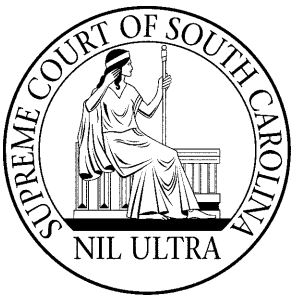

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 13, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2020-UP-101-Erick Hernandez v. State	Pending
2020-UP-103-Deborah Harwell v. Robert Harwell	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5614-Charleston Electrical Services, Inc. v. Wanda Rahall	Pending
5636-Win Myat v. Tuomey Regional Medical Center	Pending
5641-Robert Palmer v. State et al.	Pending
5659-State v. Fabian Lamichael R. Green	Pending
5661-Palmetto Construction Group, LLC v. Restoration Specialists, LLC	Pending
5671-SC Lottery Commission v. George Glassmeyer	Pending
5684-Lucille Ray v. City of Rock Hill	Pending
5694-State v. Ricky Henley	Pending
5696-The Callawassie Island v. Ronnie Dennis	Pending
5697-State Farm v. Beverly Goyeneche	Pending
5698-Gunjit Singh v. Simran Singh	Pending
5699-PCS Nitrogen, Inc. v. Continental Casualty Co.	Pending
5700-Gene Schwiers v. SCDHEC	Pending
5703-David Lemon v. Mt. Pleasant Waterworks	Pending
5705-Chris Katina McCord v. Laurens County Health Care System	Pending
5707-Pickens County v. SCDHEC	Pending
5710-Russell Carter v. Bruce Bryant	Pending

5711-Carla D. Garrison v. Target Corporation	Pending
5714-Martha Fountain v. Fred's Inc.	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-283-Kathleen Kelly v. James Rachels	Pending
2019-UP-295-State v. Anthony M. Enriquez	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-336-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-337-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-381-SCDSS v. Andrea Benjamin	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart	Pending
2019-UP-386-John Willie Mack, Sr. v. State of South Carolina	Pending
2019-UP-391-State v. Brian Everett Pringle	Pending
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending
2019-UP-399-Tracy Pracht v. Gregory Pracht (2)	Pending
2019-UP-401-Stow Away Storage v. George W. Sisson (2)	Pending
2019-UP-415-David Deen v. Deborah Deen	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-001-State v. Guadalupe G. Morales	Pending
2020-UP-003-State v. Shane Alexander Washington	Pending
2020-UP-004-Emory J. Infinger and Assoc. v. N. Charleston Com. Ctr.	Pending
2020-UP-017-State v. Emory Warren Roberts	Pending

2020-UP-018-State v. Kelvin Jones	Pending
2020-UP-026-State v. Tommy McGee	Pending
2020-UP-038-State v. Vance Ross	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Terry Williams, Petitioner.

Appellate Case No. 2018-001365

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Williamsburg County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27967
Heard October 30, 2019 – Filed May 13, 2020

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Ernest Adolphus Finney III, of Sumter, for Respondent.

JUSTICE JAMES: Terry Williams shot and killed Larry Moore (Victim) and shot and wounded Reva McFadden. Williams was indicted for murder, assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime. He maintained he acted in self-defense. A jury convicted him of voluntary manslaughter (a lesser-included offense of murder), ABHAN, and the weapon charge. The court of appeals affirmed. *State v. Williams*, Op. No. 2018-UP-176 (S.C. Ct. App. filed May 2, 2018).

We granted Williams a writ of certiorari to determine whether the court of appeals erred in affirming the trial court's ruling allowing the State to impeach McFadden on redirect examination with details of two previous instances of domestic violence between Williams and McFadden. We hold the trial court erred in allowing the State to elicit unfairly prejudicial details of the domestic violence incidents. The error was not harmless; therefore, we reverse the court of appeals and remand for a new trial.

I.

The shooting occurred shortly after midnight on November 10, 2013, in the parking lot of Viola's Place, also known as "Celestine's," a bar in Williamsburg County. Williams and McFadden had been together for fifteen years, were married for the last five of those years, and have five children together. They had been separated for approximately one year at the time of the shooting. Victim and McFadden had been dating for approximately nine months. Evidence in the record indicates Williams was still in love with McFadden and was upset over her growing relationship with Victim.

After the shooting, Williams fled the scene in his vehicle, parked it outside his cousin's home, and hid in the woods for the rest of the night. He turned himself into law enforcement later that day and was eventually indicted for murder, ABHAN, and possession of a weapon during the commission of a violent crime.

A. Pre-trial Immunity Hearing

Williams moved for immunity pursuant to the Protection of Persons and Property Act.[1] His immunity hearing was held the day before his jury trial began.

[1] *See* S.C. Code Ann. §§ 16-11-410 to -450 (2015); § 16-11-450(A) ("A person who uses deadly force as permitted by the provisions of this article or another applicable

Williams argued he was immune from prosecution under the stand-your-ground provisions of subsection 16-11-440(C).[2] Even though Williams does not appeal the trial court's denial of immunity, McFadden's testimony from the immunity hearing gives context to her trial testimony and the trial court's evidentiary rulings that are the subject of this appeal.

Williams called McFadden as a witness during the immunity hearing.[3] She testified that on the night of the shooting, she and Victim were inside the club shooting pool and socializing. She testified Victim's mood darkened when Williams entered the bar, ordered a drink, and walked back outside. McFadden asked Victim what was wrong, and Victim responded he was "tired of [Williams] mean mugging." According to McFadden, "mean mugging" means giving someone dirty looks. McFadden told Victim to ignore Williams, but Victim told her he was going outside to "see what [Williams] wants to do." McFadden begged Victim to stay inside the bar, but Victim refused and walked outside. Moments later, McFadden followed Victim outside into the parking area, where Victim was standing near the front of Williams' vehicle, with Williams behind the open driver's door about ten feet away from Victim. McFadden testified Victim was complaining angrily to Williams about Williams looking at him, and in response, Williams was telling Victim "back up man, just leave it alone, back up, back up." McFadden testified she attempted to step in front of Victim and Williams started shooting.

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provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . .").

[2] "A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 16-11-440(C) (2015).

[3] It is apparent from McFadden's testimony during both the immunity hearing and during trial that her sympathies lay with Williams, as her testimony generally supported Williams' claim of self-defense.

As defense counsel was questioning McFadden about the shooting, he asked McFadden to describe Williams, and she replied, "[Williams] is a nice person, you know, quiet person, real quiet person, a self-person, don't bother nobody really." Since Williams had the burden of establishing the elements of self-defense (save the duty to retreat) under subsection 16-11-440(C), defense counsel had to establish that Williams was reasonably in fear for his life immediately before the shooting. McFadden testified Victim was "very, very furious, very mad" at Williams. She also testified she had known Williams for fifteen years, knew how to gauge his emotions, and that Williams seemed afraid for his life.

On cross-examination by the State during the immunity hearing, after McFadden acknowledged she described her husband on direct examination as quiet, loving, and sweet, the State asked McFadden if Williams was the same man who (1) pulled an AK-47 on her during an argument eleven months before the shooting and (2) pulled a .22 caliber pistol on her during another argument six months before the shooting. McFadden admitted those two incidents occurred and that she called the police both times. The trial court denied Williams' motion for immunity, and the case proceeded to trial the next day.

After jury selection, Williams moved to exclude testimony concerning the two incidents. Defense counsel stated, "I understand the State's position was potentially that I may have opened the door [during the immunity hearing] when I asked the witness about . . . the defendant's character, whether or not he has a character for violence or anything of that nature. . . . I'm not planning on opening the door [in front of the jury]. I tell you very candidly I'm not planning on doing that again." The trial court instructed the State to request an in camera hearing prior to introducing evidence of any other bad acts committed by Williams.

B. Trial Testimony

Since the burden of proof shifted to the State once the jury trial began, McFadden was called as a prosecution witness during trial. Her description of the events leading up to the shooting basically tracked her testimony during the immunity hearing. McFadden testified that by the time she went outside after Victim, Victim and Williams were already exchanging words by Williams' vehicle. She testified several others were present at the time. Tabitha Greene was one of the others present.

Greene testified Victim and McFadden walked to McFadden's truck, walked back inside the bar, and came back outside within moments. Greene testified Victim walked over to Williams, stood in front of Williams with his arms crossed, and stared at Williams, which prompted Williams to ask Victim, "[W]hat the f**k are you looking at?" Greene testified Victim responded, "[T]hese are my f**king eyes, I can look where I want to look." Greene testified Williams replied, "Okay," and then dropped his head and walked away. Greene testified Victim then told McFadden several times to go back inside the bar. Greene testified she went inside because she was afraid there would be an altercation. Only Williams, Victim, and McFadden remained outside.

Returning to McFadden's testimony, McFadden testified Williams walked towards his vehicle with Victim following him. McFadden testified Victim said to Williams, "[W]hat you want to do, I'm tired of you, I'm tired of seeing you everywhere I go, I'm tired, what you want to do[?]" McFadden testified Williams stood next to his vehicle behind the open driver's door and responded, "[G]o on, back up, just back up, don't come close to me, back up." McFadden testified she saw that Williams had a gun, so she tried to step between the two men. She testified Williams fired approximately ten shots and Victim fell to the ground. Williams fled the scene in his vehicle, and McFadden drove Victim to the hospital. Victim did not survive. An autopsy revealed Victim had been shot five times. McFadden was shot once in her left foot.

Under cross-examination by defense counsel, McFadden testified she had known Williams for fifteen years and could tell when he was happy, sad, and scared. She further testified under cross-examination:

> **Q:** Yesterday[, during the pre-trial immunity hearing,] I was very specific in the questions that I asked you, very specific, and I asked you, looking at your husband, knowing his face, knowing him for 15 years, how did he appear that night? What did you say yesterday when I asked that very specific question?
>
> **A:** I'm thinking that I said he, he was scared. I know he was scared; that's what I'm saying.
>
> **Q:** And that was just yesterday when I said ---
>
> **A:** Yes.

Q: --- specifically asked you, that night ---

A: Yes.

Q: --- when [Victim] was in front of him ---

A: Yes.

Q: --- hands raised ---

A: Yes.

Q: --- [Williams] saying back away ---

A: Yes.

Q: I asked you, what was your husband's demeanor, the man you knew, how was he acting that day, was your husband afraid?

A: He was scared.

Q: He was scared. *Tell me why he was scared based upon the person, you know, for 15 years knowing when he's happy, when he's sad, things of that nature*.

A: *Because he, he really never been in a confrontation in his whole entire life with anyone in an argument. He tries to stay away from people 'cause he's scared, and that's why when I say he always take his gun because he be scared*.

(emphasis added). McFadden's last response is the focal point of this appeal.

During redirect examination by the State, McFadden confirmed her testimony that Williams was not known to get into any confrontations. The State then requested and was granted an in camera hearing, during which the State argued it should be able to introduce evidence of the two prior incidents of domestic violence between McFadden and Williams to impeach McFadden's testimony regarding Williams' "propensity for or the lack of propensity [for] violence."

The State argued to the trial court that the details of the two prior incidents were admissible under Rule 404(b) of the South Carolina Rules of Evidence to

establish Williams' intent and to establish the shooting was not a mistake or an accident. The State also argued Williams opened the door to introducing details of the incidents pursuant to Rule 404(a)(1), SCRE. The State asserted defense counsel's questions of McFadden were designed to elicit testimony about Williams' non-confrontational character, McFadden's testimony in response to those questions spoke to Williams' non-confrontational character, and the State should be allowed to rebut this character evidence with evidence of Williams' confrontational character.

In response, defense counsel agreed McFadden should not be allowed to mislead the jury with her testimony that Williams had never been in a confrontation with anyone. However, defense counsel argued his questions were not designed to elicit a response from McFadden that Williams was peace-loving and non-confrontational, and counsel asserted Williams would suffer unfair prejudice if the State were allowed to introduce details of the two prior incidents to impeach McFadden. Counsel argued the State's "questioning should be tailored just to impeach [McFadden] for telling something that was not true."

Our disposition of this appeal turns upon the trial court's ruling that defense counsel's questions did not open the door to the State's introduction of contrary character evidence. After having the court reporter play back the questions asked by defense counsel and the answers given by McFadden, the trial court ruled defense counsel's questions were not designed to elicit testimony from McFadden that Williams was a non-confrontational person. Rather, the trial court ruled McFadden's answers to the questions opened the door; explaining further, the trial court stated, "[McFadden] can't have it both ways. She can't have [Williams] over there peaceful, never having an argument with anyone, and come in here and testify before a jury and mislead the jury that's the truth when she's been a victim otherwise." (emphasis added).

The trial court allowed the State to question McFadden about the details of the prior domestic violence incidents for three reasons: (1) Rule 404(a)(1) permitted detailed questioning on redirect to rebut McFadden's testimony that Williams was a peaceful, non-confrontational person; (2) Rule 404(b) permitted questioning on redirect to establish Williams' intent and to establish the shooting of Victim was not a mistake or an accident; and (3) McFadden had given untrue testimony, and the State should be allowed under Rule 607 to impeach McFadden by eliciting testimony on redirect to establish she had not told the truth on cross-examination.

When the trial court concluded its ruling, the jury returned, and the State resumed redirect examination of McFadden:

> **Q:** Ms. McFadden, when we left off I asked you was it your sworn testimony that your husband was never known to get in any kind of confrontation with another person during his entire life in your response to me. Was that your testimony, correct?
>
> **A:** When I said that I was meaning with someone else otherwise me.
>
> **Q:** Oh, okay. So you want to clarify that again. We want to make further clarification.
>
> **A:** Can I?
>
> **Q:** Yeah. In fact, he got into a confrontation with you about six months before the shooting, right? Didn't your husband ----
>
> **A:** Most likely, we always stayed in confrontation, me and him.

McFadden then confirmed the details of the two prior incidents, specifically that Williams presented a firearm during both incidents and that McFadden called the police for assistance. Williams again objected and again argued the State's redirect examination of McFadden about the prior incidents should have ceased after McFadden's testimony clarified that Williams had never been in any confrontations with people other than her. The trial court overruled Williams' objection. The jury found Williams not guilty of murder but found him guilty of voluntary manslaughter, ABHAN, and possession of a weapon during the commission of a violent crime.

Williams appealed, and the court of appeals affirmed. *State v. Williams*, Op. No. 2018-UP-176 (S.C. Ct. App. filed May 2, 2018). The court of appeals held the trial court did not abuse its discretion in allowing the State to question McFadden about the two prior domestic violence incidents pursuant to Rule 404(a)(1). We granted Williams a writ of certiorari to review the court of appeals' decision.

II.

The trial court ruled the details of the two prior domestic violence incidents were admissible under Rule 404(a)(1), Rule 404(b), and Rule 607. Williams argues this was reversible error. The trial court conducted only a cursory analysis of Rule

404(b), and it is apparent the trial court primarily based its ruling upon Rule 404(a)(1) and Rule 607. In fact, the State has not advanced any argument on Rule 404(b)'s applicability and acknowledges in its brief to this Court that the trial court did not base its ruling on Rule 404(b). Therefore, we will limit our discussion to the applicability of Rule 404(a)(1) and Rule 607 to this case, and we will review the importance of proportionality and Rule 403 to a proper analysis of the admissibility of the details of the prior domestic violence incidents.

A. Rule 404(a)(1), SCRE

Rule 404(a)(1) provides:

> **(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> **(1) Character of Accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[.]

Plainly, before the State may rebut evidence of a character trait of the accused, the accused must first offer evidence of that character trait into the trial. The rule does not allow rebuttal character evidence from the State when a witness other than the accused gratuitously testifies about a character trait of the accused. Here, in ruling Williams' questions of McFadden were not designed to elicit a response from McFadden about a character trait of Williams—that Williams was peaceful and non-confrontational—the trial court ruled the witness, not the accused, placed a trait of Williams' character in issue.

