the incident.

Ultimately, the State alleged that no altercation took place in the bathroom and that Sims was not acting in self-defense. Rather, the State alleged that Sims had been planning to murder David and calmly and coolly made the decision to accelerate her plan on the night in question. The State offered testimony from several witnesses indicating the house was "pristine" and contained no evidence of an altercation other than David's body. Dr. Spitz testified that the lack of gunshot residue on David's shirt indicated that Sims shot him from over two feet away. Additionally, the State introduced evidence of irregularities surrounding the gun. First, the gun was registered to a man named Michael White.[5] Second, the gun was loaded with only two rounds. Third, Sims claimed to have moved the gun to the bathroom in her attempts to child proof the house, but a .38 revolver was found in David's nightstand.[6] Finally, Sims claimed she drew the gun from the bathroom vanity, but Officer Cestare testified that the gun case was located in Sims's nightstand with the clasps unfastened. In its closing argument, the State argued Sims left the bathroom, walked around the bed to her nightstand, and returned with the gun to trap an unarmed David in the bathroom. At no point did the State offer any evidence to suggest Sims lost control or was overcome with an uncontrollable impulse to do violence when she shot David.

B. The Defense's Case

The Defense argued that Sims shot David in self-defense. Sims testified about her history with David and how the marriage eventually deteriorated. The defense also presented evidence of incidents in which David frightened Sims. Sims's friend, Lisa, testified that during a phone conversation Sims abruptly ceased communicating. When communication was reestablished, Sims explained that David had jerked the phone out of her hand because he wanted to see who she was talking to. Sims indicated David had been eavesdropping around the corner and she

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[5] Sims testified that her father purchased the gun from one of his employees, Mike White, over ten years prior to the incident and had given it to her after a woman had been kidnapped from the local Wal-Mart.

[6] Sims testified that she did not know the .38 revolver was in David's nightstand, but assumed he kept it in his truck as she had purchased it for him after he indicated he liked the one Sims kept in her car.

kept trying to recall whether she had said something that would have made him mad. Sims's friend testified that this was the first time she realized Sims was afraid of David. Sims also testified concerning two incidents. During one incident, David lost his temper after playing with their puppy. Sims indicated that the puppy scratched David and David's demeanor changed from playful to "I'm about to hurt this dog." Sims testified that the puppy hid behind her as David angrily demanded that she hand the puppy to him. Sims later texted David indicating her concerns about the incident, to which David replied, "So are you saying that the next time he needs discipline, that I should instead just punch you in the face?" Sims also described an incident in which David got physical with her. Sims, a nurse anesthetist, explained that in July 2012, she had been on call when David took her phone to the other side of the house to go through it. Sims told David she needed her phone because she was on call, and David responded by stating that her job was "so important" and "so much more important than his," but he did not return the phone. As a result, Sims took the house phone to the bathroom to let the hospital know to call her at that number. Sims testified that David followed her into the bathroom and put his arms around her. Sims said she thought David was going to hug her, but instead he began to beat on her back with a closed fist. Sims indicated that she tried to push away from David but he grabbed her arms so tightly that it hurt. She continued to struggle with David and ultimately bloodied his lip. At that point, Sims, who was pregnant and in her first trimester at the time, testified that David wrapped his hands around her throat and slammed her into the wall. She indicated that David let go of her throat after she asked him what he was doing, and she then called 911.[7]

Sims then testified that on August 11, 2013—the day of the shooting—David had "woken up looking to argue." David wanted to go to Ruby Tuesdays and Bass Pro Shop, but he became frustrated with Sims as she was packing their baby's diaper bag and tidying the house. Once they were on their way, Sims indicated that David began questioning her and making snide remarks about the diet pills her OB/GYN had given her. Sims testified that David seemed frustrated throughout their outing, and that on the ride home he purposefully drove over the rumble strips on the highway in an attempt to get on her nerves. At some point on their ride home, Sims

[7] The defense offered the Computer Aided Dispatch (CAD) report to corroborate Sims's story.

asked David if he wanted to separate. David indicated that they needed to talk and Sims said they could talk after she put their son to sleep.

Once they arrived home, David wanted to speak with Sims immediately and began calling her name louder and louder. However, Sims indicated that she wanted to wait until the baby was asleep to speak with David. Instead of engaging with David, Sims began doing chores so that she would not have anything to do after putting the baby to sleep. After doing some chores, Sims decided to take a bath. Sims began filling the tub, sitting on the edge while she texted her mother.

While waiting for the tub to fill up, Sims testified that David came into the bathroom with tools in his hands. Sims could tell David was frustrated, but assumed he had come in to work on the toilet because it had been having problems.[8] However, David told Sims he was going to talk to her "right now." David asked Sims if she wanted to separate and she responded no, but that she did not want to be married to someone who did not love her. David told Sims that he did not want to be married to a "d**n liar," indicating he had counted the number of diet pills she had taken. David then asked how many times Sims had been to see the marriage counselor by herself, as David did not want her talking to the counselor alone. Sims indicated she had gone to see the counselor once. David accused Sims of lying about being unable to schedule an appointment for both of them in the following two weeks because he had visited the counselor twice by himself. Sims then reached for her phone to show David the scheduling conflicts with the counselor, but David tried to wrestle it away, resulting in a struggle for the phone. At some point during the struggle, Sims was cut three times on her arm.

