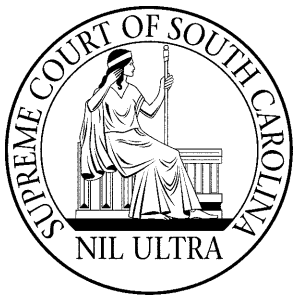

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
June 20, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James T. Judy, Petitioner,

v.

Ronnie Judy, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26987
Heard February 3, 2011 – Filed June 20, 2011

AFFIRMED

Capers G. Barr, III, of Barr, Unger & McIntosh, of Charleston, for Petitioner.

R. Bentz Kirby, of Orangeburg, for Respondent.

JUSTICE BEATTY: Following the resolution of his partition action in probate court, James Judy ("James") filed suit in circuit court asserting a cause of action for waste against his brother, Ronnie Judy ("Ronnie"), for the destruction of a pond located on a tract of real property involved in the partition action. A jury found in favor of James and awarded him actual and punitive damages. Ronnie appealed the jury's verdict, arguing the circuit

court erred in declining to dismiss the suit against him on the basis of laches, collateral estoppel, or *res judicata*, and in declining to permit him to amend his Answer to include the defense of waiver.

On appeal, the Court of Appeals affirmed the circuit court's refusal to dismiss Ronnie's suit on the basis of collateral estoppel and laches. The court, however, reversed the circuit court's refusal to dismiss the suit on the basis of *res judicata*. Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009). This Court granted James's petition for a writ of certiorari to review the decision of the Court of Appeals as to whether *res judicata* operated to preclude the waste lawsuit. We affirm.

I. Factual/Procedural History

On May 13, 1983, Vesta Rumph ("Mrs. Rumph") died testate, leaving three parcels of real property in Dorchester County to be distributed equally between Ronnie and James. The three parcels included: (1) a 10.9-acre tract ("10.9-acre Tract"); (2) a 9.29-acre tract, on which the Rumph family homestead stood ("Homestead Tract"); and (3) a 134.71-acre tract, which included an 11-acre, man-made pond ("Pond Tract").

Although the property was not formally distributed for many years, the brothers orally agreed that Ronnie would take possession of the Homestead Tract and live in the Rumph homestead, and James would take possession of the remaining two tracts. From July 1983 until October 15, 2001, Ronnie served as personal representative of Mrs. Rumph's estate ("Estate").

On February 8, 2001, James filed suit in probate court[1] seeking partition of the Estate's property.[2] On February 12, 2001, Ronnie executed a

[1] See S.C. Code Ann. § 62-3-911 (2009) ("When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the personal representative or one or more of the heirs or devisees may petition the court prior to the closing of the estate, to make partition.").

[2] The property was not partitioned as the result of that suit.

Deed of Distribution in his capacity as personal representative of the Estate granting ownership of the three tracts to himself and James as the heirs.

As a result of alleged dubious transactions regarding the property, James petitioned to have Ronnie removed as personal representative of the Estate. On October 15, 2001, the probate court removed Ronnie as personal representative of the Estate and appointed James in his place.

In early May 2003, someone operating a backhoe damaged the earthen dam supporting the eleven-acre, man-made pond on the Pond Tract, and the pond drained completely. On May 5, 2003, detectives with the Dorchester County Sheriff's Office investigated the destruction of the pond. During their investigation, the detectives discovered that the locked gate to the pond had been forcibly torn down, and backhoe tracks were found leading from the breached dam into Ronnie's backyard where his backhoe was located.

On November 7, 2003, James again petitioned the probate court to partition the property. In his petition, James requested the probate court take into consideration the co-devisees' conduct before issuing an order equitably partitioning the subject property, including "Ronnie F. Judy's negligent, grossly negligent, or intentional acts causing the destruction of the fishing pond located on the subject property." During the partition hearing, James presented expert testimony that established the value of the Pond Tract would have been worth $1,000 more per acre had the pond not been destroyed.

By order dated January 7, 2004, the probate court granted the requested relief. The probate court awarded ownership of the Pond Tract to James and the 10.9-acre Tract and Homestead Tract to Ronnie. In assessing the value of the three parcels, the court did not consider Ronnie's "alleged destruction" of the pond because James specifically withdrew this claim and requested that the court not "factor in such loss of value when computing the amount of property each party shall receive." The court held "all other issues regarding money owed to either party on these parcels of land to be moot."

On November 29, 2005, James filed an action against Ronnie in circuit court arising out of the destruction of the man-made pond.[3] In his Complaint, James alleged "the acts of [Ronnie] in willfully and maliciously destroying the earthen dam of Rumph's pond constitute[d] waste." Due to the loss of the pond, James sought actual and punitive damages. In response, Ronnie filed a pro se Answer in which he generally denied the allegations. On the eve of trial, Ronnie's recently-retained counsel moved to dismiss for lack of subject matter jurisdiction on the grounds that James's lawsuit was barred by the doctrines of laches, collateral estoppel, and *res judicata*. Additionally, counsel moved to amend Ronnie's Answer to add the defense of waiver.

On April 9, 2007, the circuit court conducted a jury trial on James's cause of action for waste. Prior to trial, the circuit court denied Ronnie's motion to dismiss but indicated that the issues could be addressed at the directed verdict stage of the trial.

During the trial, the probate court's order was introduced as evidence and discussed during James's testimony. During James's cross-examination, he acknowledged that he had filed an action in probate court alleging that Ronnie destroyed the dam but requested that the probate court not rule on the matter because he "would settle this at a later date." James further admitted that his expert, who testified during the circuit court proceedings, testified at the probate court hearing regarding the reduction in the overall value of the Pond Tract due to the destruction of the pond.

At the close of the case, Ronnie renewed his motion to dismiss. In denying the motion to dismiss, the circuit court found an "ambiguity" in the probate court's order that was to be construed in favor of James.

Subsequently, Ronnie moved to amend his Answer to allege the doctrines of laches, waiver, *res judicata*, and collateral estoppel. Although the court permitted the amendments with the exception of waiver, the court ruled against Ronnie and submitted the case to the jury.

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[3] Weeks later, James sold the Pond Tract for $1,280,000. Notably, in his petition to the probate court, the appraiser hired by James assigned the Pond Tract a value of $375,000.

The jury found in favor of James and awarded him $67,350 actual damages and $22,650 punitive damages.

After the circuit court denied Ronnie's post-trial motions, Ronnie appealed to the Court of Appeals. The Court of Appeals affirmed the circuit court's refusal to dismiss James's suit on the basis of collateral estoppel and laches, but found that James's suit for waste was barred on the basis of *res judicata*. Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009).[4] In reaching this conclusion, the court held "the identity of the subject matter of the two suits rests not in their forms of action or the relief sought, but rather, in the combination of the facts and law that give rise to a claim for relief." Id. at 10, 677 S.E.2d at 218.

II. Discussion

James contends the Court of Appeals erred in finding that his lawsuit for waste was barred by *res judicata*. In support of this contention, James claims the prior probate court action was conducted for the limited purpose of partitioning the real property of the Estate. Because the subject matter of his waste claim was not identical to the partition action, James asserts that the requisite elements of the doctrine of *res judicata* were not satisfied. Thus, he avers that he should not have been precluded from pursuing his claim for waste in the circuit court.

There are very few reported cases discussing the tort of waste. However, one decision defined this tort as: "At common law, waste is any permanent injury to lands, houses, gardens, trees, or other corporeal hereditaments done or permitted by the tenant of an estate less than a fee to the prejudice of him in reversion or remainder." Wingard v. Lee, 287 S.C. 57, 60, 336 S.E.2d 498, 500 (Ct. App. 1985). "Waste may be committed by acts or omissions which tend to the lasting destruction, deterioration, or material alteration of the freehold and the improvements thereto or which diminish the permanent value of the inheritance." Id. "Whether particular acts or omissions constitute waste depends on matters of fact, including: the

[4] Based on its decision, the court declined to rule on the issue of waiver. Judy, 383 S.C. at 10, 677 S.E.2d at 219.

nature, purpose, and duration of the tenancy; the character of the property; whether the acts complained of are related to the use and enjoyment of the property; whether the use is reasonable in the circumstances; and whether the acts complained of are reasonably necessary to effectuate such use." Id.

In order for *res judicata* to operate as a bar to James's lawsuit for waste, the following elements needed to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992).

Our courts, however, have found that the doctrine of *res judicata* is not an "ironclad" bar to a later lawsuit. Garris v. Governing Bd. of the South Carolina Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998).

Significantly, the Restatement (Second) of Judgments has recognized exceptions to the application of this doctrine.[5] See Restatement (Second) of

[5] Section 26 of the Restatement (Second) of Judgments provides in relevant part:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a

Judgments § 26 (1982 & Supp. 2011); id. (noting in commentary that section 26 "presents a set of exceptional cases in which, after judgment that would otherwise extinguish the claim under the rules of merger or bar . . . , the plaintiff is nevertheless free to maintain a second action on the same claim or part of it.").

In view of these exceptions, we must answer the threshold question of whether the probate court had subject matter jurisdiction to adjudicate James's claim for waste. See Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) (differentiating jurisdiction of the probate court and the circuit court; recognizing that lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court).

If the probate court was without jurisdiction to adjudicate this claim, then our analysis ends as James could have only pursued his claim in circuit court. Thus, under the exception identified in section 26(1)(c) of the Restatement (Second) of Judgments, *res judicata* could not have operated to bar James's lawsuit for waste. Alternatively, if the probate court had jurisdiction over the claim of waste, we must then determine whether the elements of *res judicata* were proven.

