The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay South Carolina Bar License Fees and Assessments

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O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on February 1, 2012, under Rule 419(b)(1), SCACR, and remain suspended as of April 1, 2012. Pursuant to Rule 419(e)(1), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2012.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or 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.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 4, 2012

Attorneys Suspended for Nonpayment of 2012 License Fees
As of April 1, 2012

Mr. Gerald Warren Abendroth
Abendroth Law Office
362 Cotton Indian Creek Rd.
McDonough, GA 30252

Mr. Bryan Alexander
5547 Ridge Ave.
Philadelphia, PA 19128

Mr. Timothy David Bounds
7535 E. Peakview Avenue
Apartment 527
Centennial, CO 80111

Mr. Imani Chiphe
Federal Public Defender's Office
55 E. Monroe, Ste. 2800
Chicago, IL 60603

Ms. Melody Sunshine Creese
PO Box 880489
Boca Raton, FL 33488-0489

Ms. Carolyne Adams Day
104 Brookhollow Dr.
Flat Rock, NC 28731

Mr. Archie Lamont Dixon
NBA
645 Fifth Ave.
Olympic Tower
New York, NY 10022

Mr. Jeffrey Charles Dunham
Frost Brown Todd LLC
Chase Tower - 8th Floor
707 Virginia Street, East
Charleston, WV 25301

Mr. Benjamin David Goldstein
195 Downey St.
San Francisco, CA 94117

Mr. Christian Robert Gunderson
605 Gallbush Rd.
Chesapeake, VA 23322

Mr. Lucas Victor Haugh
K&L Gates, LLP
535 Smithfield Street
Pittsburgh, PA 15222-2312

Mr. Christopher McAdams Hill
Hill Mullikin Co.
2672 Bayonne Avenue
Sullivan's Island, SC 29482

Mr. L. Daniel Kellogg
1765 Peachtree St., Apt D3
Atlanta, GA 30309-2318

Mr. David Prior Kerney
Kerney Law Firm, LLC
PO Box 607
Kent, KY 6757

Mr. James Lai
Cision US Inc.
332 S. Michigan Ave.
Chicago, IL 60604

Mr. George Kane Macklin
Nationwide Insurance
150 Cartright St.
Charleston, SC 29492

Mr. Gustave Charles Martschink III
158 Uhland Terrace, NE
Washington, DC 20002

Ms. Catherine Barr Marziotti
3722 Sunset Blvd.
Houston, TX 77005-2030

Mr. David E. Mathis
4833 Carolina Beach Rd., Ste. 106
Wilmington, NC 28412

Mr. Robert Wallace Mayhue Jr.
Stewart and Associates, PLLC
105 Executive Dr.
Madison, MS 39110

Mr. David Wilson Norville
PO Box 1127
Monroe, NC 28111-1127

Mr. Neal A. Patel
1112 M St, NW
#507
Washington, DC 20005

Mr. William J. Pennington III
5385 5th Fairway Drive
Hollywood, SC 29449

Mr. Michael J. Pitch
McCarthy Law Firm, LLC
PO Box 11332
Columbia, SC 29211-1332

Mr. Richard John Raeon
Warner Construction Consultants, Inc.
253 de la Gaye Point
Beaufort, SC 29902

Mr. Robert D. Schoen
141 Crescent Rd.
Santa Rosa Beach, FL 32459

Mr. Jeffrey Lyle Shaw
Jeffrey L. Shaw, PC
1170 Howell Mill Rd., Ste. 305
Atlanta, GA 30318

Mr. James Howard Swick
Swick & Hindersman, LLC
1421 Bull St.
Columbia, SC 29201

Ms. Andrea Lynne Taylor
2027 Country Manor Dr.
Mt. Pleasant, SC 29466-7411

Mr. Richard D. Trala Jr.
2405 Lourdes Rd.
Richmond, VA 23228

Ms. Deborah Williamson Witt
14525 Cabarrus Station Road
Midland, NC 28107

Ms. Trisha Anne Zeller
Zeller Law Office
2526 Woodbourne Ave.
Louisville, KY 40205-1722

The Supreme Court of South Carolina

In the Matter of Frank C. McCrystle, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 8, 1999, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 29, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 4, 2012

The Supreme Court of South Carolina

In the Matter of Dennis W. Olley, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 1, 1976, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 28, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 4, 2012

The Supreme Court of South Carolina

In the Matter of Jeffrey D. Zentner, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 16, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 27, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

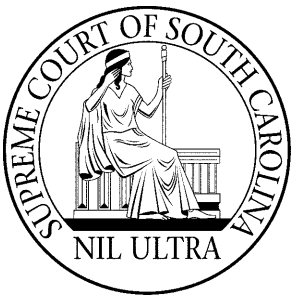
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 4, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 11, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marilee B. Fairchild and Larry J. Fairchild,	Plaintiffs,
Of whom Marilee B. Fairchild is	Respondent,

v.

South Carolina Department of Transportation, William Leslie Palmer and Palmer Construction Co., Inc.,	Defendants,
Of whom William Leslie Palmer and Palmer Construction Co., Inc., are	Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 27112
Heard November 15, 2011 – Filed April 11, 2012

AFFIRMED

Kirby D. Shealy, III and Bradley L. Lanford, both of Baker, Ravenel & Bender, of Columbia, for Petitioners.

Bert G. Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Walterboro; and George D. Jebaily and Suzanne H. Jebaily, both of Jebaily Law Firm, of Florence, for Respondent.

JUSTICE BEATTY: This Court granted a petition for a writ of certiorari to review the decision in *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009). The Court of Appeals affirmed in part, reversed in part, and remanded for a new trial a negligence action arising from a motor vehicle accident. In relevant part, the Court of Appeals determined (1) Marilee Fairchild's claim for punitive damages should have been submitted to the jury, (2) the trial court should have charged the jury on the intervening negligence of a treating physician, and (3) the trial court did not abuse its discretion in denying William Leslie Palmer's motion under Rule 35, SCRCP for an independent medical examination (IME) to be performed by Dr. James Ballenger. We affirm.

I. FACTS

This action arises out of a motor vehicle accident that occurred on March 1, 2001 while several vehicles were traveling south on Interstate 95 in South Carolina.

Just before the accident, James Rabb, an employee with the South Carolina Department of Transportation (SCDOT), was driving a dump truck with an attached trailer transporting a backhoe. Rabb was traveling in the left lane of the southbound traffic (closest to the median) when he pulled in to a

paved "cross-over" in the median so he could turn around and enter the northbound lanes of I-95. While Rabb was stopped waiting for the northbound traffic to clear, the back of his trailer allegedly protruded into the left traffic lane on the southbound side.

Several cars traveling south in the left lane directly behind Rabb saw Rabb's trailer and simultaneously switched to the right lane. When those cars moved over, Marilee Fairchild, who was behind them driving a minivan, saw Rabb's trailer partially blocking the left lane where she was traveling. Fairchild "flashed" her brakes and then continued to brake while staying ahead of the vehicle behind her. Fairchild managed to avoid Rabb's trailer, but she was struck by a truck traveling behind her that was driven by William Leslie Palmer.

Palmer, whose truck also had an attached trailer (which contained a motorcycle), hit his brakes and swerved to the right when he came upon Fairchild. However, Palmer struck Fairchild's minivan, and the force of the impact with Palmer's large vehicle caused Fairchild's minivan to flip over and roll before landing in the median. Rabb's truck was not hit in the accident.

On February 26, 2003, Fairchild[1] brought this negligence action against SCDOT, Palmer, and Palmer Construction Co., alleging she sustained physical injuries and property damage in the accident. She sought both actual and punitive damages. Fairchild thereafter entered into a covenant not to sue with SCDOT, and SCDOT was dismissed as a party.

At trial, the jury returned a verdict in favor of Fairchild for $720,000. Both parties appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. We thereafter granted Palmer's[2] petition for a writ of certiorari.

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[1] Fairchild's husband was also a plaintiff, but he is not a party to this appeal.

[2] "Palmer" shall also include his construction company, where applicable.

II. LAW/ANALYSIS

A. Punitive Damages

Palmer first argues the Court of Appeals erred in holding the trial court should have submitted Fairchild's claim of punitive damages to the jury based on its determination that the evidence and its reasonable inferences created a factual question as to whether he had acted recklessly.

The trial court granted Palmer's motion for a directed verdict on Fairchild's claim for punitive damages on the basis there was *no* evidence of reckless conduct by Palmer. However, the trial court did conclude that two statutes governing traffic safety were implicated in this case and charged the jury on the same. The first, section 56-5-1520(A), provides general rules as to maximum and safe speeds and states when lower speeds may be required:

> A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Speed must be so controlled to avoid colliding with a person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of a person to use care.

S.C. Code Ann. § 56-5-1520(A) (2006).

In addition, the trial court charged the jury on section 56-5-1930(a), which prohibits following too closely:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

Id. § 56-5-1930(a).

The Court of Appeals found the grant of a directed verdict on the claim for punitive damages was error as the evidence and its reasonable inferences created a factual question as to whether Palmer had acted recklessly. *Fairchild*, 385 S.C. at 353, 683 S.E.2d at 823. The court agreed with Fairchild that, based on Palmer's conduct, which included driving a large commercial truck[3] into heavy traffic just before the accident without any reduction in his rate of speed, and his alleged statutory violations, the jury should have been permitted to consider whether Palmer acted recklessly. *Id.*

Citing long-standing South Carolina precedent, the Court of Appeals held the violation of a statute constitutes negligence per se, and negligence per se is some evidence of recklessness and willfulness that requires submission of the issue of punitive damages to the jury. *Id.* at 354, 683 S.E.2d at 823. The Court of Appeals cited this Court's decision in *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993) as well as additional authorities to this effect:

> *Wise v. Broadway,* 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) ("The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury."); *Rhodes v. Lawrence,* 279 S.C. 96, 97-98, 302 S.E.2d 343, 344 (1983) ("In these circumstances, a jury question as to punitive damages was clearly presented given the well settled rule that a showing of statutory violation can be evidence of recklessness and willfulness."); *Austin v. Specialty Transp. Servs., Inc.,* 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004) ("A factual question as to punitive damages is presented when there is evidence of a statutory violation.").

[3] Palmer's truck weighed 13,740 pounds, the trailer weighed 2,760 pounds, and the motorcycle he was transporting was 655.6 pounds.

Id. The Court of Appeals noted "[t]hese cases limit their holdings to creating a jury question only and not recklessness per se." *Id.* The court referenced the express limitation pronounced by this Court in *Wise*:

> Violation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly. It is always for the jury to determine whether a party has been reckless, willful, and wanton. However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation.

Id. at 354, 683 S.E.2d at 823-24 (quoting *Wise*, 315 S.C. at 276-77, 433 S.E.2d at 859 (internal citations omitted)).

