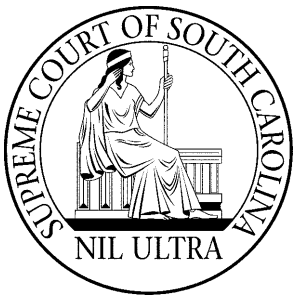


OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 27, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5615-Rent-A-Center East v. SCDOR	Denied 03/21/19
5617-Maria Allwin v. Russ Cooper Associates, Inc.	Pending
5618-Jean Derrick v. Lisa Moore	Pending
5620-Bradley Sanders v. SCDMV	Pending
5621-Gary Nestler v. Joseph Fields	Pending
5622-Benjamin Gecy v. Somerset Poiint	Pending
5623-Natasha Turner v. Michael Kellett	Denied 03/21/19
5624-State v. Trey C. Brown	Denied 03/21/19
5625-Angie Keene v. CNA Holdings	Pending
5627-Georgetown County v. Davis & Floyd, Inc.	Pending
5629-Citizens for Quality Rural Living v. Greenville Planning	Pending
5630-State v. John Kenneth Massey, Jr. (2)	Pending
5631-State v. Heather Sims	Pending
2018-UP-389-Gloria Terry v. Robert Terry, Sr.	Granted 03/27/19
2018-UP-432-Thomas Torrence v. SCDC	Pending
2018-UP-470-William R. Cook, III v. Benny R. Phillips	Pending
2019-UP-023-Nikolay Gul v. Kohler Company	Denied 03/21/19
2019-UP-034-State v. Hershel Mark Jefferson, Jr.	Pending
2019-UP-041-Hollee Gay v. Stephen Gay	Pending
2019-UP-042-State v. Ahshaad Mykiel Owens	Pending
2019-UP-047-Michael Landry v. Angela Landry	Pending
2019-UP-052-State v. Michael Fulwiley	Pending

2019-UP-066-U. S. Bank, N.A. v. Rhonda Lewis Meisner (2)	Denied 03/21/19
2019-UP-067-Lorrie Dibernardo v. Carolina Cardiology	Pending
2019-UP-068-Shay Vitale v. Jon Vitale	Denied 03/21/19
2019-UP-069-Pearline Williams v. Larita Hipp	Pending
2019-UP-070-O'Shea Brown v. Steel Technologies	Pending
2019-UP-075-State v. Gerald J. Ancrum	Denied 03/21/19
2019-UP-078-State v. Michael T. Rencher	Denied 03/21/19
2019-UP-083-State v. Melvin Durant	Pending
2019-UP-093-Carnie Norris v. SCDPPPS	Denied 03/21/19
2019-UP-099-John Doe v. Board of Zoning Appeals	Pending
2019-UP-100-State v. Rhajon Sanders	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5562-Raymond Farmer v. CAGC Insurance	Pending
5564-J. Scott Kunst v. David Loree	Pending
5566-Tyrone York v. Longlands Plantation	Pending
5574-State v. Jeffrey D. Andrews	Pending
5582-Norwest Properties v. Michael Strebler	Pending
5583-Leisel Paradis v. Charleston County	Pending
5589-State v. Archie M. Hardin	Pending
5591-State v. Michael Juan Smith	Pending
5592-State v. Aaron S. Young, Jr.	Pending

5593-Lori Stoney v. Richard Stoney	Pending
5596-James B. Williams v. Merle S. Tamsberg	Pending
5600-Stoneledge v. IMK Dev. (Marick/Thoennes)	Pending
5601-Stoneledge v. IMK Dev. (Bostic Brothers)	Pending
5604-Alice Hazel v. Blitz U.S.A., Inc.	Pending
5605-State v. Marshell Hill	Pending
5606-George Clark v. Patricia Clark	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-255-Florida Citizens Bank v. Sustainable Building Solutions	Pending
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending
2018-UP-365-In re Estate of Norman Robert Knight, Jr.	Pending
2018-UP-417-State v. Dajlia S. Torbit	Pending
2018-UP-439-State v. Theia D. McArdle	Pending
2018-UP-454-State v. Timothy A. Oertel	Pending
2018-UP-461-Mark Anderko v. SLED	Pending
2018-UP-466-State v. Robert Davis Smith, Jr.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sierra Club, Respondent,

v.

South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC, Defendants,

of whom Chem-Nuclear Systems, LLC, is Petitioner,

and South Carolina Department of Health and Environmental Control is Respondent.

Appellate Case No. 2015-001915

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Ralph King Anderson III, Administrative Law Judge

Opinion No. 27871
Heard April 18, 2018 – Filed March 27, 2019

AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, AND REMANDED

Stephen P. Groves, Sr., Mary D. Shahid and Sara S. Rogers, all of Nexsen Pruet, of Charleston, for Petitioner.

Amy E. Armstrong, of South Carolina Environmental Law Project, of Pawleys Island, Robert Guild, of Columbia, Special Counsel Claire H. Prince and Chief Deputy General Counsel Jacquelyn Sue Dickman, both of Columbia, for Respondents.

JUSTICE JAMES: This matter stems from the administrative law court's (ALC) decision to uphold the South Carolina Department of Health and Environmental Control's (DHEC) renewal of the license under which Chem-Nuclear Systems, LLC (Chem-Nuclear) operates a disposal facility for low-level radioactive waste. Sierra Club appealed the ALC's decision, and the court of appeals affirmed the ALC as to all issues, except as to four subsections of the regulation governing DHEC's issuance and renewal of such licenses. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 414 S.C. 581, 779 S.E.2d 805 (Ct. App. 2015). We granted Chem-Nuclear's petition for a writ of certiorari to review the court of appeals' decision. Although DHEC did not file a petition for a writ of certiorari, DHEC submitted a respondent's brief in the matter agreeing with Chem-Nuclear's arguments and expanding on certain issues raised by Chem-Nuclear. We affirm as modified in part and reverse in part the court of appeals. We remand this matter to DHEC for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Chem-Nuclear operates a low-level radioactive waste disposal facility in Barnwell County, South Carolina. The facility is located on approximately 235 acres of property owned by the State and leased to Chem-Nuclear. Chem-Nuclear began its disposal operations in 1971 and has been the sole operator of the Barnwell facility since. Chem-Nuclear's license and operations are overseen by DHEC. Throughout the years, Chem-Nuclear's operating license has been amended and renewed multiple times. The numerous amendments reflect improvements made in the disposal methods and operations of the facility. Early disposal practices, although acceptable at the time, were less than ideal, and Chem-Nuclear and DHEC have since been working together to improve disposal practices.

[1] Our recitation of the facts is limited to the ALC's factual findings in its 2005 order.

In 2000, the General Assembly enacted the Atlantic Interstate Low-Level Radioactive Waste Compact Implementation Act (the Compact Act). *See* S.C. Code Ann. §§ 48-46-10 to -90 (2008 & Supp. 2018). Through this legislation, South Carolina joined the Atlantic Low-Level Radioactive Waste Compact (the Compact) with Connecticut and New Jersey. *See* § 48-46-30(3). The Barnwell facility was designated the regional waste disposal facility of low-level radioactive waste for the Compact. *See* § 48-46-40. The Compact Act mandated decreasing limits for the amount of waste to be disposed of at the Barnwell facility from 2001-2008. *See* § 48-46-40(A)(6)(a). After fiscal year 2008, the Barnwell facility could not accept any out-of-Compact waste, and the amount of waste that has been since disposed at the facility has been substantially reduced. *See id.*

A. Summary of Chem-Nuclear's Low-Level Radioactive Waste Disposal Practices

Chem-Nuclear disposes low-level radioactive waste at the facility using a method described as "enhanced shallow land burial with engineered barriers." Engineered barriers are man-made structures designed to improve the facility's ability to meet certain objectives. The primary engineered barriers implemented by Chem-Nuclear include disposal trenches, disposal vaults, and enhanced caps.

Waste is shipped from outside sources into Chem-Nuclear's facility in disposal containers. Depending upon the type of shipment and waste classification, the transport vehicle will be directed to either the Cask Maintenance Building for further inspection or to the appropriate trench for disposal. At the appropriate trench, containers are unloaded and placed into concrete disposal vaults. Chem-Nuclear continues to inspect the containers as they are unloaded and placed into the vaults. Larger components—including steam generators and pressurizers—need not be stored in concrete vaults and are disposed of directly into a trench following DHEC's approval.

Chem-Nuclear uses three engineered trench designs to separate waste by dose rates external to the waste packages. Each trench design has a drainage system to assist in the monitoring of water infiltration entering the trench. The bottoms of the trenches are lined with clay sand or sandy clay that is designed to be permeable to allow liquids to infiltrate the soil below the trenches. None of the trench designs at

the facility have an impermeable liner or a leachate collection system.[2] Chem-Nuclear implements a surface water management plan to manage precipitation collected in its trenches, which consists of pumping water into either adjacent trenches or a lined pond.

The concrete disposal vaults provide structural stability. By design, the concrete vaults are not sealed against water intrusion. The floors of the vaults have holes to permit water to drain from the vaults into the trench, and the lids of the vaults are not grouted or otherwise sealed to keep water from entering the vault. In the past, the holes in the floor of the vaults have allowed water that has collected in the trenches to rise up into the vault.

Disposal vaults and trenches are "active" when they are in the process of being filled. Vaults are active until they are filled to capacity with disposal containers; trenches are active until they are filled to capacity with vaults and other large components. When a vault becomes full, Chem-Nuclear covers the vault with "general cover soils and an initial clay cap," reducing the infiltration of surface water into the trench. When a trench becomes full, Chem-Nuclear installs a multi-layer enhanced cap over the "inactive" trench; the enhanced cap consists of an initial clay cap, polyethylene and bentonite, a sand drain layer, and general soil materials for vegetation growth. When Chem-Nuclear is filling a vault, the active vault has no cover or roof, permitting rain to fall directly into the vault during the loading period. The Barnwell facility receives an average of forty-seven inches of rain annually. The enhanced cap is not installed until a trench is completely filled—a process that can sometimes take almost two years. DHEC inspections have revealed rainwater collecting in the open trenches. Water that comes in contact with the disposed materials eventually percolates into the soil and drives the groundwater movement that carries radioactive materials, such as tritium, out of the facility.

Chem-Nuclear first discovered tritium in its trenches in 1974. Tritium is a radioactive isotope of hydrogen and is contained in the low-level radioactive waste disposed of at the Barnwell facility. Hydrogen is a key element in water, and tritium exchanges with hydrogen in water—causing this radioactive isotope to migrate with water and groundwater. Tritium is driven into the groundwater by precipitation

[2] Leachate is defined as "any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the [radioactive] material." 10 C.F.R. Pt. 40, App. A (2018).

falling in and on the disposed materials. DHEC and Chem-Nuclear have been working together to reduce the amount of tritium migrating into the groundwater at the facility. Tritium migration from the trenches is referred to as the "tritium plume."

Chem-Nuclear has installed an extensive system of groundwater monitoring wells in and around the disposal areas at the facility. The groundwater from the facility rises to the surface and enters an above-ground stream known as Mary's Branch Creek. This stream is located outside the boundary of the property owned by the State and is on property owned and controlled by Chem-Nuclear. Chem-Nuclear has taken steps to protect the public from exposure to radiation at Mary's Branch Creek. For example, the general public is restricted from access to the waters of Mary's Branch Creek—the area is secured by a fence and is heavily vegetated. Chem-Nuclear regularly samples and tests the waters of Mary's Branch Creek.

Because Mary's Branch Creek is the first point where a hypothetical member of the public could receive a dose of radiation, DHEC has approved this point as Chem-Nuclear's regulatory compliance point. Although high concentrations of tritium have been discovered in groundwater samples elsewhere on Chem-Nuclear's property, samples taken at the compliance point have been well-below the regulatory limit for exposure. After comparing data regarding tritium levels to rainfall data as gauged by water level tables, it appears tritium concentrations may fluctuate with the amount of rainfall and may not necessarily vary as a result of new storage methods at the facility.

B. Current Controversy

Chem-Nuclear's facility is licensed and overseen by DHEC pursuant to South Carolina's status as an "Agreement State" with the Nuclear Regulatory Commission (NRC) under the United States Atomic Energy Act of 1954. *See* 42 U.S.C. § 2021 (2005). South Carolina became an Agreement State in 1969 after enacting the Atomic Energy and Radiation Control Act and promulgating the necessary regulations governing the disposal and handling of radioactive waste. *See* S.C. Code Ann. §§ 13-7-10 to -100 (2017); S.C. Code Ann. Regs. 61-63 (2011 & Supp. 2018). In designing, building, and operating the facility, Chem-Nuclear is required to comply with these regulations. The breadth and complexity of the applicable regulations are a given because of the nature of the materials being permanently disposed into the ground at the Barnwell facility.

In 2000, Chem-Nuclear timely submitted its application for the renewal of its operating license to DHEC. After reviewing Chem-Nuclear's application, DHEC imposed additional requirements on Chem-Nuclear outside of the regulations. These requirements included a comprehensive assessment of site performance (the Environmental Radiological Performance Verification (ERPV)) and a review of Chem-Nuclear's methodologies and conclusions in a predictive site assessment by a "Blue Ribbon" panel of experts appointed by DHEC. Following public hearing and comment, DHEC renewed Chem-Nuclear's license in 2004.

Sierra Club requested a contested case hearing before the ALC to challenge the renewal. Sierra Club argued Chem-Nuclear's current practices for waste disposal at the Barnwell facility did not meet the regulatory requirements. Specifically, Sierra Club contended Chem-Nuclear's current disposal methods did not adequately prevent the migration of radioactive particles from the site into the groundwater and other waters surrounding the property. DHEC and Chem-Nuclear maintained the disposal methods were sufficient under the regulatory requirements.

In 2005, the ALC affirmed DHEC's decision to renew Chem-Nuclear's license, concluding Sierra Club did not present sufficient evidence to warrant reversal of DHEC's renewal of the operating license. However, the ALC found Sierra Club raised legitimate issues and presented evidence suggesting additional studies were needed to investigate the scientific and economic feasibility of employing or implementing designs and operational procedures at the facility that would: (1) shelter the disposal trenches from rainfall and prevent rainfall from entering the trenches; (2) provide temporary dry storage facilities for the storage of waste received during wet conditions; and (3) provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible. In order to address these concerns, the ALC ordered Chem-Nuclear to conduct the above-mentioned studies and submit the results to DHEC within 180 days.[3]

[3] Noting the "undeniable rainfall problem," the ALC explained Chem-Nuclear had previously considered conceptual designs to keep rainfall out of the trenches, but Chem-Nuclear never submitted a report to DHEC—despite DHEC's request for a report in 2001.

Sierra Club appealed, and the court of appeals affirmed in part and remanded in part. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010), *cert. denied*, S.C. Sup. Ct. Order dated July 21, 2011, (hereinafter, *Chem-Nuclear I*). The court of appeals affirmed the ALC's findings related to section 7.18 and subsections 7.10.1 through 7.10.4 of Regulation 61-63. *Id.* at 439, 693 S.E.2d at 20-21. However, the court of appeals held a remand was appropriate because the ALC failed to consider whether Chem-Nuclear's disposal practices were in compliance with sections 7.11, 7.23.6, and 7.10.5 through 7.10.10 of Regulation 61-63. *Id.* at 439, 693 S.E.2d at 20. Relevant to the matter before us, the court of appeals found section 7.11 "imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA[4] would not be sufficient to address whether Chem-Nuclear is in compliance with section 7.11." *Id.* at 435, 693 S.E.2d at 19. Importantly, in remanding the matter, the court of appeals instructed the ALC to apply the factual findings set forth in the ALC's 2005 order when addressing these unaddressed sections of Regulation 61-63. *Id.* at 439, 693 S.E.2d at 20. In effect, this requirement eliminated the ALC's ability to consider not only the study it mandated in its 2005 order, which Chem-Nuclear states it prepared and presented to DHEC, but also any improvements that have been made to the facility since the 2005 order.

Upon remand in 2012, the ALC applied the factual findings from its 2005 order and issued a new order affirming DHEC's conclusion that Chem-Nuclear complied with the relevant sections of the regulation. Sierra Club appealed the ALC's 2012 remand order, and the court of appeals affirmed in part[5] and reversed in

---

[4] ALARA is an acronym for "as low as is reasonably achievable" and, as used in the regulation governing radioactive materials, means "making every reasonable effort to maintain exposures to radiation as far below the dose limits [provided by regulation] . . . as is practical." S.C. Code Ann. Regs. 61-63 § 3.2.6 (2011). The ALARA standard takes into account the "state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest." *Id.*

[5] The court of appeals affirmed the ALC as to Chem-Nuclear's compliance with other subsections of Regulation 61-63. None of the parties challenge this portion of the court of appeals' decision.

part, finding Chem-Nuclear had not complied with the following four subsections of Regulation 61-63: 7.11.11.1, 7.11.11.2, 7.11.11.4, and 7.10.7. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 414 S.C. 581, 779 S.E.2d 805 (Ct. App. 2015) (hereinafter, *Chem-Nuclear II*). The court of appeals acknowledged the difficulty the restricted record imposed by *Chem-Nuclear I* had on Chem-Nuclear's ability to demonstrate recent compliance with certain regulations. *Id.* at 622, 779 S.E.2d at 826. The court of appeals provided that on remand, "DHEC shall consider all available information as to whether Chem-Nuclear has complied with the regulations." *Id.* We granted Chem-Nuclear's petition for a writ of certiorari to address several issues regarding the court of appeals' decision.

II. STANDARD OF REVIEW

When the court of appeals remanded the matter to the ALC in *Chem-Nuclear I*, the court of appeals instructed the ALC to apply the ALC's factual findings from the ALC's 2005 order to applicable sections of the regulation. Therefore, we accept the factual findings in the ALC's 2005 order. We review the ALC's 2012 order after remand under the standard of review provided in subsection 1-23-610(B)(d) of the South Carolina Code (Supp. 2018), and may reverse only if the ALC's decision constituted an error of law. *See* § 1-23-610(B)(d) (providing an appellate court may reverse the ALC's decision when it is affected by an error of law); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court. We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo." (internal quotation marks and citations omitted)).

III. DISCUSSION

A. Chem-Nuclear's Compliance with Part VII of Regulation 61-63

In designing, building, and operating its Barnwell facility, Chem-Nuclear must adhere to all procedural requirements, performance objectives, and technical requirements found in Part VII of Regulation 61-63. Part VII, entitled "Licensing Requirements for Land Disposal of Radioactive Waste," sets forth the "procedures, criteria, and terms and conditions upon which [DHEC] issues licenses for the land disposal of wastes received from other persons." S.C. Code Ann. Regs. 61-63 § 7.1.1 (2011). "The requirements of this part are in addition to, and not in substitution for, other applicable requirements of these regulations." *Id.* Part VII "establishes

procedural requirements and performance objectives applicable to any method of land disposal. It [also] establishes specific technical requirements for near-surface disposal of radioactive waste which involves disposal in the uppermost portion of the earth." S.C. Code Ann. Regs. 61-63 § 7.1.3 (2011).