Turning to the jurisdiction of the probate court, we have definitively recognized that the probate court is not a constitutional court. See Davis v. Davis, 214 S.C. 247, 52 S.E.2d 192 (1949) (recognizing the probate court has only such jurisdiction as vested in it by the General Assembly); S.C. Const. art. V, § 12 ("Jurisdiction in matters testamentary and of administration . . . shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article."); see also Anderson, 299 S.C. at 115, 382 S.E.2d at 900 ("The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental."). Thus, the extent of the probate court's jurisdiction is defined

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> single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Restatement (Second) of Judgments § 26 (1982 & Supp. 2011) (emphasis added).

by our legislature. A decision regarding the jurisdiction of the probate court requires us to review two statutes, sections 62-1-302 and 62-3-620 of the South Carolina Code.

Section 62-1-302 generally defines the probate court's jurisdiction and provides in pertinent part:

> (a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:
>
> (1) estates of decedents, including the contest of wills, construction of wills, and determination of heirs and successors of decedents and estates of protected persons.

S.C. Code Ann. § 62-1-302(a)(1) (2009 & Supp. 2010) (emphasis added). In conjunction with this code section, the general definitional section in the Probate Court defines "claims" as including "liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator . . . ." S.C. Code Ann. § 62-1-201(4) (2009) (emphasis added).

Given the broad wording of the above-outlined code sections, particularly the phrase "all subject matter related to estates of decedents," we find the probate court was statutorily authorized to rule on the waste action.

Moreover, although the tort of waste is generally filed in circuit court, the General Assembly has provided limited jurisdiction for the probate court to consider actions for waste in the context of testamentary matters. Specifically, section 62-3-620 states:

> The judge of probate of the county in which a deceased person may have died may, either of his own accord or at the instance of any creditor or other person interested in the estate of the deceased, cite before him such person as, neither being appointed personal representative nor having obtained administration of the

> effects of such deceased person, shall nevertheless possess himself of the goods, chattels, rights, and credits of such person deceased and, upon such person being cited as aforesaid, the judge of probate shall require of him a discovery and account of all and singular the goods, chattels, rights, and credits of the deceased and shall proceed to decree against him for the value of the estate and effects of the deceased which he may have wasted or which may have been lost by his illegal interference, charging him as executors of their own wrong are made liable at common law as far as assets shall have come into his hands.

S.C. Code Ann. § 62-3-620 (2009) (emphasis added); see Greenfield v. Greenfield, 245 S.C. 604, 614, 141 S.E.2d 920, 926 (1965) (discussing the precursor to section 62-3-620 and stating "the statute authorizes the entry of a judgment against the executor de son tort for the value of such assets as may have been wasted or lost by the illegal interference").

Applying the foregoing to the facts of the instant case, we conclude the probate court had jurisdiction to consider James's claim for waste given Ronnie's conduct classified him as an "executor de son tort" under section 62-3-620.

At the time Ronnie allegedly destroyed the pond in May 2003, he was no longer the personal representative of the Estate as the probate court had replaced him and appointed James in October 2001. Therefore, Ronnie's destruction of the Estate's real property operated to place James's claim within the purview of section 62-3-620 and, in turn, authorized the probate court to adjudicate this claim. See Haley v. Thames, 30 S.C. 270, 276, 9 S.E. 110, 112 (1889) (discussing precursor to section 62-3-620 and defining "executor de son tort" as "[i]f a stranger takes upon himself the office of executor by intrusion, not being so constituted by the demand nor appointed administrator" (citation omitted)).

Furthermore, this Court has found that where a court has jurisdiction over a partition action then any cause of action that is incident to the right of partition, including waste, should simultaneously be adjudicated. Vaughn v. Lanford, 81 S.C. 282, 62 S.E. 316 (1908). In Vaughn, this Court stated that

"[a]ccounting for waste, for betterments, and for rents among cotenants is now recognized as an incident to the right of partition, and the universal practice of the court of equity is to adjust all these matters in the suit for partition." Id. at 288, 62 S.E. at 318. The Court explained that where a court has proper jurisdiction of a partition case "there is hardly any question in relation to property which this Court may not determine incidentally for the purpose of doing complete justice and preventing multiplicity of litigation." Id. In reaching this conclusion, the Court reasoned that "[t]his rule is just and in accord with the principle that, when all the parties and the property are before the court of equity, it will do full justice to all before releasing its hold." Id. at 289, 62 S.E. at 319.

Having found the probate court had jurisdiction to adjudicate James's claim of waste, the question becomes whether the "identity of the subject matter" between the partition action and the waste action was the same for the purposes of *res judicata*.[6]

Although there is no dispute in our jurisprudence regarding the three elements of *res judicata*, our courts have utilized at least four tests in determining whether a claim should have been raised in a prior suit.[7] Because a determination of whether *res judicata* precludes a subsequent suit cannot be reduced to a formulaic process, we decline to adopt or attempt to define a single standard. See Aliff v. Joy Mfg. Co., 914 F.2d 39, 43 (4th Cir.

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[6] We have confined our analysis to the critical element regarding the "identity of the subject matter" as there is no dispute regarding the remaining two elements, i.e., the identity of the parties and adjudication of the issue in the former suit.

[7] See James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996) ("South Carolina courts have used at least four tests to determine when a claim should have been raised in the first suit: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action.").

1990) ("There is no simple test to determine what constitutes the same cause of action for res judicata purposes. Each case presents different facts that must be assessed within the conceptual framework of the doctrine.").

Instead, we reiterate and rely on the conceptual framework recognized in Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999), wherein we stated:

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

Id. at 34, 512 S.E.2d at 109 (citations omitted).

In Plum Creek, we also recognized that simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions. Plum Creek Dev. Co., 334 S.C. at 35 n.4, 512 S.E.2d at 109 n.4. We explained that "[a] claim for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of res judicata." Id. at 35, 512 S.E.2d at 109 (quoting 46 Am. Jur. 2d Judgments § 536 (1994)). Furthermore, we noted that "for purposes of res judicata, 'cause of action' is not the form of action in which a claim is asserted but, rather the 'cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'" Id. at 36, 512 S.E.2d at 110 (quoting 50 C.J.S. Judgment § 749 (1997)).

Because this conceptual framework is fundamentally sound, we take this opportunity to definitively rule that the four tests previously used by our appellate courts should be considered merely as factors rather than rigid, independent tests.[8] We believe this approach effectuates the fundamental

[8] Although we implicitly recognized this distinction in Plum Creek, we did not affirmatively resolve the application and import of the four tests. Plum

purpose of *res judicata*, which is to ensure that "no one should be twice sued for the same cause of action." First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945).

Cognizant of this conceptual framework, we conclude that James clearly raised a waste cause of action in his probate court pleadings. Even though James did not delineate waste as a separate cause of action, the allegations in his pleadings set forth the elements of this tort. James, however, specifically requested that the probate court not rule on this claim. Due to James's request, the probate court withheld a ruling on this issue.

Because the tort duties that were breached and the evidence was the same in both proceedings, there was "identity of subject matter" for the purposes of *res judicata*. Yet, in violation of the doctrine of *res judicata*, James attempted to "split" his cause of action for waste by pursuing and procuring another remedy in circuit court for an identical claim. Given the probate court could have fully adjudicated the waste cause of action, James was precluded from initiating a second lawsuit in the circuit court as this cause of action could have been raised in the former suit. Furthermore, the probate court definitively resolved James's claims regarding the property by ruling that it would "consider all other issues regarding money owed to either party on these parcels of land to be moot."

Even if the probate court could have adjudicated his claim for waste, James contends that the probate court could not have awarded punitive damages; thus, he asserts that *res judicata* should not operate as a bar to recovering these damages in circuit court.

We disagree with James's arguments given he chose the probate court as the forum to adjudicate his claims for partition and waste of the Estate property. If he desired to recover punitive damages, James could have filed both claims in circuit court or removed his lawsuit in its entirety to the circuit

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Creek Dev. Co., 334 S.C. at 35 n.3, 512 S.E.2d at 109 n.3 (discussing the doctrine of *res judicata* and referencing, but not definitively relying on, the four tests used by South Carolina courts in determining whether a claim should have been raised in a prior suit).

court for an adjudication of all claims. See S.C. Code Ann. § 15-61-50 (2005) (providing circuit court with jurisdiction to partition in kind or by sale real and personal estates); S.C. Code Ann. § 62-1-302(d)(5) (2009) (providing "actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value" must be removed to the circuit court). Accordingly, we hold that James's election to proceed in probate court effectively waived his right to recover punitive damages.

III. Conclusion

Based on the foregoing, we find *res judicata* precluded James from adjudicating his lawsuit for waste in the circuit court.[9] Therefore, the decision of the Court of Appeals is

[9] The dissent based its position to reverse on its view that Respondent acquiesced in Petitioner's splitting of his claim. However, there is no evidence in the record before us that Respondent acquiesced. It is undisputed that Petitioner raised the issue of waste in the probate court and offered expert testimony in support of his position and the amount of damages he suffered. It is also undisputed that Petitioner, without explanation, requested that the court not consider Respondent's waste. A litigant is not required to object to a withdrawal of a claim against him, nor is there a requirement that he demand an explanation for the generosity of his opponent, especially if the opponent is his brother.

Moreover, it is undisputed that the trial court's order specifically stated it "considered all other issues regarding money owed to either party on these parcels of land to be moot." (emphasis added). This ruling by the probate court would reasonably lead any litigant to believe that all issues regarding the property were resolved. The Petitioner did not object; therefore, if we apply the dissent's logic, we would have to conclude that Petitioner acquiesced in waiving his waste claim.