As noted, the trial court ruled defense counsel's questions of McFadden were not designed to elicit testimony of Williams' peaceful and non-confrontational character. The State disagrees with the trial court and argues evidence of Williams' confrontational nature and his propensity to brandish a firearm were fair game because defense counsel's questions were designed to elicit a response from McFadden that Williams was peaceful and non-confrontational. In other words, the State claims defense counsel opened the door to rebuttal character evidence. "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *Bowman v. State*, 422 S.C. 19, 40, 809 S.E.2d 232, 243 (2018) (quoting *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008)). Although evidence of a defendant's character is

not generally admissible to prove his propensity to act accordingly, "when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law[.]" *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Before we reach the question of whether the trial court abused its discretion in allowing evidence of the details of the prior incidents under Rule 404(a)(1), we must first determine whether the trial court abused its discretion in concluding defense counsel's questions were not designed to elicit evidence of Williams' peaceful and non-confrontational character. If we conclude the trial court did not abuse its discretion in this regard, we have no choice but to rule the trial court committed an error of law in invoking Rule 404(a)(1) as a basis for allowing the introduction of the details of the prior incidents.

To repeat, during the immunity hearing, defense counsel asked McFadden to generally describe Williams, and McFadden responded that Williams was "nice," "quiet," and did not bother anyone. This loosely-worded question and McFadden's answer to it opened the door for the State to provide at least some rebuttal evidence of Williams' confrontational character during the immunity hearing. When the jury trial began the next day, defense counsel acknowledged to the trial court that he may have opened the door to character evidence during the immunity hearing, but he was adamant he would not open the door during trial. During trial, defense counsel elicited testimony from McFadden that it appeared to her that Williams was in fear of death at the hand of Victim. Then the following exchange occurred:

> **Q:** He was scared. Tell me why he was scared based upon the person, you know, for 15 years knowing when he's happy, when he's sad, things of that nature.
>
> **A:** Because he, he really never been in a confrontation in his whole entire life with anyone in an argument. He tries to stay away from

people 'cause he's scared, and that's why when I say he always take his gun because he be scared.

We hold the trial court did not abuse its discretion in ruling Williams did not open the door to evidence of his confrontational character or his propensity to brandish a firearm when in a confrontation. That ruling removed Rule 404(a)(1) from the evidentiary equation; therefore, the trial court committed an error of law in relying upon Rule 404(a)(1) to allow the State to introduce evidence of Williams' confrontational character.

B. Rule 607, SCRE

The trial court also cited Rule 607 as a basis for allowing the introduction of the details of the prior incidents between Williams and McFadden. Rule 607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness." One obvious way to impeach a witness is to elicit testimony from that witness that establishes she previously gave false or misleading testimony on the same subject matter. McFadden's testimony that Williams had "never been in a confrontation in his whole entire life with anyone in an argument" was not true, for Williams had been in two confrontations with McFadden just eleven months and six months before the shooting. Williams rightly concedes the State should have been allowed to elicit testimony from McFadden to establish her prior testimony was not true. Williams argues the trial court instead allowed the State to go far beyond that point and introduce inadmissible propensity evidence. The question becomes how far the trial court should have allowed the impeachment to go. Rule 403 provides the framework for answering that question.

C. Rule 403, SCRE

The concept behind Rule 403 is clear: if the probative value of the evidence sought to be admitted "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," the trial court, upon proper objection, may exclude the evidence. *See* Rule 403, SCRE. The Rule 403 concern most often invoked is "the danger of unfair prejudice." In the context of Rule 403, "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

Whether the subject is contrary character trait evidence under Rule 404(a)(1) or impeachment of a witness under Rule 607, Rule 403 requires the evidence offered to be proportional to the evidence that gave rise to its admissibility. We have guarded against "thinly-veiled attempt[s] to show propensity" initiated under the guise of an attempt at impeachment. *See Young*, 378 S.C. at 106, 661 S.E.2d at 390; *State v. Heyward*, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019). We have emphasized proportionality in "opening-the-door" settings as well. *See Bowman*, 422 S.C. at 40, 809 S.E.2d at 243-44 ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." (quoting *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006))); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 ("Testimony in response must be 'proportional and confined to the topics to which counsel had opened the door.'" (quoting *Bowman*, 422 S.C. at 42, 809 S.E.2d at 244)); *see also State v. Robertson*, 205 A.3d 995, 1004 (Md. 2019) ("The doctrine of opening the door has limitations. It allows for the introduction of otherwise inadmissible evidence, but only to the extent necessary to remove any unfair prejudice that might have ensued from the original evidence." (quoting *Little v. Schneider*, 73 A.3d 1074, 1082 (Md. 2013))); *Khan v. State*, 74 A.3d 844, 856 (Md. Ct. Spec. App. 2013) ("While the proverbial door was opened to the disputed testimony, it remained for the trial court to balance its probative value against its prejudicial nature . . . .").

When the State initially challenged McFadden about her untruthful testimony that Williams had never been in a confrontation in his entire life, McFadden tried to qualify her testimony and stated, "[w]hen I said that I was meaning with someone else otherwise me." She further tried to qualify her testimony by stating, "[W]e always stayed in confrontation, me and him."

Williams argues that at this point, no further impeachment of McFadden was warranted because McFadden had admitted her testimony on cross-examination was not true. Williams claims the trial court abused its discretion in allowing the State to elicit the details of the two domestic violence incidents, especially the details that Williams presented a firearm on both occasions and that McFadden called the police on both occasions. Williams argues any probative value of these details was substantially outweighed by the danger of unfair prejudice, as Williams was standing trial for shooting two people. We agree. We question whether these details had any probative value in this case, and we hold the introduction of these details had "an undue tendency to suggest a decision on an improper basis." *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830.

The trial court properly allowed the State to ask McFadden if she had been involved in two prior confrontations with Williams, as this would impeach her previous testimony that Williams had never been in any confrontations with anyone. However, the trial court erred in allowing the State to elicit the details of the incidents, primarily that Williams presented a firearm and that police were called.

III.

We also hold the erroneous introduction of evidence of these details of the prior incidents was not harmless. Evidence of Williams' guilt was certainly not overwhelming. The severity of the unfair prejudice was amplified because the indicted offenses centered upon Williams' use of a firearm to kill one person and wound another. The inadmissible details of the prior incidents amounted to extremely prejudicial propensity evidence, which likely eroded Williams' theory of self-defense and likely influenced the jury to base its verdict on improper considerations.

We reverse Williams' convictions and remand for a new trial on the charges of voluntary manslaughter, ABHAN, and possession of a weapon during the commission of a violent crime.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Landry, Petitioner,

v.

Angela Landry, Respondent.

Appellate Case No. 2019-000843

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Rochelle Y. Conits, Family Court Judge

Opinion No. 27968
Heard February 11, 2020 – Filed May 13, 2020

REVERSED AND REMANDED

Rhett D. Burney, of Rhett Burney, PC, of Simpsonville, and J. Falkner Wilkes, of Greenville, for Petitioner.

Larry Keith Wood, of Larry K. Wood, P.A., of Mauldin, for Respondent.

JUSTICE HEARN: We granted Michael Landry's petition for a writ of certiorari to determine whether the court of appeals erred in affirming the family court's denial of his motion under Rule 60(a), SCRCP, to correct an alleged clerical error in a final

order. We reverse the decision of the court of appeals and remand to the family court for a new hearing.

FACTUAL/PROCEDURAL BACKGROUND

Michael Landry (Husband) filed an action against Angela Landry (Wife) seeking a divorce on the ground of one year's continuous separation. The parties were scheduled for a contested hearing before the family court on December 6, 2016. On the morning of trial, the parties drafted and signed a handwritten agreement resolving all of the issues between them except for the divorce. Thereafter, the parties informed the court they had reached a final agreement, marked the agreement as Plaintiff's Exhibit 1, and submitted it to the court for approval. The agreement, which consisted of three pages and seventeen paragraphs, determined the issues of alimony, equitable distribution of property, child support, custody and visitation of the minor child, and attorney's fees. The terms of the agreement were not read into the record; instead, the court questioned both parties about their general understanding of the agreement and whether they entered into it freely and voluntarily. Satisfied with the parties' responses, the court stated it would approve the agreement and make it the final order of the court.

As requested by the family court, Husband's attorney drafted the order, incorporating the handwritten agreement by typing its terms into the final order. After sending it to opposing counsel for his approval, Husband submitted the order to the family court judge, who signed it on January 18, 2017. Nine weeks later, Husband noticed the order contained a provision requiring him to pay Wife one-half of his military retirement benefits—the focal point of this appeal. Specifically, paragraph 2 of the final order, which was not part of the parties' handwritten agreement, stated: "Husband shall pay wife one-half of his Airforce retirement[.] The Defendant will as soon as possible make application for her portion of the benefits to be paid directly to her relieving him of any obligation to continue to pay her portion out of his funds." However, the handwritten agreement did mention Husband's military retirement in paragraph 6, which stated: "The husband's alimony payments, child support payments, and ½ of military retirement for December 2016 shall be paid by husband to wife once the TSP[1] is divided by QDRO. The amount is

[1] The Thrift Savings Plan (TSP) is a retirement savings and investment plan for Federal employees and members of the uniformed services. Established by Congress in the Federal Employees' Retirement System Act of 1986, the TSP is a defined contribution plan that provides the participant with retirement income based on how

$2,923.00." Nevertheless, believing the addition of paragraph 2 to be a mistake—albeit one made by his own attorney in drafting the order—Husband moved for relief under Rule 60(a), SCRCP, based upon a clerical mistake "arising from oversight or omission."

The court held a hearing on the motion. Noticing that a provision in the handwritten agreement referenced Husband's military retirement benefits, the court questioned Husband's counsel as follows: "Well, wait a minute, Paragraph 6 says, 'The husband's alimony payments, child support payments, and one half of the military retirement.' It says that doesn't it?" Husband's counsel answered affirmatively. Regarding paragraph 2 at issue, the court asked Husband's counsel, "Well, why in the world would you add that if, y'all drafted it, why did y'all add that if it wasn't your agreement?" Husband's counsel replied, "I don't know why we put that in there. All I can tell you, I know why we put the agreement in writing. That was so there would not be any misunderstanding. Both parties signed that. We presented that to the court. The only reason we typed it from that point on was because it looked neater." Wife's counsel opposed the motion, arguing the parties did in fact agree to share Husband's military retirement benefits.

Thereafter, the court denied the motion, finding Husband should have requested relief pursuant to Rule 59(e), SCRCP, rather than through Rule 60(a), SCRCP, and accordingly, the court lacked jurisdiction to consider the merits of the motion. Alternatively, the court found the parties had agreed that one-half of Husband's military retirement benefits would be paid to Wife. Husband appealed to the court of appeals, which affirmed the family court's decision in an unpublished per curiam opinion pursuant to Rule 220(b), SCACR. Husband petitioned for a writ of certiorari, which this Court granted.

ISSUE PRESENTED

Did the court of appeals err in affirming the family court's order denying Husband's motion under Rule 60(a), SCRCP, to correct the final order by removing

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much is paid into the account during employment and earnings accumulated over time. *What is the Thrift Savings Plan (TSP)?*, THRIFT SAVINGS PLAN, https://www.tsp.gov/PlanParticipation/AboutTheTSP/index.html (last visited Feb. 5, 2020).

a provision that was allegedly included by mistake and to which the parties purportedly did not agree?

STANDARD OF REVIEW

On appeal, this Court reviews the family court's legal and factual issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018). Therefore, in appeals taken from the family court, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 652 (2011). However, a family court's evidentiary or procedural rulings will not be reversed on appeal absent an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2. In reviewing decisions to grant or deny motions under Rule 60, SCRCP, the abuse of discretion standard applies. *See Ex Parte Carter*, 422 S.C. 623, 631, 813 S.E.2d 686, 690 (2018). An abuse of discretion occurs when the ruling is controlled by an error of law, or when based on factual conclusions, is without evidentiary support. *McKinney v. Pedery*, 413 S.C. 475, 482, 776 S.E.2d 566, 570 (2015).

DISCUSSION

Husband contends both the family court and the court of appeals erred in rejecting Rule 60(a) as a vehicle for correcting the order to conform it to the parties' original intent. Conversely, Wife asserts Rule 60(a) is inapplicable because Husband seeks to change the scope of the judgment and he forfeited his ability to challenge the order by failing to file a Rule 59(e) motion. We disagree that Rule 59(e) afforded the only avenue of relief. However, because the agreement is ambiguous as to whether the parties actually intended to permanently divide Husband's military retirement benefits, and that fact was never clarified during the court's initial approval of the agreement, we decline to adopt Husband's position at this posture and instead remand to the family court for that determination.[2]

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[2] Husband also argues the court of appeals erred in applying *Brown v. Brown*, 392 S.C. 615, 709 S.E.2d 679 (Ct. App. 2011), to the facts of this case. However, because our analysis of the family court's decision is dispositive, 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) (finding an appellate court need not address remaining issues on appeal when decision of a prior issue is dispositive).

We begin by addressing whether the family court erred in finding that it lacked jurisdiction to consider the substance of Husband's motion because he was procedurally required to seek relief under Rule 59(e) rather than Rule 60. It is well-established that a Rule 59(e) motion to alter or amend a judgment must be served within ten days from receiving notice of entry of the order. Rule 59(e), SCRCP; *Overland, Inc. v. Nance*, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018). In contrast, Rule 60 applies to specific contexts and does not impose a ten-day jurisdictional requirement. Particularly relevant is Rule 60(a), SCRCP, which enables the court on its own initiative or on a party's motion to correct clerical mistakes "arising from oversight or omission." However, not all mistakes may be corrected under this Rule, as the United States Court of Appeals for the Fourth Circuit has explained:

> The basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of blunders in execution whereas the latter consist of instances where the court *changes its mind*, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Sartin v. McNair Law Firm, 756 F.3d 259, 265 (4th Cir. 2014) (quoting *Rhodes v. Hartford Fire Ins. Co.*, 548 Fed.Appx. 857, 859-60 (4th Cir. 2013) (per curiam)). Instead, for Rule 60(a) to apply, the "mistake" must be one where "there is an inconsistency between the text of an order or judgment and the . . . court's intent when it entered the order or judgment," which "includes an unintended ambiguity that obfuscates the court's original intent." *Id*. at 265-66.

While the family court has authority to modify certain orders, including those involving a child or ongoing child support and alimony payments upon a showing of changed circumstances, it may not modify an order pertaining to equitable property division. *See Miles v. Miles*, 393 S.C. 111, 120, 711 S.E.2d 880, 885 (2011) (holding spousal support may be modified where requesting party demonstrates a substantial change in circumstances); *Moesley v. Moesley*, 263 S.C. 1, 4, 207 S.E.2d 403, 404 (1974) (holding divorce decree may be modified with respect to custody and child support); S.C. Code Ann. § 20-3-620(C) (2014) ("The [family] court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal."). Further, it is "exceedingly clear that the family court *does not* have the authority to modify court

ordered property divisions." *Simpson v. Simpson*, 404 S.C. 563, 571, 746 S.E.2d 54, 58-59 (Ct. App. 2013). The only exception to this general rule is when Rule 60 is implicated.

Specifically, Rule 60(a) provides a mechanism to modify an order that may be non-modifiable under these general principles. *Thompson v. Thompson*, 428 S.C. 142, 149, 833 S.E.2d 274, 278 (Ct. App. 2019) ("[T]he family court has jurisdiction to reconsider an otherwise un-modifiable property division in order to correct clerical errors and in exceptional circumstances."). For example, the court allowed modification of property division under Rule 60(a) to correct a clerical error that accounted for the same trailer twice in the court order. *Clark v. Clark*, 423 S.C. 596, 609-10, 815 S.E.2d 772, 779-80 (Ct. App. 2018). In *Simmons v. Simmons*, 392 S.C. 412, 414-15, 709 S.E.2d 666, 667 (2011), we found the family court had subject matter jurisdiction to revisit a court-approved divorce settlement agreement when the alimony portion was declared void on appeal. Moreover, the court of appeals has found exceptional circumstances existed to allow modification under Rule 60(b)(5). *See Johnson v. Johnson*, 310 S.C. 44, 47, 425 S.E.2d 46, 48 (Ct. App. 1992) (holding if justice so requires, the court may relieve a party of a final consent order if it was based on a vacated final consent order in a related case).

Here, in its order denying Husband's Rule 60(a) motion, the family court held the relief Husband sought did not fall within the scope of Rule 60(a), and that he instead should have filed a motion pursuant to Rule 59(e). Under this state's precedent discussed above, this determination was error. Because we find the family court erred in denying Husband's motion based on a lack of jurisdiction, we now consider the merits of Husband's claim.