The Court of Appeals concluded that there was evidence Palmer was negligent per se in causing the accident, which consisted of following another vehicle too closely and speeding; consequently, a jury could have found Palmer violated sections 56-5-1930(a) and 56-5-1520(A), and the finding of a statutory violation may be considered by the jury as evidence of recklessness. *Id.* at 357, 683 S.E.2d at 825. As a result, the court reversed the grant of a directed verdict on punitive damages and remanded for a new trial. *Id.*

On appeal to this Court, Palmer asserts this was error, and that "evidence of a statutory violation alone, without more, is generally insufficient to send the issue of punitive damages to the jury." He contends the two statutes at issue codify the common law standards for safe speeds and following distances, and they do not establish bright-line standards; therefore, they should not form the basis for an award of punitive damages without other supporting evidence.

In reviewing a ruling on a motion for a directed verdict, this Court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion. *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 435 S.E.2d 864 (1993). A case should be

submitted to the jury when the evidence is susceptible of more than one reasonable inference. *Unlimited Servs., Inc. v. Macklen Enters., Inc.*, 303 S.C. 384, 401 S.E.2d 153 (1991). It is not the duty of the trial court to weigh the testimony in ruling on a motion for a directed verdict. *Young v. Bost*, 241 S.C. 289, 128 S.E.2d 118 (1962).

Punitive damages are recoverable where there is evidence the defendant's conduct was reckless, willful, or wanton. *Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388 (1986). Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The terms "willful" and "wanton" when pled in a negligence action are synonymous with "reckless" and import a greater degree of culpability than mere negligence. *Id.* at 288, 709 S.E.2d at 612. "Evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages." *Id.* (quoting *Marcum v. Bowden*, 372 S.C. 452, 458 n.5, 643 S.E.2d 85, 88 n.5 (2007)); *see also* S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

"Ordinarily, the test is whether the tort has been committed in such a manner or under circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the plaintiff's rights." *Cartee*, 290 S.C. at 337, 350 S.E.2d at 390. "The test may also be satisfied by evidence of the causative violation of an applicable statute." *Id.* "However, before punitive damages may be submitted to the jury, there must be evidence the statutory violation proximately contributed to the injury." *Id.* "Ordinarily, whether or not the statutory violation contributed as a proximate cause to the injury is a question for the jury." *Id.*

"There must be some inference of a causal link between the statutory violation and the injury to warrant submitting the issue of punitive damages to the jury." *Id.* at 337-38, 350 S.E.2d at 390. For example, in *Cartee* the Court noted that if, in a case by beneficiaries against trustees for

mismanaging assets, the trustees had been guilty of driving without their driver's licenses, they would have been guilty of violating a statute; however, that violation could have nothing to do with the injuries claimed by beneficiaries and would not justify a charge on punitive damages because "[s]ome inference of causation must be shown." *Id.* at 338 n.3, 350 S.E.2d at 390 n.3; *see also Austin v. Specialty Trans. Servs., Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (stating the causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring submission of the issue of punitive damages to the jury).

In *Copeland v. Nabors*, 285 S.C. 340, 329 S.E.2d 457 (Ct. App. 1985), the Court of Appeals found the record contained evidence from which the jury could have inferred that Nabors violated one or more statutes relating to maximum speed limits and to overtaking and passing vehicles proceeding in the same direction and that Nabors thereby engaged in conduct warranting an award of punitive damages. Likewise, in *Field v. Gregory*, 230 S.C. 39, 94 S.E.2d 15 (1956), this Court found evidence of the violation of at least three applicable traffic statutes, which resulted in a traffic collision, warranted the submission of punitive damages to the jury. We stated, "The violation of an applicable statute is negligence per se, and whether or not such breach contributed as a proximate cause to [the] plaintiff's injury is ordinarily a question for the jury." *Id.* at 44, 94 S.E.2d at 18 (citation omitted). We observed that "[c]ausative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness." *Id.* at 46, 94 S.E.2d at 19 (citing *Morrow v. Evans*, 223 S.C. 288, 295, 75 S.E.2d 598, 601 (1953)); *accord Padgett v. Colonial Wholesale Dist. Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958); *Vernon v. Atlantic Coast Line R. Co.*, 221 S.C. 376, 70 S.E.2d 862 (1952); *Ralls v. Saleeby*, 178 S.C. 431, 182 S.E. 750 (1935); *Lumpkin v. Mankin*, 136 S.C. 506, 134 S.E. 503 (1926).

In *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978), this Court held that testimony that a witness saw two vehicles traveling north on Highway 52, that Bernard's vehicle was trailing the vehicle driven by Daniels and gaining on Daniels's vehicle, and that the Bernard automobile rammed

into the rear of Daniels's vehicle was evidence from which the jury could have reasonably inferred that Bernard was following too closely and was failing to maintain a proper lookout. *Id.* at 55, 240 S.E.2d at 519-20. The Court noted following too closely was a violation of section 56-5-1930 and "the violation of a statute is negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Id.* at 55, 240 S.E.2d at 520 (citing *Jarvis v. Green*, 257 S.C. 558, 186 S.E.2d 765 (1972) and *Still v. Blake*, 255 S.C. 95, 177 S.E.2d 469 (1970)). The *Daniels* Court concluded the trial court erred in holding there was no evidence of recklessness to sustain an award for punitive damages. *Id.* at 56, 240 S.E.2d at 520.

Similarly, in the current appeal, we find the trial court erred in granting a directed verdict on the issue of punitive damages. It is not the duty of a trial court to weigh the evidence. Viewing the evidence and its reasonable inferences in the light most favorable to Fairchild, as both the trial court and this Court are required to do, we hold there is evidence to create a jury question as to whether or not Palmer acted with recklessness, thus requiring submission of the issue of punitive damages to the jury.

Palmer was driving a commercial-sized truck, towing a 28-foot trailer, and hauling a motorcycle, and his combined weight exceeded eight and one-half tons. Palmer knew he was approaching an area of merging traffic and possible congestion on I-95 near several rest areas, and he acknowledged that it was an area "where a lot of accidents happen." Palmer further described the traffic around his truck prior to the collision as "typical crazy interstate 95 traffic, you know, everybody running together." He also was aware of the potential that traffic could slow down to a crawl due to a wreck or other conditions, and he knew of the need to maintain a safe stopping distance for such a large vehicle.

Palmer acknowledged that he maintained a "pretty steady speed" of 65 to 70 miles per hour to avoid "giving distance" that would let other vehicles cross into his lane ahead of him. He also stated he was "maybe a hundred

feet or more" behind Fairchild when she first applied her brakes. Palmer maintained he did not even notice Fairchild until right before the impact.

We further agree with the Court of Appeals that there is evidence that Palmer might have violated section 56-5-1520(A) (circumstances requiring a reduction in speed) and section 56-5-1930(a) (following too closely), and there is an inference that the violations of these statutes were the proximate cause of the accident. Therefore, Fairchild's claim for punitive damages should have been submitted to the jury.

Moreover, even where the trial court has submitted the issue of punitive damages to a jury, the defendant still has an opportunity to challenge the propriety of any resulting punitive damages award. The trial court has the authority to review the punitive damages award and if the court finds the award is inappropriate or excessive, it has the discretion to order a new trial or remittitur. *See generally Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (stating a reviewing court should consider the following set of factors in conducting a post-judgment review of an award of punitive damages: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases).

B. Intervening Negligence of Third Party

Palmer next contends the Court of Appeals erred in determining the trial court should have charged the jury on the intervening negligence of a third party.

Fairchild submitted three proposed instructions (Plaintiff's Requests to Charge #11, #12, & #13) regarding intervening negligence, which included several variations on the following principles:

> The intervening negligence of a third party will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care.
>
> It is the law in South Carolina that the negligence of a treating doctor is reasonably foreseeable. It is the general rule that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the doctor as part of the immediate and direct damages which naturally flow from the original injury.

The trial court declined to give the requested instructions on the basis there was no evidence of negligent treatment by an attending physician.

The Court of Appeals held this was error, noting that during the trial Palmer had stressed the side effects of the drugs prescribed for Fairchild during treatment for her injuries and had suggested that she was overmedicated. *Fairchild*, 385 S.C. at 352, 683 S.E.2d at 822. Palmer had implied that the overmedication, rather than his own negligence, was the source of many of Fairchild's ailments. *Id.* The Court of Appeals additionally noted that, to support this theory, "Palmer called and questioned several doctors and nurses to discuss Fairchild's course of treatment." *Id.* The Court of Appeals found that "[t]he following statement by [Palmer's] counsel made during closing arguments, in particular, was convincing that the charges were relevant: 'So ask yourself, is it the chronic post-traumatic headache that is the disabling headache, or is it the medication over-use that is the disabling headache?'" *Id.* at 352, 683 S.E.2d at 822-23. The court concluded it was error to refuse to give the requested instruction and further found that, "given the jury's verdict and the amount of damages at issue," the ruling could have impacted the jury's verdict, resulting in prejudice. *Id.* at 352, 683 S.E.2d at 823.

Palmer acknowledges that the proposed charges correctly state the current law in South Carolina,[4] but maintains there were no references made at trial to a negligent act or omission by a treating physician. Palmer also states that he did not seek a charge on whether the intervening negligence of a third party severed the causal connection between Palmer's negligence and Fairchild's injury, and this is an affirmative defense, citing *Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct. App. 1994) (holding the defense of a third-party's intervening acts of negligence does not break the causal chain if the acts are foreseeable).

"Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." *Id.* "Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Id.*

It is the court's duty to instruct the jury on the law, and "[t]he jury ought not to be left to cut a way through the woods with no compass to guide it." *Collins-Plass Thayer Co. v. Hewlett*, 109 S.C. 245, 253-54, 95 S.E. 510, 513 (1918), *cited in Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 259, 136 S.E.2d 297, 298 (1964).

To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial.[5] *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30

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[4] *See, e.g., Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978).

[5] The Court of Appeals correctly cited this standard in its opinion. However, Palmer takes issue with one case the court cited, *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000), which states: "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Palmer contends the "beyond a reasonable doubt" reference is a criminal standard that is not

(2008); *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005); *Jones v. Ridgely Commc'ns, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991); *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003); *Merritt v. Grant*, 285 S.C. 150, 328 S.E.2d 346 (Ct. App. 1985).

We find the charge requested by Fairchild was necessary to allow the jury to properly evaluate proximate cause and resulting damages, and its omission resulted in prejudice to Fairchild. There was an abundance of testimony elicited by Palmer on the allegation that overmedication by Fairchild's physicians was a possible cause of many of Fairchild's ailments. Palmer's message throughout the trial was that he should not be held responsible for any resulting symptoms in Fairchild that might have been caused by or exacerbated by overmedication or the treatment of Fairchild's physicians.

For example, Palmer called Dr. James Ballenger, a psychiatrist, as an expert witness for the defense. Dr. Ballenger testified "that the most likely reason [Fairchild's] headaches got so much worse from '02 to at least '05 or maybe into '06, was that . . . *a decision was made* to go into big-time medications. Oxycontin was the first one." (Emphasis added.) He opined that Fairchild's difficulties were likely linked to "rebound headache syndrome . . . meaning you have the headache; you take very strong medicines; it goes away, it comes out of your system, and you get a headache ultimately caused by taking the medicine." Although Palmer also states there was testimony that the overmedication could also be based on Fairchild's own conduct, the implication here clearly was that a treating physician made the decision "to go into big-time medications" and that this was not the best course of treatment. Palmer also called Dr. Robert Richey, an internist who had treated Fairchild. Dr. Richey asserted Fairchild "was on a cornucopia of medicine," and he expressed reservations about several drugs, including Sulfasalazine and Indocin, prescribed by Fairchild's other physicians and he detailed the potential side effects from these drugs.