Of course, Chem-Nuclear's appeal to this Court focuses on the court of appeals' conclusion that it was not in compliance with certain technical requirements enumerated in Part VII. In pertinent part, subsection 7.11.11 of the South Carolina Code of State Regulations (2011) provides:

> The disposal units and the incorporated engineered barriers shall be designed and constructed to meet the following objectives:
>
> > 7.11.11.1 to minimize the migration of water onto the disposal units.
> >
> > 7.11.11.2 to minimize the migration of waste or waste contaminated water out of the disposal units.
> >
> > 7.11.11.4 temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil.

Subsection 7.10.7 requires DHEC to find Chem-Nuclear "provides reasonable assurance that the applicable technical requirements of [Part VII] will be met." S.C. Code Ann. Regs. 61-63 § 7.10.7 (2011). The court of appeals concluded Chem-Nuclear's compliance with subsection 7.11.11 as a whole could not be measured solely by results and that consideration must be given as to "whether Chem-Nuclear took any actions to meet the technical requirements imposed by these subsections, and if so, the sufficiency of Chem-Nuclear's actions." *Chem-Nuclear II*, 414 S.C. at 600, 779 S.E.2d at 815.

As to subsection 7.11.11.1, the court of appeals found Chem-Nuclear had not satisfied the technical requirement of designing and constructing its disposal units and engineered barriers "to minimize the migration of water onto the disposal units." *Id.* at 606, 779 S.E.2d at 818. Regulation 61-63 does not define "minimize." In their

joint brief to the court of appeals, Chem-Nuclear and DHEC presented a definition of minimize: "to reduce to the smallest possible amount, extent, size, or degree." The court of appeals accepted this definition, as do we. The court of appeals interpreted the "migration of water" to include both surface water and rainfall. *Id.* at 601, 779 S.E.2d at 815. During oral argument at the court of appeals, DHEC conceded this point. The court of appeals found the record demonstrated Chem-Nuclear had not taken any action "to prevent even one raindrop from migrating onto one active vault or trench." *Id.* at 606, 779 S.E.2d at 818. The court of appeals also found that "while initial clay caps and enhanced caps reduce the migration of water onto inactive disposal units, there is no evidence and no finding by the ALC that DHEC has required, or that Chem-Nuclear has taken, any action that would reduce this migration to the smallest possible amount." *Id.*

As to subsection 7.11.11.2, the court of appeals found Chem-Nuclear had not satisfied the technical requirement of designing and constructing its disposal units and engineered barriers "to minimize the migration of . . . waste contaminated water out of the disposal units."[6] *Id.* at 610, 779 S.E.2d at 820. The court of appeals acknowledged Chem-Nuclear had taken steps to *reduce* the migration of waste-contaminated water out of disposal units; however, the court of appeals noted the record failed to support a finding that Chem-Nuclear wholly complied with subsection 7.11.11.2. *Id.* The court of appeals based its holding on "(1) Chem-Nuclear's failure to comply with subsection 7.11.11.1, and (2) there being no evidence, and no finding, that Chem-Nuclear has taken action to 'minimize'—reduce to the smallest amount possible—the migration of waste-contaminated water out of disposal units." *Id.* at 610-11, 779 S.E.2d at 820.

As to subsection 7.11.11.4, the court of appeals similarly found noncompliance. *Id.* at 613, 779 S.E.2d at 821-22. The court of appeals concluded this subsection requires Chem-Nuclear to: "(1) collect and retain water that migrates onto the disposal units, (2) test this water for radioactive waste material, (3) if such waste material is discovered, engage in removal or remedial measures, and (4) accomplish this without contaminating the groundwater or surrounding soil." *Id.* at 611, 779 S.E.2d at 820. The court of appeals acknowledged Chem-Nuclear follows a surface water management plan; however, the court of appeals found there was no

[6] The court of appeals agreed with the ALC's determination that Chem-Nuclear minimized the migration of radioactive *waste-forms* out of the disposal units. *Id.* at 607, 779 S.E.2d at 818.

evidence in the record that Chem-Nuclear ever tested the water pumped from the trenches for radioactive waste material. *Id.* The court of appeals noted the 2005 ALC order found there was no leachate collection system, and the court of appeals explained such a system would allow Chem-Nuclear to satisfy all of the requirements of subsection 7.11.11.4. *Id.* at 612-13, 779 S.E.2d at 821.

The court of appeals also found Chem-Nuclear had not complied with subsection 7.10.7. *Id.* at 622, 779 S.E.2d at 826. Subsection 7.10.7 provides as a condition for issuance of a license that the applicant provide "reasonable assurance that the applicable technical requirements of [Part VII]" were met. This finding by the court of appeals was based on its conclusion that Chem-Nuclear had not demonstrated compliance with the "technical requirements" of subsections 7.11.11.1, 7.11.11.2, and 7.11.11.4. *Chem-Nuclear II*, 414 S.C. at 617, 779 S.E.2d at 823.

1. Subsection 7.10.7

Again, subsection 7.10.7 provides as a condition for issuance of a license that the applicant provide "reasonable assurance that the applicable technical requirements of [Part VII]" were met. Chem-Nuclear argues the court of appeals incorrectly concluded section 7.11 sets forth mandatory "technical requirements" for compliance. Chem-Nuclear claims this conclusion alters *Chem-Nuclear I*'s designation of section 7.11's requirements as "compliance requirements." Chem-Nuclear argues, "In concluding [section] 7.11 imposed 'technical requirements' instead of just 'compliance requirements,' the [c]ourt of [a]ppeals determined these 'newly discovered' requirements necessitated specific action by Chem-Nuclear."

We affirm the court of appeals' conclusion that subsections 7.11.11.1, 7.11.11.2, and 7.11.11.4 are in the category of "technical requirements" Chem-Nuclear must satisfy as a condition of its license. However, we do not interpret the court of appeals' decision to mandate any specific action Chem-Nuclear must take in order to achieve compliance with the requirements of section 7.11. To the extent the court of appeals' opinion can be interpreted to mandate certain specific actions in this case, it is modified.

2. Subsection 7.11.11.4

We reverse the court of appeals' holding that Chem-Nuclear failed to comply with subsection 7.11.11.4. Again, this subsection provides that all disposal units and

engineered barriers must be designed and constructed to allow for the "temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil." Our focus upon this subsection is directed to the seemingly innocent use of the article "the" before the words "detection and removal." The ALC concluded this subsection requires the disposal units and engineered barriers to be designed and constructed to allow for the temporary collection of water and other liquids so as to allow for the detection and removal of water and other liquids. The court of appeals held the "plain language" of the subsection requires disposal units and engineered barriers to be designed and constructed so as to allow for the detection and removal of radioactive waste material. The sentence structure of subsection 7.11.11.4 is hardly "plain" and is awkward at best. That unclear wording necessarily begs the crucial question of exactly what must be detected and removed. Again, the ALC concluded water and other liquids must be detected and removed, but the court of appeals concluded radioactive waste material must be detected and removed.

Subsection 7.11.11.4 contains no specific reference to the detection and removal of "radioactive waste material," nor does it contain any requirement that the water and other liquids be tested at that point. The court of appeals erred in reading those requirements into the subsection. North Carolina has adopted a very similar set of technical requirements and performance objectives in its statutory scheme addressing the storage of low-level radioactive waste. *See* N.C. Gen. Stat. § 104E-25 (2017). Subsection 104E-25(f)(4) of the General Statutes of North Carolina is North Carolina's corresponding section to our subsection 7.11.11.4. In pertinent part, it provides that disposal units and engineered barriers must be designed and constructed to allow for:

> (4) Temporary collection and retention of water and other liquids for a time sufficient to allow for their detection and removal or other remedial measures without contamination of groundwater or surrounding soil.

§ 104E-25(f)(4) (emphasis added). This subsection is, with the exception of the use of the word "their," essentially identical to our subsection 7.11.11.4.[7] The North Carolina scheme's use of the word "their" confirms the purpose of its subsection 104E-25(f)(4) is to allow for the collection and retention of water and other liquids for a time sufficient to allow for the detection and removal of water and other liquids. The ALC interpreted our subsection 7.11.11.4 in this manner, and we agree with this interpretation. After so concluding, the ALC found that Chem-Nuclear employs a surface water management plan to manage precipitation collected in trenches, and water is pumped into adjacent trenches to ensure it does not come into contact with waste or disposal units. The ALC also found the water may be pumped into an adjacent lined pond. The ALC further found the trenches are designed to prevent the flow of surface water from coming into contact with waste. Thus, the ALC concluded Chem-Nuclear has established the disposal units and engineered barriers were designed and constructed in compliance with subsection 7.11.11.4. We agree and therefore reverse the court of appeals' holding as to this subsection.

3. Subsections 7.11.11.1 and 7.11.11.2

We affirm the court of appeals' decision that Chem-Nuclear failed to comply with subsections 7.11.11.1 and 7.11.11.2. We adopt the court of appeals' reasoning as to these two subsections. However, our affirmation of the court of appeals on this issue is not to be construed as a mandate that covers be erected over the disposal units; during proceedings to take place on remand, DHEC shall take all admissible evidence into account when addressing the question of compliance with these two subsections.

Subsection 7.11.11.1 provides that disposal units and incorporated engineered barriers must be designed and constructed to "minimize the migration of water onto the disposal units." DHEC's counsel conceded during oral argument at the court of appeals that the phrase "migration of water onto" disposal units includes rainfall. However, before this Court, DHEC joins Chem-Nuclear's position that the phrase "migration of water onto" does not include rainfall. We disagree with Chem-Nuclear and DHEC's position that subsection 7.11.11.1's reference to the "migration of water onto" includes only surface water and excludes rainfall. The regulation does not

[7] Subsection 104E-25(f)(4) does not include the word "the" before the word "contamination" and the word "surrounding." However, these omissions do not affect the clarity of the subsection.

define the phrase "migration of water onto." However, based on the plain meaning of the words "water" and "onto," we find this phrase includes rainfall and other precipitation. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (providing "where . . . the plain language of the statute [or regulation] is contrary to the agency's interpretation, the Court will reject the agency's interpretation"). Water can indeed both migrate directly "onto" the disposal units from the sky as precipitation and migrate into and onto the disposal units as surface water once it hits the ground.

Chem-Nuclear and DHEC argue the court of appeals improperly interpreted the term "minimize" in subsections 7.11.11.1 and 7.11.11.2 to mean "prevent."[8] Although we agree "minimize" does not mean "prevent," we do not agree with Chem-Nuclear and DHEC that the court of appeals' opinion requires such prevention. Nothing in the court of appeals' opinion requires the complete elimination of the migration of water and waste-contaminated water onto or out of the disposal units; in fact, the court of appeals stressed, "We do not believe our opinion can be fairly read to require Chem-Nuclear to prevent all rainfall onto the disposal units. Rather, the opinion is written to the requirement in subsection 7.11.11.1 that Chem-Nuclear 'minimize' rainfall." *Chem-Nuclear II*, 414 S.C. at 606 n.14, 779 S.E.2d at 818 n.14. The court of appeals simply applied the definition of "minimize" provided by Chem-Nuclear and DHEC in their joint brief before the court of appeals—"to reduce to the smallest possible amount, extent, size, or degree." *Id.* at 604, 779 S.E.2d at 816. We accept this definition and reiterate that "minimize" does not mean "prevent."

4. ALARA

Chem-Nuclear also argues the court of appeals significantly enlarged its original holding in *Chem-Nuclear I*, in which the court of appeals concluded section 7.11 "imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address whether Chem-Nuclear is in compliance with section 7.11." *Chem-Nuclear I*, 387 S.C. at 435, 693 S.E.2d at 19. Chem-Nuclear contends the court of appeals has abjectly rejected ALARA

[8] Subsections 7.11.11.1 and 7.11.11.2 of the South Carolina regulation mandate minimization; however, the corresponding North Carolina statutory provisions mandate prevention. *Compare* S.C. Code Ann. Regs. 61-63 § 7.11.11.1-.2 (2011) *with* N.C. Gen. Stat. § 104E-25(f)(1)-(2) (2017).

considerations when it considered Chem-Nuclear's disposal operations. In *Chem-Nuclear II*, when discussing the minimization requirement mandated in applicable subsections of 7.11.11, the court of appeals found there was "no inherent reasonableness or practicability consideration involved in analyzing Chem-Nuclear's compliance." *Chem-Nuclear II*, 414 S.C. at 604 n.13, 779 S.E.2d at 816 n.13. Additionally, the court of appeals stated, "In determining compliance with the technical requirements of subsection 7.11.11.4, however, we consider the actions taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain measure based on its own ALARA analysis." *Id.* at 613 n.18, 779 S.E.2d at 821 n.18. Perhaps, such language could be interpreted to eliminate an ALARA analysis in determining what actions must be taken to comply with the technical requirements of the regulation.

We therefore modify the court of appeals' opinion insofar as these statements or any other such language in the opinion suggest ALARA is eliminated from an analysis of compliance with the technical requirements of the regulation. Although compliance with ALARA alone is insufficient (as previously held by the court of appeals in *Chem-Nuclear I*), we reject any interpretation by which ALARA is totally divorced from the technical requirements. We repeat: when determining what approach(es) Chem-Nuclear must take to achieve compliance with any given technical requirement, DHEC must take ALARA into account, but DHEC shall not rely upon ALARA as the sole basis for compliance with the technical requirement.

Chem-Nuclear's desire for our review of the court of appeals' decision is partly centered on the health and safety of its workers, and we understand this concern. Indeed, subsection 7.20, entitled "Protection of Individuals During Operations," provides in pertinent part, "Every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable." S.C. Code Ann. Regs. 61-63 § 7.20 (2011). However, there is a parallel concern regarding the public's and the environment's exposure to radioactive waste. Subsection 7.18, entitled "Protection of the General Population from Releases of Radioactivity," provides in pertinent part, "Reasonable effort should be made to maintain releases of radioactivity in effluents to the general environment as low as is reasonably achievable." S.C. Code Ann. Regs. 61-63 § 7.18 (2011). Therefore, when reviewing Chem-Nuclear's actions to meet the requirements of the regulations, DHEC must review the technical feasibility of certain actions, weigh the consequences of requiring such actions, and evaluate such actions in the context of other applicable regulatory requirements for environmental and worker safety. Such an approach would allow for DHEC's

consideration of ALARA in determining whether Chem-Nuclear has complied with the requirements of subsections 7.11.11.1 and 7.11.11.2.

Chem-Nuclear cannot rely upon its compliance with other result-based portions of the regulations to excuse noncompliance with the requirements of subsection 7.11.11. *See* S.C. Code Ann. Regs. 61-63 § 7.1.1 (2011) ("The requirements of this part are in addition to, and not in substitution for, other applicable requirements of these regulations."). However, evidence that establishes compliance with such result-based regulations may well be relevant to the issue of compliance with the requirements of subsection 7.11.11. The technical requirements in 7.11.11 must be read in conjunction with the performance objectives. The requirements of 7.11.11 are indeed designed to help meet certain performance objectives; however, the requirements in 7.11.11 are not to be ignored after performance objectives are satisfied. If mere compliance with performance objectives were sufficient to demonstrate compliance with other sections of the regulations—such as these technical requirements—then these other sections of the regulations would become unnecessary and superfluous. *See Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))).

B. Deference to DHEC

Chem-Nuclear and DHEC argue that the court of appeals erred by not giving deference to DHEC's interpretations of the requirements under section 7.11 since DHEC has the technical expertise to balance the different competing considerations that the judiciary may lack. Both contend deference should have been given in interpreting and applying the multiple, intertwined sections contained in Regulation 61-63.

"[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. "If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411

S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal quotation marks and citations omitted). "Nevertheless, where . . . the plain language of the statute [or regulation] is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. Therefore, in summary, "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute [or regulation].'" *Kiawah*, 411 S.C. at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). We believe we have given due deference to DHEC's interpretation of the applicable regulations.

On a more specific point, as noted above, at oral argument before the court of appeals, DHEC conceded the phrase "migration of water onto" included rainfall. Now, DHEC urges us to adopt Chem-Nuclear's interpretation that the phrase includes only surface water. Certainly, we are not required to give deference to an agency's interpretation of a regulation when that very interpretation has changed within the same litigation. Whatever the case, we do not give deference to DHEC's current interpretation, as it runs afoul of what we conclude is the clear meaning of the phrase.

C. Burden of Proof

Chem-Nuclear and DHEC argue the court of appeals improperly shifted the burden of proof away from Sierra Club when concluding Chem-Nuclear was not in compliance with DHEC's regulations. Chem-Nuclear and DHEC assert the court of appeals shifted focus from whether Sierra Club demonstrated by a preponderance of the evidence that Chem-Nuclear failed to comply with subsections 7.11.11.1, 7.11.11.2, 7.11.11.4, and 7.10.7, to whether Chem-Nuclear had demonstrated compliance with the regulations. Chem-Nuclear and DHEC argue that by demanding a demonstration of affirmative actions by Chem-Nuclear and DHEC to show compliance with the court of appeals' interpretation of the regulations and in presuming a lack of specific findings in the ALC's 2005 record demonstrates a failure to comply with this interpretation, the burden is impermissibly shifted to Chem-Nuclear and DHEC. We disagree.

The standard of proof in an administrative hearing of a contested case is by a preponderance of the evidence. *See* S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2018) ("Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence."). "In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of

proof." *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017). Additionally, "the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

Here, Sierra Club undoubtedly bore the burden of proof before the ALC because it was challenging DHEC's decision to renew Chem-Nuclear's operating license. Additionally, the burden remained with Sierra Club as it was the appellant before the court of appeals. With that in mind, we find the burden of proof was not improperly shifted from Sierra Club to Chem-Nuclear and DHEC during the court of appeals' review of the ALC's 2012 order.

Importantly, in *Chem-Nuclear I*, the court of appeals explicitly constrained the ALC from making any new findings of fact on remand. 387 S.C. at 438-39, 693 S.E.2d at 20. This Court denied Chem-Nuclear's petition for a writ of certiorari to review the court of appeals' decision in *Chem-Nuclear I*. Therefore, on remand, the ALC was required to apply the detailed findings of fact from its 2005 order and reach new conclusions of law regarding the unaddressed regulatory provisions. The ALC's 2012 order concluded, "[Sierra Club] has failed to carry [its] burden, as this Court finds and concludes that the factual findings in the 2005 Decision, when applied to [the regulations] demonstrate that the Barnwell Facility is compliant with these regulations and that the renewal of [Chem-Nuclear's license] was proper." In *Chem-Nuclear II*, the court of appeals also recognized its confinement to the findings of fact from the ALC's 2005 order and concluded the ALC erred in finding Chem-Nuclear's compliance with certain regulations were supported by the evidence in the record. 414 S.C. at 622, 779 S.E.2d at 826.