In his Rule 60(a) motion, Husband argued the provision was inadvertently added during the process of incorporating the terms of the handwritten agreement into the final order and that the parties did not agree to that term. In contrast, Wife contended Husband did agree to the provision. Both in its ruling from the bench and its findings in the written order, the family court indicated Husband agreed to pay one-half of his military retirement benefits to Wife. However, we are unable to discern from the record any evidence which supports that finding. It is possible the family court could have found that the provision of the handwritten agreement referencing Husband's payment of one-half of his military retirement benefits to

Wife for the month of December 2016 supported this conclusion.[3] While the court also could have simply believed Wife's counsel when he said the parties agreed to divide Husband's military retirement, it is well settled that statements by counsel are not evidence. *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. Consequently, the family court may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments." (citations omitted)).

Here, there was no hearing with testimony from the parties to determine whether they agreed to the provision at issue, and we cannot infer findings of fact which do not appear in the record. *See* Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."); *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) (noting an order in compliance with Rule 26(a) contains sufficient findings of fact in support of its conclusions); *Id*. ("[W]hen an Order is issued in violation of Rule 26(a), this Court may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence."). Although parties are typically bound by the terms set forth in their agreement, we believe the agreement at issue is ambiguous such that parol evidence of the parties' intent must be considered to determine what the parties agreed to with respect to this fairly substantial marital asset. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) ("[I]t is the general rule that parol evidence is admissible to show the true meaning of an ambiguous written contract."). Therefore, we remand for the family court to take testimony and make findings in support of its decision. *See McKinney v. McKinney*, 274 S.C. 95, 104, 261 S.E.2d

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[3] At oral argument, Husband's counsel explained that this provision was included in the agreement for the purpose of paying Wife arrearages in alimony and child support in exchange for dismissing her contempt action against him. He stated Husband's military benefits were mentioned in the provision because he wanted to specify where the approximately $691.00 of the $2,923.00 total stated in the agreement would come from. He further clarified that this was the only amount of Husband's military retirement the parties agreed would be paid to Wife, which is why paragraph 10 of the agreement stated, "Each party will retain their own . . . retirement accounts . . . to the exclusion of the other except as specifically set out in this agreement."

526, 530 (1980) (noting the family court "should have resolved the ambiguity apparent on the face of the agreement by receiving testimony and evidence as to the intentions of the parties and the circumstances of the agreement").

The procedure utilized by the parties and the court in approving the handwritten agreement reached immediately before the hearing has hampered our ability to resolve this case. Normally, we are not inclined to provide litigants with another "bite at the apple" in presenting their case. *See Lewis*, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n.11. Moreover, a party whose conduct induces error is generally not in a position to complain on appeal. 5 C.J.S. *Appeal and Error* § 1082 (2019) ("Error due to the fault, or in favor, of the appellant or plaintiff in error ordinarily will not result in a reversal . . . . Generally, to procure the reversal of a judgment, the commission of error without fault on the part of the party complaining must be shown."). However, without any testimony as to what the parties intended in paragraph 6 of the handwritten agreement, even our de novo standard of review does not enable us to find the parties agreed to share Husband's military retirement benefits. Accordingly, we take this opportunity to remind the bench and the bar of the proper procedure for approving family court agreements.

The approval of agreements reached between parties in domestic litigation dates back to 1983. *Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("In all decrees entered after this decision, the parties may contract concerning their property settlement and alimony, but the submitted agreement must be approved by the family court."). This court has also mandated statewide mediation of all contested family court cases. *Re: Circuit Court Arbitration and Mediation and Family Court Mediation Pilot Program* 2015-11-12-04 (S.C. Sup. Ct. Order dated Nov. 12, 2015). Under the ADR Rules, a final mediated agreement is reduced to writing in the form of a Memorandum of Agreement prior to approval by the court. Rule 6(g), SCADR. However, even when mediation does not produce a final agreement, counsel often continue to negotiate until a final agreement is reached, sometimes on the eve of trial.

When parties choose to resolve their disputes through settlement rather than participate in a contested hearing, the better practice is for counsel to reduce the agreement to writing in a formal, typed document duly initialed and signed by the parties. Indeed, this Court has noted that "out of court agreements should be reduced to writing and submitted to the court for approval." *Small v. Small*, 286 S.C. 87, 90, 332 S.E.2d 769, 771 (1985). At the approval hearing, the agreement or a copy of it should be marked as an exhibit, and the parties should be examined under oath

concerning their understanding of the agreement, its voluntary nature, their satisfaction with counsel, and whether there has been a full disclosure of all marital assets and debts. Thereafter, counsel should request the court admit the agreement into evidence.

While having a formal, typed document introduced into evidence and ultimately attached to the family court's final order is preferred, we recognize that sometimes, as here, an agreement is reached immediately before a scheduled contested hearing and is not reduced to a formal typed document. *See Small*, 286 S.C. at 88, 332 S.E.2d at 770 (involving a divorce settlement agreed upon in open court). In that case, the terms of the agreement should be carefully stated upon the record, and thereafter, the parties should be thoroughly questioned under oath concerning their understanding of the terms of the agreement, the voluntariness with which the agreement was entered, their satisfaction with counsel, and whether there has been a full financial disclosure. *See Liles v. Liles*, 272 S.C. 511, 513, 252 S.E.2d 886, 887 (1979) (concluding "the settlement agreement became binding when it was read into the record"); 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." (emphasis added)).

Moreover, because family courts are courts of equity, their primary focus is whether the parties' agreement is fair and reasonable. *See Fischl v. Fischl*, 272 S.C. 297, 300, 251 S.E.2d 743, 745 (1979). Naturally, this inquiry begins with determining whether the agreement was voluntarily given. *See Skipper v. Skipper*, 290 S.C. 412, 413, 351 S.E.2d 153, 154 (1986). In deciding whether an agreement is fair, it is not the court's task to decide the parties' rights but rather to determine whether the agreement is within the bounds of reasonableness from both a procedural and substantive perspective. *Burnett v. Burnett*, 290 S.C. 28, 30, 347 S.E.2d 908, 909 (Ct. App. 1986). In the context of property settlement, the court is required to consider the parties' financial declarations.[4] *See* Rule 20(a), SCRFC; *Kane v. Kane*, 280 S.C. 479, 483-84, 313 S.E.2d 327, 330 (Ct. App. 1984). The family court's obligation to review the fairness of an agreement includes a duty to examine plain, unambiguous agreements. *Miller v. Miller*, 280 S.C. 314, 315, 313

[4] While the parties' financial declarations were not included in the record on appeal, Wife's counsel indicated at oral argument they were submitted to the family court.

S.E.2d 288, 289 (1984). Ambiguous agreements, however, require the family court to determine the intent of the parties before making a ruling as to fairness and to consider several factors as enumerated in our family court jurisprudence. *See McKinney*, 274 S.C. at 103, 105, 261 S.E.2d at 530-31 (holding the parties' agreement was ambiguous and requiring the family court to try to resolve the ambiguities before ruling upon the fairness of the agreement). *See, e.g.*, *Lucas v. Lucas,* 279 S.C. 121, 122-23, 302 S.E.2d 863, 864 (1983) (considering the parties' contributions to the marriage); *Drawdy v. Drawdy,* 275 S.C. 76, 77, 268 S.E.2d 30, 30 (1980) (finding it incumbent on the family court to consider the economic circumstances and contributions of each party); *Doe v. Doe*, 286 S.C. 507, 514, 334 S.E.2d 829, 833 (Ct. App. 1985) (noting the trial judge considered the length of the marriage, the parties' ages, incomes, needs and obligations, financial status, and relative contributions to the marriage).

Because the parties' agreement in this case was ambiguous, the family court was required to determine the parties' intent and resolve the ambiguities as part of its obligation to review whether the agreement was fair and reasonable. Based on the record presented to us, neither at the initial hearing approving the parties' agreement nor the subsequent hearing on Husband's Rule 60(a) motion was any evidence received by the family court as to what the parties intended by paragraph 6 in the handwritten agreement regarding Husband's military retirement benefits. Therefore, we cannot discern from the record before us any evidence supporting the family court's finding that the final order incorporated the parties' intent with respect to this significant marital asset. Accordingly, we remand to the family court to make this determination.

CONCLUSION

For the foregoing reasons, we conclude the court of appeals erred in affirming the family court's denial of Husband's Rule 60(a) motion based on a lack of jurisdiction, and we remand for an evidentiary hearing to determine what the parties actually agreed to with respect to Husband's military retirement benefits and whether Husband is entitled to relief.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Wetherill Clark, Respondent-Petitioner,

v.

Patricia Brennan Clark, Petitioner-Respondent.

Appellate Case No. 2019-000442

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Harry L. Phillips, Jr., Family Court Judge

Opinion No. 27969
Heard December 12, 2019 – Filed May 13, 2020

AFFIRMED IN PART & REVERSED IN PART

David Collins, Jr., of Collins Law Firm, of Greenville, Ken Lester and Catherine Hendrix, of Lester & Hendrix, of Columbia, all for Petitioner/Respondent.

David Wilson, of Wilson & Englebardt, LLC, of Greenville, for Respondent/Petitioner.

JUSTICE HEARN: In this cross-appeal concerning the apportionment of marital assets, the issues before the Court emanate from the valuation of a minority interest

in a family-held business. Specifically, the question is whether the court of appeals erred in its handling of the family court's application of two discounts when determining the fair market value of a 25% interest for purposes of equitable apportionment—one for marketability and the other for a lack of control. Relying on *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 533 (2015), the court of appeals rejected the marketability discount but applied the lack of control discount. We now affirm in part and reverse in part, reiterating that the applicability of these discounts is determined on a case-by-case basis.[1]

FACTS

George and Patricia Clark married in 1987 and filed for divorce twenty-five years later in 2012 after Husband discovered Wife had a multi-year affair with one of Husband's employees. The parties initially met while they attended college at Emory University, and they married after graduation. The couple had three children and lived in Greenville at the time of the divorce. Early on, Husband worked in sales with several different companies, but he eventually joined the family business, Pure Country, Inc.

Pure Country is located in North Carolina and specializes in custom tapestry blankets, afghans, pillows, tote bags, and other gift apparel. Husband's father established the company during the late 1980s, and it steadily grew. Along with his father, Husband's mother, sister, aunt, and niece also worked at the company. Husband's mother and father each owned a 37.5% interest in the Pure Country, and Husband's sister had the remaining 25% interest. However, approximately six weeks after Husband decided to join the business, his mother unexpectedly died of a heart attack. After the mother's death, Husband's father assumed her interest, meaning he had 75% while Husband's sister retained her 25% interest. Husband continued to work without any stock ownership. However, during this time, Husband's sister and brother filed a lawsuit against the father, alleging he was not competent to act in any capacity at Pure Country. When Husband supported his father, he was sued as well. Ultimately, the father transferred his 75% stock ownership to Husband, which the

[1] Unfortunately, this case represented one of the last matters before Judge Phillips, as he passed away in October 2015, only a month after ruling on Wife's post-trial motions. While Judge Phillips's tenure as a family court judge was far too brief, he nevertheless established himself as one of our finest trial judges.

family court found was a gift and therefore nonmarital property.[2] During this time, the parties settled the lawsuit, as the sister sold her 25% interest to Husband for $400,000, to be paid over a fourteen-year period. As a result, the present value was approximately $98,000.

A year later, in 2006, several tragedies occurred, as Husband's brother and father died. Early in the summer of 2006, Husband's father was diagnosed with pancreatic cancer. During this time, his brother went missing, although the family did not initially realize this. Instead, Husband's sister informed everyone that their brother was busy—first saying he was on a ski trip and then that he had gone to Florida. Eventually, Husband grew concerned, and in September, police discovered part of the brother's remains in a shallow grave at his sister's house in North Carolina after one of her neighbors threatened to call police upon seeing what appeared to be a grave. Ultimately, the sister's husband was convicted of second degree manslaughter, and the sister pled guilty to accessory after the fact to second degree manslaughter in North Carolina.

As the marriage grew more strained, Wife asked Husband whether he would be amenable to her having a "sex surrogate." While both acknowledged conversations about a sex surrogate occurred, Husband claimed he rejected the idea, with Wife's paramour contending Husband knew and condoned the arrangement. From 2008-2012, Wife had an affair with Michael Thorstad, an employee of Pure Country. During this time, Wife approached Husband about obtaining equity in the business. In October 2009, Husband transferred a 25% interest to her, and the corresponding stock agreement contained a restriction that limited any subsequent sale to the business, other shareholders, or immediate family members. Eventually, in early 2012, Husband found a salacious picture on Wife's phone from Thorstad. In April of that year, Husband filed for divorce.

During the course of the eight-day trial, both parties called expert witnesses as to the value of Pure Country and Wife's 25% equity interest. Husband's expert was Catherine Stoddard and Wife's final expert was Marcus Hodge. Stoddard applied three different methods to value the business—the asset, market, and investment approaches. The asset approach consists of calculating the underlying assets and liabilities of the company. The market approach compares the business to

[2] Whether Husband's 75% interest in Pure Country was marital or nonmarital was not appealed to this Court.

other similar companies that have traded in private markets, and the income approach calculates the expected future economic benefits of ownership.

Under the income approach, Stoddard initially valued the 25% interest at $116,365. Importantly, she then applied a 35% marketability discount to account for several factors. Because Pure Country is a privately-held company, a buyer cannot purchase the interest on a publicly-traded market. Therefore, the sales process involves higher transaction costs, as it usually takes more time and energy to find a broker and a willing private investor. Further, Stoddard testified that a closely-held corporation is less marketable and less liquid than a publicly traded business. Particularly relevant here, she also considered the stock agreement from the 2009 transaction that transferred the 25% interest to Wife. That agreement specifically provided:

> 4. Transfer of Stock
>
> (a) General Rule. Unless otherwise provided in a bylaw adopted by the shareholders, no interest in Shares may be transferred, by operation of law or otherwise, whether voluntary or involuntary.
> (b) Exception. Subsection (a) shall not apply to a transfer:
> (1) To the corporation or to any other shareholder of the same class of shares.
> (2) To members of the immediate family of a shareholder or to a trust all of whose beneficiaries are members of the immediate family of a shareholder. The immediate family of a shareholder shall include only lineal descendants (George P Clark, Abigail B Clark, Elizabeth M Clark) and spouses of any lineal descendants.

Stoddard cited this restriction as the reason she arrived at a higher marketability discount than she usually would apply.

Under the asset approach, she valued the entire company at $736,000 and applied both a marketability discount and a lack of control discount. As a result, she opined the 25% value was $83,724. Finally, under the market approach, she valued the 25% interest at $65,430. She weighed each method, and ultimately opined the value was $75,000, which included both a marketability and lack of control discount.

Conversely, Wife's expert, Hodge, opined the total value of the company was $1.8 million. Hodge also applied a marketability discount—finding a 26% reduction

appropriate—but later suggested the value should not be discounted. Unlike Stoddard, Hodge's valuations addressed the value of the company as a whole rather than specifically analyzing the effect of owning a minority interest. Hodge noted, "I valued 100 percent of the equity in Pure Country." In response to whether he valued the 25% interest, he stated, "I did. And it's just a straight 25% interest."

The family court found Stoddard to be more credible, as she thoroughly explained the basis of her opinions, providing the reasons she chose to apply the discounts. Further, the court rejected Hodge's opinion, which compared Pure Country to other purportedly similar businesses, finding, "The problem…is the lack of evidence as to whether the mills [Wife's expert] compared with [Pure Country] are in fact comparable in scope, size, and lines of manufacturing." The court acknowledged the "debate as to whether…discounts should apply in a divorce setting as the business is actually not being sold." However, it correctly recognized that the valuation standard is to determine an asset's fair market value, which assumes a hypothetical sale between a willing buyer and seller. Accordingly, the court agreed with Stoddard and found the value of the 25% interest was $75,000.

On appeal, the court of appeals affirmed in part and reversed in part. *Clark v. Clark*, 425 S.C. 453, 463, 823 S.E.2d 200, 205 (Ct. App. 2018). The court rejected the marketability discount, relying on *Moore.* Because there was no evidence that Husband intended to sell the business, the court noted, "[T]o the extent the marketability discount reflected an anticipated sale, *Moore* deems it a fiction South Carolina law no longer recognizes." *Id.* at 463–64, 823 S.E.2d at 205. Further, concerning the stock restriction that limited transferability to immediate family members, the court stated,

> If, though, Husband has no plans to sell PCI then the stock restriction's effect on value is just as phantom as the discount rejected in *Moore*; both concern liquidity, which *Moore* held irrelevant to the fair market value of a closely held business for equitable distribution purposes when one spouse intends to retain ownership. We therefore hold use of the marketability discount improper under these specific facts.