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applicable in this civil case. We agree, but find the citation to *Wells* did not affect the propriety of the conclusion reached by the Court of Appeals in *Fairchild*.

Further, in cross-examining Fairchild's witnesses, Palmer repeatedly questioned the type of medical treatment she had received and whether she had suffered adverse effects, such as increased pain and medical "intoxication," from the prescribed treatment. The clear purpose of Palmer's repeated line of questioning in this regard was to reduce the assessment of damages by distinguishing any harm he believed was caused by Fairchild's medical treatment and alleged overmedication from any harm he allegedly caused in the motor vehicle collision.

Under these particular circumstances, where Fairchild's treatment and medical condition were the focus of so much of the testimony, the charge should have been given to avoid confusion for the jury and to aid it in properly evaluating proximate cause and damages. We agree with the Court of Appeals that the failure to give the requested charge was error warranting reversal. *See, e.g., Eaddy*, 244 S.C. at 259, 136 S.E.2d at 298 (concluding where the request to charge was of a controlling principle of law and was timely made, the refusal of the charge was error requiring reversal and a new trial).

C. Palmer's Motion for an IME by Dr. James Ballenger

Palmer next contends the Court of Appeals erred in holding the trial court did not abuse its discretion in denying his motion for an IME to be performed by Dr. James C. Ballenger.

Palmer filed a pretrial motion, pursuant to Rule 35 of the South Carolina Rules of Civil Procedure, for an IME to be performed on Fairchild by Dr. Ballenger. Dr. Ballenger is a psychiatrist who had been retained by Palmer as an expert witness regarding Fairchild's alleged injuries.

Fairchild did not oppose an IME, but objected to Dr. Ballenger being designated the examining physician because he had a pre-existing relationship with Palmer. Specifically, Fairchild asserted the following: (1) some four months earlier, Palmer had named Dr. Ballenger as an expert

witness for the defense and had paid him a retainer; (2) Dr. Ballenger had already examined some of Fairchild's medical records that were sent to him by Palmer; (3) Dr. Ballenger had already formed opinions about her condition prior to an IME; (4) Dr. Ballenger was expected to testify as a defense witness at trial; and (5) Dr. Ballenger had been referred to Palmer by another expert who had also been retained by Palmer to question the extent of Fairchild's injuries.

The trial court denied Palmer's motion to have Dr. Ballenger perform an IME. The trial court found Dr. Ballenger's prior work on Fairchild's case as a retained expert for the defense and the fact that Palmer had sent Dr. Ballenger not only Fairchild's medical records, but also the transcripts of depositions of some of Fairchild's treating physicians in advance of his request for an IME, formed the basis for a reasonable objection to the appointment of Dr. Ballenger. The trial court further stated that, upon being instructed to submit a list of alternative physicians for the court to consider for the IME, Palmer had informed the court that he was unwilling to pay for an examination to be made by any physician other than Dr. Ballenger. The trial court concluded that, "given this election by [Palmer], [it was] left with no alternative other than to deny the motion."

The Court of Appeals determined the trial court did not abuse its discretion in denying Palmer's motion to have Dr. Ballenger perform an IME on Fairchild. *Fairchild*, 385 S.C. at 360, 683 S.E.2d at 827. Palmer argues this was error, as Fairchild did not assert a "reasonable objection" under Rule 35(a), SCRCP to the appointment of Dr. Ballenger. Palmer contends a physician's prior relationship with the defendant and his or her familiarity with the case should not preclude the physician from being selected by the defendant to perform the examination.[6] Both parties have observed that there

[6] Palmer cites, e.g., *Timpte v. District Court*, 421 P.2d 728, 729 (Colo. 1966) ("So long as a plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right, in the absence of an agreement by the parties as to who the examining physician will be."). The *Timpte* case applying Colorado state court rules, as well as other authority cited by Palmer applying Rule 35 of the Federal Rules

are no South Carolina decisions specifically addressing the provision for a "reasonable objection" under Rule 35(a), SCRCP.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.*; *see also Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (stating where the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning without resort to forced construction to limit or expand the rule); *cf. Muci v. State Farm Mut. Auto. Ins. Co.*, 732 N.W.2d 88, 93 (Mich. 2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.").

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

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of Civil Procedure, are inapposite because those rules do not contain the same provision present in Rule 35(a), SCRCP. Further, we do not agree that a plaintiff chooses his or her own physician. *See* John E. Parker & Jack L. Nettles, *Automobile and Truck Accidents*, *in* 1 *The South Carolina Practice Manual* 199 (William Howard, Sr. & E. Warren Moise eds., 2000) (noting the plaintiff usually did not choose his or her physician; instead, treatment was provided by the physician on call at the hospital or the person was referred to the physician by another physician).

Rule 35 of the South Carolina Rules of Civil Procedure governs requests for physical and mental examinations and provides in relevant part as follows:

> In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown . . . .
>
> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides. . . . Upon *reasonable objection* to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician; but the fact that a physician was so designated shall not be admissible upon the trial.

Rule 35(a), SCRCP (emphasis added). The official Notes to Rule 35(a), SCRCP observe that the first paragraph of Rule 35(a) is based on the Federal Rule on this subject, but the second paragraph is not included in the Federal Rule. The second paragraph was specifically added by this Court to establish limits on the use of this procedure.[7]

[7] A somewhat similar procedure exists under workers' compensation law, which allows the appointment of "a disinterested and duly qualified physician or surgeon" to examine the injured claimant. S.C. Code Ann. § 42-17-30 (Supp. 2011).

Under the plain language of Rule 35(a), the defendant clearly does not have the right to unilaterally select the examining physician; rather, the court alone has the right to make the appointment. The rule contemplates that the parties will confer on this point to make suggestions, but where a "reasonable objection" has been interposed and the parties cannot agree, the court will make the selection. *See* Rule 35(a), SCRCP (providing upon reasonable objection and "if the parties shall fail to agree as to who shall make the examination, the court may designate a physician"); *see also* Rule 11(a), SCRCP (stating motions should generally contain an affirmation that the movant's counsel communicated with opposing counsel prior to filing the motion to make a good faith effort to resolve the matter).

A "reasonable objection" in this context simply means the reason for the objection must not be frivolous. What is reasonable will depend on the individual facts and circumstances of the case, which is precisely why the determination of this matter, as in other discovery and evidentiary disputes, is best left to the sound discretion of the trial court. *See generally LeBlanc v. Cambo*, 223 A.2d 311 (Conn. C.P. 1966) (observing what is a reasonable objection to a particular physician named to perform a physical examination is a matter that must of necessity be left to the trial court's inherent discretion).

The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. This purpose was recognized long before South Carolina law permitted such examinations. *See Best v. Columbia Elec. St. Ry., Light & Power Co.*, 85 S.C. 422, 428, 67 S.E.1, 3 (1910) (Woods, J., dissenting) (stating nothing can be more helpful to the jury in reaching a just estimate of the damages in a personal injury suit than knowledge of the true nature of the injury, and whenever it appears to the circuit court that an examination by impartial experts would materially aid the jury, the circuit court should order such examination to be made by disinterested experts). Thus, the better rule is that the physician should not be affiliated with either party in order to serve the purposes of Rule 35.

In *Richardson v. Johnson*, 444 S.W.2d 708, 710 (Tenn. Ct. App. 1969), the Tennessee court, echoing these sentiments, listed a series of guidelines regarding court-ordered physical examinations, including, "The physician must be selected by the court, not the defendant, and must be competent and disinterested." The court stated "it is clear that the power so vested in the court is a discretionary power, and not an absolute right in the applicant, and that the physician or physicians so appointed act as officers of the court, and not as agents of either party." *Id.* at 712. The court further observed that where claims concern injuries or disabilities that are based upon the subjective complaints of the plaintiff, "an impartial physician may have objective means of testing the subjective claims of the plaintiff[.]" *Id.* As is further explained in a case from a Missouri court:

> The law invests the trial court with authority to appoint physicians to make [a] physical examination of the plaintiff in a physical injury suit. The defendant cannot demand it as a matter of right, but the court in its discretion may do it in the furtherance of justice. When the court makes such an appointment, [it] does so because [it] determines in [its] discretion that the case calls for the opinion of *disinterested and unbiased physicians, not friends of either parties*, whose testimony is likely to be biased.

Atkinson v. United Rys. Co., 228 S.W. 483, 485 (Mo. 1921) (emphasis added) (internal citations omitted). The Missouri court also recognized that a "court could not compel [a] plaintiff to submit to [a physical] examination by the witnesses for the other side," and "[t]he physicians appointed in such cases are the officers of the court." *Id.*

In the current appeal, the finding of the trial court that Fairchild had interposed a reasonable objection to Dr. Ballard's designation as the examining physician was a proper exercise of the trial court's inherent discretion to rule on discovery matters and is amply supported by the record. Dr. Ballenger was retained as a defense witness and had reviewed not only Fairchild's medical records, but also the deposition testimony of other potential witnesses, and it was alleged that he had already formed adverse

opinions regarding Fairchild's injuries before the IME was requested.[8] Under the circumstances present here, we agree with the Court of Appeals that Palmer has shown no abuse of discretion in this regard.

IV. CONCLUSION

We affirm the decision of the Court of Appeals, which found reversible error in the trial court's failure to submit the issue of punitive damages to the jury and to charge the jury on the intervening negligence of a treating physician, and found the trial court did not abuse its discretion in denying Palmer's motion for an IME to be performed by Dr. Ballenger.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

[8] Fairchild notes that, immediately after the denial of the motion for an IME, Palmer supplemented his discovery responses with a listing of adverse opinions regarding Fairchild's injuries that Dr. Ballenger planned to testify to at trial. Thus, Dr. Ballenger must have already formed these adverse opinions prior to the time an IME could have been scheduled. Further, Dr. Ballenger did testify at trial as a defense witness for Palmer in accordance with these adverse opinions.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of North Myrtle Beach, Respondent,

v.

East Cherry Grove Realty Co., LLC, The State of South Carolina, and John Doe, Defendants,

Of whom East Cherry Grove Realty Co., LLC is the Appellant,

and The State of South Carolina is Respondent.

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27113
Heard March 8, 2012 – Filed April 11, 2012

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach, for Appellant.

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, and Michael W. Battle, of Battle, Vaught & Howe, of Conway, for Respondents.

