The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2018. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 18, 2018.

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

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

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 18 2018

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FOR THE 2017-2018 REPORTING YEAR
AS OF APRIL 17, 2018

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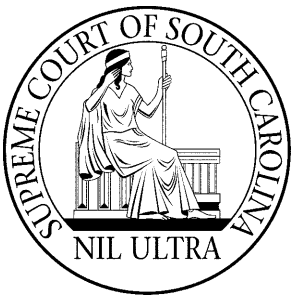

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 25, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Vernon Beaty Jr., Appellant.

Appellate Case No. 2015-000718

Appeal from Laurens County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 27693
Heard June 15, 2017 – Refiled April 25, 2018

AFFIRMED

Clarence Rauch Wise and E. Charles Grose Jr., both of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

JUSTICE JAMES: Michael Vernon Beaty Jr. (Appellant) was convicted of murdering Emily Anna Asbill (Victim) and received a life sentence. We affirmed Appellant's conviction on December 29, 2016, in *State v. Beaty*, Op. No. 27693 (S.C.

Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1 at 13). We subsequently granted the parties' petitions for rehearing and heard further argument. We affirm Appellant's conviction.

FACTUAL AND PROCEDURAL HISTORY

Appellant and Victim attended an evening party in their hometown of Clinton. They decided to leave the party between 9:00 pm and 10:00 pm and agreed to give their friend Will Alexander a ride home. Appellant drove the vehicle, Victim sat in the front passenger seat, and Alexander sat in the backseat. At approximately 11:00 pm, Appellant rang the doorbell at his parents' home and asked his stepfather for help. When Appellant's stepfather approached the car, he found Victim unconscious on the front passenger side floorboard and called 911. EMS arrived shortly thereafter and found Victim sitting on the floorboard with her head laid back on the passenger seat. She was not breathing and did not have a pulse. Appellant's shirt was wrapped around Victim's right arm. Victim was found to have severe "road rash" on her right and left arms and bruising to her neck. EMS transported Victim to the hospital, where she was pronounced dead. An autopsy revealed the cause of Victim's death was asphyxia due to strangulation.

At trial, the State introduced several of Appellant's statements to law enforcement into evidence. These statements varied materially. Appellant initially suggested Victim died of a self-inflicted cutting injury. Following law enforcement's receipt of the autopsy results, Appellant voluntarily returned to the police station and repeated his earlier version of events. However, in this statement, Appellant stated he had to undo Victim's seatbelt when he realized she was unconscious after arriving at his parents' home. When Appellant was informed of the autopsy results, which showed Victim had been strangled and had "road rash," Appellant gave a written statement explaining he and Victim had argued during the car ride, Victim had opened the car door to jump out, and he had grabbed her shirt to pull her back into the car.

At trial, the State and Appellant presented expert witnesses to support their theories as to the events leading up to Victim's death. The State's theory was that Appellant strangled Victim with a USB cord after a fight during which she tried to jump out of the moving car. Appellant's theory was that when Victim tried to jump out of the moving car, he held her in by her tank top, which caused the ligature marks on her neck and rendered her unconscious, and that once he pulled her back into the

car, she succumbed to positional asphyxiation due to the awkward position she assumed on the floorboard.

The pathologist who conducted the autopsy was called by the State and testified the ligature marks on Victim's neck were visible on the front and sides of her neck but not on the back of her neck. The pathologist identified a USB cord found in the car as consistent with the ligature marks and the abrasion on Victim's neck. DNA analysis of the USB cord showed Victim's DNA on the middle of the cord. The cord's ends had a mixture of at least two individuals' DNA, with Victim being the major contributor and Appellant being the minor contributor.

A forensic pathologist also testified for Appellant and stated the USB cord did not cause the injuries to Victim's neck and opined positional asphyxiation played a role in Victim's death. A mechanical engineer testified for Appellant and stated the ligature marks on Victim's neck could have been caused by someone holding her up by her tank top as she hung out of the car and that both Victim's abrasions and her blood found on the outside of the car were consistent with this scenario.

Appellant was convicted of murder and received a life sentence. Appellant timely filed a notice of appeal, and we certified the case from the court of appeals pursuant to Rule 204(b), SCACR. Appellant raised the following issues: (1) whether the State presented substantial circumstantial evidence proving Appellant committed murder; (2) whether the trial judge erred by denying Appellant's request to charge the lesser-included offense of involuntary manslaughter; (3) whether the trial judge erred in using certain language in his opening remarks to the jury; (4) whether the trial judge erred during the closing argument stage in not (a) requiring the State to open fully on the law and the facts of the case and (b) limiting the State's final closing solely to reply to new arguments presented during Appellant's closing arguments; (5) whether the trial judge erred in charging the law of circumstantial evidence as set forth in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013); (6) whether the trial judge erred in excluding testimony concerning a prior incident when Victim threatened to jump from an automobile; (7) whether the trial judge erred in denying one of Appellant's voir dire requests; and (8) whether a new trial should be ordered based on the cumulative error doctrine.

In affirming Appellant's conviction in our prior opinion, we found two of the issues Appellant raised merited discussion. *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1 at 14–17). First, we

addressed the trial judge's use of certain language in his opening remarks to the jury and the content requirements and order of closing argument. We affirmed Appellant's conviction but instructed trial judges to avoid language urging jurors to "search for the truth," find "true facts," and render a "just verdict." Second, we adopted a rule for closing argument in criminal cases, requiring the party with the right to open and close to open fully on the law and facts and limit its reply to those matters raised by the other party in its closing argument. We affirmed all of Appellant's remaining issues under Rule 220(b), SCACR.

We granted the parties' petitions for rehearing and have heard further argument. We issue this opinion to again address both the trial judge's use of certain language in his opening remarks to the jury and the rules governing the content and order of closing argument.[1] We affirm Appellant's conviction.

DISCUSSION

I. Trial Judge's Opening Remarks

After the jury was sworn, the trial judge gave preliminary remarks to the jury. The trial judge outlined the roles, duties, and responsibilities of the lawyers and the jury and explained trial procedure. During these remarks, the judge stated:

> This . . . trial . . . is a search for the truth in an effort to make sure that justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive.
>
> [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.

[1] All remaining issues are affirmed pursuant to Rule 220, SCACR. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989); *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176 (2012); *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015); *State v. Marin*, 415 S.C. 475, 783 S.E.2d 808 (2016); *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956); *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003).

> You also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical.
>
> You the jurors find [the facts] from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.
>
> In determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.
>
> After argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus render a true and just verdict.

Appellant objected to the use of the phrases "search[ing] for the truth," "true facts," and "just verdict." Appellant argued these phrases were especially improper when linked with the State's "misstatement" of circumstantial evidence and reasonable doubt in its opening statement, and because the State had informed the jury that it would have to pick between two competing theories. The State acknowledged to the trial judge that the "search for the truth" language is disfavored but argued that its use here was not reversible error. The trial judge denied Appellant's request for a curative instruction, concluding that his remarks were merely an opening comment and not a jury instruction.

Appellant relies upon *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), in which we held that jury instructions on reasonable doubt which also charge the jury to "seek the truth" or "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant. In *Aleksey*, we found there was no reversible error because the "seek the truth" language was charged in conjunction with the credibility of witnesses charge, and not with either the reasonable doubt or circumstantial evidence charges. *Id.* at 27–29, 538 S.E.2d at 251–53; *cf. State v.*

Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties).

As the trial judge noted, the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*. However, we agree with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.[2] These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins*, 210 S.C. 242, 245, 42 S.E.2d 240, 241 (1947) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

II. Closing Arguments

A. Background

During trial, before closing arguments, Appellant requested the trial judge to require the State to open fully on the law and facts of the case and then reply only to new matter raised by Appellant in his closing argument. Appellant stated to the trial judge, "I understand [the State is] going to open fully on the law and the facts, and not just open on some of the facts, but fully on the facts to explain their theory of the case so that --." The trial judge then interrupted and said, "[The State] will open and explain and then they will have final argument which I will allow them to go int[o] what they want to talk about." The solicitor responded, "[W]e believe the law in the

[2] We acknowledge the general sessions benchbook this Court previously supplied to all circuit judges contained language virtually identical to the disputed language employed by the trial judge.

state right now is the State [has the option] to bifurcate or to give one argument. We honestly would prefer to give one argument, but if [Appellant] demands that we open and close, I don't have any problem with it." The trial judge replied, "You can do it either way."

The State proceeded to open on the law and gave the facts only a cursory review. Appellant then gave his closing argument and stated to the jury that when he concluded his argument, the State would give a final argument and reply to everything he said. Appellant then informed the jury:

> Then what's going to happen is this. The State's then going to come up with their real theory. How the arm got scratched, exactly how this alleged strangulation took place, and we have to sit mute. We will not have the chance to come back and refute that, and yet they'll have a chance to refute everything we've laid out there. That was their choice as to how they chose to do the closing arguments. I can't make them do it any differently.

During its reply argument,[3] the State reviewed the inconsistencies in the statements Appellant gave to law enforcement. The State also argued the murder took place in Appellant's car on the street in front of his parents' house and that Appellant murdered Victim because she was screaming and Appellant wanted to "shut her up." Appellant argues this was improper reply argument because he mentioned none of these points during his closing argument.

Appellant argued the State's reply argument "was nothing but one big sandbag, which we discussed in chambers"[4] and constituted a violation of his due

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[3] In this opinion, if used in conjunction with the State's second closing argument, the terms "the reply," "reply argument," "final argument," and "last argument" are synonymous.

[4] When used as a transitive verb, Merriam–Webster defines "sandbag" as "to conceal or misrepresent one's true position, potential, or intent especially in order to gain an advantage over." Merriam–Webster Dictionary, http://www.merriam-webster.com/dictionary/sandbag.

process rights. Appellant asserted the State presented factual scenarios for the first time in its reply argument and requested either a mistrial or the opportunity to reply to the State's argument. The trial judge denied both requests.

In this appeal, Appellant contends the trial judge erred in refusing to require the State to open fully on the law and facts in its closing argument, in refusing to limit the State's reply argument to matters raised by Appellant's counsel in his closing argument, and in refusing to allow him to reply to new matter raised by the State in its reply argument. Appellant claims these errors violated his rights under the due process clauses of the South Carolina and United States Constitutions.[5]

In our prior opinion, we agreed in part, holding that in criminal trials, "where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Nevertheless, we concluded Appellant was not entitled to a new trial, as any error in the trial judge's denial of his motion to require the State to open in full on the facts and the law and to limit its reply was harmless beyond a reasonable doubt. Having revisited these issues upon rehearing, we now address the history of the rules governing the content and order of closing argument in criminal cases, and we address our authority to promulgate new rules governing the same. We also address Appellant's due process argument and conclude his conviction must be affirmed.

B. Rules Governing Content and Order of Closing Argument

Prior to 1802, the practice regarding closing arguments in all public prosecutions on behalf of the State was to allow the State the privilege of opening and concluding the arguments in every case addressed to the jury. *See State v. Brisbane*, 2 S.C.L. (2 Bay) 451, 453 (1802). This partiality shown to prosecutors was a "relict of the kingly prerogative." *Id.* However, in *Brisbane*, the Constitutional Court of Appeals of South Carolina (a predecessor to this Court) formulated a rule governing closing argument in criminal courts, holding that in all cases in which a defendant calls no witnesses, he should have the privilege of concluding to the jury. *Id.* at 454.

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[5] Due process requires no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV § 1; S.C. CONST. art. I, § 3.

In *State v. Huckie*, Prince Huckie and his codefendant Paris Bailey were jointly indicted and tried for burglary and larceny. 22 S.C. 298, 298–99 (1885). Following the State's presentation of evidence, Huckie declined to offer evidence in his defense, but Bailey called one witness. *Id.* at 299. Huckie argued it was error to deny him the last argument because he did not offer any evidence in his own behalf. *Id.* We noted there was no express rule giving the defendant a right to reply when the defendant offered no evidence but stated, "[R]esting upon the common law, such has been the practice." *Id.* We concluded that when a defendant in a criminal prosecution offers no evidence, he is entitled to the last argument; however, when two or more defendants are jointly tried, if any codefendant introduces evidence, the State is entitled to the reply argument. *Id.* at 300–01.[6] *See also State v. Mouzon*, 326 S.C. 199, 485 S.E.2d 918 (1997); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972).

In *State v. Garlington*, 90 S.C. 138, 144–45, 72 S.E. 564, 566 (1911), we held that in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close during closing argument but may waive the right to both arguments or may waive the right to open and instead present full argument to the jury after the State's closing argument. In *State v. Gellis*, 158 S.C. 471, 485–86, 155 S.E. 849, 855 (1930), the defendant did not call any witnesses in his own defense, but he introduced letters and telegrams into evidence through a prosecution witness. Holding the defendant did not have the right to the final argument, we clarified that "if a defendant offers *any evidence* on trial of the case, the state is not deprived of its general right to the opening and concluding arguments." *Id.* at 486–87, 155 S.E. at 855 (emphasis added). Consequently, the loss of the right to make the final argument depends upon whether a defendant introduces any evidence at all, not upon whether he calls any witnesses.

In *State v. Atterberry*, 129 S.C. 464, 469, 124 S.E. 648, 650 (1924), the defendant was indicted for possession of "a quantity of whisky" in violation of the Prohibition Law and was found guilty by a jury. For perhaps the first time, we applied a codified court rule to closing arguments in a criminal trial. The defendant introduced evidence during the trial, and prior to closing arguments, he demanded the trial court to require the State to open in full on the facts and the law. *Id.* at 471,

[6] The rationale behind this particular rule, as explained in *Huckie*, is curious but irrelevant to the instant case.

124 S.E. at 651. The trial judge refused the defendant's request and allowed the State to fully waive its opening argument. *Id.* At that time, Circuit Court Rule 59 provided, "The party having the opening in an argument shall disclose his entire case; and on his closing shall be confined strictly to a reply to the points made and authorities cited by the opposite party." We explained Rule 59 was clear and mandatory and held the trial court's failure to require the State to open fully on the law and facts was reversible error. *Atterberry*, 129 S.C. at 471, 124 S.E. at 651. Noting the "wisdom of this rule" was most clearly evident in circumstantial evidence cases, we explained that if the rule did not require the State to open in full on the facts and the law, an able prosecutor would be able to present a connection of circumstances to the jury during his last argument that the defendant would not be allowed to rebut. *Id*.

Subsequent to *Atterberry*, Circuit Court Rule 59 and any wisdom it possessed were replaced by Circuit Court Rule 58, which provided in relevant part, "The party having the opening in an argument shall disclose fully *the law* upon which he relies if demanded by the opposite party." (emphasis added). We addressed Rule 58 in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971), *overruled in part on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). In *Lee*, the defendant introduced evidence to the jury. At the close of the trial, the defendant requested the trial judge to require the State to open fully on the law and the facts during its closing argument. *Id.* at 317, 178 S.E.2d at 656. The trial judge required the State to open on the law but refused to require the State to open on the facts. *Id.* We held "the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." *Id.* at 318, 178 S.E.2d at 656. There was no discussion of due process concerns or "the wisdom" inherent in the former Rule 59.[7]

On July 1, 1985, the South Carolina Rules of Civil Procedure went into effect. *See* Rule 86, SCRCP. Rule 1, SCRCP, limits the application of those rules to civil

[7] Both Rule 59 and Rule 58 were part of an appendix to the Code of Civil Procedure. In his concurrence in *Atterberry*, Acting Associate Justice Aycock observed that nothing limited the application of these rules to civil cases. 129 S.C. at 473, 124 S.E. at 651. Circuit Court Rules 59 and 58, while they were in effect, were properly applied to criminal cases.

cases.[8] Rule 85(b), SCRCP, also effective as of July 1, 1985, retained ten enumerated criminal practice rules contained in the Appendix of Criminal Practice Rules; according to Rule 85(b), SCRCP, those ten rules were renumbered as Criminal Practice Rules 1 through 10 and were to "continue in full force and effect." Circuit Court Rule 58 was not one of those ten retained rules. Rule 85(c), SCRCP, also effective July 1, 1985, provides that all other Circuit Court Rules were repealed as of that date. Consequently, Circuit Court Rule 58 no longer existed as a codified rule as of July 1, 1985.

On September 1, 1988, the South Carolina Rules of Criminal Procedure went into effect. *See* Rule 40, SCRCrimP. No rule contained within the South Carolina Rules of Criminal Procedure addresses the content and order of closing arguments in criminal trials. Rule 39, SCRCrimP, expressly repealed all existing Criminal Practice Rules. With the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, and with the adoption of Rule 39, SCRCrimP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence. However, Rule 37, SCRCrimP, provides in part, "In any case where no provision is made by statute or these rules, *the procedure shall be according to the practice as it has heretofore existed* in the courts of the State." Rule 37, SCRCrimP (emphasis added). In the instant case, both the content and order of closing arguments were in keeping with repealed Circuit Court Rule 58, which required the State to open only on the law. *Lee*, 255 S.C. at 318, 178 S.E.2d at 656. We must first determine whether, almost thirty years after its adoption, Rule 37 preserves the application of repealed Circuit Court Rule 58 in criminal cases in which a defendant introduces evidence. We hold it does not.

This Court cannot simply assume that from July 1, 1985 through the trial of the instant case, the criminal trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent that it remains the "practice as it has heretofore existed" in criminal cases in which the defendant introduces evidence. We have no effective way to ascertain the prevailing practices of current and past trial judges. We can only conclude that absent a published court rule or a defined

[8] Rule 43(j), SCRCP, controls the content and order of argument in civil cases. This rule essentially provides that the plaintiff shall have the right to open and close at the trial of the case and must open in full, and in reply may respond in full but may not introduce any new matter. This rule has never been applied to criminal cases, and Rule 1, SCRCP, expressly prohibits such application.

common law rule, individual trial judges have developed their own practices governing closing argument in cases in which a defendant introduces evidence. That is an untenable approach to such an important phase of a criminal trial.

