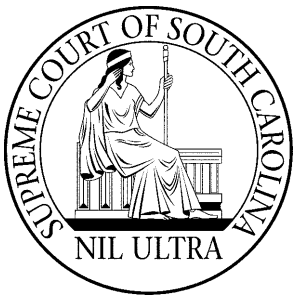

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 5, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Stephany A. Connelly and James M. Connelly, Plaintiffs,

v.

The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn, and Freya Trezona, Defendants,

of which Allstate Fire and Casualty Insurance Company, The Main Street America Group, and Old Dominion Insurance Company are the Petitioners,

and Stephany A. Connelly and James M. Connelly are the Respondents.

Appellate Case No. 2021-000005

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ Kaye G. Hearn A.J.

Columbia, South Carolina
April 5, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephany A. Connelly and James M. Connelly, Plaintiffs,

v.

The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn, and Freya Trezona, Defendants,

of which Allstate Fire and Casualty Insurance Company, The Main Street America Group, and Old Dominion Insurance Company are the Petitioners,

and Stephany A. Connelly and James M. Connelly are the Respondents.

Appellate Case No. 2021-000005

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Jocelyn Newman, Circuit Court Judge

Opinion No. 28130
Heard April 6, 2022 – Filed January 11, 2023
Re-Filed April 5, 2023

REVERSED

Thomas Frank Dougall and Michal Kalwajtys, both of Dougall & Collins, of Elgin, and Eugene Hamilton Matthews, of Richardson Plowden & Robinson, PA, of Columbia, all for Petitioners Old Dominion Insurance Company and The Main Street America Group; and Alfred Johnston Cox and Kendall Patricia Crawford, both of Gallivan, White & Boyd, PA, of Columbia, for Petitioner Allstate Fire and Casualty Insurance Company.

John D. Kassel and Theile Branham McVey, both of Kassel McVey, of Columbia, for Respondent James M. Connelly; and Bert Glenn Utsey III, of Clawson Fargnoli Utsey, LLC, of Charleston, for Respondents Stephany A. Connelly and James M. Connelly.

John Robert Murphy and Megan Noelle Walker, both of Murphy & Grantland, P.A., of Columbia, for Amicus Curiae Progressive Select Insurance Company.

JUSTICE KITTREDGE: This case involves the intersection of the uninsured motorist (UM) statute[1] with the Workers' Compensation Act (the Act).[2] Respondent Stephany Connelly was a passenger in a vehicle driven by her co-worker Freya Trezona during the course and scope of their employment when Trezona negligently caused an accident, injuring Connelly. Because workers' compensation benefits did not fully redress Connelly's injuries, Connelly made a claim for bodily injury and UM benefits with her own insurance carrier and with Trezona's carrier. Both companies denied the claim, maintaining Connelly's sole remedy lay with the Act. After Connelly filed suit seeking a declaratory judgment that both policies provided coverage, the parties agreed the dispute turned on the proper interpretation of the phrase "legally entitled to recover" found in the UM statute. *See* S.C. Code Ann. § 38-77-150(A) (stating all insurance policies must contain a UM provision "undertaking to pay the insured all sums which he is *legally entitled to recover* as damages from the owner or operator of an uninsured

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[1] S.C. Code Ann. § 38-77-150 (2015).

[2] S.C. Code Ann. §§ 42-1-10 to -19-50 (2022).

motor vehicle" (emphasis added)).[3] The trial court ruled in favor of Connelly, finding the phrase "legally entitled to recover" ambiguous. The court of appeals concurred in the finding of ambiguity and affirmed the trial court's determination that a plaintiff merely needed to show fault on the part of the uninsured driver and resulting damages, both of which had been satisfied here.

We find the statutory phrase "legally entitled to recover" unambiguous. We conclude the amount a plaintiff is "legally entitled to recover" under a UM provision of an insurance policy is the amount for which the plaintiff has a viable claim that is able to be reduced to judgment in a court of law. Because the Act prevents Connelly from ever becoming "legally entitled to recover" from Trezona under these facts, we reverse.

I.

The parties jointly stipulated the underlying facts, which are not in dispute. Connelly was injured in an automobile accident while riding as a passenger in a vehicle owned and operated by Trezona. The vehicle was covered by an automobile liability insurance policy issued by Petitioner Old Dominion Insurance Company (Old Dominion).[4] Additionally, Connelly had purchased UM coverage through her own automobile insurance policy with Petitioner Allstate Fire and Casualty Insurance Company (Allstate). At the time of the accident, Connelly and Trezona were co-workers acting within the course and scope of their employment. Therefore, Connelly made a successful claim for benefits under the Act.

Connelly then sought additional compensation against her co-worker under the bodily injury provision of the Old Dominion policy, as well as under the UM provision of both the Old Dominion and Allstate (collectively, Petitioners') policies,[5] but Petitioners denied Connelly's claims. Petitioners admitted that

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[3] The terms of both insurance policies closely mirror the statutory language, stating the insurers will pay "those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto."

[4] Petitioner Main Street America Group is a holding company that owns Old Dominion. Its interests are identical to those of Old Dominion.

[5] The Old Dominion policy provides liability coverage of $100,000 per person and $300,000 per accident. The Allstate policy provides liability coverage of $250,000

Connelly is an insured person, as defined in the policies, and that Trezona's negligence caused the accident and Connelly's resulting injuries. However Petitioners claimed, among other things, that (1) because Connelly was injured during the course and scope of her employment, the Act provides her exclusive remedy; (2) because the Act affords tort immunity to the employer and co-workers of an injured employee, Trezona is immune from suit by Connelly, thereby rendering Petitioners likewise immune; and thus (3) Connelly is not legally entitled to recover against Trezona or Petitioners.

Notwithstanding the exclusivity provision of the Act, Connelly filed suit, seeking a declaratory judgment that the UM provisions of both polices provided coverage for her injuries. Initially, Connelly named Petitioners and Trezona as co-defendants, but—perhaps in recognition of the statutory immunity the Act affords Trezona—Connelly later dismissed Trezona from the suit.[6] Petitioners answered, asserting Connelly was not "legally entitled to recover" from Trezona based on the plain meaning of that phrase as used in the UM statute (section 38-77-150). Petitioners and Connelly then filed cross-motions for summary judgment.

The circuit court granted Connelly's motion and denied Petitioners' motions. In relevant part, the circuit court held Trezona's vehicle was an uninsured vehicle because—despite the fact that Connelly was admittedly an insured person under the policies—Petitioners had denied coverage. *See* S.C. Code Ann. § 38-77-30(14)(b) (Supp. 2021) (defining an uninsured motor vehicle as, *inter alia*, a vehicle for which "there is nominally [bodily injury liability] insurance, but the insurer writing the same *successfully denies coverage* thereunder" (emphasis added)).

Likewise, the circuit court found the "legally entitled to recover" language of the UM statute was ambiguous, reasoning that the phrase is not defined in either the South Carolina Code or Petitioners' insurance policies, and there is a jurisdictional split on the correct interpretation of the phrase. The circuit court explained that it was therefore required to interpret the UM statute in a manner consistent with the

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per person and $500,000 per accident.

[6] Likewise, Connelly's husband initially asserted a claim for loss of consortium. As we explain below, the circuit court granted summary judgment on his claim, and no one challenges the propriety of that decision to this Court. We therefore do not address it further.

legislature's intent, that being "to provide benefits to protect against the peril of injury or death by an uninsured motorist to an insured motorist." Thus, the circuit court held that "legally entitled to recover" meant a plaintiff merely needed to show fault on the part of the uninsured driver and damages, and the Act's provision of immunity to Trezona did not impact the availability of UM coverage to Connelly. (Citing *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265 (Colo. App. 2001); *Barfield v. Barfield ex rel. Barfield*, 742 P.2d 1107 (Okla. 1987); *Torres ex rel. Torres v. Kan. City Fire & Marine Ins. Co.*, 849 P.2d 407 (Okla. 1993)). Expounding on that point, the circuit court explained UM coverage could coexist with the Act's exclusive remedy in these circumstances because (1) the Act's exclusivity provision only bars tort actions, but a UM claim sounds in contract, not tort; (2) Connelly did not sue Trezona or her employer, so her claims did not run afoul of the exclusivity provision; and (3) Connelly's recovery of UM benefits did not frustrate the Act's goals, as Trezona, her employer, and the workers' compensation carrier remained unaffected by allowing Connelly to receive UM benefits.

Petitioners appealed, and the court of appeals affirmed. *Connelly v. Main St. Am. Grp.*, 432 S.C. 122, 850 S.E.2d 627 (Ct. App. 2020). In large part, the court of appeals concurred with the circuit court that the phrase "legally entitled to recover" is ambiguous, citing the jurisdictional split of authority on the issue. In light of the finding of ambiguity, the court of appeals concluded Connelly was merely required to show fault and damages. The court of appeals explained that allowing UM coverage in this situation effectuated the legislature's intent, noting the UM statute must be liberally construed in favor of coverage, and the Act only bars tort claims against employers and co-employees, not contract claims for UM benefits.

We granted Petitioners a writ of certiorari to review the decision of the court of appeals.

II.

A declaratory judgment action to determine coverage under an insurance policy is an action at law. *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009). In an appeal from an action at law, the Court's jurisdiction is limited to correcting errors of law. *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). "The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law." *Id.*

In reviewing the grant of a motion for summary judgment, appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003). "[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008).

III.

Petitioners contend Connelly's recovery of workers' compensation benefits under the Act renders Trezona immune from lawsuits stemming from the accident. As a result, Petitioners argue Connelly is precluded from recovering under the UM provisions of the Old Dominion and Allstate policies because Connelly will never be "legally entitled to recover" against Trezona, and therefore, UM coverage under the policies will never be triggered. For purposes of this discussion, we will assume, without deciding, that Trezona's vehicle was uninsured and focus our analysis on whether Connelly is "legally entitled to recover" damages from Trezona.

South Carolina's UM statute provides, in relevant part,

> No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle . . . .

S.C. Code Ann. § 38-77-150(A) (emphasis added).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When the statute's language is clear and unambiguous, the rules of statutory interpretation are unnecessary, as a court has no choice but to apply the statute as written. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). This is because the language used in the statute is generally considered to be the best evidence of the legislature's intent. *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008). As a result, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to

limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

While the precise question presented in this case is a novel one in South Carolina, we have occasionally addressed the interplay between the Act and the UM statute. Generally, the Act "provides the exclusive remedy against an employer for an employee's work-related accident or injury." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 224, 661 S.E.2d 395, 403 (Ct. App. 2008). "Under the scheme [set forth in the Act], the employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Wright v. Smallwood*, 308 S.C. 471, 475, 419 S.E.2d 219, 221 (1992) (cleaned up); *see also Nolan v. Daley*, 222 S.C. 407, 416, 73 S.E.2d 449, 453 (1952) (explaining the Act confers tort immunity not only on the employer but also on any negligent co-employees).

However, "UM coverage does not sound in tort, but in contract." *Wright*, 308 S.C. at 475, 419 S.E.2d at 221. Thus, an employee injured within the course and scope of his employment may, in appropriate circumstances, recover both workers' compensation benefits and UM benefits, as the exclusivity provision of the Act does not automatically bar all contractual claims for UM benefits. *Id.*[7]

A.

Here, the lower courts found the phrase "legally entitled to recover" is ambiguous in part because there is a jurisdictional split on how best to interpret the phrase.

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[7] It is nonetheless worth noting that the Act does not contain a provision expressly authorizing the receipt of UM benefits in the event workers' compensation benefits do not fully redress the employee's injuries—a perhaps notable omission that stands in contrast to a provision in the Tort Claims Act. *See* S.C. Code Ann. § 15-78-190 (2005) ("If the amount of the verdict or judgment is not satisfied by reason of the monetary limitations of this chapter upon recovery from the State or political subdivision thereof, the plaintiff's insurance company, subject to the . . . uninsured defendant provisions of the plaintiff's insurance policy, if any, shall compensate the plaintiff for the difference between the amount of the verdict or judgment and the payment by the political subdivision. If a cause of action is barred [entirely] under § 15-78-60 of the 1976 Code, the plaintiff's insurance company must compensate him for his losses subject to the aforementioned provisions of his insurance policy.").

However, in finding the jurisdictional split legally significant, neither the circuit court nor the court of appeals analyzed the specific statutory language used by the various jurisdictions to determine whether their UM statutes or workers' compensation acts were worded differently from our own. A jurisdictional split—standing alone—does not render ambiguous a South Carolina statute dealing with the same subject matter. Relying on other states' interpretations of foreign law is of little use in determining and effectuating the legislative intent underlying our own UM statute.[8]

Compounding the error, in resolving the supposed ambiguity in the UM statute, the court of appeals relied heavily on a case decided by the Supreme Court of Appeals of West Virginia, *Jenkins v. City of Elkins*, 738 S.E.2d 1 (W. Va. 2012). *Jenkins* dealt with a situation in which an employee was injured in a motor vehicle accident with a *third party*. *Id.* at 4, 12. The West Virginia Supreme Court itself acknowledged that this is an entirely distinct factual scenario from one in which an employee is injured by a negligent *co-employee*. *See id.* at 12 (quoting *Henry v. Benyo*, 506 S.E.2d 615, 619 (W. Va. 1998)).[9] In fact, most state courts have

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[8] For example, the Supreme Court of Colorado found even if the court were to assume (without deciding) that "legally entitled to recover" meant merely fault and resulting damages, the particular language of Colorado's workers' compensation act nonetheless barred an injured employee's claim for UM benefits. *See Ryser v. Shelter Mut. Ins. Co.*, 480 P.3d 1286, 1290–91 (Colo. 2021) (en banc). We find this recent interpretation of Colorado law particularly significant given that the lower courts here relied in part on the *Borjas* case decided by the Colorado Court of Appeals in 2001.

[9] Specifically, the *Jenkins* court distinguished another of its prior decisions in which—as is the case in the instant appeal—an employee-plaintiff was injured in a motor vehicle accident caused by his negligent co-employee and attempted to recover UM benefits in addition to workers' compensation benefits. *See Wisman v. Rhodes*, 447 S.E.2d 5, 8–9 (W. Va. 1994) (disallowing the recovery of UM benefits in that circumstance due to the exclusivity provision in West Virginia's workers' compensation act). The *Jenkins* court explained that "the scope of the *Wisman* decision is limited to those motor vehicle accidents involving two employees. *Wisman* does not discuss the situation here at hand regarding motor vehicle accidents between an employee and a third-party nonemployee." 738 S.E.2d at 12 (quoting *Henry*, 506 S.E.2d at 619).

interpreted differently the legislative intent behind and requirements of their individual UM statutes when the tortfeasor is a co-employee rather than a third party. Our court of appeals, quoting *Jenkins*, found a "slight majority" of jurisdictions held a plaintiff was required only to establish the tortfeasor's fault and the amount of the plaintiff's damages. However, as we explain more fully below, that "slight majority" deals with the distinct factual situation presented in *Jenkins*, in which there was a third-party tortfeasor. In contrast, when looking only at cases dealing with motor vehicle accidents caused by a negligent co-employee, the jurisdictional split is decidedly different from the one examined in *Jenkins*.[10] Due to the factual and legal distinctions present when the tortfeasor is a co-employee, the court of appeals' reliance on *Jenkins* was misplaced.

B.

Looking solely at the language used by our General Assembly in the UM statute, we find the phrase "legally entitled to recover" is wholly unambiguous: it means a plaintiff has a viable claim that is able to be reduced to judgment against an at-fault defendant after overcoming any defenses the defendant may have presented. After all, it is only then that the plaintiff becomes *legally* entitled to recover against that defendant. We reject the lower courts' interpretation of the UM statute as requiring a plaintiff to show only fault and resulting damages. Such a reading automatically negates any defenses the at-fault driver could present, such as the statute of limitations, comparative negligence, or statutory immunity. We see nothing in the language of the UM statute to suggest the legislature intended that result.

While not necessary to interpret our own state statute, we briefly note our reading of the legislative intent underlying section 38-77-150, as applied to motor vehicle accidents caused by negligent co-employees, dovetails with the near-unanimous national approach to this factual scenario. We say this while acknowledging our decision not to parse the language of each individual state's statutes related to UM coverage or workers' compensation, for regardless of the language used by each individual legislature, there appears to be a "nationwide" legislative intent (as

[10] Tellingly, in *Jenkins*'s tallying of various jurisdictions' approaches to the proper interpretation of the phrase "legally entitled to recover," the overwhelming majority of jurisdictions in its purported "slight majority" dealt with third-party accidents, whereas the overwhelming majority of jurisdictions in the "minority approach" dealt with co-employee accidents. *See* 738 S.E.2d at 12–14 (collecting cases).

interpreted by each state's courts). Specifically, it appears legislatures collectively intended that their state's workers' compensation act serve as the exclusive remedy for an employee who seeks recompense for injuries caused by a negligent co-employee in an automobile-related accident that occurs during the course and scope of his employment. It necessarily follows that the workers' compensation acts' immunity provisions ensure the injured worker will never be "legally entitled to recover" against his co-employee. *See* 10 *Larson's Workers' Compensation Law* § 110.05[10] (2021) ("Ordinarily, for the uninsured motorist clause to operate in the first place, the uninsured third person must be legally subject to liability. Thus, if the third person is specifically made immune to tort suit by the compensation act's exclusive remedy clause, the uninsured motorist provision does not come into play. In the familiar example of co-employee immunity, the issue thus becomes whether the accident was in the course of employment; if it was, the uninsured motorist carrier has no liability." (internal footnotes omitted) (collecting cases)); John P. Ludington, Annotation, *Automobile uninsured motorist coverage: "legally entitled to recover" clause as barring claim compensable under workers' compensation statute*, 82 A.L.R.4th 1096 § 2 (1990) ("Does the tort immunity of an employer or co[-]employee mean that an injured employee is not 'legally entitled to recover' from the employer or co[-]employee, and therefore cannot receive uninsured motorist benefits for vehicular injuries received in an accident arising out of, and in the course of, employment? The answer is yes, with [limited] dissent and some qualifications. *Insofar as the uninsured motorist coverage has been bought and paid for by someone other than the injured employee,* ***the results have been uniform****. The injured employee cannot recover uninsured motorist benefits under the uninsured motorist coverage in policies obtained by his or her employer, partner, or the negligent co[-]employee.* The more common situation is where the injured employee attempts to secure uninsured motorist benefits under his or her own automobile insurance policy. Does it matter that the employee himself or herself obtained and paid for this uninsured motorist coverage? *Most courts which have considered the question have held no, since the workers' compensation statute grants tort immunity to a negligent employer or co[-]employee, and therefore the injured employee is not 'legally entitled to recover' from either of them*." (emphasis added) (internal citations omitted)); *see also Ex parte Carlton*, 867 So. 2d 332 (Ala. 2003) (following the majority approach in holding the workers' compensation act is the employee's exclusive remedy); *Perkins v. Emps. Mut. Cas. Co.*, 507 F. Supp. 3d 1172 (D. Ariz. 2020) (same, applying Arizona law); *Ryser v. Shelter Mut. Ins. Co.*, 486 P.3d 344 (Colo. App. 2019) (same), *aff'd on other grounds*, 480 P.3d 1286; *Allstate Ins. Co. v. Boynton*, 486 So. 2d 552 (Fla. 1986) (same); *Williams v. Thomas*, 370 S.E.2d 773

(Ga. Ct. App. 1988) (same); *Atl. Mut. Ins. Co. v. Payton*, 682 N.E.2d 1144 (Ill. App. Ct. 1997) (same); *O'Dell ex rel. O'Dell v. State Farm Mut. Auto. Ins. Co.*, 362 N.E.2d 862 (Ind. Ct. App. 1977) (same); *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24 (Iowa 2005) (same); *Chance v. Farm Bureau Mut. Ins. Co.*, 756 F. Supp. 1440 (D. Kan. 1991) (same, applying Kansas law); *State Farm Mut. Auto. Ins. Co. v. Slusher ex rel. Slusher*, 325 S.W.3d 318 (Ky. 2010) (same); *Hebert v. Clarendon Am. Ins. Co.*, 984 So. 2d 952 (La. Ct. App. 2008) (same); *Hopkins v. Auto-Owners Ins. Co.*, 200 N.W.2d 784 (Mich. Ct. App. 1972) (per curiam) (same); *Peterson v. Kludt ex rel. Lyczewski*, 317 N.W.2d 43 (Minn. 1982) (same); *Medders v. U.S. Fid. & Guar. Co.*, 623 So. 2d 979 (Miss. 1993) (same); *Kesterson v. Wallut*, 157 S.W.3d 675 (Mo. Ct. App. 2004) (same); *Okuly ex rel. Okuly v. USF & G Ins. Co.*, 78 P.3d 877 (Mont. 2003) (same); *Matarese v. N.H. Mun. Ass'n Prop.-Liab. Ins. Tr., Inc.*, 791 A.2d 175 (N.H. 2002) (same); *Kough v. N.J. Auto. Full Ins. Underwriting Ass'n*, 568 A.2d 127 (N.J. Super. Ct. App. Div. 1990) (same); *Vasquez v. Am. Cas. Co. of Reading*, 389 P.3d 282 (N.M. 2016) (same); *Hauber-Malota v. Phila. Ins. Cos.*, 991 N.Y.S.2d 190 (App. Div. 2014) (same); *Stuhlmiller v. Nodak Mut. Ins. Co.*, 475 N.W.2d 136 (N.D. 1991) (same); *Sims v. Marren*, 36 N.E.3d 780 (Ohio Ct. App. 2015) (same); *Cope v. W. Am. Ins. Co. of the Ohio Cas. Grp.*, 785 P.2d 1050 (Or. 1990) (en banc) (same); *Petrochko v. Nationwide Mut. Ins. Co.*, 15 Pa. D. & C.5th 312 (C.P. 2010) (same), *aff'd*, 38 A.3d 917 (Pa. Super. Ct. 2011); *Soledad v. Tex. Farm Bureau Mut. Ins. Co.*, 506 S.W.3d 600 (Tex. App. 2016) (same); *Welch ex rel. Welch v. Miller & Long Co. of Md.*, 521 S.E.2d 767 (Va. 1999) (same); *Romanick v. Aetna Cas. & Sur. Co.*, 795 P.2d 728 (Wash. Ct. App. 1990) (same); *Wisman*, 447 S.E.2d 5 (same); *cf. State Farm Mut. Auto. Ins. Co. v. Royston*, 817 P.2d 118 (Haw. 1991) (holding, in part based on the co-employee related cases, that an injured government employee could not recover under his own UM policy because he had received workers' compensation benefits and therefore would not be "legally entitled to recover" against his employer, as the owner of the uninsured vehicle); *Lieber v. ITT Hartford Ins. Ctr., Inc.*, 15 P.3d 1030 (Utah 2000) (involving a claim for UM benefits brought by an employee injured in an accident with a third-party, but nonetheless analyzing the state's UM and workers' compensation statutes and concluding that the exclusive remedy of the workers' compensation act only prevented the employee from becoming "legally entitled to recover" against an employer or co-employee, not a third party).

We too believe our legislature, like the legislatures of the overwhelming majority of jurisdictions around the country, intended the Act to be the exclusive remedy since the injured employee will never be "legally entitled to recover" against his

co-employee. Accordingly, Connelly is not "legally entitled to recover" against Trezona.

IV.

While our holding today is on firm legal footing, we note our disquiet at the result: Connelly—who paid for UM and UIM coverage—will not receive the benefit of her contractual bargain with Allstate, through no fault of her own. We can think of no other step Connelly could have taken to protect herself from this type of circumstance: she was not driving, she did not cause or contribute to the accident, she had automobile insurance, and she paid additional amounts for UM and UIM coverage. As a result, Connelly's argument—that our reading of the UM statute runs counter to the underlying legislative intent—has equitable appeal. *See Laird ex rel. Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 392, 134 S.E.2d 206, 208 (1964) (explaining the purpose of UM coverage "was to provide financial recompense to innocent persons who receive bodily injuries . . . through the wrongful conduct of uninsured motorists").

However, ruling in favor of Connelly would require us to contort the plain meaning of "legally entitled to recover" to provide an exception in the case of accidents caused by negligent co-employees who, by function of the Act, are immune from tort suits. There is nothing in the language of the UM statute or the Act that leads us to believe the legislature intended us to take such liberties—particularly when contrasted with an explicit provision of the Tort Claims Act addressing a similar possibility. *See* S.C. Code Ann. § 15-78-190 (stating that if an award under the Tort Claims Act is insufficient to redress the plaintiff's injuries in full, and UM coverage would otherwise be available to cover the plaintiff's damages, the UM carrier shall compensate the plaintiff within the limits of the policy). Given that the Tort Claims Act expressly contemplates and allows UM coverage in the event of an injured plaintiff's incomplete recovery, it is clear the legislature knows how to provide a statutory exemption to tort immunity or damage limitations on an insured's rights against a tortfeasor. We find the fact that the legislature chose not to include a similar exemption in the UM statute or the Act significant. *See* 82 C.J.S. *Statutes* § 460 (2009) ("[W]here a statute contains a given provision, the omission of such a provision from a similar statute concerning a related subject is significant to show that a different intention has existed.").

We decline the invitation to rewrite the statute or construe it in a manner manifestly at odds with its plain meaning. Connelly's remedy in this instance is not with the courts, but with the legislature. *See Criterion Ins. Co. v. Hoffmann*, 258

S.C. 282, 294, 188 S.E.2d 459, 464 (1972) ("If it is advisable that the [UM] statute be changed, it is within the province of the legislature to do so. For the courts to set about to [change the requirements of the UM statute themselves] would inevitably lead to the establishment of a mischievous precedent, and to great uncertainty and confusion in the determination of future cases of a similar nature. It is needless to describe the effects of such a condition of things in order to appreciate the necessity of avoiding it." (citation omitted) (internal quotation marks omitted)).

IV.

This case presents a straightforward question of the correct interpretation of the UM statute, particularly the "legally entitled to recover" language of subsection (A). *See* S.C. Code Ann. § 38-77-150. Any unease with today's result lies in the outcome of that interpretation, for our holding today arguably does not comport with equity and one's sense of fairness. We state the obvious: we are a court, not a legislative body. We are thus constrained by our judicial role to interpret the law as written and not to create exceptions to plainly-worded statutes. That is the province of the legislature alone, and a boundary we do not cross, even in sympathetic situations such as this.

The decision of the court of appeals is

REVERSED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quincy Allen, Petitioner,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2021-001143

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28147
Submitted March 8, 2023 – Filed April 5, 2023

AFFIRMED AS MODIFIED

E. Charles Grose Jr., of Grose Law Firm, of Greenwood, for Petitioner.

Annie Laurie Rumler and Christina Catoe Bigelow, of Columbia, for Respondent.

PER CURIAM: Petitioner, a formerly death-sentenced inmate housed at Broad River Correctional Institution, appealed to the Administrative Law Court (ALC) the denial by the South Carolina Department of Corrections (SCDC) of his grievance

concerning visitation with persons not known to him prior to his incarceration.[1] Following the ALC's dismissal of Petitioner's appeal, Petitioner appealed to the court of appeals. The court of appeals affirmed the order of the ALC. *Allen v. S.C. Dep't of Corr.*, 434 S.C. 114, 862 S.E.2d 268 (Ct. App. 2021). Petitioner now seeks a writ of certiorari to review the decision of the court of appeals. We grant the petition, dispense with briefing, and affirm the decision of the court of appeals as modified.