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which PLEICONES, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. Although I agree with the majority that the doctrine of res judicata would ordinarily bar James Judy's tort action for waste, I believe this case is excepted from claim preclusion under section 26, subsection 1(a) of the Restatements (Second) of Judgments. That section provides:

> (1) When any of the following circumstances exists, the general rule of [claim preclusion] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split the claim, or *the defendant acquiesced therein*;
>
> . . . .

Restatement (Second) of Judgments § 26 (1982 & Supp. 2011) (emphasis added).

In *Beazer East, Inc. v. United States Navy*, the United States Court of Appeals for the Fourth Circuit cited this Restatement exception, stating, "acquiescence to the filing of two separate lawsuits has also been determined to constitute consent." No. 96-1736, 1997 WL 173225 (4th Cir. Apr. 11, 1997). In that case, the court found the defendant did not acquiesce in the plaintiff's splitting of claims by filing an opposition to plaintiff's motion to consolidate the claims. *Id.* In the instant case, James requested the probate court consider Ronnie's willful destruction of the fishing pond located on the Pond Tract in his Petition to Partition Real Property. At the partition hearing, James produced an expert who testified the property was worth $1,000 less per acre without the pond. However, before the probate court issued its order partitioning the property, James requested that the court not consider that loss of value when computing the amount each party would receive. There is no evidence in the record that Ronnie objected to this request. Therefore, in my opinion, Ronnie cannot invoke the doctrine of res judicata as protection against a tort action in circuit court, aimed at righting the wrong he allegedly committed, when he allowed that claim to be ignored during the action for

partition in probate court. I would reverse the court of appeals' decision that the circuit court action was barred on the basis of res judicata, and reinstate the circuit court order awarding actual and punitive damages to James.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cole Vision Corporation and Sears Roebuck & Company, Inc.,	Plaintiffs,
Of Whom Cole Vision Corporation is the	Petitioner,

v.

Steven C. Hobbs, O.D. and NCMIC Insurance Company,	Defendants,
Of Whom Steven C. Hobbs, O.D. is the	Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 26988
Heard April 6, 2011 – Filed June 20, 2011

REVERSED

E. Raymond Moore, III, Adam J. Neil, and Ashley B. Stratton, of Murphy & Grantland, all of Columbia, for Petitioner.

Hardwick Stuart, Jr., of Berry, Quackenbush and Stuart, of Columbia, for Respondent.

JUSTICE HEARN: We granted certiorari to review the decision of the court of appeals in *Cole Vision Corp. v. Hobbs*, 384 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009), which reversed the circuit court's dismissal of Hobbs' counterclaim for spoliation of evidence. Cole Vision Corporation (Cole Vision) argues the tort of negligent spoliation of evidence is not cognizable under South Carolina law. We agree and reverse the court of appeals.

FACTUAL/PROCEDURAL BACKGROUND

Steven C. Hobbs, an optometrist, sublet space leased by Cole Vision Corporation (Cole Vision) from Sears Roebuck and Company (Sears) for his optometry practice. The sublease agreement between Hobbs and Cole Vision contained indemnity provisions whereby Hobbs agreed to defend Cole Vision and Sears against any and all liabilities arising from events occurring in Hobbs' business location or as a result of Hobbs' activities at the business. This agreement also purportedly required Cole Vision to retain copies of Hobbs' patient records. Pursuant to the agreement, Hobbs obtained professional liability insurance with NCMIC Insurance Company (NCMIC).

Mary and John Lewis (collectively, the Lewises) sued Hobbs, Cole Vision, and Sears based on Hobbs' alleged malpractice in failing to properly diagnose and treat Mary Lewis. The Lewises contend Mary Lewis's

glaucoma went undetected due to Hobbs' negligent treatment, and as a result, she was rendered blind. Cole Vision and Sears brought this action for declaratory relief after Hobbs and NCMIC refused to defend them in the malpractice suit. Although the Lewises' case was pending when Cole Vision brought this declaratory judgment action, it eventually settled.

The case brought by Cole Vision and Sears seeks a declaration that Hobbs and NCMIC were obligated to defend and indemnify them pursuant to the sublease agreement between Hobbs, Cole Vision, and Sears. Cole Vision and Sears also sought judgment against Hobbs and NCMIC for defense costs and settlement amounts of the claims asserted in the malpractice action brought by the Lewises.[1]

In response to the complaint, Hobbs filed a defense and counterclaim for negligent spoliation of evidence against Cole Vision and Sears stemming from the loss of Mary Lewis's patient profile sheet. Hobbs contended that Cole Vision lost the profile sheet, which was a key piece of evidence needed to defend the malpractice claim. According to Hobbs, he incurred costs and attorney fees as a result of his inability to adequately defend against the Lewises' claim for malpractice. Cole Vision's reply asserted that the counterclaim failed to state facts sufficient to constitute a cause of action and did not arise from the same transaction or occurrence.

Cole Vision filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, on the ground that South Carolina does not recognize a cause of action for spoliation of evidence. The circuit court agreed and granted the motion to dismiss. Hobbs appealed the circuit court's order and the court of appeals reversed the circuit court, finding that Hobbs pled facts sufficient to constitute a general negligence cause of action. The court of appeals did not determine whether South Carolina recognizes a cause of action for negligent spoliation, instead reversing the circuit court based on its characterization of Hobbs' claim as sounding in general negligence. *See Cole Vision Corp. v. Hobbs*, 384 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009). Cole Vision's petition

[1] While NCMIC was a party to the declaratory judgment action, it is not a party to this appeal.

for rehearing included a discussion of *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 122 (2008), which had been decided by this Court after the issuance of the court of appeals' decision, but the court of appeals denied the petition.[2] We granted Cole Vision's petition for certiorari.

ISSUES

Cole Vision presents three issues to this Court:

I. Did Hobbs preserve the issue of general negligence based on the spoliation of evidence for appellate review?

II. Did the court of appeals err in reversing the circuit court's order granting Cole Vision's motion to dismiss Hobbs' counterclaim for spoliation of evidence?

III. If negligent spoliation does exist under South Carolina law, did Hobbs fail to plead an essential element?

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Id.* The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim

[2] Cole Vision claims that based on *Austin*, this Court does not recognize a cause of action for spoliation of evidence, but that even if we were to recognize such a cause of action, Hobbs failed to plead an essential element of it.

for relief. *Id.* In reviewing the dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard as the circuit court. *Id.*

LAW/ANALYSIS

I. PRESERVATION

Cole Vision asserts, as it did before the court of appeals, that Hobbs' attempt to characterize his counterclaim as one for general negligence is unpreserved because it was not addressed in the circuit court's order granting the motion to dismiss, and Hobbs did not file a Rule 59(e), SCRCP, motion. Hobbs responds that he specifically raised this issue to the circuit court during the hearing and the circuit court ruled on it.

It is true that Hobbs' counsel raised the issue of general negligence in arguments before the circuit court and that, in the oral ruling from the bench, the circuit court recognized the cause of action may have some reference to negligence. However, the written order is based solely on spoliation of evidence.

It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls. See *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001*); Corbin v. Kohler Co.*, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002); *Parag v. Baby Boy Lovin*, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998). Thus, Cole Vision is correct in its assertion that Hobbs' characterization of his counterclaim before the court of appeals as one for general negligence is unpreserved. Even if we were to find Hobbs' characterization of his counterclaim as sounding in general negligence to be preserved, his position would still be unavailing; regardless of how his counterclaim is labeled, we analyze it under the same rubric as a claim based on spoliation of evidence.[3]

[3] "What's in a name? That which we call a rose by any other name would small as sweet." William Shakespeare, Romeo and Juliet, II, 11, 1-2.

II. SPOLIATION OF EVIDENCE

Cole Vision urges us to find *Austin* controlling in this case. Hobbs argues that *Austin* is distinguishable and should therefore not be persuasive. While we agree with Hobbs that *Austin* is distinguishable, we decline to adopt the tort of negligent spoliation in this State.

In *Austin*, Austin's son was found dead in his neighbor's garage from a drug overdose. 377 S.C. at 33, 659 S.E.2d at 123. The Sheriff's Office began an investigation into his death and collected various items from the scene, but it then destroyed all the evidence collected. *Id.* When Austin later discovered that the evidence was destroyed, she filed suit against the Sheriff's Office, claiming damages because the destruction of evidence impaired her ability to bring a potential wrongful death action. *Id.* The circuit court granted summary judgment in favor of the Sheriff's Office, and Austin appealed. *Id.* at 34, 659 S.E.2d at 123.

Austin urged this Court to adopt the tort of third party spoliation of evidence, specifically arguing that West Virginia's version of the tort as expressed in *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003), should be recognized. *Id.* After articulating what the *Hannah* court held to be the elements of negligent spoliation of evidence by a third party,[4] we determined that, even if we were to recognize this tort, Austin's allegations did not rise to the level of stating a claim as she would fail to meet its elements. *Id.* at 35,

[4] In *Hannah*, the Supreme Court of West Virginia identified the following elements for the tort of negligent spoliation of evidence by a third party: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action; and (6) damages. *See Hannah*, 584 S.E.2d at 569-70. The *Hannah* court refused to recognize first party negligent spoliation of evidence. *Austin*, 377 S.C. at 34 n.3, 659 S.E.2d at 124 n.3.

659 S.E.2d at 124. Although we rejected Austin's claim, we specifically "decline[d] to address whether we would, under other factual circumstances, adopt the tort of third party spoliation of evidence." *Id.* at 36, 659 S.E.2d at 124.

We believe *Austin* is distinguishable from the present case. *Austin* was a pure third party spoliation case; the Sheriff's Office would not have been a party to the wrongful death action between Austin and whoever allegedly was responsible for her son's death. This case, however, presents a unique situation. As opposed to being true third parties to the underlying case where the lost evidence was to be used, Cole Vision and Sears were co-defendants with Hobbs. This case is also not a true first-party spoliation case, where the claim is against an opposing party. In addition, Hobbs alleged that Cole Vision required all patient profile sheets be kept within their custody and control. At the 12(b)(6) stage, we are required to accept this allegation as true. Therefore, we have a potential contractual obligation between Cole Vision and Hobbs, while none existed in *Austin*.

