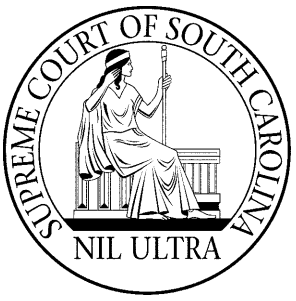

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 1, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Energy Carolinas, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League, Defendants, Of whom South Carolina Department of Health and Environmental Control and American Rivers and The South Carolina Coastal Conservation League are, Appellants.

Appellate Case No. 2010-166486

Appeal From Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Published Opinion No. 5062
Heard May 23, 2012 – Filed December 12, 2012
Withdrawn, Substituted and Refiled May 1, 2013

REVERSED AND REMANDED

Stephen P. Hightower, of Columbia, for Appellant South Carolina Department of Environmental Control.
Christopher K. DeScherer, J. Blanding Homan, IV, and Frank S. Holleman, III, all of the Southern Environmental Law Center, of Charleston, for Appellants American Rivers and South Carolina Coastal Conservation League.

James Wm. Potter, W. Thomas Lavender, Jr., Joan W. Hartley, all of Nexsen Pruet, LLC, of Columbia, for Respondent.

LOCKEMY, J.: In this administrative action, South Carolina Department of Health and Environmental Control (DHEC) appeals the administrative law court's (ALC) decision, arguing that the ALC erred in finding: (1) DHEC's review of Duke Energy Carolinas, LLC's (Duke) water quality certification application was not timely and (2) DHEC waived its right to issue a water quality certification to Duke. American Rivers and South Carolina Coastal Conservation League (Coastal Conservation) (collectively Conservation Groups) also appeal the ALC's decision and contend the ALC erred in: (1) refusing to give effect to Regulation 61-30; (2) finding DHEC's decision untimely; (3) misconstruing Regulation 61-101; (4) ignoring facts that showed Duke was estopped from arguing DHEC's decision was untimely; and (5) failing to find that Duke waived any challenge to DHEC's certification decision and the State's certification authority.[1] We reverse and remand.

FACTS

We first review the relevant statutory framework for these facts. Section 401 of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2010), "requires States to provide a water quality certification [WQC] before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994); *see* 33 U.S.C. § 1341 (2010). States "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Further, section 401 of the CWA provides:

> If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,

---

[1] DHEC and the Conservation Groups will be collectively referred to as Appellants.

> the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

Id.

"The Pollution Control Act [PCA] empowers DHEC to 'take all action necessary or appropriate to secure to this [s]tate the benefits of the Federal [CWA].'" S.C. Code Ann. § 48-1-50(17) (Rev. 2008). Section 48-1-30 of the South Carolina Code (Rev. 2008) authorizes generally that DHEC shall promulgate regulations guiding the procedures for permits under the PCA. Regulation 61-101was then promulgated pursuant to section 48-1-30 to establish procedures and policies for implementing the WQC requirements of Section 401 of the CWA. S.C. Code Ann. Regs. 61-101 (Supp. 2011); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010).

Regulation 61-101 requires that any applicant for a federal license or permit, including those issued by Federal Energy Regulatory Commission (FERC), to conduct any activity which during construction or operation may result in any discharge in navigable waters, must obtain a water quality certification from DHEC. S.C. Code Ann. Regs. 61-101(A)(2). Further, it establishes a time frame for review of the applications, stating

> [DHEC] is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If the Federal permitting or licensing agency suspends processing of the application on request of the applicant or [DHEC] or of its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by [DHEC]. Unless otherwise suspended or specified in this regulation, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance or an application.

S.C. Code Ann. Regs. 61-101(A)(6). Review can begin when an applicant has presented DHEC with a complete application in the manner specified by Regulation 61-101. S.C. Code Ann. Regs. 61-101(C)(1). An application must contain the names and addresses of adjacent property owners. S.C. Code Ann. Regs. 61-101(C)(1)(f).

Regulation 61-101(C)(2) states

> [i]f [DHEC] does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application.

Moreover, Regulation 61-101(C)(4) provides

> [w]hen [DHEC] requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by [DHEC]. Any subsequent resubmittal will be considered a new application.

The Environmental Protection Fund Act (Fund Act), sections 48-2-10 to 48-2-90 of the South Carolina Code (Rev. 2008 & Supp. 2011), was enacted for the purpose of creating a fund whose "monies must be used for improved performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering [DHEC's] functions." S.C. Code Ann. § 48-2-40 (Rev. 2008). The Fund Act applies to the processing of all environmental permits, licenses, certificates, and registrations authorized by the PCA, Clean Air Act, Safe Drinking Water Act, Hazardous Waste Management Act, Atomic Energy Act, and the Oil and Gas Act. S.C. Code Ann. § 48-2-30(B) (Rev. 2008 & Supp. 2011). WQCs are also covered by the Fund Act. S.C. Code Ann. § 48-2-50(H)(1)(b) (Supp. 2011).

The Fund Act contains a provision entitled, "Processing of permit application; maximum time for review," which mandates that DHEC promulgate regulations governing the timeliness, thoroughness, and completeness of DHEC's processing of application subject to the Fund Act. S.C. Code Ann. § 48-2-70 (Rev. 2008). Section 48-2-70 states

> [u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by [DHEC] on permit applications under that program. These schedules shall contain criteria for determining in a timely manner when an application is complete and the maximum length of time necessary and appropriate for a thorough and prompt review of each category of permit applications and shall take into account the nature and complexity of permit application review required by the act under which the permit is sought. If the department fails to grant or deny the permit within the time frame established by regulation, the department shall refund the permit processing fee to the permit applicant.

§ 48-2-70. DHEC promulgated the Environmental Protection Fees, S.C. Code Ann. Regs. 61-30 (2011), in accordance with the Fund Act. Its purpose and scope is described as follows:

> This regulation prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, "permits") and establishes schedules for timely action on permit applications. This regulation also establishes procedures for the payment of fees, provides for the assessment of penalties for nonpayment, and establishes an appeal process to contest the calculation or applicability.

S.C. Code Ann. Regs. 61-30(A). Regulation 61-30 also provides in pertinent part that "[a]pplication fees shall be due when the application is submitted. The

Department will not process an application until the application fee is received." S.C. Code Ann. Regs. 61-30(C)(1)(b). Further, the regulation maintains that

> [t]he schedule shall be tolled when the Department makes a written request for additional information and shall resume when the Department receives the requested information from the applicant. If an applicant fails to respond to such a request within 180 days, the Department will consider the application withdrawn and the application fee will be forfeited. The Department shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

S.C. Code Ann. Regs. 61-30(H)(1)(c).

On June 5, 2008, Duke filed an application with DHEC to obtain a WQC for a FERC license authorizing Duke's continued operation of the Catawba-Wateree Hydroelectric Project in South Carolina. The application was submitted without the required names and addresses of the adjacent property owners. Additionally, Duke did not provide the regulatory application fee.

On June 27, 2008, Duke supplied DHEC with several lists that contained the names of interested citizens and stakeholders who had contacted Duke and requested notification of matters regarding Duke's FERC application. However, the lists still did not contain all the names and addresses of the adjacent property owners. On July 29, 2008, Duke provided DHEC with a list of the names and addresses of all the adjacent property owners. In response to Duke's fulfillment of that requirement, DHEC notified Duke by email that it was placing Duke's application on public notice. However, DHEC also specified it still required an affidavit of publication and the required application fee from Duke before its review would commence and the 180 day clock would start. DHEC placed Duke's application on public notice on August 8, 2008.

DHEC also sent a letter to Duke dated August 19, 2008 (Letter 1), requesting additional information regarding the draft Quality Assurance Program Plan (QAPP) that Duke had submitted with their application. Letter 1 further requested that Duke submit the information to DHEC by October 19, 2008, and notified Duke that pursuant to Regulation 61-30, DHEC had 180 days to issue a decision

once the application was complete. Letter 1 also stated Duke's application would not be complete for processing until the application fee and affidavit of publication requested previously was received, and that "the clock stops when information is requested and [DHEC] is waiting on a response."

DHEC received the affidavit and application fee on August 25, 2008. DHEC then sent two more letters to Duke requesting additional information needed to process Duke's application. One letter (Letter 2) was sent to Duke on October 8, 2008, requesting the additional information by November 8, 2008. On November 10, 2008, DHEC received the information requested in the October 8 letter. Another letter (Letter 3) was sent to Duke on October 21, 2008, requesting information to be sent to DHEC by November 21, 2008. DHEC received a partial response on the due date for the information. The remainder of the information was received by DHEC on December 12, 2008.

On May 15, 2009, DHEC issued its Notice of Department Decision (Notice), granting Duke's WQC. The Conservation Groups appealed the Notice on May 15, 2009, challenging DHEC's proposed WQC on the grounds that it would permit Duke to operate its project in violation of water quality standards. The South Carolina Board of Health and Environmental Concern (Board) granted the Conservation Groups' request for a final review conference, which was held on July 9, 2009. On August 6, 2009, the Board issued a final agency decision, overturning DHEC's issuance of Duke's WQC.

Duke appealed the Board's decision by filing a request for a contested case proceeding in the ALC on September 5, 2009. By an order dated November 9, 2009, the ALC admitted the Conservation Groups and the South Carolina Attorney General as respondent-intervenors.[2] On January 21, 2010, Duke filed two motions with the ALC, one for summary judgment and the second for declaratory judgment. Duke based its argument for summary judgment on two grounds: (1) pursuant to regulation 61-101(A)(6) of the South Carolina Code (Supp. 2011), DHEC was required to issue a proposed decision on Duke's application for a WQC within 180 days of receiving the application on June 5, 2008, and (2) by operation

[2] The ALC limited the participation of the South Carolina Attorney General to issues impacting the State's law suit against the State of North Carolina seeking a ruling from the United States Supreme Court on the proper apportionment of water from the Catawba River.

of law, the State waived its right to issue certification when DHEC failed to either issue or deny the WQC on or before December 2, 2008.

DHEC filed a response on February 12, 2010 in which it argued for denial of Duke's motions. A hearing was held on May 6, 2010, and on June 10, 2010, the ALC granted Duke's motion for summary judgment, but failed to rule on Duke's motion for declaratory judgment. DHEC and the Conservation Groups filed a joint motion for reconsideration, which the ALC denied. Both DHEC and the Conservation Groups filed timely appeals from the ALC's decision to grant summary judgment to Duke and its denial of their joint motion for reconsideration, which this court has consolidated under this caption.

STANDARD OF REVIEW

"Appeals from the ALC are governed by the Administrative Procedures Act (APA)." *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011). "Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2010)).

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Media Gen. Commc'ns, Inc. v. S.C. Dept. of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (citing Rule 56(c), SCRCP); *see also* ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). In

determining whether a genuine issue of material fact exists, "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

LAW/ANALYSIS

Application of Regulation 61-30 to Regulation 61-101

"Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); *see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "'When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation.'" *Murphy*, 396 S.C. at 639-40, 723 S.E.2d at 195 (quoting *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002). "Furthermore, we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement." *Id.* at 640, 723 S.E.2d at 195; *see Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the [legislature]." *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (citing *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). "This [c]ourt has held that a statute shall not be construed by concentrating on an isolated phrase." *Id.* (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.")); *see also Sloan*, 370 S.C. at 468, 636 S.E.2d at 606-07 ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "Moreover, it is well settled that statutes dealing with the same

subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result." *Beaufort Cnty.*, 395 S.C. at 371, 718 S.E.2d at 435.

First, we briefly address Appellants' argument that the ALC erred in finding *Responsible Economic Development, et al. v. South Carolina Department of Health and Environmental Control and Wal-Mart Stores East, LP*, 371 S.C. 547, 641 S.E.2d 425 (2007) applied to the instant case. *Responsible Economic* held that regulations from different enabling acts could not be applied to each other when the regulations did not reference each other and there is an absence of statutory authorization to apply the two acts and their corresponding regulations to each other. We agree with the Conservation Groups' contention that the present case is distinguishable from *Responsible*.

Section 48-2-70, under which Regulation 61-30 is promulgated, explicitly states DHEC must establish by regulation a schedule for timely action on permit applications for a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). It further states the schedule must have criteria for determining in a timely manner when an application is complete along with the maximum length of time necessary and appropriate for a thorough and prompt review required by the act under which the permit is sought. *Id.* The statute's plain language indicates the time schedule provided in Regulation 61-30, as well as any corresponding explanation of how to count the days in that time schedule, would be applicable to any previous regulation under which the permit is authorized.

Regulation 61-30 "prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, "permits") *and establishes schedules for timely action on permit applications*." S.C. Code Ann. Regs. 61-30(A) (emphasis added). The regulation defines "time schedule" as follows:

> In accordance with S.C. Code Sections 48-2-70 and 48-39-150, a "schedule of timely review" for purposes of this regulation shall begin when the applicant is notified that the application is administratively complete or within ten days of receipt of the application, whichever comes first; and end when a final decision is rendered. *It will include required technical review, required public notice,*

> *and end with a final decision by the Department to issue or deny the permit.* The time schedule may be tolled or extended in accordance with the conditions stipulated in Section H(1) of this regulation.

S.C. Code Ann. Regs. 61-30(B)(22) (emphasis added). Section H(2)(a)(vii) lists the time schedules for environmental permits for water pollution control and allows 180 days for a WQC permit to be processed; this time schedule mirrors Regulation 61-101's time schedule for permit review. Regulation 61-30 also states an application is not to be processed until the required processing fee is received. Duke argues that the 61-30 solely governs the time schedule by which a fee must be returned due to untimely action, and has no bearing upon the time schedule of the actual substantive decision of whether a permit will be granted. We have difficulty understanding how the processing of a permit hinges upon receipt of the fee, but then once that fee is received, there is a separate time schedule applied to each. There are multiple references to the substantive permit review process in Regulation 61-30, and many portions of Regulation 61-30's requirements and procedures regarding the application procedure mirror the requirements in Regulation 61-101. Reading the statutory mandates and regulatory requirements in their plain and ordinary sense indicates that Regulation 61-30 and 61-101 were to be read together to provide DHEC more flexibility in the processing of permits.[3] Both of the regulations can exist without one negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will be counted.

Section H(1) of Regulation 61-30 sets the procedure for counting the days in a given time schedule, and allows for tolling as well as suspension of the time schedule. S.C. Code Ann. Regs. 61-30(H)(1)(c)-(d). Because we find Regulation 61-101 and Regulation 61-30 are applicable to each other, we believe that the tolling provisions of 61-30 are also applicable to Regulation 61-101. Additionally, DHEC explained its interpretation of the time schedule to Duke Energy in their

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[3] We are not encouraging untimely action by state agencies. Further, we make no determinations in the present case as to the reasonableness of DHEC's requests for information, as that is not an issue on appeal. Simply put, we believe that these regulations recognize the need for some flexibility in making these complex permitting decisions, such as under these facts, where the applicant is untimely with their responses to DHEC's requests.

letter dated October 19, 2008, as well as in other documents. It cited Regulation 61-30, and stated that while DHEC had 180 days to complete its action on the application, only the days on which DHEC was actively reviewing the application would be counted. DHEC maintained the clock stopped when information was requested and DHEC was awaiting a response. These documents reflect DHEC's understanding of its own regulations, and Duke Energy was made fully aware of that understanding. Further, we believe DHEC's interpretation complies with the regulations' plain language.

We find the language of section 48-2-70 provides that the regulations promulgated under its authority are to enhance DHEC's review process for any permits which require a processing fee, including a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). Accordingly, we hold the ALC erred in finding, as a matter of law, that Regulation 61-30 had no application to Regulation 61-101. Thus, we reverse the ALC.

Estoppel

The Conservation Groups argue that because Duke had full knowledge that DHEC was operating by the full time period provided by reading Regulation 61-101 and Regulation 61-30 in conjunction, Duke is now estopped from maintaining that Regulation 61-30 is not applicable to Regulation 61-101. We decline to make a ruling on this issue, as it is moot in light of our above holding. *See Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (noting an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy).

Waiver of Water Quality Certification

Because we reverse and remand the ALC's grant of summary judgment based upon our finding that Regulation 61-30 does apply to Regulation 61-101, it is unnecessary for us to determine DHEC's arguments and additional sustaining grounds regarding waiver. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand the ALC's decision to grant summary judgment.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting: I respectfully dissent and would affirm the order of the ALC.

As the majority has stated, Regulation 61-101 was promulgated pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 through -350. (2008 and Supp. 2012). This regulation, which is entitled "Water Quality Certification," "establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." 8A S.C. Code Ann. Regs. 61-101.A.1 (Supp. 2012).

Paragraph A.6 of Regulation 61-101 references the requirement in the Clean Water Act quoted by the majority that a State must act on a request for water quality certification within a reasonable period of time. Under the Federal Clean Water Act, this period is not to exceed one year after receipt of a certification request unless processing of the application is suspended. If the deadline is not met, "the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1) (2006). Regulation 61-101.A.6 references the one-year deadline in the Clean Water Act for a state to act on a request for water quality certification, but imposes a shorter time limit of one hundred eighty days for DHEC to act on such a request. This regulation further provides that "[u]nless otherwise suspended or specified *in this regulation*, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application." (emphasis added).

The circumstances under which Regulation 61-101 allows DHEC to suspend processing of application for water quality certification or to delay a decision past one hundred eighty days after it is received by DHEC are explained in paragraphs

2 through 4 of subsection C of the regulation.[4] Under paragraph 2, DHEC may request additional information within sixty days after receiving an application even if the application has already been deemed complete for processing. Paragraph 3 specifies the type of information that DHEC can request, such as water quality monitoring data, water quality modeling results, or other environmental assessments. Central to this appeal is paragraph 4, which provides as follows:

> When [DHEC] requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended *upon notification to the applicant* by [DHEC]. Any subsequent resubmittal will be considered a new application.

8A S.C. Code Ann. Regs. 61-101.C.4 (2012) (emphasis added). Under Regulation 61-101.C.4, the processing of an application for water quality certification is suspended only after the applicant has failed to meet the given deadline for submitting additional requested information and DHEC has notified the applicant about the suspension. Significantly, Regulation 61-101 does not authorize DHEC to suspend processing during the interval between the time it requests more information and the deadline that it gives the applicant when it makes the request.

On August 19, 2008, DHEC sent a letter to Duke requesting additional information about the draft Quality Assurance Program Plan that Duke submitted with its application. In the letter, DHEC instructed Duke to submit the information by October 19, 2008. DHEC sent two more letters requesting more information, one on October 8, 2008, with a deadline of November 8, 2008, and another on October 21, 2008, with a deadline of November 21, 2008. The ALC found that these requests were ineffective to suspend the processing of Duke's application. I agree with this finding. Even assuming the information that DHEC requested was both

[4] Regulation 61-101.A.6 also provides that the suspension of the application process can occur "if the Federal permitting or licensing agency suspends processing of the application on request by the applicant or [DHEC] of its own volition"; however, none of these circumstances are present here.

necessary to process Duke's application and not provided by the stated deadlines, DHEC never, as required by Regulation 61-101.C.4, provided Duke with a notice of suspension after any of the specified due dates. Moreover, as I have explained in the preceding paragraph, DHEC was not authorized under Regulation 61-101 to suspend its processing of Duke's application during the interval between the date of its request and the date by which Duke was to produce the required information.

The majority quotes Regulation 61-101.C.4 and does not appear to question its relevance to the processing of applications for water quality certification. However, instead of applying the unambiguous provisions of this paragraph to determine when the processing of an application is suspended, it looks to Regulation 61-30, which provides in pertinent part:

> The time schedule shall be tolled when [DHEC] makes a written request for additional information and shall resume when [DHEC] receives the requested information from the applicant. If an applicant fails to respond to such a request within 180 days, [DHEC] will consider the application withdrawn and the application fee will be forfeited. [DHEC] shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

4 S.C. Code Ann. Regs. 61-30.H.1.c (2011). The tolling provisions in this regulation are inconsistent with those in Regulation 61-101.C.4. Under Regulation 61-101.C.4, the processing of an application continues after DHEC requests additional information from an applicant. The processing is suspended only when the applicant misses the deadline to comply with the request *and* DHEC informs the applicant that a suspension is to take place. In contrast, under Regulation 61-30.H.1.c, the time schedule to process an application is tolled at the time DHEC makes a written request for more information and remains tolled until the applicant satisfies the request. Furthermore, Regulation 61-30.H.1.c does not require DHEC to impose any deadline on such a request. DHEC itself has acknowledged these two regulations are inconsistent with each other with regard to the method of determining whether it has acted timely on an application.