JUSTICE PLEICONES: Appellant East Cherry Grove Realty Co., LLC, appeals from a jury verdict finding that the State of South Carolina holds title to disputed canals in North Myrtle Beach. The question was submitted to the jury on three theories: that two quitclaim deeds established title in the canals; that the canals had been dedicated to the public; and that the State of South Carolina holds title to the canals in trust for the public. The jury returned a verdict for the State on all three theories. Appellant argues that the trial court erred when it denied Appellant's motions for directed verdict on each theory. We find that the question of ownership under the quitclaim deeds was properly submitted to the jury and therefore affirm.[1]

FACTS

In 1961, the State of South Carolina (State) filed suit against the predecessors in interest of East Cherry Grove Realty, LLC (collectively, East Cherry Grove), seeking to establish its title to all tidal lands in the East Cherry Grove area of North Myrtle Beach. In 1963, a consent order stipulated that certain property was not a subject of the suit and exempt from a temporary injunction that prevented East Cherry Grove from selling any property below the mean high-water mark.[2] The order provided in relevant part that

[1] Under the two-issue rule, we need not reach the questions whether the other two theories were properly submitted to the jury. Smoak v. Libherr-America, Inc., 281 S.C. 420, 422-23, 315 S.E.2d 116, 118 (1984).

[2] The land that was released from the temporary injunction is shown on the related plat as the area between the "Estimated Line of Demarcation Between the Upland and Marshland as of 1948-49" and the Atlantic Ocean.

> Since this action was filed[,] the title to certain property not intended by the [State] to be included in this suit, has been questioned . . . . In order that the title to this property (that above the unquestioned mean high water mark) could be quieted a survey was made . . . .
>
> *Ordered*[,] that all the land lying between said . . . "estimated line of Demarcation between upland and marsh land" . . . and the Atlantic Ocean is hereby released and is declared not to be involved in nor within the scope of the above entitled action as it is and was above the mean high water mark of the adjacent tidal water prior to any alleged artificial changing of the level of the land or of the waterway.

After a bench trial, the trial judge ruled in favor of East Cherry Grove. However, in 1969, while the case was on appeal to this Court, the parties negotiated a settlement. As part of the settlement, the parties exchanged quitclaim deeds. These deeds defined an "agreed-on mean high water mark" by metes and bounds, which appeared as a bold line enclosing an area of marshlands on the related plat. The agreed mean high-water mark referred to in these deeds is not coterminous with the "Estimated Line of Demarcation" used in the 1963 order. The deeds quitclaimed all of the land "below" that mark, i.e., the land within the bold line (State's Land), to the State and all of the land "above" that mark, i.e., the land between the marshlands and the oceanfront (East Cherry Grove's Land), to East Cherry Grove. The deed from East Cherry Grove to the State contains additional language as follows:

> That all areas lying below the agreed mean high water mark on Northeast Canal, Nixon Canal, proposed Nixon Canal Extension, Main Channel, Nye Cut and all other existing canals are quit-claimed to the State of South Carolina, except that: It is understood and agreed that Nye Cut will remain open until Main Channel ("proposed relocation of Creek") between 25th Avenue and Nixon Canal has been cut, at which time C. D. Nixon, et al, will have the right to build a bridge at either 22nd Avenue or 23rd Avenue across Main Channel, and close Nye Cut, all as

shown on the said plat; and title to land proposed to be closed will remain in C. D. Nixon, et al.

That all areas that become areas lying below the mean high water mark as the result of excavation above the agreed mean high water mark are quit-claimed to the State of South Carolina.

The quitclaim deeds were approved and made part of a 1969 court order ending the original litigation. The 1969 order also stated that it did not affect the 1963 order.

The parties agree that the canals have been open to public use at all times since their construction.

Respondent City of North Myrtle Beach (City) brought the present lawsuit against East Cherry Grove, LLC (Appellant), and the State to settle title to the canal bottoms located in the property deeded to East Cherry Grove in the 1969 settlement. The City asserted that the State held title to the canal bottoms, a position in which the State concurred. (Hereinafter the City and State are jointly designated Respondents.) At the conclusion of a jury trial, the trial court denied Appellant's motions for a directed verdict. The jury returned a special verdict with separate findings that the State has title in the canals based on the quitclaim deeds; that East Cherry Grove had dedicated the canals to the public; and that the State holds title to the canals in trust for the public. This appeal followed.

ISSUES

1. Did the trial court err when it failed to find the 1963 order conclusive on the issue of ownership and found the quitclaim deeds ambiguous?
2. Did the trial court err when it failed to find that the State is estopped to deny the 1963 order?

STANDARD OF REVIEW

The nature of the underlying issue determines the nature of a suit for declaratory judgment. Felts v. Richland County, 303 S.C. 354, 356, 400

S.E.2d 781, 782 (1991). The determination of title to real property is an action at law. Wigfall v. Fobbs, 295 S.C. 59, 367 S.E.2d 156 (1988). In reviewing an action at law tried to a jury, the Court's jurisdiction extends only to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. Townes Associates, Ltd., v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). Questions of law are decided with no particular deference to the trial court. Wiegand v. U.S. Automobile Association, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

DISCUSSION

Appellant argues that the trial court erroneously refused to grant it a directed verdict because title to the canals was unambiguously established in East Cherry Grove in the court-approved settlement of prior litigation. We disagree.

On the first theory submitted to it, the jury found that the State owns the canals under the quitclaim deeds. Appellant argues that the trial court erred when it denied Appellant's motion for a directed verdict and submitted this question to the jury. Appellant argues in the alternative that the trial court should have found that the 1963 order was conclusive on the issue of ownership; that the quitclaim deeds unambiguously quitclaimed all interest in the canals to East Cherry Grove; and that the State is estopped by the 1963 order from claiming ownership of the canals. We find no error.

1. Did the trial court err when it failed to find the 1963 order conclusive on the issue of ownership and found the quitclaim deeds ambiguous?

Appellant argues that the 1963 order is conclusive on the issue of ownership under the quitclaim deeds because it effectively eliminates contradictory language from the quitclaim deeds, rendering them unambiguous, or, in the alternative, that the language of the quitclaim deeds unambiguously conveys all interest in the canals to East Cherry Grove. We disagree.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." Weil v. Weil, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (citations and internal quotation marks omitted).

In this case, the original suit was ultimately settled by the 1969 order, which incorporated the parties' quitclaim deeds and stated that it did not affect the 1963 order. Thus, the 1963 order and quitclaim deeds must be interpreted as parts of a single, court-approved settlement agreement.

The 1963 consent order does contain language arguably implying that most property in the area of East Cherry Grove's Land as established in the deeds is titled in East Cherry Grove. Appellant construes this language as both the State's admission that it had no claim to that land in 1963 and the court's ratification in 1969 that none of East Cherry Grove's Land would be quitclaimed to the State by virtue of the settlement agreement. We disagree.

Viewed in isolation, the 1969 reference to the 1963 order is susceptible of this interpretation. As explained below, however, construing all of the documents together we find the settlement at least ambiguous as to ownership of the canal bottoms. First, this argument ignores the fact that the land was divided by one line, the Estimated Line of Demarcation, in the 1963 order and by a different line, the agreed-on mean high water mark, in the deeds. Second, Appellant's argument ignores the fact that when parties settle a lawsuit, either may include property or other concessions not a part of the original suit. In other words, whatever land was involved in the original suit, the settlement was not necessarily limited to that property. The court might have approved East Cherry Grove's quitclaim of any property to the State as consideration to settle the suit without believing such a transfer would conflict with the 1963 order. The court's purpose for stating in the 1969 order that the settlement did not affect the 1963 order could have been

nothing more than to avoid any taint on the title to lots sold by East Cherry Grove to third parties between 1963 and 1969.

An examination of the quitclaim deeds bears out such an interpretation. The first paragraph of the quitclaim deed from East Cherry Grove to the State quitclaims all right to "All of that certain area . . . shown on a plat . . . to be below the agreed mean high water mark as delineated on said plat" and proceeds to describe this agreed line by metes and bounds. Had the parties intended the Estimated Line of Demarcation established in the 1963 order to finally settle title, the delineation of an agreed mean high-water mark in the deeds would have been unnecessary. Moreover, the agreed mean high-water mark replicates the Estimated Line of Demarcation in only a small fraction of its length.

In addition, in a subsequent paragraph the deed quitclaims to the State "all areas lying below the agreed mean high water mark on Northeast Canal, Nixon Canal, proposed Nixon Canal Extension, Main Channel, Nye Cut and all other existing canals . . . ." The plat shows that all of the existing and proposed canals were located on East Cherry Grove's Land.

Further, the quitclaim deed to the State specifically excludes certain items on the plat from its ambit. The plat can be characterized as a rectangle, the top of which (west) is given to the State without reservation and the bottom of which is deeded generally to East Cherry Grove. Within the area deeded generally to East Cherry Grove, however, certain parts, mostly waterways, are singled out for special treatment. First, an area to the left of the lower portion (south), the "Recreational Lake," is specifically excluded from the deed. Similarly, an area to the right of the lower portion (north), is also excluded. In the center portion of the plat deeded to East Cherry Grove, however, the existing canals "are quit-claimed to the State of South Carolina," as are any future canals. The only exception to the title in the canals going to the State is found in reference to Nye Cut, where the deed specifically envisions future changes involving the filling of that waterway and the vesting of title in that future highland in East Cherry Grove. While the affirmation of the 1963 order in the 1969 settlement arguably can be read to reaffirm title in East Cherry Grove in the whole of the lower portion of the

plat, such a reading renders all of the specific exceptions and exemptions in this quitclaim deed meaningless.

Appellant argues in the alternative that the quitclaim deed's references to the canals were not to the whole of the canals but to the junctures of the canals with the State's Land or that this language constituted a promise that East Cherry Grove would not dam the canals. Even if these interpretations are possible, they are not apparent from a straightforward reading of the deed's language. At a minimum, this language permits the interpretation that East Cherry Grove intended to quitclaim title to the bottoms of these canals to the State.

A later dispute between East Cherry Grove and a resident who had purchased a lot on the Recreational Lake was heard by the same judge, who concluded "That the area comprising Recreational Lake is not now and never was owned by [East Cherry Grove]." This finding is inconsistent with Appellant's interpretation of the settlement agreement. Rather, it confirms that the 1963 order was not included with the 1969 order for the purpose of affirming that East Cherry Grove had title to all of the area comprising East Cherry Grove's Land and gives effect to the quitclaim deed's exclusion of the Recreational Lake from what remained East Cherry Grove's Land.

We find that the 1963 order and quitclaim deeds, interpreted as parts of the 1969 settlement agreement and court order, do not unambiguously quitclaim all interest in the canals to East Cherry Grove. Thus, the trial court did not err when it refused to rule that the 1963 order conclusively established title to the canals in East Cherry Grove and found the quitclaim deeds ambiguous.

2. Did the trial court err when it failed to find that the State is estopped to deny the 1963 order?

Appellant argues that the trial court erred when it denied Appellant's motions for nonsuit and directed verdict on the basis that the State is judicially estopped from denying that East Cherry Grove owned all of the area containing the disputed canal bottoms based upon the 1963 order. We disagree.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (citations omitted).

