The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF GREGORY LANCE MORRIS, PETITIONER

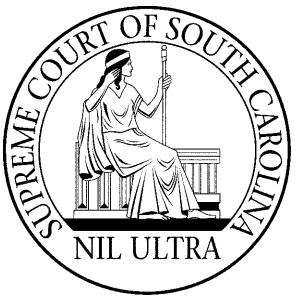
Petitioner was disbarred from the practice of law. *In the Matter of Morris*, 343 S.C. 651, 541 S.E.2d 844 (2001). Petitioner has now filed a petition seeking to be readmitted.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
April 4, 2014



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 9, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

In Re:
State of South Carolina, Respondent,

v.

Anthony Hackshaw, Defendant.

Appellate Case No. 2012-208848

Appeal from Richland County
James R. Barber, III, Circuit Court Judge,

Opinion No. 27375
Heard February 6, 2014 – Filed April 9, 2014

AFFIRMED

Tara Dawn Shurling, of Columbia, for Appellant.

James Hugh Ryan, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE KITTREDGE: This case involves the payment of attorney's fees and expenses to attorneys, Appellant Tara Dawn Shurling and co-counsel, who were court-appointed to represent an indigent charged with multiple criminal offenses. The trial court determined that the initial funding order precludes an award for the

fees and expenses sought by appointed counsel, which total $46,388.66. We affirm.

I.

Shurling was appointed to represent an indigent defendant in a criminal prosecution for murder, assault with intent to kill, criminal conspiracy, possession of a weapon during a violent crime, and possession of marijuana. Shurling sought approval for her fees and expenses to exceed the statutory caps provided by the South Carolina Indigent Defense Act.[1] Judge Childs, then the Chief Administrative Judge for the Richland County Court of General Sessions, signed two orders, one addressing attorney's fees and the other addressing expenses. In the first order, Judge Childs found it was "reasonable and proper" to award attorney's fees in excess of the statutory limits. Thus, Judge Childs awarded Shurling fees at the rate of $100 per hour and also authorized fees up to $15,000.00 "without further advance approval of [the] Court."[2] In the second order, Judge Childs addressed expenses and authorized up to $2,500 "without prior authorization from [the] court." (emphasis omitted). Specifically, Judge Childs'

[1] S.C. Code Ann. §§ 17-3-5 to -600 (2014). Section 17-3-50(A) of the South Carolina Code provides that private appointed counsel are to "be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court." S.C. Code Ann. § 17-3-50(A) (2014). The total attorney's fees may not exceed $3,500. *Id*. Attorneys are authorized to seek up to five hundred dollars for expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant." *Id*. § 17-3-50(B). Section 17-3-50(C) provides that payment in excess of these limits is "authorized *only if* the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary." *Id*. § 17-3-50(C) (emphasis added).

[2] Judge Childs also authorized the appointment of Shurling's associate, Jeremy A. Thompson. Thompson was allotted $40 per hour for out-of-court work and $60 per hour for in-court time.

order allowed $1,000 for witness fees, mileage, and subpoena service and $1,500 for all other expenses ("general expenses").[3]

After the conclusion of the trial, which lasted a week, Shurling requested a total of $44,426.00 in fees and $1,962.66 in general expenses.[4] Circuit Judge James R. Barber, III held two hearings to address these vouchers and ordered that Shurling and Thompson be paid fees and expenses subject to the preapproved limits set by Judge Childs. Shurling appealed, and this Court certified the appeal pursuant to Rule 204(b), SCACR.

II.

Shurling raises a number of issues on appeal, which we have distilled down to two dispositive issues: (1) whether Shurling is entitled to attorney's fees in excess of the preapproved amount of $15,000; and (2) whether Shurling is entitled to reimbursement for general expenses in excess of the preapproved amount of $1,500.[5]

Shurling claims that the trial court abused its discretion by limiting her fees to the preapproved amount of $15,000 based on Judge Childs' order. We disagree. Judge Childs' order, which is controlling in this case, provides that Shurling "may submit for approval by the [c]ourt a voucher for payment [of] fees up to $15,000.00 without *further advance approval*." (emphasis added). It is uncontested that Shurling submitted a bill for attorney's fees in excess of $15,000, yet she never sought further advance approval to exceed the preapproved amount of $15,000. Because Judge Childs' order is unambiguous in its requirement that further

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[3] Judge Childs was subsequently nominated and confirmed as a United States District Court judge.

[4] Shurling submitted a fee voucher for $33,020.00 and Thompson submitted a fee voucher for $11,406.00.

[5] Shurling raises additional challenges to the trial court's order, which we find are unpreserved or manifestly without merit. Accordingly, those additional challenges are affirmed pursuant to Rule 220(b)(1), SCACR.

preapproval was necessary to incur fees in excess of $15,000, we find no abuse of discretion and affirm the trial court's award of attorney's fees.[6]

Similarly, Shurling claims that the trial court abused its discretion in declining to authorize the payment of more than $1,500 in general expenses. Judge Childs' order specifically noted that general expenses were not to exceed the amounts set forth in her order absent further prior authorization from the court. Again, there was no request seeking advance approval for expenses in excess of the amounts preapproved by Judge Childs. Thus, we affirm the trial court's award of $1,500 in general expenses.

III.

We are cognizant of the fact that Shurling and co-counsel expended considerable time in the underlying criminal trial, and we commend them for their laudable service to the profession. Shurling epitomizes the professionalism of our Bar members who serve the much needed role of providing legal counsel to those who cannot afford it. Indeed, our honored profession is committed to providing access to justice for all. Nowhere is this more evident than where members of the legal profession represent indigent criminal defendants. In this case, however, in light of the unambiguous language of Judge Childs' orders and the failure to seek further advance approval to incur attorney's fees in excess of $15,000 and general expenses in excess of $1,500, we are constrained to affirm.

AFFIRMED.

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

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[6] Shurling urges this Court to construe the Indigent Defense Act to allow court-appointed attorneys to submit bills in excess of the statutory caps at the end of their representation without prior court approval. Because the clear language of Judge Childs' initial funding order is controlling in this case, we do not reach Shurling's statutory construction argument.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ida Lord, Appellant,

v.

D & J Enterprises, Inc., d/b/a Cash on the Spot,
Respondent.

Appellate Case No. 2012-208267

Appeal From York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27376
Heard January 7, 2014 – Filed April 9, 2014

REVERSED AND REMANDED

Robert J. Reeves, of Law Offices of Robert J. Reeves, P.C., of Fort Mill, and Arthur Kerr Aiken, of Aiken & Hightower, of Columbia, for Appellant.

Leland B. Greeley, of Leland B. Greeley, PA, of Rock Hill, for Respondent.

JUSTICE BEATTY: In this premises liability case involving a third-party criminal act, Ida Lord ("Lord") appeals the circuit court's order granting summary judgment in favor of D & J Enterprises, Inc., d/b/a Cash on the Spot ("D & J"). Lord asserts the circuit court erred in: (1) finding the balancing approach adopted in *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011) ("*Gopal II*"), which is used to determine a business owner's duty to protect a patron based on the

foreseeability of violent acts by third parties, applied prospectively; and (2) granting summary judgment as she presented a genuine issue of material fact on each element of her negligence claim. We reverse the order of the circuit court and remand for trial because we find *Gopal II* applies to the facts of the instant case and its application warranted the denial of D & J's motion for summary judgment.

I. Factual / Procedural History

D & J is a South Carolina corporation that operates businesses involving check cashing, "pay day" lending, and motor vehicle title lending. One of its businesses is Cash on the Spot, which is located in Rock Hill, South Carolina. Cash on the Spot is outfitted with iron bars on the windows of its building and bulletproof glass on its teller's windows for the protection of its employees.

On February 14, 2008, Lord went to Cash on the Spot to retrieve money wired to her using Western Union. As she approached the teller's window, a man seated at a nearby table stood up, reached under his clothing, pulled out a pistol, and shot Lord in the head and back. The man then demanded money as he slid his weapon through the opening in the teller's window. Marsha Boyd, the manager of the store who was stationed behind the bulletproof teller's window and had access to a silent alarm, immediately called 911. The man then fled the premises.

The incident, which lasted approximately six seconds, was captured on the store's security camera. As a result of this video and DNA recovered from a pen that the man had put in his mouth, law enforcement was able to identify the suspect as Phillip Watts, Jr.

After Watts was apprehended, he confessed to committing seven armed robberies in York County. The string of robberies, which began in October 2007 and primarily targeted small businesses, was the subject of significant media coverage. Prior to the Cash on the Spot incident, Watts robbed Rock Hill's Saltwater Seafood Market on January 28, 2008, and Fort Mill's John Boy's Valero on February 5, 2008. During these robberies, Watts shot two store clerks and a bystander. Before the February 14, 2008 incident involving Lord, the owner of Cash on the Spot warned his employees to be vigilant because "there is a madman on the loose."

On May 15, 2008, a York County grand jury indicted Watts for assault and battery with intent to kill and possession of a firearm during the commission of a violent crime stemming from the shooting of Lord. Ultimately, Watts entered a

plea of guilty but mentally ill to these charges and the other armed robberies and was sentenced to a term of life imprisonment without the possibility of parole.

On June 19, 2009, Lord filed an action for negligence against D & J, alleging the business breached its duty to her "to use reasonable care for her safety" because it failed to implement security features such as posting a security guard on the premises.

D & J answered and moved for summary judgment. In support of its motion, D & J filed a memorandum wherein it argued that it had no duty to protect Lord from the injuries caused by Watts. Citing *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000),[1] D & J asserted it was not

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[1] In *Miletic*, the plaintiff brought suit against Wal-Mart after she was abducted at gunpoint from the store parking lot on September 2, 1993. *Miletic*, 339 S.C. at 329, 529 S.E.2d at 68. The plaintiff alleged Wal-Mart had a duty to her as its customer to protect her from the criminal acts of third persons committed in the store's parking lot. *Id.* at 329, 529 S.E.2d at 68-69. In opposition to Wal-Mart's motion for summary judgment, the plaintiff submitted incident reports detailing criminal activity in or near the shopping center's parking lot in the two years preceding her abduction. *Id.* at 329, 529 S.E.2d at 69. The plaintiff also submitted an affidavit from a security consultant who stated that his security company had recommended in 1996 that Wal-Mart employ security, at the least an unarmed bicycle patrol, in its parking areas because of the subdued lighting required by city code. *Id.* After the trial judge granted Wal-Mart's motion, the plaintiff appealed to the Court of Appeals. *Id.*

In affirming the grant of summary judgment, the Court of Appeals referenced this Court's decision in *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977) as the established approach in determining the "scope of the duty of merchants." *Id.* at 330, 529 S.C. at 69. Specifically, the court stated, "There is no duty . . . upon merchants and shopkeepers generally, whose mode of operation of their premises does not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee." *Id.* (quoting *Shipes*, 269 S.C. at 484, 238 S.E.2d at 169). Although the court recognized that "the law ha[d] evolved in other jurisdictions since the Supreme Court articulated the scope of the duty of merchants under such circumstances in *Shipes*," it declined to deviate from the approach taken in *Shipes*. *Id.* Applying the test espoused in *Shipes*, the court

foreseeable that Watts would shoot Lord because Watts appeared to be a regular customer and the incident lasted less than six seconds. D & J further noted there were "no prior attempted armed robberies [at Cash on the Spot], or any type of violen[t] offense[s] against either employees or patrons." Additionally, D & J claimed there was no evidence presented to establish that Cash on the Spot was located in a dangerous area or constituted a business that attracts or provides a climate for crime. Given these facts, D & J maintained that the presence of a security guard would not have deterred Watts from entering Cash on the Spot or prevented the shooting.

In opposition to D & J's motion, Lord filed a memorandum wherein she asserted D & J's "personnel knew about Watts'[s] prior armed robberies and related shootings and appreciated the threat posed by Watts" yet failed to post a security guard at the entrance of Cash on the Spot. As a result, Lord asserted D & J's breach of its duty to her proximately caused her "catastrophic brain injuries."

Lord supplemented the memorandum with: (1) the deposition testimony of Darrell Starnes, who is the President of D & J and oversees the day-to-day operations of the corporation; (2) the deposition testimony of Boyd; (3) the affidavit of Robert Clark, a "private security expert" who opined D & J was aware of the threat posed by Watts and should have posted a security guard at the entrance of the business; and (4) newspaper articles and media coverage of the previous robberies committed by Watts.

After a hearing, the circuit court granted D & J's motion for summary judgment by order dated October 26, 2011. In so ruling, the court noted that at the time of the shooting in 2008 "the law governing the scope of the duty of merchants to protect invitees against criminal acts of third parties in South Carolina was governed by *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (S.C. App. 2000), citing *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977)." However, the court recognized that during the

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found Wal-Mart had no duty under South Carolina law to protect the plaintiff from an attack like the one she suffered. *Id.* at 333, 529 S.E.2d at 70. In reaching this conclusion, the court noted that Wal-Mart had "no notice of any comparable violent crimes occurring in the two years prior, and no incidents occurred on that particular night to put Wal-Mart on notice of an impending violent carjacking." *Id.* at 333, 529 S.E.2d at 70-71. Accordingly, because Wal-Mart had no duty to protect the plaintiff, it could not have negligently breached that duty. *Id.* at 333, 529 S.E.2d at 71.

pendency of the proceedings this Court issued its opinion in *Gopal II*, which "abandoned the imminent harm test [of *Shipes*] and adopted the balancing approach previously discussed in *Miletic*." Although the court believed *Gopal II* applied prospectively, it nevertheless analyzed the facts of the case under both *Shipes* and *Gopal II*.