The ALC held that the issue of whether the processing of Duke's application had been suspended should be analyzed under Regulation 61-101.C.4 and DHEC could not invoke Regulation 61-30.H.1.c to support its claim that it issued a timely

decision. I would affirm these holdings. First, although both regulations purport to address the issue of when DHEC can suspend processing of an application for water quality certification, Regulation 61-101 specifically covers water quality certification and was expressly promulgated to fulfill requirements of the Federal Clean Water Act. These requirements include prompt action by state agencies on requests for water quality certification, an objective important enough to warrant a legislative mandate in the Clean Water Act that unreasonable delay by a state agency in acting on such a request for water quality certification would be tantamount to a waiver by the State of its right to deny certification, which in turn would delay the applicant's pursuit of any federal license or permit for which state water quality certification is a prerequisite. *See South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (stating Regulation 61-101 "establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act"). In contrast, Regulation 61-30, which is entitled "Environmental Protection Fees," covers permitting decisions for all environmental programs administered by DHEC pursuant to federal and state law and regulation. Although Regulation 61-30 "establishes schedules for timely action on permit applications," the issue of timeliness is presented in the context of determining when an application fee is deemed to be forfeited by the applicant. Nowhere does Regulation 61-30 reference the Clean Water Act.

DHEC has argued in its brief, that Regulation 61-30.H.1.c controls here because it was enacted later than Regulation 61-101.C.4 and has been amended as late as 2004. Although its provisions apply to requests for water quality certification, Regulation 61-30, does not further the mandates of the Clean Water Act or the policy favoring prompt action by the states on requests for water quality certification. Therefore, I would hold that the ALC correctly followed Regulation 61-101.C.4 in concluding that DHEC waived its right to deny certification to Duke. *Cf. City of Rock Hill v. South Carolina Dep't of Health & Envt'l Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331 (1990) ("[T]he general rule is that statutes of a specific nature . . . are not to be considered as repealed in whole or in part by later general statutes . . . , unless there is a direct reference to the former statute or the intent of the legislature to repeal is explicitly implied therein.").

Furthermore, as Duke has noted, DHEC issued requests for information on October 8, 2008, and November 8, 2008, while it was awaiting information it requested on August 19, 2008. DHEC's own actions, then, show it did not suspend the

processing of Duke's application according to Regulation 61-30.H.1.c; rather, it continued to review it actively after it requested supplemental information.

I would further reject Appellants' arguments that the doctrines of estoppel and waiver preclude Duke from raising the issue of timeliness of DHEC's action on its application. DHEC, as the party claiming estoppel, must prove not only reliance on Duke's conduct, but also that "lack of knowledge and of the means of [obtaining] knowledge of the truth as to the facts in question." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000). Here, DHEC cannot reasonably claim it lacked knowledge and the means of obtaining knowledge about its own regulations.

As to Appellants' contention that Duke could not raise the issue of timeliness during proceedings before the ALC because it did not raise this issue to the DHEC staff or board, I note the appealed order resulted from a contested case hearing, not a judicial review proceeding. The governing statute does not limit the parties to asserting only those issues that had been litigated before the administrative agency. *See* S.C. Code Ann. § 44-1-60(G) (Supp. 2012) (setting forth procedures for contested case proceedings).

For the foregoing reasons, I would hold that DHEC's processing of Duke's application for water quality certification was never suspended pursuant to Regulation 61-101.C.4. When DHEC issued its staff decision on May 15, 2009, it had already waived its right to act on the requirement for the state water quality certification that Duke would otherwise have been required to satisfy in order to obtain a FERC license to continue operating the Catawba-Wateree Hydroelectric Project. I would therefore affirm the ALC's decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Castine, Respondent,

v.

David W. Castine, Appellant.

Appellate Case No. 2011-183186

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5120
Heard January 8, 2013 – Filed May 1, 2013

AFFIRMED

Robert Merrell Cook, II, of The Robert Cook Law Firm, LLC, of Batesburg-Leesville, for Appellant.

S. Jahue Moore, Jr. of Moore Taylor & Thomas, PA, of West Columbia, for Respondent.

LOCKEMY, J.: In this defamation case, David Castine appeals the circuit court's grant of summary judgment in favor of Frances Castine. He argues he presented sufficient evidence of the truth of the allegedly defamatory statements to withstand summary judgment. Furthermore, he contends the circuit court erred in finding his communications as a citizen regarding a public employee were not privileged. Finally, David argues the circuit court erred in finding he acted with malice as a matter of law. We affirm.

FACTS

Frances and David were previously related by marriage, as father-in-law and daughter-in-law. When Frances's husband passed away in 2007, the estate settlement caused tension between Frances and David.

Frances eventually obtained employment with Lexington County (the County) and has held her position for over three years. After discovering she had been hired by the County, David contacted several members of the Lexington County Council regarding the County's hiring practices. He stated he was concerned about Frances's employment with the County because she had a criminal record, was fired from the South Carolina Department of Motor Vehicles (SCDMV) for misconduct, and was a known user of illegal drugs. David was directed by a County councilman to contact the County's human resources manager about the issue. After contacting the human resources manager, David was told to put the concerns in writing and that the matter would be handled confidentially.

On April 1, 2009, David wrote his concerns were

> 1. [Frances] has a criminal record of several arrests or citations for fraudulent checks. As recent as 2007, she was arrested on a bench warrant for fraudulent checks. She also has been arrested for criminal domestic violence twice.
>
> 2. [Frances] was terminated from her previous employer, SC Department of Motor Vehicles for several reasons. She used a State credit card for her personal use. She would go into the department database and obtain personal information of people she did not like and use this information to harm these people. Because of her actions she caused a long time state employee to lose her position as well. A SLED investigation was conducted into her actions and found wrongdoing causing her termination.

He also stated Frances was "a well-known drug user and has been for over 25 years. . . . These drugs include marijuana and cocaine." David sent a second letter to Katherine Hubbard, the County administrator on October 23, 2009. In that letter, he requested to have questions answered, including:

> How can a person have a criminal record of writing fraudulent checks to Lexington County businesses for over twenty years get a job with the county?
>
> How can a person that was terminated from a state agency after a state agency investigation and a SLED investigation were performed and found a person violating agency policies get hired by the county?
>
> How can the Department of Human Resources and the Department of Public Safety ignore these facts when they were informed of them over six months ago?

In his deposition, David agreed with Frances's counsel that the intent behind his actions was to hurt Frances and have her fired. However, he later attempted to clarify his intent by testifying "every citizen has a right to protect the people that work for [the County]."

In a complaint filed in May 2009, Frances asserted causes of action for defamation/slander, negligence/recklessness, intentional interference with contractual rights, and a preliminary and permanent injunction. In his answer, David admitted he provided information to the County at its request but asserted that the information was true and privileged. Prior to trial, Frances filed a motion for summary judgment on the issue of liability. During a hearing before the circuit court, David put forth two defenses to preclude summary judgment on his defamation charge. First, he asserted an absolute defense of truth. Second, he asserted a defense of privilege, either qualified or absolute.

The circuit court determined Frances was entitled to a judgment as a matter of law on the issue of defamation and the matter should proceed to trial on the issue of damages. The court found David's statements were defamatory *per se*. The circuit court also found David made the statements with the express intent of harming Frances; therefore, malice existed as a matter of law. Additionally, the circuit court determined there was no qualified privilege, noting there "is no constitutional right on the part of one citizen to [maliciously] impugn the reputation of another." The court subsequently denied David's Rule 59(e) motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

LAW/ANALYSIS

The tort of defamation allows plaintiffs to recover for injuries to their reputation as the result of defendants' communications to others of a falsity regarding the plaintiffs. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001). Defamation does not focus on the hurt to the defamed parties' feelings, but on the injury to their reputations. *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001). "In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to impeach the honesty, integrity, virtue, or reputation . . . ." Hubbard and Felix, *The South Carolina Law of Torts* 462 (2d. ed. 1997).

I. Truth

David argues the circuit court erred in granting summary judgment because evidence was presented that the statements he made to the County were true. We disagree.

Relying on *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976), David maintains the defense of truth does not require proof that the statements were completely true, but only that the statements were substantially

true. In *Ross*, the supreme court held, in the context of a newspaper article, that (1) "both the headline and the article following it must be considered as one document in determining whether it is defamatory," and (2) "a sufficient defense is made out where the evidence establishes that the statement was substantially true." 266 S.C. at 80-81, 221 S.E.2d at 772-73. Here, although the first holding in *Ross* is not applicable because the present case does not involve a newspaper article, the second holding still applies.

In this case, David admitted that at least one statement he made, the accusation of improper credit card use, was not true. On appeal, David contends that because most of the statements he made are true, then both letters he sent to the County are substantially true. We find David is not entitled to the truth defense, as a matter of law, because he admitted the statement he made about Frances's improper credit card use was false. Substantial truth must be proven as to each individual statement David made, not as to the contents of the letters he sent as a whole. In that respect, we find *Ross* distinguishable from this case. Accordingly, we affirm the circuit court's ruling as to the falsity of David's statement regarding Frances's credit card use because there is no evidence that statement is true. Whether the other statements were false is a matter for the jury.

II. Privilege

David argues the circuit court erred in granting summary judgment because the statements he made to the County were privileged. We disagree.

David contends that as a taxpayer and citizen of the County, the statements he made to County officials about the suitability of Frances for employment as a county employee are privileged. "In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Id.* (citing Restatement (Second) of Torts, § 593 (1977); *see Bell v. Bank of Abbeville,* 208 S.C. 490, 38 S.E.2d 641 (1946)). In *Bell,* our supreme court held:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the

> person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Bell, 208 S.C. at 493-94, 38 S.E.2d at 643.

"In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court." *Id.* Here, in light of David's admission of his intent to harm Frances and get her fired, we find the circuit court did not err in finding privilege did not exist. Because privilege is not applicable to the specific facts of this case, we affirm the circuit court.

III. Malice

David argues the circuit court erred in finding he acted with malice as a matter of law. We disagree.

Under the common law, a defamatory statement may be actionable *per se*, in which case the court presumes a defendant acted with common law malice[1] and the plaintiff suffered general damages. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664. Common law malice is a presumption of law and "dispenses with the proof of malice when words which raise such presumption are shown to have been uttered." *Murray*, 344 S.C. at 143, 542 S.E.2d at 750 (quoting *Jones v. Garner*, 250 S.C. 479, 488, 158 S.E.2d 909, 914-15 (1968)). Moreover, common law malice is a form of malice that is "not necessarily inconsistent with an honest or even laudable purpose and does not imply ill will, personal malice, hatred, or a purpose to injure." *Jones*, 250 S.C. at 488, 158 S.E.2d at 914. Thus, the presumption of common law malice does not mean the defendant's conduct evidenced common law *actual* malice, which is defined as acting with "ill will toward the plaintiff," or

[1] "Common law malice" is also called "legal malice," "malice in law," "presumed malice, or "implied malice." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510, n.3, 506 S.E.2d 497, 501-502, n.3 (1998); *Jones*, 250 S.C. at 488, 158 S.E.2d at 914-15.

acting "with conscious indifference of the plaintiff's rights." *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665.

Slander is actionable *per se* "only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Erickson*, 368 S.C at 465-66 n.7, 629 S.E.2d at 664 n.7. However, "[l]ibel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." *Holtzscheiter*, 332 S.C. at 510-11, 506 S.E.2d at 502 (citation omitted).

David's statements to the County are actionable *per se*. Thus, the law presumes David acted with common law malice. This presumption does not imply that David acted with common law actual malice, thus he may not rebut this presumption by showing his conduct evidenced a lack of ill will, personal malice, hatred, or a purpose to injure. Under South Carolina law, David may rebut the presumption of common law malice only by showing the statement was privileged. *See Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 (stating because malice was presumed, it was defendant's burden to establish that a privilege existed in order to rebut this presumption); *Murray*, 344 S.C. at 142, 542 S.E.2d at 750 (citing *Bell*, 208 S.C. at 494-95, 38 S.E.2d at 643, to explain privileged communication is an exception to the rule that malice will be presumed where the offending statement is actionable *per se*). Because David has not established that a privilege existed, the presumption of common law malice requires a finding of general damages as to the accusation of improper credit card use. *See Holtzscheiter*, 332 S.C. at 510, 506 S.E.2d at 501 (explaining when the law presumes the defendant acted with common law malice, it is also presumed the plaintiff suffered general damages).

None of this discussion applies to common law *actual* malice. Therefore, to the extent the existence of common law actual malice becomes an issue, its existence is a question of fact that must be proven at trial. *See Murray*, 344 S.C. at 144, 542 S.E.2d at 751 (stating the existence of common law actual malice "is ordinarily for the jury to decide"); *Jones*, 250 S.C. at 488, 158 S.E.2d at 914 ("While [common law] malice will support an award of actual damages, punitive damages cannot be recovered in the absence of proof of [common law] actual malice.").

Accordingly, the findings of the circuit court are

AFFIRMED.

FEW, C.J., concurs.

SHORT, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jo Pradubsri, Appellant.

Appellate Case No. 2010-153046

Appeal From Lexington County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5121
Heard September 10, 2012 – Filed May 1, 2013

REVERSED AND REMANDED

Appellate Defender Dayne C. Phillips, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

KONDUROS, J.: In this criminal appeal, Jo Pradubsri contends the trial court erred in refusing to permit cross-examination of a witness, Melisa Martin,

regarding her potential legal exposure from her initial charges prior to accepting the State's plea offer. We reverse and remand.

FACTS

As a result of numerous tips from a confidential informant (CI), the Lexington County Sheriff's Department (the Department) conducted a search and investigation into Pradubsri. The Department was also looking for Martin, who was known to be Pradubsri's girlfriend and living with him in Richland County. On November 9, 2008, Sergeant John William Finch of the Department received a call from Sergeant Bobby Dale, with the Irmo Police Department, informing him Pradubsri and his car were at a grocery store in Irmo. Sergeants Dale and Finch began surveillance at the store and observed Pradubsri and Martin exit the store and leave the parking lot in his vehicle. Because of previously gathered information, Sergeant Finch "was extremely confident" he would find illegal substances in Pradubsri's vehicle and initiated a stop soon after Pradubsri left the parking lot. Sergeant Finch noted the stop occurred around three in the morning. As he approached the car, he noticed Pradubsri and Martin making "furtive movements in the vehicle[,] as if they were talking." He further stated Pradubsri's shoulders were shifting around and Pradubsri took quick glances in the mirror at him. When Sergeant Finch requested Pradubsri exit the vehicle, he saw a gun in the area between the driver's seat and the center console. He notified his backup officer, Sergeant Kevin Blake, who was also with the Department, of the presence of the gun and secured Pradubsri.

While securing Martin on the passenger side of the vehicle, Sergeant Blake found a clear plastic bag protruding from her waistband that contained a white rock-like substance. He then saw a second bag in her hand that contained a similar white rock-like substance, consistent with crack cocaine. A female officer was called to the scene to conduct a further search of Martin. The officer found additional rocks of what were determined to be crack cocaine in Martin's pants. Officers also found a silver handgun in Martin's purse. The officers inventoried the car, but did not find any additional drugs. Officers found more than $700 in cash on Pradubsri. Officers discovered a total of approximately sixty-eight grams of crack cocaine at the scene.

The Lexington County grand jury indicted Pradubsri of (1) trafficking crack cocaine in an amount of twenty-eight grams or more but less than one hundred

grams, (2) possession with intent to distribute (PWID) crack cocaine within proximity of a school, and (3) unlawful carrying of a pistol. Martin was initially charged with the same crimes as Pradubsri, but in exchange for her testimony against him, the State reduced her charges to possession of crack cocaine and unlawful carrying of a pistol. After pleading guilty prior to Pradubsri's trial date, Martin received an eighteen-month sentence.

At trial, Martin testified that on the night of her arrest, she falsely told law enforcement the crack cocaine was hers when it was actually Pradubsri's. She admitted she wrote a letter to the Solicitor's office informing it she would testify against Pradubsri in exchange for a speedy plea and a more lenient sentence. She acknowledged that during her plea, she answered she was willing to testify during Pradubsri's trial. On cross-examination, Pradubsri attempted to elicit testimony regarding Martin's potential legal exposure for her initial charges had she not accepted the State's plea offer. The State objected to this testimony as being irrelevant, but Pradubsri argued that pursuant to his right to confrontation under the Sixth Amendment, he was allowed to elicit this testimony from Martin. Further, Pradubsri contended case law supported his argument.

The trial court was concerned with Pradubsri's line of questioning because Martin was initially charged with the same charges as Pradubsri, and thus, if that testimony was allowed, the jury would be improperly informed of the exact sentence he was facing. The State agreed with the trial court. The trial court further explained the jury was not entitled to information regarding the length of potential sentences for Pradubsri's charges because other than in a death penalty setting, it is not to be concerned with sentencing. The trial court then held Pradubsri could ask Martin if she potentially had faced a substantial amount of time without the State's plea offer because that related to the issue of bias or prejudice. However, he could not ask about the specific length of the potential sentence for each charge. The trial court sustained the State's objection with those parameters.

Pradubsri resumed questioning about Martin's initial charges, asking if she faced "a significant amount of time on [them]." She responded affirmatively. Pradubsri then asked, "When you wrote the Solicitor, didn't you say that you would do what you could to receive a more lenient sentence?" Martin again responded in the affirmative. She also testified the State helped her receive a reduced bond.

Pradubsri extensively cross-examined her regarding her prior drug use, her role in Pradubsri's drug activities, and her involvement in other illegal activities.

Pradubsri was convicted on all counts. The trial court sentenced him to thirty years' imprisonment for the trafficking charge, fifteen years for the PWID within proximity of a school charge, and one year for the pistol charge, which were all to run consecutively. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court only reviews errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* "Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000). "The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice." *Id.* at 625, 525 S.E.2d at 247-48.

LAW/ANALYSIS

I. Cross-Examination of Martin

Pradubsri maintains the restriction on cross-examination regarding Martin's exact potential legal exposure prior to her acceptance of the State's plea offer violated his Sixth Amendment right to confrontation and was in contravention of our supreme court's decision in *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). We agree.

"The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence." *Id.* at 331, 563 S.E.2d at 318. "However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." *Id.* at 331-32, 563 S.E.2d at 318.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and

interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *Id.* at 330, 563 S.E.2d at 317 (internal quotation marks omitted). "The Sixth Amendment is applicable to the states through the Fourteenth Amendment." *Id.*

"A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause." *Id.* at 331, 563 S.E.2d at 317. "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." *Id.* (internal quotation marks omitted).

> A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

Id. (alteration in original) (internal quotation marks omitted). However, "[t]he trial judge retains discretion to impose reasonable limits on the scope of cross-examination." *Id.* "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Id.* If the defendant establishes the limitation unfairly prejudiced him, the error is reversible. *Id.*

In *State v. Brown*, one of the State's chief witnesses was initially charged with trafficking cocaine, the same crime for which the defendant was on trial. 303 S.C. 169, 170-71, 399 S.E.2d 593, 593-94 (1991). The witness had been hired to transport cocaine from one city to another, but when she arrived at the designated airport, she was apprehended by undercover agents. *Id.* at 170-71, 399 S.E.2d at 594. Cocaine was found in her suitcase, and she agreed to cooperate with law enforcement by staging a sting operation for her contact. *Id.* at 171, 399 S.E.2d at 594. She testified the person she contacted was the person who arranged their meetings, and when he arrived, law enforcement officers arrested him. *Id.* The State elicited testimony from the witness regarding her plea agreement; specifically, that in exchange for her testimony against the defendant, "she was allowed to plead guilty to one conspiracy charge for which she could receive a maximum sentence of seven and one-half years." *Id.* On cross-examination, she

admitted her original charge of trafficking was reduced as part of her plea agreement. *Id.* When the defendant attempted to ask the witness about the potential sentence for trafficking in cocaine, the trial court sustained the State's objection. *Id.*

The South Carolina Supreme Court found the trial court abused its discretion and unfairly prejudiced the defendant in limiting the cross-examination of the witness. *Id.* It stated "[t]he fact [the witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury." *Id.* Further, it found the witness's "testimony was a crucial part of the State's case since she provided the only evidence of defendant's knowing involvement in the drug transaction." *Id.* at 171-72, 399 S.E.2d at 594. Because the error unfairly prejudiced the defendant, our supreme court held the defendant's right to meaningful cross-examination outweighed the State's interest in excluding the evidence. *Id.* at 172, 399 S.E.2d at 594.