One may inquire whether this Court may simply create a much-needed practice or procedural rule simply by exercising its authority to alter the common law. This is a reasonable inquiry, especially since the courts of this State attend on a daily basis to the notions of order, predictability, and due process in criminal proceedings. Indeed, "[t]he common law changes when necessary to serve the needs of the people. We have not hesitated to act in the past when it has become apparent that the public policy of the State is offended by outdated rules of law." *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (citations omitted). *See also Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (altering the common law of social host liability); *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (abolishing contributory negligence); *Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985) (observing that since the dog-bite law was of common law origin, it could be changed by common law mandate); *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (abolishing sovereign immunity).

In the foregoing cases, we certainly did alter the common law and were within our authority to do so. However, those cases involved substantive common law, not common law procedural rules. We are prohibited on two fronts from promulgating a new rule in the course of deciding the issues in this case. First, this Court does not have the power to adopt new rules of procedure for future trials by writing opinions to decide cases. Instead, when we decide an appeal from a criminal conviction—as we do here—our power is limited to correcting errors of law.[9]

Second, the South Carolina Constitution limits this Court's power to promulgate rules governing practice and procedure in the courts of this State. Before 1973, the South Carolina Constitution did not address in any manner the power of this Court to implement rules of practice and procedure in the courts of this State. On April 4, 1973, article V, section 4 of the South Carolina Constitution was amended to grant power to this Court, subject to statutory law, to "make rules governing the practice and procedure in all such courts [in the unified judicial

[9] *See* S.C. CONST. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.").

system]." S.C. CONST. art. V, § 4. While this amendment was in effect, we did not make any rules governing the content and order of closing argument in criminal cases, and Circuit Court Rule 58 and other Circuit Court Rules carried the day until July 1, 1985, when the South Carolina Rules of Civil Procedure came into being, with Rule 85, SCRCP, preserving some criminal practice rules and repealing others, including Circuit Court Rule 58.

On February 26, 1985, article V, section 4A of the South Carolina Constitution took effect. It remains in effect today and provides:

> *All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly* during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. CONST. art. V, § 4A (emphasis added).

On January 28, 2016, we initiated the prescribed legislative process by proposing an amendment to the South Carolina Rules of Criminal Procedure to add Rule 21. *See Re: Amendments to the South Carolina Rules of Criminal Procedure*, 2014-002673 (S.C. Sup. Ct. Order dated Jan. 28, 2016). Proposed Rule 21 stated, "Closing arguments in all non-capital cases shall proceed in the following order: (a) the prosecution shall open the argument in full; (b) the defense shall be permitted to reply; and (c) the prosecution shall then be permitted to reply in rebuttal." *Id.* However, by concurrent resolution, the General Assembly, as was its prerogative, rejected proposed Rule 21 in April 2016. *See* S. Con. Res. 1191, 121st Gen. Sess. (S.C. 2016).

While we acknowledge and respect the limitations placed on this Court's power pursuant to article V, section 4A of our constitution, in order for our criminal court system to operate efficiently, effectively, and consistently, clearly stated rules

governing the content and order of closing argument are required. Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument. Pursuant to the common law rule set forth in *Huckie*, if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in *Gellis*, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

This case falls within the last category. Appellant introduced evidence during trial. Under our holdings in *Huckie* and *Gellis*, the State was entitled to the reply argument. Appellant asked the trial court to require the State to open in full on the facts and the law and asked the trial court to restrict the State's reply argument to rebuttal to matters raised by Appellant in his closing argument. The trial court denied these requests and essentially followed repealed Circuit Court Rule 58, allowing the State to open on the law and give the facts a cursory review. Appellant then presented his closing argument. After the State made its reply argument, Appellant asked to be allowed to rebut what he argued was new matter raised by the State. The trial court denied this request as well. Appellant claims his due process rights were violated by this procedure.

C. Due Process

While this Court's authority to promulgate rules is restricted by article V, section 4A of the South Carolina Constitution, we retain the authority to determine—on a case-by-case basis—whether a defendant's due process rights have been violated by procedural methods employed during a trial. Stated another way, our authority to rectify a specific due process violation falls within our constitutional power to correct errors of law and trumps our inability to adopt a clearly stated practice or procedural rule. We must therefore determine whether Appellant's due process rights were violated in this instance.

"Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather it is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). In any case, procedural due process contemplates a fair trial. *Id.* This concept applies to closing arguments. South Carolina case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon reply arguments which have a basis in the record but to which a defendant is not allowed to respond. Generally, "[i]mproper comments [made during closing argument] do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The relevant inquiry is whether the State's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997).

Appellant cites *Bailey v. State*, 440 A.2d 997, 1003 (Del. 1982), in which the Delaware Supreme Court held the trial court abused its discretion in permitting the State to utilize the "sandbagging" trial strategy in its reply argument. Appellant acknowledges there is no rule in South Carolina that prohibits "sandbagging," but he asserts his due process rights were violated because the State was allowed, in its reply argument, to present to the jury for the first time "two crucial theories" and "an out of context statement of Appellant."

Appellant's defense at trial was that he accidentally strangled Victim when he pulled her back into the moving vehicle by pulling on her tank top, thereby rendering her unconscious, with Victim then succumbing to positional asphyxiation on the front passenger floorboard. The State's theory of the case was that Appellant strangled Victim to death with the USB cord found in Appellant's car. The Appellant's parents' driveway as a potential scene of the murder was put before the jury through the State's witnesses—the first responders who found Victim deceased in the driveway of Appellant's parents' house. Appellant contends the first new theory argued by the State in its reply argument dealt with the location of the murder, i.e., that Appellant strangled Victim in Appellant's car in the driveway in front of Appellant's parents' house. Appellant claims his due process rights were violated when the State was permitted, in its reply, to argue this point to the jury. Appellant

contends that at the least, he should have been permitted to respond. We first note that the State's presentation of this theory during its reply was arguably a proper response to the theory Appellant advanced in his closing argument. Whatever the case, the question of exactly where Victim's death occurred was largely inconsequential to the question of whether Appellant murdered Victim or whether Victim instead died of causes unrelated to Appellant's criminal conduct.

Appellant contends the second new theory argued by the State in its reply was that Appellant murdered Victim because Victim was screaming at Appellant during the drive home, and Appellant wanted to "shut her up." The fact that the two were in an argument and Victim was screaming at Appellant was entered into evidence through Appellant's own statement to law enforcement. Again, the State's advancement of this theory in reply was arguably a proper response to the sequence of events argued by Appellant in his closing argument. Even if it could be considered new matter, we conclude the State's advancement of this theory was relatively insignificant.

During its reply argument, the State also presented a PowerPoint summary of one of Appellant's statements to law enforcement. Appellant argues the State took the statement out of context when it "implied that [Appellant] said that [Victim] made it seem like I made her want to hurt herself." Appellant's actual statement to law enforcement was, "Yet a little before or at this point, I believe, that [Victim] made it seem like I had made her want to hurt herself, which is common for us when we argue." We conclude this minor point was insignificant to the jury's consideration of the issues.

While the State perhaps did not restrict its reply argument to matters raised by Appellant, and while Appellant was not allowed to respond to the foregoing three points, we conclude Appellant did not suffer prejudice as a result. *See Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *id.* (noting the relevant inquiry is whether the State's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process"). Neither the State's reply arguments on these three points nor the trial court's refusal to allow Appellant to respond denied Appellant "the fundamental fairness essential to the concept of justice." *See Hornsby*, 326 S.C. at 129, 484

S.E.2d at 873. Therefore, we conclude Appellant has not established a due process deprivation.

CONCLUSION

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. Such language includes, but is not limited to, any language suggesting to the jury that its task is to "search for the truth" or to find "true facts," or that the jury should render a "just verdict." However, we hold Appellant has failed to show prejudice from these remarks sufficient to warrant reversal.

Article V, section 5 of the South Carolina Constitution limits this Court's authority to correcting errors of law and does not empower us to promulgate a procedural rule for future cases by simply issuing an opinion. Article V, section 4A, of the South Carolina Constitution prohibits this Court from adopting any rules of practice and procedure—even a much-needed rule governing the practice and procedure of closing arguments in criminal cases—without first going through the prescribed legislative process.

Currently, there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the "constitutional rule" that a defendant's right to due process cannot be violated at any stage of a trial. Consequently, trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial. We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate. We hope the day will soon come when such rules are firmly in place.

We hold Appellant has not established prejudice resulting from the trial judge's opening remarks, and we hold Appellant was not denied due process during the closing argument stage of the trial. Appellant's conviction is therefore

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Gary, Petitioner,

v.

Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Low Country Medical Transport, Low Country Medical Transport, Inc., Eugene A. Kirkland, and American Medical Response, Inc. (d/b/a Access2Care), Defendants.

Of Whom American Medical Response, Inc. (d/b/a Access2Care) is the Respondent.

Appellate Case No. 2016-001937

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Marvin H. Dukes III, Special Circuit Court Judge

Opinion No. 27791
Heard April 18, 2018 – Filed April 25, 2018

VACATED AND REMANDED

Joseph Dawson III, of North Charleston, for Petitioner.

C. Mitchell Brown and Brian P. Crotty, both of Nelson, Mullins, Riley & Scarborough, LLP, of Columbia; and Robert H. Hood and Robert H. Hood, Jr., both of Hood Law Firm, LLC, of Charleston, for Respondent.

PER CURIAM: Petitioner Charles Gary sought a writ of certiorari to review the court of appeals' decision in *Gary v. Askew*, 417 S.C. 232, 789 S.E.2d 94 (Ct. App. 2016). Respondent American Medical Response, Inc. (Access2Care) contracted with the South Carolina Department of Health and Human Services (DHHS) to administer Medicaid's Nonemergency Medical Transportation Program. Pursuant to its contract with DHHS, Access2Care served as broker, whereby it contracted with Low Country Medical Services, the entity that transported patients for nonemergency medical appointments.

The underlying suit arose after Gary was injured in a collision while being transported in an ambulance operated by Low Country Medical Services. Less than three months after Access2Care filed its amended answer and without any meaningful discovery, Gary moved for summary judgment, arguing both public policy and the contract between Access2Care and DHHS imposed a nondelegable duty on Access2Care to ensure safe transportation of patients. The trial court granted summary judgment in favor of Gary, but the court of appeals reversed, holding Access2Care did not owe a nondelegable duty to safely transport Gary.

Because the record contains minimal evidence about the nature of the collision and the parties have not had an opportunity to conduct significant discovery, we find summary judgment is premature. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004) ("[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues."); *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding summary judgment was premature where the plaintiff did not have an adequate opportunity to conduct discovery on the issue of medical causation).

Accordingly, we vacate the court of appeals' opinion and remand to the circuit court for further proceedings.[1]

VACATED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, JAMES, JJ. and Acting Justice Paul E. Short Jr., concur.

[1] We express no opinion as to the merits of Gary's nondelegable duty claim.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center,

v.

South Carolina Department of Health and Environmental Control and the Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill is the Petitioner, and

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center and South Carolina Department of Health and Environmental Control are the Respondents.

Appellate Case No. 2017-000984

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 27792
Submitted February 14, 2018 – Filed April 25, 2018

REVERSED IN PART AND REMANDED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen, PLLC, all of Charleston, for Petitioner.

Stuart M. Andrews, Jr., Susanna Knox and Daniel J. Westbrook, of Nelson, Mullins, Riley & Scarborough, LLP, all of Columbia; and Ashley Caroline Biggers and Vito Michael Wicevic, both of Columbia, all for Respondents.

PER CURIAM: Petitioner seeks a writ of certiorari to review the court of appeals' decision in *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed Jan. 11, 2017). We deny the petition for a writ of certiorari as to question III, but grant the petition as to questions I and II, dispense with further briefing, and reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review. We remand the case to the court of appeals to issue a ruling on whether the decision of the Administrative Law Court (ALC) "interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation" in violation of the dormant Commerce Clause. *See McBurney v. Young*, 569 U.S. 221, 234-37, 133 S. Ct. 1709, 1719-20, 185 L. Ed. 2d 758, 771-72 (2013) (explaining the concept of the "dormant Commerce Clause" (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S. Ct. 2488, 2496, 49 L. Ed. 2d 220, 229 (1976))).

To explain our ruling that the issue is preserved, we recite portions of the procedural history of this case. In 2005, four hospitals—Petitioner, Respondent Amisub, Presbyterian Healthcare System, and Hospital Partners of America—applied for a certificate of need (CON) to construct and operate an acute-care hospital in Fort Mill. In May 2006, the Department of Health and Environmental Control (DHEC) determined the acute-care hospital was necessary, and granted a CON to Amisub, but denied a CON to Petitioner and the others. DHEC's decision to award the CON to Amisub was based in part on its interpretation of the language of the South

Carolina Health Plan[1] that only existing health care providers in York County were eligible for additional hospital beds. Petitioner filed a contested case at the ALC, contending DHEC had erroneously interpreted the language of the Health Plan. Alternatively, Petitioner argued that if DHEC's interpretation was correct, the Health Plan violated the dormant Commerce Clause because it improperly restricted interstate commerce. The ALC found DHEC's interpretation of the Health Plan was not correct, reversed, and remanded to DHEC.[2] The ALC's determination that the Health Plan did not require the CON to be awarded to an existing York County provider made it unnecessary for the ALC to reach the alternative dormant Commerce Clause claim.

On remand, DHEC granted a CON to Petitioner, but denied a CON to the others. Amisub filed a second contested case at the ALC, which again reversed, this time ordering a CON be granted to Amisub and denied to Petitioner. Petitioner appealed to the court of appeals. The court of appeals affirmed, finding Petitioner's dormant Commerce Clause argument as to the ALC's ruling in the second contested case was unpreserved for appellate review.

Petitioner's theory that the dormant Commerce Clause issue is preserved begins with the fact that any potential violation arising from the language of the Health Plan was resolved in Petitioner's favor by the ALC in the first contested case. We find this was a reasonable interpretation of the ALC's order in the first contested case. In the second contested case, therefore, Petitioner reasonably believed the dormant Commerce Clause was not an issue. However, Petitioner contends the ALC's ruling in the second case improperly restricted interstate commerce—and thus violated the dormant Commerce Clause—not because of the language of the Health Plan, but because the ALC ruled partially on the basis that the hospital Amisub was already operating in South Carolina should be protected from out-of-state competition like Petitioner, a North Carolina entity. In other words, Petitioner contends the ALC reversed DHEC's award of a CON to Petitioner, and awarded a CON to Amisub, based on the ALC's improper desire to protect Amisub from out-of-state competition, even though the Health Plan does not provide for such protection.

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[1] *See generally* S.C. Code Ann. § 44-7-180 (2018) (providing for the development of the South Carolina Health Plan).

[2] We dismissed Petitioner's appeal from this decision on the ground the order was not immediately appealable. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

Petitioner argues it had no reason to anticipate this basis for the ruling, and thus it had no reason to renew its dormant Commerce Clause challenge before or during the second contested case trial. Rather, Petitioner argues it was only after it received the ALC's ruling that it realized the dormant Commerce Clause had again become an issue. At that time—Petitioner argues—it made the argument of a dormant Commerce Clause violation with clarity in a timely Rule 59(e) motion.

The court of appeals found "the record does not show [Petitioner] presented to the ALC any argument that [Amisub]'s positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. [Petitioner] waited until filing its Rule 59(e) motion to present this argument, which is too late." If Petitioner had reason to believe this issue was actually being litigated before the ALC in the second contested case, and yet remained silent, we would agree with the court of appeals.[3] However, the dormant Commerce Clause issues arising out of the language of the Health Plan were resolved in Petitioner's favor in the first contested case. Thus, Petitioner could not reasonably have foreseen the ALC would craft its order in a fashion to revive those issues. Therefore, Petitioner had no reason to raise the dormant Commerce Clause challenge in the second contested case until the ALC issued its order. No party should be penalized for not addressing an issue as to which it had previously prevailed, and which it did not reasonably contemplate would yet

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[3] While not dispositive, we find it important that Respondents did not raise issue preservation in their briefs to the court of appeals. We also note the court of appeals specifically recognized the dormant Commerce Clause issue before it presented a different question from the one presented in the first contested case. The court of appeals stated,

> [Petitioner] does not challenge the constitutionality of the CON Act itself. Further, [Petitioner] does not challenge the constitutionality of the State Health Plan or the Project Review Criteria. Rather, [Petitioner] argues the purpose and effect of the ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria are to protect [Amisub] from out-of-state competition, and, therefore, such an application violates the dormant Commerce Clause.

Amisub, slip op. at 5.

be the basis of the court's ruling. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.").

Accordingly, we reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review, and remand the case to the court of appeals for a ruling on the merits of the issue.

The parties have stressed to us the obvious point that it has been almost twelve years since DHEC made the determination an acute-care hospital was necessary in York County. For this reason, we order the court of appeals to expedite consideration of this case.

REVERSED IN PART AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Theodore G. Hartsock, Jr., as Personal Representative of the Estate of Sarah Mills Hartsock (Estate of Sarah Mills Hartsock), Plaintiff-Respondent,

v.

Goodyear Dunlop Tires North America Ltd., a foreign corporation; Goodyear Tire & Rubber Company, a foreign corporation, Defendants-Appellants.

Appellate Case No. 2016-002398

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 27793
Heard September 28, 2017 – Filed April 25, 2018

CERTIFIED QUESTION ANSWERED

Wallace K. Lightsey, of Greenville, M. Gary Toole, of McDonald, Toole & Wiggins, of Orlando, Fl., pro hac vice, E. Duncan Getchell, Jr. and Michael H. Brady, both of McGuire Woods LLP, both of Richmond, Va., pro hac vice, for Defendants-Appellants.

Mark C. Tanenbaum of Mark C. Tanenbaum, P.A., of Mt. Pleasant; and Mia Lauren Maness, of Charleston, both for Plaintiff-Respondent.

Debora B. Alsup, of Thompson & Knight LLP, of Austin, Tx., pro hac vice, for Amicus Curiae the Rubber Manufacturers Association.