Before the ALC in 2005, Sierra Club presented evidence detailing the current disposal methods implemented by Chem-Nuclear and presented evidence regarding the issue of rainwater falling onto the disposal units. Sierra Club introduced evidence that the active disposal units were specifically designed to allow water to flow into and out of them. Indeed, the ALC in 2005 recognized the "undeniable rainfall problem" based on the evidence in the record and ordered Chem-Nuclear to conduct further studies regarding ways to address the "legitimate issues" and "evidence" presented by Sierra Club.

Although Sierra Club undoubtedly bore the burden of proving its case, Chem-Nuclear nevertheless bore an overarching burden to satisfy the regulatory

requirements necessary for Chem-Nuclear to earn its license. We do not read the court of appeals' conclusion that there was no evidence to show Chem-Nuclear's compliance with subsections 7.11.11.1 and 7.11.11.2 to be an impermissible shift in the burden of proof. The court of appeals applied the facts established at the hearing to the legal requirements set forth in the regulations and concluded substantial evidence did not support the ALC's findings as to subsections 7.10.7, 7.11.11.1, and 7.11.11.2.

D. Feasibility Report

Chem-Nuclear argues the court of appeals misapprehended or overlooked its compliance with the ALC's directive in its 2005 order to conduct further studies to address concerns regarding the reduction of contact between rainfall and waste. Chem-Nuclear contends that while the court of appeals acknowledged the existence of the report, it incorrectly concluded the report required it to take further affirmative action. Chem-Nuclear asserts the report's findings demonstrate it conducted an ALARA analysis and determined the benefits of certain proposed rainfall mitigation designs did not outweigh the hazards to workers that would result if the designs were implemented.

Through no fault of Chem-Nuclear, the details of the report's findings are not part of the record on appeal. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). Therefore, this Court will not address the impact of these findings. Throughout the procedural history of this case, Chem-Nuclear attempted—to no avail—to supplement the record on appeal with the report. We acknowledge the report's findings may have been helpful to Chem-Nuclear in making its compliance arguments; however, the court of appeals' remand instructions in *Chem-Nuclear I* were specific and limiting, and the remand instructions from the court of appeals in *Chem-Nuclear II* will now allow Chem-Nuclear to supplement the record before DHEC without any limitations. We are aware Chem-Nuclear and DHEC have continued to refine and improve disposal practices and have made technological improvements at the Barnwell facility since the ALC's 2005 factual findings. The record upon remand will be open, and Chem-Nuclear will be able to present evidence of actions it has taken to address its compliance with 7.10.7, 7.11.11.1, and 7.11.11.2.

The ALC's 2012 order states Chem-Nuclear conducted the studies required by the 2005 ALC order and that DHEC "concurred with the report's evaluation of the issues." In *Chem-Nuclear II*, the court of appeals expressed concern regarding

DHEC's failure to amend the requirements for issuance of Chem-Nuclear's license following the ALC's instructions in its 2005 order for Chem-Nuclear to evaluate these concerns and submit the report to DHEC. 414 S.C. at 621, 779 S.E.2d at 825. The court of appeals noted "the fact that DHEC did not require Chem-Nuclear to take *any* action or make *any* changes to its disposal practices casts doubt upon DHEC's decision to renew the license." *Id.* at 621, 779 S.E.2d at 826. However, the court of appeals stated "[t]he propriety of DHEC's decision to 'concur[] with the report's evaluation of these issues' *is not before this court, and we do not base our holding on the merits of that decision*." *Id.* at 621, 779 S.E.2d at 825 (alteration in original) (emphasis added).

We likewise do not base our holding regarding Chem-Nuclear's compliance with the applicable sections of the regulations on the fact that DHEC chose not to amend the license requirements in light of the ALC's request for further studies in its 2005 order. We agree with Chem-Nuclear that the ALC's 2005 order did not mandate additional compliance requirements for Chem-Nuclear above and beyond its duty to evaluate the ALC's concerns and submit its findings to DHEC. Nevertheless, it was not reversible error for the court of appeals to comment on DHEC's decision to choose not to amend Chem-Nuclear's license based upon the ALC's 2005 request for further evaluations to be conducted.

E. The Facility's Natural Physical Attributes

Chem-Nuclear contends the specific natural physical attributes of the facility—groundwater pathways and travel time—clearly contribute positively to a reduction in the radiation and ensure site performance and compliance. Therefore, Chem-Nuclear argues the court of appeals erred by not considering the facility's natural physical attributes, analyzed under section 7.7, when concluding it was noncompliant with subsections 7.11.11.1 and 7.11.11.2. We disagree.

Section 7.7, entitled "Technical Analyses," provides "[t]he specific technical information shall also include the following analyses needed to demonstrate that the performance objectives of this part will be met." S.C. Code Ann. Regs. 61-63 § 7.7 (2011). Subsection 7.7.1 states:

> Pathways analyzed in demonstrating protection of the general population from releases of radioactivity shall include air, soil, groundwater, surface water, plant uptake, and exhumation by burrowing animals. The analyses shall

> clearly identify and differentiate between the roles performed by the natural disposal site characteristics and design features in isolating and segregating the wastes. The analyses shall clearly demonstrate that there is reasonable assurance that the exposures to humans from the release of radioactivity will not exceed the limits set forth in 7.18.

S.C. Code Ann. Regs. 61-63 § 7.7.1 (2011).

The court of appeals did not err in failing to consider the natural attributes of the facility when concluding Chem-Nuclear was noncompliant with subsections 7.11.11.1 and 7.11.11.2. Although the natural attributes of the facility may assist in a demonstration that there is reasonable assurance the exposure to humans from the release of radioactivity from the disposed waste will not exceed the regulatory limits, it is not a factor that excuses noncompliance from the requirements of subsections 7.11.11.1 and 7.11.11.2. Importantly, the natural physical aspects of the facility are only relevant *after* water has been in contact with waste and has migrated out of the disposal units. These aspects are irrelevant to the question of whether Chem-Nuclear satisfied the provisions of 7.11.11.1 and 7.11.11.2, which require Chem-Nuclear to minimize (1) the migration of water onto the disposal units and (2) the migration of waste or waste-contaminated water out of the disposal units.

IV. CONCLUSION

We affirm the court of appeals' conclusion that Chem-Nuclear has not yet demonstrated compliance with subsections 7.10.7, 7.11.11.1, and 7.11.11.2. However, we modify the court of appeals' opinion to the extent it can be read to (1) mandate what specific actions must be taken in accomplishing the technical requirements of Part VII and (2) completely ignore the concept of ALARA when Chem-Nuclear takes direct action to satisfy the technical requirements of Part VII. As we noted above, upon remand to DHEC, there will be no limitations to the record, and Chem-Nuclear will be free to introduce any additional actions it has taken to conform to the requirements of the regulations. In the event of an appeal to the ALC, the ALC may conduct its proceedings with no limitations from this Court on the evidence it may consider. We reverse the court of appeals' conclusion that Chem-Nuclear is noncompliant with subsection 7.11.11.4.

AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, and REMANDED.

BEATTY, C.J., KITTREDGE, J., and Acting Justices Paul E. Short and D. Garrison Hill, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Dennis Elvin Cervantes-Pavon, Petitioner.

Appellate Case No. 2017-001910

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27872
Heard January 31, 2019 – Filed March 27, 2019

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

JUSTICE HEARN: We granted Dennis Cervantes-Pavon's petition for a writ of certiorari to determine whether the court of appeals erred in affirming the circuit court's denial of immunity from prosecution under the Protection of Persons and Property Act, (the Act) S.C. Code Ann. §§ 16-11-410 to 450 (2015). *State v. Cervantes-Pavon*, Op. No. 2017-UP-258 (S.C. Ct. App. filed June 28, 2017). We write today to clarify several points regarding the Act and remand for a new immunity hearing.

FACTUAL BACKGROUND

Cervantes-Pavon was indicted for murdering Raymond Muniz by stabbing him with a sheetrock saw at their workplace. Both men worked on a construction project at the Belk department store in Mount Pleasant. Prior to trial, Cervantes-Pavon moved to dismiss the indictment, arguing he was immune from prosecution under the Act.

At the immunity hearing, Herbie Evans testified that on August 13, 2014, he was working as a superintendent on the Belk project and became aware of a problem between Muniz and Cervantes-Pavon. Cervantes-Pavon approached Evans and stated Muniz was picking on him. Evans spoke with Muniz and informed him that he would not tolerate any conflicts between employees and would send them home if one occurred. Evans did not witness any interactions between Muniz and Cervantes-Pavon on that day.

José Somosa, through an interpreter, testified he worked with Muniz and Cervantes-Pavon on the Belk project. Somosa recalled that the day before the stabbing, Muniz had removed his shirt and attempted to fight Cervantes-Pavon, who refused. The next day, Somosa was working as Cervantes-Pavon's helper on the project by staying on the ground while Cervantes-Pavon worked on a ladder. According to Somosa, each time Muniz walked by Cervantes-Pavon, Muniz would say the two men should fight and Cervantes-Pavon would respond that he didn't want any trouble.

Somosa testified that at the end of the workday, Muniz again wanted to fight Cervantes-Pavon. This time, Cervantes-Pavon "got angry," came down from the ladder, and "later went over to the tools and grabbed that steel thing." Somosa clarified the "steel thing" was a sheetrock saw approximately 10 inches long.

Somosa stated Cervantes-Pavon "grabbed a pipe," Muniz "grabbed like a metal thing for framing," and the two "went at each other." Both men then dropped the metal objects and began to fight hand-to-hand, with Muniz, the taller man, holding Cervantes-Pavon around his neck. Somosa then saw Cervantes-Pavon remove the saw from his waist underneath his shirt and stab Muniz once. Thereafter, both men ran outside. According to Somosa, Muniz started the fight.

The State predominantly cross-examined Somosa with two statements he had previously given to police. In those statements, Somosa reported, among other things, that he did not see the stabbing, Muniz and Cervantes-Pavon had engaged in a fist fight the week before over a broom, the fight occurred in Muniz's work area, and the two men were wrestling when Muniz was stabbed. Somosa expressed dissatisfaction with his prior statements, which were recorded in English, claiming the police "forc[ed] him to say things that [he] did not say" because the officer "spoke more English than Spanish," and Somosa told him he "wasn't understanding."

Cervantes-Pavon also testified through an interpreter. He stated his problems with Muniz started when Muniz snatched a broom from him and continued when he attempted to tell his boss about the incident. Muniz continued to verbally assault Cervantes-Pavon by using homophobic slurs and threatening to kill him. On August 13, Muniz threatened him throughout the day, including with a pipe. According to Cervantes-Pavon, he also picked up a pipe to defend himself, but Muniz struck him in the stomach and jaw. He lost possession of the pipe, Muniz dropped his pipe, and Muniz held him around the neck, strangling him. Cervantes-Pavon stated he grabbed his saw and stabbed Muniz once in an attempt to stop him.

Cervantes-Pavon argued he was entitled to immunity because he was in his place of business, was not at fault in bringing about the conflict, and he had a reasonable fear of imminent death or bodily harm. He contended he picked up the pipe to defend himself and was unsuccessful, as he was injured. Cervantes-Pavon asserted Muniz, the larger man, wrapped his arm around Cervantes-Pavon's neck, and Cervantes-Pavon stabbed Muniz in order to be able to extricate himself from the situation. Cervantes-Pavon pointed to the prior incidents between the two men as contributing to his reasonable fear of death or bodily harm.

The State argued the issue was a "clear question of fact" regarding self-defense, noting Cervantes-Pavon stabbed Muniz when Muniz was unarmed. The State contended the evidence presented did not rise to a preponderance of the evidence that Cervantes-Pavon acted in self-defense.

The circuit court denied Cervantes-Pavon's motion. The court noted the Act grants immunity if a movant proves the factors by a preponderance of the evidence. The circuit court then determined:

> Based upon the testimony presented today I deny the defendant's request for immunity based upon the Protection of Persons and Property Act. The intent of the Act is for defensive not offensive protections. There must be an absence of aggression. The testimony that has been presented today is that the boss Mr. Evans had told both of them to cut it out, that there had been a mutual confrontation. Both the defendant and the victim had discarded the tools according to Mr. Somosa and at the time the victim was stabbed the victim was not armed and that the witness believed that the victim and defendant were merely wrestling.[1]
>
> The issue of self-defense presents itself as a jury question. I am denying your motion. I do not believe the testimony rises to a level beyond a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution. I'll note your exception to my ruling.

After a three-day jury trial, Cervantes-Pavon was convicted of murder, and the circuit court sentenced him to 30 years' imprisonment. Cervantes-Pavon appealed, challenging the circuit court's denial of immunity because the circuit judge applied the wrong legal standard and reached the wrong conclusion. The court of appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR. We granted Cervantes-Pavon's petition for a writ of certiorari to review the decision.

---

[1] Although our review today is limited primarily to legal issues, we note that this characterization of Somosa's testimony is not supported by the record. Somosa never stated he believed the parties were "merely wrestling." Rather, he acknowledged he told authorities in a previous statement that Muniz and Cervantes-Pavon began wrestling after the pipes were discarded and that they were wrestling when Muniz was stabbed. Somosa never opined on the level of combat this wrestling presented in his prior statement, and he testified during the immunity hearing that Muniz's arms were around Cervantes-Pavon's neck when the two men were fighting hand-to-hand.

ISSUE

Did the court of appeals err in affirming the circuit court's denial of immunity under the Act?

STANDARD OF REVIEW

Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard. *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016). This Court reviews an immunity determination for abuse of discretion. *Id*. at 45, 791 S.E.2d at 151. A circuit court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. *Id*. n.4. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. *Id*. Section 16-11-440(C) provides the movant has no duty to retreat if, at the time of the attack, he was in a place where he has a legal right to be.

DISCUSSION

Cervantes-Pavon first argues the circuit court erred in denying him immunity under the Act by applying the wrong legal standard. He contends the court required him to prove his immunity "beyond a preponderance of the evidence," which warrants reversal. Cervantes-Pavon further asserts that, viewing the evidence presented under the proper standard, he should have been granted immunity. He argues he was not at fault in bringing about the difficulty, had no duty to retreat in his place of business, and feared losing his life or imminent serious injury because Muniz was choking him.

The State responds, contending first the circuit court merely misspoke in stating the evidence did not rise beyond a preponderance. The State further argues

the circuit court did not abuse its discretion in denying immunity because Cervantes-Pavon was the armed initial aggressor against an unarmed Muniz in mutual combat. The State notes Somosa testified that Cervantes-Pavon became angry with Muniz's comments, armed himself with a pipe and saw, and engaged in deadly combat with Muniz. According to the State, even if Cervantes-Pavon was not the aggressor, the combat was at least mutual, which makes a plea of self-defense unavailable. The State argues the fact that Muniz was unarmed when Cervantes-Pavon stabbed him is sufficient by itself to uphold the denial of immunity, citing *Manning*. The State contends Cervantes-Pavon did not have a reasonable fear of death or great bodily injury because he was not harmed during his prior fight with Muniz, had refused Muniz's invitations to fight previously, and testimony demonstrated the two were merely wrestling when the stabbing occurred.

In denying immunity, the circuit court relied on the fact that Muniz was not armed when Cervantes-Pavon stabbed him. The State relies on our decision in *Manning* to argue this is sufficient to uphold the court's decision. While we did ultimately affirm a denial of immunity in *Manning* and noted the victim was unarmed, the issue before us was only whether the court of appeals erred in requiring the trial court to conduct a complete testimonial evidentiary hearing before ruling on immunity. *See Manning*, 418 S.C. at 43, 791 S.E.2d at 150. Moreover, *Manning* is distinguishable because there was no contact between the victim and the defendant in that case, whereas here, Cervantes-Pavon alleged Muniz was strangling him. *See id*. at 45, 791 S.E.2d at 151. Further still, both parties here were armed with metal pipes at the outset of the fight that ultimately resulted in the stabbing, removing it from the realm of their past encounters that ended with no serious injuries. Accordingly, while the fact a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity, as the State contends. Similarly, the fact a defendant armed himself does not, in and of itself, make him the aggressor in a given confrontation. *See Jones*, 416 S.C. 283, 786 S.E.2d 132 (affirming a circuit court's grant of immunity where movant armed herself with a knife for protection before victim grabbed and shook her).

We next turn to the circuit court's finding that the immunity issue presented a jury question. The Act requires the circuit court to determine whether a movant is entitled to immunity. *See State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination). Some cases in which a defendant seeks immunity under the Act may present a "quintessential jury question" regarding self-defense. Such was the case

in *Curry*, where the circuit court denied immunity[2] because testimony of the victim's and defendant's witness varied substantially, the defendant testified he pulled a gun because he believed victim was lunging at him but the evidence showed victim was shot six times in the back, and defendant told investigators he "blacked out" during the shooting. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265. But just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act. Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go to trial, and the issue of self-defense may—depending upon the evidence presented at trial—be presented to the trial jury.

We believe the circuit court's immunity ruling was controlled by multiple errors of law[3], and combined with the court's erroneous characterization of Somosa's testimony, this amounted to an abuse of discretion. While the State contends there is evidence from the immunity hearing to support the court's ruling, we are unable to discern a legally correct basis on which the court relied. For example, the circuit court correctly noted that a movant must demonstrate an absence of aggression, but the record contains no evidence that Cervantes-Pavon initiated the fight. The issue of mutual combat presents a closer question. However, it is not clear this was a basis for the ruling, as the court merely noted there had been a "mutual confrontation" and gave no further factual findings or conclusions of law on this issue.[4] The circuit court appears to have based its ruling on the findings that the parties had discarded

---

[2] The defendant in *Curry* moved for immunity under the Act at the directed verdict stage. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265.

[3] We also note the court's error in stating the Act required Cervantes-Pavon to prove he was entitled to immunity "beyond" a preponderance of the evidence, instead of "by" a preponderance of the evidence. While we readily understand the court may have simply misspoken given its correct recitation of the standard immediately before the erroneous statement, this is one of several errors of law that contribute to our ultimate conclusion.

[4] While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve.

their metal objects, Cervantes-Pavon was armed while Muniz was not, and the two men were merely wrestling when the stabbing occurred. Because these were erroneous bases on which to deny immunity, we reverse the circuit court's decision on this issue and remand for a new hearing.

To be clear, we are not ordering a new trial, only a new hearing to determine whether Cervantes-Pavon is entitled to immunity under the Act. In addition, although the State cited to trial testimony to support the court's rulings in its brief, we agree with our sister state of Georgia that, "while the trial court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013). Consequently, we have limited our review to the evidence presented at the immunity hearing. Likewise, the circuit court is to rely only upon evidence presented at the new hearing on remand.

REVERSED AND REMANDED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Paul E. Short, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Virginia L. Marshall and Todd W. Marshall,
Respondents,

v.

Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC, Georgia Roane, M.D., and Rheumatology Associates, P.A., Petitioners.