However, the fact that *Austin* can be distinguished does not resolve the issue presented here: whether South Carolina should recognize a stand-alone tort for spoliation of evidence. We hold that while Hobbs may continue to assert Cole Vision's failure to maintain the document at issue as a defense to its claim for indemnification, the circuit court properly held that South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise.

We recognize that some states have adopted an independent action for spoliation of evidence. *See, e.g., Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1178 (Conn. 2006) (recognizing intentional first-party spoliation); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. Ct. App. 1998) (recognizing cause of action for negligent spoliation of evidence against third parties). Other states have refused to adopt an independent tort action, but have permitted recovery for spoliation under traditional negligence principles. *See, e.g., Smith v. Atkinson*, 771 So. 2d 429, 432-33 (Ala. 2000) (permitting spoliation claim under existing negligence law, but applying a

rebuttable presumption that the plaintiff would have recovered in the underlying litigation); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995) (finding a claim for negligent spoliation of evidence could be stated under existing negligence law). Most states, however, have refused to recognize an independent spoliation tort and continue to rely on traditional non-tort remedies such as sanctions and adverse jury instructions for redress. *See, e.g., Lips v. Scottsdale Healthcare Corp.*, 229 P.3d 1008, 1011 (Ariz. 2010) (declining to recognizing a cause of action for third-party negligent spoliation); *Owens v. Am. Refuse Sys., Inc.* 536 S.E.2d 782, 784 (Ga. App. 2000) (declining to recognize an independent third-party tort of evidence spoliation); *Goin v. Shoppers Food Warehouse Corp.*, 890 A.2d 894, 898 (Md. App. 2006) (refusing to recognize separate tort action for negligent or intentional spoliation); *Austin v. Consolidation Coal Co.*, 501 S.E.2d 161, 163 (Va. 1998) (declining to recognize a third-party spoliation tort under the facts of the particular case).

We also believe public policy considerations weigh heavily against adopting the tort in this State. First, other remedies are already available with respect to first-party claims. For example, the court of appeals has struck a party's pleadings or approved the use of adverse jury instructions against a party found to have lost or destroyed relevant evidence in the case where the evidence was to be presented. *See, e.g., Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (ordering a new trial for failure to give a jury instruction on the adverse inference of the import of evidence lost or destroyed by the defendant); *QZO, Inc. v. Moyer*, 358 S.C. 246, 258, 594 S.E.2d 541, 548 (Ct. App. 2004) (affirming the circuit court's decision to strike appellant's pleadings after appellant destroyed relevant evidence). However, Hobbs foreclosed his opportunity to obtain this relief when he settled the case brought by the Lewises.

The speculative nature of the damages calculation also militates against recognizing a negligent spoliation cause of action. In *Trevino v. Ortega*, 969 S.W.2d 950 (1998), the Supreme Court of Texas, in rejecting the tort of evidence spoliation, found, "[e]ven those courts that have recognized an evidence spoliation tort note that damages are speculative. The reason that

the damages inquiry is difficult is because evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation." 969 S.W.2d at 952-53; *see also Coprich v. Superior Court*, 80 Cal. App. 4th 1081, 1089 (Ct. App. 2000) (articulating the uncertainty concerning the nature and effect of missing evidence in negligent spoliation claims). This is particularly true where, as here, the parties to the underlying suit have settled.

The final policy consideration which weighs against adoption of the tort of negligent spoliation concerns the potential for duplicative and inconsistent litigation. If a subsequent claim for spoliation is permitted by this Court outside of the original action, that claim would require a "retrial within a trial in which all the evidence presented in the underlying action would be presented again for the trier of fact to determine what effect the spoliated evidence might have had in light of the other evidence." *Coprich*, 80 Cal. App. 4th at 1088-89. This could occur regardless of whether the trial court in the principal action determined that the spoliation warranted sanctions or adverse jury instructions, thus potentially giving rise to inconsistent results.

However, our conclusion that Hobbs is unable to bring an independent claim does not preclude him from asserting spoliation as a defense to the declaratory judgment action brought by Cole Vision and Sears. "[T]he effect of the doctrine of spoliation, when applied in a defensive manner, is to allow a defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence . . . ." Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 27 U. Tol. L. Rev. 67, 75 (1995). Other states have allowed spoliation to be used as a defense while denying its availability as an independent cause of action. *See, e.g.*, *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1118-19 (N.J. Super. Ct. Law Div. 1993) (discussing the use of negligent spoliation in New Jersey). Here, Hobbs' allegation that Cole Vision lost a key piece of evidence which it was contractually obligated to maintain, while not a legally cognizable counterclaim, remains a viable defense in this action for indemnity.

The court of appeals reversed the circuit court's dismissal of Hobbs' counterclaim because it interpreted the claim as sounding in general negligence, and Hobbs urges us to uphold the court of appeals' decision on this basis. However, we believe this semantic change does not render his counterclaim any more viable. "It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Whether denominated as a claim for spoliation of evidence or as a general negligence claim based on spoliation of evidence, the substance of this claim is the same: both are based on the allegation that Cole Vision breached its duty to maintain a key document, the absence of which harmed Hobbs in the underlying lawsuit. Therefore, we do not believe Hobbs' counterclaim survives simply by calling it a negligence claim.

CONCLUSION

While Hobbs' claim that Cole Vision breached a contractual duty to maintain the document at issue remains a viable defense in this action for indemnification, because we decline to recognize the tort of negligent spoliation of evidence, the circuit court properly dismissed it as a counterclaim. The decision of the court of appeals is therefore

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laura Cabiness, John Langley, Robin Bellah, Mary Mason and The City of Charleston, a Municipal Corporation, Appellants,

v.

Town of James Island, Mary Clark as Mayor, and the James Island Alliance for Self Government, Respondents.

Appeal From Charleston County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 26989
Heard February 2, 2011 – Filed June 20, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Adelaide S. Andrews and Susan J. Herdina, of Charleston, Charlton DeSaussure, Jr., of Haynsworth

Sinkler Boyd, P.A., of Charleston, Frances I. Cantwell, of Regan & Cantwell, of Charleston, and Timothy A. Domin, of Clawson & Staubes, LLC, of Charleston, for Appellants.

Bonum S. Wilson, IV, of Wilson and Heyward, LLC, of James Island, and Trent M. Kernodle and David A. Root, of Kernodle, Root & Coleman, of James Island, for Respondents.

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, Office of the Attorney General, for Amicus Curiae.

JUSTICE HEARN: This appeal is the culmination of the Town of James Island's (Town) third attempt to incorporate into its own municipal body. The two previous attempts were invalidated by this Court in *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996), and *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004). While our opinion today does not make the third time the proverbial charm for Town because we find its incorporation petition was not sufficient, we reach the other issues presented in this case in the interest of judicial economy to supply a sufficient framework for Town and other unincorporated areas to successfully petition for incorporation in the future.

FACTUAL/PROCEDURAL BACKGROUND

Town is located on an island just to the south of peninsular Charleston, South Carolina, with approximately 20,000 inhabitants. Over the years, the City of Charleston and the City of Folly Beach have annexed various portions of James Island, all done legally under the annexation statutes, resulting in various "pods" and "enclaves" of incorporated areas on the island. While Town does not now challenge the validity of these annexations, Charleston's

ever-growing presence on the island was the impetus for Town's incorporation movement.

In *Glaze*, we invalidated Town's first attempt at incorporation on the ground that the boundaries of the proposed town were not contiguous. 324 S.C. at 254, 478 S.E.2d at 844. Because there was no statutory definition of contiguity in effect at the time, we supplied our own and found Town could not satisfy it. Specifically, we declined to permit Town to use waterways already annexed by Charleston and Folly Beach to establish contiguity between areas it sought to incorporate. *Id.* at 253-54, 478 S.E.2d at 844. In response to the definition of contiguity we announced in *Glaze*, the General Assembly amended the incorporation statutes to include the following provision:

> Contiguity is not destroyed by an intervening marshland located in the tidal flow or an intervening publicly-owned waterway, whether or not the marshland located in the tidal flow or the publicly-owned waterway has been previously incorporated or annexed by another municipality. The incorporation of a marshland located in the tidal flow or a publicly-owned waterway does not preclude the marshland located in the tidal flow or the publicly-owned waterway from subsequently being used by any other municipality to established contiguity for purposes of an incorporation if the distance from the highland to highland of the area being incorporated is not greater than three-fourths of a mile.

S.C. Code Ann. § 5-1-30(A)(4) (2000). Town accordingly sought to incorporate again using this revised definition of contiguity. However, in *Kizer* we found this new definition was unconstitutional special legislation because it singled out incorporated areas seeking to use tidal marshes and waterways in conjunction with incorporation, and not freshwater marshes, parks, or highways, without a rational reason for doing so. 360 S.C. at 95, 600 S.E.2d at 533-34.

Following our decision in *Kizer*, the General Assembly again amended the incorporation statutes, this time through 2005 Act No. 77 (Act 77), to address the problems identified by this Court. The requirement for contiguity now reads: "'Contiguous' means adjacent properties that share a continuous border. If a publicly-owned property intervenes between the two areas proposed to be incorporated together, which but for the intervening publicly-owned property would be adjacent and share a continuous border, the intervening publicly-owned property does not destroy contiguity." S.C. Code Ann. § 5-1-30(A)(4) (Supp. 2010). Publicly-owned property is "any federally-owned, state-owned, or county-owned land or water area." *Id.* § 5-1-20(2).