Applying the "imminent harm test" enunciated in *Shipes*, the court rejected Lord's contention that D & J was aware of the specific and imminent harm. Even though Starnes warned his employees prior to the shooting that "a madman was on the loose," the court found there was no history of criminal activity on the premises of Cash on the Spot and there was no out of the ordinary behavior by Watts immediately prior to the shooting that would have put Lord or Boyd on notice of the shooting. As a result, the court determined D & J had no duty to protect Lord from the criminal actions of Watts.

Notwithstanding the circuit court's conclusion that *Gopal II* applied prospectively, the court proceeded to analyze Lord's claim using *Gopal II*. Pursuant to the balancing test of *Gopal II*, the court found Lord produced at least a scintilla of evidence that the crime was foreseeable. The court referenced the deposition testimony of Starnes and found it "clearly indicates that [D & J] actually did foresee the possibility of a third party criminal act, and even warned [its] employees to 'be on their toes, to look for suspicious people' because 'there was a madman . . . on the loose.' " Despite this finding, the court ruled that Lord failed to provide any evidence the security measures taken by D & J were unreasonable given the risk. Specifically, the court concluded Clark's expert opinion was not sufficient to establish the need for hiring costly security guards as there was no evidence of prior crimes on the premises of Cash on the Spot. Ultimately, the court held D & J had no duty to hire a security guard because it had implemented reasonable security measures.

Following the denial of her motion to reconsider, Lord appealed the circuit court's order to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Discussion

A. Arguments

In challenging the circuit court's order, Lord contends the court erred in finding the "balancing approach" established by this Court in *Gopal II* applied

prospectively. Because the balancing approach adopted in *Gopal II* "does not create liability where previously none existed," Lord maintains it should apply retroactively and control the resolution of the instant case.

Applying *Gopal II*, Lord asserts the court erred in granting summary judgment to D & J because she presented at least a scintilla of evidence showing a genuine issue of material fact as to each element of her negligence claim. Specifically, Lord asserts: (1) D & J owed a duty to her as she was a business invitee on the premises of Cash on the Spot; (2) the risk of harm to her was foreseeable because Starnes admitted he knew before the shooting that "there was a madman on the loose" and reviewed procedures with D & J employees regarding a response to a potential armed robbery; (3) D & J failed to post a security guard at the entrance of Cash on the Spot despite the foreseen risk of a shooting; (4) Clark's affidavit established that the shooting of Lord "most probably would not have occurred if D & J had posted a security guard"; and (5) there is evidence the shooting caused Lord to suffer profound neurological complications.

B. Standard of Review

The parties presented this case in the posture of a motion for summary judgment; thus, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "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. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP.

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

C. Effect of Court's Adoption of the *Gopal II* Balancing Test in 2011

To resolve this appeal, we must first determine whether our decision in *Gopal II* should apply prospectively or retrospectively and, in turn, to the instant case. In South Carolina, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citation omitted). "Prospective application is required when liability is created where formerly none existed." *Id.* at 433-34, 706 S.E.2d at 503. "As a common rule, judicial decisions in civil cases are presumptively retroactive." *Miranda C. v. Nissan Motor Co.*, 402 S.C. 577, 586, 741 S.E.2d 34, 39 (Ct. App. 2013).

Applying the above-outlined rules, we find the balancing approach in *Gopal II* should be applied retrospectively because our decision created no new duty for business owners, but, rather, clarified the test in assessing the scope of this duty.

Gopal II involved a premises liability action that arose out of the shooting of Gerald Bass while he was a guest at the Super 8 Motel in Orangeburg, South Carolina. *Gopal II*, 395 S.C. at 132, 716 S.E.2d at 912. Gopal, Inc., which is a franchisee of Super 8, owned and operated the motel. *Id.* During the evening of September 28, 1999, Bass and his roommate, Wayne Kinlaw, were turning in for the evening when they received a knock at their door by a man that Bass had seen earlier that evening at a nearby convenience store. *Id.* The door was equipped

with a peep hole and there was a large plate glass window beside the door. *Id.* After the third knock, Bass and Kinlaw opened the door without first looking to see who was there and then stepped outside. *Id.* When Bass refused the man's demand for money, the man shot Bass in the leg with a handgun and fled on foot. *Id.*

In September 2002, Bass filed a complaint alleging negligence against Gopal, Inc. and Super 8. *Id.* Gopal, Inc. and Super 8 each filed motions for summary judgment, which were granted by the circuit court. The Court of Appeals affirmed. *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009) ("*Gopal I*"). This Court granted Bass's petition for a writ of certiorari to review the decision of the Court of Appeals. *Gopal II*, 395 S.C. at 133, 716 S.E.2d at 912.

In *Gopal II*, we considered whether the Court of Appeals erred in upholding the circuit court's finding that Gopal, Inc., as the appeal against Super 8 had been dismissed, did not have a duty to protect Bass from the criminal act of a third party. *Id.* Chief Justice Toal, writing for the majority, noted that the threshold question in any negligence action is whether the defendant owed a duty to the plaintiff. *Id.* at 134, 716 S.E.2d at 913. Although the Court recognized "an innkeeper is not the insurer of [the] safety of its guests," it stated that "an innkeeper 'is under a duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm.' " *Id.* (quoting *Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp. 2d 653, 659 (D.S.C. 2005)). The Court explained that "a business owner has a duty to take a reasonable action to protect its invitees against the *foreseeable* risk of physical harm." *Id.* at 135, 716 S.E.2d at 913.

In assessing the foreseeability issue, the Court surveyed the approaches taken by jurisdictions across the country and identified four approaches: (1) under the "imminent harm rule," which was adopted by this Court in *Shipes* and cited in *Miletic*, the landowner owes no duty to protect patrons from violent acts of third parties unless he is aware of specific and imminent harm about to befall him; (2) pursuant to the second approach, which is known as the "prior or similar incidents test," foreseeability may be established only by evidence of previous crimes on or near the premises; (3) the third approach, which is known as the "totality of the circumstances test," requires the court to consider all relevant factual circumstances, including the nature, condition, and location of the land as well as prior similar incidents; and (4) under the fourth approach the court engages in a balancing test, which balances the degree of foreseeability of harm against the duty imposed. *Id.* at 135-39, 716 S.E.2d at 913-15.

After giving due consideration to each test and the associated policy implications, the Court adopted the balancing approach. *Id.* at 139, 716 S.E.2d at 915. In reaching this decision, the Court recognized that " '[t]he balancing approach acknowledges that duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed.' " *Id.* at 138, 716 S.E.2d at 915 (quoting *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn. 1996)). The Court explained that "the more foreseeable a crime, the more onerous is a business owner's burden of providing security." *Id.* at 138, 716 S.E.2d at 915. Accordingly, "[u]nder this test, the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Id.*

In adopting the balancing approach, the Court emphasized that it was not altering the "consistently imposed . . . duty on business owners to employ reasonable measures to protect invitees from foreseeable harm." *Id.* at 139, 716 S.E.2d at 915. Rather, the Court "merely elucidate[d] how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." *Id.* The Court further noted that "[t]he optimal point at which a dollar spent equals a dollar's worth of prevention will not always be apparent, but may be roughly ascertained with the aid of an expert, or some other testimony." *Id.* In replacing the "imminent harm test" adopted in *Shipes*, the Court found the "the balancing approach appropriately weighs both the economic concerns of businesses, and the safety concerns of their patrons." *Id.* By adopting this test, the Court hoped to " 'encourage a reasonable response to the crime phenomenon without making unreasonable demands.' " *Id.* at 139, 716 S.E.2d at 915-16 (quoting *McClung*, 937 S.W.2d at 902).

Applying the balancing approach to the facts of Bass's case, the Court found the Court of Appeals correctly affirmed the grant of summary judgment in favor of Gopal, Inc. *Id.* at 142, 716 S.E.2d at 917. In reaching this decision, the Court determined that Bass presented "at least some evidence the aggravated assault was foreseeable" because Bass produced a CRIMECAST report that showed, in 1999, the risk of rape, robbery, and aggravated assaults at the Super 8 as compared to the national average risk, the state average risk, and the county average risk. *Id.* at 141, 716 S.E.2d at 916. Based on this report, the Court found "the especial high probability of crime at the Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against [Bass] was foreseeable." *Id.*

The Court, however, found Bass did not provide any evidence that Gopal Inc.'s preventative measures were unreasonable given the risk of criminal activity on the property. *Id.* at 142, 716 S.E.2d at 917. Although Bass presented the deposition testimony of an expert who "concluded the addition of a closed circuit camera or some type of additional security personnel would have been reasonable in light of his perceived risk," the Court found Bass "failed to provide any evidence that [Gopal, Inc.] should have expended more resources to curtail the risk of criminal activity that might have been probable." *Id.* Instead, the Court found determinative the expert's statement that "if . . . this is [the] first time [a criminal incident occurred], there wasn't enough data for [Gopal, Inc.] to say he really needed to spend a bunch of money on surveillance cameras, a bunch of money on a full-time security guard or part-time, or train his employees to do a guard tour . . . ." *Id.*[2]

Upon further review of *Gopal II*, we now definitively hold that this decision applies retrospectively. Significantly, we implicitly announced this rule in 2011 when we applied the balancing test to Bass's case, which arose out of a criminal act that occurred in 1999. As to the substance of our decision, there is no evidence to rebut the presumption that *Gopal II* is to be applied retrospectively because we did not create any new right, liability, or cause of action. Although *Gopal II* "replaced" the "outdated" imminent harm rule in *Shipes* with a balancing test, we did not alter the well-established duty of a merchant[3] to take reasonable action to protect invitees against an unreasonable risk of physical harm. Rather, this Court

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[2] Justice Pleicones concurred in the majority's decision to affirm the grant of summary judgment in favor of Gopal, Inc.; however, he would have done so "on the ground that petitioner's negligence in leaving the safety of his motel room exceeded respondent's negligence, if any, as a matter of law." *Gopal II*, 395 S.C. at 143, 716 S.E.2d at 917 (citing *Gopal I*, 384 S.C. at 247, 680 S.E.2d at 921-22). Justice Pleicones further noted that he "perceive[d] little difference between our existing law [regarding the duty of an innkeeper to her guests], and the test adopted by the majority, other than the requirement for expert testimony, and reliance upon city/county statistics." *Id.* at 143, 716 S.E.2d at 918. If in fact the majority altered existing law, Justice Pleicones would have remanded to allow the parties an opportunity to address the newly announced test. *Id.*

[3] Even though *Gopal II* involved an assessment of the duty of an innkeeper, this does not affect the disposition of this case involving a merchant because "the answer to whether a defendant has breached any duty remains the same under either analysis." *Gopal I*, 384 S.C. at 245, 680 S.E.2d at 920.

modified the scope of this duty because we "merely elucidated" how to determine (1) if a crime is foreseeable, and (2) the economically feasible security measures that are required to prevent the foreseeable harm. Thus, we apply *Gopal II* to the facts of instant case.

D. Application of *Gopal II* Balancing Test to Instant Case

Applying the *Gopal II* balancing test, we hold the circuit court erred in granting summary judgment to D & J. Viewing the evidence in the light most favorable to Lord, we find she presented at least a scintilla of evidence to withstand the motion for summary judgment as to her negligence claim against D & J.

To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages. *Daniel v. Days Inn of Am., Inc.*, 292 S.C. 291, 295, 356 S.E.2d 129, 131 (Ct. App. 1987). The key determination in the instant case is whether D & J breached its duty to take reasonable action to protect Lord, its business invitee, against the foreseeable risk of physical harm.

Regarding the foreseeability prong of *Gopal II*, Lord presented the deposition testimony of Starnes, the owner of D & J, and Boyd, the manager of Cash on the Spot the day of the shooting. Starnes and Boyd testified they were aware of the prior robberies in York County because the local newspapers had covered the incidents. Prior to the shooting, Starnes discussed the robberies with his employees and warned them to "be on their toes to look out for suspicious people" because there was a "madman on the loose." Based on the foregoing, we find, as did the circuit court, Lord produced at least some evidence that the shooting was foreseeable.

Having determined Lord produced some evidence as to foreseeability of the risk of harm, the question becomes whether D & J's preventative security measures were unreasonable given this risk. Lord primarily asserts that D & J should have posted a security guard at the entrance of Cash on the Spot. Although this Court in *Gopal II* acknowledged the significant cost associated with hiring security guards absent evidence of prior crimes on the premises, we stated that a plaintiff may produce evidence of this prong through the testimony of an expert. Here, unlike the plaintiff in *Gopal II*, Lord presented expert testimony precisely on this point.

Robert Clark, Lord's expert in private security, reviewed the media coverage of the prior armed robberies, the deposition testimonies of Starnes and Boyd, and conducted a field investigation of the security measures used at Cash on the Spot.

Based on his investigation, Clark opined that D & J "had a duty, in the exercise of reasonable care, to post a security guard at the entrance of" Cash on the Spot in order to "provide reasonable protection for its employees and customers against the threat of a serial armed robber who had shot two store clerks and a bystander in two previous armed robberies of businesses that fit the profile of D & J's business." He further stated, "The armed robbery attempt during which Ida Lord was shot most probably would not have occurred if D & J had posted a security guard at the entrance of its check cashing location on Cherry Road in Rock Hill, South Carolina."

Under the specific facts presented in this case, we find the expert testimony was sufficient to create a question of fact for the jury. *See* Louis A. Lehr, Jr., 1 *Premises Liability* 3d § 4:7 (Supp. 2013) ("A common type of claim is one predicated on security guards the complete absence, or an inadequate number and/or inadequate training. A typical case is one in which an expert testifies that the presence of a security [guard] would have prevented the crime. Courts have held that such expert testimony is sufficient to make a fact question for the jury." (footnote omitted)); *see also Midkiff v. Hines*, 866 S.W.2d 328, 333 (Tex. Ct. App. 1993) (reversing grant of summary judgment where "[o]ne expert testified that if a uniformed security guard had been stationed on the property as a visible deterrent, the murder would have been deterred or prevented"). *See generally* E.L. Kellett, Annotation, *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619 (1966 & Supp. 2013) (referencing *Shipes*, *Miletic*, and *Gopal II* as well as other state and federal cases analyzing a business owner's duty to protect its customers from criminal activity by third parties).