Appellate Case No. 2016-001936

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27873
Heard May 1, 2018 – Filed March 27, 2019

AFFIRMED AS MODIFIED

Robert H. Hood, James Bernard Hood and Deborah Harrison Sheffield, all of Hood Law Firm, of Charleston, Stephen L. Brown, D. Jay Davis, Jr., James E. Scott IV, Perry M Buckner IV, and Russell G. Hines, all of Young Clement Rivers, LLP, of Charleston, all for Petitioners.

Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, of Columbia and J. Edward Bell III, of Bell Legal Group, and C. Carter Elliott, Jr., of Elliott & Phelan, both of Georgetown, all for Respondents.

JUSTICE HEARN: Virginia Marshall and her husband filed a medical malpractice claim against Dr. Kenneth Dodds (a nephrologist), Dr. Georgia Roane (a rheumatologist), and their respective practices, alleging negligent misdiagnosis against both Dodds and Roane. The circuit court granted Dodds' and Roane's motions for summary judgment, ruling these actions were barred by the statute of repose. The Marshalls appealed, and the court of appeals reversed and remanded the cases for trial. *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016). We affirm as modified, holding the Marshalls' claims for negligent acts that occurred within the six-year repose period are timely.

FACTS/PROCEDURAL HISTORY

In February 2010, Marshall was diagnosed with Waldenstrom's macroglobulinemia, also known as lymphoplasmacytic lymphoma, a rare type of blood cancer. Before this diagnosis, she was treated by Dodds and Roane, who the Marshalls contend committed malpractice by failing to diagnose her cancer. The Marshalls filed suit against Dodds on February 7, 2011, and against Roane on April 8, 2011. The actions were consolidated for discovery, and both doctors moved for summary judgment, contending the claims were time-barred by the six-year statute of repose.

A. Treatment by Dodds

Dodds first evaluated Marshall on July 16, 1999, two days after she was admitted to Roper Hospital for a persistent high fever. During her hospitalization, testing revealed elevated sedimentation rates (a measure of the speed at which red blood cells in a tube of blood fall to the bottom of the tube) and proteinuria (elevated protein levels in the urine). On September 15, 2004, Marshall returned to Dodds for the first time since the 1999 visit, and during this appointment, Dodds reviewed a 24-hour urine test performed a month prior that revealed urine protein levels of 3.5 grams per day. This level of protein established Marshall had proteinuria at that time. Dodds did not order further testing during the September 2004 visit but instead started Marshall on Diovan, which is typically prescribed for hypertension. When

Marshall returned to Dodds two months later, she had no complaints, and Dodds ordered no additional testing. Thereafter, on February 9, 2005, Dodds treated Marshall again, ordering a 24-hour urine test which revealed proteinuria, with protein levels of 3.1 grams per day. Despite her protein levels remaining elevated, Dodds did not order further testing. Marshall's final visit to Dodds was on September 5, 2005, where another 24-hour urine test revealed her urine protein levels had increased to 4.2 grams per day. However, Dodds did not administer any further testing. The Marshalls' actions against Dodds are based solely upon Dodds' alleged negligence on and after February 9, 2005. They allege Dodds was negligent in failing to recognize the signs and symptoms of proteinuria and in failing to order proper testing—a urine protein electrophoresis test (UPEP) and a serum protein electrophoresis test (SPEP)—which allegedly would have revealed the type of protein in Marshall's urine was cancerous. Apparently cognizant of the statute of repose, the Marshalls did not allege any negligence for acts that occurred more than six years from when the complaint was filed on February 7, 2011.

Dodds moved for summary judgment, asserting any alleged negligence first occurred more than six years prior to the Marshalls filing suit. Citing deposition testimony from the Marshalls' own experts, Dodds contended the claims were time-barred. One expert, Barry L. Singer, M.D., a specialist in oncology, testified Marshall likely had blood cancer in 2004, which would have been revealed then if a UPEP or SPEP test had been performed. He further testified that in 2004, Dodds negligently failed to diagnose the cancerous protein in Marshall's urine.

Another expert retained by the Marshalls, nephrologist Robert G. Luke, M.D., noted in his deposition and pre-suit affidavit the following standard of care for nephrologists:

1. If significant proteinuria is present, the nephrologist must determine the cause, which requires the nephrologist to order proper testing to rule out certain causes, including cancerous protein.

2. If routine tests—such as a 24-hour urine test—have inconsistent results, the nephrologist has a duty to order UPEP and SPEP tests to determine whether the protein is cancerous.

In his deposition, Luke reviewed Marshall's course of treatment with Dodds spanning four office visits from September 15, 2004, through September 15, 2005. During that time, Marshall took the prescription medication Diovan, as prescribed

by Dodds, which should have lowered her protein levels. Despite taking this medication, all her 24-hour urine tests showed proteinuria. As a result, Luke testified that Dodds negligently failed to properly monitor Marshall's response to Diovan because otherwise, he would have realized there was no change in her urine protein levels. Further, Luke opined Dodds was negligent in failing to recognize that the continued proteinuria could constitute cancer and failing to order UPEP and SPEP testing, which would have revealed cancerous protein.

Luke also opined Dodds was negligent in scheduling a six-month follow-up appointment after Marshall's September 2005 visit when a one-month check-up was warranted. However, Marshall did not go to her follow-up appointment. Luke then testified, "I have said ten times [in this deposition] that during the first two visits, [Dodds] was outside the standard of care without following up for the diagnosis of the proteinuria. The other business about responding to Diovan is a relatively minor element of the whole thing." Additionally, Luke noted, "I said the first two visits were enough information for further studies to be done, and I think that's the main evidence." The "first two visits" referred to by Luke were in September and November of 2004, both over six years before the actions were commenced against Dodds on February 7, 2011. However, Luke opined Dodds should have revisited his diagnosis in February and September of 2005 after Marshall's protein levels remained elevated. These alleged acts of negligence occurred within the repose period.

The circuit court concluded Dodds' alleged misdiagnoses after February 7, 2005, were a continuation of his previous alleged misdiagnoses and were not distinct acts of negligence that could serve as new trigger points of the statute of repose. The court found the statute of repose applicable to the Marshalls' claims against Dodds began to run prior to February 7, 2005, and therefore, time-barred their claims.

B. Treatment by Roane

Dr. Roane began treating Marshall in 2000 and in that year diagnosed Marshall with mixed connective tissue disease (MCTD), a rare autoimmune disease. This diagnosis was based in part upon laboratory studies evincing low complements (the complement system helps the body defend against infection) and the aforementioned elevated sedimentation rates and proteinuria. Roane treated Marshall for MCTD until 2007.

Beginning in 2000, Roane prescribed a drug named Imuran and increased the dosage in April 2001 and again in February 2002. During the time Marshall took Imuran, there were no changes in her sedimentation rates or proteinuria, but the complement levels improved. In August 2003, Roane stopped prescribing Imuran and prescribed CellCept. During the 2002-2003 time frame, Roane ordered no testing other than 24-hour urine tests and the same lab studies. On April 29, 2005, Marshall visited Roane with symptoms including elevated sedimentation rates, enlarged lymph nodes, proteinuria, fever, and chills. Five months later, on September 29, 2005, Roane ordered another 24-hour urine test which revealed Marshall's proteinuria had increased from 3.5 grams per day to 4.2 grams per day over the prior year. However, despite this increase in protein levels when the opposite should have occurred if Marshall actually suffered from MCTD, Roane did not order further testing. Thereafter, Marshall returned to Roane in 2006 and ceased treatment a year later. The Marshalls claim Roane negligently misdiagnosed her cancer as MCTD and negligently failed to order additional testing after the proteinuria was still present at the September 29, 2005 office visit. The Marshalls did not commence their actions against Roane until April 8, 2011, and accordingly, the claims against Roane are only based on conduct that occurred within six years.

To pursue their claims against Roane, the Marshalls retained Thomas M. Zizic, M.D., an expert in the field of rheumatology. In his deposition, Zizic was particularly critical of Roane's failure to reassess Marshall's condition beginning in 2002 and 2003, especially since her proteinuria, high sedimentation rate, and low complements had not changed even with an increased dosage of Imuran. Specifically, he testified, "I'm very critical at '03. I'm critical at the point where she goes to maximal Imuran in February of '02, 150 milligrams, and still things don't change in terms of the laboratory parameters we've been talking about." Zizic further testified that when the maximal dosage of Imuran was being administered in 2002 and "it still hasn't changed, then at that point you've got to re-workup the patient." Zizic testified this "re-workup" would consist of almost a dozen tests comprising a "complete antibody profile," as well as the aforementioned UPEP and SPEP tests, which if administered in 2003 would have revealed Marshall was not suffering from MCTD.

Additionally, Zizic testified that Roane breached the standard of care as far back as 2002 and 2003 by not engaging in a "reconsideration of where [Roane] was in the treatment of the patient" and that if the "re-workup" had been done in August 2003, Marshall's blood cancer would have been discovered. Finally, Zizic testified

that from 2004 until treatment ended in 2007, Roane should have administered yearly laboratory studies until reaching a definitive diagnosis of Marshall's blood cancer. While Zizic was critical of acts prior to 2005, the failure to administer these tests constituted alleged negligence within six years from when the Marshalls commenced their actions against Roane on April 8, 2011.

The Marshalls focus solely upon the negligent conduct of Roane occurring on and after April 29, 2005, contending separate repose periods were triggered by each misdiagnosis when the standard of care required Roane to reconsider the original diagnosis. The circuit court disagreed, concluding the sole trigger date of the six-year statute of repose was prior to April 8, 2005, and because the actions against Roane were not commenced until April 8, 2011, the claims were time-barred.

C. Court of Appeals' Decision

The Marshalls appealed both rulings, and the court of appeals reversed, holding even though there was evidence Dodds and Roane negligently misdiagnosed Marshall's condition before February 7, 2005, and April 8, 2005, respectively, a new statute of repose period was triggered by each subsequent misdiagnosis because each act was a separate occurrence of negligence. *Marshall*, 417 S.C. at 205, 789 S.E.2d at 92. We granted Dodds' and Roane's petitions for a writ of certiorari to review the court of appeals' decision.

ISSUE

In a medical malpractice case where evidence exists that doctors breached the standard of care on multiple occasions, does the statute of repose begin to run with each breach, resulting in recent breaches being actionable even though older ones are barred?

STANDARD OF REVIEW

An appellate court employs the same lens as the trial court in reviewing a grant of summary judgment. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). While the facts are viewed in the light most favorable to the nonmoving party, the interpretation of a statute is a question of law decided without any deference to the court below. *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 547, 819 S.E.2d 124, 126 (2018); *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

DISCUSSION

The statute of repose for medical malpractice claims requires an action to be commenced within "six years from date of occurrence." S.C. Code Ann. § 15-3-545(A) (2005). Subsection 15-3-545(A) provides:

> [T]o recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, *not to exceed six years from date of occurrence*, or as tolled by this section.

(emphasis added). The six-year period "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339–40, 380 S.E.2d 821, 821 (1989). Initially, the statute clearly sets forth the triggering date as the "date of occurrence." However, we note what this provision does not say—the date of the *first* occurrence. Thus, we must determine whether the Marshalls can pursue a negligence claim based on acts occurring within the six-year repose period when older acts occurred outside the time period. To address this question, we must first discuss the import of the continuous treatment rule and continuous tort doctrine, as we have previously rejected both doctrines in the medical malpractice context. *See Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). Dodds and Roane contend the court of appeals' decision breathes new life into these two rules previously rejected by this Court.[1] However, the Marshalls assert both doctrines are irrelevant to the inquiry before us. We agree with the Marshalls that neither doctrine is invoked by our decision today.

[1] The dissent likewise posits that we have resurrected these two doctrines today, a characterization of our opinion with which we disagree. Our differences stem from how we view the text of our statute of repose, and we maintain our rejection of judicially engrafted tolling principles.

In *Harrison*, we recognized,

> The so-called "continuous treatment" rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Id. at 135, 580 S.E.2d at 112. At its core, the continuous treatment rule is a tolling mechanism, permitting plaintiffs to recover for malpractice which otherwise would be outside the limitations period because the clock does not begin until treatment has ended. Accordingly, the continuous treatment rule acts as a "last occurrence rule," where the plaintiff can bootstrap prior, untimely acts of alleged negligence to ones brought within the limitations period provided the conduct is part of a continuous course of treatment. *See Caughell v. Grp. Health Co-op. of Puget Sound*, 876 P.2d 898, 905 (Wash. 1994) (noting under the continuous treatment rule the statute of limitations begins to run on "the *last* negligent act committed by the defendant"). Many courts across the country have dealt with the continuous treatment rule, but because it is a tolling mechanism, it typically appears in a statute of limitations analysis. *See, e.g.*, *Parr v. Rosenthal*, 57 N.E.3d 947, 959 (Mass. 2016) (adopting the continuous treatment rule and expressly holding it "does not affect the statute of repose…"); *Forshey v. Jackson*, 671 S.E.2d 748, 756 (W.Va. 2008) (citing 61 Am.Jur.2d *Physicians, Surgeons, Etc.* § 299, at 400 (2002) ("Under the 'continuous treatment' doctrine, the running of the statute of limitations is tolled when a course of treatment that includes wrongful acts or omissions has run continuously and is related to the original condition or complaint."); *Hill v. Fitzgerald*, 501 A.2d 27, 31–32 (Md. 1985) (holding while the doctrine applies to toll the limitations period for an undiscoverable medical malpractice claim, "[t]he rule does not, however, govern the date upon which the actionable negligence occurred"). Because our focus today is to ascertain only when the negligence occurred, the doctrine is not implicated.

Accordingly, we find persuasive a decision by Maryland's highest court, which like us, has rejected the continuous treatment rule. In *Jones v. Speed*, 577 A.2d 64 (Md. 1990), Jones and her husband filed a claim against her doctor, alleging failure to properly diagnosis her condition. The doctor moved for summary judgment, contending any negligence occurred outside the five-year limitations

period. The issue was whether Jones could recover for subsequent malpractice if the initial negligence, but not the subsequent acts, was untimely. *Id.* at 67. The doctor presented the same argument that Dodds makes here—that because any negligence first occurred on the initial visit and outside the limitations period, claims based on all subsequent acts of malpractice were untimely. *Id.* at 66–67. As the court noted,

> The theory of the plaintiffs is rather straightforward. They do not retreat from their assertion that [the doctor] was negligent on 17 July 1978 when he failed to order a CAT scan or other radiographic studies and failed to diagnose the presence of Mrs. Jones's brain tumor. They argue, however, that each time Mrs. Jones returned to [the doctor] with unabated complaints of her chronic symptoms, the doctor had a duty to reconsider his original diagnosis, and to obtain additional diagnostic studies. The breach of that duty, they urge, constitutes negligence.

Id. at 67. The doctor argued that to allow Jones to recover for acts that occurred within the limitations period would be to revive the continuous treatment rule, which had previously been rejected in Maryland. *Id.* However, the court disagreed, holding Jones could proceed on the theory that subsequent acts of negligence within the limitations period were recoverable, and in doing so, the court rejected the notion that its decision disturbed the legislature's intent that the limitations period act as an outer limit of liability. Instead, the court noted, "if the plaintiffs are correct, they will be entitled to recover damages *only* for acts of negligence occurring within five years of the filing of their claim." *Id.* at 68. Further, "[c]laims for damages occurring at an earlier time, and resulting from earlier acts of negligence on the part of the defendant, are effectively barred." *Id.* Notwithstanding this conclusion, the court reaffirmed that "[t]he continuous course of treatment rule remains lifeless in Maryland."[2] *Id.*

---

[2] The dissent contends *Jones* is inapposite because it addresses Maryland's statute of limitations. We agree that the policy reasons supporting statutes of limitation and repose are different but believe this distinction is the proverbial red-herring in this case. The court's analysis in *Jones* is not premised on tolling principles applicable in a statute of limitations analysis, as the date of occurrence did not change based on when treatment ended or when the plaintiff's injury was discovered. Instead, the court's decision stood for the proposition that tortfeasors cannot cherry-pick untimely acts to shield themselves from every subsequent act of malpractice, whether or not those acts are within the limitation period. This rationale is entirely consistent with the text of our statute of repose, which is not limited to the first

Dodds and Roane rely on Georgia case law where in *Kaminer*, the Georgia Supreme Court effectively adopted the "first occurrence rule" in interpreting its statute of repose in a misdiagnosis case.[3] *Kaminer v. Canas*, 653 S.E.2d 691, 692 (Ga. 2007). In a 4-3 decision containing a spirited dissent, the majority asserted the date of the initial negligence starts the clock even for subsequent acts of malpractice. *Id.* at 695. The dissent's analysis mirrors that of Maryland's highest court, namely that a patient may pursue a claim for separate acts of medical malpractice that occurred within the limitations period. *Id.* at 698–99 (Hunstein, J., dissenting). While we disagree with the court of appeals that our statute of repose is materially different than Georgia's provision, and modify that portion of the court's opinion accordingly, we nevertheless believe the dissent in *Kaminer* is more persuasive, as it noted,

> [I]t is possible for a doctor to misdiagnose a patient more than once in the course of treatment, where new or more severe symptoms would, under the relevant standard of care, require a reassessment of the initial diagnosis. The Court of Appeals did not, as the majority contends, effectively revive the continuing treatment doctrine, which effects an *extension* of the statute of limitation with respect to the *initial* diagnosis. *See Young v. Williams,* 274 Ga. 845, 846, 560 S.E.2d 690 (2002). Instead, the Court of Appeals simply held that a *new* act of negligence, with its concomitant *new* injury, carries with it a *new* limitations period.

Id. at 698 (Hunstein, J., dissenting). We find this reasoning better comports with the General Assembly's codification of the statute of repose. We readily acknowledge the policy behind section 15-3-545(A) as "an **absolute time limit beyond which liability no longer exists and is not tolled for any reason** because to do so would upset the economic balance struck by the legislative body." *Harrison*, 354 S.C. at 138, 580 S.E.2d at 113–14 (emphasis in original). Moreover, our decision honors the purpose behind the statute of repose, in part, that "[w]hen causes of action are

---

occurrence. Finally, we repeat, the continuous treatment rule and its companion the continuing tort doctrine are of no moment here because our precedent categorically bars recovery for acts which occurred outside the repose period. *See Harrison*, 354 S.C. at 141, 580 S.E.2d at 116.

[3] Ga. Code Ann. § 9-3-71(b) (2007) provides:

> (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission." *Langley v. Pierce*, 313 S.C. 401, 404–05, 438 S.E.2d 242, 243–44 (1993) (quoting *Kissel v. Rosenbaum*, 579 N.E2d 1322, 1326–28 (Ind. Ct. App. 1991). We fail to see the logic in preventing an aggrieved party from seeking redress for acts that occurred *within the repose period*. It can hardly be said that the acts of negligence alleged here that occurred within the repose period constitute "long-forgotten" acts or omissions.