Frank L. Epps and Hannah Rogers Metcalfe, both of Greenville, for Amicus Curiae the South Carolina Association for Justice.

JUSTICE KITTREDGE: This Court accepted the following certified question from the United States Court of Appeals for the Fourth Circuit:

> Does South Carolina recognize an evidentiary privilege for trade secrets?

Answer: South Carolina does recognize an evidentiary privilege for trade secrets, but it is a qualified privilege.

I.

In its Order of Certification, the Fourth Circuit summarized the relevant facts and procedural history as follows:

> In July 2010, Sarah Mills Hartsock was killed in an automobile crash on Interstate 26 in Calhoun County, South Carolina. Her personal representative, Theodore G. Hartsock, Jr., brings this survival and wrongful death action asserting claims under South Carolina law for negligence, strict liability, and breach of warranty. Mr. Hartsock alleges that the vehicle in which Mrs. Hartsock was riding was struck head-on by another vehicle. That vehicle had crossed the median after suffering a blowout of an allegedly defective tire that Goodyear Dunlop Tires North America Ltd. and Goodyear Tire & Rubber Company [collectively "Goodyear"] designed, manufactured, and marketed. Federal subject-matter jurisdiction exists under 28 U.S.C. § 1332 based upon complete diversity of citizenship between the parties and damages alleged to be greater than $75,000.

> During pretrial discovery a dispute arose between the parties over certain Goodyear material relating to the design and chemical composition of the allegedly defective tire. Goodyear objected to producing this material, asserting that it constitutes trade secrets. The district court eventually found, and Mr. Hartsock does not dispute, that the material does, in fact, constitute trade secrets. However, the court ordered Goodyear to produce the material subject to a confidentiality order. In doing so, the court applied federal discovery standards, rejecting Goodyear's contention that South Carolina trade secret law applies.
>
> Goodyear thereafter moved for reconsideration, reiterating its argument that South Carolina law applies. The district court denied the motion but certified its order for interlocutory review pursuant to 28 U.S.C. § 1292(b). The court also stayed the proceedings pending Goodyear's anticipated appeal. After Goodyear appealed, a panel of [the Fourth Circuit] agreed to permit the appeal. The parties filed briefs, and [the Fourth Circuit] heard oral arguments in October 2016.

Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 672 F. App'x 223, 224–25 (4th Cir. 2016) (footnotes omitted).

II.

We answer the certified question by analyzing how privileges are recognized in South Carolina and evaluating the South Carolina Trade Secrets Act (hereinafter "Trade Secrets Act"), S.C. Code Ann. §§ 39-8-10 to -130 (Supp. 2017).

A.

An evidentiary privilege is "[a] privilege that allows a specified person to refuse to provide evidence or to protect the evidence from being used or disclosed in a proceeding." *Evidentiary Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014). The principle underlying recognition of a privilege is simple: although the public "has a right to every man's evidence," an exception may be justified "by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (citations omitted). "[A]n asserted privilege must also 'serv[e] public ends.'" *Id.* at 11

(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).[1] In addition, "[i]t is well recognized that a privilege may be created by statute" as deemed appropriate by Congress or a state legislature. *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *accord In re Decker*, 322 S.C. 215, 218–19, 471 S.E.2d 462, 463–64 (1995).

Some privileges are not limited solely to communications, and some privileges are absolute, while others are qualified. Among the more well-known privileges recognized in South Carolina are the privilege against self-incrimination, U.S. Const. amend. V, the attorney-client privilege, *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944), and the news media qualified privilege.[2] S.C. Code Ann. § 19-11-100 (2014). A review of privileges in general

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[1] For example, the United States Supreme Court has stated that the spousal, attorney-client, and psychotherapist-patient privileges are "rooted in the imperative need for confidence and trust." *Jaffee*, 518 U.S. at 10 (citation omitted). Moreover, the United States Supreme Court explained that these privileges serve public ends:

> [T]he purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." And the spousal privilege . . . is justified because it "furthers the important public interest in marital harmony." The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.

Id. at 11 (citations omitted). South Carolina has also recognized these privileges and their importance to society. *See, e.g.*, *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619–20 (1973).

[2] For example, the news media has a strong but nevertheless qualified privilege. S.C. Code Ann. § 19-11-100(A) (the news media "has a *qualified privilege* against disclosure of *any information, document, or item* obtained or prepared in the gathering or dissemination of news" (emphasis added)). The privilege is qualified in that section 19-11-100(B) provides disclosure may be compelled if it is established that the privilege was waived or it "(1) is material and relevant to the controversy for which the testimony or production is sought; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper

reveals the common thread is that public policy favors the confidentiality of these communications or information. *See, e.g.*, *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619–20 (1973). Moreover, "privileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court." *Id.* at 254, 195 S.E.2d at 620.

South Carolina has one evidentiary rule referencing privileges—Rule 501, SCRE—which states:

> *Except as required* by the Constitution of South Carolina, by the Constitution of the United States or *by South Carolina statute*, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

(emphasis added). Thus, unlike many other jurisdictions, South Carolina does not delineate specific privileges through its rules of evidence. Rather, our evidentiary privileges are provided through an assortment of sources: the South Carolina or United States Constitution, the common law, or a statutory provision.

When construing a purported statutory privilege, there is no requirement that the word "privilege" be used by the General Assembly in order to evidence an intent to create one. *See, e.g.*, *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (citing section 19-11-30 of the South Carolina Code of Laws as providing a marital privilege although the statute does not use the word "privilege" and simply states "no husband or wife *may be required to disclose* any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage" (emphasis added)). Our role as a court, of course, is to interpret a statute to discern and effectuate legislative intent. *Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

With these principles in mind, we turn to the question at hand—does South Carolina recognize an evidentiary privilege for trade secrets?

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preparation or presentation of the case of a party seeking the information, document, or item." S.C. Code Ann. § 19-11-100(B). As a result, the qualified privilege enjoyed by news media can be overcome when the requesting party fulfills the stringent balancing test articulated in the statute.

B.

Generally, a trade secret is "information including, but not limited to, a formula . . . process, design, prototype, procedure, or code," which "derives independent economic value . . . from not being . . . readily ascertainable by proper means." S.C. Code Ann. § 38-9-20(5)(a). "[T]he value of a trade secret hinges on its secrecy," so "owners or inventors go to great lengths to protect their trade secrets from dissemination." *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009) (quoting *Bridgestone Am. Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007)) (footnote omitted). Indeed, the importance of "trade secret protection to a healthy economy has been widely accepted for some time." *Id*. "Over the last two hundred years, the law has developed mechanisms for accomplishing this end." *Id.* In South Carolina, the Trade Secrets Act is designed to protect trade secrets before, during, and after litigation. *See* S.C. Code Ann. §§ 39-8-10 to -130 (Supp. 2017); *see also Laffitte*, 381 S.C. at 473–74, 674 S.E.2d at 161–62. At issue here is the protection afforded during litigation.

Originally, in 1992, the General Assembly enacted the Uniform Trade Secrets Act ("UTSA"), which was narrow and focused upon actions regarding the misappropriation of trade secrets. However, in 1997, the General Assembly effectively repealed UTSA and replaced it with the Trade Secrets Act, which affords broad trade secret protections in any action—not just misappropriation. S.C. Code Ann. § 39-8-60(B). Most importantly, the new legislative provisions added the requirement for a "substantial need" to be shown before a trade secret holder would be compelled to disclose a trade secret.[3] *Id.*

In order to be protected, a trade secret must be the subject of reasonable efforts "to maintain its secrecy," S.C. Code Ann. § 39-8-20(5)(a)(ii), and, if so, the trade secret "is protectable and enforceable until it is disclosed or discovered by proper means." S.C. Code Ann. § 39-8-30(A). The Trade Secrets Act provides protection "[i]n any civil action where discovery is sought of information designated by its

[3] Almost all states have adopted a form of UTSA or enacted their own legislation to protect trade secrets. However, no other state's trade secret statute includes all of the various provisions and protections found in South Carolina's Trade Secrets Act, nor does any other state require a substantial need to be shown before disclosure will be compelled. Instead, more than a third of the states have enacted a rule of evidence providing a qualified privilege for trade secrets, which allows the trade secret holder to refuse to disclose the trade secret unless the court found nondisclosure would tend to conceal fraud or otherwise work injustice.

holder as a trade secret." S.C. Code Ann. § 39-8-60(B). We find it is here that the General Assembly evidenced its intent to create a qualified privilege for trade secrets.

Although the General Assembly did not use the word "privilege," the protections afforded by section 39-8-60—namely, that the holder of a trade secret may refuse to disclose it—are the quintessence of a privilege and evince an unmistakable legislative intent to protect trade secrets from disclosure where public policy demands it. Indeed, the Trade Secrets Act demonstrates not only the Legislature's intent for a trade secrets privilege to exist but also the standards that must be met for this qualified privilege to be overcome.

Most importantly, the new legislative provisions added the requirement for a "substantial need" to be shown before a trade secret holder would be compelled to disclose a trade secret. S.C. Code Ann. § 39-8-60(B). Before compelling disclosure, a court must determine "whether there is a substantial need by the party seeking discovery [of] the information." *Id.* Thus, section 39-8-60 of the Trade Secrets Act requires a heightened standard—substantial need—before disclosure of the trade secret will be ordered. A substantial need may be shown if four criteria are met:

> (1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;
>
> (2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading;
>
> (3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and
>
> (4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.

Id. § 39-8-60(B).

This substantial need standard is complemented by the provisions of Rule 26(c)(7) of the South Carolina Rules of Civil Procedure. This Court in *Laffitte* noted that,

without the benefit of section 39-8-60, federal and state courts typically apply a three-part balancing test to determine if a trade secret is subject to disclosure with a protective order under Rule 26(c)(7): (1) the party opposing discovery must show the information is a trade secret and disclosure would be harmful; (2) the party seeking discovery must show the information is "relevant and necessary"; and (3) the court must weigh the potential harm against the need for disclosure. *Laffitte*, 381 S.C. at 474–75, 674 S.E.2d at 162 (examining the Trade Secrets Act in the context of a plaintiff's discovery request for a tire manufacturer's skim stock formula in a similar product liability action). While noting this balancing test was held by other courts to govern the discovery of trade secret information, the Court also observed that, consistent with section 39-8-60, South Carolina requires a higher standard than the generally prevailing "relevant and necessary" inquiry. *Id.* at 475–76, 674 S.E.2d at 163.

In *Laffitte*, we explained "that the information [sought] must be relevant not only to the general subject matter of the litigation, but also *relevant specifically to the issues involved* in the litigation." *Id.* at 475, 674 S.E.2d at 163 (emphasis added). Additionally, a party "cannot merely assert unfairness but must *demonstrate with specificity* exactly how the lack of the information will impair the presentation of the case on the merits to the point that *an unjust result* is a real, rather than a merely possible, threat." *Id.* at 476, 674 S.E.2d at 163 (emphasis added) (quoting *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003)). Hence, South Carolina's heightened inquiry at the "relevant and necessary" step incorporates the "substantial need" requirement of the Trade Secrets Act. Consequently, when determining whether trade secret information is subject to disclosure, the substantial need requirement is an integral part of the South Carolina balancing test.

Thus, if a substantial need is shown and the balancing test weighs in favor of the one requesting disclosure, the qualified privilege is overcome. Then, the trade secret holder will be compelled to disclose the trade secret, but the holder is nevertheless afforded protection under "an appropriate written protective order." S.C. Code Ann. § 39-8-60(E).[4] Moreover, when a trade secret is ordered to be

[4] *See also* Rule 26(c)(7), SCRCP (providing, upon motion and for good cause shown, a court may make any order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way"). This rule is in accord with related provisions of our rules of civil procedure. *See* Rule 30(j)(3), SCRCP (stating counsel may object to a question on the ground that the answer is protected by a privilege and privilege is

produced during discovery, it is also protected if it is disclosed at trial. S.C. Code Ann. § 39-8-60(H) ("When information produced pursuant to this section is discussed or otherwise disclosed at a trial or hearing, the owner of the produced trade secret information is allowed to obtain individually signed confidentiality agreements from all parties . . . ."). The General Assembly has identified this as the proper balance to be struck between fostering and protecting innovation yet allowing an injured party access to critical information. It is this legislative choice we are bound to effectuate.[5]

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defined to include "trade secret protection"); *see also* Rule 26(b)(1), SCRCP (stating discovery may be obtained "regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action" (emphasis added)).

[5] With respect for the dissent, we emphasize that the Fourth Circuit has asked whether South Carolina recognizes an *evidentiary* privilege for trade secrets. The dissent focuses solely on the term "privilege," without regard to the precise question posed by the Fourth Circuit, which places the question (and hence our answer) in the context of litigation. The dissent's reframing of the certified question is based on its view that the Fourth Circuit intended to ask a different question. Moreover, the dissent's reframing of the certified question fails to recognize the qualified nature of the evidentiary privilege. The fact that the provision is dependent upon the circumstances of each case speaks to the qualified nature of the privilege, which naturally arises first in the discovery phase of civil litigation. *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003) (discussing its trade secret privilege in the discovery context and recognizing "the application of the test would depend on the circumstances presented"); *see also* S.C. Code Ann. § 19-11-100 (providing a qualified privilege for news media and recognizing the factors to overcome it are evaluated on a case-by-case basis). As acknowledged by the Fourth Circuit in its order of certification: "The federal courts have long recognized a qualified evidentiary privilege for trade secrets" and "[b]eing a *qualified* privilege, federal courts have not afforded automatic and complete immunity against disclosure, but have in each case weighed [the] claim to privacy against the need for disclosure." *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd*, 672 F. App'x 223, 226 (4th Cir. 2016) (internal quotation marks and citations omitted). We believe the proper approach is to answer the question and, if the Fourth Circuit really intended to ask a different question, we trust it will seek clarification, or reframe the question, in the normal course.

III.

The existence of an evidentiary privilege will invariably bring to the fore the tension between the law's overarching goal of seeking the truth and the ability of an owner of a trade secret to resist its disclosure. Here, in discerning legislative intent, the Trade Secrets Act sets forth a specific balancing test to resolve that tension. The legislature has chosen to strike that balance through the heightened "substantial need" test. Therefore, we answer the certified question from the United States Court of Appeals for the Fourth Circuit by holding that South Carolina does recognize a qualified evidentiary privilege for trade secrets.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., HEARN and JAMES, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I agree with everything the majority has written about South Carolina law governing the discovery of trade secrets in the courts of South Carolina, except that the label of "privilege" should be applied. I would answer the certified question "No."

As we explained in *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), our law regarding the discoverability of trade secrets begins with the discovery provisions of our Rules of Civil Procedure—specifically Rule 26(c)—and includes section 39-8-60 of the South Carolina Trade Secrets Act. *See* 381 S.C. at 475, 674 S.E.2d at 162-63 (stating "we hold that the balancing test associated with the discovery of trade secret information under Rule 26(c), SCRCP, governs the discovery of trade secret information"); 381 S.C. at 473, 674 S.E.2d at 161 (stating "[t]he . . . Act addresses discovery matters," citing section 39-8-60). Nothing in the majority opinion changes the discoverability of trade secrets under our rules of discovery and the Act as we explained in *Laffitte*.

The Fourth Circuit framed the certified question before us as whether we "recognize an evidentiary privilege for trade secrets." The label "privilege" means nothing in terms of the discoverability of trade secrets in the courts of South Carolina. However, as the Fourth Circuit states in its order certifying the question, "the answer [to the certified question] will determine whether federal or state law applies to the discovery of trade secrets in this diversity action." Ordinarily, the federal court's reason for asking a certified question is not our concern. Here, however, it helps us frame our answer to know that we are not being asked "what is the law," but simply what to call it.

In my opinion, regardless of the label we might place on the provisions of the Act, its provisions applicable to this dispute are rules of discovery. *See Laffitte*, 381 S.C. at 475, 674 S.E.2d at 162 (stating section "39-8-60 does not improperly limit the operation of Rule 26, but rather is consistent with Rule 26 in that both provide for reasonable restrictions on the discovery of trade secrets. The . . . Act therefore does not supplant, but rather complements, Rule 26(c)."). Federal courts apply their own discovery rules, an obvious principle of law that is the premise of the Fourth Circuit's question. Thus, the answer to the certified question is "No."

Section 39-8-60 of the Act—the provision the majority finds creates a privilege—is actually a rule of discovery. First, the section is entitled, "Preservation of secrecy *during discovery* proceedings of civil actions; substantial need defined." § 39-8-60 (emphasis added). Second, subsection 39-8-60(A) specifically addresses the application of the Act "in connection with discovery proceedings." § 39-8-

60(A). Third, the discoverability of trade secrets depends on the variable concept of "substantial need." § 39-8-60(B). This pivotal provision—clearly dependent on the circumstances of the case being litigated, as opposed to the trade secret holder's rights under the Act—is a rule of discovery. As the term substantial need is defined in the Act, whether it exists depends on the individual circumstances of each case. These are circumstances the presiding judge must determine during discovery. Fourth, subsection 39-8-60(E) requires a protective order, which by necessity will be entered pursuant to the discovery provisions of the applicable Rules of Procedure. *See* Rule 26(c), Fed. R. Civ. P. (governing the entry of discovery protective orders). Fifth, subsection 39-8-60(F) contemplates whether a "[l]itigation-sharing order" may be entered, an issue that arises only as a part of discovery. In respect to litigation sharing orders, South Carolina does not have the power to supersede provisions of federal law that encourage sharing information obtained in discovery.[6] Thus, while subsection 39-8-60(F) is applicable in state court litigation, it cannot govern how federal courts treat sharing of discovered information.

The majority opinion explains—accurately—how those provisions work in the discovery phase of state court litigation. In the discovery phase, the determination of whether information must be produced is ultimately the responsibility of the trial court. In contrast—as the majority explains—the concept of "privilege" places the determination of whether to produce information in the hands of the holder of the privilege. *See generally Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "privilege" as, "An evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship.").