In this case, the 1963 order fails to demonstrate a definite position taken by the State with regard to canal bottoms located within East Cherry Grove's Land. Even if it did, principles of judicial estoppel would not apply where a contrary position as to title is premised on intervening documents such as the quitclaim deeds here. Permitting the State to argue that it has title to the canals certainly does not threaten the integrity of the judicial process.

We find that the elements of judicial estoppel are not met, the State is not estopped to assert title to the canal bottoms, and the trial court did not err when it denied Appellant's motions for nonsuit and directed verdict.

Because the State is not estopped to claim title to the canal bottoms under the 1963 order, the 1963 order does not answer the question of ownership, and the quitclaim deeds were ambiguous, the trial court did not err when it denied Appellant's motion for nonsuit and directed verdict and submitted the question of ownership under the quitclaim deeds to the jury.

Appellant's remaining exceptions are disposed of pursuant to Rule 220(b), SCACR, and the following authorities: North Greenville College v. Sherman Construction Co., Inc., 270 S.C. 553, 557, 243 S.E.2d 441, 442 (1978) (trial court has broad discretion to determine the admissibility of evidence, and its decisions are reversed only when they constitute an abuse of discretion that amounts to an error of law); Rule 403, SCRE; Richardson v. Donald Hawkins Construction, Inc., 381 S.C. 347, 352, 673 S.E.2d 808, 811 (2009) (permitting exclusion of evidence that would mislead or confuse the jury, constitute undue delay or waste of time, or be cumulative); State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 636 (1980) (judge's charge to the jury must correctly state the law, but reversal is not warranted "when considered as a whole, [the charge] adequately cover[s] the applicable law under the facts of the case"); Hardin v. South Carolina Dept. of Transp., 371

S.C. 598, 609 n.4, 641 S.E.2d 437, 443 n.4 (2007) ("Government action can effect no taking unless it has deprived an owner of a property interest.").

CONCLUSION

For the reasons given above, the jury verdict is **AFFIRMED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James "Cal" Bell, Othella Bernard, Katherina Bower, Linda M. W. Bratton, Ann T. Bridges, Richard M. Cobb, as Personal Representative of the Estate of Rance C. Cobb, Jeannie B. Croxton, Bernetha L. Culbreath, William K. Dreyer, Jacqueline D. Farr, Ruth Fritts, Nancy Glenn, Etta Jane Jones, Geneva M. Martin, Mary H. McCabe, Beverly McClanahan, Max D. Randolph, Carolyn McIver Smith, Maggie G. Williams, and Paula Woodlief, Appellants,

v.

South Carolina Department of Corrections and Palmetto Unified School District No. 1, Respondents.

Appeal From Richland County
John McLeod, Administrative Law Court Judge

Opinion No. 27114
Heard January 25, 2012 – Filed April 11, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

W. Allen Nickles, III, of Columbia, for Appellants.

Lake E. Summers and Katherine Phillips, of Malone, Thompson, Summers & Ott, of Columbia, for Respondents.

JUSTICE BEATTY: Appellants, who are current and former certified educators employed by the South Carolina Department of Corrections ("SCDC") in the Palmetto Unified School District ("PUSD"), collectively appeal the Administrative Law Court's ("ALC's") order affirming the State Employee Grievance Committee's decision denying Appellants' grievances regarding the SCDC's Reduction-in-Force ("RIF"),[1] which was implemented on June 1, 2003.

On appeal, Appellants contend the ALC erred in failing to enforce: (1) the plain language of the RIF policy; (2) the controlling legislation applicable to the PUSD and the RIF policy; (3) Appellants' constitutional rights with respect to employment; and (4) Appellants' rights as "covered employees" with respect to the RIF policy. Based on these alleged errors, Appellants assert they are entitled to reinstatement to employment as well as back pay and benefits. We affirm in part, reverse in part, and remand.

[1] "'Reduction in force' means a determination made by an agency head to eliminate one or more filled positions in one or more organizational units within the agency due to budgetary limitations, shortage of work, or organizational changes." S.C. Code Ann. § 8-17-320(21) (Supp. 2011).

I.

In 1981, the South Carolina Legislature established a "special statewide unified school district" within the SCDC known as the Palmetto Unified School District No. 1.[2] The PUSD was designed to "enhance the quality and scope" of inmate education with a goal of reintegrating offenders into the community.[3] The PUSD operates nine high schools, which are located in correctional institutions throughout the state, serving students between the ages of 17 and 21 years old. In addition, the PUSD offers inmates older than 21 the opportunity to receive adult education if they wish to pursue their GED while incarcerated. The PUSD also oversees a vocational program that offers 53 vocational and career technology classes designed to furnish inmates with basic technical skills to aid them in securing gainful employment upon their release.

As a sanctioned school district, the PUSD must meet standards set by the State Board of Education.[4] The PUSD has its own superintendent and school board[5] that are responsible for operating the PUSD "under the supervision of the State Department of Corrections."[6] By statute, "[t]he superintendent of the district [PUSD] and all other educational personnel shall be employed, supervised, and terminated according to the South Carolina Department of Corrections' personnel policies and procedures."[7]

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[2] S.C. Code Ann. § 24-25-10 (2007).

[3] Id. § 24-25-20.

[4] Id. § 24-25-30.

[5] Id. § 24-25-70.

[6] Id. § 24-25-40.

[7] Id. § 24-25-90.

In January 2003, Jon Ozmint was appointed as the Executive Director of the SCDC. Faced with budget cuts and an ongoing budget deficit, Ozmint presented Reduction-in-Force policy ADM-11.05 dated March 14, 2003, to the State Office of Human Resources (OHR) for its approval.[8] The policy outlined the procedures to be utilized in effectuating the RIF plan and the employees' respective rights.

As part of the plan, the SCDC was divided into "competitive areas,"[9] which were delineated by eleven circular regions throughout the state that included "entire groups of institutions and divisions within a reasonable geographic area to accommodate the realistic opportunity for staff relocation, . . . recall and reinstatement." Under the RIF policy, a "covered state employee"[10] whose position was eliminated as a result of the RIF was permitted to "bump"[11] another "employee with the lowest RIF Service Date

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[8] See 23A S.C. Code Ann. Regs. 19-719.04 (Supp. 2010) (outlining state agency RIF policies and procedures). We note that this section was amended by State Register Volume 34, Issue Number 5, which became effective on May 28, 2010. In the interest of clarity, we have cited to the version in effect prior to the amendment unless otherwise noted.

[9] According to the RIF policy, a "competitive area may be agency wide, a department, or a more restricted geographical area where the staff is separately organized and clearly distinguishable from the staff in other areas."

[10] A "covered employee" is defined as "a full-time or part-time employee occupying a part or all of an established full-time equivalent (FTE) position who has completed the probationary period and has a 'meets' or higher overall rating on the employee's performance evaluation and who has grievance rights." S.C. Code Ann. § 8-17-320(7) (Supp. 2011). This definition does not include "employees in positions such as temporary, temporary grant, or time-limited employees who do not have grievance rights." Id.

[11] "'Bumping' refers to the action taken when an employee subject to lay off is placed in a vacant position or displaces ('bumps') another employee in the same or another job classification and/or location."

in the same job classification and pay band with the same or lower pay level." A "covered employee," however, could only exercise this right within his or her designated competitive area.[12]

Additionally, the RIF policy provided for "Recall and Reinstatement Rights of Employees."[13] Specifically, the policy provided in pertinent part:

> When a vacancy occurs in an employee's competitive area which is (1) in the **same job class**, pay band, pay level **or lower**, and **functionally similar** as the position held prior to the lay off, downward bumping, or reassignment and (2) within a reasonable geographic distance (30 mile radius) of the work location of the employee, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications.

In his letter addressed to the Director of the OHR, Ozmint stated that he had made the decision to eliminate "148 non-security" positions from headquarters management and administrative support staff, non-essential inmate support programs, and certified education and support staff.

On March 28, 2003, the OHR approved the RIF plan after determining the plan was "procedurally correct." The OHR, however, clarified that its approval did not "include the determination of the geographic locations in the competitive areas, competitive classes, competitive class series, bumping rights, the positions to be eliminated, or any exceptions included in the plan, since these are solely the responsibility of SCDC management."

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[12] See 23A S.C. Code Ann. Regs. 19-719.04(B)(2)(b) (Supp. 2010) ("Competitive area(s) shall be determined by the agency according to critical needs. Any covered employee affected by a reduction in force shall have bumping rights within a competitive area(s).").

[13] See 23A S.C. Code Ann. Regs. 19-719.04(B)(4)(a) (Supp. 2010) ("Any covered employee affected by a reduction in force shall retain covered status and recall rights for a period of one year from the date of separation.").

The SCDC notified its employees of the RIF on April 1, 2003. On June 1, 2003, the day the RIF plan went into effect, 148 employment positions were eliminated from the SCDC. The PUSD lost 84 positions, which included Appellants and represented 56.75% of the RIF.

On July 16, 2003, Ozmint notified SCDC employees of a "Retirement Opportunity" that had been established to further reduce costs. Under this plan, the SCDC would permit employees to retire from the agency between August 1 and October 1, 2003. Once retired, the employee was required to "experience a 15 calendar-day break in service" and then could be rehired in their present position but in a temporary capacity. A temporary employee[14] did not receive benefits other than "retiree benefits" and was paid for hours actually worked.

Appellants, who were certified educators with the PUSD and "covered employees," timely filed grievances with the SCDC regarding their separation from employment as a consequence of the RIF.[15] The SCDC denied each of the grievances without a hearing. Subsequently, each of the Appellants appealed the SCDC's denial of their grievances to the State Human Resources Director. After Appellants received the final, unfavorable decision of the State Human Resources Director, Appellants filed a consolidated complaint and petition for judicial review in the circuit court.

After several procedural hearings and rulings involving discovery, a circuit court judge found that material issues of fact existed regarding

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[14] A "temporary employee" is defined as "a full-time or part-time employee who does not occupy an FTE (Full-Time Equivalent) position, whose employment is not to exceed one year, and who is not a covered employee." S.C. Code Ann. § 8-17-320(25) (Supp. 2011).

[15] See S.C. Code Ann. § 8-17-330 (Supp. 2011) ("A reduction in force is an adverse employment action considered as a grievance only if the agency, or as an appeal if the State Human Resources Director, determines that there is a material issue of fact that the agency inconsistently or improperly applied its reduction in force policy or plan.").

Appellants' contention that the SCDC inconsistently or improperly applied its RIF policy and plan in 2003. As a result, the judge remanded the matter to the OHR for disposition by hearing before the State Employee Grievance Committee ("Committee").

Following ten days of hearings, the Committee issued its final decision denying Appellants' request for relief and upholding the June 1, 2003 RIF plan as implemented by the SCDC. The Committee found there was "insufficient evidence to support Appellants' allegations that the RIF policy or plan was improperly or inconsistently implemented." Additionally, the Committee concluded there was "no credible evidence presented that the elimination of educator positions in the PUSD was motivated by a desire for retaliation for an earlier lawsuit[16] that resulted in the increase of educators' salaries." Instead, the Committee found the RIF plan was developed to "maximize[] savings while retaining as many employees as possible in essential areas." The Committee noted that "[t]he education program was one area where significant cost-saving opportunities existed" as opposed to such areas as "security, housing, clothing, food, and healthcare" where further budgetary cuts could not be "tolerated."