Id. at 464, 823 S.E.2d at 205–06.

Conversely, the court of appeals affirmed the family court's decision to apply a lack of control discount because a minority shareholder would not have control over the company. *Id.* at 467, 823 S.E.2d at 207. However, the court of appeals found

Stoddard used an effective 44% lack of control discount, which it deemed excessive. Ultimately, the court determined the marketability discount did not apply, and only a 30% lack of control discount applied, meaning the 25% share was valued at $132,656. Both parties filed a petition for certiorari, which we granted as to the application of these two discounts.

ISSUES

I. Did the court of appeals err in reversing the family court's decision to apply a marketability discount to Wife's minority interest in Pure Country?

II. Did the court of appeals err in affirming the application of a lack of control discount?

STANDARD OF REVIEW

Unless the family court's decision is evidentiary or procedural, the appropriate standard of review from the family court is de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018). However, even under our de novo review, we recognize the family court is in the best position to determine credibility. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). Further, our de novo review does not discard "the longstanding principles that trial judges are in superior positions to assess witness credibility and that appellants must show the trial judge erred by ruling against the preponderance of the evidence . . . ." *Stone v. Thompson*, 428 S.C. 79, 91–92, 833 S.E.2d 266, 272 (2019).

DISCUSSION

I. Marketability Discount

Husband contends the court of appeals erred in rejecting a marketability discount when both parties' experts applied the discount to varying degrees. Wife contends this discount does not apply because it accounts for the higher transaction costs inherent in a sale, which Husband has no intention of doing. We agree with the family court that a marketability discount applies.

A party's interest in a closely held corporation is valued according to its fair market value. This valuation principle is defined as "the amount of money which a purchaser willing but not obligated to buy the property would pay an owner willing but not obligated to sell it, taking into account all uses to which the property is

adapted and might in reason be applied." *Reid v. Reid*, 280 S.C. 367, 373, 312 S.E.2d 724, 727 (Ct. App. 1984). This well-established standard assumes a hypothetical sale between a willing buyer and a willing seller. *Id.* However, tension has long existed between proper business valuation principles and the desire to fairly and justly apportion marital assets. Indeed, in *Moore*, this Court acknowledged, "The familiar tension between a family court's goal of equity and recognized valuation principles may be explained, at least in part, due to the absence of a true willing buyer and willing seller in marital litigation." 414 S.C. at 508, 779 S.E.2d at 542. Further, the court noted, "While a traditional approach to valuation may often be dispositive in a family court setting, we recognize that flexibility must exist to allow our family court judges (and appellate courts under de novo review) discretion to fashion equitable relief under the facts and circumstances presented." *Id.* at 525 n.12, 779 S.E.2d at 552 n.12. However, this does not mean that we, as an appellate court, should disregard the testimony and credibility determinations supported by the record under the auspice of de novo review. *See Lewis*, 392 S.C. at 390, 709 S.E.2d at 654. Certainly, if we value flexibility in how the family court apportions the parties' marital assets—which we clearly do—we should consider that court's decision when it has chosen to accept the parties' expert testimony that a marketability discount applies and when the court has found one party's expert more credible. The family court's flexibility in its equitable apportionment must go both ways; otherwise, we risk effectively imposing a bright-line rule where we have previously declined to do so.

In *Moore*, the primary issue concerned whether a privately-held business's goodwill may be marital property. 414 S.C. at 508, 779 S.E.2d at 542. The Court concluded enterprise goodwill is marital property while personal goodwill is not. *Id.* at 512, 779 S.E.2d at 544. Additionally, the parties disputed whether a marketability discount applied, with the wife's expert, Raymond McKay, testifying that a 20% discount was appropriate "to reflect the illiquidity or lack of marketability of shares of a closely held business." *Id.* at 506, 779 S.E.2d at 541. However, the wife's other expert did not believe a marketability discount was appropriate because neither party contemplated a sale nor did any extraordinary circumstances exist. *Id.* at 526 n.13, 779 S.E.2d at 551 n.13. Further, the husband's expert also did not believe a marketability discount applied because the business could be sold "fairly readily." *Id.* at 507, 779 S.E.2d at 542. With these facts, the Court declined to apply a marketability discount, and in doing so, reiterated that whether such a discount applies is determined on a case-by-case basis. The Court noted,

> We decline to impose a bright line rule regarding the appropriateness of such discounts in all family court business valuations, but we find no justification for discounting the value of Candelabra in this case due to lack of marketability. Because Wife will retain ownership of Candelabra, we see no legitimate reason to indulge in the fiction of a marketability discount.

Id. at 525, 779 S.E.2d at 551. In addition, the Court stated,

> McKay in his report noted the often-made argument that "since a sale of the company is not anticipated as a consequence of most divorce litigation, no [marketability discount] should apply." McKay opted for a marketability discount, and understandably so, in his faithful adherence to the concept of "fair market value." We do not address, and leave for another day, other discounts generally associated with determining fair market value.

Id. at 525 n.14, 779 S.E.2d at 552 n.14. The Court cited *Fausch v. Fausch,* 697 N.W.2d 748, 752 (S.D. 2005) for the proposition that whether a marketability discount is appropriate when no sale is contemplated is determined on a case-by-case basis—a prevalent position across the country. *See, e.g.*, *In re Marriage of Thornhill*, 232 P.3d 782, 786 (Colo. 2010) (finding "the trend appears to go against such per se rules" prohibiting marketability discounts when valuing a closely held corporation in marital litigation); *Priebe v. Priebe*, 556 N.W.2d 78, 82 (S.D. 1996) (finding that the "common thread" when determining whether to apply a discount is that the "issue…must be dealt with by trial courts on a case-by-case basis"); *Cobane v. Cobane*, 544 S.W.3d 672, 680 (Ky. Ct. App. 2018) (finding that the "common thread" in all cases involving the "determination of whether to apply a minority discount lies within the discretion of the trial court based upon the facts of the particular case."); *Schickner v. Schickner*, 348 P.3d 890, 894 (Ariz. Ct. App. 2015) (noting that the majority of jurisdictions decline to adopt bright-line rules when valuing minority interests in a domestic relations case).

The court of appeals acknowledged the case-by-case standard, yet its position effectively established a bright-line rule disallowing this discount. While the family court, and appellate courts under de novo review, must have some flexibility in crafting a fair equitable apportionment, the court of appeals' decision alters the fair market value standard that has heretofore guided valuation. As other jurisdictions that employ the fair market value standard have done, we believe the best approach

is to allow our family court judges discretion to apply these discounts on a case-by-case basis. *See In re Marriage of Thornhill*, 232 P.3d at 787 ("[T]he approach that is more in line with the trial court's broad discretion in determining the equitable division of marital property in such proceedings is to allow such courts the discretion to determine whether to apply a marketability discount based upon the facts and circumstances of the parties and marriage in a particular case."); *Fausch*, 697 N.W.2d at 752–53 ("Whether or not it is fair or appropriate to apply a discount in a divorce case where no immediate sale is contemplated is for the trial court to determine based upon the evidence of the case."); *May v. May*, 589 S.E.2d 536, 550 n.22 (W. Va. 2003) ("A discount for lack of marketability occurs when there is evidence that a business will receive less than its true value in a sale for any number of reasons . . . The family court judge rejected the 20% discount for lack of marketability, on the grounds that there was no evidence that the practice would actually be sold. To accept this reasoning as a basis for rejecting the 20% discount would make such discounts inappropriate in all divorce cases. As a practical matter, business valuations in divorce cases will generally be done on the basis of a theoretical sale, as opposed to an actual sale."); *Telfer v. Telfer*, 558 S.W.3d 643, 655–56 (Tenn. Ct. App. 2018) ("Generally, applicability of the use [of] a lack of marketability discount depends on the characteristics of the ownership interest being valued, not whether the owner of the interest actually intends to sell the interest."); *Id.* ("[C]ourts sometime[s] find application of a lack of marketability discounts inappropriate, but in many instances, the decision to apply the discount is seen as discretionary."); *Alexander v. Alexander*, 927 N.E.2d 926, 939 (Ind. Ct. App. 2010) (noting that family courts have broad discretion to apply marketability discounts and that courts "should be able to determine the present value of a spouse's ownership interest in light of marketability and minority shareholder discounts"). Recognizing the discretion afforded to the family court concerning the propriety of a marketability discount implicitly underscores the fact-intensive nature of our review. *See, e.g.*, *In re Marriage of Thornhill*, 232 P.3d at 787 (noting the court's broad discretion to apply a marketability discount based on the facts of the case). Even our de novo standard acknowledges we are not in the best position to make a credibility determination, nor are we inclined to minimize the family court's reliance on both parties' initial acceptance of this discount. While some jurisdictions categorically

prohibit marketability discounts when apportioning marital assets, we continue to reject this approach.[3]

Accordingly, with these principles guiding our analysis, we turn to the facts of this case to determine whether the family court erred in applying a marketability discount. As the family court correctly noted, both experts initially applied a marketability discount, with Wife's expert only later backpedaling at the direction of her counsel. This is in contrast to the situation in *Moore*, where experts for both parties testified to varying degrees that a marketability discount was not appropriate. *Moore*, 414 S.C. at 525 n.13, 779 S.E.2d at 551 n.13. While we acknowledge that one of the wife's two experts in *Moore* applied a marketability discount, the other did not. *Moore*, 414 S.C. at 525, 779 S.E.2d at 551. Further, expert testimony demonstrated the business could be sold "fairly readily." *Id.* at 507, 779 S.E.2d at 542. Conversely, Stoddard thoroughly explained her valuations and the reasons justifying applying this discount. She began with the fact that Pure Country is a privately held business, meaning it is less marketable and less liquid than its publicly traded counterpart. Additionally, the stock transfer agreement severely restricted the pool of potential buyers, further affecting liquidity. With so few potential buyers, Stoddard understood that prospective purchasers would have leverage in negotiating a price for Wife's 25% interest.

Hodge based his opinions in part on a comparative sales analysis where he selected sales of purportedly similar businesses as a benchmark for Pure Country's value. While the comparative businesses consisted of those in the mill industry in North Carolina, we agree with the family court that Hodge did not provide evidence demonstrating that a hypothetical buyer would actually compare these businesses when valuing Pure Country. For example, Hodge did not explain the size, scope, and

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[3] We disagree with the dissent that its position does not abandon the principles of fair market value because it removes the concept of a hypothetical sale, which is the basis for projecting the asset's value. The dissent would hold that the application of a marketability discount is inappropriate because the husband does not intend to sell the business; however, this ignores the fact that South Carolina embraces fair market value, which is not controlled by an owner’s intent—rather it reflects the time it would take to sell the asset in question. Instead, consistent with our longstanding jurisprudence concerning business valuation principles, we reiterate whether a marketability discount is appropriate when calculating an asset's fair market value is determined on a case-by-case basis.

lines of manufacturing of the comparative businesses; accordingly, faced only with Hodge's general conclusion, the family court rejected Wife's valuation. Moreover, Hodge's opinions concerning comparative sales exemplified his overall testimony, leading the family court to find Stoddard's valuation "more thorough, reasoned, and better articulated than Mr. Hodges." As a result, we agree with the family court that the fair market value of Wife's 25% interest should be discounted based on the nature of the company. The value of this minority interest would certainly be impacted in a transaction between a willing buyer and seller. Because the marketability discount accounted for these facts, we agree with the family court's decision to apply it.

II. Lack of Control Discount

Wife contends the court of appeals erred in applying the lack of control discount because Husband will own 100% of the company after the apportionment. Husband asserts the preponderance of the evidence supports applying the discount to ascertain the fair market value of Wife's 25% interest. We agree a lack of control discount applies here.

A lack of control discount—also commonly referred to as a minority discount—accounts for the minority interest's inability to control the business. The minority status certainly affects an asset's fair market value, and therefore, it is proper for courts to consider the propriety of this discount. We have previously done so in other contexts. *See Dowling v. South Carolina Tax Commission*, 312 S.C. 194, 439 S.E.2d 825 (1993). In *Dowling*, five children received stock from their parents as a gift. The IRS believed the parents had undervalued the stock, but the trial court disagreed and accepted the 30% discount for lack of control. This Court affirmed and noted, "The majority of courts have found that minority interest discounts are appropriate within the familial context." *Id.* at 198, 439 S.E.2d at 828. The Court concluded, "We decline to hold that as a matter of state law, minority stock discount for family-held corporations are not allowed."[4] *Id.*

[4] We disagree with the dissent that *Dowling*, grounded on different facts, is irrelevant to our decision. We find the basic principle expressed in *Dowling*—that we do not impose a categorical rule prohibiting lack of control discounts in the familial context—is sound and applicable here. Accordingly, our analysis turns on the facts of this case, including the experts' testimony and the family court's credibility determinations. Concerning credibility, we recently explained that a factfinder may not "give artificial importance to a credibility determination when credibility is not

Wife contends the court of appeals erred by not following its precedent, specifically *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d 684 (Ct. App. 2000). In *Fields*, the husband was a minority shareholder in three privately-held businesses, one of which he served as vice president. The wife's father was the controlling shareholder of that business, and the family court awarded the husband's 18% interest to the wife because she could readily sell that portion to the controlling shareholder—her father. Conversely, if the husband retained ownership of the stock, he likely would be "squeeze[d] out," as the wife's father had already removed him from the board and fired him. *Id.* at 189, 536 S.E.2d at 688. The husband's expert testified that usually a minority discount is appropriate to account for the minority shareholder's lack of control, but that the stock's value would be higher if allocated to the wife because she could consolidate it with her father's controlling interest.

On appeal, the wife contended the family court erred in accepting this testimony, which implicitly rejected a lack of control discount, because there was no way to know what the father would do in the future. *Id.* The court of appeals affirmed the family court's decision, noting the discretion afforded in selecting competing valuations. Ultimately, the court of appeals found the family court did not abuse its discretion, the applicable standard of review at the time. *Id.* at 190, 536 S.E.2d at 688.

We agree with the court of appeals that "*Fields* is best limited to its facts and cannot be read as barring discounting the value of a spouse's minority interest anytime the other spouse owns (or is aligned with the owner of) a majority of the closely held business." *Clark*, 425 S.C. at 464, 823 S.E.2d at 206. The court did not

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a reasonable and meaningful basis on which to decide a question of fact." *Crane v. Raber's Disc. Tire Rack*, Op. No. 27951 (S.C. Sup. Ct. filed April 29, 2020) (Shearouse Ad. Sh. No. 17 at 26). Unlike the reliance on a credibility determination that had no basis in the record and where objective medical evidence rebutted the Workers' Compensation Commission's findings, the family court's credibility determination was thorough and relevant to valuing Wife's 25% interest. Further, the determination of fair market value in domestic litigation is a question of fact that almost always involves expert testimony. *See Lewis*, 392 S.C. at 391, 709 S.E.2d at 655 (noting the determination of fair market value is a question of fact). Because we are easily able to discern the family court's credibility determination from the record and that finding is paramount in weighing the competing expert testimony, we reject the dissent's willingness to discard it.

examine the concept of fair market value, and therefore, there is no evidence whether the family court deviated from this standard when apportioning the marital property.

Moreover, as is the case for marketability discounts, our valuation standard is fair market value, not fair value. *See Brown v. Brown*, 792 A.2d 463, 476 (N.J. Super. Ct. App. Div. 2002) ("'Fair value' is not the same as, or short-hand for, 'fair market value.' 'Fair value' carries with it the statutory purpose that shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value. This is particularly appropriate in the close corporation setting where there is no ready market for the shares and consequently no fair market value."). We profoundly disagree with Wife's and the dissent's assertion they are not abandoning the principles of fair market value because they are removing the fundamental aspect of fair market value—projecting the value attributed by a willing buyer and seller in a hypothetical sale. Further, the dissent's conclusion that a discount for lack of control is improper fails to consider the impact on the value of Wife's 25% share and would essentially change our State's approach to valuations to a fair value standard.