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[6] *See, e.g.*, National Highway Safety Administration Docket No. 2015-95, 80 Fed. Reg. 57046, 57047 (Sept. 15, 2015) (stating "[t]o the extent protective orders . . . or other confidentiality provisions prohibit vehicle safety-related information from being transmitted to NHTSA, such limitations are contrary to established principles of public policy and law"); *Charter Oak Fire Ins. Co. v. Electrolux Home Prods.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012) ("[A]llowing the sharing of discovery among related cases is an efficient and effective means of avoiding duplicative and costly discovery, as well as avoiding unnecessary delay in the adjudication of cases."); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 221 (D. Mont. 1986) ("[A]ny information obtained by plaintiff through the discovery process may be shared with counsel in similar cases without restriction.").

This contrast is important. Thus, the majority places emphasis on its belief that the Act "is designed to protect trade secrets before, during, and after litigation." But this statement is only partially accurate. Certainly the Act protects trade secrets from misappropriation *by others* at all times, but the Act protects *the privilege holder's* right to refuse disclosure only in the discovery phase of a civil lawsuit. The majority states "the protections afforded by section 39-8-60—namely, that the holder of a trade secret may refuse to disclose it—are the quintessence of a privilege." However, our Trade Secrets Act permits the refusal to disclose a trade secret *only* in one context: the discovery phase of a civil action. The Act contains no provision allowing the holder of a trade secret to refuse to disclose it in the face of any other lawful authority.

The "quintessence" of privilege, however, permits the refusal of disclosure in the face of *all* lawful authority. For example, a person may refuse to disclose in criminal court privileged communications with his attorney. The marital privilege—upon which the majority relies for the notion that a statute need not use the word "privilege" to create one—applies in all courts. *See State v. Copeland*, 321 S.C. 318, 323-24, 468 S.E.2d 620, 624 (1996) (discussing the application of the marital privilege in criminal court). The same is true of the news media privilege, which applies "in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought." S.C. Code Ann. § 19-11-100(A) (2014). A so-called privilege that applies only in the discovery phase of a civil lawsuit is not a privilege; it is a rule of discovery.

Finally, I believe the language of subsection 39-8-60(C) refutes the majority's finding that the Legislature intended to create a privilege. The subsection provides,

> Direct access to computer databases containing trade secret information, so-called "real time" discovery, shall not be ordered by the court unless the court finds that the proponent of the discovery cannot obtain this information by any other means and provided that the information sought *is not subject to any privilege*.

The subsection clearly contemplates that a court might find trade secret information "is not subject to any privilege." However, that could not be possible if the Legislature already made the information privileged by passing the Act.

No matter what label is applied to the discovery provisions of the South Carolina Trade Secret Act, they are discovery provisions, and federal courts apply their own

rules of discovery. The answer to the Fourth's Circuit's question whether it should apply state law to this discovery dispute is "No."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brandon Garren, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2015-000756

ON WRIT OF CERTIORARI

Appeal from Pickens County
Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Opinion No. 27794
Submitted September 27, 2017 – Filed April 25, 2018

REVERSED

Attorney General Alan Wilson and Assistant Attorney General Ruston W. Neely, both of Columbia, for Petitioner.

Appellate Defender David Alexander, of Columbia, for Respondent.

JUSTICE KITTREDGE: Respondent Brandon Garren pled guilty to assault and battery of a high and aggravated nature (ABHAN) and criminal domestic violence of a high and aggravated nature (CDVHAN) in connection with a series of brutal

attacks on his live-in girlfriend (Victim). He was sentenced to concurrent prison terms of fifteen years and ten years, respectively. No direct appeal was taken. Garren then filed an application for post-conviction relief (PCR). The PCR court granted relief, finding plea counsel was ineffective for failing to obtain a competency evaluation prior to Garren's guilty plea and that Garren's plea was involuntary due to his use of medication. We reverse and reinstate Garren's guilty plea and sentence.

I.

In January 2012, the Pickens County Sheriff's Office responded to a call and found Garren screaming at the Victim with a pistol in his pocket. The Victim was crying and had visible injuries. The Victim stated Garren repeatedly struck her and swung an ax at her head, barely missing her. The responding officers found an ax on the premises and saw a hole in the wall which the Victim indicated occurred when Garren swung the ax at her head. The Victim also indicated Garren had pointed the gun at her when she called law enforcement.

Thereafter, in June 2012, the Sheriff's Office responded to another call, this time from neighbors, who heard the Victim screaming and noticed the Victim outside, badly beaten and partially clothed, wandering in the yard while holding her pants. The Victim told deputies she and Garren had been apart, but Garren picked her up and held her against her will for a week, threatening to kill her if she left and beating her repeatedly over the last two days.

This attack began in the bathroom, where Garren forced unknown pills down the Victim's throat and asked her if she wanted to die. Then Garren submerged the Victim in the bathtub and told her that he was authorized, as her husband, to beat her. Garren tied up the Victim and dragged her throughout the house, beating her with golf clubs, wine bottles, a medicine cabinet, a toaster oven, a lantern, and a belt, all of which were recovered from the scene. The Victim believed she was going to die, so she encouraged Garren to take some pills, which eventually caused him to pass out. At that point, the Victim grabbed her clothes and tried to escape, but she could not see due to her facial swelling, and she was found wandering along a fence by neighbors who heard her screams and called police.

The Victim's injuries were extensive. Her eyes were swollen shut and her face was severely beaten, with broken bones requiring multiple facial reconstructive

surgeries. She had blood and glass throughout her hair, and her hair had to be cut off to remove the debris. The Victim also required dental reconstructive surgery to replace the teeth knocked out during the attacks, and she underwent neurological evaluations due to the extreme nature of her injuries and resulting trauma. When law enforcement arrived, the Victim was transported to the Intensive Care Unit in Greenville.

As a result of these incidents, Garren was charged with attempted murder, kidnapping, CDVHAN, and pointing and presenting a firearm, and Garren retained counsel to represent him. Garren faced up to a total of eighty-five years in prison—up to thirty years each for the attempted murder and kidnapping charges; up to twenty years for the CDVHAN charge; and up to five years for the firearm charge. *See* S.C. Code Ann. § 16-3-29 (attempted murder); *id.* § 16-3-910 (kidnapping); *id*. § 16-25-65(B) (CDVHAN); *id*. § 16-23-410 (pointing and presenting). Following plea counsel's negotiations with the State, Garren entered a "straight up" guilty plea to CDVHAN and the lesser charge of ABHAN. The more serious charges (and the firearm charge) were dropped.

During the plea proceeding, the assistant solicitor stated "[the victim's] face was beaten worse than any woman's face I've ever seen. I've never seen anything like that." Garren informed the plea judge that he understood the offenses to which he was pleading guilty; the constitutional rights, as enumerated by the plea judge, that he was waiving; and the possible sentences that could be imposed. Garren stated he had discussed his situation with plea counsel and that he was "most satisfied" with counsel's services. Notably, Garren confirmed he was not under the influence of any drugs or alcohol and that no one promised him anything or forced him to plead guilty.

During the plea hearing, plea counsel told the judge that Garren suffered from various physical health problems and that Garren "obviously has some mental problems." Counsel claimed that at the time of the incidents, both Garren and the Victim abused prescription medications and that Garren had "little" memory of the incidents. However, counsel explained that since entering the detention facility, Garren was much improved, as he had "gotten off pills" and gained weight—almost fifty pounds.

Plea counsel asked the plea court to consider a three- to five-year sentence with five years' probation and substance abuse treatment; however, the plea court found

"[t]his case is beyond [the] pale" and sentenced Garren to concurrent prison terms of fifteen years for ABHAN and ten years for CDVHAN. No direct appeal was taken.

Garren filed a PCR application alleging counsel was ineffective for failing to request a mental health evaluation and that Garren's guilty plea was rendered involuntary as a result of medications he was given while in jail which impaired his ability to understand the plea proceedings. Specifically, Garren alleged:

> Due to being in a state of lethargy from medication given to me by the [P]ickens County Jail which was mind altering, and the result of medical treatment being given me by the Cancer Center of the Carolinas, The combined effects rendered me unable to, or incompetent to enter a plea.

Garren nevertheless failed to offer at the PCR hearing any evidence as to the specific medications and dosages he was administered at the Pickens County jail while awaiting trial and during the time period immediately prior to his guilty plea.

At the PCR hearing, plea counsel testified that Garren initially faced several serious charges and that the photographs depicting the Victim's extensive facial injuries were "devastating" to Garren's case. Plea counsel testified that he negotiated a reduction in charges, as well as a plea offer from the State for a total of fifteen years, which Garren rejected.

Plea counsel testified that there was no indication Garren had any mental health issues at the time of the plea that necessitated further evaluation. Plea counsel explained that he never saw the need for Garren to undergo a competency evaluation, but that he was bothered by the length of the sentence Garren ultimately received. It is abundantly clear from the record that counsel was anticipating a different plea judge. As plea counsel testified, Garren was expected to appear before a different plea judge in the morning, but Garren was not transported from jail until the afternoon. Counsel stated he firmly believed that "the switch in judges . . . added something to [Garren's] sentence. I can't say how much. But I think it did add something." Counsel stated Garren came from "a great family" and explained that, in hindsight, based on the actual sentence received:

> I really wish that we had taken the time to get a psychological evaluation. Because while I did, at that time, believe him to be competent[,] and I continue to believe he is competent, I believe there are some psychological issues that would have *mitigated his punishment* and *materially affected the sentence* that he got. And I really regret that I did not do that.

(emphasis added).

When asked if Garren seemed confused or "out of it" at the plea proceeding, counsel stated Garren's affect is always "a little bit spacey" but Garren nevertheless appeared to follow everything that was happening, and at no time did Garren indicate he did not understand what was going on.

Garren's testimony was similar to counsel's, as he, too, focused on the length of his sentence. Garren testified that he was unhappy with his sentence, specifically claiming he believed he was going to receive a sentence of two to five years, plus probation, but that fell through when he "got the wrong judge." Garren admitted that plea counsel never promised Garren he would receive a two- to five-year sentence. And the plea judge, in a thorough guilty plea colloquy, explained the potential sentence Garren was facing.

While it is manifest the focus of Garren's PCR is the length of his sentence, he may not challenge a lawful sentence merely because he was hoping for a more lenient one. Garren, of course, understands that, and he has postured his PCR on the basis that his plea counsel was ineffective for failing to request a competency evaluation. Garren is uncertain whether he ever requested a competency evaluation, but he thinks his mother may have asked for one. Garren's mother did not testify at the PCR hearing, and Garren offered no evidence of what a mental health evaluation would have shown had one been sought prior to his guilty plea.

As to the voluntariness of his guilty plea, Garren claimed he did not understand or have any recollection of the plea proceeding itself—including that he informed the judge his plea was not induced by any promises or threats and that he was not under the influence of alcohol or drugs. As to the issue of medication, Garren testified on direct examination:

Q: Now, I know you've raised some issues in regards to your case. And one of them is dealing with medication and the effects on you regarding—understanding what was going on. Can you go into some detail about that?

A: I don't know what kind of medication they was giving me in the county. But they have a way of giving medication that's—they have a bunch of little glasses on a tray. And they just give you medicine. I don't know if they give me the wrong medicine or what they done. But I had a reaction two different times to that medicine they give me.

Q: Okay. Have you at any time ever had a mental evaluation?

A: No, sir. They never did have me one for — while I was in the county the whole time.

Q: Okay. Do you think that — did you want one, or ever request one or talk to [plea counsel] about that?

A: I think my mother had requested to get one.

Q: Okay, I guess —and what I'm trying to understand, did you understand what you were doing on the day you pled guilty?

A: No, sir.

Q: Okay. Did you ever explain that to [plea counsel], or have a conversation with him about, I don't know what I'm doing, what I'm pleading guilty to or any of that?

A: [Plea counsel] told me that he wouldn't never represent me again when he come into the courtroom that day — I meant into the hallway. I reckon that was where it's at.

Garren testified further on cross-examination:

Q: Okay. So you don't recall one way or the other about what [you and plea counsel] talked about?

A: The only thing I really recall is how I got the transcript of the trial and read it myself. That's the only way I can remember what happened.

. . .

Q. Okay. So you don't remember anything about the guilty plea itself.

A. No, ma'am.

Q. Okay. So you don't remember telling the judge that no one had made any promises to you? You don't recall that?

A. No, ma'am

Q. And do you recall [ever] telling [plea counsel] that morning that you just didn't understand what was going on, or you just don't recall?

A. [Plea counsel] come in the hallway and told me he wasn't never going to represent me again.

Q. Okay. So you recall that conversation with [plea counsel], you just don't remember anything else about the plea?

A. That's it.

This testimony was the only evidence Garren offered in support of his claim that his plea was affected by medication. Although Garren's PCR application identified his medical records as further support for this claim, Garren did not offer into evidence his medical records or any information indicating he took medication *on the day of the plea* or identifying the type, dosage, or potential mind-altering

effects of the medication(s) which he claimed rendered him incompetent to enter a guilty plea. Further, Garren offered no testimony or other evidence indicating that he would not have entered a guilty plea but for the influence of medication.

Nevertheless, the PCR court granted relief, concluding plea counsel was deficient for failing to seek a competency evaluation before Garren pled guilty and finding that Garren's guilty plea was entered involuntarily due to "the influence of medication which affected [Garren's] ability to understand what he was doing on the day of his plea." This Court granted the State's petition for a writ of certiorari to review the PCR court's decision.

II.

This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them. *Caprood v. State*, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). However, this Court will reverse the PCR court's decision when it is controlled by an error of law or unsupported by the evidence. *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

The State now argues this Court should reverse because there is no evidence in the record to support the PCR court's findings that (1) counsel was ineffective in not obtaining a competency evaluation; and (2) that Garren was unable to understand the plea proceeding due to medication. We agree and reverse.

A.

"There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Alexander v. State*, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991)). "Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (citing *Strickland*, 466 U.S. at 687; *Alexander*, 303 S.C. at 541–42, 402 S.E.2d at 485).

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is

usually, but not invariably, foreclosed." *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea. *See Jamison v. State*, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

"[W]hen establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the plea." *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017) (internal marks omitted) (quoting *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)); *see Matthews v. State*, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004) ("Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea.") (citing *Jeter*, 308 S.C. at 232, 417 S.E.at 595–96); *see also id.*, 308 S.C. at 232, 417 S.E.2d at 596 ("The test of competency to enter a plea is the same as required to stand trial. The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." (citations omitted)).

As to the deficiency prong of the *Strickland* analysis, the State correctly argues that there is no evidence in the record that plea counsel's failure to seek a competency evaluation fell below an objective standard of reasonableness. To the contrary, plea counsel testified that, based on his interactions with Garren, a competency evaluation was unnecessary; that counsel believed Garren was competent at the time of the plea; and that he continued to believe Garren was competent. *Compare Jeter*, 308 S.C. at 232–33, 417 S.E.2d at 596 (finding counsel acted reasonably in relying on his own perceptions of a defendant's competency), *with Ramirez*, 419 S.C. at 22–23, 795 S.E.2d at 845–46 (finding plea counsel was deficient in failing to seek an independent competency evaluation where plea counsel was "clearly on notice" the defendant had mental health issues based on his own personal interactions with the defendant, as well as a previous psychological evaluation identifying several mental health issues). Because the record contains no evidence to support a finding that counsel's decision not to seek a competency evaluation fell

below reasonable professional norms, the PCR court erred in finding counsel was deficient.

Likewise, there is no evidence in the record to support the PCR court's findings as to the prejudice prong of the *Strickland* analysis. Garren presented no evidence to demonstrate a reasonable probability that he would have been found incompetent to enter a guilty plea had a competency evaluation been conducted. *Cf. Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (holding prejudice from trial counsel's failure to procure and present evidence cannot be shown where the omitted evidence is not presented at the PCR hearing). Indeed, without *any* proof that Garren suffered from identifiable mental health issues that undermined his competency to plead guilty, any claim of prejudice is purely speculative. *See id.* (observing mere speculation and conjecture by the applicant is insufficient to establish the allegation that counsel's deficient performance resulted in prejudice); *Jeter*, 308 S.C. at 233–34, 417 S.E.2d at 596 (explaining that an applicant asserting counsel was ineffective in failing to procure a mental evaluation must show there is a reasonable probability that he would have been determined to be incompetent at the time of the plea). There is no evidence to support the PCR court's prejudice finding.

B.

The State further claims the PCR court erred in finding Garren's guilty plea was entered involuntarily as a result of Garren's medications, which he claimed impaired his ability to enter a voluntary guilty plea. We agree.

Before a defendant may plead guilty, it must be established that the defendant is competent and that the defendant's decision to plead guilty is a knowing and voluntary one. *Sims v. State*, 313 S.C. 420, 423–24, 438 S.E.2d 253, 254–55 (1993) (citing *Godinez v. Moran*, 509 U.S. 389, 398–01 (1993)). The test for competency is the same whether a defendant pleads guilty or goes to trial—namely, "whether the defendant has the present ability to consult with his attorney with a reasonable degree of rational understanding" and the requirement that the defendant "have a rational as well as a factual understanding of the proceedings against him." *Id*. at 422–23, 438 S.E.2d 254.

"The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." *Godinez*,

509 U.S. at 401 n.12 (citing *Drope v. Missouri,* 420 U.S. 162, 171 (1975) (observing that a defendant is incompetent if he "lacks the *capacity* to understand the nature and object of the proceedings against him") (emphasis added)). "The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id*. (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

"That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process." *United States v. Savinon-Acosta*, 232 F.3d 265, 268 (1st Cir. 2000) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). "Common sense, backed by ample case law, suggests that medication can in some circumstances affect a defendant's mental state to a degree that undermines the defendant's ability to enter a voluntary plea." *Id*. "The critical question is whether the drugs—if they have a capacity to impair the defendant's ability to plead—have in fact done so on this occasion." *Id*. (citing *Miranda-Gonzalez v. United States*, 181 F.3d 164, 166 (1st Cir. 1999)) (holding that the plea court, upon learning a defendant has recently taken medication, should conduct an inquiry "to identify which drugs a defendant is taking, how recently they have been taken and in what quantity, and (so far as possible) the purpose and consequences of the drugs in question").