Although we affirm the result reached by the court of appeals, we take this opportunity to address the confusion that has arisen in past jurisprudence between the subject matter jurisdiction of the ALC and the requirement that an inmate allege deprivation of a state-created liberty interest for the ALC to grant relief. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (holding subject matter jurisdiction refers to "the courts' statutory or constitutional *power* to adjudicate the case" (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998))). The ALC has subject matter jurisdiction to review a final decision of an administrative agency. *See* S.C. Code Ann. § 1-23-600(D) (Supp. 2021) (providing an administrative law judge shall preside over all appeals from final decisions of contested cases, with limited listed exceptions); *Al-Shabazz v. State*, 338 S.C. 354, 373, 527 S.E.2d 742, 752 (2000) (holding as to SCDC's resolution of "administrative matters," "Review, although limited in scope, must be provided in some form. The most practical and obvious solution is that [SCDC's]

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[1] "Quincy Jovan Allen[] pleaded guilty to two counts of murder [and other crimes]. After a sentencing hearing conducted by the trial judge, Allen was sentenced to death for the murders . . . ." *State v. Allen*, 386 S.C. 93, 95, 687 S.E.2d 21, 22 (2009). The United States Court of Appeals for the Fourth Circuit recently vacated Petitioner's death sentence, requiring a new sentencing hearing. *See Allen v. Stephan*, 42 F.4th 223, 259 (4th Cir. 2022) ("The sentencer in this case excluded, ignored, or overlooked Allen's clear and undisputed mitigating evidence, thereby erecting a barrier to giving this evidence meaningful consideration and effect and eviscerating the well-established requirements of due process in deciding who shall live and who shall die. Because this violates the Eighth Amendment's guarantee against the arbitrary imposition of the death penalty, we reverse the judgment of the district court and remand with instructions that the district court issue the writ of habeas corpus unless the State of South Carolina grants Allen a new sentencing hearing within a reasonable time.").

final decisions, like those of other agencies, are subject to review pursuant to the APA. Accordingly, we hold, as stated above, that an inmate may seek such review under the APA."). The ALC has appellate jurisdiction over any matter where the procedural requirements for perfecting an appeal have been met. *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004) (citing *Great Games, Inc. v. S.C. Dep't of Rev.*, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000)). Thus, the ALC had subject matter jurisdiction to review SCDC's denial of visitation. *See Al-Shabazz*, 338 S.C. at 376, 527 S.E.2d at 754 ("An inmate may . . . seek review of [SCDC]'s final decision by an ALJ in . . . [an] administrative matter."); *Slezak*, 361 S.C. at 331, 605 S.E.2d at 507 ("We now clarify that the AL[C] has subject matter jurisdiction to hear appeals from the final decision of [SCDC] in . . . [an] administrative matter.").

In *Al-Shabazz*, however, this Court contemplated that an administrative decision by SCDC would be reviewed only for a denial of the inmate's due process rights. *See* 338 S.C. at 369, 527 S.E.2d at 750 (explaining that "[p]lacing review of [SCDC's final decision in an administrative matter] within the ambit of the APA will ensure that an inmate receives due process"); *id.* ("While review by an administrative law judge and the courts will be available under the APA, we emphasize that we are not holding that all APA provisions apply to the internal prison disciplinary or decision-making processes."). The Court noted, "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Id.* (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972)). Therefore, we held in *Al-Shabazz*, an inmate must allege the denial of a state-created liberty interest to be entitled to relief for the denial of his due process rights. 338 S.C. at 370, 527 S.E.2d at 750 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)); *see Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 441-42, 586 S.E.2d 124, 126 (2003) ("The [*Al-Shabazz*] Court explained further that procedural due process was guaranteed only when an inmate was deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property."); *see also Sandin v. Conner*, 515 U.S. 472, 483-84 (1995) (holding states may create liberty interests that are protected by the Due Process Clause, but "these interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 461 (1989) (holding state law may create liberty interests for inmates that are entitled to due process protection).

Our courts have addressed questions of whether an inmate's claim implicates a state-created liberty interest on numerous occasions since *Al-Shabazz*. In *Sullivan*, this Court held that "the only way for the [ALC] to obtain *subject matter jurisdiction* over [an inmate's] claim is if it implicates a state-created liberty interest." 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added). The analysis of the issue in *Sullivan* as one of "subject matter jurisdiction," which has been repeated in several cases, was mistaken.

We attempted to clarify the distinction between the ALC's subject matter jurisdiction and its ability to summarily dismiss appeals without a hearing in *Slezak*. There, we held the ALC "has jurisdiction over all properly perfected inmate appeals, but . . . it may summarily decide those appeals that do not implicate an inmate's state-created liberty or property interest." 361 S.C. at 333, 605 S.E.2d at 509. In *Skipper v. South Carolina Department of Corrections*, 370 S.C. 267, 279 n.5, 633 S.E.2d 910, 917 n.5 (Ct. App. 2006), the court of appeals appropriately cited *Slezak* stating, "We believe the [ALC] improperly dismissed [the inmate's] appeal on the ground that it lacked subject matter jurisdiction. In light of our decision that [the inmate's] grievance did not implicate a state-created liberty interest, we find the [ALC] had jurisdiction to dismiss the appeal on the merits." *See also S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App. 2008) (rejecting SCDC's contention that the ALC should have dismissed the appeal because the claim did not implicate a state-created liberty or property interest and holding the ALC "clearly had subject matter jurisdiction to hear [the inmate's] appeal" and could have summarily dismissed the case if it determined the claim did not implicate a state-created interest or could have, in its discretion, heard the appeal).

However, subsequent cases continued to recite the "subject matter jurisdiction" language, and the ALC frequently—as it did in this case—dismisses inmate appeals for lack of subject matter jurisdiction when the inmate fails to show the claim implicates a state-created liberty interest sufficient to trigger procedural due process guarantees. *See, e.g.*, *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) (holding the ALC had "jurisdiction" to review the appeal because the inmate challenged the method and procedure employed by the Parole Board in reaching its decision, which raised a sufficient liberty interest to trigger the due process requirements of judicial review); *Furtick v. S.C. Dep't of Corr.*, 374 S.C. 334, 340, 649 S.E.2d 35, 38 (2007) (holding the ALC had "jurisdiction" to review the loss of good-time credits because the claim sufficiently implicated a state-created liberty interest), *abrogated by Howard v. S.C.*

Dep't of Corr., 399 S.C. 618, 733 S.E.2d 211 (2012); *Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 424-25, 602 S.E.2d 56, 57-58 (2004) (noting the decision that the statutory mandate requiring inmates be paid the prevailing wage was a state-created liberty or property interest was not intended to expand the "jurisdiction" of the ALC in any other circumstance).

We now clarify—again—that the ALC has subject matter jurisdiction over inmate grievance appeals that have been properly filed. *See Slezak*, 361 S.C. at 331, 605 S.E.2d at 507 ("We now clarify that the AL[C] has subject matter jurisdiction to hear appeals from the final decision of [SCDC] in . . . [an] administrative matter."); *see also Wilkins v. United States*, No. 21-1164, slip op. at 6 (U.S. Mar. 28, 2023) ("If a decision simply states that 'the court is dismissing "for lack of jurisdiction" when some threshold fact has not been established,' it is understood as a 'drive-by jurisdictional rulin[g]' . . . ." (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006))). A claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over the appeal. However, the ALC is not required to hold a hearing in every matter and may summarily dismiss an inmate's grievance if it does not implicate a state-created liberty or property interest sufficient to trigger procedural due process guarantees. The ALC may not grant an inmate relief from an erroneous administrative decision by SCDC, however, unless the inmate demonstrates the error deprived him of due process. *See Sullivan*, 355 S.C. at 441-42, 586 S.E.2d at 126 (discussing *Al-Shabaaz* and holding the inmate was not entitled to relief because his appeal of SCDC's administrative decision did not implicate due process).

Accordingly, the court of appeals incorrectly analyzed the issue as one of "subject matter jurisdiction" when it affirmed the ALC's decision. However, we affirm the holding that the denial of Petitioner's visitation with persons not known to him prior to incarceration does not implicate a state-created liberty interest, and we agree with the result of the court of appeals' decision to affirm the dismissal of Petitioner's appeal by the ALC.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Braden's Folly, LLC, Respondent,

v.

City of Folly Beach, Appellant.

Appellate Case No. 2022-000020

Appeal from Charleston County
Roger M. Young Sr., Circuit Court Judge

Opinion No. 28148
Heard November 15, 2022 – Filed April 5, 2023

REVERSED AND REMANDED

Danny Calvert Crowe, of Crowe LaFave, LLC, of Columbia; and Joseph C. Wilson IV, of Joseph C. Wilson Law Firm LLC, of Folly Beach, both for Appellant.

Keith M. Babcock, Ariail Elizabeth King, and Joseph B. Berry, all of Lewis Babcock LLP, of Columbia, for Respondent.

JUSTICE KITTREDGE: Respondent Braden's Folly, LLC owns two small, contiguous, developed coastal properties on the northeast end of Folly Beach. The City of Folly Beach amended an ordinance to require certain contiguous properties under common ownership—like those owned by Braden's Folly—to be merged into a single, larger property. The ordinance did not impact the existing uses of Braden's Folly's contiguous lots. Nevertheless, Braden's Folly challenged the

merger ordinance, claiming it had planned to sell one of the developed properties, and that the merger ordinance interfered with its investment-backed expectation under the *Penn Central* test. *See generally Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (stating in regulatory takings cases, courts must examine the economic impact of the regulation on the property owner's investment-backed expectations, as well as the character of the government action). Folly Beach denied the claim of an unconstitutional regulatory taking. Pursuant to cross-motions for summary judgment, the circuit court agreed with Braden's Folly, finding the merger ordinance effected an as-applied taking of Braden's Folly's beachfront property. Folly Beach appeals from the grant of summary judgment in favor of Braden's Folly. We reverse.

Underlying our application of the *Penn Central* factors is the distinct fragility of Folly Beach's coastline, which is subject to such extreme erosion that the General Assembly exempted Folly Beach from parts of the South Carolina Beachfront Management Act.[1] This exemption gave the city the authority to act in the State's stead in protecting the beach there. As we will describe more fully below, one of Braden's Folly's properties is contributing to worsening erosion rates on Folly Beach and, along with similarly situated properties, is threatening the existence of the entire beach in that area of the state.

Turning to the *Penn Central* test, we hold two of the three factors—the economic impact of the merger ordinance on Braden's Folly and the character of the governmental action—weigh in favor of finding the merger ordinance did not amount to a taking of Braden's Folly's properties. We find the remaining factor—the extent to which the merger ordinance interfered with Braden's Folly investment-backed expectations—does not weigh in favor of either party. Accordingly, we hold Braden's Folly has not suffered a taking under the *Penn Central* test. We therefore reverse and remand to the circuit court for entry of judgment in favor of Folly Beach.

I.

A.

In the 1890s, the United States Army Corps of Engineers (ACOE) constructed jetties in Charleston's harbor in order to protect the oceanic shipping channels.

[1] S.C. Code Ann. §§ 48-39-250 to -360 (2008 & Supp. 2022).

Following construction of the jetties, the sand migration in the area was disrupted, and the erosion rate in Folly Beach increased exponentially as sand left the area and was not replaced.[2]

In response to the high rate of yearly erosion, Folly Beach began engaging in periodic beach renourishment, in which millions of cubic yards of sand would be brought to the area to build the beach vertically upwards by five feet or more. Each renourishment project was funded largely (85%) by the federal government—specifically, the ACOE—in recognition of the fact that the federal government caused much of the erosion by constructing the Charleston jetties.[3]

Nonetheless, the ACOE refused to renourish privately owned property. Therefore, in the early 1990s, Folly Beach secured perpetual easements from all of the oceanfront property owners. In granting the easements, the property owners permanently gave up their right to build oceanward of the perpetual easement line running through their properties.

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[2] After the jetties were built, Folly Beach's yearly rate of erosion increased to nine feet per year. In comparison, other coastal areas in the state experience less than two feet of erosion per year. Chester W. Jackson Jr., *Mapping Coastal Erosion Hazards Along Sheltered Coastlines in South Carolina 1849 to 2015*, Dep't of Health & Env't Control vi (2017), https://scdhec.gov/sites/default/files/docs/HomeAndEnvironment/Docs/Jackson_SCShorelineReport122017.pdf.

[3] As one witness for Folly Beach explained:

> Section 111 of the 1968 River and Harbor Act[, 33 U.S.C. § 426i (2018),] provides authority for the [ACOE] to develop and construct projects for prevention or mitigation of damages caused by Federal navigation work, such as jetties. In 1987, Folly[Beach]'s Section 111 study determined that approximately 57[%] of the erosion of Folly Beach was due to the construction and continued operation of the Charleston Harbor Federal navigation project. As a result of this determination, the cost sharing percentages were adjusted from the standard 65% federal and 35% local to 85[%] federal and 15[%] non-federal (City of Folly Beach).

(Footnote omitted.)

Around that same time, in recognition of the quickly changing beachfront, the General Assembly exempted Folly Beach from part of the requirements of the South Carolina Beachfront Management Act. *See* S.C. Code Ann. § 48-39-290(E). Folly Beach's unique treatment under the Beachfront Management Act extends to three notable areas. First, the South Carolina Department of Health and Environmental Control (DHEC) is typically tasked with redrawing the baseline[4] every seven to ten years based on updated erosion rates. *See* S.C. Code Ann. § 48-39-285. However, in Folly Beach, the baseline was set in 1993 and is not subject to change regardless of any erosion or accretion, no matter how extreme. Second, the State typically strictly regulates any development in the beach area between the baseline and the setback line.[5] However, there is no setback line established in Folly Beach, so the city has the sole discretion to allow all types of development right up to the baseline with no oversight from the State. Finally, in a similar vein, the Beachfront Management Act prohibits oceanfront property owners from building new erosion control structures—or from repairing existing structures damaged greater than 50%—if the structures are located seaward of the setback line.[6] However, because Folly Beach does not have a setback requirement, oceanfront property owners may build new seawalls or repair existing seawalls all the way up to the baseline, so long as the plans are approved by the city.

B.

A portion of the northeast end of Folly Beach has a double row of properties. The "A lots" are directly adjacent to the ocean-side of East Ashley Avenue, and the "B lots"—also known as "super-beachfront" lots—are closest to the ocean. There is

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[4] The baseline is an invisible jurisdictional line typically drawn along the crests of the oceanfront sand dunes, and it serves as the starting point for determining the other jurisdictional line—the setback line—under the Beachfront Management Act. *See* S.C. Code Ann. § 48-39-280.

[5] The setback line "must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline . . . ." S.C. Code Ann. § 48-39-280(B); *see also* Jackson, *supra* note 2 (stating the average annual erosion rate for beaches in South Carolina is 1.8 feet per year); S.C. Code Ann. § 48-39-290(B) (setting forth a number of restrictions on development in the area between the baseline and setback line).

[6] *See* S.C. Code Ann. § 48-39-290(B)(2).

no road between the A and B lots, so the B lots are accessible only through the A lots.

Historically, an individual or entity would own an A lot and the contiguous B lot and would transfer the lots to a new owner simultaneously. The B lots—all of which were undeveloped until some twenty years ago—were frequently submerged or, at best, on active beach. Therefore, the B lots typically had little to no independent value[7] and served no purpose other than to provide beach access to the A lots directly adjacent to them.

However, beginning in the mid- to late-1990s, following Folly Beach's first round of beach renourishment, some of the B lots were elevated enough to make development possible. As a result, over the next decade and with Folly Beach's approval, seventeen of the thirty-seven super-beachfront lot owners developed single-family residences on their B lots. Nonetheless, the perpetual easement line runs through the B lots, preventing many B-lot owners from developing their properties and leaving the owners who did develop super-beachfront houses little buildable area to do so.[8]

Due to the high rate of erosion in Folly Beach, the newly renourished B lots were quickly reclaimed by the sea. In response, many of the owners who developed their B lot also built seawalls in front of their super-beachfront houses.[9]

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[7] The B lots were often worth less than $500, and many of the owners voluntarily abandoned their B lot in tax sales. In fact, the only reason the B lots even exist is because in the 1950s, another road was platted and paved in front of the B lots, parallel to East Ashley Avenue. That road has long since been destroyed by the eroding beach and is now permanently lost.

[8] Accordingly, most of the new super-beachfront houses touched the edge of the buildable area on the B lots, with little to no space between the houses and the perpetual easement line. In fact, between beach renourishments, the super-beachfront houses were not infrequently surrounded by the ocean on three sides. Because the ACOE places the renourishment sand all the way up to the perpetual easement line, the vertical rebuilding of the beach occurs within mere feet of the backdoors to these super-beachfront houses.

[9] A few of the super-beachfront houses do not have a seawall. Folly Beach and DHEC often take those unprotected super-beachfront houses "out of service" for renters due to safety concerns, usually related to the failure or overflow of the

Unfortunately, the seawalls did not stop the beach erosion and, instead, exacerbated the erosion problem for neighboring properties with undeveloped B lots and no seawalls. The sand attrition on the neighboring properties turned into areas the ACOE dubbed "blue blobs"—giant depressions that held rain and seawater and spanned the length of multiple properties, even reaching into A lots in some places. Because these blue blob areas were located on private property, they were not repaired by the ACOE or the periodic beach renourishment, nor were the costs to repair the blue blob areas paid for by the federal government. Rather, the repair of the erosion on lots neighboring the super-beachfront properties was required to be paid for entirely by the City of Folly Beach or the owners of the damaged lots. In other words, innocent property owners who had chosen *not* to develop their B lots had to pay for the damage caused by the seawalls of their neighbors' super-beachfront properties.

C.

Each round of beach renourishment in Folly Beach was projected to last for around eight years. However, as the number of super-beachfront houses and associated seawalls increased, so too did the frequency and cost of beach renourishment. As is relevant to this case, the last four rounds of renourishment occurred in 2005, 2007, 2014, and 2018, and the next one is already scheduled for 2024—none of which are eight years apart. As a result, the ACOE threatened to cut off federal funding for the renourishment projects unless Folly Beach stopped allowing super-beachfront lots to be developed and attempted to unwind the existing super-beachfront development. Given the importance of the beach to the local economy, and its inability to pay for the renourishment projects on its own, Folly Beach agreed to do so.

The city took multiple steps to reverse super-beachfront development. For example, it created a Dune Management Area (DMA), which prohibits development within forty feet of the perpetual easement line. The DMA affects all of the B lots. In consequence, the DMA prohibits new development on the B lots and—should any existing super-beachfront houses be more than 50% damaged in a storm or otherwise—prevents repair of the existing structures on the B lots.

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home's unprotected septic system onto active beach. However, even super-beachfront homes with seawalls are occasionally taken out of service for similar reasons, including Braden's Folly's B lot.

Likewise, in April 2019, Folly Beach amended its Code of Ordinances. Notable to this appeal, Folly Beach amended its existing merger ordinance to provide that adjacent lots under common ownership may no longer be sold or developed as separate lots if (1) either lot is undersized[10] and (2) one or both lots touch the baseline.[11] The zoning ordinances allow nonconforming uses to continue on properties affected by the merger ordinance. Likewise, the zoning ordinances prohibit the rebuilding of a nonconforming structure that is damaged or destroyed by more than 50% of its market value.[12] Thus, if an affected property owner had

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[10] Folly Beach's zoning ordinances set the minimum lot size at 10,500 square feet, but a grandfather clause relaxes this restriction for substandard lots that preexisted adoption of the ordinances. Therefore, a number of nonconforming small lots exist in Folly Beach, particularly along the ocean. As we discuss further below, the two lots at issue in this case are both less than 10,500 square feet and, thus, are nonconforming with Folly Beach's zoning ordinances.

[11] Specifically, the newly amended merger ordinance stated, in relevant part:

> (B) *Combination of lots*. If two or more lots of record . . . are in single ownership on or after March 1, 2019, . . . and if all or part of one or more of these lots do not comply with the lot area standards [requiring lots to be a minimum of 10,500 square feet in size] . . . ; and if one or both of these lots are adjacent to . . . [the] Baseline, the lots involved shall be considered to be an individual lot for the purposes of this [zoning ordinance], and no portion of these lots shall be used or sold which do not comply with the lot area standards, nor shall any division of the lots be made that leaves remaining any lot that fails to comply with the lot area standards.

Folly Beach, S.C., Code of Ordinances § 168.04-01 (2022). The prior version of the merger ordinance did not apply unless both commonly owned, undersized lots touched the baseline.

[12] In particular, the reconstruction ordinance provides, in relevant part:

> (A) *More than 50% of pre-damaged market value*. In the event a nonconforming structure is damaged or destroyed, by any means, to the extent of 50% [or more] of its market value prior to such

developed both his A and B lots, and those lots were merged by the amended ordinance, he could continue to use or rent both houses on the merged lot even though the area is zoned single-family residential. This nonconforming use could continue until one of the houses was destroyed beyond 50% of its pre-damaged market value. However, upon a 50% or more destruction of one of the houses, the zoning ordinances would prevent the rebuilding of the damaged structure, instead allowing the existence of only one house on the single, merged lot.[13]

> destruction, such structure shall not be restored unless in conformance with the standards for the zoning district in which it is located . . . .
>
> (B) *Less than 50% of pre-damaged market value*. . . . [If] a nonconforming structure . . . is damaged or destroyed, by any means, to an extent of less than 50% of its market value prior to such damage or destruction, it may be restored to its pre-damaged state provided reconstruction is initiated within 24 months and provided the reconstruction complies with all other city ordinances as well as all state and federal laws and does not create any new nonconformities.

Folly Beach, S.C., Code of Ordinances § 168.03-05 (2022).

[13] In tandem with its creation of the DMA and amendment of the merger ordinance, Folly Beach began more aggressively applying the avulsion doctrine. *See Severance v. Patterson*, 370 S.W.3d 705, 722 (Tex. 2012) ("Courts generally adhere to the principle that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added to or taken away from their banks or shores through erosion, the wearing away of land, and accretion, the enlargement of the land. . . . Avulsion, by contrast, as derived from English common law, is the sudden and perceptible change in land and is said not to divest an owner of title." (cleaned up)). As a result, Folly Beach filed suit against any B-lot owner who was attempting to develop his property in the near future. In particular, Folly Beach sought to prohibit B-lot owners from building on the portions of their lots that resulted from avulsion (i.e., the beach renourishment) because that land was part of the active beach and, thus, was owned by the State and protected by the public trust doctrine. The circuit court granted the property owners' motion to dismiss the lawsuit in May 2020. Folly Beach's appeal of that decision is pending in the court of appeals at this time.

With this background in mind, we now turn to the particular facts of this case.

II.

A.

Braden's Folly owns adjacent lots (Lot A and Lot B) on East Ashley Avenue. Both Lots are very small: Lot A is 8,377 square feet, and Lot B is 3,808 square feet.[14] Pursuant to Folly Beach's local zoning ordinances, all lots must be at least 10,500 square feet. Because Lots A and B preexisted Folly Beach's zoning ordinances, their sizes were grandfathered in upon passage of the zoning laws but are nonetheless classified as nonconforming.

When Braden's Folly acquired the Lots in 1999, there was a small house on Lot A, and Lot B was undeveloped because it was either underwater or part of the active beach. Following a beach renourishment in 2005, Lot B became developable because it had been transformed into mostly sandy beach. Therefore, between 2006 and 2007, Braden's Folly received building permits from Folly Beach and constructed two single-family residences—a larger, more modern one on Lot A and a smaller one on Lot B—for a total cost of $1.1 million.[15]

According to Braden's Folly, it had always intended to keep one of the Lots and sell the other—whichever of Lot A or B received the highest offer—in order to pay for the construction costs of the two houses. However, construction on the Lots finished in 2007 during the housing market collapse and Great Recession, which made selling either of the Lots financially unfeasible at that time. Nonetheless, even after the housing market recovered, Braden's Folly did not place the Lots on the market, continuing to use them for family vacations and as rental properties

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[14] To be more precise, Lot B is approximately the same size as Lot A. However, taking the perpetual easement line into account, the buildable area on Lot B is only 3,808 square feet.

[15] Lot A did not have independent access to the beach except for through Lot B. Likewise, Lot B did not have independent access to a road or room for a septic system. One had to cross Lot A to access Lot B. As a result, while the homes were being constructed, Braden's Folly granted itself a series of purported easements across the Lots to provide beach access for Lot A and road access and septic lines for Lot B. We discuss the efficacy of these easements in section IV.D of the opinion.

that grossed an average of $117,000 per year combined. It was not until February 2018 that Braden's Folly finally put the houses on the market, listing Lot A for $1.3 million and Lot B for $1.2 million.

One year later, upon the amendment of Folly Beach's merger ordinance in April 2019, Lots A and B were legally combined or "merged" into a single lot. In May 2019, Folly Beach sent a letter to Braden's Folly requesting it stop marketing the Lots separately and advising it to inform any prospective purchasers of the merger ordinance. Braden's Folly did not respond, continuing to list the Lots separately with no indicia either Lot was impacted by the merger ordinance.

Eventually, in August 2019, Braden's Folly received its first offer: a $1.1 million offer to purchase Lot A. Braden's Folly did not accept the offer, and the prospective purchasers declined to pursue the property further after learning of the existence of the merger ordinance and its impact on Lot A. Braden's Folly's realtor thereafter advised Braden's Folly to "[u]se this [offer] contract to go after the city. You might get your money and not have to sell" either Lot.

Four months later, not having received a single other offer, Braden's Folly filed suit against Folly Beach, claiming its inability to sell was due to the existence of the merger ordinance. According to Braden's Folly, the merger ordinance had upset its reasonable, investment-backed expectation under the *Penn Central* test and amounted to an unconstitutional taking.

Subsequently, in October 2020, Braden's Folly received a second offer to purchase Lot A for $1.2 million but instructed its realtor to decline the offer as it was "unable to accept due to the City's [merger] ordinance." Upon learning of the second offer, Folly Beach informed Braden's Folly it objected "in the strongest terms to the continued marketing of these properties separately during the pendency of this lawsuit." Braden's Folly again ignored the city's correspondence. Rather, despite receiving only two offers in nearly two-and-a-half years, Braden's Folly inexplicably raised the listing price for Lot B to $1.25 million.

In December 2020, Braden's Folly received a third offer, this time to purchase Lot B for $1.2 million. When Braden's Folly informed the prospective purchaser (Christopher Bonner) of the merger ordinance and pending litigation, Bonner stated he did not care whether the properties were merged and "would still like to get the [Lots] under contract." Therefore, on January 4, 2021, Bonner offered $2.2 million for Lots A and B together. The offer did not have an expiration date, but

Braden's Folly did not respond, later claiming it had no intention of selling during litigation or "below market value."

Having received no response, one week later, on January 11, 2021, Bonner unilaterally raised his offer to $2.55 million for Lots A and B—full asking price. Again, Braden's Folly did not respond to the offer. That same day, the listing for Lot A was removed from the internet. Three days later, the listing for Lot B naturally expired and was removed from the internet.

For the next two weeks, Bonner repeatedly attempted to get a response from Braden's Folly, reiterating his $2.55 million offer on numerous occasions. Meanwhile, an unrelated property went on the market just down the street from Lots A and B, and Bonner purchased that lot instead.

On January 28, 2021, after Bonner had acquired the other nearby lot, Braden's Folly reached out to Bonner, purportedly attempting to accept Bonner's $2.55 million offer for both Lots. However, Bonner replied that he had purchased another property nearby and no longer had as high a motivation to purchase Lots A and B. Because Bonner now intended Lots A and B to be purely investment properties, rather than ones he would live on with his family, he lowered his offer for Lots A and B to $2 million. Braden's Folly countered, stating it would accept $2.6 million (i.e., higher than Bonner's initial offer when he was a more motivated buyer). Bonner declined to purchase the Lots at that price. Because the Lots have remained off the market since January 2021, Braden's Folly has not received any further offers to purchase Lots A and B, whether merged or separate.

B.

In the interim, the pending takings lawsuit progressed, and Braden's Folly and Folly Beach filed cross-motions for summary judgment. The circuit court ultimately granted summary judgment to Braden's Folly, finding the merger ordinance constituted an as-applied taking because it unreasonably interfered with Braden's Folly's investment-backed expectation to sell the Lots separately. The circuit court held a property owner's reasonable investment-backed expectations are defined at the time the investment is made, and Braden's Folly intended to sell one of the Lots when it constructed the houses in 2006 and 2007. Likewise, the circuit court found the merger ordinance had an impermissibly detrimental economic impact on the value of the Lots, citing an alleged $508,000 market value loss calculated by an appraiser hired by Braden's Folly during litigation. Lastly, the circuit court found the character of the merger ordinance was akin to a classic

taking, explaining that, while merging "undeveloped or partially developed properties may not amount to a regulatory taking, . . . forcing two single-family residential houses to be merged into one property amounts to a taking."[16] The circuit court therefore concluded that "all" of the *Penn Central* factors weighed in favor of Braden's Folly, and that the merger ordinance as-applied to the Lots amounted to a regulatory taking.

Folly Beach directly appealed to this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR (stating the notice of appeal should be directly filed with the clerk of this Court if the appeal involves a constitutional challenge to a municipal ordinance).

III.

In reviewing the grant of summary judgment, this Court applies the same standard as the circuit court. *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). Summary judgment is appropriate "if 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." Rule 56(c), SCRCP. The Court must view the evidence and all reasonable inferences taken from it in the light most favorable to the non-moving party. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

The question of whether a taking has occurred is a question of law that this Court reviews de novo. *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (first citing *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011); and then citing *Ex parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011)).