Our decision also does not implicate any tolling principles, as only claims based on acts within the repose period are actionable. We find it wholly inconsistent to immunize serial malpractice under the guise that the legislature intended an "absolute time limit" when the acts for which the Marshalls seek to recover fall within such time constraints. *See State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 78, 777 S.E.2d 176, 199–200 (2015) (noting that fixing the deadlines on the date of the first instance of misconduct when there is repeated wrongdoing would allow "parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated") (quoting *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 880 (2013)).

To hold otherwise would require us to rewrite our statute of repose and superimpose "first occurrence" into section 15-3-545(A) rather than merely interpret what the provision actually says—"the date of occurrence." Like the court of appeals, we reject the notion that our statute of repose requires us to aggregate multiple acts of malpractice as part of a "first diagnosis rule." Neither the statute's language nor our precedent sanctions such a result. Accordingly, we turn to whether the Marshalls have presented facts to survive a motion for summary judgment based on their claims of alleged medical malpractice which occurred on and after February 7, 2005, as to Dodds, and April 8, 2005, as to Roane.

Regarding Dodds, the record contains expert testimony that Dodds was negligent in failing to recognize that the continued use of medication designed to reduce protein levels was not effective, as revealed by tests in February and September of 2005—within the six-year repose period. Therefore, the Marshalls contend Dodds should have reconsidered the original diagnosis. At the least, the Marshalls' experts noted that if she had undergone the UPEP and SPEP tests, which would have cost approximately $100, Dodds would have realized the protein was

cancerous. Concerning Roane, there is evidence in the record to support the Marshalls' claims that further testing was necessary, especially after Marshall exhibited chills, fever, enlarged lymph nodes, proteinuria, and elevated sedimentation rates on her April 29, 2005 visit. These symptoms, as well as the continued lack of improvement in her protein levels despite medication, are sufficient to defeat summary judgment. Because section 15-3-545(A) is triggered on the "date of occurrence," the Marshalls claims are not barred.

CONCLUSION

Section 15-3-545(A) begins to run after each occurrence, which is consistent with our rejection of the continuous treatment rule and the continuous tort doctrine. Accordingly, we affirm as modified.

AFFIRMED AS MODIFIED.

BEATTY, C.J., and FEW, J., concur. JAMES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE JAMES: I respectfully dissent. I believe the majority has applied the continuous treatment rule and the continuing tort doctrine to the Marshalls' claims against Petitioners Dodds and Roane. We specifically refused to adopt either rule in *Harrison v. Bevilacqua*, 354 S.C. 129, 138-39, 580 S.E.2d 109, 114 (2003). The majority's holding undercuts the clear policy statement made by the General Assembly when it enacted the statute of repose. Many would applaud the alteration of the statute of repose to permit this action to proceed, but such alteration is within the province of the General Assembly, not the courts. Therefore, I would reverse the court of appeals and reinstate the circuit court's grant of summary judgment to Dodds and Roane.

I.

A. Section 15-3-545(A)

Our statute of repose provides:

> [A]ny action to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, *not to exceed six years from date of occurrence*, or as tolled by this section.

S.C. Code Ann. § 15-3-545(A) (2005) (emphasis added). The six-year period "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989).

In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), we quoted with approval the following from *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326-28 (Ind. Ct. App. 1991):

> A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a

> statute of limitation. *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).
>
> . . . .
>
> Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.
>
> . . . .
>
> Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Langley, 313 S.C. at 404-05, 438 S.E.2d at 243-44.

B. The Continuous Treatment Rule and the Continuing Tort Doctrine

In *Harrison v. Bevilacqua*, the patient at the center of the litigation was James McLean, a diagnosed schizophrenic who was judicially deemed incompetent. He was involuntarily committed to Crafts-Farrow State Hospital (operated by the Department of Mental Health) in 1982 and was not discharged until March 6, 1995. In the action commenced on his behalf on June 1, 1995, the plaintiff alleged the Department of Mental Health was negligent because McLean (1) had been confined in the hospital too long, (2) should not have resided in a locked ward, and (3) had been improperly medicated. Specifically, the plaintiff alleged McLean should have been released as early as October 1983. The plaintiff also alleged the Department failed to follow its own Level of Care reports which, at various times, recommended McLean's transfer to an open ward or a community facility or his home. The

Department claimed the action was barred by our six-year statute of repose found in subsection 15-3-545(A). The plaintiff first claimed the continuous treatment rule and the continuing tort doctrine mandated that the time to commence the action did not begin to run until the date of McLean's discharge, March 6, 1995. Alternatively, the plaintiff contended the five-year insanity tolling provision found in section 15-3-40(2)(a) of the South Carolina Code (2005) allowed recovery for any acts of negligence occurring five years before the date the action was commenced.

In *Harrison*, we considered and specifically rejected the adoption of both the "continuous treatment rule" and the "continuing tort doctrine." 354 S.C. at 138-39, 580 S.E.2d at 114. We recited the continuous treatment rule as follows:

> [I]f the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Id. at 135, 580 S.E.2d at 112 (quoting *Preer v. Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

The doctrine of continuing tort applies "where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time." *Id.* at 139, 580 S.E.2d at 114 (quoting *Mears v. Gulfstream Aerospace Corp.*, 484 S.E.2d 659, 664 (Ga. Ct. App. 1997)). Under this theory, a limitations period does not begin to run "until such time as the continued tortious act producing injury is eliminated." *Id.* (quoting *Mears*, 484 S.E.2d at 664).

Our reason for rejecting both doctrines was to honor the public policy rationale behind the legislature's adoption of both the statute of limitations and the statute of repose, the latter of which reflects the establishment of "an absolute time limit beyond which liability no longer exists." *Id*. at 138, 580 S.E.2d at 113-14 (quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 243).

In finding the Marshalls' claims to be barred by the statute of repose, the circuit court relied in part upon Georgia case law holding that when there is a medical negligence claim arising from an alleged failure to diagnose and treat a condition over a course of time, the statute of repose begins to run on the date of the first negligent act. *See Kaminer v. Canas*, 653 S.E.2d 691, 697 (Ga. 2007); *Howell v. Zottoli*, 691 S.E.2d 564, 567 (Ga. Ct. App. 2010).

The Georgia statute of limitations and statute of repose are found in section 9-3-71 of the Georgia Code and provide as follows:

> (a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
>
> (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought *more than five years after the date on which the negligent or wrongful act or omission occurred.*

Ga. Code Ann. § 9-3-71(a)-(b) (2007) (emphasis added). The Georgia statute of repose, subsection 9-3-71(b), is markedly similar to our statute of repose.

The Supreme Court of Georgia, like this Court, has refused to adopt the continuous treatment rule. *See Young v. Williams*, 560 S.E.2d 690, 693 (Ga. 2002) (refusing to adopt the continuous treatment rule in medical malpractice cases involving allegations of misdiagnosis). In *Harrison*, we relied upon Georgia precedent in rejecting the continuing tort doctrine. 354 S.C. at 139, 580 S.E.2d at 114 (providing the continuing tort doctrine is inapplicable to medical malpractice cases since the doctrine "would nullify the intent of the General Assembly that, after five years, no medical malpractice action could be brought, even when a disability attaches to toll the running of the statute because the statute of repose abolishes any action five years after the negligent or wrongful act or omission" (quoting *Charter Peachford Behavioral Health Sys. v. Kohout*, 504 S.E.2d 514, 521 (Ga. Ct. App. 1998))).

In light of our holding in *Harrison*, I am constrained to agree with the rationale employed by the Supreme Court of Georgia in *Kaminer*. The *Kaminer* Court held that in cases of misdiagnosis and resulting mistreatment, when the disease existed

on the date of initial misdiagnosis, the statute of repose begins to run on the date of the initial misdiagnosis. 653 S.E.2d at 697. In *Kaminer*, the plaintiff was born with a rare heart defect for which he underwent surgery when he was two months old. During and after the procedure, the plaintiff received transfusions of whole blood and blood products. The plaintiff then exhibited signs of pediatric AIDS, but the defendant doctors attributed these signs to the plaintiff's heart condition. The plaintiff began treatment with one defendant doctor at age seven and with the other defendant doctor at age nine. After being treated by one defendant doctor for nine years and by another defendant doctor for seven years, the plaintiff was finally given an HIV test at age seventeen. The test showed he had AIDS, and it was uncontroverted he contracted the AIDS virus from the blood transfusions beginning at age two months. Although the defendant doctors serially misdiagnosed the plaintiff's AIDS each time the plaintiff presented to them for treatment, the *Kaminer* Court concluded the plaintiff's claims were barred by the statute of repose, holding that in cases of misdiagnosis and mistreatment, the statute of repose begins to run on the date of the initial misdiagnosis. *Id.* In so holding, the *Kaminer* Court recognized that even though the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act by the same medical care provider cannot serve as the new starting point of the statute of repose where the negligent act is the repeated failure to diagnose and treat a continuing condition. *Id.*[4] I agree with this reasoning, as it comports with the public policy considerations upon which our statute of repose is based.

The majority gives short shrift to our conclusions in *Harrison* and simply concludes that the continuous treatment rule and the continuing tort doctrine do not apply to the Marshalls' claims. I certainly agree that neither doctrine applies; neither doctrine can ever apply, as we explicitly rejected both in *Harrison*. The majority has essentially adopted a refined version of the continuous treatment rule and the continuing tort doctrine. In my view, the majority has "run afoul of the absolute

[4] The Supreme Court of Georgia has held that its interpretation of the Georgia statute of repose in *Kaminer* does not apply in a medical malpractice case founded upon allegations of failure to warn, treat, and advise a plaintiff patient when she presented for treatment of new medical conditions not related to the condition for which she first sought treatment. *See Schramm v. Lyon*, 673 S.E.2d 241, 242-43 (Ga. 2009).

limitations policy the Legislature has clearly set" in our statute of repose. *See Harrison*, 354 S.C. at 138, 580 S.E.2d at 114.

The majority relies upon the rationale of the Court of Appeals of Maryland in *Jones v. Speed*[5] in support of its conclusion that the statute of repose is not violated when a patient seeks recovery only for those acts of negligence occurring within the statute of repose. The majority's reliance upon *Jones* is misplaced. In *Jones*, the Court of Appeals considered the provisions of section 5-109(a)(1) of the Maryland Code when considering a factual scenario very similar to the one at bar and concluded the plaintiff's action could proceed, in spite of Maryland's rejection of the continuous treatment rule. 577 A.2d at 70. Section 5-109(a)(1) is markedly different from our statute of repose and provides in pertinent part:

> (a) An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in § 3-2A-01 of this article, shall be filed within the earlier of:
>
> (1) Five years of the time the injury was committed[.]

A recitation of the facts and legal analysis employed by the Court of Appeals of Maryland in *Jones* is not necessary, as the Court clarified in *Anderson v. United States*, 46 A.3d 426, 443 (Md. 2012), that section 5-109(a)(1) was a statute of limitations and not a statute of repose. Citing *Jones* and other prior decisions as examples, the *Anderson* Court acknowledged it had previously characterized section 5-109(a)(1) as both a statute of limitations and a statute of repose. *Id.* The *Anderson* Court explained in great detail the difference between the two and concluded section 5-109(a)(1) was "a statute of limitations because its trigger is an 'injury' which . . . means when the negligent act is coupled with some harm, rather than being dependent on some action independent of the injury." *Id.* I see no logic in applying another state's analysis of its statute of limitations to our analysis of our statute of repose, especially when the statutes are worded so differently and when the public policy considerations prompting the adoption of a statute of repose are different from the public policy considerations prompting the adoption of a statute of limitations. "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a

[5] 577 A.2d 64 (Md. 1990).

legislatively determined period of time." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing *Langley*, 313 S.C. at 403-04, 438 S.E.2d at 243).

The policy behind our statute of repose is that at some point, the liability of a negligent defendant has to be extinguished, even if the plaintiff has not discovered her injury by the expiration of the repose period. Statutes of repose are designed to cut off liability after a period of years, sometimes bringing harsh results. As we noted in *Capco*, "[s]tatutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists."[6] *Id.* at 142, 628 S.E.2d at 41 (quoting *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 54 n.6 (Minn. 2005)). However, we cannot ignore the policy considerations behind the statute, and "we are not at liberty to rewrite the statute[]." *Id.* at 144, 628 S.E.2d at 42.

The approach sponsored by the majority allows the Marshalls to move forward the dates of treatment for which they want to sue, even though, according to their experts, virtually identical acts of alleged negligence occurred on all pertinent treatment dates before and after the crucial dates of February 7, 2005 (Dodds) and April 8, 2005 (Roane). This approach belies the reasoning behind our refusal to adopt the continuous treatment rule and the continuing tort doctrine in *Harrison* and nullifies the public policy rationale behind our General Assembly's adoption of the statute of repose. As I stated when I began, many would applaud the alteration of the statute of repose necessary to permit the instant action to proceed; however, such alteration is within the province of the General Assembly, not the courts. "[T]his court does not make the law, but it does enforce it, in sorrow over its rigor in some instances." *Hillhouse v. Jennings*, 60 S.C. 373, 380, 38 S.E. 599, 601-02 (1901).

II.

As to the Marshalls' claims against Dodds, (1) Dodds allegedly first negligently failed to diagnose Ms. Marshall's cancer in 2004 and (2) any subsequent misdiagnoses by Dodds were a continuation of Dodds' previous alleged misdiagnoses. I would hold any misdiagnoses by Dodds on or after February 7, 2005, did not trigger any new repose periods as to Dodds. As to the Marshalls'

---

[6] In *Hoffman*, we rejected equal protection and due process challenges to the statute of repose. 298 S.C. at 342, 380 S.E.2d at 823.

claims against Roane, Roane allegedly first breached the standard of care as early as 2002, 2003, or 2004 (1) by failing to perform appropriate testing, (2) by not reconsidering Ms. Marshall's lack of progress under the prescribed course of treatment, and (3) by failing to administer yearly laboratory studies until reaching a definitive diagnosis of Ms. Marshall's blood cancer. I would hold any misdiagnoses by Roane on or after April 8, 2005, did not trigger any new repose periods as to Roane. Therefore, I would reverse the court of appeals and reinstate the circuit court's grant of summary judgment to Dodds and Roane.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Meredith Huffman, Respondent,

v.

Sunshine Recycling, LLC and Aiken Electric Cooperative, Inc., Petitioners.

Appellate Case No. 2016-002080

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Orangeburg County
Maité Murphy, Circuit Court Judge

Opinion No. 27874
Heard March 6, 2018 – Filed March 27, 2019

AFFIRMED IN PART AND REVERSED IN PART

Breon C. M. Walker and Jessica Ann Waller, both of Gallivan, White & Boyd, PA; and Pope D. Johnson III, all of Columbia, for Petitioners.

James Todd Rutherford, of The Rutherford Law Firm, LLC; and Robert Fredrick Goings and Jessica Lee

Gooding, both of Goings Law Firm, LLC, all of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: Following her arrest for receiving stolen goods, Meredith Huffman filed a complaint against the Orangeburg County Sheriff's Department (the Sheriff's Department), Sunshine Recycling, LLC (Sunshine), and Aiken Electric Cooperative, Inc. (Aiken), for negligence, false imprisonment, and malicious prosecution. Huffman later settled her claims against the Sheriff's Department, and the two parties filed a stipulation dismissing the Sheriff's Department from the action.[1] The trial court granted summary judgment in favor of Sunshine and Aiken. The court of appeals reversed. *Huffman v. Sunshine Recycling, LLC*, 417 S.C. 514, 790 S.E.2d 401 (Ct. App. 2016). Both Sunshine and Aiken filed petitions for writs of certiorari to review the court of appeals' opinion. We granted the petitions, and now reverse the court of appeals' opinion as to Sunshine and affirm as to Aiken.

I. Factual and Procedural History

On May 16, 2010, seventy pounds of copper wire and fifty pounds of aluminum tie wire were stolen from Aiken. In total, the stolen wire was worth $463.19.

The following day, Mark Goss, Aiken's Loss Control and Safety Coordinator, and Deputy Maurice Huggins viewed a surveillance video from Aiken that depicted an unidentified black male removing copper and aluminum wiring from Aiken trucks. An Aiken employee also reported seeing a white Ford truck driving out of Aiken's parking lot around the time of the theft. As was Goss's typical practice when

---

[1] Based on this dismissal, only the false imprisonment and malicious prosecution causes of action remained as to Aiken and Sunshine.

Aiken suffered a loss of this nature, Goss checked with local metal recyclers to see if the thief tried to sell the copper and aluminum.

Goss's search led him to Sunshine. Goss testified he arrived at Sunshine the morning following the theft and only two customers had come in. Goss told Sunshine's owner, Joseph Rich, he was looking for stolen copper and aluminum wire believed to have been taken by a black male in a white Ford pickup truck. Rich took Goss into the metal drop-off area to look for the stolen items. Goss identified Aiken's materials which were comingled with other metals. Rich, who claimed to speak Spanish, spoke to an unidentified Spanish-speaking employee working in the metal drop-off area. According to Goss, the Spanish-speaking employee informed Rich a white woman had brought the copper and aluminum wire to Sunshine.[2] However, Rich later testified in his deposition the Spanish-speaking employee informed him "that the *first person* in the warehouse that was selling materials in that group was a white woman." (emphasis added.) There is no indication Rich asked the employee about any subsequent customers.

Officer Ashley Aldridge of the Sheriff's Department arrived at Sunshine to investigate the theft. Goss informed Aldridge he believed a black male in a white Ford truck was involved and told Aldridge what Aiken's surveillance video showed, that an Aiken employee saw a white truck leaving Aiken at the time of the robbery, and what the Spanish-speaking employee at Sunshine reported. Rich told Aldridge and Goss they were welcome to view the receipts documenting the amounts paid to customers who sold metal to Sunshine that morning and the time-stamped video footage of customers waiting at the payment window. Aldridge viewed the video, saw Huffman waiting for her payment of $53, and obtained a copy of Huffman's receipt. Rich also informed Aldridge that Sunshine had a video of the metal drop-off area and, although there were issues with the video playback that morning, he would provide Goss and the Sheriff's Department with a copy.

The next day, May 18, 2010, Officer James Ethridge visited Sunshine to photograph the metal identified by Goss as stolen from Aiken. Ethridge testified that when he arrived at Sunshine, Sunshine employees had already pulled copies of

---

[2] Goss testified that, "in the metal industry, it's not uncommon for girlfriends and wives to bring metal in and drop them off. It happens all the time."

Huffman's invoice, receipt, and driver's license. While at Sunshine, Ethridge spoke with Rich, who reiterated the employees working in the drop-off area had informed him Huffman was the individual who brought in the items and she was driving a red truck. Rich also stated he had not yet obtained a copy of the video showing the metal drop-off area but would contact Sunshine's security servicer to request a copy of the video for Ethridge.