In reaching its conclusion, the Committee found the SCDC "followed proper protocol and did not violate any policies, procedures, or statutes." Specifically, the Committee found that: (1) educators were not unfairly targeted for termination or terminated based on a belief by other employees or members of management that educators were "overpaid" but, rather, as the result of "cost-saving principles" due to the high salaries of most educators as compared to other personnel; (2) the development of the competitive areas did not violate the RIF policy as the manner in which these areas are designated is left to the discretion of the Executive Director of the SCDC and neither state law nor the RIF policy required the PUSD to be treated as a single, competitive area to afford agency-wide bumping rights; (3) the SCDC management was not obligated by statute or policy to consult with the PUSD

[16] See Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 538 S.E.2d 656 (Ct. App. 2000) (holding that Appellants, who were employed as PUSD teachers, were entitled to a salary supplement based on the statewide school district average in addition to the state mandatory minimum salary).

School Board or obtain its approval before implementing the RIF as the PUSD is not a separate entity but exists as a unit under the purview of the SCDC; (4) the retirement opportunity offered by the SCDC after the RIF was designed to further reduce operating costs by permitting employees to retire from their full-time positions and return to their positions in a temporary capacity, a position for which recall rights were inapplicable; and (5) the hiring of temporary employees before the RIF and the retention of certain temporary employees after the RIF did not violate the approved RIF policy as these positions were less costly than full-time positions given that the positions were hourly and without benefits.

Appellants appealed the Committee's final decision to the ALC. Following a hearing, the ALC affirmed the Committee's decision. In a detailed order, the ALC denied each of Appellants' claims by reiterating and elaborating on the Committee's conclusions of law. Additionally, the ALC rejected Appellants' supplemental argument regarding an alleged equal protection violation. Specifically, the ALC found the SCDC had a rational basis "by which to both implement its RIF through the establishment of 11 competitive areas and to offer its retirement opportunity to those employees unaffected by the RIF who were retirement eligible."

Appellants appealed the ALC's final decision to the Court of Appeals. This Court certified the appeal from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II.

A.

The Administrative Procedures Act establishes this Court's standard of review for cases decided by the ALC and is set forth in section 1-23-610(B) of the South Carolina Code, which provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may

> affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2011).

B.

In challenging the legitimacy of the RIF policy and plan, Appellants raise multiple arguments through the presentation of factual issues, RIF policy provisions, statutory law, and constitutional law. Rather than address these points separately, we find the most logical approach to analyzing these arguments is to categorize the issues into Appellants' claims regarding the creation, implementation, and effectuation of the RIF.

C.

Because the PUSD is statutorily defined as a "unified," statewide school district, Appellants contend the PUSD should not have been included in the RIF as it is a separate entity of the SCDC. In the alternative, Appellants claim the PUSD's Superintendent and Board should have been consulted and actively involved in the creation of the RIF policy and plan. In support of this claim, Appellants direct this Court's attention to Superintendent Wendell Blanton's testimony wherein he stated that he only heard about the RIF plan shortly before it was implemented.

In addition to these procedural challenges, Appellants assert the SCDC, via Ozmint and John Near,[17] exceeded its authority in dividing the agency into eleven competitive areas as these geographic regions were arbitrarily drawn solely for the purpose of eliminating "bumping" rights for senior PUSD employees. Appellants claim these geographic regions had "no bearing on administration or delivery of educational services" and ultimately deprived Appellants of the opportunity to compete for vacant positions throughout the state rather than only in their limited geographic region, which encompassed a thirty-mile radius.

As will be discussed, we conclude the ALC properly affirmed the Committee's decision regarding the SCDC's creation of the RIF policy and resultant plan.

1.

Although section 24-25-40 of the South Carolina Code authorizes the Superintendent and the Board to operate the PUSD, they do not operate independently as this code section also states that this division is "under the supervision of the State Department of Corrections." Furthermore, as previously identified, section 24-25-90 of the South Carolina Code specifically includes the PUSD and all other educational personnel within the SCDC and subjects them to the agency's personnel policies and procedures regarding employment and termination.

In addition to this legislative mandate, there is evidence in the record that the PUSD operates and is viewed as a functional subsidiary of the SCDC. John Near testified regarding the organizational structure of the SCDC. Near stated the SCDC has twenty divisions, which include the Education Division. Geraldine Miro, the Deputy Director for the SCDC's Programs and Services, classified the PUSD as a component of the Division of Education within the SCDC. Additionally, Wendell Blanton the PUSD's Superintendent testified that the PUSD "encompasses education in the

[17] John Near, who served as the Director of the Department's Division of Human Resources in 2003, drafted the RIF policy and prepared the RIF plan, including the identification of the competitive areas.

Department of Corrections." He added that he not only reported to the PUSD Board but also to Miro. He also admitted that the PUSD, unlike a regular school board, had "limited power." Finally, several witnesses testified that the PUSD does not have its own finance office, payroll department, or human resource office as these are centrally located and operated in the SCDC's headquarters in Columbia.

Because the PUSD exists as merely a division under the purview of the SCDC's Executive Director and not as a separate entity, it was properly included in the RIF. By the same reasoning, there is no statutory authority to support Appellants' position that its Superintendent or Board should have been consulted and involved in the creation of the RIF policy and plan.

2.

As the record reflects, all divisions of the SCDC were included in and affected to some extent by the RIF. Like the other divisions, the PUSD was subject to the authority of Ozmint. In this capacity, Ozmint was authorized with broad discretion to create an RIF policy and plan to reduce costs within the SCDC. As recognized by the OHR's approval of the RIF policy, Ozmint legitimately identified the education division as being less essential compared to those divisions involving security, housing, clothing, food, and healthcare. Although a disproportionate number of PUSD positions were eliminated as compared to other divisions, we agree with the ALC that Ozmint did not exceed his authority by creating the eleven competitive areas to effectuate the RIF plan.

According to the applicable regulations, the SCDC is specifically authorized to determine the "competitive areas" according to the "critical needs" of the agency. 23A S.C. Code Ann. Regs. 19-719.04(B)(2)(b) (Supp. 2010). Furthermore, contrary to Appellants' assertions, the geographic limitation of a thirty-mile radius is specifically provided for in paragraph 7.2 of the RIF Policy and appears to be validly derived from section 8-17-320 definitional provisions and the OHR's regulatory provision 19-700, which defines an "involuntary reassignment" as "the movement of an employee's principal place of employment in excess of thirty miles from the prior work station at the initiative of the agency." See S.C. Code Ann. § 8-17-320(13)

(Supp. 2011) (defining "involuntary reassignment" of an agency employee); 23A S.C. Code Ann. Regs. 19-700 (Supp. 2010) (same).

Moreover, each competitive area included at least one correctional institution and, in turn, at least one school. Because each correctional institution has its own organizational structure, we reject Appellants' contention that the designation of the eleven areas violated the terms of the RIF policy as the staff within each correctional institution and school are "separately organized and clearly distinguishable from the staff in other areas."

There is also evidence in the record that the eleven geographic areas were reasonable based on financial and employee "bumping" considerations. Near, who was directed by Ozmint to create the competitive areas, testified he and his staff developed these areas based on the threshold understanding that an involuntary reassignment of an agency employee is limited to a thirty-mile radius. Near claimed the creation of the geographic areas was the best option to provide eliminated SCDC employees with the "biggest opportunity to bump" in a confined area so that they would not have to relocate to another area of the state. Ozmint also testified the regions were drawn to minimize bumping which, in turn, would result in cost savings. Jon Davis, the Director of Audits for the SCDC, testified the areas were allocated in such a way that "when the RIF took place, it would be a reasonable area for people to bump into and they wouldn't have such a huge commute to have to go all the way across the state." Davis compared the small geographic area to that of a "normal school district."

Based on the foregoing, we agree with the ALC that there were no procedural or statutory violations committed by the SCDC in creating the RIF. The RIF policy and plan complied with the requisite administrative and legislative provisions and was approved by the OHR as "procedurally correct" prior to its implementation.

In view of our decision, the question becomes whether the SCDC properly implemented the RIF plan.

D.

Appellants contend the SCDC's method of reassigning employees to temporary positions and rehiring retirees in a temporary capacity to provide educational services violated the provisions of the RIF policy. Based on the SCDC's utilization of temporary employees before and after the RIF, Appellants assert their rights as "covered employees" were violated given they were precluded from being "recalled" into positions that were filled by temporary employees or briefly vacated when employees retired. Additionally, those Appellants who retained employment with the SCDC after the RIF assert they received a correctional officer's pay, which was "significantly below the statutory teacher pay schedule" despite performing essentially the same educational duties as they did prior to the RIF.

1.

We find Appellants are correct in their assessment of the SCDC's utilization of temporary employees.

There is no dispute that Appellants were "covered employees" at the time the SCDC implemented the RIF on June 1, 2003. As "covered employees," Appellants were entitled to be recalled for a period of one year (June 1, 2003 through May 31, 2004) if a position for which they were eligible became vacant. 23A S.C. Code Ann. Regs. 19-719.04(B)(4)(a) (Supp. 2010).

As the record reflects, several employees retired pursuant to the SCDC's "Retirement Opportunity" on July 16, 2003 and were then rehired by the SCDC in a temporary capacity. Although the SCDC was statutorily authorized to rehire these retirees, this optional decision should not have nullified Appellants' recall rights.

Once retired, the SCDC employees were required to "experience a 15 calendar-day break in service" and could be rehired in their present positions but in a temporary capacity. Because these employees experienced a "break

in service"[18] when they retired, their positions became vacant. Furthermore, at the point of their retirement, these employees lost any "right" to re-employment as this decision is within the discretion of the SCDC. See S.C. Code Ann. § 9-11-90(4)(a) (Supp. 2011) (outlining retirement provisions for PORS and stating, in part, that "[a] retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system or any system provided in this title without affecting the monthly retirement allowance he is receiving from this system"); Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011) (noting textual similarities between SCRS (section 9-1-1790) and PORS statutes and recognizing that an employee's decision to return to work after retiring was optional, as was an employer's decision to re-hire that employee).

In contrast, Appellants had statutory and policy priority over the retirees to be recalled into the vacant position. See S.C. Code Ann. § 8-11-185(C) (Supp. 2011) ("An agency seeking to fill a vacancy or a new position must obtain information from the Office of Human Resources' reduction in force applicant pool provided to the office pursuant to subsection (A). An agency shall provide priority consideration to employees terminated due to a reduction in force for any vacancy or new position in the same classification, classification series, or position category held at the time of layoff. An agency is prohibited from filling the position if the agency does not first seek to fill the position from among these qualified employees provided by the Office of Human Resources.").