III. Conclusion

Given the summary judgment posture of this case, we conclude it is premature to deprive Lord of the opportunity to present her case to a jury. As we noted in *Gopal II*, "whether a business proprietor's security measures were reasonable in light of a risk will, at many times, be identified by an expert." *Gopal II*, 395 S.C. at 141, 716 S.E.2d at 917. Here, Lord presented such expert testimony. At this stage, it is not the role of the circuit court or this Court to determine whether Lord will prevail on her negligence claim, but whether she presented a mere scintilla of evidence to withstand D & J's motion for summary judgment.

We emphasize that our decision should not be construed as requiring all merchants to hire costly security guards.[4] Instead, we merely find that it is for a jury to decide whether D & J employed reasonable security measures to fulfill its duty to protect Lord from the foreseeable risk of a shooting. Clearly, D & J recognized that it was susceptible to an armed robbery at Cash on the Spot as it had installed security cameras and placed bars on the office windows. It also sought to protect its employees by placing them behind bulletproof glass, equipping them with panic buttons, and providing them with immediate access to a silent alarm. The circumstances of this case, however, presented a heightened risk of danger beyond the ordinary operation of Cash on the Spot. As evidenced by Starnes's deposition testimony, there was a foreseeable risk of a shooting at Cash on the Spot given the rash of armed robberies that culminated in the shootings of store clerks and customers at nearby businesses. Under these unique facts, we cannot find that D & J was entitled to judgment as a matter of law on Lord's cause of action for negligence.

Accordingly, the order of the circuit court is

REVERSED AND REMANDED.

TOAL, C.J., and HEARN, J., concur. PLEICONES, J., concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion.

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[4] The dissent clearly misconstrues our decision, stating "Today the Court holds that a merchant has a duty to provide a security guard where random acts of criminal violence occur miles away from the business." Such an interpretation is erroneous as we make no such definitive determination regarding a merchant's duty. Rather, we adhere to our decision in *Gopal II* that a plaintiff, who offers evidence of whether a business proprietor's security measures were reasonable in light of a risk, may withstand a motion for summary judgment. Lord, as the party opposing the motion for summary judgment, properly offered expert testimony that D & J's preventative security measures were unreasonable given the foreseeable risk of criminal activity. Moreover, the dissent places great emphasis on the fact that the prior shootings occurred two or more miles away from D & J. This fact, however, does not defeat or weaken Lord's position as it would take no more than five minutes for one to travel such a short distance. Accordingly, unlike the dissent, we cannot find that D & J was entitled to summary judgment as a matter of law.

JUSTICE PLEICONES: I concur in the result reached by the majority in this case. I write separately because, as the majority notes, I do not believe *Gopal II*[5] wrought any change in the law which requires a prospective/retrospective analysis.

Further, while I agree with the dissent that, ". . . the law does not impose upon a business owner a duty to provide a security guard," I do not read the majority opinion to require that measure in this or any case.

The duty as correctly pointed out by both the majority and the dissent is one of reasonable care to protect invitees from unreasonable risk of harm. Whether the jury would have valued Clark's opinion that a security guard was required in this case in order to fulfill that duty poses questions of credibility and fact.

[5] *Bass v Goapl, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011).

JUSTICE KITTREDGE: Today the Court holds that a merchant has a duty to provide a security guard where random acts of criminal violence occur miles away from the business. Because I believe, as a matter of law, that no such duty exists, I would affirm. It is also my judgment that a proper application of *Gopal II* would result in affirming the grant of summary judgment by the able trial judge. *Bass v. Gopal*, 395 S.C. 129, 716 S.E.2d 910 (2011). As a result, I respectfully dissent.

Respondent operates a check cashing business, known as Cash on the Spot, on Cherry Road in Rock Hill, South Carolina.[6] On January 28, 2008, Phillip Watts shot an employee of the Saltwater Seafood Market during an armed robbery. The Saltwater Seafood Market is located in Rock Hill, two miles from Respondent's business. Eight days later, on February 5, Watts robbed the John Boy's Valero and shot a customer and an employee. John Boy's Valero is located in Fort Mill, South Carolina, approximately eight miles from Respondent's business. Nine days later on February 14, Watts shot Appellant at Respondent's business. There is no evidence of any violent crimes occurring either on or in the immediate vicinity of Respondent's business.

The majority states the "key determination" in this case is whether Respondent "breached its duty to take reasonable steps to protect Lord, its business invitee, against foreseeable risk of physical harm." A business owner, of course, owes a duty of reasonable care to protect its invitees against the foreseeable risk of physical harm, a position which Respondent has never contested. But that is not the question before this Court. Rather, this case should be decided on the limited theory advanced by Appellant to defeat summary judgment—that is, whether the law imposed a duty on Respondent's business to provide a security guard. Under the circumstances presented, I would hold as a matter of law that no such duty existed.

The sole argument presented by Appellant to the trial court in opposition to the summary judgment motion is found in the affidavit of a private investigator and security consultant, Robert Clark, who opined that Respondent had a "duty . . . to post a security guard at the entrance to its check cashing location on Cherry Road in Rock Hill." Appellant's counsel asserted at the summary judgment hearing that "in this case . . . the duty is the duty to have a security guard." Appellant, to her credit, has pursued this same limited argument on appeal. In her brief, we find the following statements: "Despite their knowledge and appreciation of the threat posed by Watts, [Respondent's] personnel did not have a security guard posted at

[6] Numerous commercial establishments are located on Cherry Road.

the entrance of the [business] location"; the risk of harm "weighs heavily in the balance and justifies a requirement that [Respondent] post a security guard"; and under the circumstances, the law imposed on Respondent a "duty to post a security guard until the threat by Watts had passed." Appellant's Br. at 3, 7, 8.

Appellant's assignment of error on appeal conflates the legal question of duty with the scintilla rule concerning factual matters in reviewing a summary judgment motion. Appellant argues "[t]here is a genuine issue of material fact on the question of whether [Respondent] owed a duty to [Appellant] to post a security guard at its business to protect her from a foreseen criminal act by [the shooter]." Appellant's Br. at 6. The majority has accepted Appellant's invitation to apply the scintilla rule to the legal question of duty, observing that at the summary judgment posture, "it is not the role of the circuit court or this Court to determine whether [Appellant] will prevail on her negligence claim." Yet, the question of duty is one for the court. While I acknowledge the mere scintilla standard for summary judgment, "'[a] motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine.'" *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) (quoting *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011)). Only when a legal duty is established does the issue of "whether the defendant breached that duty [become] a question of fact." *Id*. (citing *Singletary v. S.C. Dep't. of Educ.*, 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994)).

As acknowledged, Respondent owed a duty of reasonable care to its invitees, and whether a business owner has satisfied or breached that duty is generally a fact question for the jury. Appellant, however, has framed the question narrowly by seeking to impose a duty on Respondent to provide a security guard. I would hold that under the undisputed facts of this case, the law does not impose upon a business owner a duty to provide a security guard.

The trial court analyzed this case under *Shipes*[7] and *Gopal II*.[8] In evaluating the *Gopal II* balancing test, while the trial court found there was some evidence of foreseeability,[9] it examined the sole theory of duty advanced by Appellant and

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[7] *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977).

[8] *Bass v. Gopal*, 395 S.C. 129, 716 S.E.2d 910 (2011). I join the majority in utilizing the balancing test adopted in *Gopal II*.

concluded that the law does not impose on a business owner a duty to provide a security guard under the circumstances.[10] The trial court's order concludes:

> In Gopal, the Supreme Court found that "the hiring of security personnel is [no small burden]. Considering a business's economic interest, it is difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises." The facts of this case are no exception. There is no evidence of prior crimes on the premises of Cash on the Spot. Therefore, if the rationale of the [Appellant] is taken to its logical conclusion, every business in York County that was manned by one or two people and had cash on hand had a legal duty to hire a security guard from February 5 onward, either until the assailant was caught or to some unknown time in the future when the threat was no longer imminent. Imposing such a heavy burden on small businesses, based on these facts, is both unreasonable and economically unfeasible.

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[9] Evidence of foreseeability comes from Respondent's owner's warning to the employees to be vigilant, because "there [was] a madman on the loose." *See Melton v. Boustred*, 183 Cal. App. 4th 521, 538, 107 Cal. Rptr. 3d 481, 496 (6th Dist. 2010) ("[R]andom, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." (quotation omitted)). Given the two prior robberies and shootings occurred two or more miles away, and the complete absence of any serious crimes on Respondent's premises, I would not use Respondent's owner's "madman on the loose" statement to impose a duty on the business to provide a security guard.

[10] Although not determinative in resolving this appeal, I note the employees of Respondent were separated from the customers by bulletproof glass and wore panic buttons around their neck. Moreover, prior to the robbery, Respondent's employees attended a meeting where the policies and procedures regarding armed robberies were discussed in order to prepare them for possible future incidents. Whether these measures were reasonable is not before us, for Appellant proceeded on the sole theory that the law imposed a duty on Respondent to provide a security guard.

The facts of this case are tragic, the trauma and injuries to Appellant horrific. But the question of whether the law imposes a duty on a business to provide security guards should follow the *Gopal II* framework, which I am convinced answers the question "no" under the facts of this case. Because I believe the trial court struck the proper balance in evaluating the legal question of duty and correctly granted summary judgment, I would affirm.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles William Berger, Respondent

Appellate Case No. 2013-002535

Opinion No. 27377
Submitted January 27, 2014 – Filed April 9, 2014

DISCIPLINE IMPOSED

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

Charles William Berger, of Florida, pro se.

PER CURIAM: Respondent is licensed to practice law in Florida;[1] he is not licensed to practice law in South Carolina. In May 2013, the Office of Disciplinary Counsel (ODC) filed Formal Charges against respondent alleging that, by use of the Internet, he solicited clients in South Carolina and represented clients in two separate legal matters before the courts of this state. Respondent did not answer the Formal Charges, was found to be in default, and is therefore deemed to have admitted the factual allegations made in those charges. See Rule 24(a), RLDE, Rule 413, SCACR. Following an evidentiary hearing in which respondent did not appear, the Hearing Panel issued a Panel Report recommending, respondent: 1) be prohibited from seeking any form of admission in South Carolina for five years; 2) that he reimburse all fees and costs paid by the South

[1] Respondent is also admitted to the Pennsylvania Bar. He practices law from Palm Beach County, Florida.

Carolina clients harmed by his misconduct within thirty (30) days of the date of discipline; and 3) that he be required to pay the costs of the proceedings within thirty (30) days of the date of discipline, in addition to other sanctions. Neither ODC nor respondent filed exceptions to the Panel Report and the matter is now before the Court for consideration.

FACTS

Matter I

In 2011, Mr. and Mrs. Doe, residents of South Carolina, were having difficulty paying the mortgage on their home and were facing foreclosure; the lender removed the foreclosure action from the active roster to attempt loss mitigation or loan modification. In the spring of 2012, Mrs. Doe conducted an Internet search to locate a lawyer and completed a form on a mortgage modification website. Several companies responded, including respondent's law firm, the Law Offices of C. William Berger, Esquire, which sent the Does a letter offering assistance.

Mrs. Doe contacted respondent's law firm for assistance in avoiding foreclosure. She inquired about the effect of respondent being in Florida and, in reply, was told "Yes …you will have a local attorney…." Thereafter, the Does signed a fee agreement, paid a retainer of $1,500.00, and agreed to have the law firm withdraw a monthly fee from their bank account. The Does received emails addressing how long the matter would take and stating "[w]e have never lost a home ...that is because we only take on clients that we can help …and have a valid case." The Does received a "Welcome Email" stating the firm had contacted the Does' lender and requested the Does complete a form and send requested documents. The Does completed the form and sent the requested documents. Over a three month period, the Does received the same "Welcome Email" on three occasions.

In August 2012, the Does received an email from their lender advising it was unable to proceed with the loss mitigation process because it had not received certain documents and it had filed a Motion to Restore the foreclosure proceeding to the roster. Mrs. Doe contacted respondent's law firm and forwarded the lender's letter and motion by email. She was again sent the "Welcome Email." After repeated attempts to contact the law firm, Mrs. Doe was notified on August 24, 2012, that the law firm had filed a response to the lender's motion. As of this time, neither of the Does had spoken with respondent or any other lawyer with his firm.

In the meantime, respondent's law firm repeatedly told Mrs. Doe that a "negotiator" would be assigned to assist with the loan modification process. When the negotiator contacted Mrs. Doe on August 24, 2012, the negotiator did not mention the lender's Motion to Restore and advised what to do "if you are currently behind or do fall behind on your mortgage payments."

On August 28, 2012, Mrs. Doe spoke with the lender who requested she submit several of the same documents she had given to respondent's law firm. Mrs. Doe communicated this request to the negotiator who then requested the same documents that Mrs. Doe had already submitted to the law firm.

On September 20, 2012, Mrs. Doe received notice that a hearing in the foreclosure case was scheduled for October 3, 2012. Mrs. Doe notified the negotiator who responded, "[t]his is a hearing due to not paying on your mortgage, I am going to forward this over to the correct department and have the attorney give you a call." From September 20 until the morning of the hearing, Mrs. Doe sent at least seventeen email messages to representatives of respondent's law firm asking to speak with her lawyer, asking for the lawyer's name, and inquiring about the hearing. She received a few responses, none of which answered her questions. At one point, she received an email stating, "[w]e are waiting to hear back from your attorney, [Lawyer A]."[2] According to the Formal Charges, Lawyer A had not been retained by respondent's firm to represent the Does.