Although the family court retains discretion to reject this discount in other cases, here, the court chose to accept Stoddard's opinion, finding Stoddard more credible than Wife's expert. Moreover, Wife's expert never attempted to value the 25% interest separately, as he incorrectly assumed that Husband's 75% stake was marital. Instead, he merely calculated the value of the business as a whole and divided it by four. A hypothetical buyer would certainly require more than a simple mathematical exercise given the inability to exert control. Because the buyer would be at the whim of the majority, it would be difficult to find a buyer willing to pay a proportionate amount. These considerations all affect the asset's fair market value, which drives valuation. Accordingly, our review of the record supports the family court's decision to apply a lack of control discount. Nevertheless, as a matter of arithmetic, we agree with the court of appeals that Stoddard mistakenly applied a 44% discount rather than a 30% reduction. Husband acknowledged at oral argument that he did not challenge this reduction; accordingly, the 25% share of Pure Country is valued at $86,226.[5]

[5] The court of appeals rejected the marketability discount but applied a 30% lack of control discount, which resulted in a $132,656 value for the 25% interest. Husband did not object to the court's decision to reduce the lack of control discount from 44%

CONCLUSION

Based on the foregoing, we affirm in part and reverse in part, reiterating that whether a marketability discount or a lack of control discount is appropriate when apportioning marital assets is determined on a case-by-case basis.

AFFIRMED IN PART AND REVERSED IN PART.

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

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to 30%, so we used the $132,656 figure and then applied the 35% marketability discount.

JUSTICE JAMES: I respectfully dissent. I agree with the majority that our holding in *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 533 (2015), does not create a bright-line rule prohibiting the application of a marketability discount in cases in which there is no evidence that a sale of the business is contemplated. However, I would hold that under the facts of this case, a marketability discount was not appropriate. I would also hold there should be no discount for lack of control. Therefore, I would affirm the court of appeals in result as to the marketability discount and would reverse the court of appeals as to the minority discount.

Marketability Discount

Husband's expert, Catherine Stoddard, applied a 35% marketability discount to Wife's 25% interest in Pure Country. I believe a marketability discount should not be applied in this case.

I agree with the majority that *Moore v. Moore* did not create a bright-line rule prohibiting the application of a marketability discount in cases in which there is no evidence a sale of the business is contemplated. However, I believe the result reached by the court of appeals is correct, as the facts of this case are not meaningfully different from the facts in *Moore*. Here, as in *Moore*, one spouse owns a minority interest in a business, and the minority interest is marital property. Here, as in *Moore*, the other spouse owns the entire remaining interest in the business. Here, as in *Moore*, the minority interest is to be conveyed by court order to the spouse who already owns the entire remaining interest. Here, as in *Moore*, there is no evidence the spouse who will own the entire remaining interest intends to sell the business. In *Moore*, we stated, "Because Wife will retain ownership of [the business], we see no legitimate reason to indulge in the fiction of a marketability discount." 414 S.C. at 525, 779 S.E.2d at 551. Here, the fiction of a marketability discount is just as apparent, and the rejection of the discount in this case would be no more a rejection of the principles of fair market value than was our holding in *Moore*.

The majority emphasizes that Wife's expert, Marcus Hodge, initially testified on direct examination that he had applied a 25% marketability discount to the entire business, which of course translated to a 25% marketability discount for Wife's interest. Hodge later testified on direct that because Husband did not intend to sell Pure Country, "the marketability discount at that point becomes kind of arbitrary . . . it really provides a discount that falls in his favor." The majority characterizes this portion of Hodge's testimony as "backpedaling," but I do not. A

full reading of his testimony establishes that Wife's counsel was simply guiding Hodge through his valuation of Pure Country and asking him to assume certain facts, one of which was that Husband does not intend to sell the business. That was not backpedaling, but rather a recognition of reality. In essence, Hodge's testimony, given in October 2014, recognized what we held to be appropriate exactly one year later when we decided *Moore*: under certain facts, faithful adherence to the concept of fair market value must yield to reality. Here, the reality is that Husband will now have ownership of 100% of Pure Country. *See Moore*, 414 S.C. at 525 & n.14, 779 S.E.2d at 551 & n.14.

I have one final comment upon the application of a marketability discount. Stoddard testified she applied a higher marketability discount to Wife's interest than she normally would because of the transfer restrictions placed on Wife's shares at the time Wife acquired the shares from Husband. The record does not reflect how much of Stoddard's 35% marketability discount is attributable to the transfer restrictions. At the least, even if some marketability discount is appropriate, the stock transfer restrictions should not be a factor. Once Wife's shares are transferred to Husband, there will be no motivation for Husband to keep the restrictions in place; therefore, the financial relevance of these transfer restrictions is illusory.

Lack of Control/Minority Discount

Under the facts of this case, I would not apply a discount for lack of control. Also called a "minority discount," this type of discount recognizes the reality in many business settings that the interest of a minority shareholder is worth less because that shareholder has no control over the operations of the business, the use or liquidation of assets, or the distribution of income or earnings. The travails of the minority owner are true in the abstract; however, in this case, the devaluing effect of lack of control upon Wife's shares will vanish the instant Husband acquires her shares.

Stoddard was asked on cross-examination if Husband would receive a windfall if Wife's shares were subjected to a minority discount on the front end and then transferred to Husband. Stoddard's response explains in a nutshell the fallacy of applying the minority discount under the facts of this case: "Well, the value in [Husband's] hands would be higher than the value in [Wife's] hands, I think, if that's what you're asking." Stoddard then tried to "backpedal" by referencing the devaluing effect of the stock transfer restrictions, which, as discussed above, are illusory as to Husband.

The court of appeals and the majority cite *Dowling v. South Carolina Tax Commission*, 312 S.C. 194, 439 S.E.2d 825 (1993), for the proposition that it is appropriate for courts to consider the propriety of a minority discount. I have no quarrel with that basic proposition, but just because it is generally proper for courts to consider the propriety of a minority discount does not mean the discount should be applied in this case. In *Dowling*, Mr. and Mrs. Dowling gifted their five children 2,000 shares of stock in Sherwood, Inc. (representing all shares in the corporation) in equal shares over two years. The South Carolina Tax Commission claimed gift tax deficiencies for those two years, and litigation ensued in the circuit court. The children argued their respective interests in the corporation should be subjected to a minority discount, and the Tax Commission argued a minority discount should not be allowed "when the aggregate of the family holdings creates a majority interest in the corporation." *Id.* at 198, 439 S.E.2d at 828. The circuit court rejected this argument and found the value of the interests held by each child should be discounted because each child held a minority interest in the corporation. This Court affirmed, declining to hold that minority discounts for family-owned businesses are not allowed in South Carolina. *Id*. at 198-99, 439 S.E.2d at 828.

The factual distinctions between *Dowling* and this case illustrate the point that courts should not apply minority discounts at the expense of uncontroverted facts. Even though *Dowling* and the instant case both involve family-owned businesses, each of the five children in *Dowling* intended to retain their respective 20% interests, and the application of a minority discount to each child's interest reflected that reality. In contrast, in the instant case, the reality is that Husband will assume ownership of Wife's 25% interest in Pure Country, giving him a 100% interest. The propriety of the application of a minority discount to five equal minority interests of a family business for the legitimate purpose of gift tax avoidance is very different from the equitable distribution of a marital asset between a husband and wife, particularly when the spouse with a controlling interest is awarded ownership of the other spouse's minority interest.[6]

Conclusion

The result I support would not require the abandonment of the principles of fair market value. Principles of fair market value do indeed form the starting point for the valuation of a marital asset; however, when facts and common sense dictate,

[6] In my view, this is true even though only 25% of Pure Country is marital property.

courts should avoid an approach that results in a fictional value being assigned to the asset.

As to the marketability discount, I would affirm the court of appeals in result. As to the minority discount, I would reverse the court of appeals.

FEW, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Builders Mutual Insurance Company and Nationwide Mutual Insurance Company, Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; WC Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60, Defendants,

Tri-County Roofing, Inc., Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter;

Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61, Third-Party Defendants.

And

Complete Building Corporation, Inc., Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete, Third-Party Defendants,

Of Whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc. are the Respondents.

Appellate Case No. 2019-000238

Appeal from Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 27970
Heard February 11, 2020 – Filed May 13, 2020

AFFIRMED

John L. McCants, of Rogers Lewis Jackson Mann & Quinn, LLC, of Columbia, for Appellant Builders Mutual

Insurance Company; and J.R. Murphy and Timothy J. Newton, both of Murphy & Grantland, P.A., of Columbia, for Appellant Nationwide Mutual Insurance Company.

Justin O. Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love; Steven L. Smith, Zachary J. Closser, and Samuel M. Wheeler, all of Smith Closser Wheeler P.A., of Charleston, for Respondent Tri-County Roofing, Inc.; and James A. Atkins, of Clawson & Staubes, LLC of Charleston for Respondent WC Services, Inc.

Mark S. Barrow and Christy E. Mahon, both of Sweeny, Wingate & Barrow, P.A., of Columbia, and Steven M. Klepper, of Kramon & Graham, P.A., of Baltimore, Maryland, all for Amici Curiae Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company.

Frank L. Eppes, of Eppes & Plumblee, P.A., of Greenville, and Jesse A. Kirchner, Michael A. Timbes, and Thomas J. Rode, all of Thurmond Kirchner & Timbes, P.A., of Charleston, all for Amicus Curiae South Carolina Association for Justice.

JUSTICE KITTREDGE: In this case, several insurance companies (the Insurers) appeal the denial of their motions to intervene in a construction defect action between a property owners' association (the Association) and a number of construction contractors and subcontractors (the Insureds). The underlying construction defect action proceeded to trial, resulting in a verdict for the Association.

We find the Insurers were not entitled to intervene as a matter of right, and, further, the trial court did not abuse its discretion in denying them permissive intervention. Nonetheless, as we will discuss further, the Insurers most assuredly have a right to a determination of which portions of the Association's damages are covered under the commercial general liability (CGL) policies between the Insurers and the Insureds. As such, we reaffirm our prior holdings allowing insurance companies to contest coverage in a subsequent declaratory judgment action.

I.

Palmetto Pointe at Peas Island (Palmetto Pointe) is a condominium development located in Charleston County near Folly Beach. Following Palmetto Pointe's construction, the Association became aware of damage to the buildings, which they attributed to the Insureds. As a result, the Association filed a construction defect action against the Insureds for negligence, breach of implied warranties, and unfair trade practices and sought $17.5 million in actual and consequential damages to repair or replace various components of the condominiums. The Insureds each had one or more applicable CGL policies with the Insurers, and, pursuant to the CGL policies, the Insurers provided independent counsel to the Insureds to defend them in the action, subject to a reservation of rights to later contest whether the damages awarded in the action were covered by the CGL policies. The Insurers were not made parties to the construction defect action and did not direct the Insureds' defense.

Approximately three years later, at the tail end of the discovery period, the Insurers individually motioned to intervene in the action "for the limited purpose of participating in the preparation of a special verdict form or a general verdict form accompanied by answers to interrogatories for [] submission to the jury during trial." The Insurers disavowed any desire to be formally named as a party to the action, citing the likely prejudice to themselves and their clients (the Insureds).[1] However, by motioning to intervene, the Insurers essentially sought to force the

[1] *See, e.g.*, Rule 411, SCRE (prohibiting the admission of evidence tending to show a person was insured against liability); *Crocker v. Weathers*, 240 S.C. 412, 424, 126 S.E.2d 335, 340–41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it.").

Association and the jury to itemize the damages against each Insured, which was not otherwise required. In doing so, the Insurers hoped to ensure the jury would determine which portions of the damages were covered by the applicable CGL policies, thus obviating the need for the subsequent declaratory judgment action.

The trial court denied the motions to intervene, and the Insurers appealed to the court of appeals. We subsequently certified the Insurers' appeals pursuant to Rule 204(b), SCACR.

II.

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emps. Ins. Co.* (*Ex parte GEICO*), 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law. *Id.* (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)). Moreover, the error of law must be so opposed to the trial court's sound discretion "as to amount to a deprivation of the legal rights of the party." *Id.* (citation omitted).

III.

The Insurers sought to intervene as a matter of right under Rule 24(a)(2), SCRCP. This Court has explained an entity seeking intervention as a matter of right under Rule 24(a)(2) must necessarily:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). With respect to the second element, we have compared having an interest in the action with constitutional standing, in that the intervenor must be a "real party in interest." *See Ex parte GEICO*, 373 S.C. at 138–39, 644 S.E.2d at 702–03 (describing a real party in interest as one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one

who has only a nominal, formal, or technical interest in, or connection with, the action (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994))); *see also Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984) (explaining the interest required for intervention as a matter of right must be "direct," "immediate," and "significantly protectable," rather than "remote or contingent" (citations omitted)). As our precedent makes clear, the Insurers are not "real parties in interest" to the construction defect action and, thus, cannot satisfy the four-part test espoused in *Berkeley Electric*. *See Ex parte GEICO*, 373 S.C. 136, 138–39, 644 S.E.2d at 701, 702–03.[2]

Because the Insurers have not shown they have a direct interest in the construction defect litigation for Rule 24(a)(2) purposes, we hold the Insurers have not met the requirements to intervene as a matter of right. *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714 (listing an interest in the action as one of four elements required for intervention as a matter of right). As a result, we affirm the trial court's denial of the Insurers' motions to intervene as a matter of right. *See Restor-A-Dent*, 725 F.2d at 876 ("We are frank to admit that we are also influenced here by practical considerations that seem significant. A refusal to find a right under Rule 24(a) still leaves open the possibility in an appropriate case of permissive intervention by an insurer under Rule 24(b) for the purpose sought here, while a contrary holding would open the door wider to such intervention regardless of any unfortunate effect on the course of the main action. Moreover, a variety of factors properly bear on whether the type of intervention sought here should be allowed, and the trial judge's determination should ordinarily be accorded great weight. Application of subsection (b) of Rule 24 rather than subsection (a) recognizes these considerations, in view of the explicit emphasis in the former on undue delay or prejudice in the main action . . . .").

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[2] A significant number of courts discussing intervention as a matter of right under similar factual scenarios found the insurance companies' interests were contingent, rather than direct, for similar reasons. *See, e.g.*, *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 766 (2d Cir. 1984); *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1194 (D.N.M. 1999); *Davila v. Arlasky*, 141 F.R.D. 68, 70–73 (N.D. Ill. 1991); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984); *Universal Underwriters Ins. Co. v. E. Cent. Ala. Ford-Mercury, Inc.*, 574 So. 2d 716, 723 (Ala. 1990) (citing *U.S. Fid. & Guar. Co. v. Adams*, 485 So. 2d 720, 721–22 (Ala. 1986)); *Donna C. v. Kalamaras*, 485 A.2d 222, 223 (Me. 1984).

IV.

Turning to permissive intervention, Rule 24(b), SCRCP, provides:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

An intervenor seeking permissive intervention must: (1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove his participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties. "A reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452 (5th Cir. 1984)).

The record is replete with facts rationally supporting the trial court's denial of the Insurers' motions for permissive intervention. We therefore conclude the Insurers have failed to prove the trial court abused its discretion. *See Ex parte GEICO*, 373 S.C. at 135, 644 S.E.2d at 701. In affirming the trial court, we need look no further than the third factor—the delay or prejudice to the original parties. There are facts in the record supporting the trial court's decision that the Insurers' intervention would (1) unnecessarily complicate the construction defect action, including altering the Association's burden of proof and possibly delaying the trial, and (2) create a conflict of interest for the Insureds' counsel, who were supplied to them by the Insurers.

A.

As to the complication of the construction defect action, we note that, absent the Insurers' intervention, the Association has no need to parse its damages into categories corresponding to the coverage provided in a CGL policy.[3] Rather, as

[3] Generally, a CGL policy does not cover the cost of repairing or removing faulty

one of the Insurers conceded, the Association could properly request and receive a general verdict against all of the Insureds. However, with the addition of special jury interrogatories and verdict forms, the Association—as the plaintiff, *with the burden of proof*—would have a heightened burden to itemize its damages into Insurer-defined categories which the Association may not have intended to present to the jury. The Association's counsel here specifically bemoaned this exact problem. According to counsel, at the time the Insurers motioned to intervene (three years into the action and at the end of discovery), the parties had conducted

"in excess of 40 depositions wherein the question[s that would be] relevant to the special verdict [or] special interrogatory . . . weren't asked."