Thus, Appellants were entitled to be recalled for the vacant positions. By implementing the "Retirement Opportunity" and immediately "recasting" the vacant positions as temporary positions, the SCDC deprived Appellants of their recall rights. Furthermore, there is evidence in the record that some of the rehired retirees were retained for more than one year in clear violation

[18] Regulation 19-700 defines a "break in service" as "an interruption of continuous State service" and identifies six scenarios that satisfy this definition. 23A S.C. Code Ann. Regs. 19-700 (Supp. 2010). Subsection six of this regulation delineates a move "from a full-time (FTE) position to a temporary, temporary grant, or time-limited position" as constituting a "break in service." Id.

of the statutory definition of a "temporary employee," which in essence converted the temporary position to a Full-Time Equivalent (FTE) position.

Based on the foregoing, we conclude the ALC erred as a matter of law in analyzing the temporary employee issue. Accordingly, we reverse this portion of the ALC's order.

2.

The record reflects that four Appellants were retained as employees after the RIF, but were classified and paid as correctional officers rather than certified educators despite performing nearly identical duties as those assigned before the RIF.

James Bell testified that, prior to the RIF, he was employed as a vocational carpentry teacher at Perry Correctional Institution. He received his certification for vocational carpentry in 1977 and was first employed with the PUSD beginning in 1992. Bell lost this position due to the RIF, but was rehired in January 2006 to teach carpentry at the same location. Although he performed the same duties as before the RIF, Bell testified that he received approximately $13,000 less than he was making in June 2003.

Nancy Glenn testified she was employed as a librarian for approximately eleven years prior to the RIF. After the RIF, Glenn lost her position but accepted a job as a correctional officer. According to Glenn, she performed the same librarian duties in the new position with "some additional duties as officer." She further stated that she worked in the same building before and after the RIF. Glenn, however, received approximately "one-half" her previous salary. Glenn served in this position for almost two years before being hired as classroom teacher and librarian at Trenton Correctional Institution.

Mary McCabe testified that she was employed as a library/media specialist in the education department located at Perry Correctional Institution prior to the RIF. After the RIF, McCabe accepted a position as a correctional officer in order to avoid losing her insurance and other state employee benefits. McCabe did not go through officer training and still

performed her duties as the library/media specialist. McCabe testified that she received a $2,100 reduction in pay. One month later, McCabe was offered the option of being called back into the position of library/media specialist on the condition that she would be transferred to the Tyger River Correctional Institution. McCabe accepted the offer with the understanding that she would be paid according to the teachers' pay schedule. Although McCabe was responsible for two libraries, she testified that her pay did not increase but remained at the "same teacher scale pay" in the amount equal to her salary before the RIF.

Beverly McClanahan testified that prior to the RIF she was employed to teach vocational horticulture at Broad River Correctional Institution. After the RIF, McClanahan accepted a position as a correctional officer with a $23,000 reduction in pay. In August 2004, McClanahan was asked to "come back and teach vocational horticulture but as a lieutenant." In this position, which was entitled "vocational trainer," McClanahan performed duties that "were exactly the same" as those that she had done prior to the RIF. In June 2005, McClanahan accepted a position at the Department of Juvenile Justice to teach horticulture and science. In this position, McClanahan was compensated according to the teachers' pay schedule.

In view of this evidence, we find the SCDC effectively circumvented the Court of Appeals' decision in Abraham as the affected Appellants were certified educators performing educational duties; thus, they were entitled to a salary that was commensurate with the teachers' pay schedule as established in Abraham. See Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 49, 538 S.E.2d 656, 663 (Ct. App. 2000) (interpreting section 24-25-70(7) of the South Carolina Code and concluding that "the plain language of 'teachers' pay schedule based on the state and average school supplement pay scales' means that, in addition to the state mandatory minimum, [the PUSD] Employees are entitled to additional compensation equal to the mathematical average of all salary supplements paid by school districts across the state").

Our decision is guided by our recent opinion in Grimsley v. South Carolina Law Enforcement Division, 396 S.C. 276, 721 S.E.2d 423 (2012). In Grimsley, Appellants were rehired employees of the South Carolina Law Enforcement Division ("SLED") and members of the Police Officers

Retirement System. As part of this process, SLED required Appellants to sign a form, which provided that Appellants "will have a reduction of 13.6% in [their] salary to cover the amount it will cost SLED to pay the employer portion of retirement." Id. at 279, 721 S.E.2d at 425. Appellants brought a takings claim on the ground this provision was contrary to section 9-11-90(4)(b) of the South Carolina Code, which assigns the responsibility for the employer portion of retirement to the employer. Id. We agreed with Appellants, finding their "takings claim [was] predicated on their entitlement to retain the percentage of their salary--13.6%--that was used to pay the employer portion of the retirement contributions." Id. at 285, 721 S.E.2d at 428. Accordingly, we concluded that section 9-11-90 provided a basis for Appellants to assert a cognizable property interest rooted in state law that was sufficient to survive Respondent's motion to dismiss. Id.

Similar to the employees' statutory right in Grimsley, Appellants as "covered employees" were statutorily entitled to be recalled to vacant positions for a period of one year following the RIF. Furthermore, those employees who were retained after the RIF and performed the same educational duties were entitled to a salary based on the teachers' pay schedule established in Abraham. The SCDC could not, through an internal policy, deprive Appellants of these interests rooted in state law.[19]

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[19] As previously noted, the Regulations regarding RIFs were amended and became effective of May 28, 2010. Of import is a provision that states,

> When a covered employee is assigned lower level responsibilities or demoted as a result of a reduction in force implemented due to budgetary reductions, the employee's salary may be reduced on the effective date of the reduction in force. The agency head or his designee, at his discretion, may reduce the employee's salary to a salary either between 0%–15% below the employee's current salary or between the employee's current salary and the midpoint of the lower pay band. In exercising this discretion, the agency head or his designee may use the option which results in the greatest cost savings.

E.

Finally, Appellants contend the RIF deprived them of the constitutionally protected right to continuing employment in violation of due process of law and the equal protection of laws. Specifically, Appellants explain that "[a]s 'covered employees,' [they] enjoyed the right to retain employment unless removed for cause or by proper reduction in force."

As previously discussed, we find Appellants were arbitrarily and capriciously denied a right to employment pursuant to their recall rights and a property interest as to their compensation established in Abraham. Thus, our decision to reverse the ALC with respect to the temporary employee issue and the salary issue is determinative that Appellants' substantive due process rights were violated.

We decline to address Appellants' remaining constitutional arguments as a decision would be inconsequential given our prior rulings. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive); see also Arnal v. Fraser, 371 S.C. 512, 523, 641 S.E.2d 419, 424 (2007) ("It is our firm policy to decline to rule on constitutional issues unless such a ruling is required.").

III.

Based on the foregoing, we find the SCDC properly created the RIF policy and submitted it to the OHR for approval. Because the OHR deemed the RIF "procedurally correct," the ALC correctly affirmed the Committee's decision regarding the inclusion of the PUSD in the RIF and the designation of the eleven competitive areas. We, however, conclude that the SCDC violated statutory law in precluding Appellants from exercising their priority

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1 S.C. Code Ann. Regs. 19-719.04(A)(5) (2011). We find this provision is inapplicable in the instant case as: (1) it post-dates the June 2003 RIF; and (2) the affected Appellants were not assigned lower level responsibilities but, rather, performed nearly identical duties to those assigned prior to the RIF.

right to recall as to the positions vacated by the retirees. Because the "Retirement Opportunity" offered by the SCDC required a fifteen-day break in service before rehiring, we find that "window" constituted a vacancy for which Appellants should have been offered the opportunity for employment. In a related issue, we find the SCDC violated the Abraham decision by retaining certified educators after the RIF but paying them as correctional officers as they were entitled to be compensated commensurate with the teachers' pay schedule. Accordingly, we affirm in part, reverse in part, and remand this case to the Committee to determine the appropriate relief.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hook Point, LLC, Respondent,

v.

Branch Banking and Trust Company, First Reliance Bank, and Allan Risinger, Defendants,

Of Whom Branch Banking and Trust Company is, Appellant.

Appeal from Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 27115
Heard March 21, 2012 – Filed April 11, 2012

REVERSED

Frank R. Ellerbe, III, and Wilson W. McDonald, both of Robinson, McFadden & Moore, of Columbia, for Appellant.

Frederick A. Gertz, of Gertz & Moore, of Columbia, Thornwell F. Sowell and David C. Dick, both of Sowell, Gray, Stepp & Laffitte, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent Hook Point, LLC (Hook Point) was granted a preliminary injunction preventing Appellant Branch Banking and Trust Company (BB&T) from drawing on, and defendant First Reliance Bank (First Reliance) from honoring, a $1.5 million letter of credit. BB&T appeals. We reverse.

FACTS

In late 2007, Hook Point sought a loan from BB&T for the purpose of developing a subdivision on property Hook Point owned on Lake Murray called Panama Pointe. BB&T issued a commitment letter to Hook Point in September 2007 indicating that it would loan the company $5.1 million and establish a $2 million line of credit to enable Hook Point to develop the subdivision. Security for the loan included a first mortgage on the Panama Pointe property, personal guarantees of Hook Point's four principals, and a $1.5 million standby letter of credit issued by First Reliance in favor of BB&T.

Hook Point applied to and obtained a letter of credit (LC) from First Reliance that named BB&T as beneficiary.[1] The LC was secured by a cash deposit at First Reliance of approximately $310,000, several real properties owned by a Hook Point affiliate, and personal guarantees of the Hook Point principals. Under the terms of the LC, BB&T was permitted to make draws upon presentation of a draft accompanied by

> 1) The original letter of credit. 2) A notarized, sworn statement by the Beneficiary, or an officer thereof, that: a) The Borrower has failed to perform its obligations to the Beneficiary under the

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[1] A person who applies for a letter of credit is the applicant (in this case, Hook Point). The bank that issues the LC on behalf of the applicant is the issuer (First Reliance Bank). The entity that has the right to draw on the LC is the beneficiary (BB&T).

> Loan Agreement and Promissory Note dated November 16, 2007, executed by and between [Hook Point and BB&T] b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations; and; [sic] c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit.

The loan from BB&T to Hook Point was finalized in a loan agreement on the same day the LC was issued. Hook Point proceeded to complete infrastructure work in the development and began construction on the first home before determining that market conditions had become unfavorable to the project as originally contemplated. Hook Point defaulted on the Loan Agreement and related notes and loan documents by, among other things, failing to pay property taxes, to make interest payments due under the notes, or to pay the principal due under one note. BB&T gave Hook Point notice of default in September 2010 and accelerated the loans under the terms of the Loan Agreement on December 21, 2010. On the same day, BB&T tendered a demand letter to First Reliance, seeking to draw the full amount of the LC.

On December 23, Hook Point filed suit alleging several causes of action against BB&T, including for fraudulent misrepresentation by which BB&T induced Hook Point to enter the loan agreement. Hook Point admitted to being $70,000 in arrears on interest but argued that the terms of the agreement did not permit BB&T to draw the full amount of the LC if that exceeded the amount of interest due. It also sought an ex parte temporary restraining order preventing First Reliance from honoring a draft on the LC by BB&T, which the court granted. After a hearing, the court also granted a preliminary injunction against drafts on or honor of the LC beyond amounts of accrued interest, requiring extension of the LC for one year, and requiring Hook Point to post a $50,000 bond with the court. This appeal followed, and the case was transferred to this Court pursuant to Rule 204(b), SCACR.