With this new, broader definition of contiguity, Town again sought incorporation. It is this attempt at incorporation that is currently before the Court. The description of the proposed area to be incorporated contained in Town's Petition for Incorporation (Petition) submitted to the Secretary of State's (Secretary) office described Town's boundaries as the physical space commonly thought of as the island of James Island but

> specifically excluding all property legally annexed into Folly Beach and Charleston, [and] specifically excluding those properties for which contiguity is not established pursuant to § 5-1-30([A])(4), as represented and listed by [Tax Map Sequence (TMS)] numbers contained in Exhibit A, attached hereto by reference and made a part thereof.

The Petition contained a map identifying the properties to be included within Town's corporate limits. The list of TMS numbers attached to the Petition[1] contained the following disclaimer:

[1] This list was not found in "Exhibit A," the exhibit referenced in the description of the boundaries. The document titled Exhibit A to the Petition was a Certification of Population Density. This list of TMS numbers was identified as part of Attachment 1 to Exhibit H, a feasibility study.

> The attached list of TMS Numbers identifies properties to be included in the proposed Town boundaries. Because this list was obtained from Charleston [C]ounty, it contains TMS Numbers which are not intended to be included; thus, TMS numbers for properties not to be included have been struck through or underscored by hand. [D]o not include those properties struck through or underscored in defining the proposed town's boundaries.

This list of TMS numbers came from various sources, including Charleston County, Charleston, and Folly Beach. However, none of the over 9,200 TMS numbers included in that list were struck through or underscored. Additionally, the list and the proposed map of Town's boundaries had some inconsistencies: 144 properties on the TMS list were not marked on the map as being included in Town, and 117 properties identified on the map were not found in the TMS list. Furthermore, Charleston annexed 121 properties located on either the list or the map after Town filed its Petition and 116 during the time prior to Town's filing of the Petition but while it was organizing to do so. Due to the fluctuating state of the incorporated areas of James Island, Town re-checked and updated its data throughout the Petition process in an attempt to stay current.

After receiving the Petition, the Secretary's office forwarded Town's Petition to the Joint Legislative Committee on Municipal Incorporation (Committee). The Committee found the Petition sufficient and recommended that the Secretary certify a local special election to determine whether the incorporation should take place. On the eve of the election, Town sent an e-mail to the Charleston County Board of Elections, which was organizing the special election, striking some twenty-four properties from the election roll because they were not contiguous.[2] Town did not inform the Secretary's

[2] Appellants claim to not know why Town asked these properties be stricken from the roll. However, the circuit court specifically found these properties were not contiguous to the main body of the proposed town. Because Appellants have not challenged that finding on appeal, it is the law of the case. *See Johnson v. Hunter*, 386 S.C. 452, 455, 688 S.E.2d 593, 595 (Ct.

office of this deletion. The voters were in favor of incorporation by a margin of three-to-one, and the Secretary's office issued a Certificate of Incorporation to Town. Appellants subsequently challenged the election in the circuit court in a timely manner.

Before the circuit court, Appellants first alleged that the most recent amendments to the incorporation statutes effected by Act 77 were unconstitutional special legislation. Additionally, Appellants argued that Town's Petition was insufficient and sought to incorporate property that is not contiguous. The court found for Town on all of Appellants' issues. This appeal followed.

ISSUES PRESENTED

I. Does Town's Petition satisfy the requirements of Section 5-1-24 of the South Carolina Code (Supp. 2010)?

II. Are the incorporation statutes concerning contiguity and publicly-owned property unconstitutional special legislation?

III. Does the definition of contiguity supplied by section 5-1-30(A)(4) permit an area seeking to incorporate to use publicly-owned property already incorporated or annexed into an existing municipality to affirmatively establish contiguity?

LAW/ANALYSIS

I. Sufficiency of Petition

Appellants argue Town's Petition failed to comply with the requirements of section 5-1-24. We agree.

App. 2010). Accordingly, for purposes of this appeal these properties are not, nor were they ever, part of the area to be incorporated.

Section 5-1-24 lays out the content requirements for a petition for incorporation. It requires that the petition set out the corporate limits for the proposed municipality and the number of inhabitants residing therein. S.C. Code Ann. § 5-1-24(A)(1). The petition must then be signed by fifteen percent of the qualified electors who reside within those limits. *Id.* Finally, the petition must contain documentation concerning the minimum service standards set out in section 5-1-30. *Id.* § 5-1-24(A)(2). Appellants only challenge Town's compliance with the first requirement, arguing that Town did not set forth its proposed limits with sufficient specificity.

In its Petition, Town described the general metes and bounds of the island of James Island and then specifically excluded all property annexed by either Folly Beach or Charleston and property that is not contiguous under section 5-1-30(A)(4). Appellants point out that properties on the map and the TMS list included with the Petition were not identical, each containing properties not listed on the other as being included within Town's boundaries; the boundaries of Town are subject to change due to challenges regarding the contiguity of Town's limits, as well as Charleston's continuing annexations; and twenty-four properties were stricken from the voter rolls on the eve of the election. Appellants therefore argue the Petition submitted by Town was incomplete, contained inaccuracies and inconsistencies, and was conditional upon the resolution of certain issues and Charleston's actions. Accordingly, they believe it is void because it was not sufficiently clear to enable the Secretary and the Committee to determine the proposed limits of Town. The circuit court disagreed, finding that Town substantially complied with the requirements of section 5-1-24.

Because this section is a recent addition to South Carolina's code, the appellate courts of this State have not yet had an opportunity to address the requirements under it. However, other jurisdictions have squarely faced this issue with similar statutes. In *People ex rel. Village of Worth v. Idhe*, 177 N.E.2d 313 (Ill. 1961), the Supreme Court of Illinois held that "[d]escriptions of municipal boundaries are not construed with the same strictness as those contained in deeds and contracts[,] and if the incorporating petition and accompanying map, when viewed together, fairly apprise the public of the

property involved, the description will be considered proper." *Id.* at 315. So long as the variance in the descriptions is not so great "as to cause public misapprehension upon the point," the petition is valid. *Id.* In Wisconsin, "if the description and the map, when viewed together, fairly apprise the public of the territory to be incorporated, the statute will be satisfied notwithstanding certain errors or omissions." *In re Incorporation of Town of Port Washington as a Village*, 637 N.W.2d 442, 446 (Wis. Ct. App. 2001).

We find the rules enunciated in *Village of Worth* and *Town of Washington* to be fair statements of the requirement under section 5-1-24. The language of section 5-1-24 does not require strict construction of incorporation petitions, nor would such a requirement be reasonable. During the time it takes to incorporate a municipality, many different eventualities may occur that are out of the incorporating body's control. Annexation into an existing municipality is a prime example. During the pendency of a petition for incorporation, an existing municipality can validly annex properties that are within the proposed limits of the new entity. Such an act is perfectly lawful, and we do not wish to punish areas seeking to incorporate by holding their petitions invalid because the precise limits are in a state of flux due to continuing annexations. Penalizing the municipality for these actions would be inconsistent with the goal of allowing and encouraging local areas to attain self-governance by permitting an adjoining area to thwart these noble efforts. Furthermore, when areas comprised of thousands of separate properties seek to join together into a unified municipality, requiring one-hundred percent accuracy for the boundary description may be practically impossible. County and local tax maps may not be in sync, and there are often discrepancies between which properties lie in unincorporated areas and which have already been incorporated or annexed. Again, we cannot hold the expectant municipality accountable for such errors. Accordingly, a petition will sufficiently describe the boundaries of the proposed municipality so long as it fairly apprises the public of what is to be included, even if there are some errors or inconsistencies.

However, we do not believe Town has met this requirement. The problem lies not with the continuing annexations performed by Charleston,

nor with the discrepancies between the map and the TMS list, which only account for a relatively small number of the total properties sought to be incorporated.[3] There is also no deficiency in excluding all areas already incorporated into Folly Beach and Charleston, as most people would know whether their property is within the unincorporated part of James Island or either of those cities. Additionally, Town did not err in striking properties from the election roll on the eve of the election as these properties were not contiguous with Town and therefore not part of it to begin with. The total effect of all those issues is, at most, *de minimis*, and the result of the realities of the incorporation process.

Instead, the flaw in Town's Petition emanates solely from the language simply excluding all properties that are not contiguous under section 5-1-30(A)(4). As the parties made clear through the various exhibits used during the trial, our final interpretation of contiguity has the potential to affect the inclusion of well over one thousand properties, which cannot be considered to be *de minimis*. We recognize that the reason why contiguity is an issue in this case is the piecemeal annexation of properties on James Island by Charleston before, during, and after the filing of the Petition. While the mere fact that Charleston was annexing properties during this time does not by itself impact the sufficiency of Town's Petition, we must draw the line where those actions potentially impact the inclusion of large portions of the properties sought to be incorporated by cutting off sizeable areas from the main body of Town. When this happens, we are no longer faced with "certain errors or omissions" or a fair notification of what is to be included. Instead, we are confronted with a situation where the inclusion of a significant number of properties is contingent upon a *post hoc* judicial determination, which leaves the voters unaware of whether large portions of Town will ever be incorporated at the time they cast their votes. In the case before us, this causes sufficient uncertainty over what the public believes is

[3] Town argues that because TMS numbers are not required by the statute to be included in a petition for incorporation, their inaccuracy in this case does not affect its incorporation. However, because Town specifically referenced and included these TMS numbers in the Petition, we cannot disregard them.

included within Town such that they could not be fairly apprised of the property involved.