Further, in a subsequent declaratory judgment action, the Insureds and the Insurers have the collective burden to show which portions of the general verdict are covered under the CGL policies. *See Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (explaining the initial burden to prove that a loss is covered under an insurance policy is on the insured, and once the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage); *see also Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 642 n.5, 594 S.E.2d 455, 460 n.5 (2004) (stating that, when relevant, the insured bears the burden to prove an exception to the exclusion applies in order to restore coverage). Allowing the Insurers to intervene in the construction defect action in an attempt to segregate covered and non-covered damages would effectively place that burden of proof on the Association. Through the trial court's decision to leave all coverage issues to a subsequent declaratory judgment action, the burden of proof concerning the coverage dispute will remain with the Insureds and the Insurers respectively, where it properly belongs.

Likewise, even if the Insurers were permitted to intervene, it would only grant them the ability to *request* special jury interrogatories and verdict forms under

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workmanship; however, the policy does cover the cost of repairing additional, consequential damage caused by the faulty workmanship, such as water intrusion caused by negligent construction. *See* S.C. Code Ann. § 38-61-70(B)(2) (2015); *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49–50, 717 S.E.2d 589, 593–94 (2011) ("In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components [is covered under a CGL policy], but the defective construction would not [be covered].").

Rule 49(a) and (b), SCRCP. However, it does not require the trial court *use* the requested documents at all, much less without modification. *See Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 n.16 (S.D. Ala. 2003); *Plough, Inc. v. Int'l Flavors & Fragrances, Inc.*, 96 F.R.D. 136, 137 (W.D. Tenn. 1982). Were the Insurers to object to the trial court's failure to submit the proposed interrogatories or to the way the interrogatories were framed by the court, they could appeal and grind the entire construction defect trial to a halt. *See Restor-A-Dent*, 725 F.2d at 877 (noting this complication, and stating, "While it is highly unlikely that such an appeal would be successful in view of a [trial] court's broad discretion in this context, nevertheless the possibility of this complication of the main action remains." (citation omitted)).

B.

Additionally, a number of attorneys in this case raised concerns over the conflict of interest inherent in allowing the Insurers to intervene.[4] One of the most common worries expressed by the attorneys was that if the trial court permitted a verdict form with special interrogatories, it would place the Insureds' counsel in the untenable position of essentially conceding liability so as to focus instead on damages. In particular, several counsel explained a special verdict form would force them to alter their presentation of evidence to shunt as much of the Association's damages as possible into covered, consequential damages (e.g., water intrusion *resulting from faulty workmanship*), thereby conceding the Insureds had, in fact, created faulty workmanship in the first place. The concerns over the possibility—and likelihood—of a conflict of interest in these types of situations are echoed by a number of courts across the country. *See, e.g.*, *Nat'l Fire Ins. Co. of Pitt., P.A. v. Bakker*, 917 F.2d 22 (4th Cir. 1990) (per curiam); *Restor-A-Dent*, 725 F.2d at 877; *Nieto*, 61 F. Supp. 2d at 1195 (noting the insured would not only have the burden of presenting a defense to the plaintiff's accusations, but were his insurance company allowed to intervene, he would also have the additional burden of having his insurance company interfere with his defense); *High Plains Coop. Ass'n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290–91 (D. Neb. 1991); *Wedco*, 102 F.R.D. at 43; *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 882–83 (Ind. Ct. App. 2006) (noting the insurance company's argument that its insured would not want to seek an allocated verdict because it "would automatically expose [the

[4] In fact, all counsel provided by the Insurers to the Insureds refused to take positions on the motions to intervene for fear of a conflict of interest.

insured] to liability on" the non-covered damages portion of the allocated verdict); *Donna C.*, 485 A.2d at 225; *Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 363, 803 S.E.2d 288, 311 (2017) (Pleicones, A.J., dissenting) (opining it would be impossible for an insurance company to intervene in a construction defect suit and assert a defense against coverage without creating an impermissible conflict of interest (citation omitted)); Christopher Lyle McIlwain, *Clear as Mud: An Insurer's Rights and Duties Where Coverage Under a Liability Policy is Questionable*, 27 Cumb. L. Rev. 31, 52–53 (1997) (explaining courts frequently deny permissive intervention because "requiring the jury to focus on certain issues may prejudice the prosecution or defense of the plaintiff's claim, and may force the insured to take steps to assure coverage of claims rather than defend all claims").

We conclude there are facts in the record that support the trial court's decision that permissive intervention here would present conflict of interest concerns and likely cause undue delay and prejudice to the Association and the Insureds. Accordingly, we hold the trial court did not abuse its discretion in denying the Insurers' motions for permissive intervention. *See, e.g.*, *Restor-A-Dent*, 725 F.2d at 877 ("Under all of these circumstances, we cannot say that the district judge abused his discretion here [in denying the insurance company's motion for intervention].").[5]

V.

According to the Insurers, their motions to intervene were mandated by our decisions in *Auto Owners Insurance Co. v. Newman*[6] and *Harleysville Group*

[5] Following the denial of the Insurers' motions to intervene, the trial court permitted the construction defect trial to go forward, despite the Insurers' pending appeals of those motions. The Insurers thus also raise a question to this Court as to whether the trial court erred in allowing the trial to proceed while the appeals were still pending. Because we have found the trial court did not abuse its discretion in denying the motions to intervene, the Insurers were not improperly excluded from participating in the construction defect trial. As a result, this issue is moot, and we do not address it.

[6] 385 S.C. 187, 684 S.E.2d 541 (2009).

Insurance v. Heritage Communities, Inc.[7] We respectfully disagree, although the Insurers' position is understandable, especially with respect to *Newman*.

In *Newman*, a homeowner sued a construction contractor for the alleged defective construction of her home, and, following an arbitration proceeding, an arbitrator issued an award in favor of the homeowner. 385 S.C. at 190, 684 S.E.2d at 542. In a subsequent declaratory judgment action between the contractor and its insurance company, the trial court found the CGL policy covered the damages awarded by the arbitrator. *Id.* at 190–92, 198, 684 S.E.2d at 543, 547. This Court affirmed in part and reversed in part, finding the CGL policy covered parts of the damages awarded by the arbitrator but did not cover other parts of the damages. *Id.* at 196, 198, 684 S.E.2d at 545–46, 546–47. However, the Court refused to review or parse the arbitrator's award, finding that arbitration awards are generally conclusive and will not be reviewed on the merits on appeal. *Id.* at 198, 684 S.E.2d at 547 (citing *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76–77, 488 S.E.2d 335, 337–38 (1997) (stating an appellate court must affirm an arbitration award so long as it is "barely colorable")).

It was not the intent in *Newman* to categorically foreclose a subsequent declaratory judgment action to resolve a coverage dispute. To the extent *Newman* may be read to foreclose an insurance company's subsequent declaratory judgment action to resolve the coverage dispute, we modify *Newman* accordingly. South Carolina has long recognized the efficacy of declaratory judgment actions in this context. *See, e.g.*, *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965).

Turning briefly to *Harleysville*, a condominium property owners' association sued a construction contractor for the alleged defective construction of the condominium complex, and a jury awarded a general verdict to the property owners' association. 420 S.C. at 329–31, 803 S.E.2d at 292–94. In the declaratory judgment action between the insurance company and the contractor, the Special Referee ordered the insurance company to pay the entirety of the general verdict, despite the fact that the verdict included some losses that explicitly were not covered under the CGL policy, because he found that "it would be improper and purely speculative to attempt to allocate the [] general verdict[] between covered and non-covered damages." *Id.* at 332, 803 S.E.2d at 294. Notably, in the

[7] 420 S.C. 321, 803 S.E.2d 288 (2017).

alternative, the Special Referee found the insurance company's reservation of rights letter to the insured was inadequate and constituted an implied waiver of the insurer's right to contest coverage in the declaratory judgment action. *See id.* at 336, 338, 803 S.E.2d at 296, 297. It was this latter basis—the inadequate reservation of rights letter—that served as the basis of this Court's affirmance of the Special Referee. *See id.* at 336–44, 803 S.E.2d at 296–301 (describing the reservation letter as a "generic denial[] of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method)"). The Court concluded the reservation of rights letter was so lacking that it was "insufficient to [actually] reserve [the insurance company's] right to contest coverage of actual damages," and, therefore, affirmed the Special Referee's decision. *Id.* at 343, 803 S.E.2d at 300. *Harleysville* neither mandates intervention in the underlying construction defect action nor forecloses a declaratory judgment action to resolve a coverage dispute.

VI.

The parties offer varying approaches on the specifics of how a subsequent declaratory judgment action should be tried. It appears a significant point of contention is the Insurers' concern that any coverage decisions in the declaratory judgment actions will be bound by factual determinations made in the construction defect action. This point has been addressed by this Court in *Sims v. Nationwide Mutual Insurance Co.*

In *Sims*, the Court explained that, generally, "where an insurance company has notice and [an] opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not." 247 S.C. at 84–85, 145 S.E.2d at 524. However, the Court reasoned that rule could not apply in situations where the insurance company had a conflict of interest with its insured, such as when the company claimed the acts being sued over were partially or wholly outside the scope of the applicable insurance policy. *Id.* at 85–89, 145 S.E.2d at 524–26 (explaining the underlying purpose of the general rule is to obviate the delay and expense of two trials upon the same issue between parties whose interests are identical; and when a conflict of interest causes the parties' interests to diverge, "the judgment against the [insured] does not decide issues as to the existence and extent of the duty to indemnify," such that "in a subsequent action the [insurance company] may show that the circumstances under which [it] was required to give indemnity do not exist" (quoting *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177

F.2d 793, 799–801 (4th Cir. 1949) (citing the predecessor to the modern Restatement (Second) of Judgments § 58 (2020))).

As further explained in section 58 of the Restatement (Second) of Judgments:

> [T]he indemnitor has a right to its day in court on whether the indemnitee's liability is within the scope of the indemnity obligation. . . .
>
> . . . [A]n indemnitor who has an independent duty to defend the indemnitee in effect has two legal capacities with regard to the indemnitee. In his capacity as insurer against the indemnitee's risk of being sued on claims that "might be found to be" within the indemnity obligation, the indemnitor has a responsibility to provide counsel and supporting assistance to defend the indemnitee without regard to the indemnitor's interests . . . . In his capacity as indemnitor, he has a responsibility to indemnify for such liability as may be within the indemnity obligation. *In the latter capacity, he should not be bound by determinations in an action in which he participated in the former capacity if there is a conflict of interest between the two*.

See Restatement (Second) of Judgments § 58 & cmt. a (emphasis added).

Sims is directly applicable to the parties' dispute here. As explained above, there is a conflict of interest between the Insurers and the Insureds as to the proper method of calculating damages vis-à-vis what portions of the Association's total damages are covered under the CGL policies. Thus, the Insureds and the Insurers are not precluded from introducing evidence as to which damages are covered (or excluded from coverage) by the CGL policies. *See, e.g.*, *Universal Underwriters Ins. Co.*, 574 So. 2d at 723 ("Nevertheless, nothing in our law would bar [the insurance company] from litigating the coverage issue in a declaratory judgment action after the resolution of the underlying cases in this matter."); *Donna C.*, 485 A.2d at 224. Having said that, the parties would be bound by the total amount of any jury verdict in the construction defect action. *See* Restatement (Second) of Judgments § 58(1) (explaining the parties in the declaratory judgment action may not dispute the "existence and extent" of the judgment in the first action).

The Insurers and amici voiced their concerns that, in a declaratory judgment action, courts may reject any efforts to allocate a general verdict into covered and non-covered damages because that allocation requires some degree of speculation

as to what the jury may have intended when issuing its verdict. *Cf., e.g.*, *Harleysville*, 420 S.C. at 332, 803 S.E.2d at 294 (explaining the Special Referee found "it would be improper and purely speculative to attempt to allocate the [] general verdict[] between covered and non-covered damages"). We, too, are concerned about the possibility an insurance company may be unjustly forced to cover damages that are otherwise properly excluded under a CGL policy.[8]

Given that the parties in the declaratory judgment action are bound by the total verdict in the construction defect action, how then do we attempt to fairly allocate covered damages and non-covered damages? This seems to be the biggest challenge to resolve. We begin by noting that we do not oppose the parties coming to an agreement on a framework for allocating damages, subject to the approval of the court. Failing an agreement of the parties, we set forth a default approach that shall serve as the framework for use in declaratory judgment actions for allocating covered and non-covered damages. This default framework is utilized in other jurisdictions, and it allows litigants in a declaratory judgment action to use percentages, rather than exact dollar amounts, to determine the amount of covered and non-covered damages in a general verdict.

The primary source of evidence in the declaratory judgment action should be the transcript of the merits hearing. In the discretion of the court, additional evidence may be presented that is relevant to the coverage dispute determination, such as expert testimony.[9] We emphasize that the additional evidence, if any, must be

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[8] In fact, the insurance company in *Harleysville* attempted to use a percentage-based approach described more fully below, but the Special Referee rejected the evidence as "irrelevant and speculative." Because the *Harleysville* majority issued its decision on the basis of the insurance company's inadequate reservation of rights letter, the Court did not address this finding by the Special Referee. To avoid any future confusion, we reject the notion that, in a declaratory judgment action, it is "improper and purely speculative" to allocate a general verdict into covered and non-covered damages. *See Harleysville*, 420 S.C. at 332, 803 S.E.2d at 294.

[9] For example, in *Harleysville*, the insurance company proffered expert testimony from a general contractor who had prepared an estimate to completely repair the damaged condominium buildings. The expert segregated the portion of his estimate which constituted the cost to repair damages from water intrusion (covered damages) and determined what percentage of his total estimated damages

narrowly tailored to the coverage dispute question, as the transcript of the merits hearing will be the primary source of evidence. The trier of fact shall then make a determination allocating on a percentage basis what portion of the underlying verdict constitutes covered damages and what portion constitutes non-covered damages. *See, e.g.*, *Duke v. Hoch*, 468 F.2d 973, 984 (5th Cir. 1972) (explaining that on remand to allocate a general verdict, the "primary source of evidence will be, of course, the transcript of the merits trial, containing the evidence on which the jury based its verdict. The trial judge, as trier of fact, will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so. If it is impossible for the court to make a meaningful allocation based on only the transcript, [the judgment creditor, standing in the shoes of the insured,] should have the right to adduce additional evidence and [the insurance company] to present evidence in rebuttal."); *MedMarc Cas. Ins. Co.*, 199 S.W.3d at 60, 63 (describing in a declaratory judgment action the insureds' motion to allocate the general verdict in the underlying suit, and remanding the trial court's initial decision to allocate 25% of the jury verdict as covered damages because, while permissible to allocate by percentage, the trial court did not specify how it arrived at the 25% number); *Keltner*, 842 N.E.2d at 883 (noting the parties seemed to assume that if a general verdict was entered in the underlying action, there would be no later opportunity to distinguish between covered and non-covered damages, but holding that a supplemental proceeding in a declaratory judgment action "would offer an occasion for presenting evidence and argument regarding *a fair approximation* of the division of damages" (emphasis added)).

As we have acknowledged in this type of case in the past, perfect precision in allocating damages is not always achievable. Where perfect precision is not achievable, a fair approximation must suffice. *See Crossman*, 395 S.C. at 65–66, 717 S.E.2d at 602 (acknowledging that, after adopting a time-on-the-risk approach to progressive damage allocation, the time-on-the-risk "formula *is not a perfect estimate of the loss attributable to each insurer's time on the risk.* Rather, it is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that

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that portion constituted. Finally, he took the percentage of the covered damages and multiplied it by the jury's verdict, arriving at an amount representing the approximate portion of the general verdict constituting the covered damages.

proof. However, absent such proof, assuming an even progression is a logical default." (italic emphasis added) (emphasis in original omitted)). Our exhaustive research persuades us that the percentage-based approach will best achieve a fair allocation of damages.

VII.

For the foregoing reasons, we conclude the trial court did not abuse its discretion in denying the Insurers' motions to intervene and, therefore, affirm. In doing so, we also recognize that the Insurers have the right and ability to contest coverage of the jury verdict in a subsequent declaratory judgment action. In that action, the Insurers and the Insureds will be bound by the existence and extent of any jury verdict in favor of the Association in the construction defect action. However, they will not be bound as to any factual matters for which a conflict of interest existed, such as determining what portion of the total damages are covered by any applicable CGL policies.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Appellant,

v.