Sims testified that after David took her phone, he turned around with the knife in his hand. Sims claimed David got in her face, held the knife in her face, and called her a "stupid b***h." Sims asked David why he was so angry with her and began backing up, to which David responded by taunting her with the knife. Sims indicated that David was trying to scare her, calling her a "stupid b***h" and telling her he wanted to knock the "F'ing teeth out of [her] head." Sims testified, "I've seen him mad before, but I've never seen him this mad; this was something different. This was something that I had never experienced before, and I was scared." Sims

[8] The parties stipulated that upon examination of the toilet, it did not work properly and needed to be repaired.

indicated that, because she was scared, she reached for the gun she had placed in the bathroom vanity.[9]

Sims testified that after pulling the gun from the vanity drawer, she held it by her side. She indicated that after doing so, David asked her, "What the 'F' are you going to do with that?" Sims told David, "I'm not going to do anything with it, you're just scaring me, and I want you to stop." David responded by telling her, "You're not going to do s**t," and Sims indicated that the presence of the gun seemed to make him angrier. David continued to call her names and taunt her with the knife, and Sims indicated that she kept trying to back out of the bathroom. However, as she backed up, David again told her, "I would like to knock your F'ing teeth out of your head," and lunged at her with the knife, stabbing her in the stomach. When he lunged at her, Sims testified, "[M]y hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." After shooting David, Sims called 911 and began administering CPR.

To support its theory of self-defense and counter the allegations that Sims's wounds were self-inflicted, the defense offered Adrienne Hefney, the SLED agent who analyzed the DNA swabs collected by the Horry County Police Department. Agent Hefney testified that the DNA profile developed from one side of the knife handle matched David's profile, and the probability of selecting an unrelated individual having a matching DNA profile is "approximately 1 in 3.1 quintillion." Agent Hefney indicated this side of the knife handle tested positive for David's blood and touch DNA. Agent Hefney also testified that the partial DNA profile developed from the other side of the knife handle matched David's DNA and that such DNA was likely touch DNA. Conversely, Agent Hefney indicated that none of the DNA found on the knife handle matched Sims's DNA. Agent Hefney further explained that it would be highly unlikely for a person to self-inflict wounds with a knife without leaving touch DNA on the handle. Additionally, when testing one side of the knife blade, Agent Hefney indicated she found a mixture of blood DNA and that

[9] Sims testified that she placed the gun in the vanity around July 21, 2013, after her pediatrician suggested childproofing the house when her son learned to roll over onto his stomach. Sims indicated she placed the gun in the bathroom vanity because she and David always kept the bathroom door closed and the couple did not own a gun safe.

Sims was the major contributor. Agent Hefney also testified that Sims was the major contributor of the blood DNA found on the grip of the pistol.

The defense offered two experts to further corroborate Sims's self-defense theory. First, Dr. Joshua Tew was offered as an expert in radiology. Dr. Tew testified that Sims's puncture wound was consistent with a stab wound and the depth ranged from 3.2-3.5 cm, or approximately 1.3 inches. Dr. Tew explained that Sims's stab wound was superficial in the sense that it did not penetrate the peritoneal cavity,[10] but had it done so it would have penetrated the colon.

The defense also offered Dr. Kim Collins as an expert in forensic pathology. Dr. Collins testified that the wounds on Sims's arm were defensive wounds, noting they did not run in the same direction and were located on her dominant arm, whereas self-inflicted wounds are typically located on the non-dominant side. Dr. Collins indicated Sims's puncture wound was consistent with the knife found at the scene and came within one millimeter of puncturing the peritoneal cavity. Dr. Collins further indicated that had Sims's peritoneal cavity been penetrated, the injury could have been fatal as it may have resulted in a ruptured colon, spleen, or major blood vessel. With regard to Sims's bruises, Dr. Collins explained that bruising takes time to appear, and that it would not be unusual for bruises to appear a day or two after the injury. Additionally, based on the entry and exit wounds, Dr. Collins determined David was leaning forward with his right side forward and his left side back at the time the shot was fired. However, Dr. Collins testified that, without a ballistics test, there is no way to determine the distance from which Sims shot David, only that there was no visible gunshot residue. Concerning the knife, Dr. Collins testified that David could have maintained control of it after being shot and that the blood transfer pattern on his hand was consistent with reaching for a wound while gripping a knife.

C. Jury Charges and Deliberations

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[10] "The peritoneum is a thin, translucent, serous membrane. . . ." Temel Tirkes, MD et al., *Peritoneal and Retroperitoneal Anatomy and Its Relevance for Cross-Sectional Imaging*, 32 RadioGraphics 437, 438 (2012). "The peritoneal cavity is a potential space between the parietal peritoneum, which lines the abdominal wall, and the visceral peritoneum, which envelopes the abdominal organs." *Id*.

After the defense rested its case, the court asked both parties if they had reviewed its proposed charge. Defense counsel indicated he did not believe charges for voluntary and involuntary manslaughter were supported by the evidence, but the court said it would address counsel's concerns after the State presented its rebuttal witnesses. Later, during the charge conference, the State objected to the court charging the jury with involuntary manslaughter, as the State argued there was no evidence that the shooting was accidental. Similarly, defense counsel objected to the court charging voluntary and involuntary manslaughter, indicating he wanted the court to charge "murder or nothing." The court indicated it believed evidence of voluntary and involuntary manslaughter was in the record, stating,

> There is testimony from the defendant herself she pulled the weapon up and it just kind of went off. And like I said, I understand you both disagree . . ., but there are cases that are very specific about if you charge voluntary, you need to charge involuntary if the facts are sufficient.

Defense counsel maintained his position, stating, "I don't see evidence in the record for voluntary or involuntary manslaughter, but I understand your ruling."