On several occasions, an employee of the law firm told Mrs. Doe that the employee had been consulting with a lawyer in the law firm named "Lynn." Mrs. Doe was not put in touch with "Lynn" or given Lynn's last name or contact information.

On the day of the October 3, 2012, hearing, Mrs. Doe received an email from the employee stating "Lynn" had "Fed-Ex'd" a motion to the judge yesterday. The email further stated "there is a conflict with the Attorney's schedule for the hearing. HOWEVER, speaking with Lynn…it is advised that you go to the hearing and State [sic] that you have an attorney, and your case is being handled, and there was a conflict with her schedule."

[2] The law firm identified Lawyer A by name; Lawyer A is authorized to practice law in South Carolina.

Court records indicate "Defendant's Motion to Dismiss for Failure to State Cause of Action and Improper Restablishment of the Lost Note" was sent by Federal Express listing the Does' name at respondent's return address. The motion was not signed by the Does and did not list a lawyer on behalf of the Does. The motion was improper as this was not a "lost note" case. Further, respondent's law firm did not serve a copy of the motion on counsel for the lender. In addition, the Does were not provided with a copy of the motion and were neither consulted nor advised regarding its contents. At the time of the hearing, neither of the Does had spoken with respondent or any attorney at his law firm.

Moments before the hearing, a representative of the law firm sent Mrs. Doe an email with the name and telephone number for another attorney, Lawyer B, licensed to practice law in South Carolina. Lawyer B did not appear at the hearing. Respondent's firm had not retained Lawyer B to handle the Does' case.

At the hearing, Mrs. Doe informed the judge that respondent was representing she and her husband and had a scheduling conflict. Counsel for the lender stated no one in her law firm had been contacted by an attorney on behalf of the Does. The judge took evidence from the lender; the judge held the matter in abeyance for three weeks to allow Mrs. Doe the opportunity to submit documentation of active loan modification negotiations.

Between October 3 and October 18, 2012, Mrs. Doe sent at least sixteen email messages to employees of respondent's law firm asking to speak to an attorney and requesting the documentation requested by the judge. She was not able to speak with a lawyer and did not receive any documentation verifying she was in active negotiations to modify the loan. Mrs. Doe was repeatedly told that "Lynn" was handling the matter.

The Does were not able to submit the required documentation to the judge. Mrs. Doe informed two of respondent's employees that a sale date was scheduled for December 3, 2012. In the weeks leading up to the sale, Mrs. Doe sent repeated email messages to the law firm asking questions, requesting a lawyer, and requesting a phone call. According to the Formal Charges, the employees "continued to put Mrs. [Doe] off, claiming that they were waiting to hear from the lender and promising that they would postpone the sale of the property."

On November 14, 2012, an employee forwarded Mrs. Doe an email message from a "litigation paralegal" containing information about the South Carolina procedures for filing a notice of appeal copied from the Internet. The email advised the deadline for filing an appeal was November 22, 2012. Mrs. Doe responded with questions about the appeal process, including whether respondent's law firm would assist with the appeal. No one responded to her questions.

On November 20, 2012, an employee emailed Mrs. Doe and advised that she contact the Greenville County Clerk of Court for information, "tell them that you are filing an appeal & get more info (exactly who to make the check payable to and if there is a specific appellate form or if the notice of appeal is sufficient). If they are paying cash, that is easiest, but from what I found above it looks like it would be payable to Greenville County Circuit Court." Mrs. Doe inquired about the effect an appeal would have on the sale date but did not receive a response.

The following day, Mrs. Doe contacted the lender's counsel directly. Mrs. Doe successfully postponed the sale date. The Does hired a South Carolina lawyer to assist with the foreclosure and loan mediation.

From June 2012 through February 2013, respondent continued to make monthly drafts from the Does' bank account for attorney's fees.

Matter II

The Roes are residents of South Carolina. On May 27, 2011, the Roes' lender filed a foreclosure action in Lexington County. No answer was filed and no attorney made an appearance.

In February 2012, the Roes hired respondent to represent them in the foreclosure proceeding. They signed a fee agreement, paid respondent's law firm $1,500.00, and made arrangements for the law firm to draw a monthly fee from their bank account. In the fee agreement respondent agreed to provide the following services: answering the complaint, amending the answer, making and amending affirmative defenses, answering amended complaints, communicating with opposing counsel, scheduling hearings, maintaining and reviewing the client file, monitoring the court docket, preparing for hearings, attending hearings (in person or by phone), conducting and updating legal research, defending against motions for summary judgment, and handling pretrial motion not related to discovery. The fee

agreement excluded the following services: discovery, "trials," lawsuits by mortgage holders other than the first mortgage holder, transactional services, and claims of "affirmative" relief.

On February 21, 2012, a foreclosure hearing was held. Neither respondent nor anyone from his law firm appeared on the Roes' behalf. A default judgment was entered on February 22, 2012.

On June 8, 2012, the Roes filed a Motion for Reconsideration and to Reinstate the Loan prepared by respondent's law firm, listing the Roes as *pro se*, but providing the address for the law firm. On June 15, 2012, the court issued notice of the hearing on the Motion for Reconsideration, serving the Roes at the property address and respondent's law firm address in Florida. The hearing was held on June 26, 2012; no one appeared on the Roes' behalf.

On July 5, 2012, the judge signed the order denying the Motion for Reconsideration. On July 24, 2012, the Roes filed a notice of appeal prepared by respondent's law firm. On July 31, 2012, the Roes filed a Motion to Stay Eviction Pending Appeal prepared by respondent's law firm. On each document, respondent's Florida address was listed below the Roes' names.

The Roes' home was sold in foreclosure. From February through July 2012, respondent continued to make monthly drafts of $750.00 from the Roes' bank account for attorney's fees.

Matter III

On November 6, 2012, ODC served respondent with a Notice of Investigation in the Doe matter, advising of his obligation to respond within fifteen days pursuant to Rule 19, RLDE. No response was received. ODC sent respondent a reminder letter on December 21, 2012, pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). On February 6, 2013, ODC served respondent with a subpoena for the Does' client file and a list of all of his South Carolina clients. Respondent did not provide the subpoenaed documents.

On March 18, 2013, ODC served respondent with a Notice of Investigation in the Roe matter, advising of his obligation to respond within fifteen days pursuant to Rule 19, RLDE. On the same day, ODC served respondent with a second

subpoena again asking for the Does' client file, a list of all of his South Carolina clients, and for the Roes' client file. Respondent failed to respond to the Notices of Investigation, failed to respond to the subpoenas, and failed to appear for two interviews scheduled pursuant to Rule 19(c)(3), RLDE.

The Formal Charges alleged respondent failed to cooperate in ODC's investigation of the two above matters by failing to respond to the Notice of Investigations, by failing to respond to subpoenas, and by failing to appear for two interviews scheduled pursuant to Rule 19(c)(3), RLDE.

The Hearing Panel found respondent's conduct violated the following Rules of Professional Conduct, Rule 407, SCACR[3]: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation); Rule 1.3 (lawyer shall act with diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information; lawyer shall explain matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation); Rule 1.5 (lawyer shall not make agreement for, charge, or collect unreasonable fee or unreasonable amount for expenses); Rule 1.15(c) (lawyer shall deposit into client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 3.1 (lawyer shall not bring or defend proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous); Rule 3.5(b) (lawyer shall not communicate ex parte with judge during proceeding unless authorized to do so by law or court order); Rule 5.3 (lawyer who individually or together with other lawyers possesses comparable managerial authority in law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that non-lawyer employee's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(a) (lawyer shall not practice law in jurisdiction in violation of the regulation of legal profession in jurisdiction or assist another in doing so); Rule

[3] The Rules of Professional Conduct, Rule 407, SCACR, are applicable as respondent's misconduct occurred in connection with matters pending before tribunals in South Carolina. See Rule 8.5(b), RPC (addressing choice of law for disciplinary matters).

5.5(b) (lawyer not admitted in this jurisdiction shall not hold out to public or otherwise represent lawyer is admitted to practice in this jurisdiction); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to a lawful demand for information from disciplinary authority).

DISCUSSION

As noted above, since respondent failed to answer the Formal Charges, he is deemed to have admitted the allegations in the charges. Rule 24(a), RLDE. Further, since he failed to appear for the Panel Hearing, respondent is deemed to have admitted the factual allegations and to have conceded the merits of any recommendations considered at the Panel Hearing. Rule 24(b), RLDE.

Pursuant to Rule 3(b), RLDE, Rule 413, SCACR, the Commission on Lawyer Conduct (the Commission) has jurisdiction over all allegations that a lawyer has committed misconduct. "Lawyer" is defined as "a lawyer not admitted in this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Rule 2(q), RLDE. Accordingly, even though he is not admitted to practice law in South Carolina, respondent is subject to discipline in this state.

The authority to discipline lawyers and the manner in which the discipline is imposed is a matter within the Court's discretion. In the Matter of Van Son, 403 S.C. 170, 742 S.E.2d 660 (2013). When the lawyer is in default the Court need only determine the appropriate sanction. Id.

We find respondent's misconduct particularly egregious. Although not admitted to practice law in South Carolina, respondent nevertheless engaged in the practice of law in this state. He represented clients in South Carolina. He or his firm provided advice to clients and prepared and filed pleadings, some of which were frivolous, on behalf of his clients. Although he prepared and filed motions, respondent neglected to attend the motion hearings. Moreover, respondent charged and collected unreasonable fees from clients for the minimal work he did perform and then continued to collect fees from clients even after his representation ceased. When disciplinary charges were filed against him, respondent ignored the matter by failing to respond, participate in the investigative process, or appear for the hearing.

In considering the appropriate sanction, we find several aggravating factors applicable. First, respondent undertook the representation of vulnerable clients,

individuals who had financial difficulties and faced the prospects of losing their homes to foreclosure. In the Matter of Samaha, 399 S.C. 2, 731 S.E.2d 277 (2012); In the Matter of Dickey, 395 S.C. 336, 718 S.E. 2d 739 (2011). Second, respondent failed to cooperate in the disciplinary investigation and to appear for the hearing. In the Matter of Hall, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998) ("An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous or indifferent lawyers."). Third, as recognized in the Panel Report, respondent received a public reprimand from the Supreme Court of Florida in 2003. By the reprimand, the Florida Supreme Court sanctioned respondent for failing to provide competent representation, failing to act with reasonable diligence and promptness in representing a client, and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding representation. Respondent has committed the same misconduct in the current matter.

If respondent were admitted to practice law in South Carolina, his conduct would warrant disbarment. Since he is not admitted in South Carolina, we find it appropriate to permanently debar him from seeking any form of admission to practice law in this state (including pro hac vice admission) without first obtaining an order from this Court allowing him to seek admission. We further order respondent to fully reimburse all fees and costs paid by the clients in this matter and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion.

Should he wish to seek admission in the future, the burden of proof shall be on respondent to establish by clear and convincing evidence that he is of sufficient character and fitness. Under no circumstances shall respondent be eligible to seek admission until he has fully reimbursed his clients for all fees and costs paid in this matter and paid the costs of this proceeding.

DISCIPLINE IMPOSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Amelia H. Lorenz, Respondent.

Appellate Case No. 2014-000290

Opinion No. 27378
Submitted February 25, 2014 Filed April 9, 2014

DISBARRED

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

Amelia Holt Lorenz, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to any period of definite suspension or to disbarment. Respondent requests that the sanction be made retroactive to November 1, 2012. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of interim suspension. In the Agreement, respondent acknowledges being in default on the formal charges. She admits the material portions of the factual allegations and the allegations of rule violations set forth in the formal charges as follows.

Facts

On July 26, 2012, respondent conducted a real estate closing on behalf of a client but did not pay off the client's mortgage or record the deed in a timely manner.

Sometime shortly after the closing, respondent closed her practice and moved to Georgia. She did not provide her title insurance company with her new contact information, nor did she update her contact information with the South Carolina Bar or in the Attorney Information System.

By September 2012, respondent owed the title insurance company approximately $4,533.24 in title insurance premiums on approximately twenty-five closings. The title company incurred $200 in fees to retain a law firm to conduct title searches.

Respondent did not respond to the notice of investigation, a subpoena for the files and financial records from the closing discussed above, or any correspondence from ODC, and failed to appear for two interviews. ODC's review of trust account records obtained from the bank revealed counter withdrawals and miscellaneous debits. Without respondent's accounting records or her cooperation in the investigation, ODC has no explanation for the transactions and no way to determine whether funds from respondent's closings were disbursed appropriately or in a timely manner.

As noted, respondent was placed on interim suspension on November 1, 2012, but she has not filed the affidavit required by Rule 30(g), RLDE, Rule 413, SCACR, nor has she delivered her files or otherwise cooperated with the attorney appointed to protect her clients' interests.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall communicate with the client); Rule 1.15(d) (upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person and shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to); Rule 1.16 (requirements when terminating representation); and Rule 8.1 (a lawyer in connection with a disciplinary matter

shall not fail to respond to a lawful demand for information from a disciplinary authority).

Respondent also admits she has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(3)(it shall be a ground for discipline for a lawyer to willfully violate a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules, willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under these rules, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19(b)(1), (c)(3) or (c)(4)); Rule 7(a)(5)(it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6)(it shall be a ground for discipline for a lawyer to violate the oath of office taken to practice law in this state); and Rule 7(a)(7)(it shall be a ground for discipline for a lawyer to willfully violate a valid court order issued by a court of this state). Finally, respondent admits she has violated Rule 410, SCACR, by failing to update her contact information with the Bar and in AIS, and Rule 417, SCACR, by failing to follow financial recordkeeping requirements.

Respondent has agreed to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct within ninety days of the imposition of discipline.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to the date of interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court. Within ninety days of the date of this opinion, respondent shall, as set forth in the Agreement, pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants,

v.

Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T, and James Edahl, Respondents,

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T, and James Edahl, Respondents.

Consolidated Appellate Case No. 2012-205647

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 27379
Heard November 6, 2013 – Filed April 9, 2014

AFFIRMED

M. Dawes Cooke, Jr., and John William Fletcher, both of Barnwell, Whaley, Patterson, & Helms, LLC, of Charleston; John P. Linton, Sr., and Brian C. Duffy, both of Duffy & Young, LLC, of Charleston; Andrew K. Epting, Jr., and Michelle Nicole Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston, for Appellants.

Julio E. Mendoza, Jr., and Tanya Amber Gee, both of Nexsen Pruet, LLC, of Columbia; and Molly Hughes Cherry, of Nexsen Pruet, LLC, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: In this consolidated appeal, the plaintiffs from four separate actions (collectively, Appellants) ask this Court to reverse the trial court's order granting a motion to dismiss in favor of Branch Banking & Trust Company (BB&T) and BB&T employee James Edahl (collectively, Respondents). We affirm.

The facts, in the light most favorable to Appellants, are as follows.[1] Skywaves I Corporation (Skywaves) is a South Carolina corporation that develops technology for the wireless telecommunications industry. In 2005, Skywaves entered into a factoring agreement with BB&T. From 2005 to 2007, Skywaves and BB&T occasionally amended the factoring agreement via written modifications so that BB&T could fund Skywaves's working capital needs as those needs developed and expanded.

In early 2007, Skywaves won several lucrative government contracts, and its Board of Directors determined that the company required more capital than BB&T provided at that time in order to meet the increased demand for their products. Skywaves therefore solicited funding proposals from various entities, including Wachovia, Hunt Capital, and BB&T.

In March 2007, Edahl, an employee at BB&T's branch located in Charleston, held a meeting for Skywaves and its current investors, informing them:

> that [BB&T] understood the short and long term capital needs of Skywaves; that Skywaves did not need a large bank or additional

[1] We note that the trial court and both parties continuously referred to the motions at issue as "motions to dismiss." However, Appellants provided materials outside the pleadings to the trial court—specifically, the new factoring agreement and correspondence between BB&T and Skywaves—and the court relied on those materials in making its decision to dismiss Appellants' claims, thereby converting Respondents' motions to dismiss into motions for summary judgment. *See* Rule 12(b), SCRCP.

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP, including viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011); *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

> capital funding to continue its growth; that [Respondents] believed Skywaves was strategically positioned for success; that [Respondents] wanted to take Skywaves to a sale or stock IPO; and that BB&T would fund all the company's financial needs.

Following this presentation, Skywaves decided to obtain the needed funding from BB&T. Skywaves therefore entered into a new and expanded factoring agreement, which provided for, among other things, financing based on accounts receivable, invoices, purchase orders, contracts, and site plans. The parties intended the new factoring agreement to obligate BB&T to advance the costs of Skywaves's expanded manufacturing.

Several months later, in July 2007, Edahl made a presentation to Appellants, each of whom was a director, officer, or shareholder in Skywaves, in addition to a current or potential investor in Skywaves. During the presentation, Edahl told Appellants that BB&T believed that Skywaves would continue to develop and expand into new markets, that BB&T "was fully committed to providing all of Skywaves['s] short-term and long-term financial needs for growth," and that BB&T would honor the new factoring agreement between itself and Skywaves. Appellants alleged that they each relied on these statements and were induced to "invest[] in the growth" of Skywaves via purchasing equity positions and making loans to Skywaves.

BB&T funded Skywaves in accordance with the new factoring agreement from March 2007 until January 2008. In January 2008, BB&T asserted that Skywaves had defaulted under the terms of the factoring agreement, and BB&T refused to honor any further financial commitments in accordance with the contract. In the absence of funding, Skywaves filed for bankruptcy.

As a result of the bankruptcy proceedings, Appellants lost their equity investments in Skywaves. Skywaves and Appellants therefore filed separate lawsuits against Respondents—Skywaves on its own behalf, and Appellants in their capacity as investors and employees of Skywaves.[2] Appellants asserted claims for negligent misrepresentation, fraudulent inducement, negligence, and violations of the South Carolina Unfair Trade Practices Act (the SCUTPA).[3]

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[2] The action initiated by Skywaves to allocate fault for BB&T's alleged breach of the new factoring agreement is not a part of this appeal.

[3] Appellants did not appeal the trial court's dismissal of the SCUTPA claims. Therefore, the trial court's findings regarding the SCUTPA claims are the law of

Arguing that their claims were entirely separate from the claims Skywaves asserted against BB&T, Appellants asserted that the alleged misrepresentations made by Edahl during the July 2007 presentation were torts committed against them directly and that they did not file their actions to enforce the new factoring agreement between Skywaves and BB&T. Appellants requested Respondents pay actual damages in the amount of Appellants' lost investments.[4]

Respondents filed motions to dismiss in each action. Appellants opposed the motions to dismiss and attached copies of the factoring agreement and correspondence between BB&T and Skywaves in support of their motions.

The trial court granted the motions to dismiss, finding all of Appellants' claims were barred for various reasons.[5] Appellants appealed all four cases and moved to consolidate the matters, claiming that they had stated cognizable claims for negligence, negligent misrepresentation, and fraudulent inducement based on the statements made by Edahl at the July 2007 presentation. This Court certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR.

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the case, and we will not further address those claims. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (explaining that an unappealed ruling becomes the law of the case, precluding consideration of the issue on appeal).

[4] Additionally, Appellants Voytko (Skywaves's CFO) and Konersmann (Skywaves's CEO) claimed Respondents were responsible for $37,048.13 and $870,000.00, respectively, in lost salary and unreimbursed expenses.

[5] In dismissing Appellants' claims, the trial court relied in part on section 37-10-107 (the lender statute of frauds). However, section 37-10-107 only applies to suits between lenders and borrowers, such as that between Skywaves and BB&T, an it therefore is irrelevant here. *See* S.C. Code Ann. § 37-10-107 (2002 & Supp. 2010); John L. Culhane, Jr., & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779, 1780, 1792 (1990) (discussing the purpose of the Model Lender Liability Statute, of which South Carolina's lender statute of frauds is a word-for-word reproduction); *cf. Sea Cove Dev., L.L.C. v. Harbourside Cmty. Bank*, 387 S.C. 95, 98, 691 S.E.2d 158, 159 (2010) (stating that the lender statute of frauds "prohibits certain legal and equitable actions arising out of the loan of money where there is no writing evidencing *the parties'* alleged agreement" (emphasis added)).

Despite Appellants' attempt to frame their claims as alleged misrepresentations made to them in their capacity as investors, the trial court aptly noted that, at its core, this case revolves around the contractual relationship between BB&T and its customer, Skywaves. That relationship is the subject of the suit between Skywaves and BB&T, which is not before us. Rather, our inquiry here is confined to whether these plaintiffs—as investors, directors, officers, and shareholders of Skywaves—may maintain a lawsuit separate from the one brought by the company itself, for what amounts to breach of the contract between Skywaves and BB&T. We find there is no basis in the law for a finding that BB&T owed any duty to Appellants, as non-customer investors, sufficient to support their claims for negligence, negligent misrepresentation, or fraudulent inducement.[6]

It is well-established that banks owe a limited duty of care to their *customers*. *See, e.g.*, *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (finding that a bank-customer relationship is merely a lender-borrower relationship and is not fiduciary in nature unless the bank undertakes to advise its customers as part of the services that the bank offers); *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (explaining that, if the bank does create a fiduciary relationship with its customer, the bank must only "disclose material facts that may affect its customer's interests"). We find no reason to extend a bank's limited duty to non-customers under these facts, where the non-customers' claims are premised on disputed contractual obligations between a bank and its customer, but the non-customer is not an intended third-party beneficiary to that contract.[7] *Cf. Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) ("Where there is no confidential or fiduciary

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[6] *See Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (stating that duty is one element of a negligence claim); *cf. Turner*, 392 S.C. at 122–23, 708 S.E.2d at 769 (explaining that, to state a claim for negligent misrepresentation or fraudulent inducement, a party must establish, *inter alia*, that he had a right to rely on a statement made by the opposing party).

[7] Thus, despite Appellants' assertions to the contrary, the choice of law provision found in the factoring agreement and selecting North Carolina law is irrelevant as Appellants are neither parties nor intended third-party beneficiaries to the contract. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997).

relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely[, and the party has not stated a claim for negligent misrepresentation or fraudulent inducement]. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." (citing *Thomas v. Am. Workmen*, 197 S.C. 178, 182–83, 14 S.E.2d 886, 887–88 (1941))).[8]

Thus, we conclude that while Skywaves may be able to show that, as a BB&T customer, the bank owed the corporation a duty, Appellants are not BB&T's customers and therefore are not owed a similar duty. Accordingly, we affirm the trial court's ruling that Respondents were entitled to judgment as a matter of law as to all of Appellants' claims.

PLEICONES, HEARN, JJ., and Acting Justice James E. Moore, concur. BEATTY, J., not participating.

[8] Appellants are sophisticated investors who, between the six of them, invested almost $1.5 million in Skywaves over a protracted period of time. *Cf. Poco-Grande Invs. v. C & S Family Credit, Inc.*, 301 S.C. 323, 325, 391 S.E.2d 735, 736 (Ct. App. 1990) (finding that a real estate business and a lawyer were "sophisticated and mature businessmen" who consequently had no right to rely on the alleged misrepresentations).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sarah Dawkins, Appellant,

v.

Union Hospital District (a.k.a. Wallace Thomson Hospital), Respondent.

Appellate Case No. 2012-211938

Appeal From Union County
John C. Hayes III, Circuit Court Judge

Opinion No. 27380
Heard January 22, 2014 – Filed April 9, 2014

REVERSED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, and Donald Gist, of Gist Law Firm, P.A., both of Columbia, for Appellant.

William U. Gunn and Joshua Tate Thompson, both of Holcombe Bomar, P.A., of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: Sarah Dawkins (Appellant) appeals the trial court's decision granting Union Hospital District d/b/a Wallace Thomson Hospital's (the Hospital) motion to dismiss with prejudice and finding that Appellant was required

to comply with the statutory requirements for filing a medical malpractice claim, specifically the Notice of Intent (NOI) and expert affidavit requirements. We reverse.

FACTS/PROCEDURAL BACKGROUND

On February 22, 2009, Appellant began experiencing headaches and became unable to maintain her balance. Appellant's daughter believed Appellant was having a stroke and called an ambulance, which drove Appellant to the Hospital. Appellant's daughter informed the Hospital staff of Appellant's symptoms, including the instability and possible symptoms of a stroke. The Hospital admitted Appellant to the emergency room, but left her unattended and unmonitored. Further, the Hospital prevented Appellant's family members from accompanying her into the emergency room area. At some point after being admitted but prior to receiving treatment, Appellant attempted to use the restroom and fell, fracturing her right foot.

Appellant filed a complaint against the Hospital on February 18, 2011, and an amended complaint on May 9, 2011, alleging in both that she would not have suffered her injuries "had the [Hospital's] staff performed their duties in compliance with the Hospital Policies." She specifically claimed that the Hospital was negligent in "failing to keep a watchful eye on a person who had originally complained of dizziness, headaches and instability, which were the precursors of her admittance" and in "failing to take any precautionary actions, by any means, to insure [Appellant's] safety."

The Hospital moved to dismiss Appellant's complaint under Rule 12(b)(6), SCRCP. In support of its motion, the Hospital asserted that Appellant's claim alleged "medical malpractice," as defined by S.C. Code Ann. § 15-79-110(6) (Supp. 2012); further, it argued that "[p]atient assessments, fall risk precautions based on those assessments, and ensuring patient safety based on knowledge of medications and their side effects are all aspects of skilled and technical medical treatment rising above the knowledge of laypersons." Accordingly, because the Hospital viewed Appellant's claim as one sounding in medical malpractice, it

argued that Appellant was required to comply with the NOI and expert affidavit requirements found in section 15-79-125.[1] *See* S.C. Code Ann. § 15-79-125(A) (Supp. 2012).

The trial court granted the Hospital's motion to dismiss, holding that Appellant's claim fell within the broad definition of "medical malpractice" found in section 15-79-110(6) and that:

> Any obligation or duty owed to [Appellant] as a result of [Appellant's] initial medical complaints and the disclosure of her current medications to the intake nurses could arise only from a professional medical analysis or diagnosis. It is axiomatic that any such medical analysis or diagnosis would constitute the practice of medicine.

The trial court therefore found that Appellant's claim triggered the NOI and expert affidavit requirements found in section 15-79-125. Because Appellant did not comply with those requirements, the trial court dismissed her action.

Appellant moved for reconsideration, claiming that, *inter alia*, her claim was a negligence claim based on premises liability, and that she was a business invitee to the Hospital. However, the trial court denied Appellant's motion, stating:

> The premise of [Appellant's] allegations is based on an event that happened in a medical facility due to a medical condition. Any duty in this case arose from the fact that [Appellant] was seeking medical treatment at a medical facility. Had the events alleged to have occurred at the hospital taken place at a restaurant, grocery store, or any other place of business, none would be liable based on the allegations in the amended complaint. Therefore, this is not a premises liability case, as there is no allegation that any dangerous conditions at the hospital caused [Appellant] to fall.

Appellant appealed, and this Court certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR.

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[1] Appellant does not dispute that she failed to comply with the requirements of section 15-79-125; rather, she contends that her claim does not involve "medical malpractice," and, as such, the requirements in section 15-79-125 do not apply to her claim.

ISSUE

Whether Appellant's cause of action sounds in medical malpractice or ordinary negligence?