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[16] While the amended ordinance merged a number of lots, in many cases, one or both of the lots merged was undeveloped. Moreover, some of the developed B lots are owned by a different entity than the A lots. Because those adjacent A and B lots are not contiguous *and* owned by the same entity, the merger ordinance does not apply to them. There are only five developed B lots owned by the same entity as the A lots, so aside from Braden's Folly, there are only four other property owners for whom the merger ordinance merged two *developed* lots. None of those property owners sued Folly Beach over the merger ordinance.

IV.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chi., Burlington & Quincy R.R. v. City of Chi.*, 166 U.S. 226, 239 (1897) (making the Takings Clause applicable to the States via the Due Process Clause of the Fourteenth Amendment).[17] "As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power," namely, the payment of just compensation to the affected property owner. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987)) (internal quotation marks omitted).

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Id.* at 537. However, beginning with its decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the United States Supreme Court recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle*, 544 U.S. at 538; *see also Byrd*, 365 S.C. at 656, 620 S.E.2d at 79 ("An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property.").

The question of what constitutes a regulatory taking for purposes of requiring just compensation has proven considerably difficult for courts to answer. *Penn Cent.*, 438 U.S. at 123. In *Mahon*'s "storied but cryptic formulation, 'while property may be regulated to a certain extent, if [the] regulation goes too far it will be recognized as a taking.'" *Lingle*, 544 U.S. at 538 (quoting *Mahon*, 260 U.S. at 415). "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Id.*; *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (recognizing that a regulation "can be so burdensome as to become a taking, yet the *Mahon* Court did

[17] The South Carolina Constitution has a similar Takings Clause. *See* S.C. Const. art. I, § 13. The takings analysis under the South Carolina Constitution is identical to the analysis under federal law. *Byrd*, 365 S.C. at 656 n.6, 620 S.E.2d at 79 n.6. Because neither party raises the Takings Clause in the South Carolina Constitution, we do not discuss it further.

not formulate more detailed guidance for determining when this limit is reached"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.").

In answering that question, the Supreme Court, "quite simply, has been unable to develop any 'set formula.'" *Penn Cent.*, 438 U.S. at 124; *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (recognizing there is "no magic formula"). Nonetheless, it has articulated two overarching principles that should guide all takings decisions. First, a court's analysis must be "informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, 533 U.S. at 617–18 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of justice and fairness." (citation omitted) (internal quotation marks omitted)). Second,

> government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

Andrus, 444 U.S. at 65 (quoting *Mahon*, 260 U.S. at 413).

Applying those principles, the Supreme Court has carved out two relatively narrow categories of regulatory takings that always require compensation, neither of which is implicated here.[18] Other than those narrow categories, however, regulatory takings challenges are generally governed by the balancing test set forth in *Penn*

[18] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding a government regulation that requires a property owner suffer a permanent physical invasion of his property, however minor, will require just compensation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (finding a regulation that completely deprives a property owner of all economically beneficial use of his property amounts to a compensable taking).

Central. *Lingle*, 544 U.S. at 538; *Palazzolo*, 533 U.S. at 617. That test requires consideration of three factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 137 S. Ct. at 1943; *Penn Cent.*, 438 U.S. at 124; *see also Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (characterizing the *Penn Central* test as the polestar for regulatory takings). The Supreme Court has described the *Penn Central* test as an "essentially ad hoc, factual inquir[y]" amounting to a "complex factual assessment[] of the purposes and economic effects of government action[]" that "depends largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323, 326 (2002) (internal alteration and quotation marks omitted) (first quoting *Penn Cent.*, 438 U.S. at 124; then quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992); and then quoting *Penn Cent.*, 438 U.S. at 124).

It bears repeating that, because *Penn Central* is a balancing test, "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. . . . Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus*, 444 U.S. at 65; *see also Murr*, 137 S. Ct. at 1943 ("A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. . . . The other persisting interest is the government's well-established power to adjust rights for the public good. . . . In all instances, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (cleaned up)).

A.

"Before determining whether a taking has occurred, a court must first determine what, precisely, is the property at issue." *Dunes W. Golf Club*, 401 S.C. at 305, 737 S.E.2d at 614. "The definition of the relevant parcel profoundly influences the outcome of a takings analysis." *Dist. Intown Props. v. Dist. of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999). Because a takings analysis requires a court to compare the value that has been taken from the property with the value remaining in the property, one of the most critical steps is determining how to define the unit of property whose value supplies the denominator of the takings fraction. *Keystone*

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); *Palazzolo*, 533 U.S. at 631 (describing the determination of the denominator in the takings fraction as a "difficult, persisting question"). In essence, the question is whether a court must consider a regulation's impact on only part of the property or on the whole parcel. *Dunes W. Golf Club*, 401 S.C. at 306, 737 S.E.2d at 615.

In the past, the Supreme Court oftentimes—but not always—found the denominator in the takings fraction amounted to the entire property, and not merely the part "taken" or interfered with by the government regulation. *See, e.g.*, *Penn Cent.*, 438 U.S. at 130–31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . [on] the parcel as a whole . . . ."); *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 ("Of course, defining the property interest taken in terms of the very regulation being challenged is circular."). More recently, in *Murr v. Wisconsin* the United States Supreme Court set forth a new, more nuanced multifactor test to define the relevant parcel. 137 S. Ct. at 1945–46 (applying the new test to two contiguous properties affected by a merger ordinance).

"First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." *Id.* at 1945. Second, courts should consider the physical characteristics of the property, including "the surrounding human and ecological environment." *Id.* As to this second factor, it may be particularly relevant whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." *Id.* at 1945–46 (citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.")). Third and finally,

> courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. . . . [I]f the landowner's other property is adjacent to the small lot, the market value of the properties may well

> increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.

Murr, 137 S. Ct. at 1946; *see also Dunes W. Golf Club*, 401 S.C. at 309 n.17, 737 S.E.2d at 616 n.17 (explaining the "extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel," and stating the court may consider "various factors including whether the property is divided by a road; whether the property was acquired at the same time; whether the purchase and financing of parcels were linked; the timing of development; whether the land is put to the same use or different uses; whether the owner intended to or actually did use the property as one economic unit; and the treatment of the property under state law") (quoting *Giovanella v. Conserv. Comm'n of Ashland*, 857 N.E.2d 451, 457–58 (Mass. 2006))).

Here, we find the *Murr* factors weigh in favor of identifying the relevant parcel as Lots A and B combined. *See Quinn v. Bd. of Cnty. Comm'rs*, 862 F.3d 433, 441 (4th Cir. 2017) ("The multifactor standard established by the Supreme Court's decision in *Murr* suggests that the lots subject to merger should be viewed as a collective.").

As to the first *Murr* factor (the treatment of the land), Lots A and B are currently merged under state and local law, and there are no physical or topographical boundaries that would limit joint treatment or development of the Lots. *See Quinn*, 862 F.3d at 441; *Dunes W. Golf Club*, 401 S.C. at 309 n.17, 737 S.E.2d at 616 n.17 (citing *Giovanella*, 857 N.E.2d at 457–58). In fact, the Lots have always been owned and sold as a single unit and were even redeveloped by Braden's Folly at the same time. *See Dunes W. Golf Club*, 401 S.C. at 309 n.17, 737 S.E.2d at 616 n.17 (citing *Giovanella*, 857 N.E.2d at 457–58). Likewise, due to both the zoning ordinances and the DMA, Braden's Folly is prohibited from selling the Lots separately or from building separate homes on each should one of the existing homes be more than 50% destroyed. *See Murr*, 137 S. Ct. at 1948.

Furthermore, with respect to the second *Murr* factor (the property's physical characteristics), the Lots are located on the beach, a quintessential example of an area that is heavily regulated and likely to become subject to additional environmental regulations. *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

Finally, turning to the third *Murr* factor (the value of the property), "the prospective value that Lot [A] brings to Lot [B] supports considering the two as one parcel for purposes of determining if there is a regulatory taking." *Murr*, 137 S. Ct. at 1948. As it currently stands, and regardless of the impact of the merger ordinance, Lot B is restricted by Folly Beach's DMA. As a result, should the house on Lot B be destroyed by 50% or more, the DMA would prevent any redevelopment on that lot. The merger of Lots A and B would allow the property owner to maintain a beach house on at least one of the lots—Lot A—while simultaneously enjoying the unparalleled beach access of Lot B. Moreover, any economic impact resulting from the merger ordinance "is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements." *Id.* Allowing only one house to be built on the two combined lots could increase the market value of the Lots as well because it would allow for the expansion of the existing Lot A house, and it ensures unobstructed ocean views for that single, larger house (rather than Lot A having little to no ocean view due to the existence of the home on Lot B). *Id.* at 1946.

As a result, we hold the appropriate denominator in the takings fraction, and the appropriate parcel to compare any economic impact resulting from the merger ordinance, is the entirety of Lots A and B combined.

B.

Equally important to defining the relevant parcel, we recognize that the unique legal landscape surrounding beach management regulation in Folly Beach must underlie our analysis of the *Penn Central* factors and inform our determination of what is "just and fair" in this situation. As discussed above, the extreme erosion in Folly Beach has caused it to receive unparalleled discretion to promulgate its own beachfront management regulations, including those dealing with setback requirements and erosion control barriers. The legal exemptions Folly Beach is afforded by the state's Beachfront Management Act create an unusual situation that leaves a locality—rather than the state or federal government—as the primary entity in charge of establishing policies to protect the beach and public trust, including prohibiting beachfront development. Of course, the same locality also has competing interests, such as fostering local beachfront development, drawing in tourism via rental properties, and increasing the local tax base.

It is clear Folly Beach weighed those competing interests differently in the past. Two decades ago, Folly Beach prioritized growth and development. Now,

however, it appears Folly Beach believes that allowing development of the super-beachfront lots causes a nuisance to nearby property owners, whose lots are eroded even more than the nine-feet-per-year average due to the seawalls in front of the neighboring super-beachfront properties. Moreover, in recent years, Folly Beach has pursued policies reflecting its view that super-beachfront development risks the livelihood of the entire community via the potential destruction of the beach (if there is no renourishment) or levying a significant, unpopular tax assessment on locals (if forced to pay for the renourishment itself).

Given the uniqueness of letting a locality control its own beach management, we find some discretion must be allowed to the locality to review and unwind decisions that it later realizes were unwise. *Cf. Esposito v. S.C. Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991) (explaining that establishing a policy of withdrawal from building seaward of a setback line in an effort to address beachfront erosion is a decision "in which . . . legislatures who deal with the situation from a practical standpoint[] are better qualified than the courts to determine the necessity, character[,] and degree of regulation which these new and perplexing conditions require" (internal alteration and quotation marks omitted) (quoting *Gorieb v. Fox*, 274 U.S. 603, 608 (1927))); *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (noting that coastal property in particular presents unique concerns for a fragile land system, and that those unique concerns may allow the regulating authority to "go further in regulating [beach properties'] development and use than the common law of nuisance might otherwise permit"). Borrowing from Justice Kennedy's sound rationale, the unique concerns facing the beach and coastline at Folly Beach may allow the city to "go further" in regulating super-beachfront development than the law might otherwise permit.

Of equal importance, the merger ordinance is only one of several tools Folly Beach has employed to push back super-beachfront development. In particular, the creation of the DMA must impact our analysis, as—wholly separate from the merger ordinance—development is now prohibited in Folly Beach within forty feet of the perpetual easement line. Thus, regardless of our decision on the constitutionality of the merger ordinance, Braden's Folly cannot redevelop Lot B in the event it is ever destroyed more than 50% of its current value because Lot B is located almost entirely within the DMA. The DMA is but one example of Folly Beach's attempts to ensure the continuing availability of federal funding to rebuild the beach.

The benefits resulting from periodic beach renourishment not only impact the public as a whole, but Braden's Folly in particular. According to the ACOE, absent the ongoing beach renourishment projects, the erosion in Folly Beach would have swept away not only the entirety of the B lots by now, *but also the entirety of the A lots on East Ashley Avenue as well*.[19] If federal funding is lost due to super-beachfront development, and Folly Beach is unable to secure enough local funds to itself pay for the renourishment projects, all of the houses on the northeast end of Folly Beach—including both of Braden's Folly's Lots—will be underwater in the next two to three decades.

Keeping Folly Beach's unique legal landscape in mind, we turn to the *Penn Central* test.

C.

The first *Penn Central* factor is the economic impact of the merger ordinance on Braden's Folly.

The United States Supreme Court has uniformly rejected the proposition that a diminution in property value, standing alone, can establish a taking. *Penn Cent.*, 438 U.S. at 131; *Andrus*, 444 U.S. at 66; *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621. Rather, the Supreme Court has advised that courts must focus "on the uses the regulations permit." *Penn Cent.*, 438 U.S. at 131; *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621. Likewise, while a comparison of property values before and after the regulation is relevant, "it is by no means conclusive." *Keystone Bituminous*, 480 U.S. at 490 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). "The extent of diminution in value is but one fact for consideration in determining whether governmental action constitutes a taking." *Dunes W. Golf Club*, 401 S.C. at 317, 737 S.E.2d at 621 (cleaned up) (citation omitted).

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[19] We specifically reference an ACOE map in the record showing that, absent any of the federally-funded beach renourishments (which started in the 1990s), the ACOE estimates the location of the mean highwater line would be in the middle of East Ashley Avenue—a staggering impact on local property owners that would result from only thirty years of unchecked erosion on Folly Beach. It may be important to recall that the ACOE does not provide federally-funded beach renourishment behind the perpetual easement line, thereby imposing all costs to restore those areas on the city and the property owners.

Here, an appraisal report commissioned by Braden's Folly found that if Lots A and B were sold separately, they were worth $508,000 more than if they were sold as a single, merged lot. Thus, Braden's Folly asserts it has lost the opportunity to obtain $508,000 in future profits. While we take issue with the appraiser's calculations,[20] we will assume for the purposes of discussion that they are accurate, and the appraiser correctly calculated the value of the Lots merged together as $2.2 million. Thus, using the takings fraction, Braden's Folly is asserting a 23% economic impact due to the merger ordinance:

$$\frac{\text{Value of property taken (Numerator)}}{\text{Value of relevant parcel (Denominator)}} = \frac{\$508{,}000}{\$2{,}200{,}000} = 23\%$$

While not insignificant, a 23% reduction in value is far less than other reductions in value found constitutional by the Supreme Court. *E.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value not a taking).

Notably, the Supreme Court has considered a number of takings cases in which a loss of an opportunity to make future profits was at issue. *See, e.g.*, *Andrus*, 444 U.S. at 54, 66 (dealing with a prohibition on the sale of certain bird artifacts); *Mahon*, 260 U.S. at 412–13, 414–15 (involving a regulation prohibiting the

[20] We find any reliance on the appraiser's report is questionable at best. For example, although there are also other areas of concern, the values of the Lots merged and separate were calculated using different methods, making any comparison between the results akin to comparing apples to oranges. Specifically, in finding a $508,000 difference between the Lots value if sold separately as compared to merged into a single property, the appraiser compared the *gross* proceeds of the Lots sold separately with the *net* proceeds of the Lots sold as a single unit. In comparing net proceeds to net proceeds, the difference in values of the Lots merged and separate is around $64,000—a negligible diminution in value of around 3%. *See Murr*, 137 S. Ct. at 1949 ("The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe.").

removal of coal from underground if it would cause subsidence of human habitations aboveground). In those two cases, the Supreme Court found the key distinction was whether a regulation physically restricted the property at issue: *Mahon* involved a loss of profit opportunity accompanied by a physical restriction against the removal of the coal, whereas *Andrus* involved a loss of profit opportunity that was not accompanied by a physical restriction of the property. *See Andrus*, 444 U.S. at 65–66 & n.22 (distinguishing *Mahon*). As explained by the *Andrus* Court,

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, *a significant restriction has been imposed on one means of disposing of the artifacts*. But the denial of one traditional property right does not always amount to a taking. *At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety*. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds [and bird artifacts].
>
> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. *At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.* Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

444 U.S. at 65–66 (emphasis added) (internal citations omitted). Here, the merger ordinance is not accompanied by any physical restriction on the Lots.

Moreover, as Folly Beach has repeatedly conceded, even under the merger ordinance, Braden's Folly remains able to rent out the houses on the Lots separately and continue bringing in revenue, with the average gross receipts for the

Lots amounting to approximately $117,000 per year. *See Penn Cent.*, 438 U.S. at 131 (stating courts should focus "on the uses the regulations permit," rather than what is not permitted); *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621 (same); *cf. Murr*, 137 S. Ct. at 1949 ("They can use the property for residential purposes, including an enhanced, larger residential improvement."); *Palazzolo*, 533 U.S. at 631 ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" (citation omitted)); *Quinn*, 862 F.3d at 442 ("Quinn can still build homes on his land; the [Merger] Provision only requires that the development be less dense than he had hoped."); *Beard v. S.C. Coastal Council*, 304 S.C. 205, 208, 403 S.E.2d 620, 622 (1991) (finding a setback provision did not effect a taking in part because the property owners could still sell the property and utilize the rental units on the property).

Finally, it is legally significant that, during the pendency of this lawsuit, Bonner—a buyer who was unquestionably aware of the amended merger ordinance and its impact on the Lots—offered Braden's Folly its full asking price of $2.55 million for both Lots. Bonner diligently pursued the sale, emailing and calling Braden's Folly daily for several weeks but receiving no response to his inquiries or full-priced offer. Given those facts, it is absurd to suggest the merger ordinance had an unconstitutionally negative economic impact on the Lots. After all, Braden's Folly was offered its full asking price for the Lots. It simply chose not to accept that offer, perhaps due to its realtor's advice to continue marketing the Lots solely to "go after the city. You might get your money and not have to sell."

For all of these reasons, it is our opinion the economic impact factor weighs heavily in favor of finding there has been no compensable taking.

D.

We next turn to the second *Penn Central* factor: the extent to which the merger ordinance interfered with Braden's Folly's investment-backed expectations.

"In evaluating a regulatory takings claim, the purpose of consider[ing] . . . investment-backed expectations is to limit recoveries to property owners who can demonstrate that they [invested in] their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Columbia Venture, L.L.C. v. Richland Cnty.*, 413 S.C. 423, 449, 776 S.E.2d 900, 914 (2015) (internal alteration and quotation marks omitted) (citation omitted). "A reasonable investment-backed expectation must be more than a unilateral expectation or an

abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)) (internal quotation marks omitted); *Penn Cent.*, 438 U.S. at 130 ("[T]he submission that [a property owner] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."). Rather, courts will evaluate a property owner's reasonable, investment-backed expectations through an objective lens. *Dunes W. Golf Club*, 401 S.C. at 320, 737 S.E.2d at 622; *Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914 ("The subjective expectations of the claimant are irrelevant. The critical question is what a reasonable owner in the claimant's position should have anticipated." (internal alteration marks omitted) (quoting *Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003)) (internal citation omitted)).

For example, courts in the past have looked to a number of objective factors, including: (1) whether the challenged regulation interferes with the existing use of the property;[21] (2) the degree to which the property's general locale is subject to

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[21] *Penn Cent.*, 438 U.S. at 136 (noting the regulation at issue did not interfere with the present use of the property: "[The property's] designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years . . . . So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."); *Esposito*, 939 F.2d at 170 ("[W]e note that the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's primary expectation concerning the use of the parcel. We find that the Act permitted the . . . plaintiffs to continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment. The plaintiffs, in fact, have stipulated that 'none of the Plaintiffs . . . have discontinued use of their property, as it was used before enactment of the subject Statutes.' They continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property and continue to use it for residential and recreational purposes; and *they were significantly diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction*." (emphasis added) (cleaned up)); *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878 (stating that "continuation of the existing use of the property is the property owner's primary expectation when considering an owner's investment-backed expectations for the property" (quoting *Byrd*, 365 S.C. at 662,

regulation;[22] and (3) whether the property owner acquired the land after the regulation went into effect.[23] Likewise, in cases involving merger ordinances,

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620 S.E.2d at 82) (internal quotation marks omitted)); *Dunes W. Golf Club*, 401 S.C. at 319, 737 S.E.2d at 622 (finding the fact that the property had always been used as a golf course necessarily meant the owner's primary expectation was to continue using the property as a golf course, not to build houses on the land).

[22] *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (stating coastal property engenders a greater degree of concern due to the fragile ecosystem, and therefore the State may be permitted to go further in regulating development and use than in other types of environments); *Murr*, 137 S. Ct. at 1948 ("The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land."); *Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914 ("In examining the reasonable expectations prong, the level of industry regulation is a pertinent but not determinative factor." (quoting *Chancellor Manor*, 331 F.3d at 906) (internal quotation marks omitted)); *Dunes W. Golf Club*, 401 S.C. at 319, 737 S.E.2d at 622 (finding the property owner's expectations were unreasonable in part because they "did not take into account the wetlands, easements, or substantial changes to the [property] that would be required" to bring those expectations to fruition); *cf. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993) ("Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.") (citation omitted)).

[23] *Palazzolo*, 533 U.S. at 633, 634 (O'Connor, J., concurring) ("Further, the regulatory regime in place at the time the claimant [invests in] the property at issue helps to shape the reasonableness of those expectations. . . . For example, the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner."); *Murr*, 137 S. Ct. at 1949 ("Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."); *Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914 (explaining a property owner's reasonable investment-backed expectations are defined at the time he makes the relevant investment in the property, and any regulatory regime in place at that time informs the scope of those expectations; but also stating that

courts may also find objective indicia of a property owner's investment-backed expectations by examining the sizes and shapes of the properties to be merged. *Cf. Murr*, 137 S. Ct. at 1948 (noting it was reasonable to treat two adjacent lots as merged because they were contiguous along their longest edge, and their narrow shape and topography made it "reasonable to expect their range of potential uses might be limited").

Here, there is some objective evidence that Braden's Folly's investment-backed expectation in developing Lot B was to sell one of its Lots separately from the other. Braden's Folly invested in its Lots in 2006 and 2007 when it redeveloped the house on Lot A and built a new super-beachfront house on Lot B.[24] At that time, the merger ordinance did not exist, and property owners along East Ashley Avenue freely developed and sold their A and B lots independently from one another. Objectively, it would have been reasonable for Braden's Folly to have expected to be able to do the same. *See Murr*, 137 S. Ct. at 1949; *Palazzolo*, 533 U.S. at 633, 634 (O'Connor, J., concurring); *Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914.[25] Additionally, Braden's Folly attempted to set up a

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while "timing and sequence are quite probative and material to [the] analysis, . . . they are simply not dispositive" (citations omitted)).

[24] There is language in one of our prior cases that could indicate a property owner's investment-backed expectations are defined only at the time he purchases the property. *See, e.g.*, *Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914 ("A property owner's reasonable investment-backed expectations are defined at the time the property is purchased." (quoting *Norman v. United States*, 63 Fed. Cl. 231, 267 (2004))). However, that language should not be read out of context: in that case, the owner's investment in the property was made when he purchased the property. Here, the relevant investment was made in the property when Braden's Folly redeveloped the land. In other words, investment-backed expectations are set at the time the property owner actually invests in the property, for example, at the time he purchases it or at some other future point in time. However, as we explain below, the reasonableness of those expectations may be impacted by future events occurring after the time the investment is made.

[25] Likewise, Folly Beach affirmatively issued building permits for super-beachfront construction, which could have increased Braden's Folly's expectation that developing Lot B was reasonable. *But cf. Palazzolo*, 533 U.S. at 633, 634 (O'Connor, J., concurring) ("[T]he nature and extent of permitted development

complicated system of easements between Lots A and B to ensure both properties had road and beach access as well as room for a septic system. There would have been no reason for Braden's Folly to establish the easements if it did not intend to sell one of the Lots.

However, there are also a number of objective factors that weigh against finding Braden's Folly's reasonable, investment-backed expectation was solely to be able to sell the Lots separately from one another. First, Braden's Folly has used these Lots for family vacations and as rental properties for several decades. The "primary expectation" would seemingly be to continue those uses—something with which the merger ordinance does not interfere. *See Penn Cent.*, 438 U.S. at 136; *Esposito*, 939 F.2d at 170; *Dunes W. Golf Club*, 401 S.C. at 319, 737 S.E.2d at 622; *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878.

Second, we find significant Braden's Folly's delay in attempting to sell the Lots after their redevelopment. As explained above, the housing market collapsed around the time construction on the Lots was completed, which made selling one of the Lots financially unfeasible for several years. However, once the market recovered, Braden's Folly waited many years to put the Lots on the market, continuing to use them both as family vacation homes and rental properties. Moreover, even after the houses were placed on the market, Braden's Folly made little to no effort to actually sell either property.[26] While Braden's Folly may have initially intended to sell one of the Lots following construction, that expectation apparently changed over time.[27]

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under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations *without vesting any kind of development right in the property owner*." (emphasis added)).

[26] For example, although the houses were continuously listed for nearly three years beginning in February 2018, Braden's Folly received only two offers over the first two-and-a-half years—one in August 2019, and one in October 2020. Nonetheless, Braden's Folly never lowered the listing prices for the Lots, instead raising the listing price for Lot B by $500,000 in December 2020.

[27] At three different places in the record, one of the Braden brothers testified specifically about the changed expectation regarding the Lots, stating:

(1) "Eventually, the real estate market rebounded and offers were

Third, even assuming Braden's Folly's investment-backed expectation remained the same, the government cannot be held hostage by a property owner's expectations indefinitely when an owner refuses to implement those expectations. Rather, at some point, the government must have a right to regulate local properties in a measured fashion without running afoul of the takings doctrine, even if its regulation runs contrary to an owner's unspoken and unimplemented investment-backed expectations. *See Columbia Venture*, 413 S.C. at 449, 776 S.E.2d at 914 (explaining the property owner's subjective expectations and efforts to implement those expectations are irrelevant, and courts must instead focus on what a reasonable, similarly situated property owner should have anticipated (quoting *Chancellor Manor*, 331 F.3d at 904)).

This is particularly true when, as here, the government regulation affects properties in a dynamic, fragile environment. Coastal areas are some of the most heavily regulated areas in the state due to their inherent vulnerability and volatility. Nonetheless, at the time Lot B was developed and Braden's Folly initially formulated its investment-backed expectation, Folly Beach had enacted little to no regulations protecting the beach from over-development, including setback requirements or prohibitions on seawalls. In terms of beach regulation, Folly Beach was an outlier compared to surrounding coastal towns.

Over a decade later, when Braden's Folly half-heartedly attempted to actually implement its purported investment-backed expectation and placed the Lots on the market, there had been a number of events that impacted the reasonableness of Braden's Folly's initial expectation. More specifically, the need for regulation in Folly Beach's coastal areas had become evident. The frequency of large-scale beach renourishments steadily increased due to the super-beachfront development, objectively indicating that development was not sustainable. Of more concern, the

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available for us to sell *but we decided to continue renting and vacationing at the houses instead*." (Emphasis added).

(2) "[I]t was our intention to own one and sell one. When that didn't happen, then we went into rental, and that then kind of became sort of the combination of usage, where it was personal and rental, and it sort of bounced up and down based upon the different ages of [our] children and the locations of [our family members]."

(3) "There was a lot of family resistance [to selling the Lots]."

super-beachfront houses and their seawalls created a public nuisance via the blue blob areas. Once it became apparent that the developed B lots were the source of these flooded areas, it likewise became objectively unreasonable for Braden's Folly to expect to own Lot B with no restrictions or regulations impacting its ownership, including its ability to alienate the property in whatever manner it chose. While it is true the unreasonableness of Braden's Folly's expectations did not fully manifest until after it invested in the redevelopment of the Lots, we harken back to Braden's Folly's inexplicable delay in implementing its investment-backed expectation. That delay was entirely within Braden's Folly's control. We find it objectively unreasonable for Braden's Folly to see the creation and worsening of a public nuisance created by super-beachfront development and *not* expect the city to regulate in some fashion to attempt to fix the problem. *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation . . . ."); *Quinn*, 862 F.3d at 442 (holding a merger ordinance did not constitute an unconstitutional taking even though it interfered with the owner's investment-backed expectations to develop the affected properties; explaining the owner could still implement his expectations, just in a less dense manner than he had initially envisioned).