Before the court gave its charge to the jury, defense counsel again objected to the decision to charge the jury on voluntary and involuntary manslaughter. Conversely, the State switched its position, arguing that facts in the record justified charging the jury on voluntary and involuntary manslaughter. The court ultimately charged the jury with murder, self-defense, voluntary manslaughter, and involuntary manslaughter. Additionally, before the jury began deliberations, the court instructed the jury that, "The fact that there [are] three charges does not mean you have to find her guilty of anything. If you find the defendant not guilty of all three, then she's not guilty of anything."

During deliberations, the jury asked a question concerning unanimity. The court clarified the question asking, "Mr. Foreman, the question is: We understand that a guilty charge must be unanimous, but does a finding of not guilty on a particular charge have to be unanimous as well before moving onto another charge? Is that the question?" After the foreman replied affirmatively, the court answered, "The answer to that is, yes. So to move down, you have to unanimously do away with the one you are dealing with to move on. So, yes."

Ultimately, the jury found Sims guilty of voluntary manslaughter. Conversely, the jury acquitted her of murder and involuntary manslaughter, checking "not guilty" for both charges on the verdict form. After considering several factors, including the jury's plea that the court be merciful, the court sentenced Sims to "[twenty-five] years provided upon the service of [ten] years, balance suspended for probation for five."

D. New Trial Hearing

On December 16, 2015, the court held a hearing to rule on several motions, including whether Sims was entitled to a new trial as a result of the court instructing the jury on voluntary manslaughter. Defense counsel argued the court erred by charging voluntary manslaughter because there was no evidence in the record suggesting Sims lost control or was overcome by an uncontrollable urge to do violence. The court indicated it gave the voluntary manslaughter instruction because Sims testified that, "[the gun] went up and I shot. I shot out of reaction." In response, defense counsel relied on *Niles*[11] and *Cook*[12] for the proposition that reacting out of fear during an altercation by itself is not enough to charge voluntary manslaughter, but required further inquiry. The court found the cases distinguishable, stating,

> We had two people in a bathroom. And based upon her testimony, she's got a gun in the bathroom. . . . [S]he's got a gun in the bathroom in it, and he is fixing a toilet with a knife and some type of pliers. They have an argument. He says, I'm going to knock your effing teeth out. She says back to him, I just want a marriage. They have some verbal altercation. And then there's a gap, a very, very small gap, and he's dead with one bullet in his chest.

The court also stated, "That did strike me—quite frankly, at the time she testified that way, that was the first time I had heard that. That suddenly, oh, I was there and I fired a pistol and shot." Further, the court indicated the jury could have acquitted Sims of everything if it had believed her self-defense theory. Defense counsel continued to argue that the evidence suggested Sims shot David out of fear, not an uncontrollable urge to do violence. Ultimately, the court denied Sims's motion for

[11] *State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015).
[12] *Cook v. State*, 415 S.C. 551, 784 S.E.2d 665 (2015).

a new trial, finding the verdict was justified by the evidence at trial. This appeal followed.

II. ISSUES ON APPEAL

1. Did the circuit court err by instructing the jury on voluntary manslaughter?[13]

2. Can the case be remanded for a new trial on involuntary manslaughter?

III. STANDARD OF REVIEW

Jury charges

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "The evidence presented at trial determines the law to be charged to the jury." *State v. Gilliland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *Cook*, 415 S.C. at 556, 784 S.E.2d at 667. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id*.

Lesser-included offenses

"A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense." *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

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[13] Sims also alleges that the lack of evidence supporting the charge suggests an impermissible compromise verdict. However, we do not believe our state's jurisprudence concerning this issue has been fully accepted or developed. *See State v. Cooley*, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000) ("Since the jury heard no evidence of legal provocation, Defendant's voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict."). Moreover, we believe analyzing this issue would require this court to speculate as to what occurred during jury deliberations and ultimately why the jury reached its verdict. As such, we decline to address the issue of compromise verdicts and limit our analysis to whether a voluntary manslaughter charge was justified.

"To justify charging the lesser crime, the evidence presented must allow a *rational* inference the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (emphasis added). As such, "[t]he court looks to the totality of evidence in evaluating whether such an inference has been created." *Id*. "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010); *see also Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant."). "The trial court should refuse to charge the lesser included offense when there has been no evidence tending to show the defendant may have committed solely the lesser offense." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673. Further, "[a] mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge." *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991); *see also State v. Funchess*, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) ("[T]he mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." (internal quotation marks omitted) (quoting *State v. Hicks*, 84 S.E.2d 545, 547 (N.C. 1954))).

IV. LAW/ANALYSIS

A. Voluntary Manslaughter Charge

1) The relationship between fear and sudden heat of passion

Sims argues the circuit court erred in charging voluntary manslaughter because there is no evidence to support the charge. We agree.

"Voluntary [] manslaughter [is a] lesser-included offense[] of murder." *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *Id*. (quoting *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). "Both heat of passion and sufficient legal provocation must be present at the time of the killing," *id*., and there must be evidence of both to receive a voluntary manslaughter charge. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880. As such, "[a] defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d

604, 608 (2010). Similarly, "a defendant is not entitled to [a] voluntary manslaughter [charge] merely because he was legally provoked." *Id*. at 597, 698 S.E.2d at 608. Rather, "there must be evidence that the heat of passion was caused by sufficient legal provocation." *Id*.