In *Mizzell*, the supreme court again analyzed the court's discretion in limiting cross-examination of witnesses regarding their initial legal exposure prior to making a deal with the State. 349 S.C. at 330-35, 563 S.E.2d at 317-20. The case involved the burglary of a home. *Id.* at 329, 563 S.E.2d 316. No physical evidence was available to further the investigation, but officers recovered some of the stolen property from another individual's home after receiving a tip. *Id.* at 329-30, 563 S.E.2d at 316-17. The individual had purchased the items from the defendants and testified another man and woman were in the truck with the defendants when he bought the items. *Id.* at 330, 563 S.E.2d at 317. The State's chief witness testified he and his wife were the two other people in the truck and had been with the defendants at the victim's home. *Id.* He claimed the defendants kicked in the door and entered the home, then exited with the victim's items. *Id.* On cross-examination, the witness admitted the State originally charged him with the same crimes as the defendants, but the trial court only permitted questioning the witness in general terms about the sentence for those crimes. *Id.* Unlike in *Brown*, the witness in *Mizzell* had not made a plea deal nor pled guilty at the time of the defendants' trial. *Id.* at 332, 563 S.E.2d at 318. The witness did state "he 'could get a long sentence for these crimes.'" *Id.* at 334, 563 S.E.2d at 319. The court in *Mizzell* held:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.

Id. at 333, 563 S.E.2d at 318. Further, the court found "a witness admitting he is subject to a 'long sentence' is quite different from a witness admitting he could be sentenced to a maximum of life in prison, the sentence faced . . . if convicted of first degree burglary." *Id.* at 334-35, 563 S.E.2d at 319. Thus, it found the trial court committed a prejudicial error in restricting the defendant's cross-examination. *Id.* at 335, 563 S.E.2d at 320.

In *State v. Gracely*, 399 S.C. 363, 366, 731 S.E.2d 880, 881 (2012), the State investigated the sale of methamphetamine within a community. As a result, the State obtained a fifty-two count indictment against various individuals. *Id.* Count two of the indictment alleged Gracely conspired to sell "'more than four hundred grams of methamphetamine.'" *Id.* To establish its case against Gracely, the State relied upon evidence presented "in the form of testimony from seven individuals also named in the [i]ndictment." *Id.* at 366, 731 S.E.2d at 881-82. Gracely attempted "to show the potential bias of each witness by presenting to the jury information regarding the significantly lighter sentences th[o]se witnesses received in exchange for their testimony." *Id.* at 366-67, 731 S.E.2d at 882. When Gracely questioned one of the State's witnesses about the mandatory minimum and maximum sentences for the initial charges he faced, the trial court instructed "the witnesses could be questioned about the maximum punishment, but not the mandatory minimum punishment, for those charges they had in common with Gracely." *Id.* at 367, 731 S.E.2d at 882. Several of the State's witnesses admitted to past criminal records. *Id.* at 368-71, 731 S.E.2d at 882-84.

The supreme court clarified its decision in *Brown*, stating, "The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." *Id.* at 374-75, 731 S.E.2d at 886. Thus, the trial court erred in not allowing the jury to hear the mandatory minimum sentences the witnesses faced on their initial charges. *Id.* at 374, 731 S.E.2d at 886.

Here, the trial court allowed cross-examination in general terms about the sentence Martin faced under her original charges. On a first offense trafficking charge, she faced a mandatory minimum of seven years, but she only received eighteen months after pleading guilty to a lesser charge.[1] However, to avoid informing the jury of the exact sentence Pradubsri was facing, the trial court refused to allow Pradubsri to question her on the exact potential sentence of each charge. Pradubsri claimed the cross-examination regarding Martin's potential legal exposure was relevant to her bias and motive in testifying. Pradubsri's right to meaningful cross-examination outweighed the State's interest in excluding the evidence. Because the evidence was critical to showing Martin's potential bias, the trial court erred in refusing to allow that evidence into the record.

II. Reversible Error

"[This court's] inquiry does not end upon finding the trial court committed an error in limiting the cross-examination . . . ." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318. "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *State v. Lee-Grigg*, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007) (internal quotation marks omitted), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010). "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (internal quotation marks omitted). "No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Lee-Grigg*, 374 S.C. at 414, 649 S.E.2d at 55.

> Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

[1] Based upon her prior criminal history in the record, Martin would have faced trafficking in crack cocaine in an amount of twenty-eight grams or more, but less than one hundred grams, first offense. In 2009, at the time of the indictment in this case, the statute provided for a mandatory minimum of seven years, but no more than twenty-five years on that charge. S.C. Code Ann. § 44-53-375(C)(1)(2)(a) (Supp. 2005).

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318-19 (internal quotation marks omitted).

"Harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotation marks omitted). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." *Id.* (internal quotation marks omitted). Whether the improper introduction of "evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Brooks*, 341 S.C. 57, 62-63, 533 S.E.2d 325, 328 (2000) (internal quotation marks omitted); *see also Lee-Grigg*, 374 S.C. at 415, 649 S.E.2d at 55 (finding an insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached).

In *Gracely*, in determining whether the error was harmless, the supreme court summarized *Mizzell* and the *Van Arsdall*[2] factors. 399 S.C. at 375-76, 731 S.E.2d at 886-87. It found that while the State's witnesses presented cumulative testimonies, they only corroborated the others' testimonies. *Id.* at 376, 731 S.E.2d at 887. The State presented no physical evidence tying Gracely to the scene of the crime, enhancing the importance of the witnesses' testimonies. *Id.* The court noted no other evidence linked Gracely to the indicted offense. *Id.* Our supreme court determined the trial court should have considered the witnesses' backgrounds when limiting Gracely's cross-examination. *Id.* at 377, 731 S.E.2d at 887. The witnesses in *Gracely* all had "significant involvement with illegal drugs and other criminal activities, and cooperated following arrest and the possibility of long prison terms." *Id.* Because the case was established on circumstantial evidence, which included

[2] *Delaware v. Van Arsdall*, 475 U.S. 673 (1980).

the testimonies of witnesses "with such suspect credibility," the court decided a ruling "preventing a full picture of the possible bias of those witnesses" could not be considered harmless. *Id.* Accordingly, it reversed and remanded the case. *Id.*

Here, the State based Pradubsri's trafficking charge on the theory of constructive possession. South Carolina's definition of trafficking crack cocaine includes: "A person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of . . . [crack cocaine] . . . is guilty of a felony which is known as 'trafficking in . . . cocaine base.'" S.C. Code Ann. § 44-53-375(C) (Supp. 2012). "To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (alteration by court) (internal quotation marks omitted). "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." *State v. Muhammed*, 338 S.C. 22, 27, 524 S.E.2d 637, 639 (Ct. App. 1999) (internal quotation marks omitted). "Possession requires more than mere presence." *Jackson*, 395 S.C. at 255, 717 S.E.2d at 611-12 (internal quotation marks omitted). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." *Id.* at 255, 717 S.E.2d at 612 (internal quotation marks omitted). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." *Id.* (internal quotation marks omitted).

In another *State v. Brown*, 267 S.C. 311, 317, 227 S.E.2d 674, 677 (1976), our supreme court reversed the denial of a defendant's motion for a directed verdict on a possession of marijuana charge. The defendant was a passenger in a car in which marijuana was found. *Id.* at 313-14, 227 S.E.2d at 675-76. The court noted the State presented no evidence as to (1) who owned the car, (2) whether the passenger and the driver had any special relationship, (3) whether the passenger used or sold drugs, (4) whether the passenger recognized the smell of marijuana, (5) whether the driver and passenger were close friends, or (6) whether the driver and passenger had spent a substantial portion of the night together. *Id.* at 315-16, 227

S.E.2d at 676-77. The court also noted the bag of drugs was situated so that the passenger might not have seen it and it was opaque. *Id.* at 315, 227 S.E.2d at 676.

In *State v. Blue*, 957 F.2d 106, 106-07 (4th Cir. 1992), a police officer conducting nighttime surveillance of a house for possible illegal drug activity saw two men leave the house and enter a parked vehicle on the street. After the car began moving and was in a well-lit area, the officer stopped the vehicle to investigate a seatbelt violation, and while approaching, noticed the shoulder of the passenger "dip as if the passenger were reaching under the seat with his right hand." *Id.* at 107. After the driver and passenger exited the vehicle, the officer searched the passenger for any weapons and "discovered a needle, a syringe, and a small amount of heroin, and therefore placed [him] under arrest." *Id.* After searching the vehicle, the officer found a loaded gun under the passenger's seat. *Id.* Both the driver and passenger denied knowledge or ownership of the gun. *Id.* The passenger did not own the vehicle, and the government presented no evidence the passenger had been in the vehicle before. *Id.* at 108. The Fourth Circuit determined a passenger's shoulder dip alone did not transform him from a mere passenger in the car to a possessor of whatever was discovered underneath the seat in which he was sitting. *Id.* at 108. The court found "the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession." *Id.*

Here, the Lexington County Sheriff's Office had been searching for Martin and Pradubsri due to previous tips from a CI. Pradubsri and Martin were in an on-going relationship and had been together that night for at least a couple of hours before their arrests. Pradubsri owned the vehicle in which the drugs were located. Some of the drugs were found inside Martin's clothing, and a bag containing drugs was found in her hand as well. Sergeant Finch testified that when he made the traffic stop and approached Pradubsri's vehicle, he noticed the two inside talking and moving around, but never saw Pradubsri with the drugs. Additionally, Pradubsri had a firearm and $700 in cash on his person.

In *Brown*, 303 S.C. at 172, 399, S.E.2d at 594, the court noted the State's chief witness was the only person who could testify as to the defendant's involvement in the drug transactions. Here, Sergeant Finch testified he pulled over Pradubsri's vehicle in which Pradubsri and Martin were located but he did not see Pradubsri with any drugs. Martin's testimony was the only testimony that indicated the drugs were Pradubsri's. The State failed to present evidence amounting to constructive

possession of the drugs without Martin's testimony. They were all found on Martin's person. Only Martin's testimony demonstrated Pradubsri had constructive possession of the drugs. Accordingly, Martin's testimony was essential to the State's case. Therefore, the error in not allowing cross-examination regarding her exact potential sentence was not harmless.

CONCLUSION

The trial court erred in restricting Pradubsri's cross-examination regarding Martin's potential legal exposure prior to her accepting the State's plea offer. That cross-examination should have been allowed pursuant to the Confrontation Clause because it would have shown a particular bias in Martin's testimony against Pradubsri. Further, the error was not harmless due to the lack of sufficient evidence to find Pradubsri constructively possessed the drugs without Martin's testimony. For the foregoing reasons, the trial court is

REVERSED AND REMANDED.

SHORT, J., concurs.

LOCKEMY, J., concurring in part, dissenting in part: I concur with the majority that the trial court erred in restricting Pradubsri's cross-examination about the mandatory minimum sentence for Martin's initial charges. However, I respectfully dissent to the majority's reversal based upon a harmless error analysis. Even in light of our supreme court's recent decision in *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012), I believe distinguishing facts exist in this case to allow a finding of harmless error.

Gracely made clear a harmless error analysis is still applicable despite a trial court's improper restriction on cross-examining a witness about a mandatory minimum sentence stemming from initial charges prior to accepting a lesser plea offer. *Id.* at 375, 731 S.E.2d at 886. The court specifically found "[a] violation of the Confrontation Clause is not *per se* reversible but is subject to a harmless error analysis." *Id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . The[se] factors include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. (quoting *Van Arsdall*, 475 U.S. at 684) (emphasis omitted); *see State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) ("The list of factors as set out in *Van Arsdall* is not exhaustive.").

First, I would distinguish this case from *State v. Mizzell*, 349 S.C. 326, 536 S.E.2d 315 (2002), and *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991), because Martin was not the only witness placing Pradubsri at the scene of the crime. Our supreme court in *Mizzell* found it critical that the State's chief witness was the only witness able to place the defendant at the scene of the crime, and the complete lack of physical evidence at the scene of the crime served to greatly enhance the chief witness's testimony. *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319. Thus, it was unfairly prejudicial to restrict cross-examination of the State's chief witness as to his potential bias resulting from leniency in his sentence in exchange for his testimony against the defendant. *Id.* at 335, 563 S.E.2d at 320. Similarly, in *Brown*, the court noted the State's chief witness was the only person who could testify as to the defendant's involvement in the drug transactions. *State v. Brown*, 303 S.C. 169, 171-72, 399 S.E.2d 593, 594 (1991).

Unlike in *Mizzell* and *Brown*, a second witness in this case, also placed Pradubsri at the scene of the crime. Sergeant Finch explained he had prior knowledge of Pradubsri's involvement in illegal activity. He stated his estimated two-month investigation led up to the arrest, and thus, he knew Pradubsri by appearance and name. Further, he was confident he had legal authority to pull Pradubsri over that night. Even without Martin's testimony, other witnesses testified regarding the details of the traffic stop and the amount of drugs found at the scene, making a substantial portion of Martin's testimony cumulative for purposes of the actual crime for which Pradubsri was charged.

In examining the overall strength of the State's case and the presence of evidence corroborating the witness's testimony, I note, as did the majority, that the State based Pradubsri's trafficking charge on the theory of constructive possession. I concur with the majority's recitation of South Carolina's definition of trafficking crack cocaine and the requirements of constructive possession; however, we disagree on the application of prior case law to the present facts.

In another case titled *State v. Brown*, our supreme court outlined the facts the State used to support its theory of constructive possession against Brown:

> The sum total of the State's evidence against Brown is that he was a passenger in a car on a deserted rural road about 1:00 A.M., that Wolfe had an undetermined sum of cash in a large roll, that Brown was nervous and had no identification, that there was a smell of marijuana in the car, and that there was a large opaque bag containing eight pounds of marijuana on the rear floorboard. Wolfe knew Brown's name as Chuck Brown and Brown told Wolfe to be quiet when Wolfe started to admit the crime.

267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976).

The court listed the deficiencies in the State's circumstantial evidence, stating

> [t]here was no evidence adduced . . . as to ownership of the car or any special relation appellant had with Wolfe or the owner from which Brown's control of the car or its contents might be inferred. The bag containing the marijuana was opaque and so situated that a front seat passenger might never have seen the bag, much less its contents. There was no evidence that Brown was a seller or user of drugs, or that he even recognized the odor of marijuana; or that he was a close friend of the driver; or that he spent a substantial part of the night with him. Although Rogers testified he smelled the odor of burned marijuana he found no residue of such in or about the car of the defendant.

Id. at 315-16, 227 S.E.2d at 676-77 (internal citations omitted).

In *State v. Jackson*, 395 S.C. 250, 258, 717 S.E.2d 609, 613 (2011), this court determined the State failed to present sufficient circumstantial evidence of knowledge to support the charge of constructive possession. The drugs were found under the center console of the vehicle where the gear shifter was located. *Id.* The defendant did not own or rent the vehicle, and there was another person driving it. *Id.* Furthermore, the defendant had only met the driver once previously. *Id.* While the officer testified he smelled marijuana when approaching the vehicle, he never testified as to any suspicious movement by the defendant. *Id.* This court evaluated two other cases, *State v. Brown*, 267 S.C. 311, 227 S.E.2d 674 (1976), mentioned previously, and *State v. Blue*, 957 F.2d 106, 107 (4th Cir. 1992), and found the State presented even less evidence against the defendant than in either *Brown* or *Blue*. *Id.* at 256-58, 717 S.E.2d at 612-13. It stated in comparison to those two cases, "[t]he drugs were more out of sight, and the State presented no evidence that [defendant] was nervous or made any suspicious movements." *Id.* at 258, 717 S.E.2d at 613. Importantly, the court noted *Blue* gave guidance regarding the threshold amount of evidence necessary to support a finding of constructive possession.[3] *Id.* at 257-58, 717 S.E.2d at 613.

In *Blue*, a police officer conducting nighttime surveillance of a house for possible illegal drug activity saw two men leave the house and enter a parked vehicle on the street. 957 F.2d at 106-07. The officer pulled the vehicle over in a well-lit area to investigate a seatbelt violation, and while approaching, noticed the shoulder of the passenger, Herbert Blue, "dip as if [he] were reaching under the seat with his right hand." *Id.* at 107. After the driver and Blue exited the vehicle, the officer searched Blue for any weapons and "discovered a needle, a syringe, and a small amount of heroin, and therefore placed [him] under arrest." *Id.* After searching the vehicle, a loaded gun was found under Blue's seat. *Id.* Both the driver and Blue denied knowledge or ownership of the gun. *Id.* Blue was not the owner of the vehicle, and no evidence was presented that he had been in the vehicle before. *Id.* at 108.

Blue was convicted, and on appeal, the Fourth Circuit found the government relied on the following evidence to support its case: (1) the officer's testimony that Blue's shoulder dipped as the officer approached the vehicle and (2) the discovery of the gun under the passenger seat. *Id.* at 107-08. In reversing Blue's conviction, the

[3] The charge at issue in *Blue* was constructive possession of a gun, however it is the theory of constructive possession remains the same despite the difference in the object that is being possessed.

Fourth Circuit determined while the "shoulder dip alone [did] not transform Blue from a mere passenger in the [vehicle] to a possessor of whatever [was] discovered underneath the seat in which he [was] sitting . . . the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession."[4] *Id.* at 108.

Here, the Lexington County Sheriff's Office was conducting an on-going search for Martin and Pradubsri due to previous tips from a CI. Pradubsri was the owner of the vehicle in which the drugs were located. Pradubsri and Martin were in a relationship, lived in the same home, and had been together for at least a couple of hours on the night of the arrest. While some of the crack cocaine was found inside Martin's clothing, there was a clear, plastic bag containing crack cocaine as well, found in her hand, to which Pradubsri could have had full access, control, or dominion at any point. Sergeant Finch testified that when he made the traffic stop and approached Pradubsri's vehicle, he noticed the two occupants talking and moving around, allowing an inference that the two could have been attempting to hide the drugs. Moreover, Pradubsri had a firearm, as well as $700 in cash on his person. I believe the State presented a case distinguishable from *Brown* and *Jackson*, and that far exceeded the low threshold delineated in *Blue*. Importantly, I believe the State presented a case by which a jury could have found Pradubsri guilty of constructive possession of the drugs, even without Martin's testimony.

Despite the restriction against questioning about Martin's exact potential legal exposure, Pradubsri was able to thoroughly cross-examine her on other points regarding her bias and credibility. She discussed the exact charges she faced before the State allowed her to plead to lesser charges in exchange for testifying against Pradubsri. She further stated there was "a significant amount of time" on her initial charges and admitted to writing a letter to the Solicitor essentially begging to do whatever she needed in exchange for a more lenient sentence. Another point of distinction in *Gracely*, as well as *Brown* and *Mizzell*, was the difference in the relevant mandatory minimums. Based upon her prior criminal history in the record, Martin would have faced trafficking in crack cocaine in an amount of twenty-eight grams or more, but less than one hundred grams, first

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[4] I recognize *Blue* is cited and discussed in the majority's opinion as well, and they adopt strikingly similar language from this dissent, but we come to different conclusions.

offense. In 2009, at the time of the indictment in this case, the pertinent statute provided for a mandatory minimum of seven years, but no more than twenty-five years. S.C. Code Ann. § 44-53-375(C)(1)(2)(a) (Supp. 2005). In *Gracely*, *Mizzell*, and *Brown*, the relevant mandatory minimum at issue was twenty-five years or more, a significant increase from a mandatory minimum of seven years.