Officer Ethridge's report regarding the incident stated Goss contacted Ethridge and claimed he (Goss) had spoken with Huffman at Sunshine on May 17, 2010, while she was waiting to get paid for "the items that she had just brought in." According to the report, Goss also told Ethridge, "He viewed the items after [Huffman] left and identified them as" belonging to Aiken. In his deposition, Goss denied ever speaking to Huffman.

Over the course of the next few days, Goss repeatedly contacted Officer Ethridge to ask how the case was progressing and whether an arrest had been made. While still waiting to view the video, Officer Ethridge contacted a local magistrate and obtained a warrant for Huffman's arrest for receiving stolen goods[3] based on the information he obtained from Aiken and Sunshine. After learning of the warrant for her arrest, Huffman voluntarily went to the Sheriff's Department and spoke with Ethridge. In her statement, Huffman advised Ethridge she sold metal to Sunshine on the day in question but it was not stolen; rather, it was salvaged from a mobile home belonging to Huffman and her husband that the couple were in the process of tearing down. Huffman provided Ethridge with metal similar to what she took to Sunshine and pictures of the mobile home from which she removed the metal.

Following their discussion, Officer Ethridge arrested Huffman, placed her in handcuffs, and transported her to the detention center where she was required to change into a prison jumpsuit and wait for the next bond hearing. Huffman was not allowed to call to check on her children, who were home alone,[4] and was required

---

[3] Receiving stolen goods is a "misdemeanor triable in magistrate[']s court or municipal court . . . if the value of the property is two thousand dollars or less." S.C. Code Ann. § 16-13-180 (2015).

[4] At the time in question, Huffman's two children were approximately six and sixteen

to appear at the bond hearing handcuffed and shackled. Huffman obtained a personal recognizance bond, and was released at approximately 5:00 p.m.

After Huffman's arrest and release—more than seventeen days after the theft from Aiken—Officer Ethridge finally viewed the video of Huffman dropping off her items at Sunshine. The video depicted Huffman removing some copper wiring from her red truck that resembled the copper taken from Aiken, and some aluminum siding, not wire. Around the same time, Goss received a copy of the video from Sunshine. Goss testified the video "clearly" showed Huffman unloading "a little small pile of copper," then a black male in a white Ford truck coming in *after* Huffman and unloading "massive [] quantities of copper and aluminum out of his truck." Rich never viewed the video. Ethridge informed Rich "that after viewing the video[,] it d[id] not show [Huffman] with the same items that w[ere] taken. Due to these facts there is not enough evidence to support this case." Days later, the black male in question was identified as Eugene James. The Sheriff's Department located James, he admitted to stealing the wire from Aiken, and pled guilty.

Huffman filed a complaint against the Sheriff's Department, Aiken, and Sunshine asserting negligence, false imprisonment, and malicious prosecution. The trial court granted summary judgment as to both Sunshine and Aiken and Huffman appealed.

The court of appeals reversed the trial court's rulings and remanded the case to the lower court. *Huffman*, 417 S.C. at 532, 790 S.E.2d at 411. As to Huffman's false imprisonment claims, the court of appeals found there were genuine factual issues material to the unlawfulness of Huffman's arrest and the complicity of both Sunshine and Aiken in her arrest. *Id.* at 523, 709 S.E.2d at 406. The court of appeals found the trial court erred in granting summary judgment to Sunshine and Aiken on Huffman's malicious prosecution claims because there were genuine factual issues material to probable cause as well as the complicity of Sunshine and Aiken in

proceeding with the charge of receiving stolen goods against Huffman. *Id.* at 530, 709 S.E.2d at 410.

---

years old.

Following the denial of Sunshine and Aiken's petition for rehearing, we granted Sunshine's and Aiken's separate petitions for writs of certiorari to review the court of appeals' decision.

II. Standard of Review

This Court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is properly granted when, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Woodson*, 406 S.C. at 528, 753 S.E.2d at 434.

"In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party . . . [who] is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt.*, 381 S.C. 326, 329–31, 673 S.E.2d 801, 802–03 (2009).

III. Discussion

A. Sunshine

Sunshine's argument is twofold. First, Sunshine claims the court of appeals erred in imposing an unprecedented duty on a witness to perform its own investigation before assisting law enforcement with their criminal investigation. Sunshine claims such a duty has never been recognized in this state. Second, Sunshine contends the court of appeals erred in reversing the trial court's grant of summary judgment as to Huffman's false imprisonment and malicious prosecution claims. Specifically, Sunshine maintains that, even if we were to find a witness has a duty to investigate, the court of appeals erred in concluding Huffman offered sufficient evidence to survive Sunshine's motion for summary judgment. We agree and, therefore, reverse the court of appeals' decision as to Sunshine.

1. Creation of an unprecedented duty

False imprisonment consists of depriving a person of his or her liberty without lawful justification. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006). "To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Id.* "The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest." *Id.* at 441, 629 S.E.2d at 651. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." *Id.*

To sustain an action for malicious prosecution, "a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law*, 368 S.C. at 435, 629 S.E.2d at 648. "Malice is defined as 'the deliberate intentional doing of a wrongful act without just cause or excuse.'" *Eaves v. Broad River Elec. Co-Op., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (quoting *Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419–20 (1961)). This Court has found:

> Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. Malice also may proceed from an ill-regulated mind which is *not sufficiently cautious* before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be *implied* in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be *inferred* from a lack of probable cause to institute the prosecution.

Law, 368 S.C. at 437, 629 S.E.2d at 649 (emphasis added). It is the plaintiff's burden

"to show that the prosecuting person or entity lacked probable cause to pursue a criminal or civil action against him." *Id.* at 436, 629 S.E.2d at 649.

The notion that a private individual may face potential liability for false imprisonment is recognized in South Carolina. *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944) ("The charge of false imprisonment is not confined to the party who unlawfully seizes or restrains another, but it likewise extends to any person who may cause, instigate or procure an unlawful arrest."). As this Court definitively stated in *Wingate*, it is "well settled that where a private person induces an officer by request, direction or command to unlawfully arrest another, he is liable for false imprisonment." *Id.*; *see Whitmire v. Publix Theatre Corp.*, 164 S.C. 487, 162 S.E. 753 (1931) (finding evidence justified the jury's conclusion theater representative's actions caused plaintiff's arrest by requesting police return plaintiff to the theater for an investigation); *Falls v. Palmetto Power & Light Co.*, 117 S.C. 327, 109 S.E. 93 (1921) (holding sufficient evidence from which the jury could conclude power company's general manager acted unreasonably and without ordinary prudence in calling for the arrest of plaintiff who sold similar goods as those stolen from power company).

Although the court of appeals referenced the key language in *Wingate*, its decision effectively expanded the holding to impose a duty on witnesses and victims to investigate and analyze evidence in the same manner as law enforcement. We do not interpret *Wingate*, or its progeny, to require a witness or victim to conduct their own investigation into the offense committed in order to verify the information they provide. To interpret *Wingate* in such a manner would improperly subject witnesses and victims, who act in good faith when assisting law enforcement, to civil liability. *See Wingate*, 204 S.C. at 528, 30 S.E.2d at 311 ("Those who honestly seek the enforcement of the law . . . and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages." (citation omitted)).

Other jurisdictions have categorically refused to accept such a standard on public policy grounds and we chose to follow suit. *See, e.g.*, *Brice v. Nkaru*, 220 F.3d 233, 238–39 (4th Cir. 2000) ("[W]e are aware of no authority supporting the novel proposition that a witness, by honestly providing information to a law enforcement official, may be held responsible for the official's execution of his

independent duty to investigate."); *Lawson v. Kroger Co.*, 997 F.2d 214, 217 (6th Cir. 1993) (stating a reporting victim "may not provide false information with an improper motive, but is not required to investigate offenses against it, nor must it volunteer all information within its knowledge . . . , though it may not withhold information for an improper purpose").

In sum, we find the court of appeals' decision goes too far and risks chilling public cooperation with law enforcement investigations. *See Wingate*, 204 S.C. at 528, 30 S.E. 2d at 311 ("Where a person has information or knowledge that the law has been violated, he not only has a right, but frequently it is his duty, to communicate such information or facts to the proper officer so as to give such officer the opportunity, if in his judgment it is proper to do so, to take whatever steps may be necessary to apprehend the offender."); *Elletson v. Dixie Home Stores*, 231 S.C. 565, 573, 99 S.E.2d 382, 388 (1957) ("[I]t is to be remembered that, while individuals are to be protected against rash and baseless prosecutions, the public interests demand that courts shall not frown upon honest efforts made in attempts to bring the guilty to justice . . . ."); *Turner v. Mellon*, 257 P.2d 15, 17–18 (Cal. 1953) ("The victims of crimes should not be held to the responsibility of guarantors of the accuracy of their identifications . . . . A view contrary to that . . . would, we think, inevitably tend to discourage a private citizen from imparting information of a tentative, honest belief to the police and, hence, would contravene the public interest which must control."), *abrogated on other grounds by Hagberg v. Cal. Fed. Bank FSB*, 81 P.3d 244 (Cal. 2004).

This is not to say any individual who acts in bad faith or knowingly reports incorrect information to law enforcement cannot be held liable for false imprisonment or malicious prosecution. *See Reaves v. Westinghouse Elec. Corp.*, 683 F. Supp. 521, 525 (D. Md. 1988) ("The tort of false arrest is predicated upon *knowing* misconduct."). There is a distinct difference between an individual who, in good faith, reports mistaken or inaccurate information and an individual who *purposely* provides law enforcement with *knowingly false information*. *See Brice*, 220 F.3d at 238 ("[T]he critical question is whether the witness provided the police with his honest or good faith belief of the facts."). However, we find punishing an individual who mistakenly identifies a criminal suspect or unwittingly provides what is later discovered to be incorrect information in a criminal investigation serves no purpose. *See Jones v. Autry*, 105 F. Supp. 2d 559, 561 (S.D. Miss. 2000) (noting "the law allows wide latitude for honest action" by parties who assist law

enforcement); *Shires v. Cobb*, 534 P.2d 188, 189 (Or. 1975) ("[P]ublic policy will protect the victim of a crime who, in good faith and without malice, identifies another as the perpetrator of the crime, although that identification may, in fact, be mistaken.").

With the above framework in mind, we turn to Sunshine's argument that the court of appeals erred in concluding Huffman presented the scintilla of evidence required to survive Sunshine's motion for summary judgment on Huffman's claims for false imprisonment and malicious prosecution.

2. False imprisonment

The court of appeals noted Officer Ethridge testified that when he visited Sunshine, "*[t]hey* were guaranteeing that the metal that [Huffman] brought in was the metal -- [Goss] was saying this is 100 percent our metal from [Aiken] and the [receipt] was showing the weights, everything, was . . . everything was looking the same." *Huffman*, 417 S.C. at 529, 790 S.E.2d at 409. The court of appeals concluded this statement demonstrated Sunshine's "complicity" in Huffman's arrest because it was "unclear whether 'they' referred to Rich as Sunshine's agent; or Goss, as Aiken's agent; or both. Therefore, a jury could reasonably infer that either or both men made this representation." *Id.* Further, the court of appeals pointed to Rich's admission that he never asked his Spanish-speaking employee to identify the second or third person who dropped off metal on the morning in question, and Officer Ethridge's testimony that he was "told by Sunshine" that the video of the metal drop-off area showed Huffman dropping off the stolen items as further evidence of Sunshine's culpability. *Id.* at 529–30, 790 S.E.2d at 409–10.

We find the court of appeals misapprehended the record and misapplied the summary judgment standard in coming to its conclusion. Reviewing the entirety of Officer Ethridge's deposition testimony reveals the passage quoted by the court of appeals was simply a clarification by Ethridge that *Goss* was speaking the entire time. Accordingly, we find the court of appeals erred in morphing Ethridge's testimony into a genuine issue of material fact from which a jury could reasonably infer that Rich, as Sunshine's agent, made the representation. *See Shuler v. Tuomey Reg'l Med. Ctr.*, 313 S.C. 225, 227, 437 S.E.2d 128, 130 (Ct. App. 1993) ("It is not sufficient [to defeat a motion for summary judgment] that one create an inference which is *not reasonable* or an issue of fact that is *not genuine*." (emphasis added)).

Additionally, even if the court of appeals was correct regarding the alleged ambiguity in Ethridge's "they" testimony, neither Ethridge's testimony nor the other pieces of evidence pointed to by the court of appeals support Huffman's claim for false imprisonment because there is nothing in the record that provides a reasonable inference that Sunshine or any of its employees induced, caused, instigated, or procured Huffman's arrest simply by cooperating with law enforcement and relaying information Sunshine believed to be true at the time.

3. Malicious prosecution

Sunshine argues the court of appeals misapprehended the law and facts presented in the record regarding Huffman's malicious prosecution claim. Additionally, Sunshine contends Huffman failed to present evidence Sunshine or any of its employees acted with malice in reporting information to and cooperating with law enforcement. We agree.

Pointing to the same evidence discussed above in relation to Huffman's false imprisonment claim, the court of appeals found that, in the light most favorable to Huffman, there was at least a scintilla of evidence from which a jury could reasonably conclude (1) Officer Ethridge lacked probable cause to pursue a warrant for Huffman's arrest, and (2) this pursuit was at the insistence of *both* Sunshine and Aiken.

We find the court of appeals erred in reversing the trial court's grant of Sunshine's motion for summary judgment as to Huffman's malicious prosecution claim because Huffman failed to present a scintilla of evidence that Sunshine instituted the proceedings against her or that the proceedings were instituted at the instance of Sunshine. *See Elletson*, 231 S.C. at 573, 99 S.E.2d at 388 (noting that while individuals are to be protected against "rash and baseless prosecutions," public interests require that courts not punish honest efforts "to bring the guilty to justice"). Accordingly, we reverse the court of appeals' decision as to Sunshine.

B. Aiken

Aiken's primary challenge to the court of appeals' decision is that Huffman's claims should be barred as a matter of law pursuant to article I, section 24 of the South Carolina Constitution (the Victims' Bill of Rights) and section 16-3-1505 of

the South Carolina Code (2015).[5] Additionally, Aiken contends the court of appeals erred in relying on inadmissible evidence in reaching its decision. However, unlike Sunshine, Aiken does not directly challenge the sufficiency of the evidence presented by Huffman. We disagree with Aiken's contentions and affirm the court of appeals' decision as to Aiken.

1. The Victims' Bill of Rights and § 16-3-1505 of the South Carolina Code

Aiken argues the court of appeals overlooked, and failed to address and consider whether Huffman's claims were barred by the Victims' Bill of Rights and section 16-3-1505. Aiken argues this oversight is contrary to the court of appeals' duties and responsibilities under Rule 220(b), SCACR,[6] and "waters down the rights guaranteed to victims of crime by the Constitution and statutes regarding victims of crime."

The Victims' Bill of Rights provides that victims of crimes have the right to:

---

[5] Aiken raised this argument in its brief to the court of appeals; however, the court chose not to address the matter pursuant to *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds."). *Huffman*, 471 S.C. at 518 n.1, 790 S.E.2d at 404 n.1. Aiken raised the issue again in its petition for rehearing; however, the petition was denied.

[6] "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220(b), SCACR.

> (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process, and informed of the victim's constitutional right, provided by statute;
>
> . . . .
>
> (6) be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process;
>
> (7) confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition;
>
> . . . .
>
> (11) a reasonable disposition and prompt and final conclusion of the case . . . .

S.C. Const. art. I, § 24(A)(1), (6), (7), (11).

Section 16-3-1505 encompasses the legislative intent portion of the South Carolina Victim and Witness Service Act and states, in relevant part:

> In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and

> protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants . . . .

S.C. Code Ann. § 16-3-1505.

As to the portion of Aiken's argument regarding the Victims' Bill of Rights, this Court has never interpreted the Victims' Bill of Rights as providing a defense to victims accused of false imprisonment or malicious prosecution, and Aiken has failed to cite any case law in support of its contention. *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253 n.3, 734 S.E.2d 161, 164 n.3 (2012) (stating an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). Additionally, the incidents in which the appellate courts of this state have referred to the Victims' Bill of Rights have all occurred in a criminal setting, not a civil one as in the instant case. *See Ex parte Littlefield*, 343 S.C. 212, 221, 540 S.E.2d 81, 85 (2000) (finding once a criminal case has been resolved and the defendant sentenced, the victim loses his or her status under the Victims' Bill of Rights); *Reed v. Becka*, 333 S.C. 676, 683–84, 511 S.E.2d 396, 400 (Ct. App. 1999) (holding solicitors' prosecutorial discretion is not contracted or limited by the victims' rights laws).

As to Aiken's claim regarding section 16-3-1505, we have recognized the primary purpose of the statute is to ensure "victims are informed of their rights and any alternative means that might be available to them if the criminal prosecution is unable to meet their needs." *Ex parte Littlefield*, 434 S.C. at 218, 540 S.E.2d at 84. Further, we have stated that "while the legislative intent section indicates the General Assembly recognizes the importance of the people's civic duty to cooperate with law enforcement, *there is no indication the General Assembly intended this concept to extend outside the context of the ongoing criminal proceeding at the heart of this statute*." *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 246, 786 S.E.2d 385, 388 (2015) (emphasis added). Accordingly, we find Aiken's arguments to be without merit.

2. Inadmissible evidence

Aiken argues the court of appeals' decision was improperly based on inadmissible evidence. Specifically, Aiken argues Officer Aldridge's testimony that

Goss "imposed a sense of urgency on the case" when communicating with law enforcement was inadmissible opinion testimony by a lay witness in violation of Rule 701 of the South Carolina Rules of Evidence. Further, Aiken notes the only other evidence relied on by the court of appeals came from Officer Ethridge who testified Goss "wanted to know what I was going to do [with the case]. Was I going to arrest [Huffman], lock her up . . ." and stated Goss was "calling [Ethridge] just like any other victim would."

Rule 701 states, if a witness is testifying as a lay witness

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

Rule 701, SCRE.

During Officer Aldridge's deposition, the following exchange occurred between Aiken's attorney and Aldridge:

> Q: Do you recall anything that you haven't told us that was said by Mr. Goss of Aiken Electric?
>
> A: The one thing that does stick out in my head as far as my interaction with Mr. Goss was that he imposed a sense of urgency on the case.
>
> Q: All right.
>
> A: I'm not exactly sure what had been done or what conversation had transpired before my interactions with him, but there did seem, to be a sense of urgency on his part to get some resolution of the incident.
>
> . . . .
>
> Q: Is it unusual for victims of crimes to want to see law enforcement

take action?

A: Generally, victims are more pressed than not to have law enforcement resolve their issues.

Q: And I would assume law enforcement has to do it at its own pace, but sometimes victims are frustrated by the delay and the process of taking a case forward?

A: Right. Right. And it's completely common.