STANDARD OF REVIEW

On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003). The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau*, 355 S.C. at 202, 584 S.E.2d at 416.

ANALYSIS

We begin our analysis by acknowledging that "[b]ecause medical malpractice is a category of negligence, the distinction between medical malpractice and negligence claims is subtle; there is no rigid analytical line separating the two causes of action." *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011). Rather, differentiating between the two types of claims "depends heavily on the facts of each individual case." *Id.* at 556.

In medical malpractice actions, expert testimony is required to establish both the duty owed to the patient and the breach of that duty, unless the subject matter of the claim falls within a layman's common knowledge or experience. *Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008) (citing *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006)); *Bonaparte v. Floyd*, 291 S.C. 427, 434, 354 S.E.2d 40, 45 (Ct. App. 1987). Because medical knowledge is generally outside of a juror's common knowledge, the requisite expert testimony assists the jury in making a more accurate determination of fault regarding whether a physician's negligence in rendering medical care proximately caused the patient's injury.

However, not every injury sustained by a patient in a hospital results from medical malpractice or requires expert testimony to establish the claim. *Accord Blom v. Adventist Health Sys./Sunbelt, Inc.*, 911 So. 2d 211, 214 (Fla. Dist. Ct. App. 2005); *Kolanowski v. Ill. Valley Cmty. Hosp.*, 544 N.E.2d 821, 823 (Ill. App. Ct. 1989). For example, claims against a hospital for injuries caused by falling ceiling tiles or improperly maintained hallways or parking lots sound in ordinary negligence, and specifically in premises liability. *See, e.g.*, *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977); *see also, e.g.*, *Feifer v. Galen of Fla., Inc.*, 685 So. 2d 882 (Fla. Dist. Ct. App. 1996). The plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge.

Thus, many states' courts distinguish between medical malpractice and ordinary negligence actions by determining whether expert testimony is necessary to aid the jury's determination of fault, particularly with respect to the "duty" and "causation" elements of the claim. In general, if the patient receives allegedly negligent professional medical care, then expert testimony as to the standard of that type of care is necessary, and the action sounds in medical malpractice. *Kujawski v. Arbor View Health Care Ctr.*, 407 N.W.2d 249, 252 (Wis. 1987) (quoting *Cramer v. Theda Clark Mem'l Hosp.*, 172 N.W.2d 427, 428 (Wis. 1969)). However, if the patient instead receives "nonmedical, administrative, ministerial, or routine care," expert testimony establishing the standard of care is not required, and the action instead sounds in ordinary negligence. *Id.*; *accord Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101 (Iowa 1971); *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004); *Estate of French*, 333 S.W.3d at 556 n.9, 557 n.10, 559–60 (collecting cases).

Thus, we emphasize that not every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and, consequently, the requirements of section 15-79-125. While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony. However, at all times, the medical professional must "exercise ordinary and reasonable care to insure that no unnecessary harm [befalls] the patient." *Papa v. Brunswick Gen. Hosp.*, 517 N.Y.S.2d 762, 763–64 (App. Div. 1987). The statutory definition of medical malpractice found in section 15-79-110(6) does not

impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence.[2]

Here, we find that Appellant's claim sounds in ordinary negligence and is not subject to the statutory requirements associated with a medical malpractice claim. Appellant's complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the Hospital's employees negligently administered medical care. Rather, the complaint states that Appellant's injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care. *Cf. Kastler*, 193 N.W.2d at 101–02 (finding that claims brought by an epileptic patient who fell in the shower while unattended during a hospital stay involved routine care, not medical care, and thus sounded in ordinary negligence); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141 (Iowa Ct. App. 1993) (finding claims brought by patient who had just undergone knee surgery and who fell while unattended in the restroom sounded in ordinary negligence because they involved routine, nonmedical care).[3] Accordingly, the

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[2] *See, e.g., Lakeland Reg'l Med. Ctr., Inc. v. Allen*, 944 So. 2d 541 (Fla. Dist. Ct. App. 2006) (finding that a patient's claim against a hospital sounded in ordinary negligence when the hospital served the patient a turkey sandwich infected with salmonella); *Estate of Swift v. Ne. Hosp. of Phila.*, 690 A.2d 719 (Pa. Super. Ct. 1997) (finding that a patient's slip-and-fall claim against a hospital sounded in ordinary negligence when the patient slipped in a puddle of water in the hospital restroom); *cf. Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984) (involving a premises liability case brought by an ophthalmologist's patient who was given eye drops and left unsupervised in the waiting room, where she subsequently attempted to stand and instead fell and injured herself).

[3] Likewise, once the Hospital admitted Appellant, it was on notice that she was in a vulnerable physical state and undertook a duty to reasonably care for her. *Cf. Kelly v. Bridgeport Health Care Ctr., Inc.*, No. FBTCV106007389S, 2010 WL 3788059, at *1, 5 (Conn. Super. Ct. Sept. 2, 2010) (finding that a claim involved ordinary negligence when a dementia patient with a history of attempting to leave a nursing home facility sued the nursing home for failing to adequately supervise him after he left the facility and fell down the front steps in his wheelchair). Moreover, it prevented her family members from accompanying her to the emergency room area, thus likewise preventing them from assisting her. *Cf. Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (finding a plaintiff stated a claim for negligence where "police officers took control of the situation and

circuit court improperly classified Appellant's claim as one sounding in medical malpractice, and its dismissal of her action for failing to comply with the medical malpractice pre-filing requirements found in section 15-79-125 was in error.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is reversed and remanded for further action consistent with this opinion.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

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preempted individuals already attempting to aid the [] obviously injured and intoxicated decedent" because the officers undertook a duty to act and use due care).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joshua Bell, Petitioner,

v.

Progressive Direct Insurance Company, Respondent.

Appellate Case No. 2011-195286

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27381
Heard February 20, 2013 – Filed April 9, 2014

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, for Petitioner.

John Robert Murphy and Ashley Berry Stratton, both of Murphy & Grantland, PA, of Columbia, for Respondent.

C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Amicus Curiae Property & Casualty Insurers Association of America.

William F. Merlin, Jr., of Merlin Law Group, PA, of Tampa, Florida, and J. Jackson Thomas, of Thomas &

Brittain, PA, of Myrtle Beach, both for Amicus Curiae United Policy Holders.

Susan F. Campbell, of McGowan, Hood & Felder, LLC, of Columbia, for Amicus Curiae South Carolina Association for Justice.

A. Johnston Cox, Jennifer E. Johnsen, Jennifer D. Eubanks, all of Gallivan, White & Boyd, PA, of Greenville, for Amicus Curiae Allstate Property and Casualty Insurance Company.

CHIEF JUSTICE TOAL: The Court granted Joshua Bell's (Petitioner) petition for a writ of certiorari to review the court of appeals' decision affirming the circuit court's grant of summary judgment in favor of Progressive Direct Insurance Company (Progressive). We affirm.

FACTS/PROCEDURAL BACKGROUND

Petitioner was injured in a car accident on March 31, 2006, while riding as a passenger in a vehicle driven by a co-employee. The liability limits of the at-fault driver were tendered, and there was no underinsured motorist (UIM) coverage on the vehicle in which he was riding. Therefore, Petitioner submitted a claim for UIM benefits under a Progressive insurance policy, issued to Sarah K. Severn, effective from November 4, 2005, until May 4, 2006 (the Policy). At the time of the accident, Petitioner resided with Severn and their child. He described Severn as "his on again off again fiancé."

Both Petitioner's and Severn's names appear on the Declarations Page of the Policy under the heading "Drivers and household residents." (Emphasis removed). Under the heading "Additional information," Severn is listed as the "Named insured."

The Policy generally defines "You" and "Your" to mean:

> a. a person or persons shown as a named insured on the Declarations Page; and

b. the spouse of a named insured if residing in the same household.

(Emphasis removed). A "Relative" is defined as "a person residing in the same household as you, and related to you by blood, marriage, or adoption . . . ." (Emphasis removed).

Under Part I, entitled "Liability to Others," the Policy sets forth the following Insuring Agreement:

> Subject to the Limit of Liability, if you pay the premium for liability coverage, we will pay damages for bodily injury and property damage for which an insured person becomes legally responsible because of an accident arising out of the:
>
> 1. ownership, maintenance, or use of a vehicle . . . .

(Emphasis removed). Part I defines an "insured person" or "insured persons" as, *inter alia*, "you or a relative with respect to an accident arising out of the ownership, maintenance, or use of a covered vehicle" and "any person with respect to an accident arising out of that person's use of a covered vehicle with the express or implied permission of you or a relative." (Emphasis removed).

Part III of the Policy, which outlines the availability of UIM coverage, states the following:

> Subject to the Limits of Liability, if you pay the premium for [UIM] Coverage, we will pay for damages which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured person or due to property damage:
>
> 1. caused by an accident; and
>
> 2. arising out of the ownership, maintenance, or use of an underinsured motor vehicle.

(Emphasis removed). Part III of the Policy further states that "Insured person" and "insured persons" mean, *inter alia*, "you or a relative." (Emphasis removed).

Progressive denied UIM coverage to Petitioner under Part III of the Policy. According to the affidavit filed by Progressive's Claims Injury Operations Manager, "[t]he claim was denied because [Petitioner] did not fall within the terms, provisions and conditions of [the Policy] to qualify for benefits under the [UIM] provisions," as Petitioner "was only listed as a 'driver' on the policy and not a named insured, nor was he a resident relative of the named insured."

On September 24, 2007, Petitioner sought a declaratory judgment that he was entitled to UIM coverage under the Policy and filed complaint averring causes of action for bad faith and failure to pay benefits. Progressive answered and subsequently filed a motion for summary judgment.

The circuit court held a hearing on the summary judgment motion on October 13, 2008. Petitioner argued that he was listed as a driver and household resident on the Declarations Page of the Policy, and Progressive was aware that he and Severn resided together when he signed up for coverage. Petitioner presented the following questions to the circuit court: (1) whether a "household resident" is also a "named insured" under the Policy language; (2) whether the Policy was ambiguous; and (3) whether Petitioner was a "relative" of Severn for purposes of coverage. Finally, Petitioner also argued he was entitled to coverage under the Policy by virtue of the doctrine of reasonable expectations. Progressive argued that because Petitioner was neither the named insured nor related to the named insured by blood or marriage, he could not recover UIM benefits under the Policy. Moreover, Progressive argued that Petitioner was not Severn's common-law husband.

During the hearing, Progressive submitted a deposition transcript to support its motion for summary judgment. In the transcript, Petitioner stated he and Severn were engaged but "hadn't set a date yet." He explained he proposed to Severn when she was pregnant with their son. To the question of whether they had taken any steps to be married, Petitioner responded, "Verbal agreement and a ring . . . . She's a procrastinator and she didn't—I mean, I didn't think—I mean, the girl supposed [sic] to marry me, she's supposed to be on that, I thought, and so she didn't want to do it so it just progressively got longer." Petitioner stated that they

discussed marriage often but Severn never went through with it. In April 2008, well after the accident, Petitioner stated he and Severn ended their engagement, and Petitioner stated he had no intention of entering a relationship with Severn again.[1]

Petitioner stated he paid all of the bills for water, sewer, rent, electricity, clothing, food, and the Internet. At some point while they resided together, Petitioner relinquished his car insurance through Nationwide and became an additional driver on the Policy:

> Well, we was [sic] saving money and stuff so I took—that was insured through Nationwide and I took the insurance off of it so we wouldn't have two insurance bills, so [Severn] made me an additional driver on [the Policy] and I drove her car and we just shared that car. She'd drive me to work and I'd drive her to work and . . . I'd use [the car] on the weekend and I drove it all over.

Petitioner stated further that he "called [Progressive] on the phone" because he "had all [Severn's] personal information, my soon-to-be wife," and he "wasn't driving around Myrtle Beach with [his] name not being on her insurance" because he feared he would be arrested for driving without insurance. Petitioner stated,

> I called, gave [Progressive's employee] all my information. They put me down as an additional driver and they told me the premium, how much difference the bill was going to be each month, and then I had to pay more money at the first.

Petitioner paid all the premiums once he became an additional driver on the Policy. To the question, "Did you have any understanding of what that meant, to be an additional driver on the policy?," Petitioner responded, "No. I need a cigarette. I'm getting irritated." The deposition concluded at that point.

On January 14, 2009, the circuit court entered an order granting Progressive's motion for summary judgment, finding Petitioner was not entitled to UIM coverage under the Policy. First, the court found that Petitioner and Severn were not engaged in a common-law marriage based on Petitioner's deposition

[1] At the time they ended their engagement, Severn resided in Maryland.

testimony that he and Severn were engaged at various times, ended their engagement each time, never decided on a date to be married, were no longer engaged, and Severn resided in Maryland, a state that does not recognize common-law marriage. Second, the circuit court rejected Petitioner's argument that he was a "named insured" under the Policy based on the doctrine of reasonable expectations. Finally, relying on *Ex Parte United Services Automobile Association*, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005) [hereinafter *Ex Parte USAA*], the circuit court found that because Petitioner was listed as a "driver" on the declarations page of the Policy but not as a "named insured," and the Policy was clear regarding coverage, Petitioner was not entitled to UIM coverage under the Policy based on any ambiguity in the policy language.