Fourth, we find the purported creation of easements between Lots A and B does not weigh heavily in favor of Braden's Folly's investment-backed expectation. As briefly alluded to in note 15, *supra*, the easements were created when "Mark Braden granted *himself*" the rights to beach access for Lot A and road access and septic lines for Lot B. (Emphasis added.) However, Braden's Folly could not create those easements while owning both the dominant and servient estates, so the easements do not legally exist. *Windham v. Riddle*, 370 S.C. 415, 419, 635 S.E.2d 558, 560 (Ct. App. 2006) (explaining an easement cannot exist where both the purported servient and dominant estates are owned by the same person (citing *Haselden v. Schein*, 167 S.C. 534, 539, 166 S.E. 634, 635 (1932))), *aff'd*, 381 S.C. 192, 672 S.E.2d 578 (2009); *cf.* 12 S.C. Jur. *Easements* § 32 (Sept. 2022 Update) ("Courts generally have held that upon acquisition of the dominant tenement and the servient tenement by the same person at the same time, an easement is extinguished by merger."). Thus, while Braden's Folly argues the attempt to create the easements showed its investment-backed expectation to separately sell the Lots, because the easements do not exist, their attempted creation does not impact this factor of the *Penn Central* test or cause this factor to weigh in favor of Braden's Folly.

Fifth and finally, the size, shape, and orientation of the Lots provides objective indicia that Braden's Folly's expectation to develop and sell Lot B was unreasonable. Specifically, most of Lot B is subject to the perpetual easement for renourishment, leaving a very small footprint in which a house could be built, far below the minimum lot size requirement in Folly Beach's zoning ordinances. However, Lot B is contiguous with another undersized (albeit slightly larger) parcel—Lot A—owned by the same entity. Combining the two Lots makes a single "normal" sized lot that many other property owners living on East Ashley Avenue have used to develop one single-family home. Thus, the small size of the Lots provides some objective evidence that Braden's Folly's intent to develop and sell a separate single-family residence was objectively unreasonable. *See Murr*, 137 S. Ct. at 1948; *see also id.* at 1947 ("[L]ot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power.").

Accordingly, in sum, there are some facts that weigh in favor of finding Braden's Folly's investment-backed expectation was reasonable and some that weigh in favor of finding its expectation was unreasonable. We therefore find this factor of the *Penn Central* balancing test does not weigh in favor of either party. *See Palazzolo*, 533 U.S. at 634, 635 (O'Connor, J., concurring) (explaining that "[I]nvestment-backed expectations, though important, are not talismanic under *Penn Central*"; and counseling against giving investment-backed expectations "exclusive significance" lest the State wield too much power, or the property owner "reap windfalls and an important indicium of fairness is lost"); *Columbia Venture*, 413 S.C. at 454, 776 S.E.2d at 917 ("[D]eveloping real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." (quoting *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994))).

E.

Finally, we turn to the third *Penn Central* factor and analyze the character of the government action, specifically, whether Folly Beach's merger ordinance is akin to an eminent domain action.

Regulatory takings cases "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. A regulation will be more readily found to amount to an unconstitutional taking if it causes "private property [to be] pressed into some form of public service under the

guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018; *Penn Cent.*, 438 U.S. at 124. However, if the regulation is merely a "public program adjusting the benefits and burdens of economic life to promote the common good," the regulation will pass constitutional muster. *Penn Cent.*, 438 U.S. at 124, 125 (stating that "[z]oning law[s] are, of course, the classic example" of such a public program). It therefore becomes important for a court to consider "the magnitude or character of the burden a particular regulation imposes upon private property rights" as well as "how any regulatory burden is distributed among property owners." *Lingle*, 544 U.S. at 542 (emphasis omitted) ("In answering [the takings] question, we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good . . . .'" (quoting *Andrus*, 444 U.S. at 65)); *see also Penn Cent.*, 438 U.S. at 133 ("Legislation designed to promote the general welfare commonly burdens some more than others.").

In *Murr*, the Supreme Court discussed the character of merger ordinances extensively, stating:

> The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development.
>
> When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances.
>
> Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by

> casting doubt on the many merger provisions that exist nationwide today.
>
> . . . .
>
> . . . Finally, the [character of the] governmental action [(i.e., the merger ordinance)] was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

137 S. Ct. at 1947–48, 1949–50 (internal citations omitted); *see also Quinn*, 862 F.3d at 441, 443, 445 (reaching a similar holding for similar reasons: "Local governments require flexibility to expand services like sewer in response to community needs; those governments also must be able to control the density of development in order to prevent overcrowding in schools, clogging of streets, overload on sewer facilities, degradation of the environment, and a host of other concerns. As recognized in *Murr*, adding a highly dubious constitutional overlay to the already complex mixture of legal requirements risks making land use planning a well-nigh impossible undertaking.").

Here, Folly Beach's merger ordinance does not unfairly single out Braden's Folly's Lots. Rather, as discussed by the *Murr* Court, merger ordinances have long been employed as a tool to regulate lot sizes. Like in *Murr*, the merger ordinance here is "a reasonable land-use regulation, enacted as part of a coordinated . . . effort to preserve the [beach] and surrounding land." 137 S. Ct. at 1949–50.[28]

While Braden's Folly was slightly burdened by the merger ordinance, it in turn will "benefit greatly from the restrictions that are placed on others." *Keystone Bituminous*, 480 U.S. at 491. Folly Beach and its witnesses set forth in detail the advantages to local beachfront property owners and the public at large should the city unwind the super-beachfront development. The most important of the benefits to local property owners is the continued existence of federal funding for beach

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[28] We find it significant that the quote in the preceding sentence is the entirety of the *Murr* Court's analysis of this *Penn Central* factor: the Supreme Court was so dismissive of the possibility that a merger ordinance could enact a taking that it addressed the character of the government action in a single sentence in its opinion. That cursory analysis speaks volumes as to the strength of its finding as to this factor of the *Penn Central* test.

renourishment, which in turn (1) protects the A and B lots—particularly given that *all* of the lots would be underwater at this point if it were not for the continual beach renourishment; and (2) avoids property owners paying higher taxes if federal funding is extinguished and Folly Beach must pay for the renourishments with local funds alone.

Accordingly, we find the character of the merger ordinance is not akin to a classic eminent domain action. Rather, in light of the potential public costs of continuing unchecked super-beachfront development, we reject the argument that Folly Beach's merger ordinance constitutes anything but responsible land use policy—one that is generally applicable and widely accepted nationwide. *See, e.g.*, *Murr*, 137 S. Ct. at 1949–50; *Quinn*, 862 F.3d at 443. We thus hold this factor of the *Penn Central* test weighs in favor of finding the merger ordinance did not effect a taking of the Lots.

F.

After applying the *Penn Central* test, we find two factors weigh strongly in favor of Folly Beach: the economic impact and the character of the government action. As to the third factor, we find there is competing evidence regarding whether the merger ordinance interfered with Braden's Folly's reasonable, investment-backed expectation. We therefore conclude the third factor is a neutral factor that does not weigh in favor of either party. As a result, we hold the *Penn Central* balancing test overall weighs in favor of Folly Beach, and the merger ordinance did not effect an unconstitutional taking of Braden's Folly's Lots.

V.

Braden's Folly's super-beachfront house is one of a handful in Folly Beach that are unintentionally threatening the continued existence of the beach as a whole. In response, Folly Beach amended its merger ordinance to require the combination of jointly-held, undersized, contiguous lots that abut the beach. That merger ordinance is but one part of a coordinated effort by the city to protect the beach and the federal funding that keeps the beach from eroding away entirely.

In accordance with every other jurisdiction in the country that has addressed the constitutionality of merger ordinances, we find Folly Beach's ordinance is a reasonable land-use regulation. It is true that Braden's Folly is slightly burdened by the merger ordinance in that the ordinance restricts one method by which Braden's Folly could alienate its property. However, despite the impact of the

merger ordinance, Braden's Folly generally retains a near-full "bundle of sticks" incident to its ownership of the Lots: it may continue to use the properties in the same manner it has for decades, it may alienate the properties as a single unit, and it may exclude others from the properties as it sees fit. *See Andrus*, 444 U.S. at 65–66. Moreover, any economic impact on the value of the Lots appears to be *de minimis*. We therefore hold the merger ordinance did not unconstitutionally take Braden's Folly's property without just compensation. As a result, we reverse the circuit court's entry of summary judgment in favor of Braden's Folly and remand to the circuit court to enter judgment for Folly Beach.

REVERSED AND REMANDED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Mary Ann German, Appellant.

Appellate Case No. 2018-002090

Appeal from Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 28149
Heard September 21, 2021 – Filed April 5, 2023

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

CHIEF JUSTICE BEATTY: Appellant was convicted of felony driving under the influence ("DUI") resulting in death and sentenced to eleven years' incarceration. Before trial, Appellant moved to suppress evidence of her blood alcohol content ("BAC") obtained through a warrantless blood draw, which was

taken pursuant to section 56-5-2946 of the South Carolina Code[1] while she was hospitalized after an automobile accident. Finding that section 56-5-2946 was constitutional as applied and unchanged by the holdings of *McNeely*[2] and *Birchfield*,[3] the trial court denied the motion to suppress. The court concluded that law enforcement had probable cause to suspect Appellant of felony DUI and properly obtained the blood draw pursuant to section 56-5-2946.

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[1] Section 56-5-2946 provides in relevant part:

> (A) Notwithstanding any other provision of law, a person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].
>
> (B) The tests must be administered at the discretion of a law enforcement officer. The administration of one test does not preclude the administration of other tests. The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing. A person who is tested or gives samples for testing may have a qualified person of his choice conduct additional tests at his expense and must be notified of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial.

S.C. Code Ann. § 56-5-2946(A)–(B) (2018) (emphasis added).

[2] *Missouri v. McNeely*, 569 U.S. 141 (2013) (holding the natural metabolization of BAC does not create a per se exigency as an exception to the Fourth Amendment's warrant requirement).

[3] *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (holding warrantless breath tests, but not blood tests, are permitted as searches incident to arrest under the Fourth Amendment).

Appellant appealed her conviction based on the denial of her motion, and the court of appeals requested certification pursuant to Rule 204(b), SCACR. We agreed to consider whether the warrantless blood draw based on section 56-5-2946 violated Appellant's Fourth Amendment rights or her rights under the South Carolina Constitution and, in effect, whether section 56-5-2946 is constitutional.

We conclude section 56-5-2946 is facially constitutional but unconstitutional as applied in Appellant's case. However, we find the trial court did not err in denying Appellant's motion to suppress because law enforcement acted in good faith based on existing precedent at the time of the blood draw. We affirm Appellant's conviction.

I. FACTS

On July 9, 2016, Appellant and her husband were diverted from their vacation camping plans due to traffic and decided to pull off Highway 21 in Beaufort County. The couple decided to rest for the evening and have a few drinks at a bar, known locally as "Archie's." There, patrons offered the couple an all-you-can-drink bracelet for ten dollars as part of an event being held that night. The bar served "free pouring" liquor, and Appellant consumed a beer and four to six vodka drinks.

Around 12:30 a.m., Appellant drove their truck off the property. Upon leaving the parking lot, Appellant entered the road, ran the stop sign before Highway 21, and drove into the wrong side of the divided highway. Her truck collided with a sedan head-on, and, tragically, the other driver did not survive the collision.

Paramedics, firefighters, and police officers all responded to the collision. First responders extracted Appellant and her husband from the vehicle, and a responding officer noted an alcoholic odor emanating from each of them. The responding paramedics placed Appellant into an ambulance and noted an ethanol smell from Appellant. In response to paramedics' questions, Appellant heavily slurred her speech. One paramedic testified Appellant was intoxicated.

In the early morning hours of July 10, 2016, Appellant arrived at Beaufort Memorial Hospital by EMS on a backboard, and medical professionals expressed concern she had a serious head injury. However, Appellant's only ultimate injury was a laceration on the bottom of her foot. Later, Appellant became belligerent and agitated. The emergency room physician testified that, based on her medical opinion, Appellant was intoxicated.

After arriving on the scene of the collision, a state trooper went to the hospital to obtain a blood draw from Appellant, who was the driver of the truck involved in the accident. Based on hearing information from other law enforcement officers, being at the scene himself, and observing Appellant at the hospital, the trooper suspected Appellant of felony DUI. He placed Appellant under arrest at the hospital around 2:00 a.m.

The trooper read Appellant her rights pursuant to the implied consent statute. However, instead of reading the felony DUI advisement of rights form, he read Appellant the advisement of rights form for misdemeanor DUI because he inadvertently "grabbed the wrong form." Regardless, Appellant resisted cooperation and refused to sign the paperwork detailing her rights. The emergency room physician declined to release Appellant for a breath test within the two-hour window to take Appellant to a police station for a breath test as required by law.[4] Because the trooper could not administer a breath test in the hospital, he ordered a blood draw while Appellant was in a hospital bed.[5] Appellant's BAC registered 0.275%.

The trooper was the only officer at the hospital, and neither he nor any other responding officer sought a warrant to collect the sample of Appellant's blood. He

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[4] *See* S.C. Code Ann. § 56-5-2950(A) (2018) ("At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, *or for any other reason considered acceptable by the licensed medical personnel*, the arresting officer may request a blood sample to be taken . . . . A breath sample taken for testing must be collected *within two hours of the arrest*. Any additional test to collect other samples must be collected within three hours of the arrest." (emphasis added)).

[5] Pursuant to section 56-5-2946, if there is probable cause to believe an individual violated the felony DUI statute or is under arrest for felony DUI, he or she "*must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs." S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added); *see also State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) (holding in a felony DUI case, an officer need not offer a breath test as the first testing option, nor must the officer obtain a medical opinion that such a test is not feasible before ordering a blood test or urine sample).

conceded on cross examination that his office had provided him with a number to reach a magistrate late at night and he had used the number before. He also admitted it was "[p]ossible" to obtain a warrant; however, he explained that he did not seek a warrant because he "was trained . . . when [he] came into law enforcement" that "if there's a felony DUI involving death, [he] [did] not need permission." He told Appellant, "like it or not, we are getting a blood draw."

Three months before trial, the court heard arguments on Appellant's motion to suppress evidence of the blood draw and its results. Appellant focused her argument on an as-applied challenge rather than a facial challenge to the constitutionality of the statute. Specifically, she believed there is a way to read the statute such that a person, who is suspected upon probable cause of committing felony DUI, must consent. However, Appellant maintained that, under the facts in this case, a search warrant was necessary and only a neutral and detached magistrate could determine probable cause for a search warrant. Conversely, the State argued that, under section 56-5-2946, the probable cause to arrest Appellant for felony DUI is sufficient to eliminate the need to obtain a warrant. The State waived its argument that the officer relied on the exceptions for a search incident to an arrest or exigent circumstances and, instead, relied solely on the felony DUI statute.

The court, finding the statute constitutional as applied, ultimately adopted the State's arguments and denied the motion to suppress. Appellant renewed the motion throughout trial, and this appeal followed.

II. STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id*. at 570, 549 S.E.2d at 597.

III. DISCUSSION

Appellant contends the trial court erred in denying her motion to suppress the BAC results because the warrantless blood draw violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Appellant further argues the warrantless blood draw violated her right against unreasonable invasions of privacy in South Carolina's Constitution. Additionally, Appellant avers the State waived any reliance on the exceptions for exigent circumstances and a search incident to an arrest. Even if preserved, Appellant maintains the State failed to prove an applicable exception that would justify the warrantless blood draw. Finally, Appellant contends any error in admitting the BAC results cannot be harmless.

In response, the State claims the trial court correctly denied Appellant's motion to suppress the BAC results. The State argues the warrantless search was reasonable because exigent circumstances existed and the search was a permissible search incident to a lawful arrest. The State further maintains the good-faith exception applies and, if the trial court erred, the error was harmless.

Initially, we note that our appellate courts have said that an operator of a motor vehicle in South Carolina is not required to submit to alcohol or drug testing. *Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 383, 848 S.E.2d 768, 773 (2020) (citing *S.C. Dep't of Motor Vehicles v. Nelson,* 364 S.C. 514, 522, 613 S.E.2d 544, 548 (Ct. App. 2005)). Both *Sanders* and *Nelson* involved suspended driver's licenses due to refusal to submit to an alcohol breath test. However, these cases are distinguishable from the case now before this Court because they involved civil penalties, not criminal convictions; they did not address the constitutionality of the statutes; and the decisions appear to be founded on statutory interpretation. Nonetheless, it is arguable that our appellate courts have spoken on the issue of mandatory alcohol and blood testing, even if some may view it as dicta. In any case, clarity of the law is needed.

A. Constitutionality under the Fourth Amendment to the U.S. Constitution

This Court has recognized that a blood draw is a search and seizure under the Fourth Amendment in a triad of cases dealing with our implied consent statutes. *See State v. Key*, 431 S.C. 336, 344, 848 S.E.2d 315, 318 (2020) (remanding the case for a determination of exigent circumstances which the State has the burden to establish); *State v. McCall*, 429 S.C. 404, 410, 839 S.E.2d 91, 93 (2020) (holding exigent circumstances justified the warrantless blood draw); *Hamrick v. State*, 426

S.C. 638, 654, 828 S.E.2d 596, 604 (2019) (declining to address exigent circumstances where the good-faith exception justified the warrantless blood draw). Further, the United States Supreme Court has held a blood draw is a search under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Under the Fourth Amendment, people are free from unreasonable searches and seizures by their government. *McCall*, 429 S.C. at 409, 839 S.E.2d at 93. A warrantless search is unreasonable per se, unless it falls within a recognized exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014); *see also State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) (noting a warrantless search is *per se* unreasonable). The recognized exceptions to the warrant requirement are search incident to a lawful arrest, hot pursuit, stop and frisk, the automobile exception, the plain view doctrine, consent, and abandonment. *State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015). Three exceptions to the warrant requirement are considered here: search incident to a lawful arrest, consent, and exigent circumstances.

During the pretrial suppression hearing, the State argued that the blood draw was taken solely pursuant to section 56-5-2946 and expressly waived any reliance on the search incident to a lawful arrest and exigent circumstances exceptions. Accordingly, we decline to address these exceptions to the warrant requirement. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). In our analysis, we depend solely on the consent exception to the warrant requirement; however, we briefly discuss the other exceptions as they have developed.

South Carolina's implied consent statute provides in relevant part:

> [A] person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].

S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added). Although our jurisprudence already has considered our implied consent statutes, we have not yet directly addressed their constitutionality. In *McCall*, we reserved that question for a future case: "While we leave this question for another day, we do note numerous

courts have cast doubt on the constitutionality of similar implied consent statutes." 429 S.C. at 413 n.3, 839 S.E.2d at 95 n.3. We address that question today.

Over the years, we have seen a jurisprudential movement, in both this Court and the United States Supreme Court, calling into question the constitutionality of implied consent statutes. In *Schmerber*, the United States Supreme Court recognized that, despite the usual need for a warrant, an officer might have reasonably believed there was an emergency and a blood draw was an appropriate search incident to an arrest. 384 U.S. at 770–71 (holding the case specific facts allowed a warrantless blood draw because the officer might have reasonably believed there was an emergency). However, years later, the United States Supreme Court held the dissipation of alcohol in the blood alone does not categorically create an exigent circumstance. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding the warrantless blood draw of a suspected drunk driver as an exigent circumstance requires a "case-by-case analysis under the totality of the circumstances"). In *McNeely*, the United States Supreme Court justified the previous holding in *Schmerber* with its specific facts. *Id*. at 152, 156.

More recently, in *Birchfield v. North Dakota*, the United States Supreme Court held a warrantless blood draw cannot be taken as a search incident to an arrest.[6] 579 U.S. 438, 476 (2016). The Court considered the more intrusive nature of a blood draw against the less intrusive breath test because a blood draw pierces the skin, takes a sample from the body, and preserves it indefinitely. *Id*. at 463–64, 474. Breath tests, the Court said, are permissible as searches incident to arrests because they have little physical intrusion, the test only reveals the amount of alcohol

[6] At oral argument, the State asked this Court to limit *Birchfield* to its facts—a misdemeanor DUI—as part of its argument that the blood draw was a valid search incident to arrest. In *Birchfield*, the United States Supreme Court held a breath test, but not a blood test, may be administered as a search incident to a lawful arrest. 579 U.S. at 476. We, however, decline to apply *Birchfield* to only misdemeanor DUI cases because the United States Supreme Court in no way limited its holding in *Birchfield* to only misdemeanor cases. In fact, the Court weighed the government's interest in preventing traffic fatalities with privacy interests in light of the "carnage" and "slaughter" caused by drunk drivers. *Id*. at 465. We believe the Court, in its analysis, considered the government's heightened interest in preventing felony DUIs.

in the person's breath, and participation in the test is unlikely to enhance the arrestee's embarrassment. *Id*. at 461–63.

In 2019, the United States Supreme Court again revisited the doctrine of exigent circumstances when considering a challenge to an implied consent statute. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). There, the Court refined its holdings in *Schmerber* and *McNeely* to permit an exigent circumstances exception when, "(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id*. at 2537. The Court noted, "[B]oth conditions are met when a drunk-driving suspect is unconscious." *Id*. Yet, the Court made clear:

> We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Id. at 2539. However, in *Key*, we declined to place the burden of proving the absence of an exigency on the defendant:

> We cannot sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement.

431 S.C. at 348, 848 S.E.2d at 321 (internal citations omitted).

Similarly, this Court has seen a gradual movement in our case law governing South Carolina's implied consent statutes. First, in interpreting section 56-5-2946, we held an officer need not offer first a breath test before ordering a blood test for a felony DUI suspect. *State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005). We then declined to address the constitutionality of our implied consent statute in *Hamrick*, where the good-faith exception to the exclusionary rule applied. 426 S.C. at 655, 828 S.E.2d at 604–05. In *McCall*, we reserved the question of section 56-5-2946's constitutionality and held exigent circumstances otherwise justified the

warrantless blood draw. 429 S.C. at 413, 839 S.E.2d at 95. Most recently, in *Key*, we ruled, even when the suspect is unconscious, the prosecution has the sole burden of proving exigent circumstances. 431 S.C. at 348, 848 S.E.2d at 321. Parting ways with the *Mitchell* Court, we remanded the case for that determination. *Id*. at 349, 848 S.E.2d at 321.

Notwithstanding the development in the law, we continue to recognize the wisdom of implied consent statutes and note their valid, remedial purposes. *See Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 848 S.E.2d 768 (2020) (affirming the suspension of a driver's license where the suspected driver refused to take a BAC test).[7] Drivers in South Carolina do not hold a right to operate motor vehicles but, instead, have a privilege subject to reasonable regulation. *Id*. at 382–83, 848 S.E.2d at 773. Valid purposes behind regulating conduct with implied consent statutes include obtaining best evidence of a driver's BAC and promoting traffic safety by removing dangerous drivers from the roads. *Id*. at 383, 848 S.E.2d at 773.

Moreover, the distinction between a categorical exception and a general exception to the Fourth Amendment informs our judgment. The United States Supreme Court has recognized a limited class of categorical exceptions to the warrant requirement. *McNeely*, 569 U.S. at 150 n.3. The two types are distinguished by whether or not the exception requires a factually specific inquiry on a case-by-case basis. *Id*. Categorical exceptions, including the automobile exception[8] and the search incident to a lawful arrest exception,[9] do not require "an assessment of

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[7] We also recognize the United States Supreme Court in *Birchfield* noted the general validity of implied consent statutes. 579 U.S. at 476–77. The *Birchfield* Court called only a warrantless blood draw as a search incident to an arrest into question.

[8] *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("We therefore interpret *Carroll* [*Carroll v. United States*, 267 U.S. 132 (1925)] as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

[9] *See, e.g.*, *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth

whether the policy justifications underlying the exception . . . are implicated in a particular case." *Id*. On the other hand, general exceptions require case-by-case inquiries and analyses. *Id*.

Consent operates as a general exception because it demands a fact-specific determination of whether the suspect invoked her consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("Similar considerations lead us to agree [] that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

In analyzing the constitutionality of section 56-5-2946, we must also consider the difference between as-applied and facial constitutional challenges. "The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (quoting 16 C.J.S. *Constitutional Law* § 153, at 147 (2015)) (holding petitioner could only make an as-applied challenge because petitioner did not attack the acts as a whole and this Court has a preference to remedy constitutional infirmities in the least restrictive way possible). "The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

"One asserting a facial challenge claims that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Doe*, 421 S.C. at 502, 808 S.E.2d at 813 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015). Under a facial challenge, "a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id*. at 418 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). Conversely, "[i]n an 'as-applied' challenge, the party challenging the constitutionality of the statute claims that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act,

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Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

would be unconstitutional.'" *Doe*, 421 S.C. at 503, 808 S.E.2d at 813 (citation omitted).

Returning to the question presented, we recognize an implied consent statute cannot allow what the Fourth Amendment prohibits. Therefore, to satisfy the requirements of the United States Constitution, a warrantless blood draw pursuant to section 56-5-2946 generally must rely on the consent exception[10] to the warrant requirement.[11]

The Fourth Amendment requires a finding that consent be given voluntarily under the totality of the circumstances. *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Durades*, 929 F.2d 1160 (7th Cir. 1991); *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding consent as an exception to the warrant requirement must be voluntarily given). We further recognize that a valid finding of consent requires a suspect to be able to refuse or revoke consent. *See State v. Bruce*, 412 S.C. 504, 511, 772 S.E.2d 753, 756 (2015) (holding a suspect did not object to an officer picking up keys to access a car during a search to which the suspect consented); *State v. Prado*, 960 N.W.2d 869, 879–80 (Wis. 2021) (noting a person has a constitutional right to refuse a warrantless search). Consequently, implied consent cannot justify a categorical exception to the general warrant requirement.

Here, the trial court unconstitutionally applied section 56-5-2946 to the warrantless search of Appellant's blood. Because the statute is not unconstitutional in all its applications, Appellant brings an as-applied challenge to its constitutionality. As applied, the trial court should have conducted an inquiry into Appellant's consent to determine whether her Fourth Amendment rights were

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[10] *But see Mitchell*, 139 S. Ct. at 2531 (recognizing exigent circumstances almost always allows a warrantless blood test).

[11] Despite the State's insistence that section 56-5-2946 is constitutional as a search incident to an arrest, we find, fundamentally, it must rely on consent. As *Birchfield* made clear, a blood draw cannot be constitutional as a search incident to an arrest, and we decline to limit *Birchfield* to its facts. *See supra* n.6.

violated. Several cases from other jurisdictions, among others,[12] have followed and applied this reasoning, often recognizing statutes as invalid when they do not fall within an exception to the warrant requirement.

In *Prado*, the Supreme Court of Wisconsin found Wisconsin's incapacitated driver provision unconstitutional beyond a reasonable doubt because it did not fit within any recognized exceptions to the warrant requirement. 960 N.W.2d at 878. There, the court distinguished the exigent circumstances exception and the consent exception to the Fourth Amendment's warrant requirement. *Id*. at 879. Turning to consent, the court made the following finding:

> In the context of warrantless blood draws, consent "deemed" by statute is not the same as actual consent, and in the case of an incapacitated driver the former is incompatible with the Fourth Amendment. Generally, in determining whether constitutionally sufficient consent is present, a court will review whether consent was given in fact by words, gestures, or conduct. This inquiry is fundamentally at odds with the concept of "deemed" consent in the case of an incapacitated driver because an unconscious person can exhibit no words, gestures, or conduct to manifest consent.

Id. (internal citations omitted). The court further recognized that "[t]he concept of a statutory per se exception to the warrant requirement violates both *McNeely* and *Birchfield*," as we agree today. *Id*. at 880; *supra* nn.6 & 7. Although the Wisconsin court considered the constitutionality of the incapacitated driver provision, distinguishable from our statute, here, Appellant had the ability to exhibit and effectuate words, gestures, and conduct to manifest her opposition to the search. Seeing as the court was concerned about unconscious drivers not having the ability

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[12] *See, e.g.*, *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017) ("In recent years, a multitude of courts in our sister states have interpreted their respective—and similar—implied consent provisions and have concluded that the legislative proclamation that motorists are deemed to have consented to chemical tests is insufficient to establish the voluntariness of consent that is necessary to serve as an exception to the warrant requirement."); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) ("[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent.").

to evince consent, there exists no greater manifestation than when the suspect is conscious.

Further, in *Williams v. State*, the Supreme Court of Georgia reiterated, "[T]his [c]ourt plainly distinguished compliance with the implied consent statute from the constitutional question of whether a suspect gave *actual consent* for the state-administered testing." 771 S.E.2d 373, 376 (Ga. 2015). There, because the trial court did not determine whether the defendant gave his consent under the exception, the Supreme Court of Georgia vacated the judgment and remanded the case to determine the voluntariness of the consent under the totality of the circumstances. *Id*. at 377.

Additionally, in *State v. Yong Shik Won*, the Supreme Court of Hawaii found, "[I]n order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given." 372 P.3d 1065, 1080 (Haw. 2015). In considering Hawaii's implied consent law, the court further found, "[A] person may refuse consent to submit to a BAC test under the consent exception, and the State must honor that refusal." *Id*.