Conversely, a person is justified in using deadly force in self-defense when:

> 1. The defendant was without fault in bringing on the difficulty;
> 2. The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> 3. If the defense is based upon the defendant's actual belief of imminent danger, a reasonab[ly] prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
> 4. The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

Our supreme court has cautioned that, "[circuit] courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter, especially where a defendant claims he acted in self-defense." *Starnes*, 388 S.C. at 597–98, 698 S.E.2d at 608. "This struggle may be due to [the supreme court's] opinions which, when taken out of the evidentiary context, appear to set no boundaries as to what circumstances give rise to 'sudden heat of passion upon sufficient legal provocation.'" *Id*. at 598, 698 S.E.2d at 608.

> The sudden heat of passion need not dethrone reason entirely or shut out knowledge and volition, but it must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what may be called an uncontrollable impulse to do violence.

Sams, 410 S.C. at 309, 764 S.E.2d at 514.

"Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." *State v. Locklair*, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). "Rather, . . . the opprobrious words must be accompanied by the appearance of an assault." *Id*. Accordingly, our supreme court has held, "an unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation," and "fear resulting from an attack can constitute a basis for voluntary manslaughter." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 608–09. However, "the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction." *Id*. at 598, 698 S.E.2d at 609. "[T]he fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id*. In "determining whether an act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

In *State v. Starnes*, our supreme court took the opportunity to clarify the law regarding how a defendant's fear following an attack or threatening act relates to voluntary manslaughter. 388 S.C. at 597–99, 698 S.E.2d at 608–09. Prior to the incident, Starnes and two friends, Bill and Jared, had been hanging out at Starnes's restaurant, eventually leaving to go to a bar. *Id*. at 593, S.E.2d at 606. After leaving the bar, Bill asked Starnes to take them to buy drugs from a drug dealer, but Starnes refused, choosing to drop them off at his home instead. *Id*. at 595, 698 S.E.2d at 607. Starnes then picked up the drug dealer and took him to Starnes's house. *Id*.

Starnes testified that he saw Jared pointing a gun at the drug dealer and swearing at him. *Id*. Starnes said he went into his bedroom to retrieve his gun and, as he exited the bedroom, Bill said "whoa" and was pointing a gun at him. *Id*. Starnes then shot Bill before turning to shoot Jared, killing them both. *Id*. Conversely, Starnes's girlfriend testified that, at some point during the night, Starnes returned to his restaurant with a mark on his temple and informed her that Bill had pistol whipped him in the bar bathroom. *Id*. at 594, 698 S.E.2d at 606. Starnes's girlfriend further testified that Starnes retrieved his gun and bullets from a shelf in the kitchen and told her he was going to kill "them." *Id*. The drug dealer testified that Starnes had unexpectedly arrived at his house claiming he needed the drug dealer to come watch his back because Starnes had been having trouble with his friends. *Id*. at 595, 698 S.E.2d at 607. The drug dealer indicated that upon arriving

at Starnes's house, Starnes immediately went into the bedroom and started fumbling around. *Id*. The drug dealer claimed Jared charged at him with a gun, but Bill took the gun away from him and everyone calmed down. *Id*. The drug dealer testified that Starnes then came out of the bedroom and fired three shots at Bill and then fired at Jared. *Id*. The circuit court ultimately charged the jury on murder and self-defense. *Id*. at 596, 698 S.E.2d at 607.

Before addressing the facts of the case, the supreme court distinguished the relationship between fear and self-defense from the relationship between fear and voluntary manslaughter, stating,

> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.

Id. at 599, 698 S.E.2d at 609. Applying this distinction to the facts of the case, the *Starnes* court affirmed the circuit court's refusal to charge voluntary manslaughter, finding while Starnes testified he shot his friends out of fear, there was no evidence to indicate he was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. *Id*. Accordingly, the *Starnes* court determined, "[t]he only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." *Id*. The court further stated,

> to hold that Appellant was entitled to a voluntary manslaughter charge under the facts of this case would impermissibly blend the elements of voluntary manslaughter and self-defense. In effect, such a holding would render voluntary manslaughter a lesser-included offense of self-defense, for where there is an intentional killing based on fear alone, a defendant would be entitled to a voluntary manslaughter charge.

Id. at 599–600, 698 S.E.2d at 609.

Similarly, in *State v. Niles*, our supreme court found the circuit court properly refused to charge the jury on voluntary manslaughter. 412 S.C. at 518, 772 S.E.2d at 878. In that case, Niles, Mokeia Hammond, and Ervin Moore met the victim in a Best Buy parking lot to buy marijuana. *Id*. Moore testified that Niles set up the meeting with the victim and had made the decision to rob him. *Id*. at 518–19, 772 S.E.2d at 878. Moore claimed he was responsible for identifying the marijuana and entered the victim's vehicle to do so. *Id*. at 519, 772 S.E.2d at 879. As he returned to Niles's car, Moore testified that Niles had already exited and was leaning in the passenger-side door of the victim's vehicle. *Id*. Moore heard two gunshots and saw Niles leap back in the car. *Id*. Moore heard the victim fire a weapon in response and indicated the victim and Niles shot back and forth multiple times. *Id*. at 520, 772 S.E.2d at 879.

Conversely, Niles testified that he had merely set up the meeting, but that Moore had acted alone in robbing the victim. *Id*. Niles indicated that he had been sitting in his car with Hammond when he saw Moore and the victim fighting in the victim's vehicle before Moore exited with the stolen drugs and dove back into Niles's car. *Id*. Niles saw the victim draw his gun and shoot at them knocking out the rear passenger windows, so he grabbed his gun and returned fire. *Id*. Niles asserted he shot back because he was concerned with stopping the shooter and for Hammond's safety, testifying,

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

Id.