Kathryn Martin Key, Respondent.

Appellate Case No. 2017-001013

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

Opinion No. 27971
Heard November 20, 2019 – Filed May 13, 2020

VACATED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; and Solicitor William Walter Wilkins III, of Greenville, for Appellant.

James H. Price III and Elizabeth Powers Price, both of Price Law Firm P.A., of Greenville; and J. Falkner Wilkes, of Greenville, for Respondent.

JUSTICE JAMES: Kathryn Martin Key was convicted in the summary court of driving under the influence (DUI). Her conviction was based upon the testing of her blood, which was drawn without a warrant while she was unconscious. The circuit

court reversed and remanded, finding the summary court should have suppressed evidence of Key's blood alcohol concentration because the State did not obtain a warrant. The State appealed to the court of appeals, and the appeal was transferred to this Court.

While the State's appeal was pending in this Court, the United States Supreme Court decided *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). In *Mitchell*, the Supreme Court held for the first time that, generally, law enforcement is permitted to draw the blood of an unconscious DUI suspect without a search warrant pursuant to the exigent circumstances exception to the warrant requirement. However, the Supreme Court acknowledged the possibility of an "unusual" case presenting an exception to this new general rule. The *Mitchell* Court determined the defendant should be given the opportunity to establish the applicability of the exception to the general rule and remanded the case to the trial court for that purpose.

We have carefully considered the *Mitchell* holding and conclude we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We hold the burden of establishing the existence of exigent circumstances remains upon the State. The exigent circumstances issue in this case was not ruled upon by the summary court; therefore, we remand this case to the summary court for further proceedings consistent with this opinion.

BACKGROUND

At approximately 8:45 a.m. on December 10, 2015, Key was driving a motor vehicle on Muddy Ford Road in Greenville County. She drove across the center-line, crashed her vehicle into the driver's side of an oncoming vehicle, and then drove off the road and struck a tree. When South Carolina State Trooper Aaron Campbell arrived on scene at 8:57 a.m., Key was on a stretcher and was being loaded into an ambulance. Trooper Campbell approached to ask Key for her name and phone number, but one of the paramedics stopped him and said, "Man, she needs to go [to the hospital]." The ambulance departed, so Trooper Campbell was unable to question Key at the scene.

Trooper Campbell stayed at the scene for over an hour to investigate the accident. He photographed the scene, interviewed the driver of the other vehicle, and completed an accident report. Trooper Campbell recovered an almost-empty mini bottle of Jack Daniel's liquor from the glove compartment of Key's vehicle. "Wet residue" in the bottle led Trooper Campbell to believe the liquor had been

"freshly consumed." Trooper Campbell completed his investigation and drove to Greenville Memorial Hospital to charge Key with DUI and open container.

Trooper Campbell located Key in the emergency room trauma bay. She was unconscious and was intubated due to the severity of her injuries. Trooper Campbell arrested the unconscious Key for DUI at 10:35 a.m. and read her implied consent rights[1] to her at 10:36 a.m. Without seeking a search warrant, Trooper Campbell asked a nurse to draw Key's blood. Her blood was drawn at 10:45 a.m. (approximately two hours after the accident), and testing revealed her blood alcohol concentration (BAC) was .213%. Key then spent five days in the intensive care unit.

Key moved pre-trial to have the evidence of her BAC suppressed. She argued Trooper Campbell's failure to obtain a warrant violated the Fourth Amendment to the United States Constitution and Article I, section 10 of the South Carolina Constitution. Key contended there were no exigent circumstances to excuse the State's failure to obtain a warrant. She also contended South Carolina's implied consent statute is unconstitutional. Key did not argue Trooper Campbell lacked probable cause to suspect she had been driving under the influence.

In response, the State argued the implied consent statute is constitutional and was followed by Trooper Campbell. The State asserted the blood was legally drawn because Key statutorily consented to the blood draw by operating a motor vehicle and by not withdrawing her implied consent. The State noted, "Judge, this is not a case where we have to look for exigent circumstances. We are not looking for an

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[1] *See* S.C. Code Ann. § 56-5-2950(A) (2018) (providing a person arrested for DUI is considered to have given consent to certain chemical tests for the purpose of determining the presence of drugs or alcohol); *id.* (providing a blood test may be conducted if a breath test cannot be administered and stating the blood sample must be collected within three hours of the arrest); § 56-5-2950(B)(1) (requiring the person suspected of DUI to be given a written copy and verbally informed that "the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court"); § 56-5-2950(H) ("A person who is unconscious or otherwise in a condition rendering the person incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.").

exception to the warrant requirement." The summary court denied Key's motion to suppress.

The case proceeded to a bench trial before the summary court. Trooper Campbell testified about his investigation of the accident and confirmed he did not seek a warrant before directing a nurse to draw Key's blood at the hospital. The parties stipulated there was a magistrate on duty in Greenville County at the time Key was arrested and her blood drawn. On cross-examination, Trooper Campbell acknowledged the on-duty magistrate was only three miles from the hospital on the morning of the accident. Trooper Campbell confirmed Key was unconscious when he read Key's implied consent rights to her and when the nurse drew her blood. A SLED toxicologist testified Key's BAC was .213%.

The summary court found Key guilty of DUI, imposed a fine, and sentenced her to the five days she "served" while in intensive care. Key appealed her conviction to the circuit court. In addition to the consent argument it presented to the summary court, the State argued to the circuit court that the record was replete with evidence of exigent circumstances, including the wreck itself, Trooper Campbell staying behind at the scene to interview the accident victim and conduct his investigation, and Key's unconscious state. In a written order, the circuit court reversed Key's conviction and remanded the case for a new trial, ruling the blood alcohol evidence was obtained pursuant to an unlawful search and seizure in violation of both the Fourth Amendment to the United States Constitution and the South Carolina Constitution. The circuit court rejected the State's position that the implied consent statute permitted a warrantless blood draw but did not address the State's exigent circumstances argument. The State moved for reconsideration and again noted its argument of exigent circumstances. The circuit court denied the State's motion without addressing the exigent circumstances issue.

The State appealed to the court of appeals, and the appeal was transferred to this Court pursuant to Rules 203(d)(1)(A)(ii) and 204(a) of the South Carolina Appellate Court Rules.

DISCUSSION

The State argues the circuit court erred in reversing Key's conviction and remanding for a new trial. In its brief to this Court, the State argued the circuit court erred in finding a warrant was required to draw Key's blood because (1) exigent circumstances were present and (2) Key validly consented under the implied consent

statute and did not revoke her consent. During oral argument, the State abandoned its implied consent argument and proceeded solely under its exigent circumstances argument. Therefore, we will address only the latter issue.

A. Preservation

Key argues the State's exigent circumstances argument is not preserved for appellate review because the argument was not raised to or ruled upon by the summary court. We disagree.

Before the summary court, the State argued a warrant was unnecessary because Key, by driving a motor vehicle, consented to having her blood drawn under the implied consent statute. The State argued there was no need to address the issue of exigent circumstances because the consent issue was dispositive. Since the State prevailed on the issue of consent, it was unnecessary for the State to present additional arguments to the summary court as to why a warrant was not required. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("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."). Nothing in the trial record indicates the State conceded to the summary court that there were no exigent circumstances.

When Key appealed to the circuit court, the State argued as an additional sustaining ground that the record "is replete with exigent circumstances," and cited Key's unconscious state as one of those circumstances. *See I'On*, 338 S.C. at 419-20, 526 S.E.2d at 723 ("[A] respondent—the 'winner' in the lower court—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. . . . The basis for respondent's additional sustaining grounds must appear in the record on appeal[.]"). Here, the basis for the additional sustaining ground appears in the record on appeal. Because the State raised the issue of exigent circumstances to the circuit court, raised the issue again in its motion for reconsideration, and raised the issue on appeal to this Court, the exigent circumstances issue is preserved for review.

B. Exigent Circumstances

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

It is settled that the collection of a person's blood for BAC testing is a search and a seizure under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 767 (1966); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). "Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured." *Kentucky v. King*, 563 U.S. 452, 459 (2011). However, because the touchstone of the Fourth Amendment is reasonableness, the general presumption that a warrant is required may be overcome in certain situations. *Id.* Consent and exigent circumstances are two of the recognized exceptions to the general warrant requirement. *See State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); *Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013). Most important to the issue before us is the settled principle that "the burden is upon the State to justify a warrantless search." *State v. Peters*, 271 S.C. 498, 501, 248 S.E.2d 475, 477 (1978). At no time has this Court placed the burden on a defendant to establish that an exception to the warrant requirement does <u>not</u> exist.

"The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. at 2173. "It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence." *Id.* "[B]ecause an individual's alcohol level gradually declines soon after he stops

drinking, a significant delay in testing will negatively affect the probative value of the results." *McNeely*, 569 U.S. at 152.

The United States Supreme Court has addressed the constitutionality of warrantless blood draws in several DUI cases. *See Schmerber*, 384 U.S. at 770-71 (holding the warrantless blood draw of a DUI suspect was valid because the law enforcement officer, dealing with a car accident, could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence'"); *McNeely*, 569 U.S. at 165 (holding the determination of whether a warrantless blood draw of a DUI suspect qualifies as an exigent circumstance involves a case-by-case analysis of the totality of the circumstances and that the natural dissipation of alcohol in the bloodstream alone does not establish a per se exigency); *Birchfield*, 136 S. Ct. at 2184 (holding a lawful search incident to arrest of a DUI suspect permits a warrantless breath test but not a warrantless blood draw).

In *Mitchell*, the United States Supreme Court held the exigent circumstances exception to the warrant requirement "almost always" justifies the warrantless drawing of blood from unconscious DUI suspects. 139 S. Ct. at 2531. Three justices joined Justice Alito's lead opinion. Justice Thomas provided the fifth vote, concurring in the judgment but explaining he would impose an even more expansive rule that the natural metabolization of alcohol in the bloodstream creates an exigent circumstance in every DUI case as soon as law enforcement has probable cause to believe the driver is impaired—"regardless of whether the driver is conscious." *Id.* at 2539 (Thomas, J., concurring).[2]

In *Mitchell*, the Sheboygan, Wisconsin Police Department received a report of a drunk driver, and the responding officer found the defendant wandering on foot

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[2] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (Silberman, J., concurring) (providing the rule illustrated by *Marks* applies "only when one opinion is a logical subset of other, broader opinions"); *id.* ("In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.").

around a nearby lake, stumbling and slurring his words. A preliminary breath test revealed his BAC was .24%—triple the Wisconsin legal limit. The defendant was arrested for DUI, and law enforcement drove him to the police station for a more reliable breath test. By the time the squad car reached the station, the defendant was too lethargic to submit to a breath test. The officer decided to take the defendant to a nearby hospital for a blood test, but the defendant lost consciousness by the time they arrived at the hospital. While the defendant was still unconscious, the officer read the defendant his statutory implied consent rights. After hearing no response from the defendant and without obtaining a warrant, the officer asked hospital staff to draw the defendant's blood. The blood was collected ninety minutes after the time of arrest, and testing revealed a BAC of .222%. The defendant moved to suppress the BAC evidence, arguing the warrantless blood draw violated his Fourth Amendment right against unreasonable searches.

The *Mitchell* plurality explained the dilemma it believed officers would face when presented with an unconscious DUI suspect—"It would force [law enforcement officers] to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits." *Id.* at 2538. The plurality emphasized that such a scenario is the very reason the exigency exception exists and concluded exigent circumstances almost always exist when (1) blood alcohol evidence is dissipating and (2) "some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id.* at 2537. The plurality concluded both conditions are satisfied when a DUI suspect is unconscious and concluded "when a driver is unconscious, the general rule is that a warrant is not needed." *Id*. at 2531. It summarized:

> In such cases, [where the DUI suspect is unconscious and unable to provide a breath test,] the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those

> circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

Id.

While the Supreme Court concluded the new general rule will "almost always" apply, the Court acknowledged there may be an "unusual case" in which "a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539 (emphasis added). Because the defendant did not have the opportunity to make such a showing, the Court remanded the case to the Wisconsin state court to allow the defendant to attempt to make the showing. *Id.*

The *Mitchell* plurality closed with the following:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Id.

The people have the right under the Fourth Amendment "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause[.]" We cannot sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing

the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement. *See, e.g.*, *State v. Bruce*, 412 S.C. 504, 510, 772 S.E.2d 753, 756 (2015); *State v. Robinson*, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014); *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013); *State v. Weaver*, 374 S.C. 313, 319-20, 649 S.E.2d 479, 482 (2007); *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986); *State v. Huggins*, 275 S.C. 229, 232, 269 S.E.2d 334, 335 (1980). Likewise, the United States Supreme Court and all state and lower federal courts have consistently held the State bears the burden of establishing exigent circumstances. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (stating "the burden is on the government to demonstrate exigent circumstances");[3] *McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure.").[4]

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[3] *See also Welsh*, 466 U.S. at 749-50 (emphasis added) (internal citation omitted) ("Prior decisions of this Court . . . have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' and that *the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches* or arrests. Indeed, the Court has recognized only a few such emergency conditions[.]" (citing *Schmerber*, 384 U.S. at 770-71)).

[4] In light of our holding, we need not address Key's argument that Article I, section 10 of the South Carolina Constitution requires exclusion of evidence of her BAC. Article I, section 10 largely mirrors the Fourth Amendment but adds the express prohibition against unreasonable invasions of privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated . . . ." S.C. Const. art. I, § 10 (emphasis added). "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

CONCLUSION

In any given case, the unconsciousness of a DUI suspect might indeed be a significant factor—or even the determining factor—in the analysis of the exigent circumstances issue. However, in any given case, unconsciousness might not be a significant factor. In this case, the question of the existence of exigent circumstances was not litigated in the trial court. We therefore vacate the circuit court's reversal of Key's conviction, and we remand this case to the summary court for a determination of whether the exigent circumstances exception to the warrant requirement applies. The State shall have the burden of establishing the applicability of the exception, and the summary court shall base its ruling upon its view of the totality of the circumstances. Those circumstances may well include the very circumstances emphasized by the *Mitchell* Court.

If the summary court determines the exception applies, Key's conviction shall stand. If the summary court determines the exception does not apply, Key will receive a new trial with the BAC result suppressed. We express no opinion at this stage as to whether the exigent circumstances exception does or does not apply in this case.

VACATED AND REMANDED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JJ., and Acting Justice Thomas E. Huff, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chisolm Frampton, Employee, Appellant,

v.

S.C. Department of Natural Resources, Employer, and
S.C. State Accident Fund, Carrier, Respondents.

Appellate Case No. 2017-001764

Appeal From The Workers' Compensation Commission

Opinion No. 5726
Heard September 19, 2019 – Filed May 13, 2020

AFFIRMED

John C. Land, III, of Land Parker Welch, LLC, of Manning, for Appellant.

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mount Pleasant, for Respondent.

HILL, J.: In this workers' compensation case, the single commissioner found claimant Chisholm Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 (2015) to show his subsequent, on-the-job injury aggravated his preexisting neck condition. Nevertheless, the single commissioner found because the Department of Natural Resources (DNR) admitted the claim and provided medical treatment, Frampton was entitled to benefits for a 20% permanent partial disability to his spine. The appellate panel reversed, finding the single commissioner's conclusion that Frampton did not meet his burden of proof under § 42-9-35 was correct and, because it was not appealed, was the law of the case. The

appellate panel therefore concluded Frampton was not entitled to benefits as a matter of law. Frampton now appeals the appellate panel's reversal of the single commissioner's award, arguing (1) the appellate panel erred in requiring him to prove a compensable injury to his spine after DNR admitted liability, and (2) the single commissioner erred by considering Frampton's return to work and subsequent promotions in determining his impairment rating. Because the appellate panel's decision is supported by substantial evidence, we affirm.

I. Factual and Procedural Background

On September 4, 2010, Frampton experienced neck pain and stiffness after riding in a pickup truck across a bumpy dove field he and another DNR officer were inspecting. He reported the incident to his supervisor and went to Doctor's Care three days later. The notes from that visit indicated Frampton was diagnosed with cervical and trapezius strains and that workers' compensation paid for the visit. Frampton was released back to work the same day with the restriction of "no overhead lifting." He went back to Doctor's Care ten days later for a follow-up visit, after which he was released to work full duty.