Again, analyzing consent, the Supreme Court of Nevada, in *Byars v. State*, found the exigent circumstances exception did not justify the warrantless blood draw. 336 P.3d 939, 944–45 (Nev. 2014). The state, there, argued consent was implied from the driver's decision to drive on Nevada's roads. *Id*. However, the court held consent cannot be irrevocable by electing to drive on Nevada's roads. *Id*. Further, the implied consent statute allowing for an officer to use force to obtain a blood sample could not be read constitutionally because it does not allow a driver to withdraw consent and, thus, is not given voluntarily. *Id*. at 946.

Turning to the instant case, we conclude Appellant did not consent to the warrantless blood draw while hospitalized on the night of the accident. First, the state trooper acknowledged that he could have procured a warrant, yet he decided to order the blood draw without one. As he testified, he relied solely on what he thought section 56-5-2946 authorized. Second, Appellant refused to sign the implied consent form the state trooper presented to her, even though it was the wrong form. Appellant's signature was marked, "refused to sign." Third, Appellant, by her actions, did not impliedly consent. She became belligerent and was obstinate with hospital personnel. Fourth, when ordering the blood draw, the state trooper told

Appellant, "like it or not, we are getting a blood draw." Under the totality of the circumstances, by her actions, Appellant refused to consent to the warrantless search. Because the state trooper proceeded anyway and section 56-5-2946 does not exist as a separate exception to the general warrant requirement, the blood draw was an unreasonable search and seizure under the Fourth Amendment.

Although we find section 56-5-2946 unconstitutional as applied to Appellant, we conclude this section is facially constitutional. "Finding a statute or regulation unconstitutional as applied to a specific case does not affect the facial validity of that provision." *Travelscape v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011). Faithful to our standard of review, we recognize that an officer legally can obtain a warrant or the suspect's consent to request a blood draw, pursuant to the Fourth Amendment's mandates. Exigent circumstances also justify a warrantless blood draw in the proper case. *Mitchell*, 139 S. Ct. at 2531. Additionally, breath tests do not intrude greatly into the body, they do not reveal more than one piece of information, and they do not cause more embarrassment than what is inherent in an arrest. *Birchfield*, 579 U.S. at 462–63. Accordingly, we recognize the continued validity of section 56-5-2946, as it authorizes implied consent for breath tests.

B. Constitutionality under the South Carolina Constitution

Appellant maintains the State violated her right against unreasonable invasions of privacy. We agree.

The South Carolina Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (emphasis added). We have interpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more "heightened"—protection than that provided by the United States Constitution. *State v. Weaver*, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) (holding ultimately the search in question met the automobile exception to the warrant requirement and did not violate the more expansive right to privacy); *see*

also State v. Brown, 423 S.C. 519, 533, 815 S.E.2d 761, 769 (2018) (Beatty, C.J., dissenting) (noting the heightened protection afforded by the state constitution and finding it protected petitioner from the warrantless search of his cell phone). "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 625 n.13 (1997). "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). "South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context." *Id*. at 644, 541 S.E.2d at 841.

In the context of medical treatment, we held the State violates the right of privacy when a prison inmate would be forced to take medication solely for the purpose of facilitating execution. *Singleton v. State*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993). Further, we declared, "An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions." *Id*.

In *Forrester*, this Court considered whether the right against unreasonable invasions of privacy requires informed consent to government searches. Although we held in *Forrester* that South Carolina's right against unreasonable invasions of privacy did not require informed consent on the part of the suspect before government searches,[13] we noted the drafters of the constitution were concerned with the emergence of new technology increasing the government's ability to conduct a search. *Id*. at 647–48, 541 S.E.2d at 842–43. Specifically, we recognized the special committee to study the constitution, in drafting the provision, both intended for it to cover electronic surveillance and recognized it would have a far greater impact. *Id*. at 647, 541 S.E.2d at 842. Later, we explained in *Weaver*:

> The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy to be

[13] Ultimately, in *Forrester*, we reversed the court of appeals and found that an officer exceeded the scope of Forrester's consent when he searched the contents of her pocketbook beyond a visual inspection in violation of her right against unreasonable invasions of privacy. *Id*. at 648, 541 S.E.2d at 843.

> searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met.

374 S.C. at 322, 649 S.E.2d at 483.

In *State v. Counts*, this Court again had an opportunity to expand the analysis in *Forrester* and *Weaver*. In *Counts*, the petitioner argued the "knock and talk" technique done without probable cause or reasonable suspicion violated article I, section 10. 413 S.C. 153, 162, 776 S.E.2d 59, 65 (2015). We looked to other jurisdictions with similar rights against unreasonable invasions of privacy for guidance. *Id*. at 170–71, 776 S.E.2d at 69. However, we did not find a persuasive basis to require an officer to tell a citizen of his or her right to refuse consent to a search. *Id*. at 171, 776 S.E.2d at 69. Continuing the development of the law, we noted there must be some analysis of the privacy interests involved when a warrantless search is made: "Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence." *Id*. at 172, 776 S.E.2d at 69. In applying the new rule, we upheld the trial court's denial of petitioner's motion to suppress because the findings of fact established law enforcement's reasonable suspicion to conduct the "knock and talk." *Id*. at 173, 776 S.E.2d at 70.

Turning to the instant case, we find the provision in our state constitution is implicated when law enforcement obtains a warrantless blood draw. As the United States Supreme Court recognized in *Schmerber v. California*, there is a constitutional right to privacy in one's blood. 384 U.S. 757, 767 (1966). Because blood draws intrude upon an individual's privacy to a much higher degree, the Court distinguished a blood draw from a breath test in Fourth Amendment jurisprudence precisely. *Birchfield*, 579 U.S. at 463–64. Blood tests require piercing the skin and the extraction of a part of the person's body, and a blood test provides law enforcement with a preservable sample that contains a person's DNA and other medical information besides the BAC reading. *Id*. at 464. The drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches, and a blood test's process certainly is one of the most invasive government searches a suspect may encounter.

Although the state trooper had, at a minimum, a reasonable evidentiary basis to believe Appellant committed the felony DUI before obtaining the blood draw, Appellant refused consent to the search. In *Counts* and *Forrester*, we held law

enforcement was not required to inform the suspect of the right to refuse consent prior to a search; however, had Counts or Forrester nevertheless refused consent, law enforcement would have needed to obtain a warrant to proceed with the search. Because Appellant clearly refused her consent by refusing to sign the implied consent form and she acted inconsistently with consent, the state trooper needed to obtain a warrant to legally proceed with the blood draw under the South Carolina Constitution. Because he ordered the blood draw despite Appellant's refusal, he violated Appellant's right to be free from an unreasonable invasion of privacy.

Nevertheless, we still must closely scrutinize "unwarranted medical intrusions" to effectuate the protection of South Carolina's right against unreasonable invasions of privacy. *Singleton*, 313 S.C. at 89, 437 S.E.2d at 61. At bottom, implied consent, as referred to in the impaired driver statutory scheme, is non-existent outside of matters involving the civil suspension or revocation of driver's licenses. There is no constitutionally approved, statutory per se implied consent to a blood draw. Law enforcement's demand for a warrantless blood test must be founded on an approved exception to the warrant requirement of the Fourth Amendment. A mandatory and forced blood draw is patently distinct from other modes of DUI investigation and, consequently, violates the South Carolina Constitution when administered without a warrant.

C. Good faith

Even though the warrantless blood draw violated Appellant's rights under the Fourth Amendment and our state constitution, the State asserts the exclusionary rule should not apply because law enforcement acted in good faith. We agree.

The exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). "[T]he sole purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v. United States*, 564 U.S. 229, 246 (2011). The rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id*. at 238. In *Davis*, the United States Supreme Court concluded the officers who conducted the search did not violate Davis's Fourth Amendment rights "deliberately, recklessly, or with gross negligence." *Id*. at 240. Where there is no misconduct and no deterrent purpose to be served, suppression of

the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

In *Hamrick*, we held the good-faith exception to the exclusionary rule applied and BAC evidence from the blood test was admissible. 426 S.C. at 653, 828 S.E.2d at 604. The warrantless blood draw occurred on November 14, 2011, two years before the Supreme Court's ruling in *McNeely*. *Id*. at 643, 828 S.E.2d at 598. Because the law seemed to support the existence of exigent circumstances before the *McNeely* ruling, we ruled the officers acted lawfully based on a reasonably good-faith belief. *Id*. at 654, 828 S.E.2d at 604.

Here, Appellant's blood was drawn in the early morning hours of July 10, 2016 pursuant to section 56-5-2946, which had not been directly called into question in this state until *McCall*, over three years later.[14] At the time, *McNeely* only declined to create a categorical exigency in every DUI case. *Birchfield*, though it most seriously calls into question the validity of implied consent, was only released three weeks before the blood draw in this case and dealt only with a blood draw as a search incident to arrest. When Appellant's blood was drawn, the state trooper reasonably relied on section 56-5-2946 and did not violate Appellant's rights deliberately, recklessly, or with gross negligence. At trial, the state trooper testified he was trained to not seek a warrant before a blood draw in the situation of a felony DUI. He relied on this training when making the decision to draw Appellant's blood that night.

Therefore, we hold the good-faith exception applies because of the state trooper's reasonable reliance on section 56-5-2946 and its uncertain validity at the time.[15] Although the state trooper violated Appellant's rights under both the Fourth Amendment and South Carolina's Constitution, exclusion is not warranted. We are

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[14] *McCall* was heard on May 30, 2019 and filed on February 5, 2020.

[15] Because we find the good-faith exception to the exclusionary rule applies, we do not need to address the State's harmless error argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address petitioner's remaining issues when the first issue was dispositive).

confident law enforcement will take care to use section 56-5-2946 in accordance with what the South Carolina Constitution and the Fourth Amendment require.[16]

IV. CONCLUSION

The state trooper violated Appellant's rights under the Fourth Amendment and South Carolina's Constitution when he obtained the blood draw under section 56-5-2946 without a warrant. However, the state trooper acted in good faith based on the law existing at the time.

Despite its unconstitutional application here, section 56-5-2946 remains facially constitutional. We recognize a suspect may consent to chemical testing, and even revoke consent, as section 56-5-2946 contemplates. Additionally, we acknowledge the lower privacy interests at stake in breath analyses under the statute. Our holding today only invalidates the law enforcement practice of obtaining blood samples for BAC testing when a warrant has not been obtained, no other exceptions to the warrant requirement justify the search, and the suspect neither consents nor revokes her consent.

AFFIRMED.

KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.
FEW, J., concurring in a separate opinion.

[16] "Responsible law enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis*, 564 U.S. at 241 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

JUSTICE FEW: I concur in result. The Court is deciding this case by addressing the wrong issue. The question before us is not whether the implied consent statute is unconstitutional, but rather whether the State demonstrated the consent exception applies to excuse the Fourth Amendment's warrant requirement. German's implied consent is one circumstance to be considered in answering that question. I believe the consent exception does apply, and thus, I agree the trial court did not err in denying German's motion to suppress. I firmly disagree that our implied consent statute is unconstitutional, even as applied to German.

As I wrote for a unanimous Court in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), "pursuant to South Carolina's implied consent statute," a defendant in a felony driving under the influence case "is deemed by law to have consented to have his blood drawn by virtue of driving a motor vehicle in South Carolina." 426 S.C. at 654, 828 S.E.2d at 604. Under our implied consent law—subsections 56-5-2950(A) and 56-5-2946(A) of the South Carolina Code (2018)—German impliedly consented to the warrantless blood draw conducted in this case. German's motion to suppress the results of the blood draw, however, was based on the Fourth Amendment. Under the Fourth Amendment, the fact the implied consent law required her to consent before she was allowed to drive does not alone answer the question of whether the consent exception excused the otherwise applicable requirement the officer obtain a search warrant. Rather, German's implied consent is one circumstance a court must consider in determining whether the blood draw was a reasonable search and seizure under the Fourth Amendment. *See State v. Alston*, 422 S.C. 270, 288, 811 S.E.2d 747, 756 (2018) ("The existence of voluntary consent is determined from the totality of the circumstances." (quoting *State v. Provet*, 405 S.C. 101, 113, 747 S.E.2d 453, 460 (2013))). If the consent exception does not apply, that does not make the implied consent statute unconstitutional; it simply means the State failed—on the unique facts of this or any case—to demonstrate the consent exception excused the warrant requirement, and therefore, the search was unreasonable under the Fourth Amendment. *See id.* ("When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary." (quoting *Provet*, 405 S.C. at 113, 747 S.E.2d at 460)); *State v. Frasier*, 437 S.C. 625, 638, 879 S.E.2d 762, 769 (2022) (stating warrantless searches are unreasonable under the Fourth Amendment unless an exception to the warrant requirement applies). Thus, the question before this Court is a Fourth Amendment question, not a question of the constitutionality of the implied consent statute.

In this case, the trial court erred by failing to consider the totality of circumstances affecting whether German consented to a search and seizure without a warrant. The majority has now done that and concluded the consent exception does not apply. I would find under the totality of circumstances in this case the consent exception does apply.

First, I would put great weight on implied consent. *See generally Mitchell v. Wisconsin*, 588 U.S. ___, ___,139 S. Ct. 2525, 2532-33, 204 L. Ed. 2d 1040, 1045-46 (2019) (explaining the Supreme Court's historical approval of "many of the defining elements" of implied consent statutes). German—like all adults who hold a driver's license in South Carolina—is an adult. She made a voluntary decision to accept the privilege of driving in this State in exchange for granting consent to have her blood drawn under the circumstances of this case.

Second, I would put little weight on the fact German was agitated and drunk in the emergency room. The officer testified German was "very belligerent, and was giving the hospital personnel a very hard time." The treating physician testified, "I remember [German] because she was extremely belligerent and rude to staff." The physician said German stuck out in her memory "because she was trying to bite nurses, spitting at us, yelling at us, cursing at us." This disruptive behavior does not indicate a lack of consent, but rather, is typical of someone who is extremely drunk. The fact a suspect is agitated, belligerent, and extremely drunk does not affect the person's capacity to consent to a search. *See United States v. Watters*, 572 F.3d 479, 483 (8th Cir. 2009) (recognizing intoxication is a circumstance to be considered as to whether consent is voluntary, "but intoxication alone does not render consent invalid"); *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986) (noting "the mere fact that one has taken drugs, or is intoxicated, or mentally agitated, does not render consent involuntary"). Importantly, German was not intoxicated when she voluntarily granted consent under the implied consent law.

Third, the officer read German a form stating, as the officer described it, "she doesn't have to take the test or give the samples." As the majority explains, the officer read German the wrong form. Under the Fourth Amendment, however, the error weighs in favor of a finding of voluntary consent because the "correct" form does not

indicate the suspect may refuse the test.[17] The fact the officer told German she did not have to allow the blood draw—which the officer was not required to do under the Fourth Amendment—is important in the totality of circumstances affecting whether the consent exception applies. *See Frasier*, 437 S.C. at 638, 879 S.E.2d at 769 ("Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis." (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058, 36 L. Ed. 2d 854, 875 (1973); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001))); *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841 ("The lack of [a] warning [that a suspect may refuse consent] is only one factor to be considered in determining the voluntary nature of the consent." (citing *State v. Wallace*, 269 S.C. 547, 552, 238 S.E.2d 675, 677 (1977))); *Wallace*, 269 S.C. at 552, 238 S.E.2d at 677 ("[K]nowledge of the right to refuse consent to search is merely another factor to be considered in the 'totality of the circumstances' in determining the voluntariness of the consent to search." (citing *Schneckloth*, 412 U.S. at 248, 93 S. Ct. at 2058, 36 L. Ed. 2d at 875)).

As to the fact German did not sign the form, there is no evidence she "refused" to sign it. Rather, the evidence indicates she was too unruly to even realize she was being asked to sign it. The officer testified "she really didn't want to listen . . . and there was no way she was going to sign this paperwork." He explained it is his policy to write "refused to sign" when confronted with such disruptive behavior. Nobody testified German actually refused to sign. For all we know, she did not sign the form because she believed doing so was unnecessary in light of the implied consent law. It is not for this Court to speculate as to her reasons for not signing the form. In any event, when a suspect actually refuses to sign such a form, the refusal does not by itself invalidate the implied consent. It is only part of the totality of the circumstances a court must consider in determining whether the State has demonstrated voluntary consent under the Fourth Amendment.

Fourth, the phlebotomist who actually drew the blood testified German "was willing to have the blood drawn." I would put the most weight on this fact, that when the officer told German "like it or not, we are getting a blood draw," she willingly gave

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[17] The "correct" form under the felony DUI statute provides, "Pursuant to Section 56-5-2946, you must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol [or] drugs . . . ." Rec. on Appeal at 349, *State v. McCall*, 429 S.C. 404, 839 S.E.2d 91 (2020) (No. 2015-001097).

the sample. At the actual time of the blood draw, therefore, she gave no indication she refused the test. This compelling fact tips the totality of the circumstances and—in my view—requires a finding that she voluntarily consented to the blood draw.

In summary, German made a voluntary decision to grant consent for a Fourth Amendment search and seizure when she accepted a license to drive in this State. In the emergency room the night of the incident, she was told she did not have to allow the blood draw, but she willingly did so. There is nothing in this record that indicates German withdrew or revoked the consent she impliedly gave. Under the totality of the circumstances, I would find German voluntarily consented to have her blood drawn and the consent exception excused the warrant requirement.

The majority wrongly focuses on the constitutionality of the implied consent law. Our implied consent statute should be read to place implied consent into the Fourth Amendment analysis as one circumstance indicative of voluntary consent. Reading the statute in this way, we fulfill our obligation to interpret our statutes as constitutional, if possible. *See State v. Ross*, 423 S.C. 504, 514-15, 815 S.E.2d 754, 759 (2018) (recognizing we must construe statutes as constitutional if possible and finding a way to read a subsection of the Sex Offender Registry Act as constitutional (citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999))).

The Supreme Court of South Carolina

In the Matter of Edward C. Nix, Respondent.

Appellate Case Nos. 2023-000481 and 2023-000482

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s)

and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
April 3, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Calvin D. Ford, Appellant.

Appellate Case No. 2019-001912

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge
Paul M. Burch, Circuit Court Judge

Opinion No. 5974
Heard December 7, 2022 – Filed April 5, 2023

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Appellate Defender Jessica M. Saxon, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Tommy Evans, Jr., all of Columbia, for Respondent.

KONDUROS, J.: Calvin D. Ford appeals his convictions for murder, possession of a weapon during the commission of a violent crime, and possession of a weapon by a felon. During Ford's immunity hearing pursuant to the Protection of Persons

and Property Act (the Act),[1] Ford asserts the circuit court erred in failing to sit as fact-finder at the immunity hearing. Ford also contends the circuit court erred in determining the Act does not provide immunity from prosecution for possession of a weapon during the commission of a violent crime and unlawful possession of a weapon by a person convicted of a violent crime. During Ford's trial, Ford asserts the trial court erred in allowing the State to introduce a witness's prior consistent statement. Ford also contends the trial court erred in sentencing Ford to five years' imprisonment for possession of a weapon during the commission of a violent crime after sentencing him to life imprisonment without the possibility of parole for murder (LWOP). We affirm the trial court's admission of a prior consistent statement, vacate Ford's sentence for possession of a weapon during the commission of a violent crime, and remand for the circuit court to make specific findings of fact that support whether Ford is, or is not, entitled to immunity for murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime.

FACTS

On June 22, 2017, an Horry County grand jury indicted Ford for the murders of Jamal Burgess and Dameion Alston, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime. Ford moved for immunity from prosecution pursuant to section 16-11-450. In that motion, Ford included a sworn statement from Aliga Campbell dated August 10, 2016.

Campbell described a "heated" conversation he had with Burgess at a birthday party on July 23, 2016 while Burgess was highly intoxicated. During the conversation, Burgess explained his reasoning for knocking out Ford's teeth in an incident five years earlier and asked Campbell to call Ford and invite him to the party. Campbell did not reach Ford, but Ford arrived at the party shortly afterward anyway.

According to Campbell, Burgess approached Ford soon after Ford arrived at the party, and they began talking. Campbell recalled that Alston attempted to intervene in the conversation because it appeared Burgess was trying to fight Ford. Campbell stated that when Burgess pushed Alston to the side Alston's gun fell to

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

the ground. Campbell claimed that Burgess then began firing his gun, and Ford picked up Alston's gun and returned fire. Campbell believed that Ford acted in self-defense because Burgess shot first and speculated that Burgess inadvertently shot Alston.

Campbell also claimed that the day before the shooting, Burgess rode by his house while he was outside with Ford. Campbell stated that when Burgess saw them he pulled his shirt up and showed a gun in his waistband. Campbell "took th[at] as a threat and a warning against Ford and anyone with Ford."

On September 14, 2017, Campbell was arrested for the murders of Burgess and Alston. The State tried Campbell with Ford. On March 5, 2019, Judge Culbertson conducted Ford's immunity hearing. When Ford called Campbell as a witness, Campbell's attorney informed the circuit court that he had advised, and would advise Campbell again, to invoke his Fifth Amendment right not to testify. Ford's counsel requested that Campbell take the stand solely to invoke his Fifth Amendment rights, but the circuit court did not allow Ford to call Campbell. Instead, the circuit court allowed Campbell's counsel to "assert his client's Fifth Amendment right."

Ford then stated he wanted to call a private investigator to testify about the contents of Campbell's statement. Ford argued the investigator's testimony should be permitted under Rule 804(b)(3) of the South Carolina Rules of Evidence because Campbell, the declarant, was unavailable after invoking the Fifth Amendment, and Campbell's statement was a statement against interest. The circuit court agreed that Campbell was unavailable but ruled that the statement was not against Campbell's interest.

Ford called his cousin, Everette Ford (Everette), as a witness at the immunity hearing. Everette testified that when Ford arrived at the party, Burgess called Ford over and put his arm around Ford in an aggressive manner. Everette also stated that Burgess was aggressive in his conversation with Ford because Burgess was "[m]ad about something." Everette explained that Ford removed Burgess's arm because Burgess had previously knocked Ford's teeth out in the same manner. Everette elaborated that Burgess was known for putting his arm around people and then hitting them with a gun.

According to Everette, Burgess took his gun out and Alston dropped his gun while trying to calm Burgess down. Everette claimed that when Alston dropped his gun, Burgess began shooting. Everette recalled that Ford picked up Alston's gun and ran away while returning fire as Burgess continued shooting. However, Everette admitted on cross-examination that his initial statement to law enforcement did not include his testimony that Alston dropped a gun that Ford picked up. Everette also admitted that Ford and Burgess had seen each other without having an altercation since Burgess knocked Ford's teeth out.

The State presented testimony from other witnesses during the immunity hearing. Felicia Williams testified that when she arrived at the party, Burgess and Ford were already talking with Alston between them. Williams stated that she heard Ford say he would fight but would not shoot. Williams recalled that she saw Burgess move Alston out of the way as Ford pulled out a gun and stated she ran into the nearby house after she heard gunshots. Williams testified that she did not see Burgess with a gun that night or Everette at the party.

Sherika Gore also testified that she did not see Burgess with a gun that night or Everette at the party. Gore recalled seeing Burgess and Ford talking but did not hear them yelling. However, in an earlier recorded statement given to law enforcement, Gore stated that the conversation between Ford and Burgess became heated. Gore testified that she ran when she noticed that Ford had a gun in his hand, but she did not see where Ford got the gun.

Additionally, officers that responded to the shooting testified they found six shell casings at the scene: five .380 shell casings were arranged linearly along the edge of the road, and one nine-millimeter shell casing was in the center of the road. Autopsies revealed that Burgess sustained a single gunshot wound, and Alston sustained three gunshot wounds.

At the conclusion of the immunity hearing, the circuit court denied Ford immunity and produced an order that stated Ford "failed to prove by a preponderance of the evidence that he is entitled to immunity." The circuit court also found that the Act did not provide immunity for the crimes of possession of a weapon during the commission of a violent crime and possession of a firearm by a felon.

The trial proceeded in front of Judge Burch on November 4, 2019. The State again called Gore as a witness during its case-in-chief. On cross-examination, Ford

revealed various inconsistencies between Gore's recorded statement, her immunity hearing testimony, and her direct examination testimony. Gore stated she could not remember telling law enforcement that she was unsure whether Ford came to the party to confront Burgess. Ford used portions of Gore's recorded statement and the immunity hearing transcript to refresh her recollection.

Additionally, Ford asked if Gore and Williams had discussed their recollections of the shooting. Gore replied that she had not discussed the incident with Williams, but Ford continued to ask Gore if she had.[2] Gore stated that she never went over her testimony with Williams but admitted that "[e]verybody" had discussed what they had seen the night of the shooting.

On redirect, the State moved to introduce Gore's entire recorded statement. When Ford objected, the State claimed that Ford made an allegation of recent fabrication and because Ford used portions of the interview to cross-examine Gore, the rules of evidence permitted the State to play the prior consistent statement. The trial court overruled Ford's objection and the State published Gore's recorded statement to the jury.

The jury acquitted Campbell of all charges and acquitted Ford of Alston's murder. However, the jury found Ford guilty of Burgess's murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a firearm by a person convicted of a violent offense. The trial court sentenced Ford to LWOP for the murder conviction and five years for each weapons charge. This appeal followed.

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial [court; it] will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 337 (2020) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by

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[2] Ford asked: "So[,] your dear friend, you guys have never talked about that night?"; "So[,] you've never said [to] the young woman who you told to get your children, . . . 'That's crazy,' or anything like that?"; "Have you ever talked about what you saw that night?"

an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

LAW/ANALYSIS

I. Introduction of Prior Consistent Statement

Ford argues the trial court erred in allowing the State to introduce Gore's full recorded statement. Ford asserts that he did not express or imply that Gore's testimony was recently fabricated or the result of improper influence or motive. Ford maintains that he simply impeached Gore with her prior inconsistent statements. We disagree.

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

Rule 801(d)(1)(B), SCRE. "Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.'" *State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001).

In *State v. Jeffcoat*, the defendant was on trial for criminal sexual conduct with a minor in the first degree. 350 S.C. 392, 394, 565 S.E.2d 321, 322 (Ct. App. 2002). On cross-examination, the defendant asked the victim if she had talked with her mother about what she would say in court and if the solicitor had told her what to say. *Id.* at 397, 565 S.E.2d at 324. Over the defendant's objection and pursuant to Rule 801(d)(1)(B), SCRE, the victim's mother and therapist repeated the victim's statements describing the defendant's abuse. *Id.* at 395, 565 S.E.2d at 323. On appeal, this court determined that testimony by the victim's mother and therapist was proper under Rule 801(d)(1)(B), SCRE, because the defendant "raised the issue of improper influence or 'coaching' by asking [the v]ictim whether she

'practiced' before testifying and whether anyone had told her what to say." *Id.* at 397, 565 S.E.2d at 324.

Here, the trial court did not abuse its discretion in admitting Gore's recorded statement into evidence. Like the defendant's questions to the victim in *Jeffcoat*, Ford's questions about Gore's inconsistent statements raised the issues of recent fabrication and improper influence. Ford's questions did not simply impeach Gore; rather, Ford's questions implied that Gore either collaborated with Williams to fabricate her version of events or Williams improperly influenced Gore's testimony. Ford's implication of recent fabrication or improper influence is compounded by his persistence in repeating the questions until Gore admitted that she had discussed the incident with others. Therefore, the State was permitted to introduce Gore's full recorded statement under Rule 801(d)(1)(B), SCRE. Accordingly, we affirm as to this issue.

II. Sentence for Possession of a Weapon During the Commission of a Violent Crime

On appeal, the State concedes that Ford should not have received a sentence for possession of a weapon during the commission of a violent crime because he was sentenced to LWOP for murder. The State asks this court to vacate that sentence. Accordingly, we vacate Ford's five-year sentence for possession of a weapon during the commission of a violent crime.

III. Immunity Under the Protection of Persons and Property Act

Ford argues the circuit court erred by failing to make specific findings of fact on the elements of self-defense during Ford's immunity hearing. Ford also argues the circuit court erred in determining the Act does not provide immunity from prosecution for the associated weapons charges. We agree and remand for the circuit court to make specific findings of fact that support whether Ford is, or is not, entitled to immunity for murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime.[3]

[3] Because we remand, we do not address Ford's other contentions regarding the immunity hearing. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C.

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567-68 (2019) (quoting *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)); § 16-11-450(A) ("A person who uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . .").

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate] court[s] review[] under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *Curry*, 406 S.C. at 370, 752 S.E.2d at 266). "[T]he circuit court is in the best position to assess witness credibility and make the necessary findings of fact." *State v. McCarty*, 437 S.C. 355, 375, 878 S.E.2d 902, 913 (2022).