During Officer Ethridge's deposition, he testified Goss called him "several times about moving further with the case" and "want[ed] to know what [Ethridge] was doing [in regards to the case]." Ethridge further testified:

> I didn't have the video at that point in time so [Goss] wanted to know what I was going to do. Was I going to try and arrest [Huffman], lock her up, you know, speaking with a magistrate, what to do. On the 21st, that's what I did is [sic] I went and spoke with a magistrate.
>
> Q: Did you feel that [Goss] was urging you to prosecute [Huffman]?
>
> . . . .
>
> A: He was calling me. He was calling me just like any other victim would. You know, what are you doing? You know, what -- I mean, he had people he had to answer to . . . .
>
> . . . .
>
> Q: Okay. And the reason he was calling you is because he wanted–
>
> A: To know what I was going to do with the case. Was I . . . going to arrest [Huffman].

We find Officer Aldridge's and Officer Ethridge's testimony was based on their perceptions of their interactions with Goss; did not require special knowledge, skill, experience, or training; and did not stray into the realm of expert testimony.

See Rule 701, SCRE (noting lay witness testimony is limited to the witness's opinions or inferences which are rationally based on the witness's perception, and that do not require "special knowledge, skill, experience or training"). Accordingly, we find the court of appeals did not err in relying on or basing a portion of its ruling on the two officers' testimony.

IV. Conclusion

Based on the foregoing, we reverse the court of appeals' decision as to Sunshine and affirm the opinion as to Aiken.

AFFIRMED IN PART AND REVERSED IN PART.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Loflin and Leslie Loflin, Appellants,

v.

BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants,

Of which Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2016-001840

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5633
Heard January 16, 2019 – Filed March 27, 2019

REVERSED AND REMANDED

Daniel A. Speights and Algernon Gibson Solomons, III, both of Speights & Solomons, LLC, of Hampton, for Appellants.

George Hamlin O'Kelley, III, of Buist, Byars & Taylor, LLC, of Mt. Pleasant, for Respondent.

GEATHERS, J.: In this property dispute, Appellants William and Leslie Loflin challenge the circuit court's order granting summary judgment to Respondent Chicago Title Insurance Company (Chicago Title) on Appellants' breach of contract claim against Chicago Title. Appellants argue the circuit court erred by (1) concluding that the coverage of the title insurance policy issued by Chicago Title (the Policy) was limited to defects of record; (2) finding there were no defects in Appellants' title when the Policy was issued; and (3) concluding that their breach of contract claim against Chicago Title was barred by the statute of limitations. We reverse and remand for a trial on the merits.

FACTS/PROCEDURAL HISTORY

On September 26, 2000, Appellants purchased an interest in Defendant BMP Development, LP (Balsam), f/k/a Balsam Mountain Preserve, Limited Partnership, which was formed for the purpose of developing Balsam Mountain Preserve as a residential community in Jackson County, North Carolina.[1] Balsam Mountain Company, LLC served as the general partner, and Appellants were two of several limited partners. Although Balsam was a foreign entity, its promoter, Chaffin/Light Associates, had its principal place of business in Beaufort County and was doing business in Beaufort County "and throughout South Carolina." Chaffin/Light had previously formed and managed three developments in Beaufort County, i.e., Spring Island, Callawassie, and Chechessee Creek Club, and, through Balsam Mountain Preserve, sought to replicate Spring Island "on higher ground."

Balsam arranged for each "Founding Limited Partner" to enter into a Reservation Agreement to acquire the right to select and purchase a lot, a/k/a Homestead, in the development. Appellants entered into their Reservation Agreement on October 19, 2001, acquiring the right to purchase Balsam Mountain Preserve Homestead Number 108 (Lot 108), which was located on a mountainside in Phase I of the development. At that time, Lot 108 was not staked, but Balsam advised Appellants that the lot was approximately 1.9 acres and was circumnavigated by Balsam Mountain Preserve Road (Preserve Road).

On February 15, 2002, Appellants purchased Lot 108 for $495,000. On February 19, 2002, Chicago Title issued the Policy to insure Appellants' title to Lot 108, described in the Policy as "containing 1.837 acres, as shown on that certain plat

[1] Appellants paid $350,000 for their limited partnership interest.

dated the 10th day of December, 2001, prepared by Herron Land Surveying, certified by James Randy Herron, Professional Land Surveyor (N.C. #3202), and recorded in the Jackson County Records in Plat Cabinet 11 at Slide 383."[2] According to Appellants, the December 10, 2001 plat indicated Lot 108 was 1.837 acres and represented Preserve Road as circumnavigating the lot, and the recorded deed to Lot 108 incorporated this plat.[3]

In 2006, Balsam's President and CEO, Craig Lehman, advised Appellants that the size of Lot 108 was merely 1.4 acres and that Preserve Road traversed the property rather than circumnavigating it. At that time, Lehman was not aware that there was a second, unrecorded plat of Lot 108 reflecting the features described by Lehman or that the plat was prepared before the 2002 closing on the lot.[4] Appellants believed from their discussions with Balsam that the second plat had been prepared sometime after the 2002 closing and that the Preserve Road encroachment was an "after purchase encroachment."

The unrecorded plat, which is dated February 6, 2002, indicates in dotted lines those boundary lines from the "original configuration" that bordered the acreage being shaved off the lot for a newly configured lot. The 2002 plat noted the date for the original configuration as December 10, 2001. The plat also shows Preserve Road traversing the northeastern part of the original configuration and a small area of the northwestern corner of the original configuration. Randy Herron, who had prepared the December 10, 2001 plat, also prepared the 2002 plat. He indicated that he delivered the 2002 plat to Balsam on or about February 6, 2002.

After notifying Appellants of their reduced acreage, Balsam asked Appellants to sign a quitclaim deed reflecting the reduced size of Lot 108 and Preserve Road running through the original configuration of the lot as shown in the second plat, but Appellants refused to do so. From that point forward, Balsam and its successor in interest, Balsam Mountain Group, LLC (BMG),[5] exercised control over Preserve Road and the .437 acres in dispute. In early 2012, Appellants discovered that the

---

[2] According to Appellants, they refinanced their purchase of the lot in 2004 and again in 2006, and Chicago Title issued a policy insuring title to the lot on both occasions. According to Chicago Title, the latter policies were lenders' policies.

[3] A copy of this plat, along with two additional plats dated February 6, 2002, and April 8, 2014, respectively, is included in the exhibit at the end of this opinion.

[4] Lehman was not employed with Balsam until 2005.

[5] According to Appellants, BMG purchased Balsam Mountain Preserve in October 2011, "at some point after it was sold at foreclosure."

unrecorded plat had been prepared for Balsam two weeks before the 2002 closing and, thus, Preserve Road actually encroached on the original configuration of Lot 108 before the closing.[6]

Subsequently, Appellants submitted a claim to Chicago Title based on Balsam's and BMG's reliance on the unrecorded plat, but Chicago Title denied the claim on August 21, 2012. On July 18, 2013, Appellants filed this action against Balsam Mountain Preserve Community Association (the Association), Chicago Title, and Counsellor Title Agency, Inc. (Counsellor Title), Chicago Title's agent, asserting causes of action for Continuous Trespass (as to the Association), Encroachment (as to the Association), and Breach of Contract (as to Chicago Title and Counsellor Title). Appellants also commissioned a new survey to confirm that Preserve Road traversed the 1.837 acres they purchased. This plat is dated April 8, 2014, and shows Preserve Road traveling in a winding path from the southeastern part of the lot to its northeastern part but not touching on the northwestern corner as shown in the February 2002 unrecorded plat.

On April 14, 2014, Appellants filed an Amended Complaint substituting Balsam for the Association, alleging that Balsam was the alter-ego of the Association, and adding the following causes of action against Balsam: Fraud, Negligent Misrepresentation, Rescission, Breach of Contract, "Breach of Contract with Fraudulent Intent Accompanied by Fraudulent Act," Breach of Fiduciary Duty, Conversion, Unjust Enrichment, Accounting, and Indemnification. As to Chicago Title and Counsellor Title, the Amended Complaint asserted causes of action for Breach of Contract and Negligence.

On April 16, 2014, Chicago Title filed a motion to dismiss the Amended Complaint, which the Honorable Ernest Kinard denied on September 3, 2014. Counsellor Title also filed a motion to dismiss the Amended Complaint on April 28, 2014, and Judge Kinard denied this motion as well. Subsequently, Chicago Title filed its Answer and asserted several affirmative defenses, including the statute of limitations.

Appellants then filed their Second Amended Complaint on January 6, 2015, to (1) add as defendants BMG and the law firm of Coward, Hicks & Siler, P.A. and J.K. Coward, Jr., the attorney who represented Appellants in their purchase of Lot 108 (collectively, the Coward defendants), and (2) add a cause of action for

[6] In 2016, BMG paved Preserve Road over Appellants' objections.

Successor Liability (as to BMG) and numerous causes of action against the Coward defendants.

In July 2015, Chicago Title and Counsellor Title filed their respective motions for summary judgment, and Appellants filed a Third Amended Complaint on August 5, 2015. The Honorable Carmen Mullen conducted a hearing on Chicago Title's summary judgment motion on June 13, 2016. Judge Mullen issued an order granting the motion on August 25, 2016.

In her order, Judge Mullen concluded (1) Appellants' action was barred by the three-year statute of limitations set forth in section 15-3-530 of the South Carolina Code; (2) the February 2002 plat did not have any impact on Appellants' title to Lot 108 because this plat was unrecorded and pursuant to North Carolina statutory law, "unrecorded interests in land are invalid against subsequent purchasers of property"; (3) none of the Policy's "Covered Title Risks" were triggered by Appellants' allegations or evidence; (4) no defects in title were in existence when Chicago Title issued the Policy; and (5) there was no evidence of any negligence on the part of Chicago Title because no title search would have revealed the second, unrecorded plat. This appeal followed.[7]

ISSUES ON APPEAL

1. Did the circuit court err by concluding that the Policy's coverage was limited to defects of record?

2. Did the circuit court err by finding there were no defects in title when the Policy was issued?

3. Did the circuit court err by concluding that the breach of contract claim against Chicago Title is barred by the statute of limitations?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the

[7] Appellants do not challenge summary judgment on their negligence cause of action against Chicago Title.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In determining whether any triable issues of fact exist, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009); *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

Further, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803; *see also Radcliffe v. S. Aviation Sch.*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946) ("A scintilla of evidence is *any material* evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." (emphasis in original) (quoting *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841, 849 (1944))); *Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935) (defining "scintilla" as the smallest trace). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.*

LAW/ANALYSIS

I. Scope of Coverage

Appellants assert the circuit court erred by concluding that the Policy's coverage was limited to defects of record. At oral argument, Chicago Title conceded this point, and we agree.

In its order, the circuit court concluded that the "unrecorded plat cannot create any encumbrance and cannot create any damages for [Appellants] by [Chicago Title] as it has no impact upon [Appellants'] title to their property." The circuit court also concluded,

> There is simply no breach by Chicago Title as [Appellants] received the title referenced in both their recorded deed and the [r]ecorded [p]lat referenced in that deed.
>
> None of the enumerated "Covered Title Risks" in the Policy are triggered by [Appellants'] allegations related to the unrecorded plat or by any evidence presented to this [c]ourt . . . .

We begin our analysis by referencing case law concerning the construction of insurance policies.

> Insurance policies are subject to the general rules of contract construction. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary, and popular meaning.

Pres. Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)).

> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Ambiguous or conflicting terms, however, must be construed liberally in favor of the insured and strictly against the insurer. It is a question of law for the court whether the language of a contract is ambiguous.

Id. (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628).

"Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title [that] are in existence at the time the

insured takes title." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981). "A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value." *Pres. Capital Consultants*, 406 S.C. at 316, 751 S.E.2d at 259 (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628). "The terms of individual insurance agreements can control the method of valuation, but the purpose of title insurance has been stated as seeking to place the insured in the position he thought he occupied when the policy was issued." *Id.* at 316, 751 S.E.2d at 259–60. "Generally, the measure of damages should 'compare the encumbered value of the entire tract of . . . land with what the value of the entire tract of land would be without any encumbrances.'" *Id.* at 316, 751 S.E.2d at 260 (alteration in original) (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628).

Here, the Policy lists the following pertinent "Covered Title Risks" if they affect the insured's title on the Policy Date:[8]

1. Someone else owns an interest in your title.

2. A document is not properly signed, sealed, acknowledged, or delivered.

3. Forgery, fraud, duress, incompetency, incapacity[,] or impersonation.

4. Defective recording of any document.

5. You do not have any legal right of access to and from the land.

6. There are restrictive covenants limiting your use of the land.

[8] The Policy defines "Title" as "the ownership of your interest in the land, as shown in Schedule A," and item 2 of Schedule A states, "Your interest in the land covered by this Policy is: Fee Simple and Easement" subject to a Deed of Trust for Lighthouse Community Bank in the amount of $250,000.00 and the matters shown in Schedule B, which lists exceptions from coverage, such as taxes for 2002 and subsequent years.

7. There is a lien on your title because of:

   • a mortgage or deed of trust

   • a judgment, tax, or special assessment

   • a charge by a homeowner's or condominium association

8. There are liens on your title, arising now or later, for labor or material furnished before the Policy Date—unless you agreed to pay for the labor and material.

9. Others have rights arising out of leases, contracts, or options.

10. Someone else has an easement on your land.

11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease[,] or to make a mortgage loan.

12. You are forced to remove your existing structure—other than a boundary wall or fence—because:

   • it extends on to adjoining land or on to any easement

   • it violates a restriction shown in Schedule B

   • it violates an existing zoning law

13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

14. Other defects, liens, or encumbrances.

Additionally, the Policy provides a definition for "Public Records": "title records that give constructive notice of matters affecting your title—according to the

state statutes where your land is located." This term appears in items 1 through 3 of the Policy's "Exclusions":

> 1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
> • land use
>
> • improvements on the land
>
> • land division
>
> • environmental protection
>
> This exclusion does not apply to violations or the enforcement of these matters [that] *appear in the public records* at Policy Date.
>
> . . .
>
> 2. The right to take the land by condemning it, *unless*:
>
> • a notice of exercising the right *appears in the public records* on the Policy Date.
>
> . . .
>
> 3. *Title Risks*:
>
> . . .
>
> • that are known to you, but not to us, on the Policy Date—*unless they appeared in the public records*

(emphases added).

First, if the term "Title Risks" in item 3 already excluded matters not in the public records, there would have been no need to add the phrase "unless they appeared in the public records." In other words, adding the phrase "unless they appeared in the public records" implicitly acknowledges that the risk may not appear in the public records. Therefore, there is a reasonable inference from the key language in item 3 that the term "title risk" includes matters that do not appear in the

public records. This lends context to the list of the fourteen Covered Title Risks. We also agree with Appellants' argument that nowhere in the Policy is there any language expressly stating the Policy generally excludes defects not appearing in the public records. Again, Chicago Title conceded this point at oral argument.

Further, Appellants assert that several of the listed Covered Title Risks applicable to this action are matters that are necessarily outside the public records. As to item 1, "Someone else owns an interest in your title," Appellants highlight the Policy's definition of "Title,"[9] which does not reference the public records. Appellants also connect item 1 to their circumstances by highlighting the conformity of their own commissioned survey with the February 2002 plat showing that the reality of their ownership interest is not represented by the December 2001 plat appearing in the public records. Appellants note (1) Balsam's and BMG's continued assertion of ownership of the land underlying the Preserve Road encroachment, (2) the mysterious destruction of steel posts Appellants had placed in the ground to assert their ownership of certain areas in accordance with the recorded plat, and (3) BMG's disregard of Appellants' requests to leave Preserve Road unpaved.

As to Item 3, "Forgery, fraud, duress, incompetency, incapacity[,] or impersonation," Appellants note that Balsam was held in default for failure to answer the Amended Complaint and, thus, Balsam effectively admitted that it defrauded Appellants. We also note this item covers incompetency, which would fit Appellants' allegation that Balsam recorded the wrong plat, i.e., the December 10, 2001 plat, when it should have recorded the February 6, 2002 plat.

In sum, the Policy's plain language clearly indicates that it covers certain matters that would not necessarily appear in the public records. Not only is there a notable absence of the phrase "public records" in the list of Covered Title Risks but also as a practical matter, multiple items in this list are not necessarily consistent with the recordation of any documents, such as adverse possession, fraud, incompetency, and impersonation. Further, the Policy includes a notable exception to certain excluded Title Risks for those matters "appear[ing] in the public records," implying that the term "Title Risks" includes certain matters not appearing in the public records.

Even if the Policy's terms were ambiguous as to coverage, Appellants have presented at least a scintilla of evidence establishing a genuine factual issue

[9] The Policy defines "Title" as "the ownership of your interest in the land . . . ." *See supra* n. 8.

concerning the parties' intent as to coverage of matters not appearing in the public records. *See* Rule 56(c), SCRCP (stating that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." (emphasis added)); *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. *Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties*. The determination of the parties' intent is then a question of fact." (emphasis added) (citations omitted)).

Appellants cite the following deposition testimony of Chicago Title's representative, Cynthia Baines:

> Q. Is Chicago's position that it does not provide coverage so long as the record title is correct?
>
> A. I would say that the coverage is governed by the terms and conditions of the policy[,] so there are possibly circumstances where there would be coverage for things that are not of record title . . . .

Baines gave an example of someone impersonating a landowner and purporting to convey the owner's land to an insured under the Policy. This example would likely fall within item 3 of the Covered Title Risks, "Forgery, fraud, duress, incompetency, incapacity[,] or *impersonation*." (emphasis added).

Appellants also cite to William Loflin's supplemental affidavit as relevant to the intent underlying the Policy's language. This affidavit states that when Mr. Loflin purchased the Policy, he did not intend for the Policy's coverage to be limited to matters of public record. *See Pres. Capital Consultants,* 406 S.C. at 316, 751 S.E.2d at 259 (holding that ambiguous or conflicting terms in an insurance policy "must be construed liberally in favor of the insured and strictly against the insurer" (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628)).

Based on the foregoing, the circuit court erred in concluding, as a matter of law, that the Policy's coverage was limited to defects of record.[10]

II. Existence of Defect

Appellants assert the circuit court erred by finding there were no defects in Appellants' title when the Policy was issued, which was February 19, 2002. We agree.

"Title insurance is unique in that it is retrospective, not prospective." *Firstland Vill. Assocs.*, 277 S.C. at 186, 284 S.E.2d at 583.

> The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.

Id. (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C. 1980)).

Here, Appellants state that the unrecorded plat reflecting the Preserve Road encroachment is dated February 6, 2002, and the surveyor who prepared this plat, Randy Herron, indicated he delivered the plat to Balsam on approximately the same date. Therefore, the plat's preparation and delivery to Balsam pre-date the Policy's February 19, 2002 issuance. Appellants also challenge the circuit court's statement that they suffered no damages because the unrecorded plat had no impact on

[10] Appellants also argue Judge Kinard's denial of Chicago Title's motion to dismiss the Amended Complaint was the law of the case and, thus, precluded Judge Mullen from concluding as a matter of law that the Policy's coverage was limited to matters of public record. They note that there were no differences in the factual record and legal arguments presented by Chicago Title as to both motions. Nonetheless, "[t]he denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case." *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 431, 622 S.E.2d 564, 567 (Ct. App. 2005) (alteration in original) (quoting *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995)).