Moreover, Pradubsri was able to cross-examine Martin regarding her statement at the scene of the arrest that the crack was hers, even though at trial, she testified it was owned by Pradubsri. During direct examination, she admitted a bench warrant was issued because she did not initially appear to testify at Pradubsri's trial after being subpoenaed. She testified she used crack cocaine every day during the time she dated Pradubsri and had an addiction to it. She also explained she previously operated an escort service. She had a substantial criminal record that was entered into evidence. Thus, the jury had ample reason to discount her testimony and credibility because she was obviously lying about the drugs at the scene of the arrest, trial, or both occasions. The record reflects other points of her credibility and bias were fully tested.

While the State's case against Pradubsri would have been harder to prove without Martin's testimony, I believe there was evidence for the jury to find him guilty of constructive possession of the drugs. Further, the weakness in the State's case without Martin's testimony is but one factor in determining the harmlessness of the error. There must be some credence given to the fact that our supreme court has left a multi-factor harmless error analysis intact. Although Justice Kittredge was referring to another legal issue, his quote is relevant under these facts as well: "[I]t may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances. But these determinations are necessarily context dependent, and a categorical rule is at odds with longstanding harmless error jurisprudence." *State v. Jennings*, 394 S.C. 473, 482, 716 S.E.2d 91, 96 (2011) (Kittredge, J., dissenting).

After reviewing the factors provided in *Van Arsdall*, I would find the error in not allowing cross-examination regarding Martin's potential mandatory minimum sentence was harmless.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ammie McNeil, Appellant,

v.

South Carolina Department of Corrections and Jon E. Ozmint, Robert Ward, and Bernard McKie in their individual capacities, Defendants,

Of whom South Carolina Department of Corrections is the Respondent.

Appellate Case No. 2011-202887

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5122
Heard October 30, 2012 – Filed May 1, 2013

AFFIRMED

J. Lewis Cromer and Julius Wistar Babb, IV, both of J. Lewis Cromer & Associates, LLC, of Columbia, for Appellant.

Steven Michael Pruitt and Hannah K. Metts, both of McDonald Patrick Poston Hemphill & Roper, LLC, of Greenwood, for Respondent.

SHORT, J.: Ammie McNeil appeals from the trial court's order granting the South Carolina Department of Corrections' (SCDC) motion to dismiss her claims for due process violations, public policy discharge, and defamation. We affirm.

FACTS

SCDC employed McNeil at Kirkland Reception and Evaluation Center (Kirkland) as a captain. SCDC maintains custody of, exercises control of, and provides for the care of inmates and prisoners incarcerated by the state, including Kirkland, which is located in Richland County. An inmate, who was prescribed hypertrophic medication for threatening suicide, was transported to Kirkland, and despite his request for his medication, he did not receive it. McNeil claimed she was not made aware of the inmate's prescribed medication when he arrived at Kirkland. Even though the inmate was a known suicide risk, he was not placed in a cell with a closed-circuit camera as required. On the night of the incident, only McNeil and one other officer were on duty in violation of Kirkland's regulations requiring four to six officers. Sometime between 4 and 4:45 a.m. on August 11, 2006, the inmate committed suicide by stuffing toilet paper in his mouth and nose, asphyxiating himself. McNeil made this discovery when she tried to rouse the inmate for the 4:45 a.m. standing count.

SCDC performed an internal investigation as to the inmate's death and asked SLED (State Law Enforcement Division) to perform its own investigation. Thereafter, McNeil was cleared of any responsibility for the inmate's death and was promoted to sergeant in November 2008. In December 2007, the inmate's family filed a wrongful death lawsuit against SCDC. The case was mediated and settled in July 2009. In September 2009, McNeil was terminated because of alleged negligence in her duties at the time of the inmate's death and falsification of documents after his suicide.

On December 8, 2010, McNeil filed a complaint against SCDC, and SCDC Director Jon Ozmint, SCDC Director of Operations Robert Ward, and Kirkland Warden Bernard McKie, in their individual capacities.[1] Her complaint alleged causes of action for due process violations, public policy discharge, negligence, gross negligence, defamation, and civil conspiracy. McNeil claimed that because of the large settlement and the high scrutiny placed on them, Ozmint, Ward, and

[1] SCDC is the only respondent in this appeal.

McKie "feared pressure from the media and certain legislators resulting in an agenda to find a scapegoat or to punish someone to take the pressure off of themselves."

SCDC filed a motion to dismiss McNeil's claims on March 28, 2011, alleging she failed to state a cause of action for which relief can be granted. After a hearing on the matter, on August 15, 2011, the trial court issued its order granting SCDC's motion to dismiss McNeil's claims. The order notes McNeil alleged in her complaint "she was terminated for 'personal, political, pretextual, and scapegoating purposes' in violation of public policy." However, the court explained, "South Carolina has long recognized the doctrine of employment at-will, such that an employer may terminate an employee for good reason, no reason, or bad reason without liability." Further, the court stated McNeil "does not dispute that she was an at-will employee and even if she was terminated for personal reasons or as a scapegoat as she alleges, she still fails to state a claim and her action must be dismissed." Additionally, the court noted McNeil neither alleged her discharge was in violation of any statute or act by the General Assembly, nor cited to a South Carolina case that has found a violation of public policy without a violation of a statute or act by the General Assembly. As a result of failing to state a claim for wrongful termination, the court found her remaining causes of action could not go forward and must be dismissed.[2] McNeil filed a Rule 59(e), SCRCP, motion, which the court denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, this court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Id.* The court should

[2] McNeil did not appeal the dismissal of her claims for negligence and gross negligence; therefore, the trial court's dismissal of these claims is the law of the case.

not dismiss the complaint merely because it doubts the plaintiff will prevail in the action. *Id.*

LAW/ANALYSIS

I. Public Policy Discharge

McNeil argues the trial court erred in finding she failed to state a claim for public policy discharge on the face of her complaint because she pled she was terminated after complaining about institutional safety violations and testifying after being subpoenaed in a civil trial. We disagree.

"An at-will employee may be terminated at any time for any reason or for no reason, with or without cause." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). "Under the 'public policy exception' to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *Id.* at 614, 713 S.E.2d at 637. "The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925); *see Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (stating the determination of what constitutes public policy for purposes of the public policy exception to the at-will employment doctrine is a question of law for the courts to decide). "The public policy exception clearly applies in cases where either (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law." *Barron*, 393 S.C. at 614, 713 S.E.2d at 637; *see Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (holding the public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law); *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 246, 422 S.E.2d 91, 93 (1992) (finding employee would have a cause of action for wrongful discharge if he was discharged because he refused to contribute to a political action fund). The *Barron* court found the public policy exception is not limited to these two situations; however, the exception has not yet been extended beyond them. 393 at 614, 713 S.E.2d at 637.

As the dissent notes, in two cases for wrongful termination based on the public policy exception, our courts have reversed the trial court's dismissal pursuant to a

12(b)(6) motion because the allegations were novel and deserved further development of the facts. We find these cases are distinguishable from this case.

In *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 223, 456 S.E.2d 907, 908 (1995), the employee alleged his employer terminated him in retaliation for reporting to the United States Department of Energy and the news media his concerns about radioactive contamination and unsafe working conditions at the Savannah River Site and for voluntarily testifying about his concerns before the Defense Nuclear Facilities Safety Board. Our supreme court held the trial court's dismissal of the employee's wrongful discharge action based on the public policy exception to the employment at-will doctrine for failure to state a claim was inappropriate when the employee alleged his employment was terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at the nuclear facility. *Id.* at 226-27, 456 S.E.2d at 909-10. The court stated "[w]hether the [public policy] exception applies when an employee is terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at a nuclear facility is a novel issue, and such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss." *Id.* at 226, 456 S.E.2d at 909. We find *Garner* to be distinguishable because the existence of radioactive contamination and unsafe working conditions is a matter of public interest and public policy, and the employee specifically alleged his termination was in retaliation for reporting his concerns to the proper authorities.

In *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 370, 482 S.E.2d 792, 793 (Ct. App. 1997), the employee alleged her employer terminated her employment in retaliation for reporting her concerns to the South Carolina Department of Labor about violations of state and federal labor laws for reducing her pay without prior notice. The employee told the manager she had contacted the state labor board and, based on the advice she had received, if the violations were not corrected immediately, she would file a formal complaint with the labor board. *Id.* This court held whether an employer's retaliatory discharge of an employee who threatened to invoke her rights under the Payment of Wages Act was a violation of a clear mandate of public policy and was a novel issue; therefore, the trial court erred in dismissing the employee's cause of action pursuant to a Rule 12(b)(6) motion. *Id.* at 373, 482 S.E.2d at 794. We find *Keiger* to be distinguishable because a violation of the Payment of Wages Act is a violation of a

clear mandate of public policy, and the employee specifically alleged her termination was in retaliation for reporting her concerns to the proper authorities.

McNeil's complaint does not contend SCDC demanded she violate a law or her termination violated any law. Her complaint also does not state sufficient facts from which a court could determine a violation of any public policy. McNeil merely alleges SCDC terminated her for personal, political, pretextual, and scapegoating purposes. She does not allege her termination was retaliatory. The dissent finds the trial court failed to consider whether this case poses a novel issue and whether the facts should have been developed further before the motion to dismiss was granted. On the contrary, the learned trial court found McNeil's allegations that she was discharged for personal, pretextual, and scapegoating purposes was insufficient to state a violation of the public policy of South Carolina because our law provides an at-will employee may be terminated for a good reason, bad reason, or no reason at all. Simply stated, a litigant must allege more than a general statement that her discharge violated public policy. The complaint must set forth specific allegations that would enable the court to determine what public policy was violated. By the dissent's interpretation of our law, any employee could circumvent the employment at-will doctrine by merely asserting a termination was retaliatory in violation of a clear mandate of public policy and contend it was a novel issue in this state. This would be contrary to the public policy exception recognized by our courts. Therefore, we find McNeil's general allegations do not support a wrongful discharge action, and the trial court did not err in dismissing her cause of action.

II. Due Process Violation

McNeil argues the trial court erred in finding her cause of action for violations of due process against SCDC could not proceed because SCDC investigated the inmate's death three years prior to her termination and during those three years did not give her any indication her job was in jeopardy. We disagree.

"Procedural due process requires notice and the opportunity to be heard." *Cameron & Barkley Co. v. S.C. Procurement Review Panel*, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995). "Ordinarily, a claimant is not entitled to substantive due process when her state employment is terminated unless she has a property interest in continued employment." *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 524-25, 319 S.E.2d 717, 721 (Ct. App. 1984). "[A] property

interest in employment can be found in existing state law; in contracts, express or implied; or in mutually explicit understandings." *Id.* at 525, 319 S.E.2d at 721.

McNeil does not allege she was not given an opportunity to be heard regarding her termination. In fact, McNeil admits "she was given her grievance rights following her termination." McNeil also has not provided any state law or regulation that would require her employment contract to be renewed, she does not claim her contract guarantees future employment, and she does not allege she and SCDC had a "mutually explicit understanding" that her contract would be renewed. The mere fact that McNeil's employment contract had been renewed twice in the past is not sufficient to create a protected property interest in her continued employment. *See Hamilton*, 282 S.C. at 526, 319 S.E.2d at 722. Therefore, we find McNeil's allegations do not support an action for violation of due process, and the trial court did not err in dismissing her cause of action.

III. Defamation

McNeil argues the trial court erred in finding her defamation claim against SCDC could not proceed because she pled SCDC made and published statements that insinuated she was unfit in her business and profession. We disagree.

"The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001).

McNeil did not allege any of SCDC's statements were unprivileged, and she did not set forth with any specificity what the alleged false statements were. She also did not allege any of the statements were published to a third party or that SCDC made the alleged statements. Additionally, she did not assert to whom SCDC made the alleged statements. Therefore, we find McNeil's allegations do not support an action for defamation, and the trial court did not err in dismissing her cause of action.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, J., concurring in part and dissenting in part.

I respectfully dissent only as to the majority's decision to affirm the trial court's dismissal as to McNeil's public policy discharge claim.

In South Carolina, an at-will employee may be terminated for any reason or no reason at all. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). Our supreme court recognized an exception to this doctrine in *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985). Under the "public policy exception" to the at-will employment doctrine, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216. Our supreme court has determined the public policy exception clearly applies in cases in which either:

(1) the employer requires the employee to violate the law; or (2) the reason for the employee's termination itself is a violation of criminal law. *See id.*; *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 246, 422 S.E.2d 91, 92-93 (1992). These two situations seem to have been the sole focus of the trial court.

While the trial court and, to some extent, the majority, seem focused on only these two situations, our supreme court has made clear the public policy exception is not limited to only these situations. *See Barron*, 393 S.C. at 614, 713 S.E.2d at 637 (holding the public policy exception was not limited to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law). In fact, in at least two cases our courts have reversed trial court grants of Rule 12(b)(6), SCRCP motions on wrongful termination claims based on the public policy exception because the allegations were novel and deserved further development of the facts. *See Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995); *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 373, 482 S.E.2d 792, 794 (Ct. App. 1997). In addition, our supreme court has also held that when there is a statutory remedy

for wrongful termination, the public policy exception does not apply. *See Barron*, 393 S.C. at 615, 713 S.E.2d at 637.

Consequently, the public policy exception has developed beyond just a consideration of whether the termination was due to an employee refusing to violate the law or the termination itself was a violation of the law. Here, however, it appears the trial court only considered these two situations when it granted SCDC's Rule 12(b)(6) motion. The trial court elucidated the basis for its decision in the following passage:

> [McNeil] points to no violation of any statute or act by the General Assembly, but as stated above claims that her discharge was for "personal, pretextual and scapegoating purposes." [McNeil] also points to no case in this state that has found a violation of public policy without a violation of a statute or act by the General Assembly. For these reasons, the Court finds that [McNeil] fails to allege a violation of a clear mandate of public policy.

The trial court failed to consider whether this case posed a novel issue and whether the facts should have been developed further. In addition, the trial court did not consider whether a statutory remedy for wrongful discharge justifying the dismissal of McNeil's case existed. Although the trial court and the majority both mentioned the public policy exception is not limited to the two situations stated above, they noted no court has extended the public policy exception beyond them.

The majority relies heavily on *Barron* in affirming the trial court's decision. Respectfully, I read *Barron* as making clear the public policy exception is not limited to situations in which an employee was required to break the law or the termination itself was a violation of the law. Further, *Barron* declares solidly that the decision of whether there was a violation of a clear mandate of public policy is a question of law for the court and not a jury. It is interesting that *Barron* makes a strong effort to clarify that the public policy exception is not limited to the two stated situations, yet the majority cites it while affirming a decision limited to those situations.

To be clear, I do not interpret our law as holding mere allegations of a termination of an at-will employee in violation of a clear mandate of public policy are

sufficient to avoid the grant of a Rule 12(b)(6) motion. The court should permit the facts to be developed only when there is an issue that, based on guidance from previous cases, is sufficiently novel to at least permit some discovery before summarily dismissing the action. In this case, McNeil intimates that her compliance with a subpoena and testimony at a deposition angered SCDC. In her complaint, McNeil asserts she was terminated as a scapegoat to relieve legislative pressure on SCDC officials. She alleges she was terminated although SCDC knew she had done nothing wrong and had promoted her subsequent to the incident in question. McNeil has alleged enough to at least raise the issue of a retaliatory termination. The trial court held that even if her allegations were true, she did not state a viable cause of action for a violation of a clear mandate of public policy. The majority decision, in upholding the trial court, seems to be based on the conclusion that McNeil must allege that she was required to break the law, that her termination was a violation of law, or that the facts of this case are identical to previous cases in this area. I do not interpret the law to be so limited. The issues raised by McNeil are sufficiently novel, and she deserves at least an opportunity to develop the facts. Obviously, the facts here are not the same as in *Garner* or *Keiger*, but then again if they were then they would not meet the definition of novel. Indeed, both *Garner* and *Keiger* involved different fact situations.

I would reverse the trial court as to this issue only and remand for further proceedings. This in no way implies any evidence has been presented that would justify a cause of action for termination in clear violation of public policy. Further, it could very well be that McNeil's action is dismissed by summary judgment or some other action, but prior decisions by our courts hold she at least deserves an opportunity to develop the facts. Thereafter, the trial court, as is required, should make a ruling as a matter of law if the facts warrant the continuation of McNeil's cause of action.

For the above reasons, I respectfully concur in part and dissent in part.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mario S. Inglese and Mario S. Inglese, PC, Appellants,

v.

Carl H. Beal Jr., Linda Erickson, and Russell S. Stemke, Defendants,

Of Whom Carl H. Beal Jr. is the Respondent.

Appellate Case No. 2012-208307

Appeal From Charleston County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 5123
Heard January 9, 2013 – Filed May 1, 2013

AFFIRMED

Charles M. Feeley, of Charleston, for Appellants.

Eugene P. Corrigan III, Corrigan & Chandler, LLC, of Charleston, for Respondent.

FEW, C.J.: Mario Inglese, a lawyer, was retained to close a real estate transaction. Inglese failed to obtain a written release of a judgment lien of which he had actual knowledge, and as a result, a title insurance company was forced to pay the judgment creditor $10,000. The title insurance company sought reimbursement from Inglese, which he paid. Inglese then sued the seller—his

client—for unjust enrichment and equitable indemnity. The circuit court granted summary judgment to the seller. We affirm.

I. Facts and Procedural History

In September 2006, Carl H. Beal Jr. entered into a contract to sell real property. The contract provided that Beal would deliver "marketable title . . . free of encumbrances." Because Beal is not an attorney, he hired Inglese to close the transaction. Inglese commissioned a title search and discovered a judgment lien against the property in excess of six million dollars.[1] Inglese claims he contacted the judgment creditor's attorney, Russell S. Stemke, and reached an oral agreement with him regarding how the judgment lien would be resolved. According to Inglese, Stemke agreed to allow the net proceeds from the sale to be held in escrow on the condition the property would be released from the judgment lien, pending the outcome of the appeal in the defamation case. However, no such agreement was ever reduced to writing.

At the closing in November 2006, Inglese represented both Beal and the buyer. Beal executed an owner's affidavit, which certified to the title insurance company that there were "no pending suits, proceedings, judgments, . . . [or] liens" against him. However, this provision was crossed out and initialed by Inglese, not by Beal. Beal executed an affidavit of ownership, which required Beal to swear that "no judgment, decree or lien exist[ed] against [him], or against [his property], and no actions exist[ed] which may lead to such a judgment, decree or lien." This provision was also crossed out and initialed by Inglese, but not by Beal. Beal claims Inglese took these actions without Beal's knowledge.

In accordance with the alleged agreement, Inglese withheld the net proceeds of $28,940 at closing and listed that amount on the settlement statement at line 507 as "Escrow to Russell S. Stemke/Linda Erickson." After the closing, however, Stemke denied he had an agreement with Inglese and refused to release the property from the judgment lien.

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[1] The judgment was entered against Pat Beal, presumably Beal's wife, in a defamation case brought by Linda Erickson. *See generally Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006).

The buyer made a claim on the title insurance policy, and the insurance company paid the judgment creditor $10,000 to release the lien. The title insurance company then revoked Inglese's status as an approved title insurance agent and filed a lawsuit against him. Inglese paid the title insurance company $10,000 to settle the lawsuit.

In December 2010, Inglese filed this lawsuit against Beal on the theories of unjust enrichment and equitable indemnity. As we mentioned, Beal was Inglese's client. Beal filed a motion for summary judgment. In addition to claiming there was no issue of material fact as to either of Inglese's causes of action, Beal asserted the voluntary payment doctrine and the doctrine of unclean hands as defenses. At the summary judgment hearing, Beal's attorney argued "basically our attorney is suing us for what [the attorney] did," "my client is not an attorney," and "now there's an argument . . . that because Mr. Beal somehow benefitted from this mistake made by his attorney," Beal must compensate his own attorney. The circuit court summarily granted the motion in open court, stating, "you blame Mr. Beal and Mr. Beal is not a lawyer. He can't certify title . . . . The buck stops with the closing attorney."