At an immunity hearing, "the relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [circuit] court to deny immunity; the [circuit] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. "[T]he circuit court, in announcing its ruling, should at least make specific findings on the elements on the record." *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019); *see also McCarty*, 437 S.C. at 376, 878 S.E.2d at 913 ("[T]he circuit court shall make specific findings supporting its determination after considering all of the procedures . . . regarding the proper application of the Act.").

Our supreme court has made clear in *Cervantes-Pavon* and *McCarty* that the circuit court, sitting as fact-finder, must make specific findings that support its immunity decision. While the circuit court ruled that Ford did not prove by a preponderance of the evidence that he was entitled to immunity, the record contains no specific findings that support that determination. Therefore, the circuit

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598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate courts need not address remaining issues when disposition of an issue is dispositive).

court erred. *See McCarty*, 437 S.C. at 374-75, 878 S.E.2d at 912-13 (finding the court of appeals erred in upholding the trial court's denial of immunity because the trial court did not make specific findings that appellate courts could review).[4]

The circuit court also erred in determining that the Act does not apply to Ford's weapons charges. A finding of immunity from prosecution for murder under the Act would necessarily mean the defendant was lawfully armed in self-defense[5] and therefore also immune from prosecution for the related weapons charges. Contrary to what the State argues on appeal, the circuit court did not deny Ford immunity for the weapons charges because it denied Ford immunity for the murder charges; it ruled that the Act does not apply to the weapons charges. That was error. Accordingly, we remand for the trial court to make specific findings that support its determination of whether Ford is, or is not, entitled to immunity under the Act.

CONCLUSION

We affirm the trial court's admission of Gore's prior consistent statement, vacate Ford's sentence for possession of a weapon during the commission of a violent crime, and remand for the circuit court to make specific findings of fact that support whether Ford is, or is not, entitled to immunity for murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime. Accordingly, Ford's case is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

HEWITT and VINSON, JJ., concur.

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[4] In fairness to the learned immunity hearing judge, Ford's immunity hearing occurred before *McCarty* was published.

[5] *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (finding "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rita Joyce Glenn, individually and as personal representative of the Estate of Thomas Harold Glenn, deceased, Respondent,

v.

3M Company, f/k/a Minnesota Mining and Manufacturing Co.; Air & Liquid Systems Corporation, Individually and as Successor-In-Interest to Buffalo Pumps; Airgas USA, LLC; Aurora Pump; BW/IP Inc., a Subsidiary of Flowserve Corporation; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.; Carboline Company; Crane Co. d/b/a Crane Chempharma & Energy d/b/a Aloyco, n/k/a Crane Energy Flow Solutions; Crosby Valve, Inc.; Dana Companies, LLC; Daniel International Corporation; Fisher Controls International, LLC.; Flowserve Corporation, Individually and as Successor in Interest to Anchor/Darling Valve Company; Flowserve Corporation, Individually and as Successor to Byron Jackson Pump Company; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; Goodyear Tire & Rubber; Goulds Pumps, Inc.; Grinnell LLC, f/k/a Grinnell Corp, f/k/a ITT Grinnell Corp., Individually and as Successor to Kennedy Valve Manufacturing Co., Inc.; Hajoca Corporation; Imo Industries, Inc., Individually and as Successor-in-Interest to De Laval Turbine, Inc.; Ingersoll Rand Company; ITT Corporation; John Crane, LLC; Linde LLC, a Delaware Limited Liability Company, formerly known as the BOC Group, Inc. and/or Airco, Inc.; MP Supply, Inc. f/k/a Mill Power Supply; Metropolitan Life Insurance Company, a

wholly-owned subsidiary of MetLife Inc.; Sepco Corporation; The J.R. Clarkson Company Solely as a Successor by Merger to Anderson Greenwood & Co., f/k/a Kunkle Valve Company, Inc.; The Sherwin-Williams Company; Trane U.S. Inc., f/k/a American Standard, Inc.; United Conveyor Corporation; United Seal & Rubber Company, Inc.; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; Velan Valve Corporation; Viking Pump, Inc.; and Weir Valves & Controls USA, Inc., Individually and as Successor in Interest to Atwood & Morrill Co., Inc., Defendants.

Of which Fisher Controls International LLC is the Appellant.

Appellate Case No. 2019-001600

Appeal From Anderson County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 5975
Heard October 3, 2022 – Filed April 5, 2023

AFFIRMED IN PART AND REMANDED

C. Mitchell Brown, Allen Mattison Bogan, and Nicholas Andrew Charles, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Theile Branham McVey, of Kassel McVey, of Columbia, and Lisa White Shirley, Jessica M. Dean, and Jonathan Marshall Holder, all of Dallas, TX, for Respondent.

GEATHERS, J.: In this complex asbestos case, Appellant Fisher Controls International LLC (Fisher) seeks review of the circuit court's (1) denial of Fisher's motion for a judgment notwithstanding the verdict (JNOV), (2) denial of Fisher's

new trial motion, (3) partial denial of Fisher's motion for setoff, and (4) imposition of discovery sanctions. Among a legion of arguments made in its brief, Fisher maintains that the circuit court should have granted a setoff in the full amount of the settlement proceeds obtained by Respondent Rita Joyce Glenn (Rita) prior to trial against the jury's compensatory damages award. We affirm in part and remand for reconsideration of the respective amounts to be set off against the jury's compensatory damages awards for Rita's claims for wrongful death, survival, and loss of consortium.

FACTS/PROCEDURAL HISTORY

From the mid-1970s to at least 1990, Rita's husband, Thomas Harold Glenn (Tommy), worked as an instrument technician at the Oconee Nuclear Station operated by Duke Power Company (Duke) in Seneca. His work regularly required him to be within close proximity to co-workers' removal of gaskets and packing from valves manufactured by various companies,[1] including control valves sold by Fisher to Duke. The gaskets and packing often included asbestos, which could stand up to extremely high temperatures and high pressure. There were numerous Fisher valves at the plant, and some of them ranged from one inch to sixteen inches in diameter at the pipe connection, while others were approximately six feet tall. When the gaskets and packing in these valves were disturbed, Tommy was exposed to large quantities of asbestos.

Fisher anticipated that the gaskets and packing in their valves would deteriorate after normal use, so it sold replacements to Duke. As these gaskets deteriorated, they became brittle. Therefore, replacing one of these gaskets involved removing it from the valve component with which it was paired using a wire brush or power grinder so that the component's surface was clean enough to prevent future leaks. This process created visible dust. The removal of worn packing from valves also created dust.

Whenever a reactor unit at the plant would shut down for refueling, Tommy was routinely working alongside a crew performing maintenance work on Fisher valves and its components, which included scraping off the internal bonnet gaskets.

[1] A gasket is "a material (such as rubber) or a part (such as an O-ring) used to make a joint fluid-tight." *Gasket*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/gasket (last visited April 3, 2023). According to an employee of one of Fisher's co-defendants, packing is a "product that fits in a pump or a valve to prevent leakage from one area to another."

One of Tommy's co-workers explained that every 18 months, a reactor unit would shut down to refuel, i.e., "put new uranium in the core," which gave employees "the opportunity to do massive repairs" and maintenance. It was important to get as much work done as possible during these outages; therefore, the instrumentation crew had to work 12 hours a day, seven days a week, "because Duke was losing money if it wasn't generating."

Because the Oconee plant had three units, it had a minimum of two outages per year, and an outage would last at least sixty days. During outages, it was common for many different crews, including various instrumentation crews, to simultaneously occupy the same area while performing their respective tasks. This included Tommy's close proximity to another crew's removal of gaskets and packing from control valves, and, at times, they would even be working "on the same scaffold together."

In addition to the gaskets located inside the control valves, gaskets were used on the control valves' external flanges connecting the valves to piping in the plant,[2] and these gaskets were periodically replaced when Tommy was nearby. Although Fisher sold replacements for only those gaskets that were used inside its valves, its control valve handbook stated that gaskets made of asbestos were an option for the user to apply to its valves' external flanges.

Ultimately, Tommy was diagnosed with asbestos-related mesothelioma.[3] He underwent extensive medical treatments and took large amounts of pain medication. After an unsuccessful surgery for his condition, Tommy died on February 17, 2015. Subsequently, Rita filed the present products liability action against Fisher and numerous co-defendants, alleging that Tommy was exposed to asbestos emanating from the defendants' products. Rita asserted claims for wrongful death, survival, and loss of consortium based on theories of relief that included negligence, breach of implied warranty, and strict liability.

Prior to trial, the circuit court denied Fisher's motion in limine to exclude the testimony of Rita's medical experts but granted Rita's motion in limine to exclude a tissue study performed by Fisher's pathologist. Also prior to trial, the circuit court

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[2] A flange is "a rib or rim for strength, for guiding, or for attachment to another object." *Flange*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/flange (last visited April 3, 2023).

[3] According to one of Rita's medical causation experts, Dr. Arthur Frank, mesothelioma is "an aggressive cancer of the membranes lining the lungs."

approved a settlement between Rita and some of Fisher's co-defendants. The circuit court also approved Rita's designated allocation of 90 percent of the settlement proceeds to her wrongful death claim and 10 percent to the survival claim.

In January 2019, the circuit court conducted a trial on Rita's claims against Fisher and two co-defendants. Fisher's position at trial was that the asbestos gaskets in its valves were not harmful because they were encapsulated. At the conclusion of trial, the jury returned a verdict against Fisher on the negligence and breach of warranty theories of relief and awarded Rita $1 million for Tommy's survival damages, $1 million for wrongful death damages, and $1 million for Rita's loss of consortium damages. Additionally, the jury found "by clear and convincing evidence that the conduct of [Fisher was] willful, wanton or reckless" and awarded Rita $2,125,000 for punitive damages.

Fisher submitted several post-trial motions, including a motion for a setoff of Rita's pre-trial settlement proceeds against the jury's respective compensatory damages awards on Rita's three claims. The circuit court granted this motion in part, allocating 90 percent of the proceeds to the wrongful death claim and 10 percent to the survival claim and denying a setoff against the loss of consortium claim. The circuit court denied Fisher's remaining post-trial motions and granted Rita's post-trial motion for discovery sanctions. This appeal followed.

LAW/ANALYSIS

I. Inconsistent Verdicts

Fisher argues it is entitled to a new trial because the jury's verdicts on the strict liability and negligence theories of relief were inconsistent and the circuit court failed to instruct the jury to correct the inconsistency. Fisher asserts that the jury's finding for Fisher as to strict liability and its finding for Rita as to negligence were inconsistent because the elements of strict liability are subsumed within the elements of negligence. We conclude that the circuit court acted within its discretion in denying the new trial motion. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010) ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

While giving instructions to the jury, the circuit court stated:

> Plaintiff's claims in this case are based on three theories. The first theory is negligence, the second one is called strict liability, and the third is called breach of implied warranty. *The plaintiffs are not required to prove all of these theories to recover. Proof of a claim under any one of these theories would enable you to find that the plaintiffs are entitled to a verdict*. But the plaintiff must meet their burden of proof as to at least one of these theories in order to recover.

(emphasis added). The circuit court also instructed the jury to place the focus on the product rather than the defendant's conduct when evaluating a strict liability claim but to focus on the defendant's conduct when evaluating a negligence claim.

During their deliberations, the jury sent a question to the circuit court:

> Under Charge 13, strict liability, the plaintiffs must prove three things: First, that the product was in a defective condition, unreasonably dangerous to the plaintiff; two, that at the time of the injury the product was in essentially the same condition as it was when it left defendants' hands; three, plaintiff was injured by the product.
>
> As to Question 4 on the verdict form, which is one of three questions that asks the same thing for three different defendants, and the Question 4 is: We, the jury, find the Defendant Fisher Controls is strictly liable for selling products that proximately caused injury to the plaintiff, yes or no. And that same question is asked for all three defendants. As to strict liability question.
>
> As to Question 4 on the verdict form, determining strict liability, must all three things mentioned above be found true, or do Charges 14 for reasonable alternative design, 15 for design defect, or Charge Number 16 negate the fact that all three things under 13 must be true? In other words, is 13 an overarching umbrella for answering strict liability and 14, 15 and 16 follow underneath?

The circuit court provided the following response:

> In all circumstances, all three elements of Charge 13 must be proven in order to find strict liability. A defective condition, which is the heart of the strict liability issue, may be established in two ways: One, a design defect, and Instructions 14 and 15 discuss a design defect; or, two, a warning defect, which is addressed by 16. That is my instruction, ladies and gentlemen.

A portion of the verdict form asked jurors to select blanks corresponding to "Yes" or "No" for a series of statements. For instance, the jury indicated "Yes" to a statement concluding that Fisher "was negligent, and its negligence was a proximate cause of the Plaintiff's injuries." As to strict liability, in response to the statement "We the jury find [Fisher] is strictly liable for selling products that proximately caused injury to Plaintiff," both blanks were marked in some fashion. It appears that initially, the foreman marked the blank in front of "Yes" but scratched out the mark and then marked the blank in front of "No." What appears to be a "CK" notation is written beside "No." Notably, the jury marked the "Yes" option to Finding 7, which states that Fisher "breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages." The jurors also found "by clear and convincing evidence" that Fisher's conduct was "willful, wanton, or reckless,"[4] and they completed a "Punitive Damage Verdict Form" indicating they assessed punitive damages against Fisher in the amount of $2,125,000.

In its order addressing Fisher's post-trial motions, the circuit court stated, "Fisher has not shown that the jury's finding on strict liability was due to the absence of an element shared by the companion negligence claim in this case." The circuit court also stated, "The jury's questions about the strict liability instructions indicated division regarding whether to find for Plaintiff or Fisher on this claim. Their unanimous verdict on all three claims, finding in favor of Plaintiff on two and in favor of Fisher on one, was the jury's prerogative."

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. However, when a verdict is *so confused that the jury's intent is unclear*, the safest and best course is to order a new trial." *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997) (emphasis added) (quoting

[4] *See Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996) ("In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights.").

Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983)). "Verdicts [that] are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" *Austin*, 387 S.C. at 49, 691 S.E.2d at 149 (quoting *Prego v. Hobart*, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985)). On the other hand, "[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Id.* at 49–50, 691 S.E.2d at 149 (quoting *Rhodes v. Winn–Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967)).

Here, the general verdict form, in its entirety, clearly shows the jury's intent to hold Fisher liable for the unreasonably dangerous products it sold to Duke (the asbestos gaskets and packing) regardless of the theories on which Rita sought recovery, especially when viewed in light of the circuit court's instructions to the jury regarding products liability in general and the elements for each theory of recovery, which we discuss in more detail below.

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if (a) The seller is engaged in the business of selling such a product, and (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (2005). "A products liability case may be brought under several theories, including strict liability, warranty, and negligence." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 462, 494 S.E.2d 835, 842 (Ct. App. 1997).

> [R]egardless of the theory on which the plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.

Id. at 462–63, 494 S.E.2d at 842. "[U]nder a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the

conduct of the seller or manufacturer, and liability is determined according to fault." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). Further, "liability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller . . . ." *Small*, 329 S.C. at 466, 494 S.E.2d at 844.

Fisher cites *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010), in support of its argument that the strict liability verdict "is a finding that Fisher's product was *not* in a defective condition unreasonably dangerous to the user." (Fisher's emphasis). However, it is speculative to attribute the strict liability verdict to a specific finding regarding the product's condition because the strict liability theory of recovery has two other elements that the jury could have determined were not present. *See supra*. Nonetheless, it appears the jury found one of the three elements of strict liability was missing, and all three of these elements are also required for a negligence claim. *See supra*. Although the facts in *Branham* are distinguishable from the facts in the present case, our supreme court's analysis in that case is instructive.

In *Branham*, the circuit court concluded that as a matter of law, the product at issue was not in a defective condition and, therefore, declined to send the plaintiff's strict liability claim to the jury. *Id.* at 210, 701 S.E.2d at 8. Our supreme court held that the circuit court should have also dismissed the plaintiff's negligence claim because that claim also included the product's defective condition as an element. *Id.* at 212, 701 S.E.2d at 9. The court stated, "When an element common to multiple claims is *not established*, all related claims must fail." *Id.* at 210, 701 S.E.2d at 8 (emphasis added).

Rita cites *Bragg v. Hi-Ranger, Inc.* for the following proposition: "Strict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established either under principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other." 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). In *Bragg*, this court affirmed the circuit court's refusal to direct a verdict on the plaintiff's negligence claims despite affirming the circuit court's directed verdict as to the plaintiff's strict liability claim. *Id.* at 537–47, 462 S.E.2d at 325–30. This court illustrated its reasoning with cases from other jurisdictions, including *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) and *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978). In *Bilotta*, the Supreme Court of Minnesota explained, "Whether strict liability or negligence affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and

on the jury instructions given under each theory . . . ." *Bragg*, 319 S.C. at 540, 462 S.E.2d at 326 (quoting 346 N.W.2d at 622). In *Bigham*,

> the Supreme Court of Minnesota held the jury's findings that the [plaintiff's] work clothes were not "in a defective condition unreasonably dangerous to the plaintiff" and that [the defendant] breached neither an expressed nor implied warranty, but was nevertheless causally negligent, were not irreconcilable where there were no warning tags with respect to the flammability of the work clothes. *The strict liability instructions required the jury to assess a defect dangerous to the ordinary consumer, whereas the [plaintiff] lineman's work subjected him to fire hazards. Therefore, while the failure to warn of the flammable characteristics of the clothing was negligent as to the plaintiff, those characteristics did not necessarily render the clothing "defective and unreasonably dangerous" toward an ordinary consumer not exposed to unusual fire hazards*. Thus, the Court concluded that "*the claimed inconsistencies in the verdict could be resolved to read that the work clothing was not 'defective' because it was not unreasonably dangerous to the average consumer, but that [the defendant] was negligent in selling it without warnings of its flammability*."

Bragg, 319 S.C. at 541, 462 S.E.2d at 327 (emphases added) (citations omitted) (quoting *Bigham*, 268 N.W.2d at 896–98).

However, in *Branham*, our supreme court counseled:

> While we agree that strict liability and negligence are not mutually exclusive theories of recovery, we caution against a broad reading of *Bragg* in this regard. An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. As noted, the negligence claim must have a fault-based element, which is not required for a strict liability claim. *Where one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to*

> *ascertain the basis for the dismissal*. If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed.

390 S.C. at 211–12, 701 S.E.2d at 9 (emphasis added). Fisher argues that the basis for the jurors' rejection of Rita's strict liability claim was a finding that Fisher's product was not unreasonably dangerous to the user. However, as we previously stated, this is speculative.

Rita also argues that in the present case, the circuit court's instructions to the jury concerning negligence presented it as "a broader theory of recovery than strict liability," and therefore, the verdicts for strict liability and negligence may be reconciled.[5] Rita specifically cites the following language that the circuit court included in its instruction on negligence but did not include in its strict liability instruction:

> A manufacturer who incorporates a defective *component* or part into its finished product and places the finished product in the stream of commerce is liable for injuries caused by defects in the component part. A defendant cannot, however, be liable for an allegedly defective product that it did not design, *recommend*, *specify*, require, manufacture, sell, or place in the stream of commerce.

(emphases added). Rita contends this language is "much broader than the strict liability instruction that the plaintiff must show that 'the product was defective and unreasonably dangerous when placed in the stream of commerce.'"[6] We agree that

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[5] Fisher has not assigned error to any of the jury instructions given by the circuit court in this case. To the contrary, Fisher assigns error to the circuit court's omission of certain requested instructions, which we address below.

[6] The language cited from the strict liability instruction is

> If the products were defective and unreasonably dangerous *when they left the defendant's hands*, the defendant is liable even if all reasonable care was used in making and selling the products and even if the plaintiff did not buy the product from any of the defendants or enter in any contract with the defendant because the plaintiffs do not

if the jurors understood "the product" to be Fisher's valves rather than the asbestos gaskets themselves, they could perceive the above instruction to provide more flexibility than the strict liability instruction given because it would allow them to consider the gaskets as a component of Fisher's valves. Also, the presence of the words "recommend" and "specify" in the above instruction provides an additional basis for negligence liability that was not present (and should not have been present) in the circuit court's strict liability instruction—Fisher recommended asbestos gaskets as an option for use on their valves' external flanges even though they did not sell those particular gaskets.

These differences in the jury instructions for strict liability and negligence provide a logical reason for reconciling the verdicts on these claims. Having been presented with two additional considerations during the negligence instruction, i.e., a product's defective components and a defendant's product recommendation, the jurors had more flexibility in applying the circuit court's negligence instruction than it did in applying the circuit court's strict liability instruction. Further, the jurors' question concerning strict liability indicates they were struggling with that concept. Yet they had the benefit of the circuit court's instruction that Rita was not required to prove all three theories, i.e., strict liability, negligence, and breach of warranty, to recover from Fisher. They also had the benefit of the instruction that the focus in evaluating a strict liability claim is on the product and the focus in evaluating a negligence claim is on the defendant's conduct.

Moreover, the jurors' punitive damages award and finding for Rita on the breach of warranty claim (in addition to their finding for Rita on the negligence claim) clearly indicates their intent to hold Fisher accountable for Tommy's deadly exposure to the asbestos components of its valves and for its recommendation to use asbestos gaskets on the valves' external flanges.

Therefore, we conclude that the circuit court acted within its discretion in denying Fisher's new trial motion on the ground of inconsistent verdicts. *See Austin*, 387 S.C. at 49–50, 691 S.E.2d at 149 ("It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." (quoting *Rhodes*, 249 S.C.

> have to show negligence under the theory of strict liability. The plaintiffs must only prove the product was defective and unreasonably dangerous when it was placed in the stream of commerce.

(emphasis added).

at 530, 155 S.E.2d at 310)); *id.* at 49, 691 S.E.2d at 149 ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

II. Expert Testimony

Next, Fisher assigns error to the admission of testimony from Rita's causation experts on the grounds that (1) the testimony was unreliable and (2) it violated Rule 403, SCRE. Fisher also asserts that in the absence of this testimony, there was insufficient evidence of proximate cause and, therefore, the circuit court should have granted its JNOV motion. We will address these arguments in turn.

"The admission or exclusion of evidence is a matter within the [circuit] court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Thompson v. Swicegood*, 430 S.C. 648, 661, 845 S.E.2d 920, 926–27 (Ct. App. 2020) (quoting *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 661, 845 S.E.2d at 927 (quoting *Burke*, 421 S.C. at 558, 808 S.E.2d at 628); *see also Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000) ("Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal."). We will now address what the law requires to establish causation in an asbestos case.

Whether the theory under which a products liability plaintiff seeks recovery is negligence, strict liability, or breach of warranty, it is necessary to show "the product defect was the proximate cause of the injury sustained." *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003). "Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability." *Id.* at 116–17, 588 S.E.2d at 95. "Ordinarily, the question of proximate cause is one of fact for the jury[,] and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Small*, 329 S.C. at 464, 494 S.E.2d at 843.

Further, to account for multiple possible sources of the plaintiff's exposure to asbestos in a workplace setting, the law requires the plaintiff to show "more than a

casual or minimum contact with the product"[7] yet stops short of requiring the plaintiff to eliminate causation from all possible sources other than the defendant's product.[8] This compromise in the jurisprudence governing asbestos litigation has been labeled "the substantial factor test," and it has been adopted in most United States jurisdictions:[9] If the plaintiff can show his "exposure to a specific product on a regular basis over some extended period of time in proximity to where [he] actually worked," the jury may draw from the circumstantial evidence a reasonable inference of that product's "substantial causation" of the plaintiff's illness. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007); *see also Lohrmann*, 782 F.2d at 1158, 1162 (applying Maryland law to a pipefitter's products liability claims

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[7] *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986).

[8] *See Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even If Legal Conclusions Are Scientifically Sound. — Haskins v. 3M Co.* (hereinafter *Asbestos Litigation*), 131 HARV. L. REV. 658, 658–59 (2017) (explaining that courts presiding over asbestos litigation have departed from traditional tort standards to overcome evidentiary hurdles inherent in these cases and highlighting the substantial factor test as a departure from requiring the plaintiff to show that he would not have developed mesothelioma *but for* exposure to the defendant's product); David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 52 (2008) ("[W]ith regard to cases in which a plaintiff alleges injury after exposure to a toxin from multiple sources, a given defendant may only be held liable if the plaintiff proves by a preponderance of the evidence that exposure to that defendant's products was a 'substantial factor' in causing that injury."); *id.* at 55 ("Assuming the plaintiff is able to show that his disease was more probably than not caused by asbestos exposure, he still has to prove that a particular defendant's asbestos-containing product was a 'proximate cause' of that injury to recover damages from that defendant."); *see also Rost v. Ford Motor Co.*, 151 A.3d 1032, 1050–51 (Pa. 2016) ("[I]n asbestos products liability cases, evidence of 'frequent, regular, and proximate' exposures to the defendant's product creates a question of fact for the jury to decide. *This [c]ourt has never insisted that a plaintiff must exclude every other possible cause for his or her injury*, and in fact, we have consistently held that *multiple substantial causes* may combine and cooperate to produce the resulting harm to the plaintiff." (emphases added) (footnote omitted) (citation omitted)).

[9] *See, e.g.*, *Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991) ("The most frequently used test for causation in asbestos cases is the 'frequency-regularity-proximity' test announced in [*Lohrmann*]."); *id.* at 171 n.3 (listing jurisdictions adopting the *Lohrmann* test).

and restating Maryland's substantial factor test: "To establish proximate causation . . . , the plaintiff must introduce evidence [that] allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a *substantial factor* in bringing about the result." (emphasis added)).

By eliminating the "but for" requirement for proximate cause applied in traditional tort cases, our asbestos jurisprudence has recognized it as an "insuperable barrier to many deserving plaintiffs"[10] while still requiring the plaintiff to show "more than a casual or minimum contact with the product,"[11] thereby "absolving defendants who were not responsible for plaintiffs' injuries."[12] In other words:

> Courts, building on the Restatement (Second) of Torts, have concluded that plaintiffs must provide sufficient evidence for a jury to conclude that exposure to the defendant's asbestos or asbestos-containing product was a "substantial factor" in promoting the disease. As the comments to the Restatement (Second) note, if other actors' conduct is the predominant factor in bringing the harm at issue, then a defendant's action is not a "substantial factor" in causing the harm, and thus it is not the legal cause of the harm.
>
> Asbestos plaintiffs have faced the problem that in most cases they were exposed to asbestos many years earlier and are unable to prove with any precision how much exposure they received from any particular defendant's products. Given that this could prove an insuperable barrier to many deserving plaintiffs, courts have overwhelmingly held that proximate cause in the asbestos context should be considered in light of the "frequency, regularity, proximity test" pioneered by the Fourth Circuit Court of Appeals in [*Lohrmann*]. This test attempts to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries.

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[10] Bernstein, 74 BROOK. L. REV. at 55.
[11] *Lohrmann*, 782 F.2d at 1162.
[12] David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008).

David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 55–56 (2008) (footnotes omitted).

When the exposure occurred in an occupational setting, only the individual who contracted mesothelioma, or his co-workers, can provide the evidence necessary to meet the substantial factor test—an expert on medical causation will not purport to substitute his testimony on the science of medical causation for the legal standard that only evidence of the individual's occupational history can meet. *See Rost*, 151 A.3d at 1045 ("Ford has confused or conflated the 'irrefutable scientific fact' that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are 'substantial factors' in causing the disease. It was certainly not this [c]ourt's intention, in [its precedent], to preclude expert witnesses from informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation."). As we explain below, the expert testimony in the present case reliably established medical causation, and the lay testimony provided the information necessary to meet the substantial factor test.

A. Admissibility

1. Reliability

Fisher asserts that both of Rita's medical causation experts testified that all asbestos exposures are the cause of a person's mesothelioma and this testimony does not meet the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). *See id.* at 20, 515 S.E.2d at 518 ("[T]he proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the [circuit court] must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable."); *id.* at 19, 515 S.E.2d at 517 (setting forth four of "several factors" a court should examine in considering the admissibility of scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with

recognized scientific laws and procedures").[13] We disagree with Fisher's characterization of the expert testimony.

Rita presented the testimony of Dr. Arnold Brody, a cell biologist,[14] and Dr. Arthur Frank, a physician specializing in occupational medicine.[15] Dr. Brody testified concerning how the inhalation of asbestos causes mesothelioma. As to latency periods,[16] Dr. Brody stated that most of them are from 30 to 50 or 60 years. Dr. Brody also stated that the consensus "among scientists who understand the literature is that all of the asbestos [fiber] varieties . . . cause mesothelioma."