If a PCR applicant claims his guilty plea was involuntary due to the influence of medication, he must show "that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights, and of realizing the consequences of his plea." *United States v. Truglio*, 493 F.2d 574, 578 (4th Cir. 1974) (quotation marks and citation omitted). A PCR court must consider "objective data" about the nature and effect of the medication the defendant had taken and evaluate whether such medication "had the capability to produce a sufficient effect on his mental faculties to render him incompetent to enter a guilty plea." *United States v. Damon*, 191 F.3d 561, 565 (4th Cir. 1999) (recognizing that not all medication will influence a defendant's mental state to the point that the guilty plea must be invalidated) (citation omitted).[1] "The dispositive

[1] The dissent characterizes our reliance upon *Truglio* and *Damon* as being misplaced, portraying these cases as being procedurally distinguishable and underpinned by Rule 11 of the Federal Rules of Criminal Procedure. Our inquiry,

feature of this inquiry is whether the medication is in fact causing such an impairment." *United States v. Caramadre*, 807 F.3d 359, 368 (1st Cir. 2015).

"In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." *Jeter*, 308 S.C. at 232, 417 S.E.2d at 596 (citing Rule 71.1, SCRCP). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber*, 371 S.C. at 558, 640 S.E.2d at 886 (citation omitted).

Nothing in the guilty plea transcript suggest Garren was under the influence of drugs or otherwise dispossessed of his mental faculties at the time the guilty plea was entered. To the contrary, Garren informed the plea court, under oath, that he was *not* under the influence of any drugs or alcohol.[2] Likewise, plea counsel testified at the PCR hearing that, at the time of the guilty plea, Garren's affect was not unusual and that Garren appeared to understand the proceedings, never saying or doing anything to suggest otherwise.[3] Indeed, the only evidence in the record supporting Garren's claim is his own PCR testimony that he was given some

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however, is substantive rather than procedural in nature. Indeed, "[t]he question of an effective waiver of a federal constitutional right in a [plea] proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S.238, 243 (1969). Because Rule 11 embodies procedural safeguards designed to ensure compliance with substantive standards established by the United States Constitution, we find *Truglio* and *Damon* to be persuasive. *See McCarthy*, 394 U.S. at 465 (observing Rule 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" (footnotes omitted)).

[2] We note some courts find this dispositive. *United States v. Rivera*, 191 F. App'x 309, 311 (5th Cir. 2006) (refusing to consider documents and medical evidence contradicting defendant's sworn statements during plea colloquy that he was not under the influence of any medications at the time of the plea).

[3] *See United States v. Hardimon*, 700 F.3d 940, 943 (7th Cir. 2012) (observing a "combination of deeply confused or clouded thinking with coherent speech and normal demeanor is rare").

unidentified medication at some point while he was in jail and that he did not recall or understand the plea proceedings.

Even under our deferential standard of review, this testimony alone is insufficient to establish that Garren's guilty plea was entered involuntarily.[4] Garren's testimony establishes, at most, that Garren was administered one or more unknown medications in jail at some unknown point in time prior to pleading guilty. These vague assertions fall short as a matter of law. *See Sims*, 313 S.C. at 424, 438 S.E.2d at 255 (observing that certain medications enhance, rather than diminish, a defendant's "demeanor, emotional responses, cognitive skills, and ability to comprehend and communicate"); *see also Weeks v. State*, 341 S.W.3d 701 (Mo. Ct. App. 2011) ("The mere ingestion of drugs is insufficient to render a person incapable of pleading guilty, and the recent ingestion of drugs does not invalidate a plea of guilty where the ability of the defendant to understand and give free assent to the conviction remain unimpaired.").

Indeed, the record is utterly devoid of any evidence that Garren had taken any medication *on the day he pled guilty* or that he was, as the PCR court found, "under the influence of medication which affected his ability to understand what he was doing on the day of his plea." Absent any evidence that Garren's ability to understand the guilty plea proceeding was diminished by the mind-altering effects of one or more specific medications, Garren has failed to meet his burden of proving his plea was constitutionally infirm, and his claim fails as a matter of law. *See, e.g.*, *Anderson v. United States*, 865 F.3d 914, 920 (7th Cir. 2017) (finding a defendant's statement that he was taking unspecified psychotropic drugs, without additional information about "exactly *what* drugs [the defendant] was on, and how they affected his cognition," was an insufficient basis for the court to evaluate the defendant's competency to enter a plea); *United States v. Carter*, 795 F.3d 947, 951–55 (9th Cir. 2015) (rejecting a defendant's claim that his guilty plea was entered involuntarily where he failed to "explain how the medications at issue would have impacted his ability to enter a plea knowingly and voluntarily");

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[4] The dissent's position is anchored on this Court's highly deferential standard of review. While we acknowledge the deference owed the PCR court, deference to a credibility finding is not the issue. The lack of evidence is. Even if we defer to implicit credibility findings, as urged by the dissent, there is zero evidence in the record to support the PCR court's finding that Garren's guilty plea was *influenced* by any type of medication.

United States v. Yang Chia Tien, 720 F.3d 464, 470 (2d Cir. 2013) (characterizing the lack of information as to the potential effects of medications a defendant had taken and whether those medications could impact the defendant's understanding of the proceedings as a "critical omission"); *Miranda-Gonzalez v. United States*, 181 F.3d 164, 165 (1st Cir. 1999) (explaining "[w]hen, as now, a defendant wishes to have his plea declared invalid due to his use of prescription medication or illicit drugs, the mere fact that [he] took potentially mood-altering medication is not sufficient to vitiate his plea. Rather, he must show that the medication affected his rationality." (internal citations, alterations, and quotation marks omitted)); *United States v. Browning*, 61 F.3d 752, 754–55 (10th Cir. 1995) (placing the onus on a defendant to demonstrate that the medication in question affected his "ability to think or comprehend" and rejecting the claim that his guilty plea was involuntary due to medications in light of "the complete absence of evidence that his ability to enter a knowing and voluntary plea was affected by the medications"); *United States v. Dalman*, 994 F.2d 537, 539 (8th Cir. 1993) (rejecting a defendant's claim that his guilty plea was involuntarily entered, observing "there is nothing in the record to indicate that [the defendant] was not fully in possession of his faculties during the [plea] proceedings" and noting the defendant's "performance during the plea hearing is inconsistent with his after-the-fact claim that he did not understand the proceeding").

III.

We reverse the PCR court's findings and reinstate Garren's convictions and sentences.

REVERSED.

BEATTY, C.J., and HEARN, J., concur. FEW, J., concurring in a separate opinion. JAMES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE FEW: I concur in the result reached by the majority. I write separately to explain the narrow points of disagreement I have with the majority's analysis.

As to Garren's claim that plea counsel should have sought a mental health evaluation before he pled guilty, I agree with the majority's analysis of the prejudice prong of *Strickland*, and its conclusion that "any claim of prejudice is purely speculative." However, I disagree with the majority's conclusion that Garren failed to prove deficiency under the first prong of *Strickland*.

I begin with my belief that the PCR court's finding of deficiency was not so narrow as the majority suggests. The PCR court found "trial counsel should have requested that [Garren] have a psychological evaluation before [he] pled guilty." In disagreeing with the majority as to deficiency, I am not contending counsel was required to have a "competency evaluation." Rather, focusing on what I believe was the finding of the PCR court, the issue before us is whether counsel was obligated to get some professional input to assist counsel in understanding how to most effectively defend Garren in light of his obvious mental health issues.

As to the merits of this issue, the evidence supports the PCR court's finding that counsel was deficient in not seeking this assistance. The majority recites most of this evidence in its excellent and detailed description of the brutality of this crime. In addition to this evidence, Garren told the victim during the crime sequence he was the Apostle Paul and he baptized her. Plea counsel stated at the plea hearing that Garren "obviously had some mental problems," and at the PCR trial, "I really wish that we had taken the time to get a psychological evaluation." The victim's brother told the plea court, "I can only think that a man that would want to do this would have to be mentally disturbed." In the face of these facts, the PCR court's finding that plea counsel was deficient in failing to seek some input from some professional as to the nature and extent of Garren's obvious mental problems and the role they may have played in the events of those terrible days is amply supported by the evidence. As the majority states, "This Court will uphold the [factual] findings of the PCR court when there is any evidence of probative value to support them." *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

As to Garren's claim that his plea was involuntary, I agree with the majority the PCR court erred as a matter of law in granting relief because the evidence Garren presented the PCR court was legally insufficient. The standard of proof on this

claim is stated in *United States v. Truglio*, 493 F.2d 574, 578 (4th Cir. 1974)[5]—the applicant must show "that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation . . . ." Initially, the responsibility of determining whether the defendant is pleading guilty knowingly and voluntarily falls to the plea court. *See generally Roddy v. State*, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000) (explaining that the plea court must ensure a knowing and voluntary plea) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711-12, 23 L. Ed. 2d 274, 279 (1969)); *see also State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In this case, the record of the guilty plea is devoid of any meaningful dialogue between the plea court and the defendant from which the plea court could have made the required determination. The longest answer Garren gave to any question asked by the plea court was literally, "yes ma'am," except that when asked whether he was satisfied with his lawyer, he added, "I'm most satisfied."

Nevertheless, there is nothing in this guilty plea transcript that indicates an invalid plea. When asked whether he was under the influence of any drugs or alcohol, Garren responded, "No." As the majority points out, plea counsel testified at the PCR hearing he observed nothing unusual about his client at the plea, and Garren appeared to understand what he was doing. Therefore, there was nothing the plea court could have observed that indicated Garren was not pleading guilty voluntarily. On its face, this was a valid guilty plea.

The State has a compelling interest in maintaining the finality of a valid guilty plea. *See Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014) (stating "a valid guilty plea must be treated as final in the vast majority of cases" and citing *McMann v. Richardson*, 397 U.S. 759, 773, 90 S. Ct. 1441, 1450, 25 L.Ed.2d 763, 775 (1970), for the State's "compelling interests in maintaining the finality of guilty-plea convictions validly obtained"). To overcome this compelling interest, it is the applicant's burden to demonstrate the plea was not valid. Garren testified at the PCR trial that he *might* have taken an *unnamed* medication that *possibly* had *unknown* side effects, as a result of which he did not know what he was doing when he pled guilty. This testimony tells us nothing about the validity of the plea.

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[5] It is a federal standard, arising under the Due Process Clauses of the Fifth and Fourteenth Amendments. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

Even if the PCR court did find the testimony to be credible, the testimony is legally insufficient to support the invalidation of his plea.

The Due Process standard set forth in *Truglio* requires more than the applicant's unsupported testimony that he did not know what he was doing when he pled guilty. This is the basis of the Fourth Circuit's reliance on "objective data" in *United States v. Damon*, 191 F.3d 561 (4th Cir. 1999). Under *Truglio* and *Damon*, he must prove—certainly through expert testimony—that specific medication with explained side effects "had the capability to produce a sufficient effect on his mental faculties to render him incompetent to enter a guilty plea." *Damon*, 191 F.3d at 565 (citing *Truglio*, 493 F.2d at 578). Because Garren utterly failed to meet this standard of proof, the PCR court erred as a matter of law in granting him relief.

JUSTICE JAMES: I concur in part and dissent in part. I agree with the majority's conclusion that the PCR court erred as a matter of law in concluding Garren is entitled to PCR on the ground trial counsel was ineffective in not requesting a competency evaluation.

However, I respectfully disagree with the majority's conclusion that there is no probative evidence supporting the PCR court's factual finding that Garren had established he was under the influence of medication and did not understand the effect of his guilty plea. I believe this Court's standard of review in PCR cases requires us to affirm the PCR court's grant of relief on this ground. *See Smith v. State*, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) ("In reviewing the PCR [court's] decision, an appellate court will uphold the PCR court if any evidence of probative value supports the decision."); *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) ("The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law."); *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) ("This Court gives great deference to a PCR [court's] findings [of fact] where matters of credibility are involved.").

I agree the facts of this case are disturbing, and the injuries sustained by the victim were horrific. However, these facts have nothing to do with whether Garren's guilty plea was voluntary. Whether the fifteen-year aggregate prison term imposed upon Garren was harsh or lenient and whether he was expecting to plead in front of a different judge are likewise irrelevant to our analysis of the issues before us. The majority cites its perception that the focus of Garren's PCR claim is his displeasure with his fifteen-year aggregate sentence. That may be true, but Garren's motivation in pursuing PCR is something to be considered by the PCR court in its evaluation of all the evidence, not by this Court. Otherwise, we would be weighing evidence, which is not within our province in a PCR case. The PCR court could have easily considered these facts, concluded Garren's overall testimony was not credible, and concluded Garren had not met his burden of proof. However, the PCR court sifted through all the evidence—including Garren's self-serving testimony—and concluded he had proven he did not enter his plea voluntarily.

I must add that many might consider the fifteen-year sentence imposed to be relatively light under the circumstances. Presumably, Garren is aware that if the PCR court's decision is upheld, on remand the kidnapping and weapon charges would be reinstated, the ABHAN charge would return to the indicted greater

offense of attempted murder, the CDVHAN charge would remain in place, and he would be facing a much harsher aggregate sentence than that imposed by the plea court.

The PCR court found Garren "was under the influence of medication which affected his ability to understand what he was doing on the day of his plea." The evidentiary support, however slight, for this factual finding is Garren's own testimony at the PCR hearing. I respectfully disagree with the majority's conclusion that the PCR court did not find Garren's testimony to be credible. While the PCR court did not explicitly state it found Garren's testimony to be credible or not to be credible, the PCR court did note it had the opportunity to observe each witness who testified at the hearing, was able to "closely pass" upon their credibility, and weighed their testimony accordingly. Garren testified:

> I don't know what kind of medication they was giving me in the county [jail]. But they have a way of giving medication that's -- they have a bunch of little glasses on a tray. And they just give you medicine. I don't know if they give me the wrong medicine or what they done. But I had a reaction two different times to the medicine they give me.

Garren testified he did not know what he was doing when he pled guilty. Although self-serving, his testimony is still probative evidence to support the PCR court's ruling that Garren's guilty plea was involuntary due to the medication he was given in jail. *See Davie v. State*, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009) (providing that depending on the facts of a case, self-serving testimony may be sufficient).

Because the PCR court granted Garren relief based upon the evidence before it, and because Garren was the only witness who testified he was under the influence of medication and did not understand the effect of his guilty plea, the PCR court undeniably deemed his testimony credible. I believe Garren's self-serving testimony—believed by the PCR court—constitutes probative evidence in support of the PCR court's ruling that Garren's guilty plea was involuntary due to the medication he was given in jail.

The majority cites *United States v. Truglio* for the proposition that Garren was required to prove to the PCR court "that his mental faculties were so impaired by

drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights, and of realizing the consequences of his plea." 493 F.2d 574, 578 (4th Cir. 1974) (quotation marks and citation omitted). That is precisely what Garren established to the satisfaction of the PCR court, the only tribunal in a position to evaluate Garren's credibility on this most crucial issue. In *Truglio*, the Fourth Circuit held the record supported the district court's factual finding that the defendant was "alert and very well possessed of his faculties" at the time he entered his guilty plea. *Id.* at 579. Here, our standard of review requires us to honor the PCR court's factual finding that Garren was *not* well possessed of his faculties at the time of his plea.

The majority relies upon *United States v. Damon* for the proposition that Garren had the burden of presenting objective data to the PCR court establishing the nature and effect of the medications Garren had taken, and that Garren was required to present evidence the medication "had the capability to produce a sufficient effect on his mental faculties to render him incompetent to enter a guilty plea." 191 F.3d 561, 565 (4th Cir. 1999). In *Damon*, while entering a guilty plea to a murder charge, the defendant Damon advised the plea court that he was taking an antidepressant drug; his lawyer advised the plea court that one side effect of the drug was impaired judgment. *Id.* at 563. After Damon was sentenced to life in prison, he moved to vacate his plea on the ground that he entered the plea involuntarily due to the medication he was taking. *Id.* The plea court denied the motion. *Id.* Damon appealed, claiming the plea court had a duty, when informed he was taking the medication, to conduct further inquiry into the effect the drug had on his ability to voluntarily enter the plea. *Id.* at 564.

I believe the majority's reliance upon *Damon* is misplaced. The Fourth Circuit's resolution of Damon's appeal was primarily dependent upon its analysis of the plea court's adherence to Rule 11 of the Federal Rules of Criminal Procedure, which admittedly requires inquiry into a pleading defendant's ingestion of medication. The Fourth Circuit concluded the plea court erred in failing to conduct further inquiry into the effect Damon's ingestion of the antidepressant drug had upon the voluntariness of his plea and remanded to the plea court, holding that Rule 11 required such further inquiry. *Damon*, 191 F.3d at 566. In the instant case, Garren's assertion that his plea was involuntary is properly included as part of his claim for PCR, not as part of a motion to vacate his plea for a Rule 11 deficiency. We have never before held or even intimated that a PCR applicant is required to present objective data regarding the properties, combinations, and effects of drugs

to establish he did not voluntarily enter a guilty plea. I would hold the PCR court was entitled to rely solely upon Garren's self-serving testimony. If the PCR court had ruled Garren's testimony on this point was not credible and rejected his PCR claim for the very reasons cited by the majority, our standard of review would have required us to affirm in that instance as well. At the very least, if the majority deems *Damon* to be binding on the point, a remand to the PCR court would be in order, as that was the result ordered by the Fourth Circuit in *Damon*.