On March 15, 2011, Frampton saw a neurosurgeon, Dr. Byron Bailey, who examined him for ongoing neck and arm pain. Frampton testified he was referred by workers' compensation to Dr. Bailey because his neck condition had not improved since the September 4, 2010 accident. Dr. Bailey's medical records, however, indicated he had treated Frampton before the dove field incident and was "following [Frampton] for cervical radiculopathy"[1] and described Frampton as having symptoms of neck pain and right arm numbness that had "progressed from the study that was done approximately a year ago." The next day, Frampton underwent a series of tests whereby Dr. Bailey determined he would require spinal surgery. Dr. Bailey performed a cervical discectomy and fusion on March 21, 2011, and continued to see Frampton for follow-up visits. Frampton returned to work on May 1, 2011, but was restricted to light duty for another several weeks.

In June 2011, Frampton was involved in a serious car accident. He saw Dr. Bailey

[1]"Cervical radiculopathy is a disease process marked by nerve compression from herniated disk material or arthritic bone spurs. This impingement typically produces neck and radiating arm pain or numbness, sensory deficits, or motor dysfunction in the neck and upper extremities." Eubanks, *Cervical Radiculopathy: Nonoperative Management of Neck Pain and Radicular Symptoms*, 81 American Family Physician 33 (2010).

soon after for a previously scheduled appointment and reported experiencing aggravation of his neck pain. Dr. Bailey determined Frampton likely developed a cervical strain as a result of the car accident and prescribed a number of medications and physical therapy. Frampton continued to see Dr. Bailey periodically for neck pain up until the hearing.

On September 20, 2013, Dr. Bailey completed a Form 14B, stating Frampton reached maximum medical improvement (MMI) on April 17, 2013, listing his diagnosis as cervical spondylosis, and assigning him a 20% impairment rating to the cervical spine. However, Dr. Bailey later revised the form to assign Frampton a 75% impairment rating to the cervical spine and a 26% whole person impairment rating.

On November 17, 2014, Frampton filed a Form 50 seeking total permanent disability benefits for the injury to his neck and right arm allegedly sustained during the dove field accident. He denied any prior permanent disability.

In its Form 51 Answer to Request for Hearing, DNR stated, "It is [a]dmitted the employee sustained an injury or illness on or about the date set forth in the Form 50." However, DNR (1) denied any injury to Frampton's right arm, (2) denied Frampton needed or was entitled to additional medical care as a result of any work-related injury, and (3) claimed Frampton reinjured his cervical spine during his June 2011 car accident and was currently being treated for that injury. In its prehearing brief, DNR again denied Frampton was permanently and totally disabled in light of his ability to continue working without restriction and reiterated its argument that the car accident was a subsequent, intervening accident. DNR did not, however, cite § 42-9-35 as a specific defense in its Form 51 or prehearing brief.

Before the single commissioner, Frampton testified he was working full time but had some limitations in what he was physically able to do. Frampton asserted he had no limitations or disability in his neck before the September 4, 2010 accident. He believed he had lost at least 75% use of his neck because of his ongoing pain and his limited movement; however, he confirmed he was not taking any medications at that time for his neck.

Frampton testified he did not recall seeing Dr. Bailey before the September 4, 2010 dove field incident or having problems in his neck or arm before the incident and that he believed workers' compensation paid for the surgery. However, none of Dr. Bailey's medical records reference a work-related injury on September 4, 2010, and some list Frampton's state health plan as the insurer. DNR also submitted records from Dr. Bailey dated March 6, 2010, in which he noted Frampton had a history of cervical radiculopathy and reported numbness in his arm beginning approximately

three weeks prior. On cross-examination, Frampton acknowledged he would not have gone to see Dr. Bailey back in March 2010 and had an MRI scan of his neck if he was not having neck pain at that time, and he agreed that on the intake forms, he characterized his symptoms as having begun gradually over a number of years. Frampton also acknowledged he never mentioned the September 4, 2010 dove field incident when asked to describe his injuries to Dr. Bailey.

Frampton urged the single commissioner to find that he lost more than 50% use of his back and, therefore, there was a rebuttable presumption that he had a permanent and total disability. *See* S.C. Code Ann. § 42-9-30(21) (2015). "[S]ection 42-9-30(21) states there is a rebuttable presumption of [permanent and total disability] when a claimant has 50% or more loss of use of the back." *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 464, 732 S.E.2d 190, 195 (Ct. App. 2012).

DNR argued Frampton's injury resulting from the dove field incident was merely a cervical strain and Frampton failed to meet his burden to prove he aggravated his preexisting neck condition as a result of the accident pursuant to § 42-9-35. DNR also argued the June 2011 car accident was a subsequent, intervening accident, breaking any existing chain of causation between the dove field accident and Claimant's injury, relying on *Geathers v. 3V, Inc.*, 371 S.C. 570, 579–80, 641 S.E.2d 29, 34 (2007) (holding when an employee with a preexisting but non-disabling prior injury suffers a subsequent, disabling injury that aggravates or activates the preexisting condition, compensability is limited to the second injury, not the first).

The single commissioner found Frampton was not permanently and totally disabled, but had sustained 20% permanent partial disability to his spine as a result of his September 4, 2010 dove field work-related injury based on the evidence as a whole, including Dr. Bailey's original Form 14B assigning Frampton a 20% impairment rating to the cervical spine. The single commissioner found Claimant's testimony regarding the extent of his preexisting neck injury was not credible and Claimant suffered from preexisting neck pain and right arm numbness before his alleged work injury, citing Dr. Bailey's medical records predating the dove field incident. The single commissioner further found there was no medical evidence the dove field incident aggravated or exacerbated his preexisting neck condition for which he was already receiving treatment by Dr. Bailey, and she specifically concluded Frampton did not meet his burden of proof under § 42-9-35. However, she awarded Frampton disability benefits because she found DNR admitted the claim and provided medical treatment. As to the June 16, 2011 car accident, the single commissioner determined it was not a superseding, intervening act that broke the chain of causation, finding *Geathers* inapplicable.

In its order reversing the single commissioner, the appellate panel found the single commissioner correctly determined Frampton did not meet his burden of proof under § 42-9-35, that finding was the law of the case, and Frampton was therefore not entitled to disability benefits.

II. Standard of Review

The Administrative Procedures Act (APA) provides a reviewing court "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2019); *see also Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) ("Pursuant to the APA, this court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law."). "In workers' compensation cases, the [appellate panel] is the ultimate fact finder. An appellate court must affirm the findings made by the [appellate panel] if they are supported by substantial evidence." *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011) (citation omitted). Our supreme court has defined substantial evidence as "not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but . . . evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Laws v. Richland Cty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)). "The final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (citations omitted). "Accordingly, a reviewing court may not substitute its judgment for that of the [appellate panel] as to the weight of the evidence on questions of fact." *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).

"The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Crisp v. SouthCo. Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). "Injury" for purposes of workers' compensation means "only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015); *see also Turner v. SAIIA Constr.*, 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016) ("For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." (quoting S.C. Code Ann.

§ 42-1-160(A))). "An injury arises out of employment if it is proximately caused by the employment." *Turner*, 419 S.C. at 105, 796 S.E.2d at 154.

III. Discussion

Frampton argues that, because DNR admitted the injury and paid for some of his treatment with Dr. Bailey, the parties believed the only disputed issue at the hearing before the single commissioner would be the extent of his spinal injury and whether his arms were injured. Frampton contends DNR did not properly present § 42-9-35 as a defense because it failed to specify the statute as a defense on its Form 51 or in its prehearing brief. He further contends that, because DNR admitted the injury, he was not on notice he would be required to prove liability.

DNR acknowledges it admitted Frampton suffered an accident involving his cervical spine on its Form 51 but argues it also specifically denied liability for any workers' compensation benefits on the Form and in its prehearing brief. According to DNR, its admission that Frampton sustained an injury did not absolve him of his burden of proving entitlement to benefits, including his burden under § 42-9-35. DNR maintains § 42-9-35 is a statutory prerequisite to compensation benefits when there is a preexisting condition, rather than an affirmative defense. DNR argues it was not aware of Frampton's potential preexisting condition until receiving Frampton's medical records on the eve of the hearing before the single commissioner, at which time it raised the issue of § 42-9-35 without objection.

§ 42-9-35 provides:

> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
>
> > (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
> >
> > (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
>
> (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of

> his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

See also Burnette v. City of Greenville, 401 S.C. 417, 427, 737 S.E.2d 200, 205–06 (Ct. App. 2012) ("An injured employee 'who has a permanent physical impairment or preexisting condition' may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that 'the subsequent injury aggravated the preexisting condition or permanent physical impairment.'" (quoting S.C. Code Ann. § 42-9-35)). "The claimant's right to compensation for aggravation of a preexisting condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury." *Murphy v. Owens Corning*, 393 S.C. 77, 86, 710 S.E.2d 454, 458 (Ct. App. 2011).

Although DNR did not raise the issue of whether Frampton met his burden under § 42-9-35 in its Form 51 or prehearing brief, DNR was not on notice of Frampton's preexisting neck injury until obtaining Dr. Bailey's March 2010 medical records shortly before the hearing before the single commissioner. Furthermore, Frampton did not object to DNR raising this issue at the hearing. *See Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."). DNR's initial provision of treatment for Frampton's injury does not estop it from later contesting liability under these circumstances. *See Dozier v. Am. Red Cross*, 411 S.C. 274, 292–93, 768 S.E.2d 222, 231–32 (Ct. App. 2014) (holding employer did not waive its right to contest the compensability of the claimant's injury by providing treatment for 728 days and explaining a finding of waiver would discourage employers from providing treatment). Moreover, although DNR admitted an injury to Frampton's neck on its Form 51, it consistently denied he was entitled to benefits.

There is substantial evidence supporting the appellate panel's decision. *See Gadson*, 368 S.C. at 221, 628 S.E.2d at 266 ("Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law."). Dr. Bailey's medical records from March 2010 and Frampton's own testimony demonstrate he had a preexisting neck condition (cervical radiculopathy) at least six months before the dove field incident. Section 42-9-35 provides a claimant "shall establish by a preponderance of the evidence" a subsequent work-related injury aggravated a preexisting condition. Frampton did not prove the dove field incident aggravated his preexisting neck condition and only referenced the existence of the preexisting condition when DNR presented him with Dr. Bailey's medical records at the hearing.

Nonetheless, even if Frampton had met his burden pursuant to § 42-9-35, he did not show his neck injury was proximately caused by the dove field accident pursuant to § 42-1-160(A). *See Crisp*, 401 S.C. at 641, 738 S.E.2d at 842 ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation."); *see also Turner*, 419 S.C. at 105, 796 S.E.2d at 154 ("For an accidental injury to be compensable, it must 'aris[e] out of and in the course of employment.'"(quoting S.C. Code Ann. § 42-1-160(A))); *id.* ("An injury arises out of employment if it is proximately caused by the employment."). None of Dr. Bailey's medical records mention the dove field incident. This, taken with the fact that Frampton had already seen Dr. Bailey at least six months before the incident for the same injury, is substantial evidence supporting the appellate panel's conclusion that Frampton's treatment with Dr. Bailey, including his surgery, was not causally related to the dove field incident but was part of a long-term, ongoing course of treatment for Frampton's progressive, degenerative, disc disease, which had begun years prior. This conclusion is consistent with Frampton's own testimony before the single commissioner that he told Dr. Bailey his symptoms began gradually over a number of years and with Dr. Bailey's notes from the March 2010 visit in which he stated Frampton had a history of cervical radiculopathy.

Finally, we reject Frampton's argument that the single commissioner erroneously considered his post-injury return to work and subsequent promotions in estimating the percentage of his impairment. This issue is unpreserved for this court's review because Frampton failed to raise it before the appellate panel, and the appellate panel made no ruling on it. *See Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (an issue not raised to the single commissioner or appellate panel is not appropriate for appellate review); *see also Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 428, 450 S.E.2d 112, 115 (Ct. App. 1994) (arguments not raised to the appellate panel or circuit court are not preserved for appeal). Nevertheless, it is clear from the single commissioner's order that she only considered Frampton's return to work, subsequent promotions, and earning capacity in the context of determining the lack of credibility of Dr. Bailey's revised Form 14B and in determining Claimant was not entitled to benefits under S.C. Code Ann. § 42-9-10 (2015), which is not at issue.

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, C.J., concurs in part and dissents in part.

LOCKEMY, C.J., concurring in part and dissenting in part: I concur in part and respectfully dissent in part. I concur with the majority's finding that the single commissioner did not err by considering Frampton's post-injury return to work and subsequent promotion in determining he was not entitled to benefits under section 42-9-10. However, I would reverse the appellate panel's conclusion Frampton failed to satisfy his burden of proof under section 42-9-35 and was therefore not entitled to any benefits under the Workers' Compensation Act.

Frampton contends the appellate panel erred by requiring him to prove a compensable injury to his spine when DNR admitted liability for an injury to the cervical spine. I agree. "An appellate court may reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence." *Harrison v. Owen Steel Co.*, 422 S.C. 132, 137, 810 S.E.2d 433, 435 (Ct. App. 2018).

Here, Frampton alleged in his Form 50 that he suffered an injury to his neck and right arm when he was riding in a pickup truck through a dove field in September of 2010. In its Form 51, DNR admitted that Frampton sustained an injury on the date he alleged, and it stated it admitted "an injury to the cervical spine only" but denied the extent of the injury and all other body parts, including the arms. DNR denied Frampton was entitled to additional medical care for the injury because he suffered a subsequent injury to the cervical spine on June 16, 2011. In my view, by admitting an injury to the cervical spine, DNR agreed Frampton injured his spine as alleged in his Form 50. In addition, Frampton had been under a neurosurgeon's care for several years before he filed his Form 50, and DNR had paid for much of this treatment. The neurosurgeon completed a "physician's statement" describing his assessment of Frampton's "work related injury." All of this occurred before DNR filed its Form 51 admitting injury to Frampton's cervical spine. Further, in its Form 58, DNR argued the injury Frampton suffered in the June 2011 car accident either (1) aggravated his preexisting neck condition or (2) was a subsequent, intervening accident that severed the causal relationship between the September 4, 2010 accident and the alleged disability.

The single commissioner found as a fact that, although Frampton failed to satisfy his burden of proof under section 42-9-35, DNR admitted the claim and provided medical treatment. The single commissioner found Frampton suffered a 20% permanent partial disability to his back as a result of his work injury. The appellate panel did not disturb the single commissioner's finding that DNR admitted the claim,

and none of DNR's grounds for appeal from the single commissioner's order charged her with error in finding the claim was admitted.

In my opinion, DNR admitted the September 4, 2010 injury to Frampton's spine, and the only disputed issues at the hearing before the single commissioner were the extent of the injury and whether the arms were affected. Because this was an admitted case, I would hold the appellate panel erred by concluding that, pursuant to section 42-9-35, Frampton was required to prove that either the September 4, 2010 injury aggravated his preexisting condition or the preexisting condition aggravated the injury. I would therefore reverse the appellate panel's holding that Frampton was not entitled to any benefits under the Workers' Compensation Act.

Further, I believe the appellate panel misapplied the law of the case doctrine. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997). "Failure to challenge the ruling 'is an abandonment of the issue and precludes consideration on appeal.'" *Id.* (quoting *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)). "The unchallenged ruling, 'right or wrong, is the law of the case and requires affirmance.'" *Id.* (quoting *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970)). Here, notwithstanding the single commissioner determined Frampton failed to meet his burden of proof pursuant to 42-9-35, she ruled in his favor on this issue, finding DNR admitted the claim. Without expressly addressing this finding, the appellate panel relied on the law of the case doctrine to affirm the single commissioner's conclusion that Frampton failed to satisfy his burden of proof under section 42-9-35. However, there was no reason for Frampton to appeal the single commissioner's ruling as to section 42-9-35 because he prevailed on the issue. Therefore, I believe the law of the case doctrine did not apply and the appellate panel erred by relying on this doctrine to support its holding.

For the foregoing reasons, I respectfully dissent from the majority opinion and would reverse the appellate panel in part.