Additionally, he explained that whether an individual develops mesothelioma from his or her exposure depends on that individual's personal susceptibility based

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[13] *See also State v. Phillips*, 430 S.C. 319, 334, 844 S.E.2d 651, 658 (2020) (referencing the discussion in *Council* regarding the circuit court's gatekeeping role in determining the admissibility of expert testimony and its "responsibility to ensure the expert testimony meets the requirements of Rules 702 and 403[, SCRE]."); *id.* at 335 n.7, 844 S.E.2d at 659 n.7 (coining the phrase "*Daubert*/*Council* hearing" but neither departing from the *Council* standard for determining the reliability of scientific evidence nor explicitly adopting the standard set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

[14] Dr. Brody is also an experimental pathologist, and he is a professor emeritus in the pathology department at Tulane University School of Medicine. For fifteen years, Dr. Brody worked at the National Institute of Environmental Health Sciences, which was "involved in understanding how agents in the environment cause human disease," and he spent almost his whole career studying asbestos. He has spoken internationally about asbestos on several occasions; written over 150 peer-reviewed papers, most of which address asbestos; and testified as an expert in numerous cases nationwide on how asbestos causes disease. *See, e.g., Startley v. Welco Mfg. Co.*, 78 N.E.3d 639 (Ill. App. 2017).

[15] Dr. Frank also has a doctorate in biomedical sciences. He has been a professor at Drexel University and other colleges and a consultant to federal agencies and private employers. He has published hundreds of peer-reviewed articles and testified in numerous mesothelioma cases nationwide. *See, e.g.*, *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (Pa. 2016). In addition to performing cancer research at the National Cancer Institute, he participated in epidemiologic studies of asbestos-exposed populations.

[16] According to Dr. Brody, a latency period spans from the time of an individual's first exposure to a substance until he becomes ill as a result of all of his exposures to that substance.

on the response of his or her genetic defenses, and according to many government agencies, there is no known exposure level above background levels that is known to be safe. Dr. Brody described background levels of asbestos in the following manner:

> [W]e all have some asbestos in our lungs, not enough to cause disease, but as we walk around every day in our environment, wherever we live, there's what's called an ambient exposure. Ambient air is just what's all around us. And there are a few fibers sitting out in the air from products that release asbestos over the years or naturally occurring asbestos that may get in the air. And we inhale that asbestos over time.

Dr. Brody also explained that "cumulative dose" means the dose of a substance that enters and accumulates in the lungs over time, and that a cumulative dose is what causes disease. He testified that all exposures to that particular substance "*contribute* to the likelihood of getting a disease." (emphasis added).

Later, Dr. Frank testified, stating that (1) all of the varieties of asbestos fibers "can cause all of the [asbestos] diseases" and (2) this fact is well-established in the medical community. Dr. Frank explained that as an individual's cumulative dose increases, his risk of disease increases. He also testified that to establish a medical connection between asbestos exposure and the development of mesothelioma, three criteria must be met: (1) documentation of asbestos exposure; (2) a latency period of at least ten years; and (3) a proper diagnosis.

After having reviewed Tommy's medical records, Dr. Frank stated, "There's no question in this case that [Tommy] had [] mesothelioma." He also stated that the body of literature about the level of asbestos emitted when asbestos gaskets are removed from a valve indicates that significant levels of asbestos fibers are released when the gasket is removed using a hand wire brush or an electric-powered grinder, showing models from 2.1 to 31 fibers per cubic centimeter.[17] He explained that these levels could be as high as a million times more than background exposures.

Dr. Frank also explained that even high levels of asbestos fibers cannot be seen, and therefore, if one can see dust emanating from an asbestos product, "it's very likely that that dust is exceeding allowable levels" and "that's when you should

[17] Dr. Frank explained that a cubic centimeter is "about the size of a sugar cube."

particularly worry." Dr. Frank further testified that over the course of a year, repeated exposure at even the current permissible exposure limit presents a mesothelioma risk. According to Dr. Frank, OSHA's legal limit of exposure over an eight-hour working day is one-tenth of one fiber per cubic centimeter.

Dr. Frank acknowledged that many scientific organizations have indicated there is no known safe level of exposure to asbestos: "Outside the world of litigation, there is no entity that I know of, no persons, no organizations that would say that they can identify a safe[] level of exposure to asbestos." He explained that even at low levels of exposure, there is a risk for developing mesothelioma. Based on the evidence of Tommy's occupational exposure, Dr. Frank concluded that during Tommy's years working as an instrument technician for Duke, his regular and frequent exposures, from a distance of ten feet or less, to the removal of asbestos gaskets from the flange face of Fisher valves using wire brushes and power grinders were a significant cause of Tommy's mesothelioma. He stated that if Fisher valves had been the only source of Tommy's repeated exposures to asbestos during his entire life, that would have been sufficient to cause his mesothelioma.

Additionally, the affidavit of Dr. Frank was admitted into evidence. In his affidavit, Dr. Frank noted that over fifty countries have banned the use of all forms of asbestos. He also stated that a person's "cumulative exposure to asbestos contributes to the total dose of asbestos" and "[t]he total cumulative exposure combines to raise the risk of disease and ultimately, in someone with the disease, to cause a patient's mesothelioma." He stressed:

> These are my medical and scientific opinions. I am not offering *legal* opinions about whether an exposure is "significant" or "substantial" within the meaning of the law. I can only offer opinions about the *medical* and *scientific* significance of an exposure. Again, it must be remembered that an "exposure" is never a single fiber; as discussed throughout this affidavit, when someone breathes visible dust from an asbestos product, there may be millions or billions of asbestos fibers present.

(emphasis in original).

Fisher maintains that the expert testimony is unreliable because it employed the "each and every exposure" theory of causation, which espouses the view that

"'each and every breath' of asbestos is substantially causative of mesothelioma."[18] However, Rita's experts relied on the cumulative dose theory, and their reliance on basic medical facts in reaching their opinion is not the equivalent of testifying that "each and every exposure" was a substantial factor in causing Tommy's mesothelioma.[19]

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[18] *See Rost*, 151 A.3d at 1044 ("[E]xpert testimony based upon the notion that 'each and every breath' of asbestos is substantially causative of mesothelioma will not suffice to create a jury question on the issue of substantial factor causation."); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 31 (Pa. 2012) (noting the report of plaintiffs' causation expert concluded that each exposure is "a substantial contributing factor in the development of the disease that actually occurs" and did not assess the plaintiffs' individual exposure history "as this was thought to be unnecessary, given the breadth of the any-exposure theory" (emphasis removed)); *see also Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). A significant number of jurisdictions have found the "each and every exposure" theory to be unreliable. *See, e.g.*, *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Yates*, 113 F. Supp. 3d at 846 (listing jurisdictions); *In re New York City Asbestos Litig.*, 48 N.Y.S.3d 365, 370 (2017); *Betz*, 44 A.3d at 53 (stating that the trial court "was right to be circumspect about the scientific methodology underlying the any-exposure opinion. [The court] . . . was unable to discern a coherent methodology supporting the notion that every single fiber from among, potentially, millions is substantially causative of disease").

[19] This distinction was also made in *Rost*, 151 A.3d at 1045–46; *see also Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1301 (11th Cir. 2017) (holding that the district court did not abuse its discretion in admitting expert testimony stating "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma" and "all 'significant' exposures to asbestos 'contribute to cause mesothelioma'"); *id.* (stating that the defendant mischaracterized the opinion of the plaintiff's expert "as essentially that 'any exposure' to asbestos is a substantial factor in causing mesothelioma, which it says makes his opinion scientifically unreliable. That is not what he said."); *id.* ("While [the plaintiff's expert] testified that all significant exposures to asbestos contribute to causing mesothelioma, he did not say that <u>any</u> exposure to asbestos is a substantial factor in causing mesothelioma, or even that every significant exposure causes it."); *id.* (stating that the expert's opinion "was

Further, the cumulative dose theory on which Rita's experts relied easily meets the legal standard for reliability. As to items (1) and (2) of the *Council* factors for determining reliability (publications, peer review, and prior application of the method to the type of evidence involved in the case), Dr. Frank's affidavit indicates that scientists have analyzed cumulative asbestos exposure in order to ascribe causation in numerous peer-reviewed, published epidemiological studies, case series, and case reports. These publications "reinforce the scientific consensus that each occupational and para-occupational exposure to asbestos *contributes* to the cumulative lifetime asbestos exposure and increases a person's risk of developing mesothelioma." (emphasis added). As to item (3) (quality control procedures used to ensure reliability), Dr. Frank and his peers have not limited their analyses to the epidemiology of a substance but have also considered other scientific data, such as genetics, host factors, immunologic status, the relationship between risk and the level of exposure, and the dose-response principle. Dr. Frank stated,

> It is precisely because scientists and physicians understand the limitations of epidemiology and how certain factors can bias studies toward a lack of statistical significance or finding of a point estimate of no increased risk[] that we look at the epidemiology of a substance *along with* the other scientific data described above. Each epidemiological study must be evaluated for its strengths and weaknesses, and decisions about cause and effect should only be made on reliable data.

(emphasis added).

As to item (4) (consistency of the method with recognized scientific laws and procedures), Dr. Frank stated that he follows the same weight-of-the-evidence methodology used by the International Agency for Research on Cancer, the World Health Organization, the National Institute for Occupational Safety and Health, and the Agency for Toxic Substances and Disease Registries in reaching his conclusions about the health effects of asbestos. He explained that the duties of these organizations are to evaluate the science and not to set policy. He also noted that occupational and environmental epidemiology "is a blunt instrument and is not, in most cases, well suited to examining *precise* dose-response relationships."

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also based on an extensive knowledge of the facts in [the] case and was supported by scientific literature").

(emphasis added). Dr. Frank stated, "When examining the question of causation of sentinel diseases like mesothelioma[,][20] the scientific community recognizes case reports and case series reports are useful and valid tools."

We view the testimony concerning cumulative dose as background information essential for the jury's understanding of medical causation, which must be based on science. This presentation was not an attempt to supplant the *Henderson/Lohrmann* test.[21] Further, Dr. Frank supplemented this background information with his assessment of the probable level of exposure, 2.1 to 31 fibers per cubic centimeter, for each asbestos gasket removal Tommy was in close proximity to. He further explained that this level is millions of times higher than background exposure. Both of Rita's experts were guided by the facts specific to Tommy's occupational exposure to Fisher's products in forming their opinions concerning causation. Further, Dr. Frank routinely relies on the following factors in examining a specific case:

> In determining the relative contribution of any exposures to asbestos above background levels, it is important to consider a number of factors, including: the nature of exposure, the *level* of exposure and the *duration* of exposure, whether a product gives off respirable asbestos fibers, the level of exposure, whether a person was *close to or far from the source* of fiber release, how *frequently* the exposure took place and how long the exposure lasted, whether engineering or other methods of dust control were in place, and whether respiratory protection was used.

(emphases added).

Based on the foregoing, we conclude that only when the science of cumulative exposure is distorted through the lens of the inapt "but for" analysis can it be viewed as unreliable. In any event, Fisher has failed to show there is a reasonable probability

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[20] According to Dr. Frank's affidavit, a sentinel event is "a case of disease that, when it appears, signals the need for action."

[21] *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." (quoting *Lohrmann*, 782 F.2d at 1162–63)).

the jury's verdict was influenced by any testimony that could be reasonably characterized as espousing the each and every exposure theory. *See Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.").

Nothing in the testimony of Rita's experts indicates they were seeking to substitute their opinions on the science underlying mesothelioma for the legal standard on causation. Further, the circuit court instructed the jury, in pertinent part,

> Under any products liability theory of recovery, strict liability, negligence, or breach of warranty, the plaintiff must establish that the product defect was a proximate cause of the injuries sustained. The plaintiff must prove that the plaintiff's exposure to the defendants' asbestos product was *of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury*. . . .

(emphasis added).

With clear guidance from the circuit court's instructions on the law, which included the *Henderson/Lohrmann* standard, the jury was capable of distinguishing between the science-based testimony concerning asbestos exposure and the legal standard for establishing causation in the face of multiple possible sources of the plaintiff's exposure. Therefore, any possible presence of unreliable information in isolated portions of the expert testimony would have paled in comparison to the lay testimony concerning Tommy's occupational history.

2. Rule 403

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis . . . ." *Matter of Campbell*, 427 S.C. 183, 193, 830 S.E.2d 14, 19 (2019) (quoting *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)). "The

determination of prejudice must be based on the entire record and will generally turn on the facts of each case." *Campbell*, 427 S.C. at 193, 830 S.E.2d at 19. Further, only exceptional circumstances justify reversing the circuit court's decision on this ground. *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017).

The same reasons for our conclusion that the challenged expert testimony was reliable compel us to conclude that this evidence does not tend to mislead the jury or suggest a decision on an improper basis and, therefore, there was no danger of unfair prejudice to Fisher. Only when the science of cumulative exposure is distorted through the lens of the inapt "but for" analysis can it viewed as misleading, confusing, or unfair to defendants. Therefore, the circuit court acted within its discretion in rejecting Fisher's argument that the testimony required exclusion pursuant to Rule 403. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)); *Huckabee*, 419 S.C. at 423, 798 S.E.2d at 589 (indicating that only exceptional circumstances justify reversing the circuit court's decision on this ground); *Thompson*, 430 S.C. at 661, 845 S.E.2d at 926–27 ("The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'"); *see also Haselden*, 341 S.C. at 497, 534 S.E.2d at 301 ("Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal.").

B. Sufficiency of Causation Evidence

Because the expert testimony on causation was properly admitted into evidence, we reject Fisher's argument that Rita's evidence of causation was insufficient. *See Duckett ex rel. Duckett v. Payne*, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred."); *see also Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("In considering a JNOV, the [circuit court] is concerned with the existence of evidence, not its weight."); *id.* ("The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings."); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012) ("When ruling on a JNOV motion, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party."); *id.* ("This court must follow the same

standard."); *id.* ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965))); *Small*, 329 S.C. at 464, 494 S.E.2d at 843 ("Ordinarily, the question of proximate cause is one of fact for the jury and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence."); *cf. Est. of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 403, 811 S.E.2d 807, 815 (Ct. App. 2018) (holding multiple inferences that could be drawn from the evidence precluded summary judgment and required a jury to determine the question of causation).

In addition to the expert testimony showing medical causation, the lay testimony meets *Henderson*'s substantial factor test. In a nutshell, for at least 15 years, Tommy's work regularly required him to be within close proximity to co-workers' removal of asbestos gaskets and packing from numerous Fisher valves, and he would have breathed the visible asbestos dust from this process. *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." (quoting *Lohrmann*, 782 F.2d at 1162–63)).

III. Jury Instructions

Fisher contends the circuit court erred in declining to instruct the jury on the sophisticated intermediary doctrine, intervening cause, and the unavailability of punitive damages in breach of warranty claims. We will address each of these proposed instructions in turn, but first we consider the law concerning jury instructions in general.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* "When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Id.* at 390, 529 S.E.2d at 539. "Furthermore, the trial court is required to charge only the current and correct law of South Carolina." *Id.*

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *Id.* (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)).

Accordingly, a refusal to give a requested instruction stating a sound principle of law applicable to the case at hand constitutes reversible error only when "the principle is not otherwise included in the charge." *Clark*, 339 S.C. at 390, 529 S.E.2d at 539. Further, "the [circuit] court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved." *Id.* "Moreover, even if the [circuit] court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal." *Id.*; *see also Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005) ("A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.").

A. Sophisticated Intermediary Doctrine

Fisher asserts that the circuit court should have charged the jury on the sophisticated intermediary doctrine because there was sufficient evidence to show that (1) Duke should have been aware of the danger associated with asbestos gaskets and (2) it was reasonable for Fisher to rely on Duke to warn its employees of this danger.[22] In our view, the evidence in the present case is insufficient to require a jury instruction on this doctrine.

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[22] A November 21, 1984 script for an asbestos safety course provided to employees by Duke's construction department indicates Duke knew of the dangers of asbestos insulation but was unaware of the dangers of removing asbestos gaskets from a valve:

> Actually, asbestos is used very little in Duke Construction today, mostly to insulate electrical cabinets and pack valves, and it is used in gasket material. Even so, the asbestos in these jobs is bonded, which means it produces virtually no dust.
>
> In the past, however, nonbonded asbestos has been used for insulation throughout the Duke system. So[,] there's a

"The [sophisticated intermediary] doctrine originated in the *Restatement Second of Torts*, section 388, comment n, . . . which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier's duty to warn." *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1033 (Cal. 2016). "The Restatement drafters' most recent articulation of the sophisticated intermediary doctrine appears in the *Restatement Third of Torts, Products Liability*, section 2, comment i, at page 30. The drafters intended this comment to be substantively the same as section 388, comment n, of the *Restatement Second of Torts*." *Webb*, 370 P.3d at 1034. Comment i states, in pertinent part:

> There is *no general rule* as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. *The standard is one of reasonableness in the circumstances*. Among the factors to be considered are the *gravity of the risks* posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.

Restatement (Third) of Torts: Prods. Liab. § 2, cmt. i (Am. Law Inst. 1998) (emphases added).

Here, the gravity of the risks of lung cancer and death resulting from the inhalation of friable asbestos could not have been greater. Further, Fisher has not shown that placing a written warning on the outside of their valves or on the replacement gaskets it sold to Duke would have been infeasible or ineffective. Therefore, we are not convinced that these circumstances made it reasonable for a supplier of asbestos gaskets to rely on Duke to relay warnings to its employees. *See id.*; *Duckett*, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

> good chance asbestos dust is present wherever old insulation is being removed.

Nonetheless, Fisher contends that it was reasonable to rely on Duke to comply with occupational safety laws because Duke "should have been aware of the alleged dangers of asbestos-containing gaskets."

Moreover, it is not enough to show that the supplier's reliance would have been reasonable—the supplier must also show that it actually relied on the intermediary to convey warnings to end users. *See Webb*, 370 P.3d at 1036 ("To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it *actually* and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (emphasis added)).[23]

Rita maintains that Fisher introduced no evidence that it actually relied on Duke to warn its employees about the danger of asbestos gaskets , and Fisher has not cited any evidence to that effect in its briefs. In fact, the testimony of Fisher's corporate representative, Ronald Dumistra, indicates that Fisher could not have relied on Duke to convey warnings to its employees because Fisher did not consider asbestos gaskets to be a health risk. In other words, Fisher's belief that asbestos gaskets posed no health risk is inconsistent with Fisher's claim that it relied on Duke to warn Tommy of the dangers of asbestos gaskets.

Based on the foregoing, Fisher has not carried its burden of convincing this court that the circuit court should have instructed the jury on the sophisticated intermediary doctrine. *See Clark*, 339 S.C. at 389, 529 S.E.2d at 539 ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and *developed by the evidence* in support of those issues." (emphasis added)); *id.* at 390, 529 S.E.2d at 539 ("[T]he trial court is not required to instruct the jury on a principle of law that is irrelevant to the case *as proved*." (emphasis added)); *Duckett*, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

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[23] *See also Lawing*, 415 S.C. at 225–26, 781 S.E.2d at 557 ("[T]he sophisticated user doctrine, which arose from comment *n* to section 388 of the Restatement (Second) of Torts, recognizes that a supplier may *rely* on an intermediary to provide warnings to the ultimate user if the reliance is reasonable under the circumstances. The sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn *where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product*, and the supplier therefore *relies on the intermediary or employer* to warn the end user." (emphases added) (citation omitted) (footnote omitted)). Fisher did not show that it was difficult to warn Duke employees of the danger associated with the removal of asbestos gaskets from its valves or from the valves' external flanges.

B. Superseding Cause

Next, Fisher asserts that the circuit court should have charged the jury on superseding cause because there was sufficient evidence to support such a charge and the foreseeability of the intervening acts of third parties was a fact question for the jury. Specifically, Fisher asserts a superseding cause charge was supported by evidence of (1) Duke's negligent failure to warn employees that friable asbestos was released from asbestos gaskets during the process of removing them from the valves' components or from their external flanges and (2) the existence of non-Fisher sources of asbestos dust in Tommy's workplace.

"The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). "An intervening force may be a superseding cause that relieves an actor from liability, but *for there to be relief from liability, the intervening cause must be one that could not have been reasonably foreseen or anticipated*." *Id.* (emphasis added). "In other words, the intervening negligence of a third party will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care." *Id.* "In such case, the original negligence still remains active[] and a contributing cause of the injury." *Id.* (quoting *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998)).[24]

We agree with Fisher that foreseeability is normally a fact question for the jury. *See Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) ("Ordinarily, foreseeability is a question of fact to be decided by the jury."). However, for Fisher's superseding cause defense to be successful, it would have to convince the jury that it was unforeseeable for (1) Duke to fail to warn Tommy that friable asbestos was released from asbestos gaskets during the process of removing

[24] The *Roddey* opinion also has language that does not fit asbestos cases in which the "but for" requirement of causation has been relaxed: "Accordingly, if the intervening acts are *set into motion by the original wrongful act* and are the foreseeable result of the original act, the 'final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause.'" 415 S.C. at 590–91, 784 S.E.2d at 676 (emphasis added) (quoting *Wallace v. Owens–Ill., Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App. 1989)).

them from the valves' components or from their external flanges and (2) there to be non-Fisher sources of asbestos dust within Tommy's workplace. We view this case as one of those "rare or exceptional" cases in which the circuit court properly determined that, as a matter of law, both of these circumstances were foreseeable. *See Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))).

When the circuit court made this determination, Fisher's own corporate representative had already testified that Fisher considered the gaskets in its valves, and the replacement gaskets it sold to Duke, to be safe once they left Fisher's supplier because the asbestos in them was encapsulated. In light of its own failure to anticipate the release of asbestos dust from grinding these gaskets, Fisher's claim that it could not have foreseen Duke's similar oversight lacks credibility. Despite Duke's obligation to comply with OSHA regulations, its unwitting noncompliance was foreseeable as a matter of law. Further, it is unrealistic to infer from the evidence that the existence of other sources of asbestos dust in Tommy's workplace was unforeseeable.

Moreover, we are not convinced that Fisher was prejudiced by the circuit court's failure to give a separate instruction on superseding cause. While instructing the jury on proximate cause, the circuit court discussed foreseeability in the following manner:

> Plaintiffs must also prove something called "legal cause." And that is proven by showing that the injury was foreseeable. And that means the injury occurred as the *natural and probable* consequence of defendants' negligence.
>
> The plaintiffs must prove that some injury from defendants' negligence was foreseeable. But they do not have to prove that the particular injury that occurred was foreseeable.
>
> However, *the defendant cannot be held responsible for something that could not be expected to happen*. There's more than one cause—there can be more than one cause.

> Proximate cause does not mean the only cause. The defendants' actions can be a proximate cause of plaintiff's injury if defendants' conduct was at least one of the direct causes of the injury. Where two or more causes combine to produce the injury, [the] defendant is not relieved from liability for negligence because it's only responsible for one of the [causes]. It is sufficient that its negligence is a proximate cause without which the injury would not have resulted to a greater extent.
>
> Consequently, if defendants' negligence is a proximate cause of an injury to another, the fact that the negligence of a third party occurred with its own -- that negligence of a third party occurred with its own negligence to produce the harm does not relieve it of liability. In such cases, each wrongdoer is in breach of the duty of care over the plaintiffs. And because the negligence of each occurred to produce the injury, they can all be liable.
>
> Under South Carolina law, a defendant is entitled to assert that other persons or entities contributed to the alleged injury or damage. The matter of others' alleged fault causing the plaintiff's injury has been raised by the defendant. *It's proper for you to consider the actions of others*, but only so far as plaintiffs have met their burden of proof.

(emphases added). Therefore, even if the foreseeability of third-party negligence had been truly a question of fact in the present case, the above language advised the jury that an unforeseeable intervening force relieves the defendant from liability. *See Clark*, 339 S.C. at 389, 529 S.E.2d at 539 ("It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, *and the principle is not otherwise included in the charge*." (emphasis added)); *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011))); *id.* ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994))).

Based on the foregoing, we affirm the circuit court's ruling on this issue. *See Duckett*, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

C. Punitive Damages

Fisher also assigns error to the circuit court's failure to instruct the jury that it was impermissible to award punitive damages on a breach of warranty claim. Fisher asserts that this alleged error was reversible. We disagree.

First, even if we assumed that the circuit court should have given the requested instruction, Fisher was not prejudiced by this omission because the jury found for Rita on her negligence claim, which undoubtedly allows for a punitive damages award if the jury also finds the defendant's conduct was willful, wanton, or reckless. *See Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 ("In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights."); *Carter v. Beals*, 248 S.C. 526, 534, 151 S.E.2d 671, 675 (1966) (holding that causing a collision by violating certain statutes constituted actionable negligence and would justify punitive damages). Here, the jury found "by clear and convincing evidence" that Fisher's conduct was "willful, wanton, or reckless." Therefore, for this reason alone, we would affirm on this issue. *See Pittman*, 364 S.C. at 340, 613 S.E.2d at 380 ("A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.").

Additionally, we see no merit in the argument that the circuit court was required to give the requested instruction. Although Fisher cites *Rhodes v. McDonald*, 345 S.C. 500, 504–05, 548 S.E.2d 220, 222 (Ct. App. 2001), in support of its argument, *Rhodes* does not stand for the proposition that the requested instruction is required when the plaintiff's claims consist of a mix of tort and warranty claims. Further, Fisher has not cited any case law that requires such a specific instruction.

In *Rhodes*, the plaintiffs' claims against the defendants were breach of contract and breach of the implied warranties of merchantability, habitability, and fitness for a particular purpose. 345 S.C. at 501, 505 n.8, 548 S.E.2d at 221, 223 n.8. On appeal, the defendants assigned error to the circuit court's denial of their directed verdict motion "as to the unavailability of punitive damages on the breach of implied warranty claims." *Id.* at 503, 548 S.E.2d at 221. This court concluded that the circuit court should not have submitted the issue of punitive damages to the jury and, thus,

reversed the punitive damages award. *Id.* at 503–05, 548 S.E.2d at 221–23. The critical difference between *Rhodes* and the present case is that in *Rhodes*, none of the plaintiffs' claims allowed for a punitive damages award and, in the present case, the negligence claim allows for such an award.

Fisher asserts, "The parties and the trial court cannot assume the jury knew this specific legal principle and analyzed *only Fisher's negligence* in awarding punitive damages. The *only way* to prevent the jury from awarding punitive damages for the breach of warranty claim was for the trial court to instruct the jury that the law prohibits it." (emphases added). However, as unlikely as it would have been, had the jury found for Rita on *only* the breach of warranty claim (rejecting her negligence claim) and also awarded her punitive damages, the circuit court could have easily cured the prejudice to Fisher by granting a JNOV as to the punitive damages award. Further, the jury's focus should not have been on pigeonholing Fisher's recklessness. Rather, in considering the issue of punitive damages, the jury's sole focus should have been on whether there was clear and convincing evidence that Fisher's misconduct was willful, wanton, or with reckless regard for Tommy's rights. The jury should not have been expected to do more than simply follow this standard.

Based on the foregoing, Fisher has not carried its burden of convincing this court that the circuit court erred in declining to give the requested instruction. *See Duckett*, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred."). Therefore, we affirm this ruling.

IV. Apportionment

A. Application of the South Carolina Contribution Among Joint Tortfeasors Act

We affirm the circuit court's ruling on Fisher's apportionment arguments pursuant to Rule 220(b), SCACR and the following authorities: S.C. Code Ann. § 15-38-15 (Supp. 2022) (allowing a defendant responsible for less than fifty percent of total fault to assert liability against other potential tortfeasors); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) ("The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature."); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would

limit or expand the statute."); *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) ("Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation omitted)); *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from *the entire section* and not simply clauses taken out of context." (emphasis added)); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that a statute "must be read *as a whole* and sections [that] are part of the same general statutory law must be construed together and each one given effect" (emphasis added) (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006))); *id.* ("We therefore should not concentrate on isolated phrases within the statute."); *id.* ("Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose."); *id.* ("In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008))); *Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) ("[T]he General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) [of section 15-38-15]."); *id.* ("[A] critical feature of the statute is the codification of the empty chair defense—a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages'—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being 'empty')." (first alteration added)).