ISSUE

Did the circuit court err when it granted a preliminary injunction?

STANDARD OF REVIEW

The grant of an injunction is reviewed for abuse of discretion. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005).

DISCUSSION

BB&T contends that the circuit court erred when it granted the preliminary injunction. We agree.

"A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

On the second element, likelihood of success on the merits, BB&T argues that the grounds for refusing to honor a letter of credit are exceedingly narrow and that Hook Point has failed to show it is likely to succeed on the merits under that standard. Thus, BB&T argues that the circuit court erred when it found that Hook Point had sufficiently established this element. We agree.

A letter of credit is a financial instrument designed to reduce the need for counterparties in a transaction to trust one another by adding an intermediary bank to the transaction. This intermediary bank extends credit

to one party (typically the buyer in a sales transaction[2]) so that the other need not do so. In a sales transaction, the letter of credit typically requires a seller to represent that he has shipped goods under a sales contract and to document this representation with a bill of lading in order to draw on the LC provided by the buyer. This arrangement entails risk to the buyer, who is vulnerable to loss should the seller present fraudulent documents or deliberately ship nonconforming goods. Nevertheless, the usefulness of a letter of credit depends on its being the virtual equivalent of cash. The judicial doctrine that has developed around letters of credit reflects courts' understanding of this background and the importance to commerce of respecting the terms of this financial instrument so that it remains available as a reliable means of shifting financial risk.

Specifically, this understanding is embodied in the independence principle, under which courts recognize that the obligations created in the letter of credit are independent of the obligations of the underlying contract. See, e.g., Intraworld Industries, Inc. v. Girard Trust Bank, 461 Pa. 343, 357, 336 A.2d 316, 323 (Pa. 1975) ("The primary purpose of a letter of credit is to provide assurance to the seller of goods . . . of prompt payment upon presentation of documents. A seller who would otherwise have only the solvency and good faith of his buyer as assurance of payment may, with a letter of credit, rely on the full responsibility of a bank. Promptness is assured by the engagement of the bank to honor drafts upon the presentation of documents. The great utility of letters of credit flows from the independence of the issuer-bank's engagement from the underlying contract between beneficiary and customer. Long-standing case law has established that, unless otherwise agreed, the issuer deals only in documents. If the documents presented conform to the requirements of the credit, the issuer may and must honor demands for payment, regardless of whether the goods conform to the

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[2] Courts do not distinguish between types of LCs for purposes of analyzing whether a court should grant an injunction against honoring them. See New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co., 173 Conn. 492, 499-500, 378 A.2d 562, 566 (Conn. 1977).

underlying contract between beneficiary and customer."); Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19 (1st Cir. 1984) (Breyer, J.) ("Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party. Thus, courts typically have asserted that such letters of credit are 'independent' of the underlying contract. . . . And they have recognized that examining the rights and wrongs of a contract dispute to determine whether a letter of credit should be paid risks depriving its beneficiary of the very advantage for which he bargained, namely that the dispute would be resolved while he is in possession of the money." (citations omitted)); Roger J. Johns and Mark S. Blodgett, Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality As Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees, 31 N. ILL. U. L. REV. 297, 309 (2011) ("[T]he common concern among all stakeholders is that as the ease with which letters of credit . . . can be enjoined increases their commercial utility decreases.").

Nevertheless, courts have carved out a very narrow exception to the independence principle. Aside from permitting the intermediary bank to refuse to honor forged documents presented in order to draw on the letter of credit, courts enjoin the payment of LCs for "fraud in the transaction" when "the beneficiary's conduct has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served." Itek, 730 F.2d at 25 (internal quotation marks and citations omitted).

Put simply, the cases in which the "fraud in the transaction" exception has been applied are those in which the underlying transaction or the demand for payment is clearly a sham, and it is apparent that rigid adherence to the independence principle would facilitate what amounts to a scheme to defraud. In the case that established the fraud in the transaction exception, the beneficiary made an actual shipment so that the shipping documents were real, but substituted "rubbish" in place of salable bristles. Sztejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941). In another leading case, the beneficiary was not permitted to collect on the

LC because the fall of the Iranian government so altered conditions that the contract for military equipment could not be completed, and thus there was no possibility that the original purpose of the transaction of which the LC was a part could be accomplished. In addition, no other legal recourse was available to the applicant, and the applicant had cancelled the underlying contract in compliance with its force majeure provisions, which called for cancellation of the LC upon cancellation of the underlying contract. Itek, supra.

Several other cases also illustrate the narrowness of the fraud in the transaction exception. See Intraworld Industries, Inc. v. Girard Trust Bank, 461 Pa. 343, 357, 336 A.2d 316, 361 (Pa. 1975) ("We conclude that, if the documents presented by [the beneficiary of the LC] are genuine in the sense of having some basis in fact, an injunction must be refused. . . . [N]either the trial court nor this Court may attempt to determine [the beneficiary's] actual entitlement to payment under the lease."); see also Roman Ceramics Corp. v. Peoples Nat. Bank, 714 F.2d 1207, 1209 (3d Cir. 1983) (permitting issuing bank to dishonor LC when it knew underlying invoice had been paid and that contrary certification was false); Dynamics Corp. of Am. v. Citizens & S. Nat. Bank, 356 F.Supp. 991, 999 (D.C. Ga. 1973) (describing court's role as limited to ensuring that the defendant could not "run off with plaintiff's money on a *pro forma* declaration which has absolutely no basis in fact"); Mid-America Tire, Inc. v. PTZ Trading Ltd., 95 Ohio 367, 392, 768 N.E.2d 619, 641 (Ohio 2002) (affirming injunction against honor of LC where defendants repeatedly lied to and misled plaintiffs about the tires available for sale in order to pressure them into making the LC available before they "could discover the truth").

The Uniform Commercial Code (UCC) incorporated this judicially developed doctrine into Article 5, the UCC formulation of the law governing letters of credit. Thus, South Carolina's adoption of the UCC incorporated into South Carolina law the same independence principle and narrow exception limiting the enjoinment of payment of LCs to instances of egregious fraud that operates to vitiate the entire transaction. In particular, UCC Article 5, S.C. Code §§ 36-5-101 through -119, governs letters of credit. S.C. Code Ann. § 36-5-109(b) (2003) sets forth the conditions under

which a court may enjoin honor of a letter of credit as follows, in relevant part:

> If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:
>
> . . .
>
> (3) all of the conditions to entitle a person to the relief under the law of this State have been met; and
>
> (4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud . . . .

For purposes of a preliminary injunction, subsection (3) effectively incorporates the requirements of the common law related to injunctions generally: that the movant show that irreparable harm will result and that no adequate remedy at law exists if the court refuses the injunction. Poynter Investments, supra.

Subsection (4) codifies not only the general common law requirement that the movant show a likelihood of success on the merits but also the special rule for letters of credit allowing only a narrow exception for fraud in the transaction, as discussed above. The Official Comment makes this codification explicit.[3]

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[3] The Official Comment states:

In the present case, Hook Point argues that BB&T is not entitled to draw on the LC because the commitment letter described the LC as "to be

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> Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in Intraworld Indus. v. Girard Trust Bank, 336 A.2d 316 (Pa. 1975), Roman Ceramics Corp. v. People's Nat. Bank, 714 F.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in Ground Air Transfer v. Westate's Airlines, 899 F.2d 1269, 1272-73 (1st Cir. 1990):
>
> We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in Itek, 730 F.2d at 24-25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, Itek, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, id., at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see Dynamics Corp. of America, 356 F. Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," Itek, 730 F.2d at 25 (quoting Roman Ceramics Corp. v. Peoples National Bank, 714 F.2d 1207, 1212 N.12, 1215 (3d Cir. 1983) (quoting Intraworld Indus., 336 A.2d at 324-25)); then a court may enjoin payment.

used as last resort for interest carry." Hook Point also seeks to construe as fraudulent BB&T's demand on the LC. The LC, however, by its terms requires only that BB&T represent that "[t]he Borrower has failed to perform its obligations . . . under the Loan Agreement and Promissory Note" and that "[t]he amount of the draft does not exceed the amount due to the Beneficiary under the obligation." Thus, contrary to Hook Point's arguments, the plain language of the LC permitted BB&T to use it if Hook Point defaulted under any obligation of the loan agreement and note, including an acceleration clause. Furthermore, no term in the loan agreement or note to which the LC refers limits BB&T's use of the LC to interest due. Thus, it is incontrovertible that BB&T had some basis in fact for the representations it made when it drew on the LC.

If there is any validity to Hook Point's argument that the commitment letter limited the utilization of the LC exclusively to interest, that is an ordinary contract dispute that raises no implication of fraud by BB&T sufficient to trigger the narrow fraud exception. Dynamics Corp., supra. In fact, $500,000 had been reserved by BB&T from the original $5.1 million loan for the purpose of drawing down interest carry. A more plausible explanation for the "last resort" language in the commitment letter is that it was intended merely as an accommodation to the principals that BB&T would not seek to draw on the LC for interest until the reserve had been exhausted. That language, whatever it meant, is a red herring in this case as the draw on the LC was sought not only to recoup interest but as a result of multiple defaults that caused BB&T to invoke the acceleration of the entire debt.

Indeed, Hook Point's admission that BB&T was entitled to any draw on the LC for past due interest was conclusive as to the issue whether honor of the LC should be enjoined, since BB&T's entitlement to past due interest is alone some basis in fact on which BB&T could demand payment under the LC. Moreover, the strict standard required under § 36-5-109(b)(4) is that the alleged fraud vitiate the entire transaction, that is, it deprives Hook Point of any benefit from the transaction. In this case, there is no dispute that Hook Point received $5.1 million from BB&T. These facts hardly parallel the

receipt of "rubbish" instead of bargained-for salable bristles. See Sztejn v. J. Henry Schroder Banking Corp., supra.

Thus, there is no evidence Hook Point is more likely than not to succeed on a claim of material fraud so egregious as to vitiate the entire transaction as required under § 36-5-109(b)(4), and the circuit court failed to evaluate the evidence under the strict standard required for injunctions against the honor of LCs. Under the proper standard, it is clear that BB&T had a sufficient basis in fact upon which to demand payment under the LC. Thus, the circuit court's finding was based upon an error of law.

Because this issue is dispositive of the case, we need not address BB&T's remaining issues. Rule 220(b), SCACR; e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

CONCLUSION

The standard under which a fraud in the transaction claim must be measured when deciding whether to enjoin honor of a letter of credit requires that the beneficiary have no colorable claim or basis in fact for asserting its rights under the letter of credit. In this case BB&T has, in our view, not only a colorable claim but an undeniable basis in fact for asserting its rights under the letter of credit. Therefore, the circuit court erred when it granted the preliminary injunction. **REVERSED**.

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