In *State v. Rosier*, 312 S.C. 145, 146, 439 S.E.2d 307, 308 (Ct. App. 1993), the defendant pled guilty to assault and battery with intent to kill. Three days later, he moved to withdraw his plea, alleging that when he pled guilty, he was under the influence of Darvocet and Valium to the extent that he was unable to enter a knowing and voluntary plea. *Id.* at 147-48, 439 S.E.2d at 309. The defendant testified at the motion hearing held three days after his plea. *Id.* at 149, 439 S.E.2d at 310. The circuit court denied the motion to withdraw the plea, finding the defendant was not under the influence of his medications to the extent that he did not voluntarily enter his plea. *Id.* In so finding, the circuit court stated it did not believe the defendant's testimony at the motion hearing and concluded the defendant was "faking." *Id.* The court of appeals affirmed, noting the plea judge had the opportunity to observe the defendant at the plea hearing and at the motion hearing. *Id.* The court of appeals—correctly in my view—yielded to the simple premise that "[t]he determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." *Id.*

The majority concludes nothing in the *plea* transcript suggests Garren was "under the influence of drugs or otherwise dispossessed of his mental faculties" at the time of his plea. I submit this is of no consequence. In *Hyman v. State*, 397 S.C. 35, 39, 723 S.E.2d 375, 376-77 (2012), the PCR applicant pled guilty to a drug distribution offense. In his PCR action, the applicant maintained he entered his plea involuntarily because he was not allowed to view the videotape of the alleged drug transaction. *Id.* at 42, 723 S.E.2d at 378. The PCR court concluded the applicant's testimony was not credible and denied relief. *Id.* at 41, 723 S.E.2d at 378. We affirmed, citing *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994), for the proposition that an appellate court's deference to a PCR judge's credibility findings is so great that this Court is required to uphold the PCR judge's determination "*even where testimony at [the] PCR hearing was unequivocally contradicted by the trial record*." *Hyman*, 397 S.C. at 45, 723 S.E.2d at 380 (emphasis added).

I would affirm the PCR court's decision to grant Garren's application for relief.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Lancaster County. Effective May 15, 2018, all filings in all common pleas cases commenced or pending in Lancaster County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Chester
Clarendon	Colleton	Edgefield	Fairfield
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Laurens
Lee	Lexington	McCormick	Newberry
Oconee	Pickens	Richland	Saluda
Spartanburg	Sumter	Union	Williamsburg
York	**Lancaster—Effective May 15, 2018**		

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
April 23, 2018

The Supreme Court of South Carolina

Sara Y. Wilson, Respondent,

v.

Charleston County School District, Petitioner.

Appellate Case No. 2017-001569

ORDER

Petitioners and respondents have filed a joint motion seeking dismissal of their petition for a writ of certiorari to the Court of Appeals, indicating they have entered into a final settlement agreement with respondents, and they additionally ask the Court to vacate the opinion of the Court of Appeals in *Wilson v. Charleston County School District*, 419 S.C. 442, 798 S.E.2d 449 (Ct. App. 2017). We grant the motion and hereby dismiss the petition for a writ of certiorari and vacate the opinion of the Court of Appeals.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

April 19, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brian Morin, Respondent,

v.

Innegrity, LLC, Appellant.

Appellate Case No. 2014-000734

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5550
Heard September 27, 2017 – Filed April 25, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Sarah Day Hurley, of Turner Padget Graham & Laney, PA, of Greenville, for Appellant.

Adam Crittenden Bach and Robert Hudson Smith, both of Eller Tonnsen Bach, of Greenville, for Respondent.

HILL, J.: A jury awarded Brian Morin damages on his breach of contract and Wage Payment Act claims against Innegrity, LLC. Pursuant to section 41-10-80(C) of the South Carolina Code (Supp. 2017), the trial court trebled the Wage Payment Act damages, and awarded Morin prejudgment interest, costs, and attorney's fees. Innegrity appeals, arguing the trial court erred by (1) denying its judgment notwithstanding the verdict (JNOV) motion as to Morin's breach of

contract claim because it had proven the defense of impossibility, and some of the damages were speculative; (2) denying its JNOV motion on Morin's Wage Payment Act claim because the damages were unsupported by the evidence, and Innegrity established the defense of equitable estoppel; (3) trebling the Wage Payment Act award; (4) excluding Morin's deposition testimony from evidence; and (5) denying its motion for a new trial based on after-discovered evidence. We affirm all of the trial court's rulings except the trebling of part of Morin's Wage Payment Act damages.

I.

Working out of his home, Brian Morin developed a patented process for manufacturing a lightweight, high-strength synthetic fiber. In 2004, he founded Innegrity, LLC to bring the product to market. He financed Innegrity's early growth with his own funds and investments from family and friends. In 2008, Dr. Robert Schwartz invested three million dollars in Innegrity. In exchange, Morin transferred ownership of the intellectual property to the company and signed an Employment Agreement (Agreement) governing his rights and responsibilities as President and CEO. The Agreement included the company's promise to remove Morin as guarantor on any of Innegrity's loans if he were fired "without cause."

Despite the influx of funds, the company suffered from the severe recession that began in 2008. As money woes persisted, Innegrity's Board instructed Morin to "stretch" the company's cash. To avoid layoffs, in April 2009 Morin and other key employees signed letters agreeing to reduce their salaries by certain percentages, which they would recoup as a bonus once the company raised another one million dollars. Upon reaching the goal in September 2010, Morin and the others signed a second agreement delaying the bonus payout until collection of another two million dollars.

The lingering recession, chronic undercapitalization, and Board turnover increased pressure on Innegrity. To finance equipment Morin valued at 2.5 million dollars, in 2008, Innegrity borrowed 1.4 million dollars from BB&T in exchange for a first lien on equipment and a personal guarantee by Morin. Morin also guaranteed a loan to Innegrity from Appalachian Development Company (ADC) and engaged the investment firm McGladrey Capital to search for other funding. In addition, Morin

was instrumental in securing substantial grants from the National Science Foundation (NSF) and South Carolina Launch.

In 2009, an ex-Innegrity employee approached a Board member and accused Morin of falsifying time records related to the NSF grant. The Board members, including Morin, voted to hire outside counsel to investigate the allegation and later self-reported to the NSF, which suspended and ultimately terminated the grant.

Around 2010, several companies became interested in purchasing Innegrity. After conducting due diligence, however, the companies withdrew. As Innegrity's cash began evaporating, its Board members began resigning, and those left were less than cohesive. At an early November 2010 Board meeting, a motion to terminate Morin for cause failed. A few days later, the Board terminated Morin without cause. At the time, he owned approximately 23 percent of the company. Innegrity defaulted on the BB&T and ADC loans, and never removed Morin as guarantor. BB&T later auctioned the equipment for $700,000, and sued Morin on his guaranty.

After Innegrity refused to pay his severance, back pay, and other monies, Morin brought this lawsuit. At the jury trial, he sought damages for Innegrity's alleged breach of contract and violation of the Wage Payment Act. Innegrity counterclaimed for breach of fiduciary duty, breach of duty of loyalty, and equitable estoppel. The jury awarded Morin $308,456 for breach of contract (including $150,000 for the BB&T loan) and $73,230 on his Wage Payment Act claim. After a post-trial hearing, the trial court trebled the Wage Payment Act damages and awarded prejudgment interest, attorney's fees, and costs.

II.

Innegrity challenges the denial of its JNOV motion on Morin's claim for breach of the contract provision requiring Innegrity to remove Morin as guarantor on the BB&T and ADC loans, contending performance was impossible.

We review a JNOV ruling in an action at law using the same yardstick as the trial court: presuming credibility of the evidence, we measure it in the light most favorable to Morin and gauge whether there is enough evidence as to each element of the claim to allow a rational jury to find in Morin's favor. If there is, the motion must be denied, for when reviewing a JNOV ruling, neither trial nor appellate courts

may second-guess jury verdicts supported by reasonable evidence. S.C. Const. art. V, § 5; *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (2000).

Innegrity asserts it conclusively established its affirmative defense of impossibility of performance at trial by showing the company was insolvent at the time of Morin's termination, and BB&T and ADC had rejected their request to remove Morin from his guarantees.

The doctrine of impossibility excuses performance when "the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) (citation omitted). Innegrity bore the burden of proving impossibility by the greater weight of the evidence. *Id.*

Early cases were uniform that once a party contracted to perform an act, their later failure to perform the act promised breached the contract, unless it expressly excused performance or allocated the risk of nonperformance elsewhere. This rule is traced to *Paradine v. Jane*, 62 Eng. Rep. 897 (K.B. 1647), and its limited exceptions, as developed in the United States, were described in *Dermott v. Jones*, 69 U.S. 1, 5–6 (1864):

> [I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. . . . If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

To account for this strict liability, parties began building excuses into their contracts, but these attempted safeguards proved as imperfect as human foresight. Over time, courts elsewhere began using the doctrine of impossibility of performance to fill gaps left when parties failed to foresee and allocate catastrophic risks. But as the

Seventh Circuit notes, parties can still eschew these safeguards and agree to perform acts over which they have no control:

> [The doctrine of impossibility of performance] is just a gap filler—a guess at what the parties would have provided in their contract had they thought about the contingency that has arisen and has prevented performance or made it much more costly. As Holmes explained, "the consequences of a binding promise at common law are not affected by the degree of power which the promisor possesses over the promised event. . . . In the case of a binding promise that it shall rain to-morrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee. He does no more when he promises to deliver a bale of cotton." O.W. Holmes, Jr., *The Common Law* 299–300 (1881).

Wisconsin Elec. Power Co. v. Union Pac. R. Co., 557 F.3d 504, 506 (7th Cir. 2009) (internal citations omitted).

A leading South Carolina impossibility case involved a promise to deliver not cotton, but blackeyed peas. Not just any blackeyed peas, but "Texas New Crop U.S. 1 Blackeye peas" grown in Dilley, Texas. Our supreme court held performance of the contract was made impossible due to an act of God when torrential rains wiped out the entire Dilley crop. Citing *Dermott*, the court held performance is excused when "rendered impossible by the act of God, the law, or the other party." *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 586, 50 S.E.2d 698, 701 (1948); *see also Ordinary of Charlestown Dist. v. Corbett & Lightwood*, 1 S.C.L. 328, 323 (1793) (finding performance was made impossible by British invasion during American Revolution, reaffirming "the act of God, or of an enemy, were the highest excuses known in law for the non-performance of a contract") (Rutledge, C.J.).

Later South Carolina cases have reaffirmed, but not expanded, these limited grounds of impossibility. *See, e.g., Jones v. Bates*, 241 S.C. 189, 193, 127 S.E.2d 618, 619 (1962); *V.E. Amick & Assocs., LLC v. Palmetto Envtl. Grp., Inc.*, 394 S.C. 538, 546, 716 S.E.2d 295, 299 (Ct. App. 2011).

Some jurisdictions have modernized the doctrine of impossibility (also known as impractibility or frustration), repurposing it as a tool of equity to fill gaps or imply conditions in contracts when strict performance would be abjectly unfair or unreasonable. *See, e.g., Opera Co. of Boston v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1100 (4th Cir. 1987) ("[W]e accept as the correct statement of the modern and prevailing doctrine of impossibility of performance as a defense to a breach of contract to be essentially as equitable in character 'based [to quote Williston] on the unfairness or unreasonableness of giving [the contract] the absolute force which its words clearly state' . . . .") (alterations in original) (quoting 18 Williston on *Contracts* § 1937 at 33 (Jaeger ed., 3d ed. 1978))) (Russell, J.) (applying Virginia law); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) ("The doctrine [of impossibility] ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance."). *See also Restatement (Second) of Contracts* § 261 (Am. Law. Inst. 1981); 2 E. Allan Farnsworth, *Farnsworth on Contracts*, §§ 9.5–9.7 (3d ed. 2004).

South Carolina's only nod to the modern trend appears in our commercial code, which in the limited context of sales of goods excuses compliance with contract terms "if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made." S.C. Code Ann. § 36-2-615(a) (2003).

We find Innegrity's impossibility defense fails as a matter of law, as Innegrity bore the risk of not being able to remove Morin from the guarantees. Innegrity's claimed financial inability to perform cannot constitute impossibility, for consistent with *Dermott*, "the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money, will not ordinarily excuse nonperformance in the absence of a contract provision in that regard." *Moon v. Jordan*, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (Ct. App. 1990); *see also 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp*., 244 N.E.2d 37, 41 (N.Y. 1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused."). *Accord* 30 *Williston on Contracts* § 77:46 (4th ed. 1990). The Restatement is no more forgiving. *Restatement (Second)*

of Contracts § 261 (Am. Law Inst. 1981) cmt. b ("[M]ere market shifts or financial inability do not usually effect discharge under the rule stated in this Section.").

Equally unavailing is Innegrity's claim it was "impossible" to force the lenders to remove Morin's obligations. Innegrity assumed the risk it would be able to relieve Morin of the guarantees, whether by making alternative arrangements with the lender or paying off the loan. Even the most generous interpretation of impossibility will not save a contracting party who bargains for his own folly by guaranteeing performance despite impracticability. This is the lesson of Holmes' rainmaker. *See supra* Farnsworth, *Farnsworth on Contracts*, § 9.6 at 643. *See also Restatement (Second) of Contracts* § 261 (1981), cmt. c.

Also, the Agreement provided that if Innegrity terminated Morin for cause, Innegrity was obligated only to exert its "best efforts" to relieve Morin from the guarantees, a stark acknowledgment of the absolute duty and heightened risk it would take on by choosing to terminate him absent cause. *See McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 207, 33 S.E.2d 501, 510 (1945) ("Parties . . . bind themselves by their lawful contracts, and [c]ourts cannot alter them because they work a hardship." (citation omitted)). *See also Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 89, 326 S.E.2d 395, 400 (1985) ("[A] party to a contract should not be given relief from the requirements of the contract simply because it proved to be less favorable than an alternative provision would have been.").

Finally, even if Innegrity's impossibility defense was a jury question, plenty of evidence supports the jury's decision it was possible for Innegrity to perform. Morin testified the intellectual property of the company was worth ten million dollars. There was evidence the BB&T loan transaction included an option whereby Innegrity could have forced a German company to repurchase the equipment for roughly twice the amount BB&T eventually obtained at auction. Deciding the credibility of this evidence was up to the jury; all that is up to us is deciding whether there was any evidence supporting the jury's verdict, which we find there was. *See Welch*, 342 S.C. at 300, 536 S.E.2d at 418 (jury verdict will be upheld if any evidence sustains the factual findings implicit in its decision).

III.

Innegrity also attacks the jury's award of $150,000 in damages on the BB&T guaranty as speculative. We see no merit to this point. Morin testified BB&T had sued him on the full amount of the guaranty, which exceeded $250,000, but had offered to settle for $150,000. This proved Morin's damages to a reasonable certainty; the law requires nothing more. *Haltiwanger v. Barr*, 258 S.C. 27, 32–33 186 S.E.2d 819, 821 (1972) (future damages need not be proven to a mathematical certainty, and often must be approximated; therefore, "[a] wide latitude is allowed the jury"); *Lockhart Power Co. v. Askew*, 110 S.C. 449, 454, 96 S.E. 685, 687 (1918) (damages reasonably certain to materialize in future should be included in award of compensatory damages, for otherwise the injured party "would be remediless").

IV.

Innegrity asserts the trial court should have granted its JNOV motion on its defense of equitable estoppel. The essence of this defense was Morin misled the Board about Innegrity's financial condition, failed to follow the Board's directions to set aside monies sufficient to fund two months of payroll, caused the company to fail to pay wages by orchestrating the bonus deals, and caused the loss of the NSF funding. Innegrity claims it learned of the outstanding wages only upon Morin's departure, when it also found itself penniless.

As we understand Innegrity's argument, this evidence (which Innegrity interchangeably refers to also as breach of fiduciary duty and disloyalty) was sufficient to estop Morin from recovering on his Wage Payment Act claim. To establish equitable estoppel, Innegrity had to prove Morin knowingly misled it by falsely representing or concealing material facts—facts that were not known or capable of being known by Innegrity—and that it relied on Morin's conduct by prejudicially changing its position. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006); s*ee also Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017).

The record demonstrates Innegrity's Board knew or should have known about the payroll liabilities. Morin presented the Board a September 2010 unaudited financial statement from the Elliott Davis accounting firm. Morin testified the amount of Innegrity's liability for the deferred wages was included on the statement under the

accrued liabilities category. The statement also showed Innegrity had a "member's deficit" exceeding 2.7 million dollars. The Board's September 23, 2010 Executive Committee Meeting Minutes refer to discussion of "the previously enacted salary reductions that dated back to 2009," corroborating Morin's testimony the Board knew of the bonus arrangements. This was enough to enable the jury to conclude Innegrity was not ignorant of the company's wage obligations and other dire financial straits. *See Welch*, 342 S.C. at 300, 536 S.E.2d at 418 ("This [c]ourt will reverse the trial court only when there is no evidence to support the ruling below."). We also find there was no evidence Innegrity prejudicially changed its position in reliance on Morin's conduct.

V.

Next, Innegrity argues it is entitled to JNOV on the jury's award of $47,888 in back pay to Morin on his Wage Payment Act claim covering the wages withheld during the April 2009-June 2010 bonus arrangement. Innegrity contends this amount is inconsistent with the twenty-five percent reduction of Morin's $140,000 annual salary. We find the jury was entitled to credit Morin's testimony the amount owed was that stated in the September 2010 letter, a figure very close to the verdict amount. We have no way of knowing the jury's thought process, but we do know the amount it awarded was within the range of evidence.

Innegrity contends it was reasonable to withhold Morin's wages because his alleged disloyalty and misconduct left the company insolvent. It was undisputed Innegrity fired Morin without cause. The Board resolution memorializing his firing listed no disloyalty or other bad acts. There was extensive evidence demonstrating Morin's competency and loyalty. We need not wade into these weeds though, for the Agreement provides that even if Morin was fired "for cause," he was entitled to back pay.

Innegrity also points to language in the April 2009 bonus letter stating the company was not obligated to pay up if the employee was terminated. But the jury had the right to believe Morin's testimony that the company's typical policy and course of conduct was to pay the bonus even when employees had left. More to the point, the second bonus letter contained no such condition. It was also the jury's prerogative to conclude the bonus arrangement (including its conditioning of payment on achievement of the $2 million goal) did not modify Innegrity's obligation to pay Morin's wages pursuant to the Agreement.

VI.