The court of appeals affirmed in an unpublished opinion. *See Bell v. Progressive Direct Ins. Co.*, Op. No. 2011-UP-242 (S.C. Ct. App. filed June 23, 2011). The court of appeals held that Petitioner was not an "insured" under the Policy because the Policy explicitly provides for UIM for an "insured person," which it defines as "you or a relative," and Petitioner did not fall within either definition. *Id.* With respect to Petitioner's argument that the Policy was ambiguous, the court of appeals held that the mere fact that the Policy did not define "household resident" did not in itself render the Policy ambiguous. *Id.* (citing *Ex parte USAA*, 365 S.C. at 55, 614 S.E.2d at 654). The court of appeals found that Petitioner and Severn were not engaged in a common-law marriage, as the evidence merely indicated that they were "engaged to be married at some undetermined point in the future" and clearly "did not have a present intent to be married but instead a future intent to be married." *Id.* Finally, the court of appeals refused to adopt the doctrine of reasonable expectations, citing *Allstate Insurance Co. v. Mangum*, 299 S.C. 226, 231, 383 S.E.2d 464, 466–67 (Ct. App. 1989).[2]

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[2] The court of appeals acknowledged that *Mangum* discussed the doctrine of reasonable expectations in *dicta*, but found that the doctrine was not recognized under South Carolina law:

> Admittedly, the court's statement in *Mangum* is not the law of the case; however, the supreme court has consistently held that unambiguous insurance policies are subject to the general rules of contract construction.

Bell, Op. No. 2011-UP-242 (S.C. Ct. App. filed June 23, 2011) (citations omitted).

However, assuming the doctrine applied, the court of appeals stated that

> because the doctrine cannot be reconciled with the rule that unambiguous insurance policies are subject to the traditional rules of contract construction, this court is precluded from adopting the doctrine,

as "[s]uch a departure from jurisprudence must be left to our supreme court." *Id.*

Petitioner filed a petition for a writ of certiorari to review the court of appeals' decision, and this Court granted certiorari.[3]

ISSUES

I. Whether the court of appeals erred in upholding the circuit court's finding that the Policy is not ambiguous?

II. Whether the court of appeals erred in refusing to adopt the doctrine of reasonable expectations and in finding that the doctrine of reasonable expectations was inapplicable to the facts of this case?

III. Whether the court of appeals erred in finding that there was no genuine issue of material fact with respect to whether Petitioner was engaged in a common-law marriage?

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary

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[3] The Court accepted *amici curiae* briefs from United Policyholders and the South Carolina Association of Justice (SCAJ) in support of Petitioner, and Property & Casualty Insurers Association of America (Property & Casualty Association) and Allstate Property and Casualty Insurance Company (Allstate) in support of Progressive. *See* Rule 213, SCACR.

judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." (citation omitted)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citations omitted). As in the trial court, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.* (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Nevertheless, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (citation omitted).

In this case, both parties stipulated in the circuit court that the matters under consideration were matters of law for the court. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011) (citation omitted). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* at 46–47, 717 S.E.2d at 592 (citation omitted). However, an appellate court may make its own determinations concerning questions of law and need not defer to the trial court's rulings. *Id.* at 47, 717 S.E.2d at 592.

ANALYSIS

I. Contract Ambiguity

Petitioner argues that he is entitled to coverage under the Policy because its terms are ambiguous, and as such, must be construed in his favor. *See*, *e.g.*,

Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) ("Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer."). Respondent contends that the court of appeals' case, *Ex parte USAA*, 365 S.C. at 50, 614 S.E.2d at 652, is directly applicable to these facts, and forecloses a finding of ambiguity here. We agree.

In that case, the appellant argued that she should be permitted to stack coverage under the policy at issue because she was listed as an "operator" on the declarations page of the policy.[4] *Id.* at 53, 614 S.E.2d at 653. More specifically, the appellant argued that the term "operator" created an ambiguity as to whether she was a named insured under the policy, and therefore, the ambiguous terms should be resolved in favor of coverage. *Id.* at 54, 614 S.E.2d at 654. Noting that "[t]he majority view is that listing a driver on the declarations page of an insurance policy does not make that person a named insured," the court of appeals found the insured was not entitled to stack under the policy terms. *Id.* at 55, 614 S.E.2d at 654; *see also, e.g.*, *Nationwide Mut. Ins. Co. v. Williams*, 472 S.E.2d 220, 222 (N.C. Ct. App. 1996) (finding "driver" and "named insured" were not synonymous because to hold otherwise would extend "named insured" beyond its common sense meaning).[5]

Moreover, the court of appeals held that the policy's failure to define the term "operator" in the policy did not cause ambiguity in the policy because "operator" could be defined "according to the usual understanding of the term's significance to the ordinary person." *Ex parte USAA*, 365 S.C. at 55, 614 S.E.2d at 654 (quoting *Mfrs. & Merchs. Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 158, 498 S.E.2d 222, 225 (Ct. App. 1998)). Therefore, because the appellant was listed as

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[4] The named insured under the policy "treated [the appellant] as if she were her daughter and served as her guardian, though it [was] unclear whether a legal adoption ever took place," but it was undisputed that at the time of the accident, the appellant no longer resided with the named insured. *Ex parte USAA*, 365 S.C. at 52, 54, 614 S.E.2d at 652, 653–54.

[5] The court noted that some jurisdictions have found coverage in this situation under the doctrine of reasonable expectations. *Ex parte USAA*, 365 S.C. at 54, 614 S.E.2d at 654.

an "operator" and not the "named insured" in the policy, the court of appeals denied coverage. *Id.* at 56, 498 S.E.2d at 655.

Using the same reasoning, we find the Policy's terms were not ambiguous. Despite being listed as a "driver" or "household resident," there is no doubt that Petitioner was not a "named insured" as defined in the Policy. Because UIM coverage was only available to either "a person or persons shown as a named insured on the Declarations Page" and "the spouse of a named insured if residing in the same household," we find that the Policy unambiguously forecloses UIM coverage to Petitioner.

II. Doctrine of Reasonable Expectations

In the alterative, Petitioner argues that the Court should extend coverage to Petitioner under the doctrine of reasonable expectations.[6] More specifically, Petitioner argues that his status as a "household resident," which the Policy does not define, is an ambiguous provision which renders the doctrine of reasonable expectations operable based on his reasonable expectations that he had UIM coverage at the time of the accident. Petitioner and supporting *amici* argue that the doctrine embodies established legal principles, developed out of modern contract theory, and is rooted in common law principles. Progressive contends that South Carolina courts do not recognize the doctrine of reasonable expectations, and this Court should not adopt the doctrine because it cannot be reconciled with the general rules of contract construction.

We agree with Petitioner and supporting *amici* that the doctrine of reasonable expectations, in its traditional formulation, identifies a "broader principle underlying the 'cogeries of doctrines' comprising the rules of insurance policy interpretation." (quoting Robert E. Keeton, *Insurance Law: Basic Text* 351 (1971); Robert E. Keeton, *Reasonable Expectations in the Second Decade*, 12 Forum 275

[6] Under the doctrine of reasonable expectations, "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part One*, 83 Harv. L. Rev. 961, 967 (1970).

(1976)).[7] However, we decline to apply the doctrine where a contract of insurance unambiguously denies coverage under its plain terms.

South Carolina courts have a long history of formalistic interpretation with respect to all contracts and have repeatedly held that the "[i]nsurance policies are

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[7] Most commentators and courts discussing the doctrine agree that the doctrine of reasonable expectations is not at odds with traditional notions of contract interpretation, but a mere extension of these principles and is rooted in several well-established principles of common law:

> When the insured's expectation is created by some kind of ambiguity or vagueness in the policy language, syntax, or organization, something like the *doctrine of contra proferentem* . . . is operating. When the insured's expectation comes from some assertion by an agent of the insurer or through the insurer's advertising, something like the *doctrine of misrepresentation or deceit* is operating. When the insured's expectation is grounded in an assumption that coverage for the loss in question would exist given the amount of premium charged, something like the *doctrine of unconscionability* is operating. When the insured's expectation is part and parcel of the insured's sudden surprise and dismay at the absence of coverage, something like the *doctrine of mistake* is operating. When the insured's expectation comes from the insurer's invitation to the insured to place trust in the insurer that the insured's coverage needs will be satisfactorily met, something like an *estoppel or reliance theory* is operating.

Robert H. Jerry, II, *Understanding Insurance Law* 144–45 (2d ed. 1996) (emphasis added) (footnotes omitted); *see also* Arthur L. Corbin, *Corbin on Contracts* 2 (Joseph M. Perillo ed., rev. ed. 1993) ("[T]he law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."); John E. Murray, Jr., *Murray on Contracts* 671 (3d ed. 1990) ("The purpose of contract law is often stated as the fulfillment of those expectations which have been induced by the making of a promise."); Duncan Kennedy, *Form & Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1715 (1976) ("The rationale for contract is derivative from that of property. The law creates a property in expectations.").

subject to general rules of contract construction," and therefore, we "must enforce, not write contracts of insurance and . . . must give policy language its plain, ordinary and popular meaning" and "should not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 70, 310 S.E.2d 814, 816 (1983) (citations omitted); *see also USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008). Thus, "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

Our jurisprudence does not support the creation of a substantive right in reasonable expectations. However, the reasonable expectations of parties entering an insurance contract will be honored within the confines of our interpretive rules and fairness principles. *See, e.g., S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) ("Although [the insurer] contends this dispute can be resolved by a literal interpretation of the plain language of 'physical contact,' we disagree, as the Supreme Court of Rhode Island recently observed the literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory.'" (quoting *Empire Fire & Marine Ins. Cos. v. Citizens Ins. Co.*, 43 A.3d 56, 60 (R.I. 2012))). To this end, we find the Delaware Supreme Court's reasoning instructive:

> [A] fundamental premise of the doctrine is that the policy will be read in accordance with the reasonable expectations of the insured "so far as its language will permit." Thus, the rule, as recognized by this Court, is consistent with the general rules of construction, to which we have referred, that is, the Court will look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print. *But the doctrine is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of policy language.*

Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982) (emphasis added) (citation omitted); *see also Clark-Peterson Co., Inc. v. Indep.*

Ins. Assocs., Ltd., 492 N.W.2d 675, 677 (Iowa 1992) ("But the doctrine does not contemplate the expansion of insurance coverage on a general equitable basis. The doctrine is carefully circumscribed; it can only be invoked where an exclusion '(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction.'" (quoting *Aid (Mut.) Ins. v. Steffen,* 423 N.W.2d 189, 192 (Iowa 1988); *Farm Bureau Mut. Ins. Co. v. Sandbulte,* 302 N.W.2d 104, 112 (Iowa 1981))). This approach is supported by South Carolina law.

Thus, while we now hold that reasonable expectations may be used as another interpretive tool, the doctrine cannot be used to alter the plain terms of an insurance policy.[8]

III. Common-Law Marriage

Finally, Petitioner avers that he is a "relative" of Severn for purposes of UIM coverage under the Policy because they were engaged in a common-law marriage.

The existence of a common-law marriage is a question of law. *Campbell v. Christian*, 235 S.C. 102, 104, 110 S.E.2d 1, 2 (1959). The trial court's findings of fact with respect to this question will be upheld if they are supported by any evidence in the record. *Callen v. Callen*, 365 S.C. 618, 623, 620 S.E.2d 59, 62 (2005). The party asserting the marriage bears the burden of proving the common-law marriage by a preponderance of the evidence. *Ex parte Blizzard*, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937).

"A common-law marriage is formed when two parties contract to be married." *Callen*, 365 S.C. at 624, 620 S.E.2d at 62 (citing *Johnson v. Johnson*,

[8] Regardless, the Record is unclear regarding what expectations Petitioner held with respect to coverage under the Policy. Petitioner testified he added himself to the insurance policy to avoid being arrested for driving without insurance. He also testified he did not have an understanding of what it meant to be listed as a "household resident" under the policy, and did not state he reasonably expected to be covered as a named insured for UIM purposes. Thus, it is unclear how the doctrine would apply under these facts.

235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960)). However, "[n]o express contract is necessary;" instead, "the agreement may be inferred from the circumstances." *Id.* (citations omitted). Therefore,

> [t]he fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent. Consideration is the participation in the marriage. If these factual elements are present, then the court should find as a matter of law that a common-law marriage exists.

Id. Moreover, "when the proponent proves that the parties participated in 'apparently matrimonial' cohabitation, and that while cohabitating the parties had a reputation in the community as being married, a rebuttable presumption arises that a common-law marriage was created." *Id.* (citing *Jeanes v. Jeanes,* 255 S.C. 161, 166–67, 177 S.E.2d 537, 539–40 (1970)). A party may overcome the presumption by presenting "'strong, cogent'" evidence that the parties in fact never agreed to marry." *Id.* (quoting *Jeanes,* 255 S.C. at 167, 177 S.E.2d at 540).[9]

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[9] We note that it was the exclusive province of the family court to determine the existence of a common-law marriage in this case. *See Thomas v. McGriff*, 368 S.C. 485, 488, 629 S.E.2d 359, 360 (2006) ("[J]urisdiction to determine the existence of a common-law marriage depends upon the ultimate issue before the court. If the ultimate issue is heirship, which is within the probate court's exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a common-law marriage. If the existence of a common-law marriage is itself the ultimate issue, then the family court has exclusive jurisdiction."); *see also* S.C. Code Ann. § 63-5-530(B) (2010) (providing that "[n]otwithstanding another provision of law, the family court and the probate court have concurrent jurisdiction to hear and determine matters relating to paternity, common-law marriage, and interpretation of marital agreements; except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust, and guardianship and conservatorship actions before the probate court"). Therefore, Petitioner should have sought a declaration of common-law marriage in the family court, and the trial court and court of appeals erred in addressing the issue. However, for purposes of judicial economy we address the merits of the issue here. *See, e.g., Treece v. State*, 365 S.C. 134, 136 n.1, 616 S.E.2d 424, 425 n.1 (2005) ("Although this issue should have been appealed to the Administrative Law Court as provided in *Al-Shabazz v. State,* 338

In our view, Petitioner's deposition testimony unequivocally confirms that Petitioner and Severn, while cohabitating and sharing domestic and financial responsibilities, were merely *engaged* to be married. Thus, the circuit court and court of appeals' finding that no common-law marriage existed between Petitioner and Severn is supported by the evidence.