B. Constitutional Violations

We affirm the circuit court's ruling on Fisher's constitutional arguments pursuant to Rule 220(b), SCACR and the following authorities: S.C. Code Ann. § 15-38-15(D) (Supp. 2022) (codifying a defendant's right to argue the "empty chair" defense); S.C. Code Ann. § 15-38-50(1) (2005) (allowing the application of a setoff from settlement proceeds to a compensatory damages award); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (indicating that the standard for whether legislation violates the substantive due process protection afforded by Article I, section 3 of the South Carolina Constitution

is "[w]hether it bears a reasonable relationship to any legitimate interest of government"); *Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."); *id.* ("A plaintiff must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law."); *Fraternal Ord. of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002) (recognizing that for purposes of equal protection of the laws, "the determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary." (quoting *Gary Concrete Products, Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 338 (1985))); *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used."); *id.* ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be [e]ffected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."); *Doe v. State*, 421 S.C. 490, 505, 808 S.E.2d 807, 814 (2017) ("Those attacking the validity of legislation under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it." (quoting *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 128, 712 S.E.2d 401, 403–04 (2011))); *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949) ("One who is injured by the wrongful act of two or more joint [tortfeasors] has the option of bringing an action against either one or all of them as [] defendants . . . . To allow a defendant against the will of the plaintiff to bring in other joint [tortfeasors] as defendants would deny the plaintiff the right to name whom he should sue."); *Tiffany*, 419 S.C. at 563, 799 S.E.2d at 487 ("[T]his right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years."); *id.* at 556–57, 799 S.E.2d at 483–84 (explaining the policy goals underlying the legislature's enactment of the South Carolina Contribution Among Joint Tortfeasors Act); *Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce."); *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (stating that the South Carolina Contribution Among Joint Tortfeasors Act "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010))); *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (stating that a statute "must be read as a whole and sections [that] are part of the same general statutory law must

be construed together and each one given effect" (quoting *S.C. State Ports Auth.*, 368 S.C. at 398, 629 S.E.2d at 629)); *id.* ("[W]e read the statute as a whole and in a manner consonant and in harmony with its purpose.").[25]

C. Public Policy

We affirm the circuit court's ruling on Fisher's public policy argument pursuant to Rule 220(b), SCACR and the following authority: *Tiffany*, 419 S.C. at 559, 799 S.E.2d at 485 ("If the policy balance struck by the legislature in [the South Carolina Contribution Among Joint Tortfeasors] Act is to be changed, that prerogative lies exclusively within the province of the Legislative Branch.").

V. Setoff

Fisher contends that the circuit court erred by declining to grant a setoff in the full amount of Rita's settlement proceeds against the full amount of the jury's compensatory damages award because (1) Rita's allocation of the proceeds was unilateral and incomplete and (2) the circuit court failed to review the settlement documents. We agree that the circuit court should review the settlement documents and reconsider the respective amounts to be set off against the compensatory damages awards for Rita's three claims.

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" *Id.* (quoting *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012)). "In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act . . . ." *Id.* In particular, section 15-38-50 provides in pertinent part,

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[25] We do not reach Fisher's argument that it was deprived of its right "to have a jury determine all triable issues" in violation of article I, section 14 of the South Carolina Constitution. The circuit court did not rule on this argument, and Fisher did not file a Rule 59(e) motion seeking the circuit court's ruling on it. Therefore, it is not preserved for review. *See, e.g.*, *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (noting the circuit court did not explicitly rule on a particular argument, the appellant failed to show it made a Rule 59(e) motion on this ground, and, therefore, this court should not have addressed the argument).

> When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort *for the same injury* or the same wrongful death . . . *it* . . . *reduces the claim against the others* to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater[.]

(emphases added). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate *the same plaintiff* on a claim for the *same injury*."[26] *Smith v. Widener*, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphases added). In other words, "[a] non-

[26] We reject Fisher's assertion that Rita's wrongful death and survival claims seek damages for a single injury. *See* S.C. Code Ann. § 15-5-90 (2005) ("Causes of action for and in respect to . . . any and all *injuries to the person* . . . shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . , any law or rule to the contrary notwithstanding.") (emphasis added); S.C. Code Ann. § 15-51-10 (2005) ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."); *id.* § 15-51-20 ("Every such action shall be *for the benefit of the wife or husband and child or children of the person whose death shall have been so caused*, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person." (emphasis added)); *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (affirming a setoff that conformed to the allocation of damages between a wrongful death claim and a survival claim); *Jolly*, 435 S.C. at 670, 869 S.E.2d at 853 (explaining why wrongful death and survival are different claims for different injuries despite the fact that they were created out of the same set of facts); *Widener*, 397 S.C. at 473 n.1, 724 S.E.2d at 191 n.1 (citing *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 29–30, 81 S.E. 189, 189–90 (1914) for the proposition that wrongful death and survival actions are different claims for different injuries).

settling defendant is entitled to credit for the amount paid by another defendant who settles *for the same cause of action*." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830 (emphasis added) (quoting *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145).

"When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Widener*, 397 S.C. at 472, 724 S.E.2d at 190. "Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a [setoff].'" *Id.* (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). On the other hand, when the settlement "involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." *Riley*, 414 S.C. at 196, 777 S.E.2d at 830; *see also Widener*, 397 S.C. at 473, 724 S.E.2d at 191 ("[W]hen the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.").

Here, prior to trial, the circuit court issued an order approving the settlement of Rita's wrongful death and survival claims against some of Fisher's co-defendants pursuant to S.C. Code Ann. § 15-51-42.[27] The circuit court also stated,

> I approve the attorney's fees and expenses and the distribution of 90 [percent] to the wrongful death claim and 10 [percent] to the survival claim. In addition, all future settlements in this case that are disbursed in the same manner (attorney's fees and costs are deducted as indicated above and the remaining is divided pursuant to the heir agreement) are approved.[28]

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[27] Section 15-51-42(C)(1) provides that when "a wrongful death or survival action has been filed in state court and . . . the settlement agreement between the parties is reached before the matters reach trial, the personal representative shall petition the court in which the wrongful death or survival action has been filed" seeking approval of a proposed settlement.

[28] The circuit court and the parties have interpreted this language to mean that 90 percent of the settlement proceeds was allocated to the wrongful death claim and 10 percent of the proceeds was allocated to the survival claim. Rita does not assert that this allocation resulted from settlement negotiations with Fisher's co-defendants or was stipulated by the written release of her claims, and there is nothing in the record to indicate that the settling defendants agreed to any particular allocation of the proceeds, as contemplated by section 15-38-50. However, we are not prepared to reject the allocation approved by the circuit court solely on the ground that it was

The order indicated that Rita had not yet executed a release or received settlement proceeds, and therefore, the circuit court was unable to review the settlement documents before approving the settlement. After trial, Fisher filed a motion for setoff and requested to view the settlement documents. In response, Rita indicated that she had received a total of $2,805,000 in settlement proceeds. At the motions hearing, the circuit court reviewed a document Rita's counsel prepared showing a breakdown of what each settling defendant paid to Rita. However, the hearing transcript indicates the circuit court did not review the settlement agreements or releases. Instead, Rita's counsel represented to the circuit court that she had released all of her claims against the settling defendants.

The circuit court ruled that the allocation of 90 percent of the proceeds to the wrongful death claim was reasonable because Tommy had 14 more years of life expectancy and died a very painful death. The court also ruled that Rita was "well within [her] rights to allocate nothing to the loss of consortium." In its written order addressing Fisher's post-trial motions, the circuit court stated that its pre-trial approval of Rita's wrongful death and survival settlements "apportioned 90 [percent] of the settlement proceeds to wrongful death and 10 [percent] to survival." The circuit court determined that the setoff for wrongful death was $2,524,500, which eclipsed the $1 million awarded to Rita for that claim. The circuit court also determined that the setoff for the survival claim was $280,000.[29] The circuit court concluded that Fisher owed Rita "zero for wrongful death damages" and "$720,000 for survival damages." The circuit court also concluded that there was no setoff for loss of consortium "as that claim was not settled pre-trial by any defendants,"[30] and the total amount Fisher was responsible for was $1,720,000, plus punitive damages.

"unilateral." Section 15-51-42 gives the circuit court authority to approve the settlement of wrongful death and survival claims, and this authority necessarily encompasses the allocation of the proceeds among those claims to effect a timely distribution of the proceeds to the statutory beneficiaries. Nonetheless, we question whether the pre-trial allocation among the two statutory claims may be incomplete for purposes of a post-trial setoff against the respective damages awards for all three claims given that Rita had also released the settling defendants from her claim for loss of consortium.

[29] Our calculation yields $280,500.

[30] As previously stated, Rita's trial counsel represented to the circuit court that Rita settled all of her claims against the settling defendants, and appellate counsel confirmed this during oral arguments before this court.

Initially, we note that the circuit court had a responsibility to review the settlement documents *in camera* to verify not only the amount of the settlement and its terms but also whether it was "given in good faith." § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it . . . reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." (emphasis added)); *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2018) (remanding a case to the circuit court to review a settlement agreement and determine if a defendant was entitled to setoff). In *Huck*, this court held,

> To determine if the nonsettling tortfeasor is entitled to a setoff as a preliminary matter, the documents must be reviewed to determine if their terms shield the settling tortfeasor from the requirements of section 15-38-50(2). Therefore, the court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court also must determine if the release or covenant was "given in good faith." Because the trial court did not conduct such a review, we remand the case for the trial court to look at the settlement agreement and determine if [the nonsettling defendant] is entitled to a setoff.

Id. Therefore, we are compelled to remand this issue for the circuit court's *in camera* review of the settlement documents in accordance with *Huck*.

We also view the pre-trial allocation as potentially incomplete for purposes of a post-trial setoff because it did not reflect any consideration necessarily given for Rita's release of her loss of consortium claim. *See* § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it . . . reduces the claim against the others *to the extent of* any amount stipulated by the release or the covenant, or in *the amount of the consideration paid for it*, whichever is the greater[.]" (emphases added)); *e.g., Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration."). This may be due

to the circuit court's stated assumption in its written orders that Rita did not release her loss of consortium claim against the settling defendants.

We acknowledge that our case law favors a plaintiff's ability to apportion settlement proceeds "in the manner most advantageous to [her]."[31] *Riley*, 414 S.C. at 197, 777 S.E.2d at 831. However, we hesitate to read *Riley* too broadly. The principle underlying the right to a setoff, avoiding a double recovery, still requires the settlement of claims and allocation of the proceeds to be grounded in good faith. *See* § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it . . . reduces the claim against the others *to the extent of any amount stipulated by the release* or the covenant, *or in the amount of the consideration paid for it*, whichever is the greater[.]" (emphases added)).

As we read *Riley*, it appears that unlike the allocation in the present case, that allocation was specified in the settlement documents as contemplated by section 15-

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[31] In *Riley*, our supreme court concluded that this court erred in reapportioning settlement proceeds on the basis that the allocation to which the plaintiff and settling defendants agreed "did not seem to be, in the court of appeals' view, proportionately reasonable" and "may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 830–31. The supreme court stated: "Indeed, we agree with the approach taken by the Illinois Court of Appeals, which stated:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

414 S.C. at 197, 777 S.E.2d at 831 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. 2009)).

38-50. Our supreme court reversed this court's re-allocation, concluding that this court erred in disturbing the settling parties' agreement "*solely* because the apportionment may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 831 (emphasis added)); *see id.* at 197, 777 S.E.2d at 831 ("Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the *sole* purpose of benefitting [the defendant]." (emphasis added)).

Further, nothing in *Riley* suggests that the circuit court has the discretion to completely deny a setoff against a verdict for a particular claim after the plaintiff receives funds from a co-defendant to settle the same claim. *See Widener*, 397 S.C. at 472, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a [setoff].'" (citation omitted) (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). Rather, *Riley* indicates that the circuit court has discretion as to merely the amount to be setoff against the verdict when the settlement involves multiple claims. 414 S.C. at 196, 777 S.E.2d at 830 (stating that when the settlement "involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset").

Unlike the allocation in *Riley*, the unilateral allocation in the present case did not reflect any consideration given by the settling defendants for Rita's release of her loss of consortium claim. As we previously stated, the circuit court may have simply been under the impression that Rita did not release her loss of consortium claim against the settling defendants. In any event, we recognize that the specific amount to setoff against the compensatory damages award for loss of consortium is left to the circuit court's discretion as the three claims released by Rita respectively seek different types of damages and have different, overlapping beneficiaries.

Based on the foregoing, we remand for the circuit court's *in camera* review of the settlement documents in accordance with *Huck* and its reconsideration of the respective amounts to be set off against the jury's compensatory damages awards for Rita's three claims.

VI. Discovery Sanctions

Finally, Fisher argues the circuit court erred in imposing discovery sanctions on it because Fisher did not act in bad faith but merely sought to proffer expert testimony for purposes of appellate review.[32] We disagree.

"The entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.'" *Samples v. Mitchell*, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997) (quoting *State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." *Id.* at 113–14, 495 S.E.2d at 217. When a party disobeys a discovery order, Rule 37(b)(2) of the South Carolina Rules of Civil Procedure authorizes the circuit court to "make such orders in regard to the [disobedience] as are just." This language gives the circuit court discretion in the imposition of sanctions. *See also Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)).

"[A]n appellate court will not interfere with 'a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion." *Id.* (quoting *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)). "An 'abuse of discretion' may be found by this [c]ourt where the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Id.* at 282, 762 S.E.2d at 543 (quoting *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)); *see also QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004) (same). "The appealing party bears the burden of demonstrating that the [circuit] court abused its discretion." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543; *see also QZO*, 358 S.C. at 256, 594 S.E.2d at 547 (same).

Here, the circuit court's post-trial sanctions order related to Fisher's conduct and communications with opposing counsel throughout the six weeks prior to trial,

[32] Fisher has not appealed the issue for which it sought to proffer testimony, i.e., the circuit court's ruling excluding the testimony of Dr. Timothy Oury, Fisher's pathology expert. *See infra*.

which was scheduled to begin on January 14, 2019. On November 28, 2018, a pathologist hired by Fisher, Dr. Timothy Oury, sent Fisher's counsel a report concerning his examination of several slides of lung tissue preserved from Tommy's treatments. Dr. Oury concluded, "[W]hile the finding of a pleural plaque in the pathology specimen suggests this may be an asbestos associated mesothelioma, the lack of bilateral parietal pleural plaques and the lack of asbestos bodies on histologic sections suggest that *prior asbestos exposure may not have contributed to his mesothelioma*." (emphasis added). Dr. Oury recommended "digestion studies to more rigorously determine if asbestos did or did not contribute to his tumor."[33]

Fisher's counsel then initiated a discussion with Rita's counsel concerning the digestion study. The communication between two attorneys for Fisher and three attorneys for Rita began with a phone call and follow-up letter and turned to an e-mail exchange in which Rita's counsel reminded Fisher's counsel of a case management order prohibiting the destruction of tissue without an agreement of the parties or a court order.[34]

Counsel for the parties continued to exchange e-mails in an attempt to come to an agreement on the protocol for dividing the tissue so that Rita could respond to Fisher's digestion study with her own study. However, Rita's counsel, Theile McVey, also advised Fisher's counsel, Yancey McLeod, that she would "need to send the protocol to [Rita's expert] and get him to sign off. Then you can do the division of tissue and send." Accordingly, in a follow-up e-mail sent on December 10, 2018, Mr. McLeod set forth the protocol Dr. Oury would use for the tissue division and digestion. On that same day, Mr. McLeod instructed Dr. Oury to proceed with the study, contrary to Ms. McVey's previous statement that Rita's expert would have to "sign off" on the protocol—Mr. McLeod later told the circuit court in a pre-trial hearing that he had considered the agreement to be finalized once he sent the December 10 e-mail. Ms. McVey responded that there "wasn't an agreement when [Mr. McLeod] sent the protocol" and "[h]e sent the protocol on the 10th, but we didn't have a chance to process it until the 11th."

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[33] Tissue digestion involves "dissolving the organic tissue in acid to leave behind inorganic particulates." Christopher Meisenkothen, *A Shifting Paradigm? Deschenes v. Transco and the Precarious New Landscape of Concurrently Developing Disease in Connecticut's Workers' Compensation Jurisprudence*, 84 Conn. B.J. 339, 374 (2010).

[34] According to the circuit court, a "case management order in place since June 25, 2015, mandated that a party could not destroy tissue without the agreement of the parties or court order."

Beginning at 3:25 p.m. on December 11, 2018, counsel for the parties continued their e-mail exchange to clarify their intentions. The final e-mail in this exchange was from Rita's second attorney, Jonathan Holder, to Fisher's second attorney, Tim Bouch, and Rita's third attorney, Trey Branham. Mr. Holder stated,

> We need a [third] party (uninterested) to split evenly the material already in Defense's possession. That is the only way to be sure we are comparing apples to apples, then we can each have our experts do a digestion. But we need to split ASAP to [have] any hope at this getting completed prior to trial.

Mr. Holder copied Mr. McLeod and Ms. McVey on this e-mail. Nonetheless, nothing in the record shows that Fisher's counsel responded to this e-mail, and Fisher indicated in its brief that it did not consider this last e-mail to be part of the agreement on the tissue division protocol—Fisher referenced this e-mail in its brief and stated, "Fisher proceeded based on its understanding that the parties had agreed only to an even division of the tissue as Mr. Branham and Mr. McLeod confirmed in their December 11 emails."

Once Dr. Oury received the tissue in paraffin blocks from Emory University, he circled the parts to be divided and sent them to the RJ Lee Group on December 10 "to perform digestion studies with the instruction to use only ½ of the tissue circled in . . . two blocks to make a single filter." RJ Lee Group performed the digestion and sent to Fisher's counsel the unused tissue samples and a report of its findings. In turn, Fisher's counsel sent the unused tissue samples to Rita's counsel. RJ Lee Group also sent a report and "1/2 of the filter" to Dr. Oury, who in turn examined the "1/2 filter" and sent a report of his findings to Fisher's counsel. Both reports were dated December 18, 2018.

After receiving the unused tissue samples from Fisher's counsel, Mr. Holder responded via e-mail on December 17, 2018, by objecting to the involvement of RJ Lee Group on the ground that it was not an uninterested third party. Mr. Holder asked Fisher's counsel if there was enough tissue left for a digestion by an uninterested third party. Fisher's counsel did not respond to this request.

On December 21, 2018, Fisher served opposing counsel with a formal notice that Fisher would be taking a "trial preservation deposition" of Dr. Oury on January 8, 2019. Subsequently, Rita submitted a motion in limine to strike the tissue

digestion study and "preclude" any related evidence. The motion stated, in part, that Fisher did not follow the condition that the tissue must be divided by an uninterested third party and the division was performed in a manner to prevent Rita's expert from having a sufficient amount of digestible tissue. The motion also stated that Fisher waited "until the eve of trial, after the deadline for all depositions of all Defendants' expert witnesses[,] to introduce for the first [time] the results of a tissue digestion that could have been . . . performed for three years prior to trial" and this delay placed an undue burden on Rita by requiring her to hire a new expert witness to perform a tissue digestion and to be available for a deposition and trial.

Rita also sought an order of protection "from the scheduling of the deposition." Rita based this motion on several grounds: (1) the scheduled deposition would occur one day before the pre-trial hearing; (2) it overlapped deposition dates already set in the case; (3) Fisher declined Rita's requests to reschedule Dr. Oury's trial preservation deposition and to conduct a discovery deposition; (4) Fisher refused to provide Rita's counsel with the "filters or grids . . . to review RJ Lee's work"; (5) Fisher failed to make RJ Lee's scientist available for deposition; (6) the tissue was "destroyed in direct violation of the agreement of [the] parties to have it divided by an independent third party"; (7) Fisher waited over three years to seek an agreement on tissue destruction; (8) the tissue was not evenly split; and (9) Rita was also seeking to exclude the tissue digestion from evidence at trial, and, thus, any deposition of Dr. Oury should occur after the pre-trial hearing.

Attached to the written motion were copies of photographs purporting to show that "more than half of the tissue was taken from the circled area leaving Plaintiffs with insufficient tissue to digest." Fisher responded with an affidavit from RJ Lee's scientist stating that he cut and removed no more than half of the tissue for his own study and there remained sufficient tissue to perform an additional digestion study. On January 7, 2019, the circuit court filed an order granting Rita protection from the scheduling of the deposition. In this order, the circuit court stated, "The [c]ourt will address the admissibility of the testimony for trial and rescheduling of the Oury deposition, if necessary, at the pre-trial hearing scheduled for January 9, 2019."

Unbeknownst to Rita or the circuit court, Fisher's counsel met with Dr. Oury and a court reporter on January 8, 2019 to take Dr. Oury's "Sworn Statement," in the question and answer format typical of a deposition. During the pre-trial hearing on the following day, Fisher's counsel neither advised the circuit court that they had taken Dr. Oury's "Sworn Statement" nor sought to proffer it. As to her motion to exclude the tissue digestion study, Rita's counsel stated at the pre-trial hearing that RJ Lee Group was an "incredibly biased[] third party who solely represents

defendants . . . and has been criticized by . . . the Environmental Protection Agency[] in public documents . . . ." Counsel also stated that Rita's new expert indicated he did not have enough tissue to work with and allowing Fisher to introduce evidence on the tissue digestion would require Rita to depose Dr. Oury, RJ Lee's scientist, and Rita's own tissue digestion expert within just a few days before trial, which was scheduled to begin on January 14.

As the pre-trial hearing continued, Fisher's counsel admitted that the tissue had been divided "just after noon" on December 11, before the further e-mail exchange between counsel for the parties, but claimed that the parties "had already come to an agreement." Fisher's counsel also claimed that his December 10 e-mail advising Rita's counsel of the protocols was "just confirming the agreement." Fisher claimed that the parties had already come to an agreement when Mr. Holder sent the e-mail stating that the tissue division had to be performed by a disinterested third party and that prior to that e-mail, Mr. Holder had not been involved in the e-mail exchanges regarding the tissue division: "Mr. Holder was not even a part of the communications between me and [Ms. McVey] and Mr. Branham about how we were going to handle this." However, Mr. Holder was involved in the initial phone call and follow-up letter, and he was copied on all subsequent e-mails between counsel for the parties.

The circuit court concluded that there was no meeting of the minds regarding the tissue division and digestion study and Fisher's counsel should have immediately responded to Mr. Holder's request to start over with unused tissue from Emory to be divided by an uninterested third party rather than a defense expert. The circuit court granted Rita's motion, striking the digestion and precluding Dr. Oury from "testifying regarding the results of the tissue digestion or that a tissue digestion was ever performed." However, the court left open the possibility of admitting testimony regarding a new digestion: "To the extent that the Defendants can show that there is more viable tissue, they are not precluded from seeking to reach an agreement from [Rita] to complete a second digestion." Fisher made no such effort.

Near the conclusion of trial, Fisher attempted to proffer Dr. Oury's "Sworn Statement" for the record. The circuit court stated that it was blindsided and it did not consider the purported sworn statement to be an appropriate proffer because it was not submitted before the court issued the pre-trial order excluding the tissue digestion from evidence. The circuit court also noted that (1) the statement was truly a trial preservation deposition that the court had prohibited; (2) Fisher misled the court at the pre-trial hearing by staying silent about the sworn statement/deposition; (3) neither the court nor Rita's counsel was notified that the sworn

statement/deposition occurred until the end of trial; and (4) the expansion of Dr. Oury's December 18 report via the sworn statement/deposition was subject to Fisher's ongoing obligation under discovery rules to provide opposing counsel with supplemental material generated by their expert. Ultimately, the circuit court allowed the sworn statement/deposition to be used as a proffer but indicated that it would likely impose sanctions on Fisher in a post-trial order if requested by Rita. After trial, Rita submitted a motion for sanctions against Fisher for discovery abuse and violation of the circuit court's order of protection.

The circuit court granted the motion, stating:

> Here, Fisher Controls displayed a pattern and practice of disregard for this state's longstanding Discovery and Scheduling Order, the case management order and established case deadlines, the South Carolina Rules of Civil Procedure, and orders from this [c]ourt. In the handling of this issue with the tissue digestion alone, Fisher Controls repeatedly violated court orders. Fisher Controls offered no explanation for waiting until the eve of trial, years after obtaining Thomas Glenn's pathology, to perform a tissue digestion analysis. The case management order in place since June 25, 2015, mandated that a party could not destroy tissue without the agreement of the parties or court order. Fisher Controls ignored this order. Next, Fisher Controls wholly disregarded this [c]ourt's order prohibiting Dr. Timothy Oury's deposition. Although Fisher Controls labeled the deposition a "sworn statement," the statement is clearly a deposition submitted under a label which would not immediately invoke the [c]ourt's ire. The statement was transcribed by an official [c]ourt [r]eporter on the day and at the time that Fisher Controls had originally scheduled Dr. Oury's deposition—a deposition prohibited by an Order of Protection from this [c]ourt. Further, the statement consists of more than just a rote recitation of Dr. Oury's new causation conclusions. Counsel for Fisher Controls engaged in a lengthy examination of Dr. Oury and asked that he not only disclose his new opinions but explain the bases for his new opinions. The problematic nature of this conduct is compounded by the fact that Dr. Oury's new opinions were

> based on the results of the unauthorized tissue digestion—one in which the tissue was unequally divided and left the Plaintiff without sufficient tissue to conduct her own digestion. Moreover, Fisher Controls, despite being represented at pre-trial hearings and during multiple days of trial, concealed its conduct regarding its violation of [c]ourt [o]rders until the close of the presentation of evidence at the trial in this matter. The failure to produce this information during the pendency of trial, denying counsel information alleged to be "critical," is an abuse of the discovery and trial processes. It also left Plaintiff unable to respond to Fisher Controls' attempted proffer. This pattern and practice of discovery abuse is unacceptable for any party. But for Plaintiffs counsel's request to limit sanctions to a written order, greater sanctions would have been imposed as the gravity and repetitive disregard for the rules of court would have warranted substantial sanctions.
>
> As a result of Fisher Controls' abuse of the discovery and trial processes, this [c]ourt, in lieu of more serious sanctions, finds as follows:
>
> 1. Fisher Controls has intentionally and deliberately violated [o]rders from this [c]ourt regarding the discovery and trial processes which created a presumed prejudice of Plaintiff's ability to accurately and fairly present her case to the jury in this matter; and
>
> 2. The record shall reflect that Fisher Controls has repeatedly and deliberately engaged in a pattern and practice of sanctionable conduct.
>
> For the foregoing reasons, Plaintiff is entitled to the sanctions as outlined above.

Fisher has not carried its burden of showing that the circuit court abused its discretion. First, the time crunch that Fisher was under was of its own making, and

Fisher's choice to take the sworn statement/deposition without consulting with the court or opposing counsel shows a disregard for the power all courts must exercise over parties to proceedings before it in order to effectively dispense justice. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009) ("The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy."). Also, it is necessary to uphold the court's authority to enforce its own orders—here, the order of protection—when a lawful means of challenging a particular order is available. If Fisher believed it was necessary to preserve Dr. Oury's testimony for the record and submit it as a proffer, it could have sought the court's permission to do so at the pre-trial hearing in accordance with the court's language in its January 7 order of protection: "The [c]ourt will address the admissibility of the testimony for trial and rescheduling of the Oury deposition, if necessary, at the pre-trial hearing scheduled for January 9, 2019." The circuit court also gave Fisher the option of a second digestion study meeting Rita's conditions, and Fisher has failed to show that this option could not have been completed before the end of trial.

Fisher argues that it acted in good faith. We disagree. After Fisher's counsel received Mr. Holder's e-mail regarding division of the tissue by an uninterested third party, they made no effort to respond or to advise opposing counsel that the tissue samples had already been divided at that point. Additionally, they made no effort to respond to Mr. Holder's letter asking if another tissue division could be commissioned. In sum, Fisher abandoned any good faith efforts to make things right once it was notified of opposing counsel's concerns, and we are concerned that reversing the sanctions order would send a message to Fisher's counsel that they are not required to be forthright with opposing counsel or the circuit court when rushing to pursue evidence advantageous to their case on the eve of trial.

Further, the sanction imposed, a written slap on the wrist, was mild, and Fisher has failed to carry its burden of showing this sanction prejudiced Fisher or was otherwise "without reasonable factual support." *See Davis*, 409 S.C. at 282, 762 S.E.2d at 543 ("An 'abuse of discretion' may be found by this [c]ourt where the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." (quoting *Dunn*, 298 S.C. at 502, 381 S.E.2d at 735)). We agree with the circuit court that both Rita and the circuit court were blindsided by Fisher's failure to engage in forthright communications with them. Therefore, we affirm the circuit court's sanctions order.

CONCLUSION

Accordingly, we affirm in part and remand for the circuit court's *in camera* review of the settlement documents. We also direct the circuit court to reconsider the respective amounts to be set off against the jury's compensatory damages awards for Rita's three claims.

AFFIRMED IN PART AND REMANDED.

HEWITT, J. and HILL, A.J. concur.