In determining Niles was not entitled to a voluntary manslaughter charge, the supreme court found Niles's own testimony did not establish that he was overtaken by a sudden heat of passion such that he had an uncontrollable urge to do violence. *Id*. at 522, 772 S.E.2d at 880. Rather, the court indicated that voluntary manslaughter required a criminal intent to do harm and Niles's testimony demonstrated that he lacked the intent to harm the victim. *Id*. at 523, 772 S.E.2d at 881. Further, the court noted that "it was undisputed that Niles, Hammond, and Moore met the victim in the

parking lot to rob the victim during the drug transaction." *Id*. Niles admitted that Hammond and Moore were unarmed, and that he was the one who shot and killed the victim. *Id*. As such, the court determined that the scheme to rob the victim, coupled with the fact that Niles brought a deadly weapon, discounted any claim that Niles acted in a sudden heat of passion. *Id*. Under these facts, the court found there was nothing sudden about Niles's decision to shoot the victim, as he had clearly planned for the possibility that he might have to fire his weapon to accomplish the robbery. *Id*. at 523–24, 772 S.E.2d at 881.

Our supreme court further expounded on the relationship between voluntary manslaughter and self-defense in *Cook v. State*, finding the circuit court erred by charging the jury on voluntary manslaughter. 415 S.C. at 553, 784 S.E.2d at 666. Cook lived in an apartment above the victim, who constantly berated Cook for testifying in a murder trial against one of his associates and for telling their landlord that the victim sold drugs. *Id*. On the day of the incident, Cook and the victim had been exchanging hostile text messages. *Id*. at 554, 784 S.E.2d at 666. Later that night, Cook, his girlfriend, and his cousin returned to Cook's apartment complex to find the victim sitting outside on the porch. *Id*. The victim made a series of threatening comments directed at Cook that echoed similar sentiments from the texts he had sent earlier. *Id*. The victim's last comment was directed at both Cook and his girlfriend which really upset Cook; however, he continued up the stairs without saying anything to the victim. *Id*.

While in his apartment, Cook ate some watermelon, placed the rinds inside a plastic bag, and grabbed his gun before going downstairs to discard the bag. *Id*. Cook testified that once he was downstairs, he did not have an opportunity to get to the dumpster because the victim approached him, grimacing and threatening to shoot him in broad daylight. *Id*. Cook indicated that the victim had one of his hands in his back pocket and Cook was concerned that the victim would pull out a gun and shoot him. *Id*. At the same time, the victim's nephew was approaching from the opposite direction and Cook feared he was about to be jumped. *Id*. Cook claimed that he tried to walk away from the victim, but that the victim kept cutting him off and threatening him. *Id*. at 555, 784 S.E.2d at 667. At that point, Cook said "the dude was coming up" and "before I knew it, I fired a shot." *Id*. Cook indicated he fired a second shot and ran. *Id*. Cook said he fired the second shot "to make sure he was gone," explaining that "[a]s soon as I saw him reaching I just shot." *Id*. Additionally, the victim's nephew testified that Cook and the victim were talking so softly that he could hardly tell they were arguing. *Id*. He also indicated that Cook

stepped back, pulled out a gun and shot the victim before walking over the victim and shooting him again. *Id*. Cook's girlfriend also testified that Cook shot the victim a second time after he had fallen to the ground. *Id*.

The supreme court found the facts of the case did not support a finding that Cook shot the victim in a sudden heat of passion. *Id*. at 557, 784 S.E.2d at 668. The court pointed out that Cook had tried to walk away from the victim, stating, "[t]he fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off." *Id*. Additionally, the court found that at no point during Cook's statement did he indicate he lacked control over his actions. *Id*. As such, the court determined the facts of the case suggested Cook either shot the victim with malice or in self-defense. *Id*.

The *Cook* court noted the circuit court's decision to charge manslaughter relied on the following facts: 1) that Cook was in fear; 2) Cook shot the victim twice; and 3) Cook's statement "before I knew it, I fired a shot." *Id*. The court indicated that, without more, these facts were insufficient to establish Cook acted in a sudden heat of passion, stressing that neither the fact that Cook shot the victim twice nor his statement "before I knew it, I fired a shot" constituted evidence that Cook's fear manifested itself in an uncontrollable impulse to do violence. *Id*. at 557–58, 784 S.E.2d at 668. The State argued Cook's statement demonstrated that he lacked self-control when he shot the victim. *Id*. at 558, 784 S.E.2d at 668. The court disagreed, stating,

> Due to the short, swift motion of firing a gun, we believe this statement could be heard in any case in which the defendant is charged with firing a weapon, even out of self-defense. Thus, we do not believe this statement is indicative as to whether Cook was acting under an uncontrollable impulse to do violence.

Id.

Here, taken in the light most favorable to Sims, we find there is no evidence to support the inference that Sims shot David in a sudden heat of passion. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."). Sims indicated that she was in the bathroom alone when David entered with pliers and a knife and began calling her a liar. Sims then indicated that David got physical

with her over control of her phone. Sims claimed that David then began threatening her and taunting her with the knife, causing her to grab the gun out of fear. Even though she was afraid, Sims said she held the gun by her side and asked David to stop what he was doing, indicating she did not want to use the gun. *See id*. at 523, 772 S.E.2d at 881 ("Because [Appellant], by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.").