Because we find no common-law marriage existed, Petitioner does not meet the definition of "relative" in the Policy, which is defined as "a person residing in the same household as you, and related to you by blood, marriage, or adoption." (Emphasis removed). Therefore, we affirm the court of appeals' finding as to this issue.

CONCLUSION

Based on the foregoing, the court of appeals' decision is

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

S.C. 354, 527 S.E.2d 742 (2000), we dispose of it for purposes of judicial economy."); *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n. 6 (2006) (holding that regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

The Supreme Court of South Carolina

In the Matter of Michael Frank Johnson, Respondent.

Appellate Case No. 2014-000679
Appellate Case No. 2014-000680

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) 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, Peyre T. Lumpkin, pursuant to Rule 31, RLDE. Respondent consents to being placed on interim suspension.

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin 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 account(s) 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. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, 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.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 1, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Cesar Portillo, Appellant.

Appellate Case No. 2011-196447

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5216
Heard February 3, 2014 – Filed April 9, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, and Assistant Attorney General Julie Kate Keeney, all of Columbia, for Respondent.

SHORT, J.: Cesar Portillo appeals his conviction and twenty-five year sentence for first-degree criminal sexual conduct with a minor (CSC), arguing the trial court erred in: (1) qualifying a witness as an expert in child sexual assault cases and child sexual assault forensic interviewing; (2) allowing the expert to exceed his scope of expertise and testify about the significance of language and hand gestures used by the victim (Victim); and (3) allowing the expert to testify Victim exhibited

symptoms of post-traumatic stress disorder (PTSD) where no diagnosis of PTSD was made. We affirm.

FACTS

In 2010, Portillo was indicted for one count of CSC with a minor. Victim testified she spent the night with her cousin (Cousin) on the night in question. Victim testified to the abuse, stating she awoke when she felt a slight touch on her hand. Portillo, her uncle, moved her hand to his private parts and moved her hand back and forth. Portillo pulled down her pajama pants and placed his hands on her private parts. He then licked her privates. Victim witnessed Portillo touching his own private parts and "something was coming out of him, going into Cousin's polka-dotted trash can." Portillo wiped himself with a towel and left the room. He returned to retrieve a towel from Cousin's closet and entered the bathroom. When Victim heard the shower turned on, she ran into Portillo's bedroom and told her aunt (Aunt), about the assault. Victim was nine years old at the time of the sexual assault.

During the trial, Aunt testified she was married to Portillo, and Victim was her niece. Victim was spending the night in question with the Portillos' daughter, Cousin. Portillo fell asleep in his work clothes in Portillo and Aunt's bedroom. Aunt testified she eventually fell asleep and was awakened by Victim at approximately 1:30 a.m. Aunt described Victim as confused and startled. Victim told Aunt about the assault. At the time, Portillo was in the shower. When Aunt confronted Portillo, his demeanor was upset, "very shaky[, . . .] kind of, like, trembling." Aunt took Victim and Cousin to Victim's grandmother's house.

Victim's mother (Mother), a registered nurse, testified she met Aunt and Victim at the grandmother's house, and Mother later called Dr. Linda DeMarco, MD. The following day, Dr. DeMarco examined Victim. At trial, the court qualified Dr. DeMarco as an expert in the fields of pediatrics and pediatrics in sexual assault cases. Dr. DeMarco found redness and irritation between the labial lips consistent with Victim's allegations of sexual assault.

Approximately one week after the incident, Victim met with Dr. Donald Elsey for a forensic interview. A videotape of the interview was viewed by the jury. When Dr. Elsey was asked at trial what certain language used by Victim signified, he responded, "she was just telling what she was seeing . . . . She just described something that she said she saw." Dr. Elsey opined Victim's language was age-appropriate. According to Dr. Elsey, Victim "did not appear to . . . [have] words

for what she was describing, other than just to describe what she was seeing." He further opined, "It appeared to me she, again, was just describing what she said she was seeing. She wasn't using language that it seemed somebody else had given to her. It was just what she said she experienced." When asked about the significance of hand gestures Victim used, Dr. Elsey responded, "I think she was just trying to help me understand what she was trying to tell me, because I don't think she fully understood . . . understood what she was describing."

At a second interview, conducted a week after the first interview, Victim's family expressed concern to Dr. Elsey regarding symptoms Victim was experiencing, such as the inability to sleep, nightmares, and the ability to focus on school work. Dr. Elsey testified Victim said there was a connection between the alleged molestation and the symptoms. He opined the symptoms could be indicative of post-traumatic stress disorder (PTSD), but due to the short period of time between the incident and his interviews with Victim, it would be inappropriate for him to diagnose her with PTSD. However, Dr. Elsey admitted the symptoms could be indicative of a traumatic experience. He testified he referred Victim to a therapist for "trauma-focused cognitive behavioral therapy." Dr. Elsey concluded his testimony by testifying a forensic interview is "a piece of the investigation," and he could not state what happened to Victim and had made no determination in regard to the information reported to him.

The trial court instructed the jury to give "no greater weight" to an expert witness's testimony "simply because the witness is an expert." The jury convicted Portillo. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001). "The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party." *State v. Jamison*, 372 S.C. 649, 652, 643 S.E.2d 700, 701 (Ct. App. 2007).

LAW/ANALYSIS

A. Dr. Elsey's Testimony[1]

Portillo argues the trial court erred in qualifying Dr. Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing, and the qualification was prejudicial because the testimony amounted to vouching for victim's credibility. Portillo also argues Dr. Elsey's testimony regarding the significance of victim's language and hand gestures exceeded the scope of his expertise and vouched for victim's credibility.[2] We find no reversible error.

In *State v. Kromah*, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013), our supreme court found the following:

> [W]e can envision no circumstance where [a forensic interviewer's] qualification as an expert would be appropriate. Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom. The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse. Part of the [forensic interviewer's methodology] . . . involves evaluating whether the victim understands the importance of telling the truth and whether the victim has told the truth, as well as the forensic interviewer's judgment in determining what actually transpired. For example, an interviewer's statement that there is a

[1] We combine Portillo's first and second arguments.

[2] Portillo also argues the trial court erred in failing to make the findings required by Rule 702, SCRE. However, Portillo raises this issue for the first time on appeal; thus, it is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

> "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and the interviewer's subjective belief as to the victim's believability. However, an interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.

The court in *Kromah* also stated, "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Id.* at 357, 737 S.E.2d at 499. The court continued,

> [E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded.

Id. at 358, 737 S.E.2d at 499.

The supreme court found the types of statements a forensic interviewer should avoid include the following:

> • that the child was told to be truthful;
> • a direct opinion as to a child's veracity or tendency to tell the truth;
> • any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
> • any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or

> • an opinion that the child's behavior indicated the child was telling the truth.

Id. at 360, 737 S.E.2d at 500. The court continued:

> A forensic interviewer, however, may properly testify regarding the following:
>
> • the time, date, and circumstances of the interview;
> • any personal observations regarding the child's behavior or demeanor; or
> • a statement as to events that occurred within the personal knowledge of the interviewer.
>
> These lists are not intended to be exclusive, since the testimony will of necessity vary in each trial, but this may serve as a general guideline for the use of this and other similar testimony by forensic interviewers.

Id. at 360, 737 S.E.2d at 500-01. Clearly, under *Kromah*, the trial court erred in qualifying Dr. Elsey as an expert in the field of forensic interviewing. However, we find the question of whether the testimony constituted vouching is not as clear.

In this case, Dr. Elsey's testimony may violate two of the types of questions now prohibited by *Kromah*. For instance, Dr. Elsey's testimony that victim was not coached is arguably a prohibited "statement that indirectly vouches for the child's believability." *See id.* at 360, 737 S.E.2d at 500 (prohibiting such testimony by a forensic interviewer). Furthermore, Dr. Elsey's testimony regarding hand gestures and PTSD symptoms may violate the prohibition on opining "that the child's behavior indicated the child was telling the truth." *See id.* (prohibiting a forensic interviewer from stated opinion testimony). However, Dr. Elsey's testimony, as found by the trial court, was overall not as egregious as the type of opinion testimony generally found to be inappropriate vouching. For instance, in *Kromah*, the forensic interviewer testified she made a compelling finding for child abuse and related that finding to law enforcement agencies. *Id.* at 351, 737 S.E.2d at 496. The supreme court found the forensic interviewer's "testimony about a 'compelling finding' to be inappropriate." *Id.* at 359, 737 S.E.2d at 500; *see State v. Jennings*, 394 S.C. 473, 479-80, 716 S.E.2d 91, 94 (2011) (finding improper vouching where the forensic interviewer's report concluded the three minor victims had provided compelling disclosures of abuse during their interviews); *Smith v. State*, 386 S.C.

562, 569, 689 S.E.2d 629, 633 (2010) (concluding the forensic interviewer improperly bolstered the child victim's credibility when testifying the victim reported the assault to the interviewer, and the interviewer found the victim's statement believable).

In comparison, the supreme court in *State v. Douglas*, 380 S.C. 499, 503-04, 671 S.E.2d 606, 609 (2009), reversed this court's finding that the jury could infer from the forensic interviewer's testimony that she thought the victim told her the truth about being sexually assaulted. In *Douglas*, the forensic interviewer testified concerning how she conducted her interviews by building a rapport with a child, reviewing the interview process, and discussing the difference between telling the truth and telling a lie. *Id.* The supreme court found the forensic interviewer never stated she believed the child victim, noting the interviewer did not even state the victim in that case agreed to tell her the truth, and the interviewer gave no indication concerning the victim's veracity and did not in any way opine that the interviewer believed the victim was telling the truth. *Id.*; *see State v. Hill*, 394 S.C. 280, 294-95, 715 S.E.2d 368, 376-77 (Ct. App. 2011) (finding no error in the forensic interviewer's testimony regarding the specific details he looked for to indicate whether or not a child victim had been coached).

Portillo acknowledges Dr. Elsey did "not specifically testify[] that he believed the child witness" and argues instead that by stating Victim used childlike language and gestures and exhibited symptoms of trauma, Dr. Elsey vouched for Victim's credibility. As was the case in *Douglas*, Dr. Elsey did not specifically state he believed Victim to be truthful. *See Douglas*, 380 S.C. at 503-04, 671 S.E.2d at 609 (finding the expert witness did not vouch for the victim's veracity where she described the methods used during her interview). In fact, he stated he could not testify as to what happened to Victim, and he made no determination in regard to the information reported to him. However, he testified Victim was not being coached, and the symptoms she described were consistent with PTSD. After consideration of the prohibition of qualifying forensic interviewers as expert witnesses in *Kromah*, we have already found the trial court erred in qualifying Dr. Elsey as an expert in forensic interviewing. After reviewing Dr. Elsey's testimony, we likewise find error in the admission of the statements that inappropriately vouched for Victim.

Nevertheless, like other trial errors, these errors are subject to a harmless error analysis. *See Kromah*, 401 S.C. at 361-62, 737 S.E.2d at 501 (subjecting the erroneous qualification of a forensic interviewer to a harmless error analysis); *see also State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (subjecting

improper vouching to a harmless error analysis). In conducting a harmless error analysis, the reviewing court looks to the basis on which the jury actually rested its verdict. *Lowry v. State*, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008). "[T]o conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" *Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)).

In this case, the evidence admitted included the videotape of Victim's interview, and the trial testimony of Victim, Aunt, Mother, Dr. DeMarco, and Dr. Elsey. In reviewing the record for harmless error, we first note there is physical evidence of sexual assault, despite Portillo's argument the physical evidence is slight compared to that in *Douglas*. A nurse in *Douglas* examined the victim and found vaginal tearing and scarring consistent with past penetration. *Douglas*, 380 S.C. at 504, 671 S.E.2d at 609. Here, Dr. DeMarco examined Victim and found redness and irritation between the labial lips consistent with Victim's allegations of sexual assault. Although the physical evidence in *Douglas* was arguably more conclusive than that in the present case, there is some physical evidence of sexual assault in this case. In addition to the medical evidence in the case, Aunt provided corroborating testimony regarding the time and place of the sexual abuse. *See State v. Schumpert*, 312 S.C. 502, 506-07, 435 S.E.2d 859, 862 (1993) ("It is a well-settled exception to the hearsay rule that in criminal sexual conduct cases when the victim testifies, evidence from other witnesses that she complained of the assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars."). Finally, the trial court's instructions to the jury required it to give "no greater weight" to an expert witness's testimony "simply because the witness is an expert."

After a review of the record in this case, we find any errors arising from Dr. Elsey's qualification as an expert in forensic interviewing and his alleged vouching to be harmless beyond a reasonable doubt. *See Kromah*, 401 S.C. at 362, 737 S.E.2d at 501 (finding any error in the admission of the forensic interviewer was harmless beyond a reasonable doubt after a review of the entire record); *State v. Mizzell*, 349 S.C. 326, 333-34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"); *State v. Pradubsri*, 403 S.C. 270, 281, 743 S.E.2d 98, 104 (Ct. App. 2013) (explaining the requirement that a reviewing court must review the entire record to determine the effect of an error on the verdict in determining whether an error is harmless).

B. TESTIMONY ON PTSD SYMPTOMS

Portillo argues the trial court erred in permitting Dr. Elsey to testify regarding Victim's PTSD symptoms. Portillo maintains Dr. Elsey was not qualified to testify that Victim exhibited symptoms consistent with PTSD, and further argues the trial court "failed to make the requisite finding pursuant to Rule 702, SCRE." We find Portillo abandoned these arguments. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Furthermore, we find any error to be harmless beyond a reasonable doubt. *See Douglas*, 380 S.C. at 504, 671 S.E.2d at 609 (finding forensic interviewer's testimony that the victim needed a medical examination to be harmless error); *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

CONCLUSION

For the foregoing reasons, Portillo's conviction is

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.