II. The Summary Judgment Ruling

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

A. The Role of an Attorney

We begin our discussion with an examination of the role of an attorney in a real estate transaction. In South Carolina, all real estate closings must be supervised by an attorney. *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011). This requirement is based on the policy determination that the use of an attorney to close a real estate sale is necessary to protect the participants in the transaction and the public from the numerous things that can go wrong when transferring real estate. *See State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987) (per curiam) (requiring real estate closings to be conducted by attorneys "for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law"). As the supreme court stated in *Buyers Service*,

> We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern.

292 S.C. at 434, 357 S.E.2d at 19; *see also Matrix*, 394 S.C. at 140, 714 S.E.2d at 535 (stating "the presence of attorneys in real estate loan closings is for the protection of the public and that 'protection of the public is of paramount concern' in loan closings" (quoting *Buyers Serv. Co.*, 292 S.C. at 434, 357 S.E.2d at 19)).

The attorney's role pursuant to this policy, therefore, is to protect the participants in real estate transactions from the numerous potential problems that may arise. When an attorney is aware of such a potential problem, it is the responsibility of the attorney to ensure that the potential never materializes. One such problem is the existence of a judgment against the seller. A lien arises from the judgment, and if the lien is not released, the judgment creditor may foreclose against the buyer after the sale takes place. *See Ducker v. Standard Supply Co.*, 280 S.C. 157, 158, 311 S.E.2d 728, 729 (1984) ("Under South Carolina law, a judgment represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money. A judgment may also establish a lien upon the real property of the debtor."); *see also* S.C. Code Ann. § 30-7-10 (2007) (a properly recorded judgment lien on real property is valid against a purchaser of the property). In the specific context of a judgment lien against the property, the attorney-client relationship imposes on the attorney the fiduciary responsibility of protecting the client by getting the judgment lien released.

B. Unjust Enrichment Claim

Inglese first argues the circuit court erred in granting summary judgment on his unjust enrichment claim. We find Inglese failed as a matter of law to establish the elements required to recover for unjust enrichment. Therefore, the circuit court was correct to grant summary judgment on this cause of action.

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Servs.-Hilton*

Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) ("Restitution is a remedy designed to prevent unjust enrichment."). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012); *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

Inglese failed as a matter of law to establish any one of these elements. In fact, Inglese did not address the elements of unjust enrichment in the circuit court or in his briefs on appeal. Neither his initial brief to this court nor his reply brief refer to the elements of unjust enrichment even once. He simply argued there was no basis for summary judgment as to the defenses Beal asserted. Because we need not address the defenses if Inglese has failed to establish the elements of the cause of action, we address the elements.

As to the first element, Inglese did not confer a benefit on Beal. Instead, the title insurance company conferred a benefit on Beal when it paid the judgment creditor to release the lien. After that payment, the harm Inglese caused to Beal was mitigated as much as possible because the release extinguished any further liability Beal had with respect to the sale. Therefore, Inglese's decision to settle the lawsuit against Inglese had no impact on Beal. Moreover, not just any benefit conferred meets the first element. Rather, the benefit must be non-gratuitous, either because it was conferred at Beal's request or because the circumstances were such that Inglese could reasonably rely on Beal for repayment. *Campbell*, 398 S.C. at 24, 726 S.E.2d at 228 (citing *Niggel Assocs.*, 296 S.C. at 532-33, 374 S.E.2d at 509). Inglese did not pay the insurance company at Beal's request. He made the payment entirely in his own self-interest to settle a lawsuit. Also, a lawyer may not rely on his client for repayment in the event the lawyer incurs liability for the lawyer's mistake in failing to protect the client. Because Inglese conferred no benefit on Beal, he failed to meet the first element as a matter of law.

As to the second and third elements, Inglese also failed as a matter of law. We have already discussed that Inglese conferred no benefit on Beal, and thus, Beal could not have realized any value from the non-existent benefit. Finally, there is

absolutely nothing inequitable about Inglese's inability to recover restitution from Beal. Beal was merely trying to sell a parcel of real estate, and he should have been able to rely on his lawyer to protect him from the adverse effects of the judgment. Accordingly, all of the inequity in this case falls on Beal.

C. Equitable Indemnity Claim

Inglese next argues the circuit court erred in granting summary judgment on his claim for equitable indemnity. We find this claim also fails as a matter of law, and thus the circuit court ruled correctly.

The right of equitable indemnity arises out of the relationship between the indemnity plaintiff and the indemnity defendant. "Traditionally, the courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990) (*Winnsboro I*) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992). Under the doctrine of equitable indemnity,

> a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Generally, an indemnity plaintiff may recover damages from a defendant "where the wrongful act of the defendant has involved the [indemnity] plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (citation and quotation marks omitted).

When a sufficient relationship between them exists, the indemnity plaintiff (Inglese) must prove the following elements to recover damages on an equitable indemnity claim: (1) the indemnity defendant (Beal) is at fault in causing the damages of the third party (the title insurance company); (2) the plaintiff has no fault for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party's claim. *See Town of Winnsboro*

v. Wiedeman-Singleton, Inc., 307 S.C. 128, 121, 414 S.E.2d 118, 121 (1992) (defining a sufficient relationship for equitable indemnity); *Addy*, 257 S.C. at 33-34, 183 S.E.2d at 709-10 (describing the requirements for proving equitable indemnity); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (stating the elements of equitable indemnity); *Winnsboro I*, 303 S.C. at 57-59, 398 S.E.2d at 503-04 (discussing what must be proven to recover for equitable indemnity).

As to the first element, the title insurance company's damages resulted from the fact that the judgment lien was valid and enforceable against the buyer after the sale. In this regard, Beal did nothing wrongful. He was simply attempting to sell real estate and did the right thing by retaining an attorney to close the sale. Instead, it was Inglese's wrongful act in failing to resolve the lien that caused the title insurance company's damages. Because Beal is not at fault in causing those damages, Inglese failed to establish the first element.

Inglese argues, however, that he meets the first element because Beal committed wrongful conduct that led to the judgment, and this misconduct "has involved [Inglese] in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest." *See Addy*, 257 S.C. at 33, 183 S.E.2d at 709. The argument misses the point of equitable indemnity. First, it was not Beal's conduct that led to the judgment. *See Erickson*, 368 S.C. at 455-57, 629 S.E.2d at 659-60 (describing the conduct of Pat Beal leading to the judgment against her). Second, Pat Beal's conduct and the resulting judgment merely created the situation giving rise to Inglese's responsibility to protect his client. In other words, regardless of any misconduct resulting in a judgment and a lien against the property, Inglese was aware of the judgment lien and had a fiduciary responsibility to protect Beal from any adverse effect it may have on the real estate sale. Inglese cannot avoid this responsibility to protect Beal by claiming the judgment was Beal's fault. Viewing the evidence in the light most favorable to Inglese, Beal is not at fault in causing the title insurance company's damages. Therefore, Inglese failed as a matter of law to establish the first element.

Inglese also failed as a matter of law to establish the second element—whether he has no fault for the title insurance company's damages. In many cases, the resolution of an underlying lawsuit resolves the second element of an equitable indemnity claim. For example, the jury's determination in the underlying lawsuit of the indemnity plaintiff's fault will carry over to the indemnity lawsuit. *See, e.g.*,

Addy, 257 S.C. at 32, 183 S.E.2d at 709 ("The jury returned a verdict . . . against the [indemnity defendant], thus exonerating the [indemnity plaintiff] of any liability."). The underlying lawsuit did not resolve the second element here because Inglese settled the underlying lawsuit before any determination of his fault. This court recognized in *Meacher* that even though the indemnity plaintiff settled the underlying lawsuit, the "settlement alone does not preclude indemnification when there is . . . evidence to support a finding of . . . lack of fault by the indemnitee." 392 S.C. at 487-88, 709 S.E.2d at 75.

In this case, there is no possibility, and certainly no evidence, that Inglese has no fault in causing the title insurance company's damages. The title insurance company's claim would not have arisen had Inglese satisfied his fiduciary duty to Beal and resolved the lien in writing. In addition to this duty to his client, Inglese had a duty to the title insurance company. The company's lawsuit against Inglese was based on the allegation that Inglese breached that duty—by failing to resolve the lien in writing, by crossing out the representations that there were no pending judgments or liens against Beal, and by otherwise failing to disclose the judgment to the company. Inglese's decision to pay the title insurance company's claim under these circumstances requires a finding that he cannot be "exonerated from any liability for those damages," 392 S.C. at 485, 709 S.E.2d at 74, and thus that he was at fault in causing the company's damages. Therefore, Inglese failed as a matter of law to satisfy the second element of equitable indemnity.

Inglese argues, however, that if there actually was an oral agreement to resolve the lien, the factfinder could determine he was without fault and thus he met the second element. He argues summary judgment should not have been granted on this element because there is a material issue of fact as to whether there was an oral agreement. We agree there is evidence in the record that Inglese reached an oral agreement to resolve the lien. We find, however, that the existence of this evidence does not create an issue of *material* fact.

Our state's policy determination that a lawyer must supervise a real estate closing is based on the lawyer's ability and responsibility to successfully prevent the very consequences Inglese permitted to occur. One of the primary purposes of a real estate closing is to bring finality to the transaction. In *Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009), our supreme court discussed the importance of this finality, stating, "Numerous legal documents are executed in a real estate transaction and several entities involved in the transaction, including the buyer,

seller, lender, mortgage company, and title insurance company, rely on the finality of the closing." 384 S.C. at 518, 682 S.E.2d at 827. A cloud on the title of the seller, such as the judgment lien in this case, and the risk that the cloud may pass to the buyer, is one of the reasons this finality is so important. The real estate closing is the last opportunity for the parties to bring finality to this issue and prevent the cloud on the title from passing to the buyer.

As we have discussed, the responsibility to bring this important finality to the issue falls on the lawyer retained to supervise the closing. If the closing is properly conducted, the lawyer enables finality and prevents future litigation. If the agreement Inglese claims he made with the judgment creditor did in fact exist, Inglese should have documented the agreement in writing and made the writing part of the closing. Had Inglese performed this task, he would have prevented all this from occurring. Inglese chose not to document the alleged agreement, however, and thus chose to rely on the hope that the judgment creditor would later agree to relinquish his interest in the judgment. This choice by Inglese is critical to our analysis of the second element—whether Inglese is without fault—because Inglese's choice created the consequence he was retained to prevent. Inglese's choice left Beal at risk of losing all the proceeds of the sale and left the buyer at risk of having to take legal action to remove the cloud from his title. These risks are representative of those the supreme court had in mind when it stated in *Matrix* and *Buyers Service* that "the presence of attorneys in real estate loan closings is for the protection of the public and that 'protection of the public is of paramount concern' in loan closings." *Matrix*, 394 S.C. at 140, 714 S.E.2d at 535 (quoting *Buyers Serv. Co.*, 292 S.C. at 434, 357 S.E.2d at 19).

We find that Inglese's failure to protect Beal and the buyer from these risks resolves the second element of Inglese's equitable indemnity claim as a matter of law. When a closing attorney representing the seller does not document in writing the resolution of a judgment lien on his client's property as to which the attorney has actual knowledge, but instead relies only on an oral agreement with the judgment creditor, the attorney does so at his own risk.[2] When that risk materializes, as it did here, the possibility that the judgment creditor might later

[2] This appeal does not present the question of whether Inglese's failure to obtain a written release of the judgment lien results in Inglese's liability to Beal as a matter of law. We address the consequences of Inglese's failure only in the context of his lawsuit against his own client for equitable indemnity.

have acknowledged an oral agreement to resolve the lien, or that such an agreement might have been proven in subsequent litigation, is not a material fact. What is important is that the lawyer had a fiduciary duty to bring finality to the transaction, and failed. This failure cannot be excused, even if there was an oral agreement to resolve the lien. Thus, the lawyer is at fault in the transaction and cannot recover for equitable indemnity. As we stated in *Meacher*, "[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." 392 S.C. at 486, 709 S.E.2d at 74.

D. Defenses

Inglese failed as a matter of law to establish any of the elements of either of his theories of recovery against Beal. It is unnecessary, therefore, that we address Beal's defenses. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

III. Conclusion

The circuit court's granting of summary judgment is **AFFIRMED**.

WILLIAMS, J., concurs.

PIEPER, J., concurring in part and dissenting in part.

I agree that summary judgment is proper as to Inglese's equitable indemnification claim. However, I respectfully dissent as to the granting of summary judgment on Inglese's unjust enrichment claim and would reverse as to that claim.[3]

In determining whether the trial court erred in granting summary judgment, an appellate court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008). Here, as to the equitable

[3] I refer to Inglese's unjust enrichment cause of action herein, although I would label it as a cause of action for restitution.

indemnification claim, no disputed facts exist as to whether Inglese caused the loss to the title insurance company by permitting the property sale to close with the judgment lien still on the property.

Inglese claims he had an oral agreement with another lawyer to resolve the judgment lien. Courts are hesitant to resolve disputes between two lawyers. While not applicable to this case, lawyers have been required in other contexts to reduce their agreements to a written document. *See, e.g.*, Rule 43(k), SCRCP ("No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel."). One reason for such a policy is that it deters lawyers from being pulled into disputes otherwise between the clients of the lawyers.

All too often, Ronald Reagan's familiar quote comes to mind: "Trust, but verify." Inglese should have verified the resolution and discharge of the judgment lien prior to closing. While it is unfortunate that lawyers must often document agreements between themselves in writing, a lawyer should always remember the client's interest must always be protected. Even if the oral agreement proved to be valid, that agreement would have exposed the title insurance company to damages because the property was sold with the judgment lien still on the property. Consequently, the record fails to establish a question as to whether Inglese is without fault, and the equitable indemnification claim must also fail. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) ("Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action . . . for indemnity against the person whose wrong has thus been imputed to him. . . . This is subject to the proviso that no personal negligence of his own has joined in causing the injury." (citation omitted)).[4]

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[4] Under South Carolina law, joint tortfeasors may not recover equitable indemnity. *See Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307. Because Inglese is at fault, Inglese is unable to recover from Beal under this claim even if Beal is also at fault. Some jurisdictions recognize the doctrine of comparative indemnification when more than one party is at fault and share liability. *See Gem Developers v. Hallcraft Homes of San Diego, Inc.*, 261 Cal. Rptr. 626, 629 (Cal. Ct. App. 1989) ("Under

Therefore, I concur with the majority opinion that Beal is entitled to summary judgment on Inglese's equitable indemnification claim. *See id.* at 63, 518 S.E.2d at 307 ("The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." (citation omitted)).

As to Inglese's unjust enrichment claim, I would find that Beal is not entitled to summary judgment on this claim because a question exists as to whether Beal received a benefit. While Inglese may be at fault in causing the title insurance company's damages, his fault does not necessarily preclude his claim for unjust enrichment. "Restitution is an equitable remedy sought to prevent unjust enrichment." *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012) (citations omitted). A party seeking to recover on the theory of restitution must prove: "(1) that he conferred a nongratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value." *Niggel Assocs. v. Polo's of N. Myrtle Beach, Inc*., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988) (citation omitted). As to the first element, the title insurance company settled the claim to remove the cloud on the title created by the judgment lien. The title insurance company made the payment that released the lien; however, Inglese was ultimately liable for the payment to clear the title to Beal's property. Inglese paid for the title to be cleared on Beal's property. Additionally, a genuine issue of material fact exists as to whether Beal had knowledge of, or consented to, the oral agreement. While Beal did not explicitly request Inglese to confer the benefit, an inference may be drawn that Inglese could reasonably rely on Beal for repayment. *See Campbell*, 398 S.C. at 24, 726 S.E.2d at 228 (finding a plaintiff confers a nongratuitous benefit when: (1) the benefit is at the defendant's request, or (2) the plaintiff reasonably relies on the defendant to pay for the benefit, and the defendant understands or ought to understand that the plaintiff expects compensation from him).

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the equitable indemnity doctrine, defendants are entitled to seek apportionment of loss between the wrongdoers in proportion to their relative culpability so there will be equitable *sharing* of loss between multiple tortfeasors." (internal quotations omitted)). However, this issue was not raised on appeal.

As to the second element, the record includes evidence that the judgment lien on Beal's property was absolved; this creates a genuine issue of material fact as to whether Beal received a benefit. As to the third element, a fact-finder could find it inequitable for Beal, who was aware of the lien against him, to be free of the original judgment lien while requiring Inglese to bear the cost of resolving the judgment lien. At this stage of the proceedings, we merely decide if there is a factual dispute warranting the claim to be determined at trial. Based on the foregoing, I would find Beal was not entitled to summary judgment on Inglese's unjust enrichment cause of action.[5] *See Englert*, 377 S.C. at 134, 659 S.E.2d at 498 ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." (citation omitted)).

The next inquiry is whether Beal's defenses of unclean hands and the voluntary payment doctrine raised in his motion for summary judgment preclude recovery as a matter of law at this stage of litigation. As to the doctrine of unclean hands, I would find a factual dispute exists as to whether Inglese is barred from recovery under this doctrine. While Inglese is at fault in causing the title insurance company's damages, a fact-finder could determine the alleged oral agreement between counsel existed. Moreover, there is a question of fact as to any knowledge of, or consent to, the oral agreement by Beal. Accordingly, a fact-finder could find that based on the oral agreement, even though Inglese was at fault, he was not acting unfairly or with any misconduct towards Beal. *See Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943) ("The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." (citation omitted)). Furthermore, a fact-finder could find that Beal was not prejudiced and actually benefited from Inglese's conduct because the judgment lien on Beal's property was absolved and Inglese was liable for the cost. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."). On the other hand, depending on the how the evidence is viewed, including any knowledge of or consent to the oral agreement by Beal, a fact-finder could

[5] According to Inglese, he placed the net proceeds from the closing in escrow pursuant to the alleged oral agreement. The record is not developed as to whether the funds were placed in a trust account and continue to remain in any such account.

determine that Inglese's conduct bars relief under the doctrine of unclean hands. Based upon these conflicting conclusions, I would find that Beal is not entitled to summary judgment as a matter of law based upon the doctrine of unclean hands. *See Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008) (noting even if the "evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied" (citation omitted)).[6]

Finally, as an alternative, I would reverse and remand for specific findings of fact and conclusions of law as to the matters raised. The trial court's order is a Form 4 order that simply states: "Defendant Carl H. Beal's motion for summary judgment is granted." Inglese's complaint sets forth claims for promissory estoppel, unjust enrichment, and equitable indemnification.[7] In his motion for summary judgment, Beal argues the voluntary payment doctrine and the doctrine of unclean hands bar Inglese's claims. Beal also contends that Inglese's claim for equitable indemnification fails as a matter of law because Inglese's own conduct caused his damages. The trial court entered a summary order granting judgment without any findings as to these issues, and Inglese requested the court make such findings in his Rule 59(e), SCRCP motion. Thus, it is unclear whether the trial court specifically ruled Inglese's causes of actions were deficient or whether Beal's defenses raised in Beal's motion for summary judgment precluded recovery. Because the trial court declined to make findings upon request, I would alternatively reverse and remand for such findings. *See Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 241, 536 S.E.2d 86, 91 (Ct. App. 2000) (vacating the order granting summary judgment and remanding the case to the trial court for "a written order identifying the facts and accompanying legal analysis upon which it relied").

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[6] As to the voluntary payment defense, I would find that doctrine is inapplicable to the facts of this case. *See Moody v. Stem*, 214 S.C. 45, 53, 51 S.E.2d 163, 165 (1948) (finding the doctrine of voluntary payment provides that "where one man *voluntarily* pays money to another, it cannot be *against conscience and right*, that the receiver should retain it" (internal quotations omitted)).

[7] On appeal, Inglese does not challenge the trial court's grant of summary judgment on his promissory estoppel claim. Therefore, the failure to appeal this finding renders the issue abandoned. *See Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal." (citation omitted)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angelo Penza, Appellant,

v.

Pendleton Station, LLC, Diana L. Zellner, Trustee for the Diana L. Zellner Revocable Trust, Ursula Lesser, Roger Rowe, Benjamin L. Daniel, Sr., GrandSouth Bank, Enterprise Bank, Thomas M. Daniel, and Engineered Concrete Structures, Inc., Defendants,

Of whom Enterprise Bank is the Respondent.

Appellate Case No. 2012-205613

Appeal From Anderson County
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 5124
Heard December 10, 2012 – Filed May 1, 2013

REVERSED AND REMANDED

David Richard Price, Jr., of David R. Price, Jr., P.A., of Greenville, for Appellant.