Innegrity next challenges the trial court's trebling of the Wage Payment Act damages. Section 41-10-80(C) grants the trial court the discretion to award treble damages if it finds there was no bona fide dispute the wages were owed and the withholding was unreasonable and done in bad faith. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98–99, 456 S.E.2d 381, 383 (1995). In reviewing the award, we may find our own facts. *Ross v. Ligand Pharm., Inc.*, 371 S.C. 464, 471, 639 S.E.2d 460, 464 (Ct. App. 2006).

The trial court found the jury's verdict proved there was no reasonable or good faith dispute. But a "finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009).

Innegrity argues Morin was not entitled to back pay because he agreed he would be paid the bonus only when the company obtained two million dollars in funding, a condition that never occurred. While the jury rejected Innegrity's rationale, we must determine whether it constituted a "valid close question of law or fact," *Rice*, 318 S.C. at 99, 456 S.E.2d at 383 (citation omitted), sufficient to create a bona fide dispute over the withholding. Perhaps, as Morin suggests, the jury concluded the bonus letter did not override his Agreement. But we are concerned only with whether Innegrity's view of the enforceability of the bonus letter was reasonable enough to form a good faith basis for withholding Morin's wages.

We hold that it was, and therefore reverse the trial court's trebling of the $47,888 portion of the back pay verdict. *See Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 99–100, 757 S.E.2d 560, 563–64 (Ct. App. 2014) (hiring letter indicating employee would receive commissions only upon collection created bona fide dispute as to when wages due).

The jury's back pay award, however, was not limited to the bonus. It also included $11,030 in vacation back pay and Morin's salary for October and November 2010, categories unaffected by the bonus arrangement. The trial court correctly trebled these amounts, as Innegrity gave no good faith reason for withholding them.

VII.

In 2013, a federal grand jury indicted Morin for crimes related to his handling of the NSF grant. The indictment alleged Morin knowingly made false claims to the government, made false statements in a grant report, and willfully stole, embezzled, and converted one thousand dollars of NSF funds. A few days later, Morin was deposed by Innegrity in this case, during which he invoked the Fifth Amendment to several questions concerning the NSF matter.

Before trial, Innegrity advised the trial court it intended to offer the deposition excerpts in evidence pursuant to Rule 32, SCRCP, and would request the jury be charged that it could draw an adverse inference against Morin based on his invocations. *See Baxter v. Palmigiano*, 425 U.S. 308, 318–20 (1976); *Griffith v. Griffith*, 332 S.C. 630, 640–41, 506 S.E.2d 526, 531–32 (Ct. App. 1998). Believing Innegrity's proposal premature, the trial court ruled *in limine* Innegrity would only be entitled to admit the deposition excerpts and receive the adverse inference charge if Morin claimed the Fifth Amendment before the jury.

Morin was on the stand for over three hours the first day of trial. During cross-examination, Morin admitted an ex-employee had approached a Board member "and said that he hadn't worked on a grant that he was supposed to be working on and that I had reported to the government more time than he actually spent on this grant."

When Innegrity attempted to put Morin's deposition in evidence during its case, the trial court sustained Morin's objection, relying on Rule 403, SCRE. The trial court explained Innegrity could ask Morin the same questions it posed in the deposition, but until it did so, the deposition evidence was excludable as unduly prejudicial.

Innegrity claims the trial court's ruling hampered its trial strategy and ran afoul of Rule 32, SCRCP, which it interprets as granting a party the absolute right to admit the deposition of an adverse party for "any purpose." By forcing Innegrity to ask Morin the same questions he had previously taken the Fifth Amendment on, Innegrity claims it was placed in the untenable position of cross-examining a witness whose answers might differ from his deposition responses.

Evidentiary rulings may only be overturned for an abuse of discretion that prejudices a party. Abuse of discretion occurs when the ruling rests on a legal error or inadequate factual support. Prejudice ensues when it is likely the challenged

evidence or its omission influenced the verdict. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Like its federal counterpart, Rule 32, SCRCP "permits a party to introduce, as part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there." *Cmty. Counselling Serv., Inc. v. Reilly*, 317 F.2d 239, 243 (4th Cir. 1963) (Haynsworth, J.) (footnote omitted); *see also* 8A *Wright & Miller Fed. Prac. & Proc. Civ.* § 2145 (3d ed.). But the admissibility of any evidence is subject to the South Carolina Rules of Evidence, Rule 43(a), SCRCP, ("All evidence shall be admitted which is admissible under the statutes or rules of evidence heretofore applied in the courts of this State."), including Rule 611, SCRE, which gives the trial court vast discretion to control the mode and order of testimony, and Rule 403, SCRE. The main use of Rule 403 is to allow the presiding judge to ensure fairness of the trial by "excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979).

The trial court's nuanced ruling did not forbid Innegrity from admitting Morin's deposition or impeaching him with it. It conditioned admission on Morin's refusal to answer those same questions before the jury. The pivotal question was whether Morin had participated in falsifying NSF grant time records. Despite the trial court's invitation, Innegrity never asked Morin this question at trial. Had they done so, the trial court's condition would have been met. Had Morin denied it, Innegrity could have impeached him with or otherwise admitted the deposition and obtained the adverse inference charge. If Morin had admitted he falsified the records, the damage would have been equally done. *See Coletti v. Cudd Pressure Control*, 165 F.3d 767, 774 (10th Cir. 1999) (affirming similar limitation on use of adverse party's deposition testimony, rejecting Coletti's claim that ruling "thwarted her entire case strategy . . . . If, as Ms. Coletti claims, the witnesses would have changed or fabricated their testimony at trial, plaintiff's counsel could easily have used their recorded deposition testimony to effectively impeach their responses. We see no reason to reverse the jury verdict merely because Ms. Coletti insists the trial court should have allowed her to utilize her own method of getting her point across, when another, at least equally effective method of getting that same point across was easily available.") (internal citation omitted)).

What the trial court sought to avoid was Innegrity using the evidence as a dog whistle: putting in the isolated deposition excerpts and arguing Morin took the Fifth

because he knew he had committed a crime, leaving the jury to infer Morin's character was suspect. This would unfairly prejudice Morin, mislead the jury and confuse the issues, the precise things Rule 403 is designed to prevent. It turns out Morin's NSF-related conduct was criminal, but that was not an issue for this civil jury. Innegrity acknowledged as much when it agreed it could not introduce evidence of his indictment. The probative value of the deposition excerpts was limited to their ability to generate the adverse inference instruction, which might have marginally advanced Innegrity's theory of Morin's disloyalty. This value was dwarfed by the risk that injecting Morin's claim to the right against self-incrimination without sufficient context would sidetrack the jury, jostling their focus from the relevant. Heidt, *The Conjurer's Circle-the Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1124 (1982) (discussing use of Rule 403 to exclude a party's out-of-court invocation when it may "distract the jury from the main issues in the case by drawing their attention to the invoker's character and inviting speculation about the crimes he may have committed").

The trial judge can best survey the field of evidence and pinpoint the extent of this risk. Even if we were inclined to disagree with the trial court's call, which we are not, we would be hesitant to overturn it, and then only if we found the ruling outside the wide boundaries discretion sets. *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."). Nor can we find any prejudice to Innegrity, for the jury heard significant evidence the Board knew of Morin's role in the NSF scandal.

VIII.

We arrive at last to Innegrity's claim the trial court erred in denying its motion for a new trial based on Morin's November 2014 guilty plea in federal court to a misdemeanor related to his handling of the NSF grant.

Rule 60(b)(2), SCRCP, empowers a trial court to grant a new trial for newly discovered evidence if a party establishes the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005); *see also McCabe v. Sloan*, 184 S.C. 158, 167–68, 191 S.E. 905, 908–09 (1937). Relief under the rule depends upon the post-

trial discovery of previously unknown, outcome-changing facts the moving party could not have, with due diligence, unearthed before trial.

Applying this standard, the trial court found, and the record reflects, that the factual basis for Morin's guilty plea mirrored what Innegrity's Board already knew when they chose to terminate him without cause. The trial court noted Innegrity chose not to make the NSF issue a material part of its trial theory; Innegrity mentioned it during closing only to say the government was accusing Innegrity of defrauding it and had terminated the grant. The trial court found it unlikely evidence of Morin's conviction would have changed the verdict, and so do we.

The only new thing Morin's guilty plea revealed was that he had been convicted of a misdemeanor. The jury was aware Innegrity knew of the allegations of Morin falsifying federal records, allegations credible enough to launch an internal investigation and cause NSF's Office of Inspector General to pay a visit and terminate the grant. All Morin's later guilty plea could add to this sideshow would be Innegrity stamping him with the stigma of a criminal conviction, which exposes this evidence for what it is: pure impeachment, a category that can never carry the day on a Rule 60(b)(2) motion. We decline to disturb the considered conclusion of the trial judge, who had superior command over and an impartial view of the field of evidence.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Antwan Jamal Jett, Appellant.

Appellate Case No. 2015-001042

Appeal From Florence County
D. Craig Brown, Circuit Court Judge

Opinion No. Op. 5554
Heard November 7, 2017 – Filed April 25, 2018

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Edgar Lewis Clements, III, of Florence, all for Respondent.

SHORT, J.: Antwan Jett appeals his convictions and sentences for burglary first degree, armed robbery, criminal conspiracy, and possession of a weapon during a

crime of violence, arguing the trial court erred in admitting his recorded statement because it was obtained in violation of his *Miranda*[1] rights. We affirm.

FACTS

At approximately 3:30 a.m. on December 31, 2013, Michael Barr was awoken by a knock at his door. When he asked who was there, a person replied saying it was BJ, who was a friend of Barr's. When Barr opened the door, three males with their faces covered entered through the door and began assaulting him while demanding money. One male in a green hoodie had "a small Derringer," which he pointed at Barr. Another male grabbed Barr's hunting knife from the floor. The male in a green hoodie and a third male went upstairs and entered Barr's bedroom, as well as Barr's female roommate's bedroom. Barr's roommate began screaming, and the three males ran out the back door.

Officer William Blackmon responded to the scene and saw two males running away from Barr's house, one of whom was wearing a green hoodie. Officer Blackmon chased the suspects, but he was unable to apprehend them. While retracing the path of the chase, he found a hunting knife on the ground.

Officer Thomas Herman arrived at the scene and observed two males running from Barr's house with Officer Blackmon in pursuit. He testified one of the males was wearing "a green or a gray hoodie." Officer Herman followed the path of the chase and found "a small caliber handgun, a small revolver style Derringer."

Corporal Legrande Gowdy and Officer Lacey Allen both responded to the scene and began walking through the area. Officers Gowdy and Allen found a green hoodie, a gray pullover, pill bottles, and two masks that "matched the description of the one the suspect was wearing." While searching with her flashlight, Officer Allen observed someone lying underneath a vehicle that was about half a block from Barr's house. Officer Allen shouted "he's under the car, he's under the car" and drew her weapon while ordering the individual to get out from underneath the vehicle. The individual began to move from under the car but hesitated after Corporal Gowdy appeared. Corporal Gowdy instructed the individual to get out from under the car, and when the individual instead began backing up, Corporal Gowdy tased, detained, and handcuffed him. Corporal Gowdy testified the

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

individual was wearing gloves and a t-shirt, and the temperature was in the low 30s, "which would not make sense to have gloves on and no coat and no nothing or anything." Corporal Gowdy asked him about the clothing they found, and the individual said it did not belong to him. The individual told Corporal Gowdy he had been out drinking and was tired, so he crawled up under the car to go to sleep.[2] As Corporal Gowdy read the individual his *Miranda* rights, the individual said "I don't know anything about a gun." Gowdy then placed the individual into a patrol vehicle and called an investigator to question him. The individual was later identified as Jett.

Detective Felicia Jones met with Jett while he was detained in the patrol vehicle. Upon introducing herself as a police officer, Jett immediately said, "Where my lawyer at?" Detective Jones said, "I'm going to read you your rights, okay." Jett continued, "I already read my rights three times. I don't know why they reading me rights for." Detective Jones then read Jett his *Miranda* rights and asked Jett if he wanted to talk to her. Jett responded, "About what? About me being intoxicated? Finding me under a car? Man tase me, put a knee back of my head. What did I do? What did I do?" When Detective Jones asked Jett why he told the officer he did not have anything to do with a gun, Jett responded, "What gun?" She asked him why he was under the car, and Jett said he had been drinking and wanted to go to sleep, so he laid down. He said he did not know he was under a car. When Detective Jones asked Jett where he lived, he recited his address and said, "Anything else, ask my lawyer." Detective Jones then asked Jett if he did not want to talk to her anymore. Jett responded, "What happened?" and continued to say he did not know why he was tased. Detective Jones did not ask Jett any more questions.

In a pretrial motion following a *Jackson v. Denno*[3] hearing, Jett made a motion to suppress his statement to Detective Jones as the statement was taken in violation of his *Miranda* rights. Jett argued his statement — Where my lawyer at? — was unambiguous, and he affirmatively asserted his right to an attorney. The State contended Jett's statement to Detective Jones was admissible because it was ambiguous. The trial court denied the motion, finding the statement to Detective

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[2] Corporal Gowdy noted in his report that he did not smell any alcohol on the individual.

[3] 378 U.S. 368 (1964).

Jones was ambiguous and thus, the questioning was not in violation of Jett's *Miranda* rights. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Thus, "an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* "The appellate courts are 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

LAW/ANALYSIS

Jett maintains the trial court erred in admitting the recorded statement to Detective Jones. He asserts the questioning was in violation of his *Miranda* rights because he unambiguously asked for his lawyer twice during the interview and Detective Jones continued to question him. We disagree.

"When analyzing a criminal defendant's invocation of his or her right to counsel, a trial court must make two separate inquiries." *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "First, courts must determine whether the accused actually invoked his right to counsel." *Id.* "Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Id.* "If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." *Davis v. United States*, 512 U.S. 452, 458 (1994). "But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* at 459.

In *Davis*, the United States Supreme Court held a suspect must unambiguously request counsel. "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* "[A] statement either is such an assertion of the right to counsel or it is not." *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984) (brackets omitted)). The *Davis* court found Davis' statement to the investigator, "Maybe I should talk to a lawyer," was not a request for counsel and the investigator was not required to stop questioning Davis. *Id.* at 462.

Here, Jett merely made the vague statement — Where my lawyer at? — and did not expand upon the statement before continuing to talk to the police. We find Jett's statement to Detective Jones, prior to her reading Jett his *Miranda* rights, was ambiguous and equivocal enough so that a reasonable officer could have decided it was not an invocation of counsel.[4] It was not necessary for Detective Jones to make any further inquiries and ask Jett to clarify his statement. Therefore, because Jett's *Miranda* rights were not violated, the trial court did not err in admitting Jett's statement to Detective Jones.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

GEATHERS, J., concurs.

KONDUROS, J., dissenting: I respectfully dissent from the majority opinion and would hold Jett's statement to be an unequivocal and unambiguous invocation of his right to counsel.

The present case is distinguishable from *Davis v. United States*, 512 U.S. 452 (1994). In this case, Jett asked "[w]here my lawyer at?" after being read his *Miranda* rights. Jett was not questioning whether he needed a lawyer as in *Davis*.

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[4] After reviewing the audiotape, we find it is hard to understand Jett's comments to the officer, and at the least, they were ambiguous and equivocal.

The only two conclusions to be drawn from his utterance are that he is either (1) stating he already has a lawyer and seeks his or her presence or (2) asking for the lawyer referenced in his *Miranda* rights, as opposed to Davis's pondering whether he needed a lawyer.

In *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part), then Chief Justice Toal advised against playing a "gotcha" game with attorneys over procedural matters at the expense of their clients. She surmised that "[t]his practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their . . . liberty interests." *Id.* at 333, 730 S.E.2d at 287.

However inarticulate, after being pulled from underneath a car in the early morning hours, Jett declared "[w]here my lawyer at?" To my reading, Jett has made a request for a lawyer, and I would reverse the trial court's denial of his motion to suppress his statement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Denise Parker, Respondent,

v.

The National Honorary Beta Club, Appellant.

Appellate Case No. 2016-000232

Appeal from Spartanburg County
R. Keith Kelly, Circuit Court Judge

Published Opinion No. 5555
Heard March 6, 2018 – Filed April 25, 2018

AFFIRMED

Thomas A. Bright and David Lee Harris, Jr. of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Appellant.

Brian Patrick Murphy, of Stephenson & Murphy, LLC, of Greenville, for Respondent.

HILL, J.: After she was fired by the National Honorary Beta Club (Beta Club), a jury awarded Denise Parker actual damages for breach of contract and punitive damages for breach of contract accompanied by a fraudulent act. Beta Club now

appeals the trial court's denial of its directed verdict and JNOV motions, asserting there was not sufficient evidence of breach of contract accompanied by a fraudulent act to submit punitive damages to the jury. We affirm.

I.

Denise Parker had been employed at will by Beta Club for thirty-eight years, when Bob Bright arrived as CEO in 2013. Bright reorganized the company, reassigning various employees, including Parker. Parker's co-workers elected her to a staff-liaison committee reporting to Beta Club's Internal Affairs Committee (IAC), which included several members of the company's board of directors. On October 21, 2013, Bright summoned Parker to a meeting to give her a disciplinary note listing concerns about her professionalism. When Parker pressed Bright for a specific example of her shortcomings, Bright responded he could "bring the whole office staff down here" to give instances where Parker had not been helpful to them. He mentioned that just that morning, Parker did not perform a task requested by Barbara Anderson. Parker left the meeting shaken, and soon saw Anderson, who asked what was wrong. When Parker apologized to Anderson for not doing what Anderson had asked, Anderson replied she did not know what Parker was talking about. Parker explained Bright had told her she had not done what Anderson asked her to do; Anderson assured her she had.