Appellants' title. They distinguish between the unrecorded plat and what this plat *represents*, i.e., Preserve Road encroaching on their lot, the lot's diminished acreage, and the impact on the resulting value of the lot compared with the value of the lot as represented on the recorded plat. Appellants cite to testimony of Balsam's former President, Craig Lehman, indicating that the Preserve Road encroachment had a negative impact on the lot's marketability.

In other words, the recorded deed and plat do not reflect the reality of Appellants' interest in Lot 108 on the date the Policy was issued. While the February 2002 plat itself may not affect Appellant's title due to Balsam's failure to record it, Appellant's ownership interest in the land on the date of the Policy's issuance was affected by what the 2002 plat *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage. Notably, Lehman admitted to the existence of the Preserve Road encroachment and to the disconnect between what Appellants paid for and what the February 2002 plat accurately reflected on the ground. For these reasons, we reject Chicago Title's argument that the Policy does not cover these title defects because the February 2002 plat was not discovered until after the Policy's issuance. As to the land underlying the Preserve Road encroachment, Balsam has aggressively challenged Appellants' ownership interest. *See supra* Section I. Further, as previously stated, Appellants have presented evidence showing this encroachment has had a negative impact on the marketability of Lot 108. Hence, the Preserve Road encroachment and Appellants' loss in acreage fall within items 1, 3, and 14 of the Policy's "Covered Title Risks," i.e., "Someone else owns an interest in your title," "Forgery, *fraud*, duress, *incompetency*, incapacity[,] or impersonation," (emphases added) and "Other defects, liens, or encumbrances."

Based on the foregoing, Appellants presented, at the very least, a scintilla of evidence showing a defect in the title that Chicago Title insured in February 2002. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *Radcliffe*, 209 S.C. at 420, 40 S.E.2d at 630 ("A scintilla of evidence is *any material* evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." (emphasis in original) (quoting *In re Crawford*, 205 S.C. at 30 S.E.2d at 849)); *Bethea*, 177 S.C. at 529, 181 S.E. at 724 (defining "scintilla" as the smallest trace). Therefore, the circuit court erred in granting summary judgment to Chicago Title. *See* Rule 56(c), SCRCP (stating that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." (emphasis added)).

III. Statute of Limitations

Appellants contend the circuit court erred by concluding that their breach of contract claim against Chicago Title was barred by the statute of limitations because (1) the action did not accrue until 2012 and, (2) the applicable statute of limitations is twenty years rather than three years. At oral argument, Chicago Title conceded that the applicable statute of limitations is twenty years pursuant to section 15-3-520(b) of the South Carolina Code (2005) and, thus, Appellants' breach of contract claim is not time-barred. We agree, and therefore, we need not address the date of the claim's accrual. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

The circuit court concluded that section 15-3-530 of the South Carolina Code applied to Appellants' breach of contract cause of action against Chicago Title. However, section 15-3-520 states that the limitations period is twenty years for the following causes of action:

> (a) an action upon a bond or other contract in writing secured by a mortgage of real property;
>
> (b) an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530, except that a sealed contract for sale or an offer to buy or sell goods whereon the period of limitation is the same as prescribed in Section 36-2-725.

S.C. Code Ann. § 15-3-520 (2005).

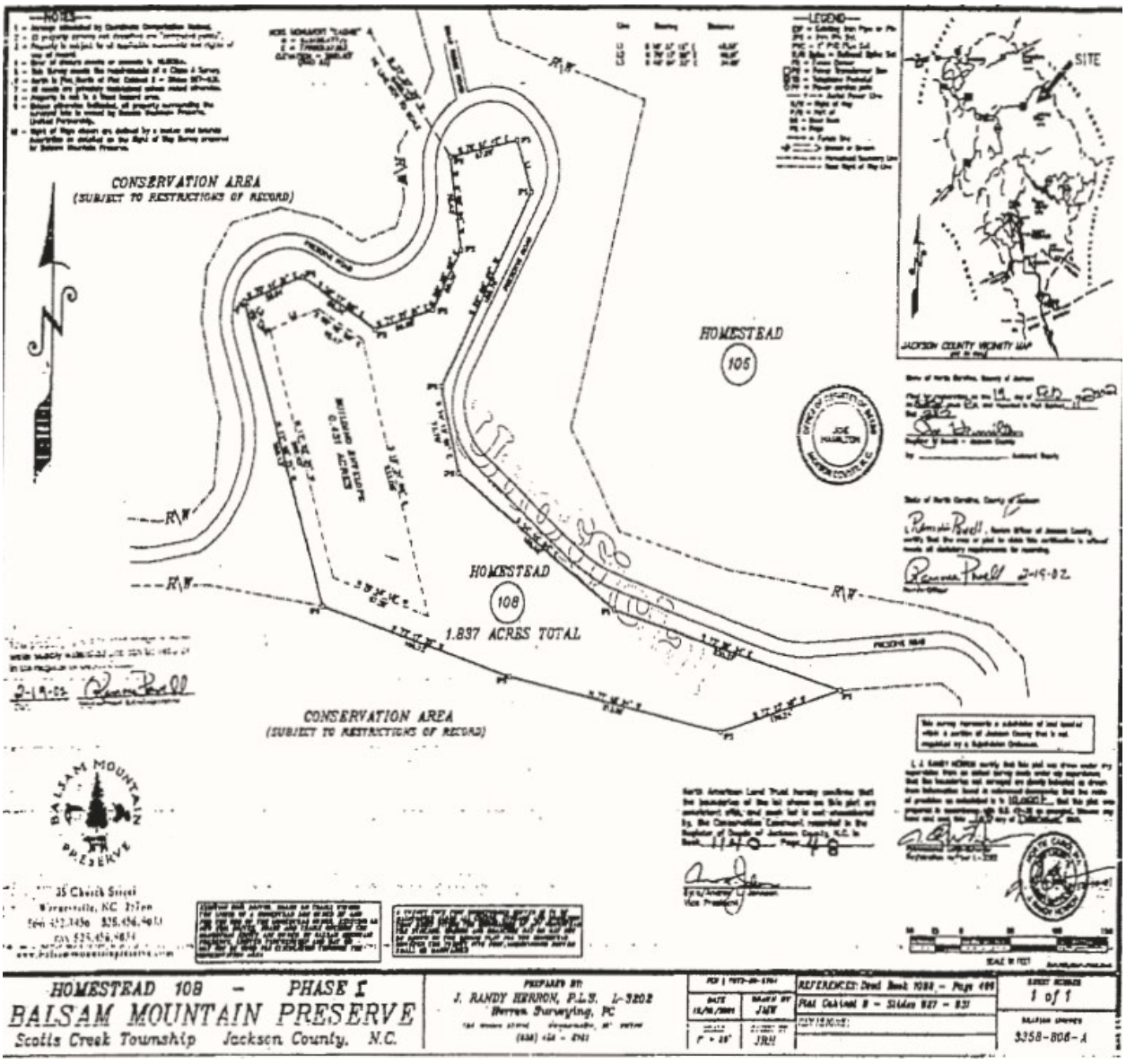
Here, the Policy qualifies as a sealed instrument because it bears the corporate seal of Chicago Title next to the signatures of its President and a second representative, which shows an intent to create a sealed instrument. Therefore, we agree that section 15-3-520 applies to the breach of contract claim against Chicago Title and the circuit court erred in concluding that this claim was barred by the statute of limitations.

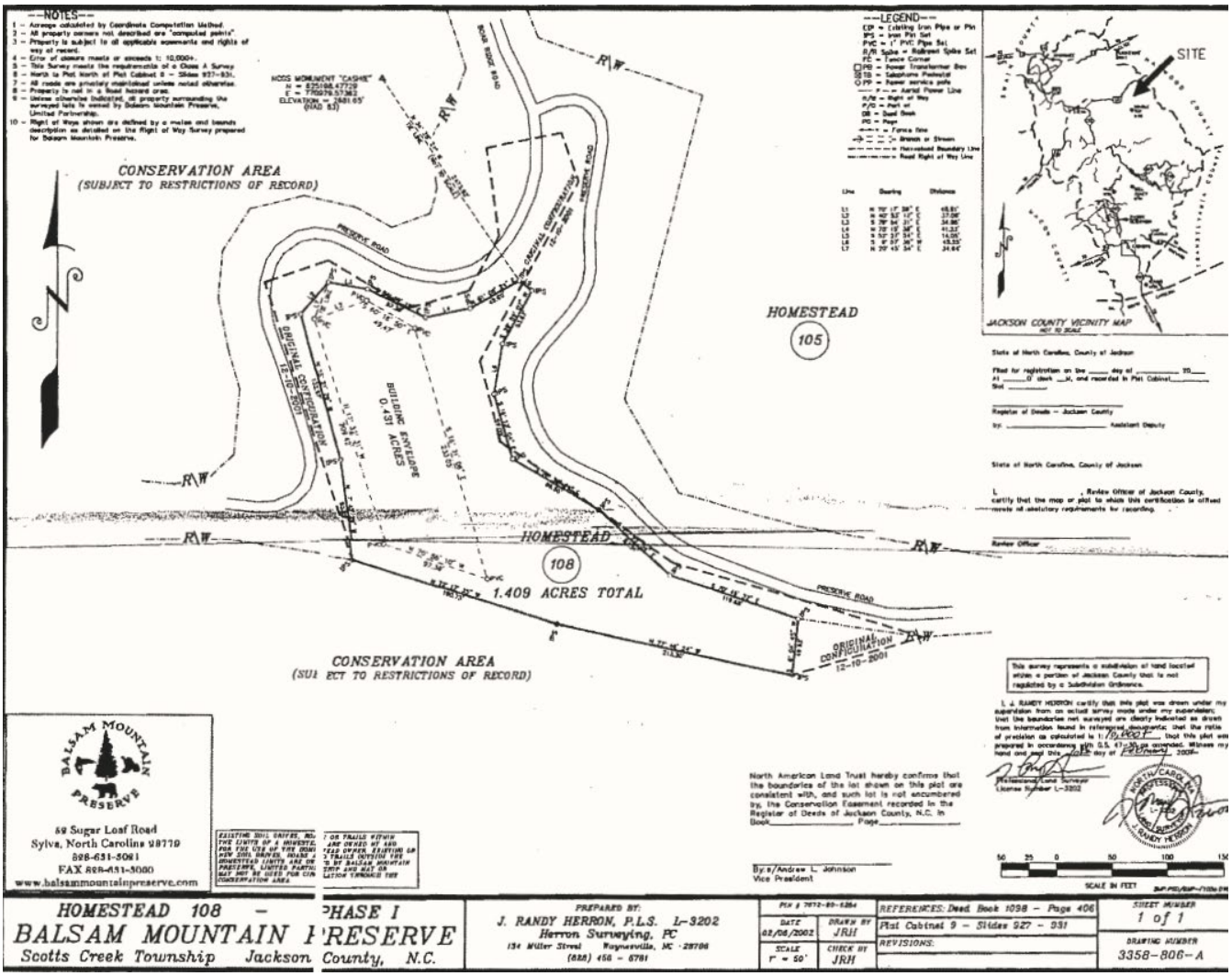
CONCLUSION

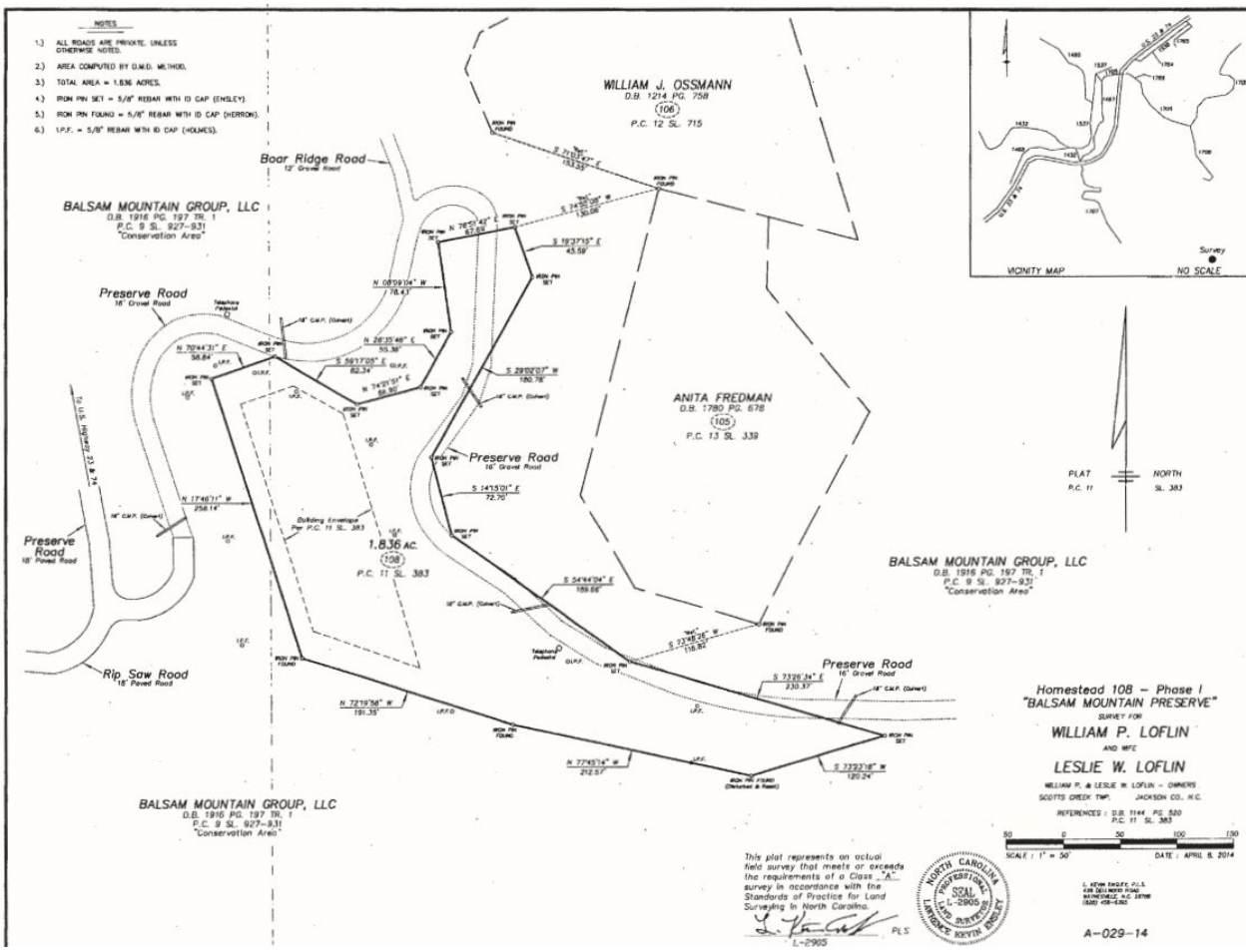
Accordingly, we reverse the circuit court's order granting summary judgment to Chicago Title, and we remand for a trial on the merits.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HILL, J., concur.




--NOTES--
--LEGEND--
CONSERVATION AREA
(SUBJECT TO RESTRICTIONS OF RECORD)
HOMESTEAD
105
HOMESTEAD
108
1.409 ACRES TOTAL
BUILDING ENVELOPE
0.431 ACRES
ORIGINAL CONFIGURATION
12-10-2001
PRESERVE ROAD
BEAR RIDGE ROAD
SITE
JACKSON COUNTY VICINITY MAP
NOT TO SCALE
BALSAM MOUNTAIN PRESERVE
69 Sugar Loaf Road
Sylva, North Carolina 28779
828-631-5081
FAX 828-631-5080
www.balsammountainpreserve.com
North American Land Trust hereby confirms that the boundaries of the lot shown on this plat are consistent with, and such lot is not encumbered by, the Conservation Easement recorded in the Register of Deeds of Jackson County, N.C. in Book _____ Page _____
By:s/Andrew L. Johnson
Vice President
SCALE IN FEET
HOMESTEAD 108 - PHASE I
BALSAM MOUNTAIN PRESERVE
Scotts Creek Township Jackson County, N.C.
PREPARED BY:
J. RANDY HERRON, P.L.S. L-3202
Herron Surveying, PC
134 Miller Street Waynesville, NC 28786
(828) 456 - 6781
DATE 02/06/2002
DRAWN BY JRH
SCALE 1" = 50'
CHECK BY JRH
REFERENCES: Deed Book 1098 - Page 406
Plat Cabinet 9 - Slides 927 - 931
REVISIONS:
SHEET NUMBER 1 of 1
DRAWING NUMBER 3358-806-A


NOTES
1.) ALL ROADS ARE PRIVATE, UNLESS OTHERWISE NOTED.
2.) AREA COMPUTED BY D.M.D. METHOD.
3.) TOTAL AREA = 1.836 ACRES.
4.) IRON PIN SET = 5/8" REBAR WITH ID CAP (ENSLEY).
5.) IRON PIN FOUND = 5/8" REBAR WITH ID CAP (HERRON).
6.) I.P.F. = 5/8" REBAR WITH ID CAP (HOLMES).
WILLIAM J. OSSMANN
D.B. 1214 PG. 758
(106)
P.C. 12 SL. 715
Boar Ridge Road
12' Gravel Road
BALSAM MOUNTAIN GROUP, LLC
D.B. 1916 PG. 197 TR. 1
P.C. 9 SL. 927-931
"Conservation Area"
Preserve Road
16' Gravel Road
ANITA FREDMAN
D.B. 1780 PG. 678
(105)
P.C. 13 SL. 339
1.836 AC.
(108)
P.C. 11 SL. 383
Building Envelope Per P.C. 11 SL. 383
Preserve Road
18' Paved Road
Rip Saw Road
18' Paved Road
VICINITY MAP
NO SCALE
PLAT P.C. 11
NORTH SL. 383
Homestead 108 - Phase I
"BALSAM MOUNTAIN PRESERVE"
SURVEY FOR
WILLIAM P. LOFLIN
AND WIFE
LESLIE W. LOFLIN
WILLIAM P. & LESLIE W. LOFLIN - OWNERS
SCOTTS CREEK TWP. JACKSON CO., N.C.
REFERENCES : D.B. 1144 PG. 520
P.C. 11 SL. 383
SCALE : 1" = 50'
DATE : APRIL 8, 2014
This plat represents an actual field survey that meets or exceeds the requirements of a Class "A" survey in accordance with the Standards of Practice for Land Surveying in North Carolina.
L-2905
PLS
NORTH CAROLINA PROFESSIONAL SEAL L-2905 LAND SURVEYOR L. KEVIN SNOOT
A-029-14