W. Cliff Moore, III and Shaun C. Blake, both of Ellis Lawhorne & Sims, P.A., of Columbia; Thomas Elihue Dudley, III, and M. Stokely Holder, both of Kenison Dudley & Crawford, LLC, of Greenville, for Respondent.

KONDUROS, J.: Angelo Penza contends the master erred in granting partial summary judgment to Enterprise Bank (the Bank) because there was a question of fact as to whether his mortgage was intended to cover Tract A in addition to Tract B. He also argues the master's order essentially reformed the original mortgage, which was error because before an instrument may be reformed there must be a showing of mutual mistake. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Pendleton Station, LLC planned to develop three tracts of property in Pendleton, South Carolina: "Tract A," "Tract B," and the "2-Acre Tract." On August 4, 2004, Penza issued a check to the Cutchin[1] Law Firm Trust Account for $200,000. Pendleton Station executed a promissory note promising to pay Penza the principal and interest at the rate of twelve percent. A mortgage from Pendleton Station and Diana L. Zeller, Trustee for the Diana L. Zeller Revocable Trust, to Penza and other parties[2] secured the promissory note. The mortgage was dated August 4, 2004, and recorded in the Office of the Register of Deeds for Anderson County on October 24, 2004. The mortgage granted Penza a lien on real property described in the body of the mortgage as 31.31 acres shown as Tract B on a plat entitled Closing Survey for Coastal Plains Development Company, LLC, dated August 12, 2003, and citing TMS # 063-00-01-001 and 062-00-08-003. The document's pages were numbered one through five. However, the document filed had six pages. The sixth page was entitled Schedule A. Schedule A described 31.31 acres shown as Tract A also on the plat entitled Closing Survey for Coastal Plains Development Company, LLC, and referencing TMS # 063-00-01-001 and 062-00-08-003.

Zeller had obtained Tract B from Coastal Plains Development in a deed dated August 29, 2003. Coastal Plains Development conveyed Tract A to Pendleton Station on August 10, 2004, and the deed was recorded October 25, 2004.[3] Penza

[1] William J. Cutchin was Pendleton Station's attorney.

[2] Several of these other parties never actually loaned Pendleton Station any money, and on May 27, 2007, Cutchin sent them a document for them to sign and return indicating their portion of the mortgage was satisfied.

[3] However, Cutchin testified in his deposition that Pendleton Station owned Tract A at the time the note and mortgage were executed to Penza.

gave Pendleton Station two additional $250,000 checks, one on October 22, 2004, and the other on November 27, 2004.[4]

On October 25, 2005, Cutchin re-recorded the mortgage in the Office of Register of Deeds for Anderson County. This version of the mortgage did not include a Schedule A and contained the following language by Cutchin:

> When the attached mortgage was sent to be recorded, a "Schedule A" was accidentally and incorrectly attached which described a tract of land which was NOT subject to the mortgage. There was no reference to the "Schedule A" in the body of the mortgage, and it was a scribner's [sic] error that the "Schedule A" was originally recorded as the 6th page at Book 06429, Page 00306.
>
> The only tract of land under mortgage is that contained in the body of the mortgage. This re-recording of the mortgage now properly shows the land which is subject to the mortgage.

Penza was not notified of the re-recording. On the same day, Cutchin recorded a mortgage from Pendleton Station to the Bank securing Tract A in connection with a $3 million development loan. In February of 2006, Pendleton Station fully repaid Penza the $200,000 and interest.

Pendleton Station did not complete the development project and in March 2007, the Bank accepted a deed in lieu of foreclosure from Pendleton Station including Tract A. Zeller deeded her interest in Tract B to the Bank as well.

On May 15, 2007, Penza filed a complaint seeking foreclosure of Tracts A and B pursuant to the mortgage. The Bank filed an answer dated July 25, 2007, denying Penza was entitled to foreclosure. On November 12, 2008, the Bank filed a motion for summary judgment, arguing there was no genuine issue of fact that Penza's

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[4] Penza contends this was an additional loan, secured by the same property as the original mortgage. The Bank contends this was an investment in the LLC. The master denied the Bank's summary judgment motion as to this allegation of Penza's complaint. This matter is not before us on appeal.

mortgage does not secure any underlying debt and in the alternative, secures only Tract B and not A. Following a hearing, the circuit court denied the motion without prejudice. The Bank filed a second motion for summary judgment dated November 16, 2009, contending discovery had produced additional evidence of facts supporting the grounds for its first summary judgment motion. On November 22, 2010, the case was referred to a master-in-equity, including the second summary judgment motion.

Cutchin testified in his deposition that when he drafted the mortgage, he only intended for it to cover Tract B and the inclusion of Tract A was a mistake. Penza testified in his deposition he did not know what property the mortgage encompassed. The master held a hearing on the summary judgment motion on October 19, 2011, and issued an order granting partial summary judgment. The master found a genuine issue of material fact existed as to whether Penza's $500,000 was secured by the mortgage. However, the master found there was no issue of genuine material fact as to the real property encumbered by the mortgage. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

LAW/ANALYSIS

I. Partial Summary Judgment

Penza argues the master erred in granting the Bank partial summary judgment because there was a question of fact as to whether Penza's first mortgage was intended to encumber Tract A in addition to Tract B. We agree.

"[T]he interpretation of a deed is an equitable matter." *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998). "The construction of a clear and unambiguous deed is a question of law for the court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004). "[T]he determination of whether language in a deed is ambiguous is a question of law. The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Proctor v. Steedley*, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363 n.8 (Ct. App. 2012) (citation omitted).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 590, 635 S.E.2d 649, 655 (Ct. App. 2006) (internal quotation marks omitted). "[O]nce a contract or agreement is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). "Moreover, in ascertaining [the grantor's] intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law." *Bennett*, 370 S.C. at 590, 635 S.E.2d at 655. When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper. *See Springob v. Farrar*, 334 S.C. 585, 590, 514 S.E.2d 135, 138 (Ct. App. 1999). Only "[w]hen the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." *Williams*, 266 S.C. at 59, 221 S.E.2d at 528.

The master erred in partially granting the Bank's motion for summary judgment. The mortgage that was originally recorded and signed by Penza referenced both Tracts A and B. When the mortgage was re-recorded a year later, Penza was not contacted. Additionally, both Zellner and Pendleton Station signed the mortgage

even though Tract B was solely owned by Zellner, while Tract A was owned by Coastal Plains Development and transferred to Pendleton Station six days after the execution of the mortgage. The mortgage also references the same two tax map numbers in reference to both Tract A and Tract B. Therefore, viewing the evidence in the light most favorable to Penza, a question of fact remains as to whether the mortgage encumbered Tract A in addition to Tract B. The master's order finding Cutchin's statement was "the most reliable evidence of what occurred" and that Penza's evidence provided to demonstrate the mortgage encompassed both tracts "is not convincing" indicates the master did more than look for the existence of evidence to demonstrate an issue of material fact and instead weighed the evidence. Accordingly, we find the master erred in granting the Bank partial summary judgment.

II. Reformation of the Mortgage

Penza asserts the master's order essentially reforms Penza's first mortgage so it does not encumber Tract A. Penza maintains this was error because equity did not permit the master to do this without Penza's consent. Our decision that the master erred in granting summary judgment because there are issues of material fact is dispositive. Thus, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

III. Additional Sustaining Ground

The Bank contends we should affirm the master's decision because its having a right to rely on the re-recorded mortgage, which explicitly disclaims the mortgage encumbers or ever intended to encumber Tract A, is an additional sustaining ground. We disagree.

> [A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also

> could violate the principle that a court usually should refrain from deciding unnecessary questions.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). However, "an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." *Id.* at 421, 526 S.E.2d at 724.

"[A] mortgage that has been mistakenly satisfied may be reinstated only where there is no third party who, without notice of the mistake, subsequently and in good faith acquires an interest in the property." *First Palmetto Sav. Bank, F.S.B. v. Patel*, 344 S.C. 179, 184, 543 S.E.2d 241, 243 (Ct. App. 2001).

For us to affirm the partial grant of summary judgment on this basis would be inappropriate. While this may be a viable argument for the Bank, it did not raise it in its summary judgment motion. Because this case is at the summary judgment stage, it is improper for us to decide the case based on this when the facts are not fully developed. Accordingly, we decline to affirm the appeal on this basis.

CONCLUSION

Because there is an issue of material fact as to whether the mortgage included Tract A, the master's partial grant of summary judgment is

REVERSED AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Anthony Martin, Appellant.

Appellate Case No. 2011-192066

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5125
Heard April 3, 2013 – Filed May 1, 2013

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, for Respondent.

CURETON, A.J.: Anthony Martin appeals his convictions for armed robbery and conspiracy to commit armed robbery, arguing the trial court erred in denying his motion to suppress evidence of flight. We affirm.

FACTS

On April 23, 2009, a masked gunman robbed the Bank of America in Aiken of $12,000. Several months later, Martin was arrested in Atlanta, Georgia. When a police officer stopped him, Martin gave a false name and date of birth. After confirming his identity with a photograph, the officer arrested him and charged him with giving false information to a law enforcement officer. Martin was later transferred to South Carolina, where he was indicted for armed robbery and conspiracy to commit armed robbery.

I. Motion to Suppress

Immediately prior to trial, Martin moved to suppress evidence of his arrest for giving false information. First, he argued the evidence was of a previous conviction and would constitute improper character evidence under Rule 404 of the South Carolina Rules of Evidence. Second, he contended the false-information incident occurred nearly a year after the robbery, and he had no reason to believe the Georgia authorities were seeking him in connection with the South Carolina robbery. The trial court denied his motion but noted the Georgia authorities could not testify Martin was convicted of giving false information to law enforcement.

II. Trial

At trial, the State presented evidence that Martin, Quinton Harmon, David Dixon, and Roosevelt Johnson had planned and executed the robbery. Harmon had scouted the bank, Dixon had acted as lookout, Martin had entered the bank and demanded money, and Johnson had driven the getaway car.

Eyewitnesses testified bank employees and two customers were present when a man wearing a dark hoodie and a mask that covered his face entered the bank. Witnesses could not identify the man, who ran into the lobby pointing a gun and ordered the employees and customers to get down on the floor. One employee pulled the silent alarm and dialed 911. Another employee, watching from the parking lot as the man ran out of the bank, provided police with a description and the license plate number of the getaway car.

Harmon, Johnson, and Dixon testified they knew Martin as "T-Money." All three men admitted robbing the bank. According to the men, Martin proposed a robbery the day before the incident, and they scouted possible targets the same evening. On the day of the robbery, Johnson picked up the other three men in his red 2005 Mustang. They stopped at a local fast-food restaurant, where Martin obtained a pair of gloves, then traveled to Dixon's home, where Dixon gave Martin a pillowcase and white t-shirt.

Later, the men drove to a car wash near the bank. Harmon went into the bank to "scope it out" and asked the teller questions about opening accounts. According to the men, after Harmon returned to the car and delivered his report, Martin pulled black pants and a black hooded jacket on over his other clothing and wrapped Dixon's white t-shirt around his face. He carried a black handgun.[1] Harmon, Dixon, and Johnson waited in the car while Martin robbed the bank. When he returned, Martin jumped into the car and told Johnson to drive.

As Johnson drove toward Augusta, Georgia, Martin stripped off the black clothing and handed $300 or $400 to each of the other men. Indicating he meant to board a bus for Atlanta, Martin directed Johnson to drive to the bus station in Augusta. However, Martin was unable to buy a ticket due to a power outage. The men drove to the local mall, where Martin called a friend to pick him up. The other three men left the mall in Johnson's car.

After the police published a photograph of Harmon taken from the bank's security camera shortly before the robbery, Harmon contacted them. He gave a statement that led to his arrest and to the issuance of arrest warrants for Johnson, Dixon, and Martin. Later, Johnson named the same four men in his statement to the police.[2] Officers identified Martin's grandmother and obtained from her Martin's full name, date of birth, and physical description. An officer in Gwinnett County, Georgia, provided them with a photograph of a person Johnson and Harmon confirmed was the man they knew as T-Money.

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[1] Jacob McKie testified he loaned Martin a small, black pellet gun on the morning of the robbery.

[2] The police spoke with Johnson first, but in that initial discussion, Johnson claimed to have been at the mall during the robbery.

Officer Christopher Poythress of the DeKalb County Police Department testified that on April 13, 2010, he was sent to locate a wanted person at an apartment complex in Atlanta, Georgia. His dispatcher provided the name Anthony Martin, a date of birth, and an address. Finding no one at home, Officer Poythress contacted the leasing office and confirmed Martin stayed at the apartment. As the officer was leaving the complex, he stopped a man fitting the description he received from the leasing agent. Officer Poythress recalled the man denied having any identification but gave the name Troy Brown and a birthdate of January 15, 1985. The man first claimed to live on the property but then stated he was there to visit his sister. Later, after receiving a color photograph of Martin, Officer Poythress confirmed Martin was the man he had stopped.[3]

In his defense, Martin presented testimony from his mother and grandmother. According to his grandmother, Martin lived with her in South Carolina until Easter Sunday, which was April 12, 2009, when his mother took him back home to Snellville, Georgia. His mother recalled waking him up in Snellville on the day of the robbery and dropping him off near a bus stop so he could look for work.

In its closing argument, the State summarized the testimony, noting Martin had given Officer Poythress "a fake name [and a] fake date of birth and tried to mislead him about what he was doing in that apartment complex." The State concluded its argument by capitalizing on Martin's departure for Atlanta:

> The defense asked where did all of that money go? Well[,] that money went to Atlanta, because T-Money took the money and ran. He had his friend come pick him up and take him to Atlanta. When the police tried to approach him and tried to talk to him at that apartment complex. He lied about his name. He lied about his date of birth. He evaded law enforcement. He gave misleading information. So now you have the opportunity to play your part[,] and the [S]tate asks that you go back into that room and deliberate and find this defendant guilty.

[3] It is important to note that Officer Poythress never testified Martin was arrested for giving false information or that he was convicted of that crime.

The jury convicted Martin of both offenses. He received concurrent sentences of twenty years' imprisonment for armed robbery and five years' imprisonment for criminal conspiracy. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Martin asserts the trial court erred in refusing to suppress evidence that he gave Officer Poythress false identifying information, because no nexus existed between the false information and the bank robbery. We agree, but we find the error was harmless.

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This general rule applies to evidence of particular acts, including flight. *State v. Orozco*, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011), *cert. granted* (Oct. 17, 2012). Our supreme court has identified the "critical factor to the admissibility of evidence of flight" as "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities . . . [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). In addition, this court has held evidence of "unexplained" flight

> is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. However, we have further noted that [t]he critical factor to the admissibility

> of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Flight evidence is relevant when there is a nexus between the flight and the offense charged. It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted.

Orozco, 392 S.C. at 220, 708 S.E.2d at 231 (citations and internal quotation marks omitted). This court has also recognized that South Carolina's rule echoes the federal rule:

> [T]he relevance of flight evidence is premised on a nexus between the flight *and the offense charged. See, e.g.*, *United States v. Beahm*, 664 F.2d 414, 419-20 (4th Cir. 1981) (finding evidence of flight inadmissible where a defendant flees "after 'commencement of an investigation' unrelated to the crime charged, or of which the defendant was unaware"); *United States v. Foutz*, 540 F.2d 733, 740 (4th Cir. 1976) (stating that evidence of flight should be excluded where defendant flees while being investigated for another crime).

State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004).

Decisions concerning the admission of flight evidence are subject to a harmless error analysis. *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267. Generally, appellate courts do not set aside a conviction based upon harmless error. *Id.* An error "is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *Id.* (citation and internal quotation marks omitted).

I. Totality Test and Nexus Requirement

The State correctly distinguishes between evidence of flight, on the one hand, and the evidence challenged in this appeal, which concerned Martin's dishonest answers to Officer Poythress's questions. However, because flight is merely one form of evasive conduct, we find the totality test used to determine the admissibility of flight evidence is equally useful in determining the admissibility of evidence of other types of evasive conduct.

A court assessing evidence of flight must determine whether "the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." *Id.* at 209, 631 S.E.2d at 266. This test requires the existence of a nexus between the flight and the offense charged. *See, e.g.*, *Robinson*, 360 S.C. at 195, 600 S.E.2d at 104 (recognizing the nexus requirement). An alternate explanation for the flight may affect the admissibility of the evidence. *See Orozco*, 392 S.C. at 220, 708 S.E.2d at 231 (noting evidence of "unexplained" flight "is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee"). This totality test and its components assist the trial court in determining the relevance of evidence of evasive conduct, as well as in weighing the probative value of that evidence against its prejudicial effect. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

In the federal courts, "[t]he chain of inferences leading from evidence of flight to consciousness of guilt must lead to consciousness of guilt of the crime charged." *United States v. Porter*, 821 F.2d 968, 976 (4th Cir. 1987). Moreover,

> To establish this causal chain, there must be evidence that the defendant fled or attempted to flee and that supports inferences that (1) the defendant's flight was the product of consciousness of guilt, and (2) his consciousness of guilt was in relation to the crime with

> which he was ultimately charged and on which the evidence is offered.

United States v. Obi, 239 F.3d 662, 665 (4th Cir. 2001). An inference that guilty knowledge motivated the accused to flee "would be completely unfounded where a defendant fle[d] after commencement of an investigation unrelated to the crime charged, or of which the defendant was unaware." *Beahm*, 664 F.2d at 419-20 (internal quotation marks omitted). In *Beahm*, the trial court instructed the jury it could infer guilt from evidence of the accused's flight, which occurred three weeks after the crime but on the same day the accused received a note from an FBI agent requesting that the accused contact him. *Id.* at 416, 420. The appellate court found the instruction to be error because "[i]n essence, the jury was allowed to draw an inference of ultimate guilt from flight based upon an inference that defendant felt guilty after receiving a note from the FBI." *Id.* at 420. The appellate court held evidence must "sturdily support[]" each inference linking the accused's flight to the offense charged. *Id.* Nonetheless, it reversed based upon "[t]he government's failure to substantiate adequately the inference that [Beahm] was aware he was wanted for the crime." *Id.*

Although the general rule covers "any guilty act, conduct, or statements on the part of the accused," the body of law that has developed around this inference of a guilty conscience has primarily concerned flight. *McDowell*, 266 S.C. at 515, 224 S.E.2d at 892. The rationale underlying the admissibility of flight evidence, that "it is not to be supposed that one who is innocent and conscious of that fact would flee," applies to other forms of evasive conduct as well. *See Orozco*, 392 S.C. at 220, 708 S.E.2d at 231. The courts should not suppose a person who knew he was innocent but under suspicion would disguise himself, hide from the police, or lie to officers investigating the crime of which he is suspected. Accordingly, we find the test for determining the admissibility of evidence concerning flight also applies to evidence of evasive conduct.

II. Error

Under the totality test, the State failed to establish a nexus between the robbery of the Bank of America in Aiken and Martin's deceitful answers. The robbery took place in South Carolina on April 23, 2009. Nearly a year later, Officer Poythress, an officer for DeKalb County, Georgia, approached Martin at an apartment complex in Atlanta and asked him about his identity and his business at the

apartment complex. Although the officer was uniformed and drove a marked police car, he did not indicate his reason for stopping Martin. Thus, Martin's dishonesty to Officer Poythress was both temporally and geographically remote from the robbery. No evidence indicated the police had previously contacted Martin, he had received a warning about the investigation, or Martin had made statements to others about being sought for the robbery. As in *Beahm*, the State failed to present evidence Martin knew the police suspected him of the Bank of America robbery.

Martin also argues that because he was on probation, he was entitled to an inference his evasive conduct was attributable to his efforts to avoid arrest for violating his probation. We note that, while the State asserted at the suppression hearing that Martin skipped town without telling his probation officer and "[d]id not transfer it back to Atlanta," Martin did not make that argument as the basis for suppressing evidence of his evasive conduct. Thus, he is not entitled to argue such an inference on appeal. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding an appellant may not argue one ground to the trial court and another ground on appeal). Notwithstanding, without an inference that Martin's guilty knowledge of the bank robbery led to his dishonesty with Officer Poythress, the State failed to establish a nexus between the 2009 bank robbery and Martin's 2010 lies to the police. Consequently, the trial court erred in admitting evidence of Martin's attempt to avoid arrest.