On October 25, 2013, during the IAC's regular meeting with the staff-liaison committee, a board member asked Parker about her recent meeting with Bright. After a member of the IAC told Parker she could not be fired for answering its questions, she revealed details of her meeting, including Bright's allegation about the Barbara Anderson incident. Bright was not present at the IAC meeting, and he was out of town the next week. Bright met with Parker the following Monday, November 4, and handed her another disciplinary note, stating she was negative and failed to respond to emails. When Bright asserted he understood Parker had been negative with the IAC, she explained she had only answered the IAC's questions and the IAC had told her she had to answer and could not be fired for doing so. As to the emails, Parker declared the only ones she did not answer were either spam or UPS notifications requiring no action. At the end of the meeting, Bright fired Parker. Parker testified Jay Moore, Beta Club's technology director, later informed her he had repeatedly told Bright the only emails she had not responded to were spam.

Parker sued Beta Club for breach of contract and breach of contract accompanied by a fraudulent act. A jury awarded her $518,006.00 in actual damages and $350,000.00 in punitive damages.

II.

We recognize Beta Club contested much of Parker's evidence. In reviewing the denial of a directed verdict/JNOV motion, however, we cannot weigh the evidence or pass on credibility; our sole task is deciding whether, reviewing the record in the light most favorable to Parker, any evidence reasonably supports the jury's verdict. *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003).

The jury's verdict carried with it an implicit finding that Beta Club's promise to Parker that she could not be fired for answering the IAC's questions altered her at-will employment, creating a contract that was breached when Bright fired her for that very reason. Beta Club has not appealed the verdict that it breached Parker's contract. Instead, it contends the evidence was insufficient to enable the jury to find the breach of contract was accompanied by a fraudulent act, on which the punitive damages award depends.

Synthesizing cases going back to 1904, Judge Bell summarized what proof entitles a party to recover punitive damages for breach of contract accompanied by a fraudulent act:

> (1) *A breach of contract.* In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement.
>
> (2) *Fraudulent intent relating to the breaching of the contract and not merely to its making.* Fraudulent intent is normally proved by circumstances surrounding the breach.
>
> (3) *A fraudulent act accompanying the breach.* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53–54, 336 S.E.2d 502, 503–04 (Ct. App. 1985) (citations omitted).

The jury's breach of contract verdict satisfies the first element, so we are only concerned with the remaining two: whether Parker proved a fraudulent intent relating to the breach and a fraudulent act accompanying it. Before we discuss whether Parker met these elements, it is necessary to explain we define fraud in this context broadly:

> Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921) (quoting 12 R. C. L. 229).

Beta Club argues that because Bright did not know of Parker's newly formed employment contract, he could not have fraudulently intended to breach it. We find the premise of this argument faulty. The jury heard evidence that Parker told Bright about the IAC's promise to her before he fired her, which was enough evidence for them to find Bright thereafter developed fraudulent intent (or decided to continue the scheme he started on October 21) connected to the later breach. And of course, principles of agency law (with which the jury was charged) allowed them to impute knowledge of Bright's previous conduct to Beta Club.

Fraudulent intent may, and often must, be proven circumstantially from the factors surrounding the breach. *Floyd*, 287 S.C. at 54, 336 S.E.2d at 503–04. Evidence of a dishonest design or devious scheme satisfies the fraudulent intent element, and such conduct could have originated before—and continued after—the contract was formed. The jury was presented abundant evidence of Bright's plan to oust Parker based on false pretenses. The credibility of the evidence was up to them, and they could have found Bright's scheme odious. Beta Club maintains that Bright's conduct preceding the November 4 meeting is immaterial, as Bright had no knowledge of Parker's contract before that date. We do not believe the evidence can be so neatly parsed. Motive may be irrelevant to a pure breach of contract action, but it can be

used to show fraudulent intent. *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988). The motive to trump up charges against Parker did not end when the contract was formed (it just became actionably devious) and bears on whether Bright fraudulently intended to breach her contract.[1]

Even if Beta Club breached the contract with a willful or fraudulent purpose in mind, it would not be liable for breach of contract accompanied by a fraudulent act unless Parker proved a fraudulent act accompanied the breach. *Floyd*, 287 S.C. at 54, 336 S.E.2d at 504. Inherent in the jury's verdict is a finding that Beta Club breached the contract, which means the jury found Bright's proffered reasons for firing Parker were false and pretextual, and she was fired for answering the board's questions. Beta Club contends that giving a false excuse for breaching a contract is not enough, by itself, to meet the elements. It maintains the fraudulent act—the pretext—also constituted the breach and, consequently, there was no separate fraudulent act that "accompanied" the breach. We disagree. The breach occurred when Beta Club fired Parker for answering the IAC's questions. Had Bright told Parker she was being fired for that reason, she would have been limited to actual damages for breach of contract. When he chose to fire her and deceive her as to the reasons, he committed a fraudulent act entitling Parker to punitive damages. The record contains testimony that Bright's use of the email issue was a charade. This was enough to support the jury's finding of a fraudulent act, which could have also been based on his ruse involving Barbara Anderson and his diversionary attack on the "professionalism" of a veteran employee respected by her peers. *See Floyd*, 287 S.C. at 54, 336 S.E.2d at 504 (fraudulent act may precede the breach if it is connected with the breach and not too remote).

In *Conner v. City of Forest Acres*, an employee sued the City of Forest Acres for breach of contract accompanied by a fraudulent act after her termination. 348 S.C. 454, 460, 465–66, 560 S.E.2d 606, 609, 612 (2002). The trial court granted summary

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[1] Parker contends Beta Club's fraudulent intent arguments were not preserved. Beta Club sufficiently raised the issue of lack of evidence of fraudulent intent at trial, and even specifically raised its argument on the relationship of Bright's lack of knowledge of the contract to Beta Club's lack of fraudulent intent at the close of Beta Club's case. The trial court ruled on this issue when it denied the motion for a directed verdict. We find the issue preserved. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (delineating four requirements for issue preservation).

judgment to the City. *Id.* at 457, 560 S.E.2d at 607. However, our Supreme Court found a genuine issue of material fact, stating:

> Conner contends that the City and its agents committed numerous fraudulent acts in connection with her termination. Primarily, however, Conner's claim is that the City fabricated pretextual reasons for Conner's termination knowing the reasons were false and did not justify termination for cause. Viewing the evidence in the light most favorable to Conner, as we must, we find there is a genuine issue of material fact as to whether the City fraudulently breached its contract.

Id. at 466, 560 S.E.2d at 612.

We find *Conner* dispositive. The record contains ample evidence of fraudulent intent and fraudulent acts. The trial court's denial of the directed verdict motion and well-reasoned order denying Beta Club's motion for JNOV are

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BLH by parents/ general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

Appellate Case No. 2014-002254

Appeal From Spartanburg County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5556
Heard May 11, 2017 – Filed April 25, 2018

REVERSED

Andrew F. Lindemann and Joel Steve Hughes, both of Davidson & Lindemann, PA, of Columbia, for Appellant.

Charles J. Hodge and T. Ryan Langley, both of Hodge & Langley Law Firm, PC, and James Fletcher Thompson, of James Fletcher Thompson, LLC, all of Spartanburg, for Respondent.

MCDONALD, J.: This case involves the alleged breach of adoption assistance subsidy [AAS] agreements by the South Carolina Department of Social Services

(DSS). DSS contends (1) the circuit court erred in certifying a class when the class representative failed to prove the necessary element of commonality, and (2) the class certification and notification process violates the statutory and constitutional rights of potential class members and their families. We agree that the circuit court erred in granting class certification.

Facts and Procedural History

In April 2013, minor BLH brought this action against DSS through her adoptive parents, filing her complaint as a potential class action on behalf of "All children, age 19 or younger on the date of the Motion for Class Certification (January 6, 2012), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and [DSS], executed on or before June 20, 2002."[1] The complaint alleged DSS breached its AAS contracts with class members by unilaterally cutting adoption assistance benefits to special needs children by twenty dollars per month, beginning in June 2002.[2]

In October 2013, BLH moved to certify the class pursuant to Rule 23, SCRCP.[3] At an April 2014 hearing, BLH argued the commonality requirement was satisfied because DSS cut all class members' benefits at the same time and in like manner.

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[1] The circuit court stated there were approximately 4,000 affected children. DSS cut similar subsidies for special needs children in foster care as well; however, DSS restored the foster care benefits in 2004.

[2] In September 2011, BLH's adoptive parents sued DSS and four former directors on the same facts in a case removed to federal court. *See Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). The District Court certified the class, but the Fourth Circuit concluded parents could not establish the DSS directors violated their clearly established rights under the federal Adoption Assistance and Child Welfare Act of 1980. *Id.* at 180, 183. Thus, the Fourth Circuit found the directors were entitled to qualified immunity. *Id.* at 183.

[3] *See* Rule 23(a), SCRCP (setting forth numerosity, commonality, typicality, adequacy of representation, and the amount in controversy as the five elements that must be satisfied for class certification).

DSS disagreed, relying on *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), to support its argument.

After the hearing, the circuit court issued a Form 4 order granting class certification. DSS moved for reconsideration and requested a formal order addressing its commonality argument.

On May 21, 2014, the circuit court issued a more detailed order. Concerning commonality, the court ruled there were two "critical common questions of law and fact," namely: (1) whether the benefits cut breached the contracts with the families of adopted children or violated the implied duty of good faith and fair dealing, and (2) whether, in light of DSS's reinstatement of benefits for families of foster care children, the failure to reinstate benefits for families of adopted children breached the contracts or violated the implied duty of good faith and fair dealing. Separately, the court ordered an "opt-out" notice procedure and ordered DSS—which the court found "regularly corresponds or has previously corresponded with all class members"—to serve each class member a notice "which shall advise them of the facts of this case and their right to opt out within 30 days."

In August 2014, DSS filed a second motion to reconsider and requested oral argument. In the motion, DSS again asked the court to rule on its position that BLH could not satisfy the commonality element required by Rule 23 and *Gardner*. DSS further argued the court erred in establishing notice procedures without giving DSS an opportunity to be heard and in requiring DSS to bear the burden and expense of notifying potential class members.

On September 16, 2014, the circuit court filed an amended order, but the only change related to the class certification issue was the court's inclusion of language indicating it had also relied on two affidavits.[4] On September 30, 2014, DSS filed a third motion for reconsideration requesting a formal order adjudicating the issues raised in its second motion for reconsideration.

On October 16, 2014, DSS appealed; the court of appeals stayed the appeal until the circuit court could rule on DSS's third motion for reconsideration.

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[4] These affidavits do not appear in the record, and any issues concerning them were not appealed.

In February 2015, the circuit court held a hearing on the third motion for reconsideration. Regarding the notice issue, DSS consented to providing BLH with information about potential class members but asserted it should not be required to notify potential class members of the opt-out procedures. Additionally, DSS again challenged the commonality requirement, citing *Gardner*. On the record, the circuit court denied reconsideration of the class certification, but granted DSS's request to make BLH responsible for notifying potential members of the class of the opt-out procedures. However, DSS was required to provide BLH with information about potential class members within ninety days of the circuit court's filing of its formal order. The parties agreed the formal order would include language protecting the confidentiality of the parties involved. The court asked BLH to prepare a proposed order and submit it to DSS.

On April 1, 2015, DSS sent the circuit court and BLH an alternative proposed order. DSS's proposed order included language that allowed for the production of names and addresses but "protect[ed] the identities of persons who have been adopted to the extent possible." DSS expressed concern that the class action notices might be the "first information" some class members receive that informs them they were adopted. DSS also questioned what legal authority minors would have to opt out of a class action. DSS requested that these issues be addressed before the notices were mailed in order to ensure DSS and its lawyers had no liability for "sending . . . adopted children a class action notice that tells them that they were adopted."

BLH responded that the procedures in its proposed order provided for confidentiality and it saw "no reason" for the notices to inform the children that they were adopted. BLH also clarified the notices would be sent to the children's adoptive parents, not the children themselves. In an email two days later, DSS further objected to language in BLH's proposed order requiring that it provide copies of the potential class members' AAS contracts, arguing there had been no discussion about whether DSS would have to "produce thousands of contracts within [the] 90 day timeframe." DSS also asserted that mailing the notices to the adoptive parents did not solve the confidentiality problem because some of the children were no longer minors. Finally, DSS argued there was no way to explain the suit to potential class members so that they could make an informed opt-out decision without mentioning that they were adopted.

On April 30, 2015, the circuit court issued another order. As to commonality, the court found it determinative that DSS had stipulated that each of the potential class members signed a contract for AAS payments, and there was a subsequent twenty dollar reduction in payments. The court stated, "Given the abundance of common issues, ease of [DSS's] access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar." Regarding the notice procedure, the court found "good cause" was shown under the relevant adoption confidentiality law to require DSS to provide the names and addresses of potential class members to BLH. However, the court ordered the information was to remain confidential, was to be redacted in public filings, and could not be disseminated to third parties. All correspondence to class members was to be marked "Confidential." On June 8, 2015, DSS amended its notice of appeal to include the April 30 order.

Law and Analysis

A. Appealability

"The general rule established by [our supreme court] is that class certification orders are not immediately appealable." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008). The supreme court has, however, "reviewed interlocutory orders involving class certification when they contain other appealable issues." *Id.* at 449, 661 S.E.2d at 85. DSS argues the challenged orders are immediately appealable because if the identities of the class members are revealed, the resulting harm cannot be corrected. To support its argument, DSS cites *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006).

In *Howe*, a client attempted to sue his attorney anonymously for breach of fiduciary duty and professional negligence. 362 S.C. at 215, 607 S.E.2d at 355. The client moved to proceed anonymously because the underlying matter was a civil suit alleging sexual abuse, but the circuit court denied the motion. *Id.* On appeal, this court explained that "[u]nder the collateral order analysis employed by the federal courts, the order is appealable if it (1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." *Id.* at 216, 607 S.E.2d at 356. Under this framework, this court held the appealability criteria were met

because the order denying the client's motion to proceed anonymously "ha[d] the effect of revealing his identity, the very thing he was seeking to keep confidential." *Id.* at 217, 607 S.E.2d at 356.

Ex parte Capital involved a company that attempted to unseal the divorce records of an employee who had admitted to embezzling from the company. 369 S.C. at 4–5, 630 S.E.2d at 466. The employee appealed an order permitting the company to examine the divorce records to inspect the employee's financial representations. *Id.* at 5, 630 S.E.2d at 466. Our supreme court held the order unsealing the records "determined a substantial matter forming the whole or part of the family court proceeding in which [the company] sought access to the record of the [employee's] divorce. No further action is required in the family court to determine the parties' rights; therefore, the order is immediately appealable . . . ." *Id.* at 7–8, 630 S.E.2d at 468. "Moreover, [the supreme court] agree[d] with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." *Id.* at 8, 630 S.E.2d at 468. The court wrote that "[c]ompelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the [lower] court's directive was ultimately found to be erroneous." *Id.* (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 9 (1st Cir. 1998)).

We find *Howe* and *Ex parte Capital* instructive. Like those cases, this case involves the disclosure of personal and potentially sensitive information for which there would be "no appellate remedy . . . likely to repair any damage done by an improper disclosure." *Ex parte Capital*, 369 S.C. at 8, 630 S.E.2d at 468. Therefore, we hold this case is properly before the appellate court.

B. Commonality

DSS asserts BLH cannot satisfy the necessary element of commonality because numerous individualized inquiries of potential class members are needed in this case. We agree.

"Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." *Gardner*, 353 S.C. at 20, 577 S.E.2d at 200. "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Id.* at 21, 577 S.E.2d at 200. "We generally defer to the trial court's discretion in granting class certification absent an error of law." *Id.*

Failure to establish any prerequisite is fatal to class certification; therefore, we limit our discussion to BLH's inability to prove commonality. *Id.* ("Because failure to satisfy even one prerequisite is fatal to class certification we limit our discussion to the Named Plaintiffs' inability to prove commonality."). "To establish commonality, a party must show that 'there are questions of law or fact common to the class.'" *Id.* (quoting Rule 23, SCRCP). "In practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together." *Id.* (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991)). "Critically, '[n]ot every issue in the case must be common to all class members.'" *Id.* (quoting *O'Connor v. Boeing N. Amer., Inc.*, 184 F.R.D. 311, 329 (C.D. Cal. 1998)). "Commonality is met only where the class shares a determinative issue." *Id.* at 21, 577 S.E.2d at 200–01.

Gardner involved several taxpayers who sued the Department of Revenue and other agencies for improperly seizing their tax refunds due to their outstanding debts with the agencies. 353 S.C. at 8, 577 S.E.2d at 194. The circuit court certified a class "'composed of all persons who had their 1996, 1997, or 1998 South Carolina income tax refund seized' by certain enumerated agencies." *Id.* at 19 n.11, 577 S.E.2d at 199 n.11. The taxpayers asserted the "common thread" was that they all had their refunds seized without proper notice. *Id.* at 22, 577 S.E.2d at 201.

On appeal, the supreme court found there were two common questions of law: (1) whether the notices were deficient and (2) whether the deficiency prejudiced the

taxpayers. *Id.* However, the court ultimately held there was no commonality, explaining:

> This is not a typical class action where minor factual differences exist among the individualized cases of class members. Instead, the factual differences (whether prejudice exists) are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit.

Id. (citation omitted).

We find this case analogous to *Gardner* as there are more than "minor factual differences" among the various class members. This is not a case in which the relevant inquiry merely involves plaintiffs who "may be entitled to different amounts of damages." *See McGann v. Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (1986) (recognizing Rule 23(a)(2) "does not demand that all questions of law and fact be common"). Several issues here will require individualized inquiry, such as whether each set of adoptive parents accepted or consented to the reduction in payments, exhausted any available administrative remedies, entered into renewal agreements, or at any pertinent time terminated their agreements. Accordingly, we hold the necessity of such individualized inquiries "negates the benefits of a class action suit." *Id.*

Conclusion

We reverse the grant of class certification.[5]

GEATHERS and HILL, JJ., concur.

[5] Because we find BLH failed to establish commonality, it is unnecessary that we address the constitutional and statutory concerns raised in DSS's challenge to the notification process. *See Gardner*, 353 S.C. at 20, 577 S.E.2d at 200 (limiting its consideration to the element of commonality).