Sims also told police she grabbed the gun hoping to "scare" David so he would stop his threatening behavior, adding that she had never meant to shoot him. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[B]y Appellant's own testimony, he shot at the men *to scare them away*. Appellant's testimony appears designed to *support a charge of self defense, not heat of passion*.") (emphases added). According to Sims, David became even angrier, continuing to threaten her as she tried to back out of the bathroom. *See Cook*, 415 S.C. at 557, 784 S.E.2d at 668 ("The fact that [Appellant] was trying to walk away from the conflict does not suggest [Appellant] was incapable of cooling off."). As she tried to back out, Sims testified that David lunged at her and "my hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." *See id*. at 558, 784 S.E.2d at 668 ("We do not believe . . . [Appellant's] statement 'before I knew it, I fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). While Sims acknowledged that she shot out of fear, she never indicated that she lost control or was overcome with an uncontrollable impulse to do violence. *See Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear."); *id*. at 598, 698 S.E.2d at 609 ("[T]he fear must . . . cause the defendant to lose control and create an uncontrollable impulse to do violence."); *Cook*, 415 S.C. at 557, 784 S.E.2d at 668 ("[A]t no point during [Appellant's] statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest [Appellant] shot [v]ictim either with malice or in self-defense."). The record is clear that Sims only shot David once. *See Cook*, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe the fact that [Appellant] shot [v]ictim twice . . . is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). After shooting David, Sims immediately began administering CPR and called 911. *See State v. Oates*, 421 S.C. 1, 28, 803 S.E.2d 911, 926 (Ct. App. 2017) (finding "Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting"); *see also Niles*, 412 S.C. at 523, 772 S.E.2d at 881 ("Because

[Appellant] . . . lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts."). Accordingly, like the defendants in *Starnes*, *Niles*, and *Cook*, we find the only evidence in the record is that Sims deliberately and intentionally shot David and that she either shot him with malice aforethought or in self-defense.

In deciding to charge voluntary manslaughter, the circuit court erred in relying on Sims's testimony that her hand went up and she shot out of reaction.[14] *See Cook*, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe . . . [Appellant's] statement 'before I knew it, I fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence.").[15] Furthermore, we find a voluntary manslaughter charge was not justified by a gap between the altercation and David's death,[16] as there is no evidence supporting the conclusion that Sims was overcome with an uncontrollable impulse to do violence. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."); *see also State v. Cain*, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct].").

2) Evidence of an altercation prior to the killing

The State argues the circuit court properly charged the jury on voluntary manslaughter because Sims and David were engaged in a heated argument and David had or was about to initiate a physical altercation. The State relies on *Lowry*[17] and *Knoten*[18] for the proposition that charging voluntary manslaughter is appropriate where there is evidence that the defendant and the victim were engaged in a heated altercation prior to the killing. However, we find both cases factually distinguishable from the case at bar.

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[14] *See supra* §§ I(C) & (D).
[15] However, we note that *Cook* was issued after the completion of the instant trial. As such, the circuit court did not have the benefit of the *Cook* decision when issuing its initial ruling on the voluntary manslaughter charge.
[16] *See supra* § I(D).
[17] *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993).
[18] *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001).

In *Lowry*, our supreme court held the circuit court erred in failing to charge the jury on voluntary manslaughter. 315 S.C. at 399, 434 S.E.2d at 274. Lowry was drinking with some friends outside of a grocery store when the victim approached and began berating him. *Id*. at 398, 434 S.E.2d at 273. The two men began arguing and "bumped chests," but no punches were thrown. *Id*. Lowry aimed a pistol at the victim and pulled the trigger, but the pistol was unloaded. *Id*. One of Lowry's friends broke up the fight and the victim went into the grocery store. *Id*. A short time later, Lowry loaded his pistol, fired a shot into a nearby sign, and followed the victim inside. *Id*. Once inside, the two men began arguing again. *Id*. According to the State's witnesses, Lowry then challenged the victim to "take it outside," and the victim responded, "Man, I am unarmed. Do you expect me to walk outside and let you kill me?" *Id*. To demonstrate he was unarmed, the victim spread his arms from his body. *Id*.

Conversely, Lowry's witnesses indicated that the victim said, "You think you are a big man because you got a gun." *Id*. The victim then moved towards Lowry in a menacing fashion with his arms and hands outstretched in an attempt to grab him. *Id*. It is undisputed that after the victim raised his arms, Lowry shot him in the chest. *Id*. After the victim fell, Lowry cursed him and shot him again in the head. *Id*. The supreme court held the circuit court erred in refusing to charge the jury on voluntary manslaughter because the evidence indicated the victim and Lowry were in a heated argument and the victim was about to initiate a physical encounter when the shooting occurred. *Id*. at 399, 434 S.E.2d at 274. Thus, the jury could have discerned that Lowry was under the heat of passion. *Id*. at 400, 434 S.E.2d at 274.

Similarly, in *Knoten*, our supreme court reversed Knoten's murder conviction, finding that a jury charge on voluntary manslaughter was required by the evidence presented at trial. 347 S.C. at 313, 555 S.E.2d at 400. After the disappearance of Kimberly Brown (Brown) and her daughter, police discovered that Knoten was the last person to have seen Brown alive. *Id*. at 300, 555 S.E.2d at 393. After further investigation, police questioned Knoten about the disappearances, and he provided three different versions of events. *Id*. at 300–01, 555 S.E.2d at 393–94. In his first statement, Knoten indicated he had left Brown's apartment between 10 and 10:30 p.m. the night she disappeared. *Id*. at 301, 555 S.E.2d at 394. Knoten claimed he got in his car, drove away from the complex, and then blacked out. *Id*. He woke up the next morning near a boat ramp and went to work. *Id*. He said he did not know if he had killed Brown or her daughter. *Id*. In his second statement, Knoten indicated that he and Brown had consensual sex the night she disappeared, and that she became

agitated afterwards, arming herself with a knife and threatening him. *Id*. Knoten claimed Brown then cut him on the leg and chased him outside while he was nude. *Id*. Knoten retrieved a foot-long steel bar from his trunk and reentered the apartment. *Id*. Upon reentering, Brown cut him again and he hit her over the head with the steel bar. *Id*. Knoten's third statement was consistent with his second, except he admitted to raping Brown. *Id*.