III. Prejudice

Nonetheless, we find the trial court's admission of the challenged evidence was harmless. While it is true the eyewitnesses in the bank could not identify the gunman and no forensic evidence linked Martin to the robbery, the State presented ample competent evidence of Martin's guilt. *See Pagan*, 369 S.C. at 212, 631 S.E.2d at 267 (stating "an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached"). Harmon, Johnson, and Dixon testified consistently that Martin had served as the mastermind and the gunman in the robbery for which each of them faced a charge of bank robbery and a possible prison sentence of thirty years. Eyewitness descriptions of the gunman's attire and pillowcase-style money bag comported with the co-conspirators' descriptions of the clothing and bag Martin carried on the day of the robbery. Furthermore, Jacob McKie, a disinterested party, recalled loaning Martin a small, black pellet gun the

night before the robbery. In view of this evidence, Officer Poythress's testimony likely had no effect on the jury's determination of guilt. Therefore, any error the trial court committed in admitting the challenged evidence was harmless.

CONCLUSION

We find the test previously articulated for determining the admissibility of evidence of flight applies to evidence of other forms of evasive conduct. In applying this test to the evidence against Martin, we find the State failed to establish a nexus between the April 2009 robbery of the Bank of America in Aiken and Martin's provision of false identifying information to a Georgia police officer the following year. As a result, insufficient evidence was presented to support an inference Martin lied to the officer to avoid prosecution for the Bank of America robbery. However, in view of the evidence presented of Martin's guilt, we find any error in admitting this evidence was harmless beyond a reasonable doubt. Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ajoy Chakrabarti and Sukla Chakrabarti, Respondents,

v.

City of Orangeburg, Appellant.

Appellate Case No. 2012-207348

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Published Opinion No. 5126
Heard March 12, 2013 – Filed May 1, 2013

AFFIRMED IN PART AND REVERSED IN PART

Pete Kulmala, of Harvey & Kulmala, of Barnwell, for Appellant.

C. Bradley Hutto, of Williams & Williams, of Orangeburg, for Respondents.

SHORT, J.: In this negligence and inverse condemnation case, the City of Orangeburg (Orangeburg) appeals, arguing the trial court erred in: (1) concluding its demolition of Ajoy and Sukla Chakrabartis' house amounted to inverse condemnation requiring payment of just compensation; (2) denying its motions for a directed verdict and judgment notwithstanding the verdict (JNOV) on the causes of action for gross negligence and sovereign immunity; and (3) awarding two

distinct damage amounts on the two causes of action. We affirm in part and reverse in part.

FACTS

In 2003, the Chakrabartis purchased a fire-damaged house located in Orangeburg, South Carolina. Ultimately, Orangeburg determined the house to be a nuisance and condemned it under the International Property Maintenance Code (IPMC), which Orangeburg adopted as its building maintenance code. Orangeburg demolished the house in August 2005. On July 26, 2007, the Chakrabartis filed a complaint against Orangeburg, alleging negligence in condemning the house as a nuisance and demolishing it and seeking actual damages. In its answer, Orangeburg asserted fourteen defenses including: (1) collateral estoppel/*res judicata*; (2) waiver; (3) sole and comparative negligence of the Chakrabartis; and (4) immunity under the South Carolina Tort Claims Act (the Act). The Chakrabartis filed an amended complaint, adding additional causes of action for wrongful condemnation, inverse condemnation, and trespass.[1]

A trial was held October 5-7, 2011, with the issue of inverse condemnation being tried by the bench and all other causes of action, including the amount of damages, being decided by the jury. At the close of the Chakrabartis' case, Orangeburg made motions for a directed verdict as to the negligence and inverse condemnation causes of action, and as to its immunity under the Act. The court denied the motions, finding there was sufficient evidence in the record to create a factual question for the jury to determine if Orangeburg was grossly negligent. At the close of all evidence, the Chakrabartis moved to amend their pleadings to conform to the gross negligence standard and withdraw their cause of action for negligence with no objection from Orangeburg. The court determined there was a compensable taking, and the jury returned a verdict of gross negligence and awarded damages of $165,000 for negligence and $85,000 for just compensation. The Chakrabartis moved post-trial to elect the negligence verdict of $165,000 and preserve their right under the inverse condemnation award in the event the negligence award was reduced or set aside. Orangeburg filed a motion for JNOV, and in the alternative, for a new trial or new trial *nisi remittitur*, and for an order requiring the Chakrabartis to elect a remedy. The court denied all of Orangeburg's motions. This appeal followed.

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[1] The Chakrabartis withdrew their cause of action for trespass during the trial.

STANDARD OF REVIEW

When reviewing the denial of a motion for a directed verdict, this court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference. *Id.* In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. *Id.* This court will only reverse the trial court when there is no evidence to support the ruling below. *Id.*

When considering a motion for JNOV, the trial court is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). When reviewing the denial of a motion for JNOV, this court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence, and the jury's verdict must be upheld unless no evidence reasonably supports the jury's findings. *Id.*

LAW/ANALYSIS

I. Gross Negligence

Orangeburg argues the trial court erred in denying its motions for a directed verdict and JNOV on the Chakrabartis' cause of action for gross negligence. We disagree.

Orangeburg argues the Chakrabartis were not entitled to recovery on their gross negligence cause of action because they presented no evidence of a breach by Orangeburg of any duty owed to the Chakrabartis in connection with Orangeburg's decision to condemn and demolish their house. Orangeburg also argues the Chakrabartis did not show its decision to demolish their house was inconsistent with or violated its internal property maintenance code; thus, there was no evidence of gross negligence.

A plaintiff must prove three elements to recover on a claim for negligence: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873

(2011). "If any of these elements is absent a negligence claim is not stated." *Summers v. Harrison Constr.*, 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct. App. 1989). "The court must determine, as a matter of law, whether the law recognizes a particular duty[, and] [i]f there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999).

"Ordinarily, under South Carolina's public duty doctrine, public officials are 'not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than [to] anyone individually.'" *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999) (quoting *Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991)). "Generally, there is no common law duty to act. An affirmative legal duty, however, may be created by statute, contract relationship, status, property interest, or some other special circumstance." *Jensen*, 304 S.C. at 199, 403 S.E.2d at 617.

The Act is the "exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (2005). The Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke*, 336 S.C. at 393, 520 S.E.2d at 152. "Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." *Id.*

Under the Act, a governmental entity is not liable for a loss resulting from certain enumerated events including "licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(12) (2005). A potential licensee, licensee, or an injured third party may seek

relief under this exception. *Steinke*, 336 S.C. at 393, 520 S.E.2d at 152. "Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). "Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances." *Id.*

On March 6, 2003, Orangeburg Building Official Alan Ott sent the Chakrabartis a letter notifying them Orangeburg declared the house was unsafe, unfit for use, and a public nuisance, and advised them of alternatives for future responsive action. On April 7, 2003, the Chakrabartis applied for a building permit and identified the owner was acting as the contractor, which required they not rent or sell the house for a period of two years. The same date, a handwritten permit application was filed identifying Thomas Darby as the contractor and reflecting a scheduled completion date of June 2, 2003, for the exterior and August 1, 2003, for the interior. However, the restoration work was not completed by those dates, and on May 19, 2004, Ott again wrote to the Chakrabartis advising them of the deadlines and giving them a deadline of sixty days for the completion of the exterior repairs.

On August 5, 2004, Orangeburg Building Inspector David Epting wrote to the Chakrabartis advising them they had thirty days from August 4, 2004, to complete the exterior work and one-hundred-and-twenty days from August 4, 2004, to complete the interior work. On September 9, 2004, Orangeburg Building Inspector Gene Nelson wrote the Chakrabartis, summarizing a meeting between the parties to address Orangeburg's concerns that the Chakrabartis did not intend to occupy the house upon completion, and the initial building permit was based upon the assumption they would live in the house for at least two years. The letter advised the Chakrabartis that Orangeburg had voided the April 7, 2003 building permit; the Chakrabartis were to hire a licensed architect to evaluate the condition of the house and submit a plan for safety and code compliance; and Orangeburg would issue a new building permit to the Chakrabartis.

Orangeburg issued the Chakrabartis a new building permit on December 7, 2004, identifying Michael Stroman as the contractor and specifying a June 10, 2005 completion date. On June 13, 2005, Nelson wrote to the Chakrabartis advising them that after an inspection of the house, he found it to be unsafe, unfit for human habitation, and a public nuisance. The letter stated the Chakrabartis were in violation of code section 110.1, and the residence must be demolished before July

13, 2005. If the Chakrabartis did not demolish the house by July 13, 2005, the letter stated Orangeburg would demolish the house and bill the Chakrabartis for the cost of the work. The letter also provided "any person affected by this decision shall have the right to appeal to the Construction Board of Appeals within [twenty] days of service of the notice." The Chakrabartis did not appeal. On June 15, 2005, Orangeburg personally served the Chakrabartis with the notice of condemnation. Thereafter, Orangeburg demolished the house in August 2005, which cost $12,025.

Section 110 of the IPMC addresses demolition. IPMC Section 110.1 provides a city may demolish an unsafe house as a nuisance if one of three requirements are met: (1) the city deems it impossible to save (unreasonable to repair) and ordered its demolition; (2) the owner and the city both agree to demolish it; or (3) in cases where repairs have been undertaken, any substantial construction had ceased for two years.[2] Orangeburg asserts the evidence provides compelling proof that there was "cessation of normal construction" of more than two years on the Chakrabartis' property. Orangeburg maintains there is little doubt the requirement was met, considering the history of the project from March 2003 to June 2005. It also asserts that because the Chakrabartis' work on the house was so sporadic, especially between the summer 2004 inspection and the June 2005 decision to demolish the house, it is questionable whether they ever began "normal construction."

Orangeburg asserts the testimony of Gene Nelson, Code Enforcement Officer for Orangeburg, and Jim Meggs, former attorney for the City of Columbia, supports its assertion that Orangeburg followed procedure in demolishing the Chakrabartis' house. Nelson testified he did not have to ask permission from the Chakrabartis before demolishing their house. He stated that when he finds a property in disarray or in a condition that is a danger to the city, he has the right to condemn it by notifying the homeowners. He further testified the Chakrabartis had not done any work on the house from the time he issued the second permit until he did the final condemnation, and it was still in the same condition as when he first inspected it in 2004. Meggs testified the June 13, 2005 demolition letter complied with section 110 of the IPMC, contained all of the required elements, and was a good and effective notice under the code. He further stated that based on his review of all of the documents in this case, Orangeburg complied in all respects with the

[2] On appeal, Orangeburg only argues subsection (3) of IPMC Section 110.1. It does not argue subsections (1) or (2).

requirements of the IPMC in reaching the ultimate removal of the property. He testified that based on the history in this case it did not seem there was ever normal construction as contemplated by the IPMC.

The Chakrabartis' second contractor, Johnnie Coulter, was hired in December 2004. He testified he did work on the roof and ceilings; studded walls; put insulation in the walls; performed some electrical work; and installed some sheetrock. He further testified he was working on the house until Orangeburg bulldozed it. The Chakrabartis presented into evidence a check made out to Coulter for $5,000, dated August 19, 2005, that notes it was for the "last payment of Middleton St. House." Nelson, Orangeburg's former code enforcement officer, testified that when he inspected the house in August 2004, some sheetrock had been installed, which had not been approved by the city. He also testified that some electrical work had been done between the time Orangeburg issued the second permit in December 2004 and the demolition in August 2005.

The Chakrabartis argued Orangeburg was grossly negligent in demolishing their house without waiting the requisite time, the cessation of normal construction for a period of more than two years after work began, as required by section 110.1 of the IPMC. In its order denying Orangeburg's post-trial motions, the trial court found Orangeburg issued a second building permit to the Chakrabartis six months prior to demolishing their house, and Orangeburg produced no evidence of a date when substantial construction on the property had ceased for any significant period, much less the required two years. Therefore, the trial court determined Orangeburg did not follow the proper procedure in demolishing the Chakrabartis' house.

Under any of the gross negligence definitions, we find the trial court properly denied Orangeburg's motion for a directed verdict because, when the facts are viewed in the light most favorable to the Chakrabartis, the record shows Orangeburg issued a second building permit to the Chakrabartis six months before demolishing their house, and Orangeburg produced no evidence of a date when substantial construction on the property had ceased for any significant period, much less the required two years. Further, evidence was presented that the Chakrabartis' contractor was doing work on the house until Orangeburg demolished it. Therefore, evidence was presented that Orangeburg did not follow the proper procedure in demolishing the Chakrabartis' house.

We also find the trial court properly denied Orangeburg's motion for JNOV because we find the evidence reasonably supports the jury's findings. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (providing that when reviewing the denial of a motion for JNOV, this court does not have authority to decide credibility issues or to resolve conflicts in the testimony and evidence, and the court must uphold the jury's verdict unless no evidence reasonably supports the jury's findings).

II. Sovereign Immunity

Orangeburg argues the trial court erred in denying its motions for a directed verdict and JNOV based on sovereign immunity. We disagree.

Orangeburg asserts it is immune to liability pursuant to the following three subsections of section 15-78-60 of the Act: (1) section 15-78-60(2) (governmental entity is not liable for a loss resulting from administrative action or inaction of a legislative, judicial, or quasi-judicial nature); (2) section 15-78-60(4) (governmental entity is not liable for a loss resulting from adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies); and (3) section 15-78-60(23) (governmental entity is not liable for a loss resulting from institution or prosecution of any judicial or administrative proceeding). S.C. Code Ann. §§ 15-78-60(2), (4), (23) (2005).

None of these three exceptions contain a gross negligence standard. When an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions. *See Steinke*, 336 S.C. at 398, 520 S.E.2d at 155 ("[T]he trial court often faces Tort Claims Act cases in which at least one of the asserted exceptions contains the gross negligence standard while other asserted exceptions do not. We hold that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. Otherwise, portions of the Act would be a nullity, which the Legislature could not have intended."). It would make no sense to conclude Orangeburg may be found grossly negligent in a licensing decision, yet allow it to escape liability under one of these other exceptions. Because we find Orangeburg may be liable if it was grossly negligent in its licensing per section 15-78-60(12), and the trial court properly denied Orangeburg's motion for a directed verdict for gross negligence, we also find the

court properly denied Orangeburg's motions for directed verdict based on sections 15-78-60(2), (4), and (23).

Further, we find the trial court properly denied Orangeburg's motion for JNOV based on these sections because we find the evidence reasonably supports the jury's findings. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (providing that when reviewing the denial of a motion for JNOV, this court does not have authority to decide credibility issues or to resolve conflicts in the testimony and evidence, and the court must uphold the jury's verdict unless no evidence reasonably supports the jury's findings).

III. Waiver and Estoppel

Orangeburg argues the Chakrabartis are barred from recovery in negligence by the defenses of waiver and estoppel because they did not appeal from the June 13, 2005 letter informing them they had twenty days from the date of the letter to appeal the decision to the Construction Board of Appeals.

Orangeburg first raised the defenses of waiver and estoppel in its answer to the Chakrabartis' amended complaint. During trial, Ajoy Chakrabarti conceded he did not file an appeal. At the close of the Chakrabartis' case, Orangeburg made two motions for directed verdict, at which time it did not argue waiver and estoppel. The court did not rule on waiver and estoppel. Thereafter, the court charged the jury with waiver and estoppel. Orangeburg did not take exception to the jury instructions.

Orangeburg then raised waiver and estoppel in its motion for JNOV, new trial, new trial *nisi remittitur*, and for election of remedies, asserting the court erred in denying its motion for directed verdict because of the Chakrabartis' noncompliance with the appeal provision. In its order denying Orangeburg's post-trial motions, the court did not rule on waiver and estoppel. Orangeburg did not file a Rule 59(e), SCRCP motion. Therefore, because Orangeburg did not raise the issue of waiver and estoppel to the trial court in its directed verdict motion, we find the issue is not preserved for our review. *See Scoggins v. McClellion*, 321 S.C. 264, 267, 468 S.E.2d 12, 14 (Ct. App. 1996) (holding an issue not raised in a directed verdict motion will not be considered on appeal concerning the denial of the directed verdict); *In re McCracken*, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (stating only issues raised in a directed verdict motion can properly be raised in a JNOV

motion); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

IV. Inverse Condemnation

Orangeburg argues the trial court erred in concluding its demolition of the Chakrabartis' house amounted to inverse condemnation requiring payment of just compensation. The Chakrabartis concede this issue in their brief. Accordingly, we reverse the $85,000 judgment on the inverse condemnation cause of action.

V. Damages

Orangeburg argues the trial court erred in awarding two distinct damage amounts on the two causes of action. The Chakrabartis concede the court erred in finding Orangeburg's demolition of their house amounted to inverse condemnation and abandon the $85,000 judgment on that cause of action. Therefore, we only address the arguments relating to the $165,000 award for gross negligence.

The Chakrabartis assert the jury appropriately found they were entitled to $165,000 in damages for their gross negligence cause of action. They argue they notified Orangeburg of their intended charge as to actual damages, and Orangeburg took no exception to the charge. The court instructed the jury on actual damages, and the Chakrabartis assert the jury's award properly included all expenses associated with putting them as near as possible in the same position they were in before the incident occurred. *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) ("The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury.").

The Chakrabartis presented evidence in support of their damages. Sukla Chakrabarti testified they purchased the house for $35,000; paid their contractor, Darby, $40,000; and paid another contractor, Johnnie Coulter, more than $100,000. She testified that in her opinion, the fair market value of the house was between $160,000 and $170,000. *See Bowers v. Bowers*, 349 S.C. 85, 92, 561 S.E.2d 610, 614 (Ct. App. 2002) ("As a general principle, a landowner, who is familiar with her

property and its value, is allowed to give her estimate as to the value of the land and damages thereto, even though she is not an expert."). The Chakrabartis presented into evidence without objection checks written to Coulter totaling $106,476.55, and Coulter testified his contract with the Chakrabartis was for $150,000 and there was about $30,000 worth of work left. They presented a check written to Darby for $5,000. Darby testified the Chakrabartis paid him between $35,000 and $40,000. Ajoy Chakrabarti also testified they paid Darby $40,000. The deed for the house shows a $35,000 purchase price. Therefore, we find the jury's award of $165,000 was within reason and not disproportionate based on the evidence presented to them. *See Austin*, 358 S.C. at 311, 594 S.E.2d at 873 (providing this court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award); *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 557, 314 S.E.2d 19, 23 (Ct. App. 1984) ("In determining whether there was sufficient evidence on which the jury could base its verdict, we are mindful that the fact that damages occurred in one of several ways does not defeat a claim if the evidence tends to support the reasonable probability of the theory relied on. In a civil action, proof to a certainty is not required.").

CONCLUSION

Accordingly, we affirm the trial court's denial of Orangeburg's motions for directed verdict and JNOV and the jury's award of $165,000 in damages for the Chakrabartis' gross negligence cause of action. We reverse the trial court's finding of inverse condemnation and award of damages for inverse condemnation.

AFFIRMED IN PART AND REVERSED IN PART.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jenean Trammell Gibson, as Personal Representative for the Estate of James E. Gibson, III, Appellant,

v.

Christopher C. Wright, M.D., Respondent.

Appellate Case No. 2010-163726

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5127
Heard October 30, 2012 – Filed May 1, 2013

AFFIRMED

Charles J. Hodge and Timothy Ryan Langley, both of Hodge & Langley Law Firm, PC, of Spartanburg, for Appellant.

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia; and Howard W. Paschal, Jr., of Greenville, for Respondent.

KONDUROS, J.: In this medical malpractice action, the Estate of James E. Gibson, III[1] appeals the trial court's (1) admission of summaries as evidence, (2) failure to grant a mistrial after Christopher C. Wright, M.D. asked about Gibson's social security benefits, and (3) excluding as hearsay Gibson's questions to Dr. Wright about another doctor's deposition. We affirm.