We recognize that this places Town in the unenviable position of attempting to define an area it seeks to include without much guidance from the applicable statutes or case law and with much disagreement as to what properly can be included. However, Town took no preliminary steps to determine what it may be able to incorporate despite knowing of this contingency. This created a major risk that Town may be seeking to exclude a large number of non-contiguous properties by merely excluding a broad and vague category of properties in the Petition. It is the uncertainty generated by this risk that renders the Petition insufficient. As best as we can tell, this risk is fairly unique due to Town's relationship with Charleston, but it is still a substantial risk nonetheless. Despite the inclusion of a map and list of TMS numbers[4] to illustrate what Town was attempting to incorporate, the uncertainty surrounding the inclusion of large tracts of property within Town's proposed limits renders the Petition insufficient.[5] Accordingly, we reverse the judgment of the circuit court. We realize our conclusion that Town's Petition was not sufficient is dispositive of this case. However, in the interest of judicial economy and the likely event of Town re-filing its Petition, we reach the remaining issues to provide guidance for future incorporation petitions and help alleviate the ambiguities that plagued Town's most recent petition.

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[4] Although Town's Petition did include a list of TMS numbers for properties it said were *included* within its boundaries, the list contained a notation that properties it did not seek to include had been struck through or underscored. Because none of the numbers were marked out, we do not believe the public could fairly rely on this list to determine what was to be included in Town.

[5] We do not hold that any uncertainty or the threat of any legal challenge to the precise boundaries of a proposed town will render the incorporation petition insufficient. Rather, it is in a case such as this where the inclusion of sizeable portions of the municipality is at stake that the sufficiency of the petition come into question.

II. Constitutionality of Contiguity Provisions

Next, we consider the question of whether the contiguity provisions enacted through Act 77 are unconstitutional special legislation. Appellants contend the 2005 amendments are unconstitutional because they treat those annexing into an existing municipality differently than those seeking to incorporate separately. In particular, they allege persons seeking to incorporate can cross over and "disregard" existing municipal boundaries to establish contiguity, while the same is not permitted for property owners attempting to annex. In response, Town argues those incorporating and those annexing are not part of the same class, therefore the amendments do not result in disparate treatment among class members, which is the hallmark of special legislation. We agree with Town and hold the statute constitutional.

Our Constitution provides, "The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit: . . . To incorporate cities, towns or villages, or change, amend, or extend charter thereof." S.C. Const. art III, § 34, cl. II. When a statute is challenged on the ground that it is special legislation, the first step is to identify the class of persons to whom the legislation applies. *Kizer*, 360 S.C. at 92-93, 600 S.E.2d at 532. In this regard, our special legislation framework largely tracks that for determining whether a statute violates one's right to equal protection. *Id.* at 93, 600 S.E.2d at 533. If the statute treats all class members equally, then the law is general legislation and permissible. *Id.* at 92-93, 600 S.E.2d at 532. The law must be general both in form and in operation. *Id.* at 93, 600 S.E.2d at 532.

If the legislation does not apply uniformly, the second step is to determine the basis for that classification. *Id.* It is well-settled that the mere fact a statute creates a classification does not render it unconstitutional special legislation. *Id.* Rather, it is only arbitrary classifications with no reasonable hypothesis to support them that are prohibited. *Id.* at 93, 600 S.E.2d at 533. Again, this parallels our analysis under the rational basis test for equal protection challenges. A classification is constitutional "if some

intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently than others," or the special law "best meet[s] the exigencies of a particular situation." *Id.* Put another way, "[t]he classification must bear some reasonable relation to the object sought to be obtained by the law." *U.S. Fid. & Guar. Co. v. City of Columbia*, 252 S.C. 55, 61, 165 S.E.2d 272, 274 (1969). As always, statutes are presumed constitutional, and the party challenging them must prove their infirmity beyond a reasonable doubt. *McElveen v. Stokes*, 240 S.C. 1, 6, 124 S.E.2d 592, 594 (1962). "We will not overrule the [General Assembly]'s judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion." *Kizer*, 360 S.C. at 93, 600 S.E.2d at 533.

Turning to the case before us, we must first determine the proper class to which Act 77 applies. Appellants argue the class created is the broader group of all those seeking to effect changes in municipal boundaries, be it through incorporation or annexation. Town argues, and we agree, that the class is comprised solely of people seeking to incorporate; those attempting to annex are in a separate class unto themselves. First, the statute by its very terms applies only to those incorporating; the provisions for annexation are found in another chapter of the code. Second, there are myriad differences between incorporation and annexation such that those attempting to accomplish either are not similarly situated. *Compare* S.C. Code Ann. § 5-1-10, *et seq.* (incorporation statutes) *with* S.C. Code Ann. § 5-3-10, *et seq.* (annexation statutes).[6] Therefore, those incorporating and those annexing are dissimilar enough that they are not in the same class for purposes of our special legislation analysis. Because the contiguity statute treats all members of the class of incorporators similarly on its face, it is general legislation in form.

[6] Although these differences are rooted in statute, Appellants do not argue they represent disparate treatment between incorporation and annexation. Rather, these provisions demonstrate the fundamental differences between property owners attempting to annex into an existing municipality versus those seeking to incorporate separately.

Further, we find no evidence that Act 77 in practice affects only a certain number of individuals seeking to incorporate, which was the first constitutional defect identified in *Kizer*. Although the contiguity statute in effect at that time in *Kizer* applied generally on its face, we determined that in reality it applied only to "any unincorporated area that is *geographically configured so that it may establish contiguity using previously annexed marshland and waterways*." *Kizer*, 360 S.C. at 94, 600 S.E.2d at 533 (emphasis added). The legislation therefore implicitly created two different groups of incorporators: those using previously annexed marshland and waterways and those seeking to use other previously annexed property. *Id.* at 95, 600 S.E.2d at 534. Because of this disparity, we proceeded to determine whether the classification was arbitrary and unreasonable. *Id.* at 94, 600 S.E.2d at 533. Here, the statute is not so limited. In *Kizer*, we were troubled that only areas situated next to tidal marshlands and waterways could take advantage of provisions of the statute, which amounted to a very small number of unincorporated areas in the State. *Id*. Although a class comprised of one member certainly can be constitutional, *id.* at 93, 600 S.E.2d at 532, we found the statute created two distinct groups within the class of incorporators, *id.* at 94, 600 S.E.2d 533. The version of the statute now before the Court addressed that concern by permitting the use of *any* publicly-owned property, regardless of where it exists in the State. While an area seeking to incorporate only benefits from the current version of section 5-1-30(A)(4) if there is publicly-owned property available for use in the manner prescribed, the current language does not present the same geographically targeted approach as that at issue in *Kizer*. In fact, Appellants appear to concede that Act 77 creates no true subclasses within the broader class of incorporators. Therefore, Appellants have not proven beyond a reasonable doubt that Act 77 implicitly creates two groups of incorporators, and we find it is general in operation. We accordingly hold that the amendments contained in Act 77 are constitutional.

Because we hold that the statute in question is general legislation as it creates no disparate treatment within the applicable class, we need not reach the second question in our special legislation analysis of whether any subclass created is reasonable. Contrary to Appellants' argument that "the

legal underpinning of any law is its rationality, regardless of its general application or whether it creates a class," a law cannot be unconstitutional special legislation unless it is first, indeed, special. Were we to examine the rationality of a law irrespective of any classification it creates, we would impermissibly step from our position as the arbiter of a statute's constitutionality and into the seats of the General Assembly. The mere fact that a law may be irrational does not automatically make it unconstitutional. Such arguments must be made at the ballot box, not to the bench.

III. Definition of Contiguity

The resolution of the challenge regarding the definition of contiguity revolves around two issues: (1) whether ownership of property for purposes of section 5-1-20(2) requires fee simple ownership or embraces other possessory interests such as easements and right of ways and (2) whether an area seeking to incorporate can use publicly-owned property to affirmatively establish and create contiguity with another area. Town argues that a strict interpretation of the definition of ownership contravenes the express intent of the General Assembly, and we agree. As to precise application of contiguity, Appellants urge us to focus on the words "but for" contained in the statute and argue for a stricter interpretation of contiguity. Town, on the other hand, argues for a broader view of contiguity, in essence arguing that so long as unincorporated areas can be connected by publicly-owned property—even if that includes "running down" public roads to do so—the incorporating area has met the contiguity requirement.[7] As to this issue, we agree with Appellants.

The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute. *Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 571,

[7] In instances where Town seeks to incorporate publicly-owned property, this problem does not arise. There, the publicly-owned property is to be part of Town and there is no issue of it "destroying" contiguity. This issue only arises where publicly-owned property *already annexed* by Charleston intervenes between areas Town seeks to incorporate.

666 S.E.2d 892, 895 (2008). These words must be construed in context and in light of the intended purpose of the statute in a manner "which harmonizes with its subject matter and accords with its general purpose." *Id.* at 570, 666 S.E.2d at 896. The meaning of certain words can be ascertained by reference to associated words in the statute. *Id.* However, if the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used. *Id.* But if applying the plain language would lead to an absurd result, we will interpret the words in such a way as to escape the absurdity. *Ventures S.C., LLC v. S.C. Dep't of Revenue*, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008). A merely conjectural absurdity is not enough; the result must be "so patently absurd that it is clear that the [General Assembly] could not have intended such a result." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009).

The current version of the incorporation statutes generally states that areas seeking to incorporate must be contiguous, meaning they are adjacent and share a continuous border. S.C. Code Ann. § 5-1-30(A)(4). However, if publicly-owned property intervenes between two areas sought to be incorporated together as one, which but for that property would be contiguous, then they are still considered contiguous for incorporation purposes. *Id.* In other words, contiguity is not "destroyed" by that publicly-owned property. *Id.* Publicly-owned property is any federally-owned, state-owned, or county-owned land or water. *Id.* § 5-1-20(2). Publicly-owned property will not destroy contiguity even if it already has been annexed by an existing municipality. *Id.* § 5-1-24(A)(2).