The supreme court noted that, according to Knoten, he had been chased out of the apartment into near freezing temperature while he was nude. *Id*. at 305 n.5, 555 S.E.2d at 396 n.5. Construing the facts in the light most favorable to Knoten, including his assertion that he had consensual sex with Brown, the court determined Knoten had armed himself in response to Brown's original unprovoked knife attack and reentered the house to retrieve his clothes and personal items. *Id*. Once inside, Brown attacked him again before Knoten killed her. *Id*. Under these facts, the court found a voluntary manslaughter charge was appropriate because there was evidence that Knoten and Brown were in a heated encounter before Knoten struck and killed her. *Id*. at 306, 555 S.E.2d at 396.

We find *Lowry* and *Knoten* distinguishable from the case at bar. It is true that in both cases, a physical altercation took place before the killing. However, in both cases, there is a period between the initial altercation and the killing in which the defendant was separated from his victim by four walls and a door. And in both cases the defendant armed himself, entered the building, and reengaged with the victim before the killing. The pursuit of the victim is one of the factors our supreme court considered in distinguishing *Cook* from *Lowry*, finding, "Lowry actively pursued the victim, whereas Cook attempted to walk away from [v]ictim." *Cook*, 415 S.C. at 559, 784 S.E.2d at 669. Here, there is no evidence that Sims and David were separated or that David stopped his assault. Rather, Sims indicated that she was attempting to back out of the bathroom when David lunged at her with a knife and she shot him. As our supreme court held in *Starnes*, to find that a voluntary manslaughter charge was justified "under the facts of this case would impermissibly blend the elements of voluntary manslaughter and self-defense." 388 S.C. at 599, 698 S.E.2d at 609.

While there is evidence that David attacked Sims and Sims resisted, we find the facts in this case are more akin to *State v. Dickey*, in which our supreme court reversed Dickey's conviction for voluntary manslaughter, finding he was entitled to

a directed verdict on self-defense.[19] 394 S.C. at 495, 716 S.E.2d at 98. Dickey, a security guard at Cornell Arms, was asked to evict a resident's guest, the victim, for being drunk and hostile toward the neighbors. *Id*. at 495, 716 S.E.2d at 98–99. Dickey asked the victim to leave twice, but the victim angrily refused, shouting expletives at Dickey and slamming the door both times. *Id*. at 495–96, 716 S.E.2d at 99. Dickey then called the police to report the disturbance. *Id*. at 496, 716 S.E.2d at 99. Eventually, the victim's friend convinced the victim to leave the apartment, and a witness testified that the victim tucked a liquor bottle in his shorts on the way out. *Id*.

Dickey followed the victim and his friend into the lobby, opting to take the stairs rather than share the elevator with them. *Id*. Once in the lobby, Dickey followed the victim and his friend as they approached the exit, choosing to go outside after he thought the police had arrived. *Id*. After walking halfway down the block, the victim and his friend resumed shouting obscenities at Dickey. *Id*. The victim threatened to assault Dickey and began advancing towards him quickly. *Id*. at 496–97, 716 S.E.2d at 99. When the victim was about fifteen feet away from Dickey, Dickey pulled a gun from his pocket. *Id*. at 497, 716 S.E.2d at 99–100. The victim continued to move towards Dickey and started reaching under his shirt. *Id*. Dickey, claiming that he thought the victim was reaching for a weapon, fired three shots without warning, put the gun back in his pocket and called 911. *Id*. Officers found a broken liquor bottle at the scene containing the victim's blood DNA. *Id*. Dickey was convicted of voluntary manslaughter and this court affirmed his conviction. *Id*. at 498, 716 S.E.2d at 100.

However, our supreme court found Dickey was entitled to a directed verdict on self-defense. *Id*. at 503, 716 S.E.2d at 103. In determining Dickey did not bring about the harm, the court noted that Dickey did not brandish his weapon at the victim when he got outside, but pulled it from its holster when the victim and his friend began advancing towards him aggressively. *Id*. at 500, 716 S.E.2d at 101. Similarly, the court found Dickey feared for his life and that a reasonable person would have also been in fear for his life because the victim, "began advancing toward Petitioner quickly with the purpose of assaulting him, [] continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of [the victim] and Petitioner." *Id*. at 501, 716 S.E.2d at 102.

[19] We want to emphasize that we compare Sims's case to *Dickey* only to demonstrate that voluntary manslaughter was not supported by the evidence in the record.

Finally, the court determined Dickey had no reasonable alternative to self-defense, finding, "[h]ad Petitioner turned his back, he would have likely been attacked from behind as he tried to get through the first set of glass doors." *Id*. at 502–03, 716 S.E.2d at 102–03.