FACTS/PROCEDURAL HISTORY

In 2001, Dr. Wright performed heart bypass surgery on Gibson, placing four cardiac wires in him. A few days after surgery, Dr. Wright removed two of the wires from Gibson but left in the remaining two wires. Gibson had problems with his wounds healing, and Dr. Wright referred him to Dr. James Wallace, a plastic surgeon. About five years later, after Gibson continued to have problems, Dr. Wallace performed surgery on Gibson to remove any infection. He also removed the two remaining wires with Dr. Wright's assistance.

In 2008, Gibson filed a complaint, alleging Dr. Wright was negligent in failing to (1) remove cardiac wires from Gibson despite having claimed to do so, (2) x-ray or diagnose the retained wires in a timely manner, (3) provide prompt and proper medical treatment to Gibson, (4) inform Gibson of the danger of leaving retained pacing wires in his chest cavity, and (5) treat Gibson in a reasonable amount of time so as to avoid further injury and damage. Prior to trial, Gibson filed a motion in limine requesting Dr. Wright not mention any collateral source such as insurance, social security disability, and workers' compensation. During Dr. Wright's cross-examination of Gibson, Dr. Wright asked him if he was receiving police officer's and social security disability. Gibson objected and moved for a mistrial. Following a lengthy discussion on the matter, the trial court denied Gibson's motion for a mistrial but gave the jury a curative instruction.

Later during trial, Gibson objected to Dr. Wright's using summaries of evidence, which were timelines, as PowerPoint slides to aid his examination of witnesses. Gibson argued he had not received enough time to review all of the slides and of the ones he had reviewed, many contained mistakes or were not objective. The parties debated the matter, and the trial court ultimately allowed Dr. Wright to use the slides, excluding some of the slides and allowing others. The trial court

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[1] Gibson passed away during the pendency of this appeal, and Jenean Trammell Gibson, as Personal Representative for the Estate, was substituted as the Appellant.

allowed Gibson some time to review the slides, although less time than he had requested.

During Dr. Wright's testimony, Gibson attempted to question him about a deposition Dr. Wallace gave regarding whether Dr. Wallace knew the wires had not been removed. Dr. Wright objected, arguing it was hearsay. After extensive arguments by both sides, the trial court granted the motion to exclude the deposition.

Following the conclusion of testimony, the jury found in favor of Dr. Wright. Gibson filed post-trial motions alleging the trial court erred in allowing the summaries to be used, failing to grant a mistrial after Dr. Wright violated the motion in limine agreement, and not allowing Gibson to introduce Dr. Wallace's deposition in cross-examining Dr. Wright. The trial court denied the motions. This appeal followed.

I. EVIDENTIARY SUMMARIES

Gibson argues the trial court erred in allowing Dr. Wright to present inaccurate summaries to the jury based on documents not produced to Gibson until days prior to trial, thus violating Rule 1006, SCRE. We disagree.

> Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance. Demonstrative evidence is distinguishable from exhibits that comprise "real" or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.

Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000).

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary,

> or calculation, *provided the underlying data are admissible into evidence*. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1006, SCRE (emphasis added).

"[T]he standard for merely showing or exhibiting demonstrative evidence . . . would not be higher than the standard for actually admitting demonstrative evidence." *Davis v. Traylor*, 340 S.C. 150, 156-57, 530 S.E.2d 385, 388 (Ct. App. 2000). "The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." *Id.* at 157, 530 S.E.2d at 388. "To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005).

"[C]ounsel may use a blackboard during jury argument to illustrate points that are properly arguable or to bring to the jury's attention facts or figures properly revealed by the evidence." *Edwards v. Lawton*, 244 S.C. 276, 277, 136 S.E.2d 708, 708 (1964).

> There is no impropriety in counsel's use of a blackboard, during his argument to the jury, for the purpose of fairly illustrating points that are properly arguable. Calculations made, or diagrams drawn, thereon are of course not evidence. Like statements of counsel in oral argument, they should have reasonable foundation in the evidence or in inferences fairly arguable from the evidence. Just as oral argument may be abused, so may such visual argument; and its abuse may be so flagrant as to require a new trial. Control of the arguments of counsel, with regard to the use of such visual aids, as with regard to oral statements, rests in the sound discretion of the trial judge.

Id. at 277-78, 136 S.E.2d at 708-09 (citations and internal quotation marks omitted).

In one of the federal cases to which Gibson cites, the party who sought to introduce summary exhibits as evidence under Rule 1006, FRE, appealed the trial court's denial of the introduction of the evidence. *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 6-7 (1st Cir. 1996). The trial court did not allow the evidence because the party had not brought the documents from which the summaries were drawn and the opposing party had not seen the documents, despite having access to the documents. *Id.* at 7-8. The opposing party contended the party introducing the exhibits had previously only provided "skeleton exhibits" and had not identified them as summaries until the final pretrial conference. *Id.* at 7-8 & 7 n.15. The following day, opposing counsel requested the underlying documents. *Id.* at 7 n.15. Prior to that, the opposing party had signed two pretrial memoranda without noting a problem with the exhibits. *Id.* at 7-8. Based on that, the party believed the opposing party had no problem with the exhibits and did not bring the documents to town for the trial. *Id.* at 8. The court also noted the trial "court allowed [the party] to use the exhibits as chalks[[2]], and they were relied on heavily during the testimony of its damages expert. The expert . . . testified to the specific amounts contained in the summaries while the jury was able to peruse the chalks." *Id.*

When Dr. Wright sought to use a timeline while cross-examining Gibson, Gibson objected. Dr. Wright stated he wanted to use the timeline to

> save time and put it in the most expeditious and the best way for the jury to understand it is that I'm taking records that have been provided to the other side that has some reference, either to an instruction for noncompliance or either a failure to comply with the doctor's orders. We have taken that and put it on a timeline so we could play it to the jury in the quickest and the most, uh, and the most easiest form for them to understand for the convenience.

Gibson stated he had not received the final notebook of documents Dr. Wright intended to use at trial until the Friday prior to the trial. Dr. Wright countered that

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[2] "Chalks" is a term used to refer to demonstrative jury aids. *See United States v. Milkiewicz*, 470 F.3d 390, 394 (1st Cir. 2006).

the documents had always been available for Gibson's review. Gibson informed the court as to which records he had objections in regards to the timeline. He argued some of them were subjective. Additionally, he argued others should not be allowed because they were already in evidence or were cumulative. He also argued some were not relevant. The trial court ruled on the objections, sustaining some of them and overruling others. The trial court found some of Gibson's issues with the documents went to the weight of the document. Gibson also raised an issue with Dr. Wright only using an excerpt, instead of the whole document. Gibson argued he could not read much of the document apart from the portion Dr. Wright was using. In response, the trial court stated, "That's a different battle than the one you told me you are wanting to fight right now." The trial court further stated:

> I'm looking at this from the point of view of whether or not these excerpts ought to be able to be put up on that slide and shown to the jury. In order for them to do that, they have to be in evidence already or what we've come to now is they are going to have to be subject to some kind of vetting by you because of the number of records, and just to be fair to you, to give you the opportunity to look through each one and make objections because you agreed only to their authentication, you didn't agree to their admissibility. But what is not really before me is records that he's not going to use but you want to exclude [them] based on the fact that you can't read them.

The court acknowledged it could not read the handwriting either, and then asked Gibson how the documents could prejudice him if they were not legible.

The following morning, Gibson argued information Dr. Wright was showing through the PowerPoint presentation was inaccurate and did not contain the full record. He argued "words have been added, words have been interpreted, references and inferences have been [remainder of sentence omitted from the record.]" Gibson argued that Dr. Wright was being allowed to fabricate the record by having slides that only displayed parts of a document. The trial court found Gibson could challenge Dr. Wright's interpretation on cross-examination. The trial court asked Gibson why he could not put in the record himself if he believed it was

an inaccurate translation and let the jury decide. Gibson argued if the timeline was seen by and presented to the jury, then it became evidence.

Gibson argued it had taken him five hours to read ten pages of the slides. Dr. Wright stated the documents the PowerPoint slides were based on were in evidence. The court questioned Gibson on the difference between the PowerPoint and a chalkboard. Gibson responded that an exact quote would not be a problem but that an interpretation would be. The court countered it would be the opposing attorney's role to point that out to the jury. Gibson asked for a recess for a day to review the remainder of the slides because it would take him fifteen hours to examine the ninety slides. Dr. Wright informed the court he had subpoenaed an expert witness who was not available for much longer.

The court stated it would give Gibson ample time to review the documents and after they had finished with two witnesses, court would resume in the morning. Gibson indicated he could not be prepared on the documents by the following morning. He requested the court give him until Monday to prepare. He said he had fifty-three slides to check, corresponding to 180 pages. The court asked Gibson if he would need the additional time to prepare if Dr. Wright were not using the PowerPoint and Gibson responded that he would not. The court stated it did not understand the difference because the slides would not be in evidence, and it would instruct the jury accordingly. Gibson informed the court the slides would have an enormous visual impact on the jury.

Dr. Wright informed the court he was already keeping Dr. Peter Smith, Chief of Cardiothoracic Surgery at Duke University, over one night. The court said it was thinking of adjourning court until Monday morning. Dr. Wright informed the court that he did not know if he could get Dr. Smith back to court on Monday. The trial court was bothered Gibson received the materials on Friday and did not raise an objection until the following Wednesday, but it was also bothered by how small the PowerPoint was that he was delivered. Dr. Wright stated that if the trial continued at noon the following day, he could still present his witness. Gibson informed the court that would not be enough time for him to get through his preparation on the slides. The court ruled it would allow Dr. Wright to present Dr. Smith as a witness, using the PowerPoint presentation, the following day with court beginning at noon. Court ended for the day around 6 p.m.

When court began the next day, Gibson informed the court Dr. Wright told him that morning the PowerPoint slides had been revised. Gibson stated that many of the slides with the very small print were missing from the bigger revised slides. Dr. Wright informed the court he did not add any slides, removed slides he thought might cause controversy, corrected any mistakes he noticed, and cut the number of slides in half. Gibson raised objections to specific slides, arguing material was included on the slides that was not included in what was given to him before trial. Dr. Wright countered that he was not going to introduce those specific slides. Dr. Wright informed the court he only had six pages he wished to reference and maybe they could just go through those pages. As Dr. Wright informed the court of the pages, Gibson made his objections to those pages. The court overruled some, sustained others, and found many of Gibson's issues went to the weight of the slide. Dr. Wright then presented Dr. Smith as a witness. After a weekend long break, trial resumed the following Monday. Later, at the beginning of Dr. Wright's testimony, the trial court instructed the jury:

> I told you that evidence consists of two things, first is witness testimony and the second is exhibits. Uh, you're about to see, as I understand it, some PowerPoint slides. These PowerPoint slides are not evidence. They are not exhibits. They're certainly not witnesses. They are simply a device or aid the lawyer's using to display or highlight portions of the evidence.
>
> You're instructed that the only person's recollection and interpretation of the evidence that counts [i]s yours. The PowerPoint slides or other demonstrative aid that may be used in this trial that are prepared by a party are subject to whatever interpretation you feel appropriate based on your independent view of the evidence. It is for you to decide whether the slides correctly and accurately present the information set for in the exhibits upon which they are based. If the actual underlying evidence or your interpretation of it differs from what is displayed on the slide, the actual evidence or your interpretation controls. In any event, you are not considering the slides as independent evidence.

The record contains Gibson's objections to specific slides. The trial court sustained some of the objections and overruled others. In Gibson's appellate brief, he references some of these objections. However, he argues the trial court erred in allowing Dr. Wright to use the slides at all. The slides themselves were not admitted as evidence. The trial court heard Gibson's objections to each slide. The trial court also gave Gibson additional time to review the slides. Accordingly, the trial court did not abuse its discretion in allowing Dr. Wright to use the slides. Further, Gibson does not identify any slides or errors on the timeline to which he would have objected at trial if he had more time to examine them. Therefore, even if the trial court's allowing the slides was in error, Gibson has not demonstrated how he was prejudiced by not receiving as much time as he requested.

II. MISTRIAL

Gibson asserts the trial court erred in denying his motion for a mistrial based on Dr. Wright's violation of the motion in limine excluding social security disability, workers' compensation, and insurance. We disagree.

"A litigant cannot complain of prejudice by reason of an issue he has placed before the court." *Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004). The door-opening doctrine applies in both criminal and civil cases. *Floyd v. Floyd*, 365 S.C. 56, 92, 615 S.E.2d 465, 484 (Ct. App. 2005), *overturned on other grounds by* 2008 S.C. Acts 211, § 1 (adding section 62-1-110 to the South Carolina Code, providing communications between a lawyer and a fiduciary are subject to the attorney-client privilege unless waived by the fiduciary, even if fiduciary funds were used to compensate the lawyer).

> The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.

Id. (quoting Danny R. Collins, *South Carolina Evidence* 2.9 (2d ed. 2000)).

"Whether a motion for mistrial should be granted is within the trial judge's sound discretion, and the trial judge[']s ruling will not be disturbed unless an abuse of discretion is shown." *Frazier*, 361 S.C. at 104, 603 S.E.2d at 592.

> When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. If the judge takes these steps, and the initial objecting party is not satisfied with the instruction, a further objection and a request for a further instruction should be made at that time. If the objecting party fails to make this additional objection, the asserted misconduct of counsel is not preserved for review on appeal.

McElveen v. Ferre, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989) (citations omitted).

"The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." *In re W.B. Easton Constr. Co.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). "This rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* (citing *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) (tortfeasor's liability for damages not reduced by disability payments from employer); *New Found. Baptist Church v. Davis*, 257 S.C. 443, 186 S.E.2d 247 (1972) (tortfeasor's liability for damages not reduced by value of gratuitous repairs)). "The only requirement for qualification as a collateral source is that the source be 'wholly independent of the wrongdoer.'" *Id.*

In presenting his motion in limine to the court, Gibson stated:

> The motion in limine, Your Honor, is standard. It's really aimed towards collateral source. It will be difficult for both parties to avoid that in references. I know that [Dr.

> Wright] is not going to do it intentionally. We're sure not going to try to do it intentionally. If it comes in, you know, it's one of those no harm, no foul things, but I wanted to have the motion in there just in case some witness get[s] on there and really tried to enunciate the collateral source. So if [Dr. Wright] could tell his witnesses not to talk about insurance, and I'll tell my witnesses not to talk about insurance, Social Security disability, Worker's Compensation and all that.

The trial court responded, "Okay." Dr. Wright agreed and stated: "As long as it doesn't come up -- as long as it doesn't become an issue. I got [sic] no intentions of bringing it up." The court then stated, "All right."

During Dr. Wright's cross-examination of Gibson, Dr. Wright asked, "And that you, in fact, told [the social worker] at that time you had no financial problems?" and Gibson responded, "I don't remember that." Dr. Wright then asked "But you talked about your financial problems, you are on police disability?", and he answered, "Yes." Dr. Wright continued, "And Social Security disability?". Gibson objected, and the trial court took up the matter outside the jury's presence. Gibson moved for a mistrial, stating:

> This question was not something that he volunteered. This is something that [Dr. Wright] spit out in complete violation of the Court's ruling on our motion in limine which specifically address[ed] those very questions. He just blurted it out. It's out in front of the jury now. It's a collateral source. It's clearly inadmissible.

The court found:

> My memory of the motion in limine was that y'all made it, uh, and both sides, uh, acknowledged that it was going to be hard to avoid some possible issue with collateral source because of this. I don't remember an exact ruling. But if I did make a ruling, I stand corrected.

The court made Gibson's written motion in limine Court's Exhibit 3.[3]

Dr. Wright argued he had to ask about Gibson's disability income because Gibson had continued to represent to the jury he had no income. Dr. Wright also argued his questions did not refer to a collateral source because it was police disability and social security benefits for an injury to Gibson's arm. Gibson responded he would now have to present evidence of the source and amounts of money that Gibson claimed was stolen from him by his caregiver. Dr. Wright stated Gibson had already presented testimony about his caregiver stealing his money.

The trial court stated, "I don't understand why you say it's collateral source. . . . [N]obody's going to show that your damages were -- should be reduced by some payment he received." The court noted Gibson receives police disability and social security benefits regardless of his injuries here. The trial court found "the reference by itself is not enough to warrant a mistrial. . . . I can instruct the jury to disregard, uh, the reference. I'll be glad to consider any curative instruction [Gibson] wishes to propose." Gibson said it took exception to the court's analysis. After further discussion, the court stated it was willing to give a curative instruction but understood if Gibson did not want one. Gibson asked the court to hear the instruction and asked to draft a curative instruction for the court's consideration. After the court gave him some time to craft one, he stated, "I just accept whatever curative instruction the Court wants to give."

The court instructed the jury:

> [Y]ou will recall that when we started the case, I told you that it's your job to determine the facts of this case. You remember that I told you that you have to determine the facts from the evidence and not take into account anything that is not evidence.
>
> There was, uh, shortly before we broke, a reference to, uh, Social Security and, I believe, disability. That has nothing to do with the claims involved in this case. It should not have been referenced. It's not part of the evidence in this case. It's been stricken from the record.

[3] The exhibit is not included in the record on appeal.

> You are not to take it into account or give it any weight whatsoever, discuss it, let it cross your mind or take it into consideration in any manner. I repeat to you and emphasize to you, under your oath, you are not to take that question into account, that reference into account. It's no longer part of the evidence of record in this case.

The parties' agreement at the start of trial on the motion in limine was not very concrete. Dr. Wright agreed he would try to stay away from the matter if it did not become an issue. Gibson acknowledged it would be difficult to avoid mentioning it. The mention of the matter was very short. Further, the mention did not violate the collateral source rule because it was regarding an unrelated injury. Therefore, the mention of disability was minor and any prejudice was cured by the trial court's curative instruction. Accordingly, the trial court did not abuse its discretion in denying the motion for a mistrial.

III. DEPOSITION

Gibson maintains the trial court erred by excluding as hearsay Gibson's cross-examination of Dr. Wright regarding the deposition of Dr. Wallace. We disagree.

The admission of a deposition is an evidentiary issue that requires the trial court to exercise its discretion, and we will not disturb the trial court's decision unless we find an abuse of discretion. *Paschal v. Causey*, 309 S.C. 206, 210, 420 S.E.2d 863, 866 (Ct. App. 1992); *see also Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005) ("The decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion.").

The South Carolina Rules of Civil Procedure allow the admission of depositions at trial

> against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, *in accordance with any of the following provisions*:
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of

> *deponent* as a witness, or for any other purpose permitted by the rules of evidence.
>
> . . . .
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
> (A) that the witness is dead; or
> (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or
> (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
> (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
> (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 32(a), SCRCP (emphases added).

Gibson argues the federal and state version of the rule are "essentially the same."

> The Federal Rules of Civil Procedure that allow the use of deposition testimony in place of live testimony "have not changed the long established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person."

Loinaz v. EG & G, Inc., 910 F.2d 1, 8 (1st Cir. 1990) (quoting 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2142 (1970)).

In *Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 644, 677 S.E.2d 892, 897 (Ct. App. 2009), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011), a party attempted to admit excerpts of a deposition, arguing the deponent "qualified as an officer, director, or managing agent under Rule 32(a)(2), SCRCP." The court found, "If not admissible under Rule 32(a)(2), [the party] needed to demonstrate [the deponent] was unavailable pursuant to Rule 32(a)(3), SCRCP, or alternatively, if [the deponent] was available, [the party] should have called him as a witness at trial." *Id.*

Rule 32(a)(1) allows a deposition to be used to impeach a deponent or for any other purpose permitted by the rules of evidence. Gibson was not seeking to admit the deposition to impeach the deponent, Dr. Wallace; he was attempting to admit it to impeach Dr. Wright. Additionally, Dr. Wallace was not unavailable as provided by 32(a)(3) and actually testified at trial. Gibson does not provide for what purpose the deposition is allowed under the rules of evidence but stops the reading of 32(a) before "in accordance with any of the following provisions." Accordingly, the trial court did not abuse its discretion in excluding the deposition.

CONCLUSION

The trial court did not abuse its discretion in allowing the timeline summary, and further, Gibson has not shown he was prejudiced by it. Additionally, the trial court did not err in denying his motion for a mistrial. Finally, the trial court did not err in not allowing excluding Dr. Wallace's deposition during Dr. Wright's testimony. Therefore, the trial court is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.