In addition to the plain language of these particular provisions, the General Assembly included various policy statements in the code and in Act 77 regarding incorporation. Section 5-1-22 of the South Carolina Code (Supp. 2010) reads,

> The General Assembly finds and declares the following to be the public policy of the State of South Carolina:
>
> (1) publicly-owned property may be incorporated or annexed by a municipality as provided by the state's statutory law;

however, publicly-owned property is for the benefit of all citizens of the State and is not the exclusive territory of any one municipality; and

(2) incorporation or annexation of publicly-owned property does not confer or convey to a municipality control over the publicly-owned property that in any way:

(a) interferes with the superior authority of the federal, state, or county government; or

(b) prevents an area seeking to be incorporated from using the publicly-owned property to establish contiguity as provided in Section 5-1-30(A)(4).

The preamble to Act 77 contains similar language:

> Whereas, municipal boundaries are limited only by the state's statutory law requirements; and
>
> Whereas, some municipalities already extend across county lines; and
>
> Whereas, if a publicly-owned property, such as a road or waterway, is within the exclusive territory of a single municipality, that municipality could extend its boundaries across the State, preventing areas that otherwise meet the statutory requirements for municipal incorporation from attaining local self-governance; and
>
> Whereas, the General Assembly finds and declares that publicly-owned property is for the benefit of all citizens of the State and not to be used as the exclusive territory of any one municipality.

We do not read the word "owned" as being limited to only fee simple ownership. When federal, state, county, or local governments have an interest in a road, there is little else the fee simple owner can do with that property. Not only does the evidence before us show that these bodies hold their interests in perpetuity, but should the fee simple owner object to the government's use, the government could simply condemn the property and

take title in fee simple. In these instances, there is little, if anything, the private owner could do to the detriment of the rights he or his predecessor granted to the public body. For all intents and purposes, the government therefore is the owner of the property for purposes of incorporation. As evidence of the absurdity created by Appellants' position, Town points out that one of the roads in question in this case has two owners: the inner two lanes of it are privately owned with the state holding a right of way, while the state owns the outer two lanes in fee simple. Declaring only one-half of the road to be publicly-owned property, while the general populace has an equal right to use the entirety of it regardless of which lane they happen to be traveling in, cannot be the result intended by the General Assembly. Such a result would be contrary to the General Assembly's express intent of fostering incorporation by not permitting public roads and waterways to destroy the required contiguity. The thrust of property being publicly-owned is that it be for the benefit of the public, which is not dictated solely by who owns the underlying earth.

However, we disagree with Town and the circuit court as to the ultimate application of the principle of contiguity. We agree with Appellants that the "but for" language used in section 5-1-30(A)(4) means that if the publicly-owned property simply were to be removed, the question is whether the properties then share a continuous border.[8] The record compiled by the parties for this appeal contains numerous, well-executed exhibits illustrating this principle. Perhaps the most convincing exhibits illustrated the "but for"

[8] Under this requirement, if two parcels touch even at just one point, they are contiguous. Appellants argue that in order to be contiguous, the parcels' boundaries must overlap to some degree, no matter how small. Under their view, if two parcels touch at just one point, they are not contiguous because under principles of geometry, one can pass through a single point only once and cannot return through it again. However correct this argument may be geometrically, it is not in tune with the statutory requirements involved here. Section 5-1-30(A)(4) does not require overlap between the properties; it only requires that they share a continuous border. It was conceded at trial that even when two properties touch at one point, the border they share is continuous.

concept of contiguity in a "MAD Magazine" style back-page folding manner,[9] where a map of two areas alleged to be contiguous was folded in such a manner as to eliminate the previously-annexed publicly-owned property. As an added illustration, the language of the statute requires taking a zipper and closing up the publicly-owned property so that it does not exist for these purposes. It is only then that one truly can determine if *but for* that publicly-owned property would the areas touch. While the specific property lines and geographic configuration of some areas may make this analysis somewhat difficult, every effort must be made to close up the publicly-owned property in question for purposes of this analysis. Under the analysis accepted by the circuit court and argued by Town, publicly-owned property may not be the only thing between the areas sought to be incorporated, yet the areas would still be contiguous. In numerous instances, for example, once the publicly-owned property was removed from the equation, other properties already annexed by Charleston intervened between what Town seeks to incorporate. In those cases, it is only by traversing the length of the road and around these other properties that one can connect the properties claimed to be contiguous. This affirmative use of publicly-owned property to establish contiguity ignores the plain "but for" language contained therein. Furthermore, it improperly inverts the language that publicly-owned property does not destroy contiguity into the proposition that publicly-owned property can affirmatively establish it.

Town argues that this construction of contiguity is contrary to the stated public policy of more freedom in using publicly-owned property for purposes of incorporation. Indeed, we just concluded *supra* that the strict interpretation of the word "owned" contravenes that policy and the intent of the General Assembly. However, the same is not true when applying the plain language of the contiguity definition. The code provides that publicly-owned property is "for the benefit of all citizens of the State and is not the

[9] For those not familiar with this reference, we suggest examining the following compilation of MAD Magazine fold-ins from the New York Times: Fold-Ins, Past and Present – Interactive Feature – NYTimes.com, http://www.nytimes.com/interactive/2008/03/28/arts/20080330_FOLD_IN_FEATURE.html#.

exclusive territory of any one municipality." *Id.* § 5-1-22(1). It also states that no municipality can exercise control over publicly-owned property in any way that prevents it from being used to establish contiguity under section 5-1-30(A)(4). *Id.* § 5-1-22(2)(b) (citing *id.* § 5-1-30(A)(4)). Those provisions, however, do not create an unfettered right inuring to unincorporated areas to use publicly-owned property for incorporation purposes. Instead, they specifically refer to and are controlled by the statute governing contiguity. Nothing in our interpretation of contiguity would enable an existing municipality to prevent an area seeking to incorporate from using publicly-owned property, and nothing places it in the hands of any one municipality. What prevents Town from using certain parcels of publicly-owned property to establish contiguity is not the manner in which Charleston uses it, but the limitations imposed by the statute.

Therefore, while we found strict adherence to the plain language of the definition of publicly-owned property produced results contrary to the express intent of the General Assembly, nothing compels us to do the same here. We must ensure that the absurd results exception to the plain language rule of statutory construction remains an exception and apply it only when the absurdity is clear. *See Harris*, 381 S.C. at 363 n.1, 673 S.E.2d at 426 n.1 ("While we may be concerned with the unintended consequences of applying the clear meaning of [the statute] in every conceivable circumstance, such concerns in this case fall short of an absurdity that would warrant applying this rule of statutory construction."). Here, we find no patent violation of the public policy announced by the General Assembly. Accordingly, we adhere to the plain language of the definition of contiguity and require incorporating areas with issues pertaining to contiguity to conceptually eliminate publicly-owned property from the map of their proposed boundaries and determine if the properties would then touch.[10]

[10] The contiguity provision for annexation contains the same "but for" language as the incorporation statute. *Compare* S.C. Code Ann. § 5-3-150 (annexation) *with* S.C. Code Ann. § 5-1-30(A)(4) (incorporation). The only difference is the annexation statute specifically states the property mentioned—which is not the familiar publicly-owned property—cannot be used to affirmatively establish contiguity. *Id.* § 5-3-150. While the

CONCLUSION

In conclusion, we hold Town's Petition was not sufficient under section 5-1-24, and therefore we reverse the order of the circuit court upholding Town's most recent attempt at incorporation. Accordingly, we remand this matter to the circuit court for entry of judgment in favor of Appellants. However, because of the need for clarity in this area, we reach the remaining issues presented by Appellants. In doing so, we affirm the circuit court's conclusion that the incorporation scheme at issue here is not unconstitutional special legislation. We further affirm the circuit court's holding that the term "publicly-owned property" does not require fee simple ownership by the federal, state, or county governments. However, we reverse the circuit court's analysis of contiguity and hold that it is not proper for an area seeking to incorporate to "run down" the length of a public road to add more properties to the proposed municipality.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion.

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incorporation statute does not have the same express statement that publicly-owned property does not affirmatively create contiguity, the fact both statutes have identical "but for" provisions is certainly probative of the General Assembly's intent that they are to operate in the same way. *See Gov't Employees Ins. Co. v. Draine*, 389 S.C. 586, 596, 698 S.E.2d 866, 871 (Ct. App. 2010) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 572-73 (1995) (holding statutory terms should be given the same meaning in different sections absent legislative intent to the contrary)).

JUSTICE PLEICONES: I concur, but write separately as I believe that the issue of the sufficiency of the petition is dispositive of the appeal. I therefore join only Part I of the majority's decision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerry H. Risher,	Respondent,
v.	
The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management,	Appellant,
State of South Carolina and South Carolina Coastal Conservation League,	Intervenors,
Of whom, South Carolina Coastal Conservation League is,	Appellant.

Appeal From Richland County
John McLeod, Administrative Law Court Judge

Opinion No. 26990
Heard May 25, 2010 – Filed June 20, 2011

AFFIRMED

Amy E. Armstrong and James S. Chandler, Jr., of S.C. Environmental Law Project, of Pawleys Island,

for Appellant South Carolina Coastal Conservation League, Davis Whitfield-Cargile, SC Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, of Charleston, for Appellant South Carolina Department of Health and Environmental Control.

Mary D. Shahid, of Nexsen Pruet, and R. Cody Lenhardt, Jr., of McNair Law Firm, PA, both of Charleston, for Respondent.