In comparing Sims's case to *Dickey*, we focus on three facts in particular. First, like in *Dickey*, Sims did not brandish the weapon when David entered the bathroom, nor did she brandish the weapon after David began threatening and insulting her. Rather, David physically assaulted Sims, cutting her on the arm, before she drew the gun. Second, Sims indicated that she shot David because she was in fear for her life. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 608–09 ("[T]he presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction."). Moreover, like Dickey, we find that Sims's fear was reasonable. Similar to the victim advancing toward Dickey, David began advancing toward Sims with the purpose of assaulting her, continued advancing toward Sims after she drew the gun, and there was great disparity in the physical stature and capabilities of Sims and David.[20] *See Dickey* 394 S.C. at 501, 716 S.E.2d at 102 (finding Dickey's fear was reasonable because the victim, "began advancing toward Petitioner quickly with the purpose of assaulting him, [] continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of [the victim] and Petitioner"); *see also Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear."). Finally, like Dickey, Sims called 911 immediately after shooting David, in addition to promptly administering CPR. *See Oates*, 421 S.C. at 28, 803 S.E.2d at 926 (finding "Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting"). Accordingly, we find the facts of Sims's case, including the altercation with David, are more analogous to the facts of *Dickey*, rather than those of *Lowry* or *Knoten*.

Furthermore, the State cites evidence that David assaulted Sims and asks us to infer that Sims engaged in a "heated argument" and was under a sudden heat of passion when she shot David. However, inferences must be grounded in fact and not mere speculation. *See Cain*, 419 S.C. at 30, 795 S.E.2d at 849 ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct].");

[20] David's autopsy report indicated he was six foot two and two hundred fifty pounds.

State v. Palmer, 413 S.C. 410, 422–23, 776 S.E.2d 558, 564 (2015) (affirming the reversal of a petitioner's conviction where there was "no evidence other than rank speculation that such an incident occurred"). The State does not cite to any evidence that Sims was a mutual participant in the altercation or that she was overcome by an uncontrollable urge to do violence. Instead, the State asks us to infer from the fact that David attacked Sims, and Sims resisted, that the two were engaged in an "intense fight." The State then asks us to infer that, because the parties were engaged in an "intense fight," Sims was under a sudden heat of passion when she shot David. In other words, the State cites evidence that Sims was legally provoked and asks us to infer that she was under a sudden heat of passion. *See Starnes*, 388 S.C. at 597, 698 S.E.2d at 608 ("[A] defendant is not entitled to [a] voluntary manslaughter [charge] merely because he was legally provoked."). However, we do not find any evidence to support these conclusions, only speculation. Accordingly, we find a voluntary manslaughter charge is not justified where the State asks us to theorize on whether Sims was under a sudden heat of passion, especially where the totality of the evidence suggests she was not. *See supra* § IV(A)(1).

The State also argues that, based on Allyson Brown's testimony,[21] the jury could have inferred that David assaulted Sims without intending to maim or kill her and that he disengaged when Sims allegedly dropped her phone. Brown testified, concerning her understanding of the altercation, that David wrapped his arms around Sims to try and wrestle the phone away, and that Sims dropped the phone after David bit her finger. Interpreting Brown's testimony, the State argues David turned around to retrieve the phone and Sims then drew the gun. The State further contends that once Sims drew the gun, the jury could infer that David lunged at her with the knife in self-defense. Thus, the State argues that Brown's testimony supports a voluntary manslaughter charge, as the jury could have concluded that Sims was not acting in self-defense because she caused the shooting and was not without fault in causing the shooting to occur. However, in addition to asking the jury to rely upon speculative argument, the State ignored key parts of Brown's testimony. We find the State cannot justify a voluntary manslaughter charge by using bits and pieces of Brown's statement. *See Morris*, 307 S.C. at 483, 415 S.E.2d at 821 ("A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge."). Brown also testified that Sims drew the gun after she realized she had been cut during her struggle with David for

[21] The State offered Allyson Brown to testify that Sims told her a differing version of events than the one Sims had previously testified to.

control of her phone, that Sims held the gun by her side rather than pointing it at David, and that Sims was backing out of the bathroom when David lunged at her and tried to stab her. Crucially, Brown testified that Sims had never given her a reason for shooting David other than self-defense. When considering all of Brown's testimony, which is largely similar to Sims's testimony, we do not find any evidence suggesting Sims was overcome with an uncontrollable urge to do violence.

B. Remand for New Trial on Involuntary Manslaughter

The State argues that if this court determines the circuit court erred in charging voluntary manslaughter, the case should be remanded for a new trial on involuntary manslaughter. We disagree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. Const. amend. V. Accordingly, the United States Supreme Court has held, "the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). Similarly, our courts have found, "[u]nder the law of double jeopardy, a defendant may not be prosecuted for the same offense *after an acquittal*, a conviction, or an improvidently granted mistrial." *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (emphasis added) (quoting *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005)).

The State relies on *Cooley*,[22] for the proposition that conviction of a lesser-included offense acts as implicit acquittal of the greater offense. The State argues that, because involuntary manslaughter is a lesser-included offense of voluntary manslaughter, Sims's conviction for voluntary manslaughter does not act as an implicit acquittal of the lesser involuntary manslaughter charge, only the greater murder charge. However, the State ignores the fact that the jury checked "not guilty" on the verdict form for both the murder charge and the involuntary manslaughter charge, thus acquitting Sims of involuntary manslaughter at trial. As such, because an acquittal "absolutely shields the defendant from retrial," we find the case cannot be remanded for retrial on involuntary manslaughter.

V. CONCLUSION

[22] 342 S.C. at 69, 536 S.E.2d at 669.

In the instant case, the State sought and secured an indictment for murder and predicated its entire case on the theory that Sims killed David with malice aforethought. As a result, the record is devoid of any evidence that Sims was under a sudden heat of passion when she shot David. Accordingly, we find the circuit court erred in charging the jury on voluntary manslaughter and we reverse Sims's conviction. Further, we find remanding the case for retrial on involuntary manslaughter is precluded by the Double Jeopardy Clause. Therefore, we decline the State's request to do so.

REVERSED.

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