JUSTICE HEARN: Appellants South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, and South Carolina Coastal Conservation League appeal the final order of the Administrative Law Court reversing the denial of Respondent Jerry H. Risher's critical area permit application to construct a bridge over a portion of wetlands contained within his property on Fripp Island, South Carolina. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Risher is the record owner of a 0.475 acre piece of property identified as Lot 1, Block B, Subdivision 13, Fripp Island and Beaufort County, South Carolina (Lot). The Lot consists of 0.269 acres of upland high ground (buildable portion), and the remainder, which partially surrounds the buildable portion, is composed of wetlands. The Lot abuts a man-made, paved, non-vehicular foot/bike path on one side, which is maintained by the Fripp Island Property Owners Association.

One year prior to Risher's purchase of the Lot, his predecessor in title applied with the South Carolina Department of Health and Environmental Control (DHEC) and was approved for a critical area permit to construct a vehicular bridge across the non-buildable wetland portion of the Lot, connecting with the nearest vehicular road, Tarpon Boulevard. Risher purchased the Lot in 1997 and testified he understood his purchase to include

the bridge permit.[1] Risher did not have the funds to construct the bridge pursuant to the permit immediately after his purchase; therefore, the Lot remained undeveloped.

In 2006, Risher contracted with O'Quinn Marine Construction, Inc. to construct a bridge similar to the one previously submitted and approved by his predecessor in title. To that end, Risher submitted a permit application to DHEC's Office of Ocean and Coastal Resource Management (OCRM). The application requested permission to construct a concrete bridge measuring twelve feet wide, eighty-five feet long, at a height of three feet above the existing wetland grade. OCRM took the matter under advisement, but ultimately denied Risher's application based on its finding that the upland buildable portion of the Lot qualified as a coastal island which was too small to allow bridge access.

After exhausting DHEC's review options, Risher filed a Request for a Contested Case Hearing with the Administrative Law Court (ALC). Subsequently, both the South Carolina Attorney General's office and the South Carolina Coastal Conservation League filed motions to intervene before the ALC, which were granted. A hearing was held, and the ALC issued an order reversing DHEC's denial of Risher's permit request. The State filed a motion to alter or amend the judgment seeking to be dismissed as a party from the action. The State's motion was granted, and thereafter the ALC issued an amended final order noting the State's dismissal. Both DHEC and the Conservation League (collectively Appellants) appeal the ALC's determination and present the following issues to the Court on appeal:

I. Did the ALC err as a matter of law in admitting the opinion testimony of an unqualified witness and then relying upon that testimony for the basis of its decision?

[1] The permit awarded to Risher's predecessor in title is not an issue before the Court, as Risher failed to act on the permit prior to its expiration.

II. Did the ALC err in making itself a witness, when it made findings and conclusions based on its own on-site inspection?

III. Is the decision of the ALC supported by reliable, probative, and substantial evidence in the record?[2]

STANDARD OF REVIEW

The Administrative Procedures Act establishes this Court's standard of review for cases decided by the ALC and is set forth in Section 1-23-610(B) of the South Carolina Code (Supp. 2009), which provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[2] This issue addresses Appellants' combined issues two and four, which argue the ALC's determination that the Coastal Island Regulations are inapplicable to Risher's permit application, is unsupported by substantial evidence in the record.

A decision of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record.

LAW/ANALYSIS

I. Qualifications of Testifying Witness

Appellants first assert the ALC erred in admitting the opinion testimony of an unqualified witness and then relying upon that testimony for the basis of its decision. We disagree.

Lorick Fanning was called to testify on behalf of Risher. As will soon become apparent, Appellants consistently objected to Fanning's ability to testify as to the facts and circumstances of this case, as well as the conclusions he drew therefrom. On appeal, Appellants assert the ALC committed reversible error in allowing Fanning to repeatedly testify beyond the scope of what they perceived to be his area of expertise.

Fanning held undergraduate degrees in geology and forestry and had continuing education courses in land surveying, forestry, wetlands, and hydric soils, in addition to being registered as both a land surveyor and a forester in the State. The ALC qualified Fanning as an expert in forestry and land surveying, and, over objection, in the identification of wetland boundaries, including critical area boundaries. In support of his qualifications, Fanning testified he had delineated wetlands "at least 1000 times," with the vast majority of those delineations dealing with coastal topography and critical area determinations. Later in his testimony, Fanning described the role that soil interpretations play in the analysis of wetland boundary determinations, relying on his academic background in hydric soils as well as his degree in geology; however, Fanning did not hold himself out as an expert in soil classification. Again, over objection, the ALC permitted Fanning to testify as to the role soils played in his determination of the Lot's wetland and critical boundary.

Shortly thereafter, Appellants further objected to Fanning's ability to testify as to whether the Lot was a part of Fripp Island, based on his own

performance of a mean high water survey.[3] The ALC overruled Appellants' objections, and Fanning was permitted to testify that the Lot was indeed a part of Fripp Island. Appellants again objected to Fanning's testimony regarding whether or not the Lot was an integral part of the surrounding area's estuarine system.[4] Here, the ALC initially sustained Appellants' objection regarding Fanning's qualifications to testify; however, the court later reversed its ruling on Appellants' objection and allowed Fanning to be recalled for the purpose of testifying as to his opinion on the Lot's inclusion in the estuarine system.

"To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (citation omitted); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). "Qualification depends on the particular witness' reference to the subject." *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598.

"The qualification of a witness as an expert and admissibility of his testimony are matters largely within the discretion of the trial judge; however, the exercise of this discretion will be reversed where an abuse of discretion has occurred." *Payton v. Kearse*, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998) (citation omitted). As discussed in a recent opinion of this

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[3] The definition of mean high water and its relevance to the ALC's determination of whether the Lot is subject to DHEC's coastal island regulation is thoroughly developed in issue three below.

[4] An estuary, although not defined in our code of laws or regulations, has been defined as a "part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage." 16 U.S.C.A § 1453(7) (2000).

Court, trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).

> In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

Id.

In support of their contention that Fanning was unqualified to give his opinions on a variety of pertinent subjects, Appellants rely on two principal cases: *Nelson v. Taylor*, 347 S.C. 210, 553 S.E.2d 488 (Ct. App. 2001); and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). We disagree. The record shows the ALC properly considered both the amount and quality of Fanning's educational qualifications in the first instance, as well as the reliability of the proffered testimony on each subject once he was duly qualified. The court was vigilant in its efforts to ensure Fanning's testimony did not go beyond the scope of his expertise, and correctly decided that the matters upon which he testified were subjects about which he could reliably address. Consequently, the ALC did not abuse its discretion in either qualifying Fanning or in admitting his testimony.

II. Onsite Inspection by the ALC

Appellants next contend the ALC erred in making itself a witness when it made findings and conclusions based on its own on-site inspection. We find this issue is not preserved for review.

Following the close of all the evidence, the ALC decided *sua sponte* to view the lot on his own. Both parties consented on the record to his proposed visit. Following the judge's on-site inspection, he issued an order containing the following factual findings:

> Based on this Court's own inspection of the Petitioner's lot, it is possible to walk unassisted and without crossing any standing water from Tarpon Blvd. to the 0.269 acres of high ground at the location of the bridge proposed in the Permit Application.

The ALC also included the following footnote after this finding of fact:

> Petitioner's lot was admitted into evidence at the Court's suggestion and with the consent of all parties. On December 11, 2008, this Court inspected Petitioner's lot at low tide, giving special attention to the area that the proposed bridge would cross. I was left with a lasting impression that if the area between Tarpon Blvd. and the upland portion of Petitioner's lot was mowed, it would look like a lawn. Moreover, I could walk across that area without getting mud on my shoes.

Appellants, relying on Rule 605, SCRE, argue that a presiding judge should not testify in a trial as a witness. While Appellants acknowledge that the ALJ did not actually "testify," they maintain he clearly testified in his final order "when it was too late for any party to object or to even attempt to cross-examine or rebut this new witness."

The ALC, as the ultimate finder of fact in this action, was free to visit the Lot and draw its own conclusions therefrom. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (stating the ALC acts as the fact-finder in reviewing permitting decisions and is not restricted by the findings of the administrative agency); *see also Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 273-74, 363 S.E.2d 891, 895-96 (1987) (approving the ability of a trial judge, also acting as a trier of fact, to conduct an on-site inspection of the premises in question). The Chief Justice makes a persuasive argument concerning the problems that result from an ALC's inclusion of facts and observations not otherwise admitted as evidence, but when the ALC here included its first-hand observations of the Lot in its final order, Appellants failed to file a motion for reconsideration or a motion to alter or amend the judgment pursuant to Rules 29 or 68 of the Rules of Procedure for the Administrative Law Court, or Rules 59(e) or 60,

SCRCP.[5] Consequently, we decline to reach the merits of Appellants' contention because, in our view, it is unpreserved for this Court's review. *See Brown*, 348 S.C. at 519, 560 S.E.2d at 417 (stating issues not raised to and ruled upon by the ALC are unpreserved for appellate review).

III. Substantial Evidence to Support the ALC's Final Order

Finally, Appellants contend the ALC erred in concluding the Lot was exempt from Coastal Island Regulation because it was part of Fripp Island. We disagree.

The ALC found the South Carolina Coastal Zone Management Act[6] did not apply for three distinct and equally dispositive reasons. The ALC first determined the Lot was exempted from regulation establishing access to coastal islands under Regulation 30-12.N because Fripp Island was expressly excluded by the General Assembly's definition of coastal island in Regulation 30.1.D(11). 23A S.C. Code Ann. Regs. 30-12.N (Supp. 2009); 23A S.C. Code Ann. Regs. 30-1.D(11). Regulation 30-12.N explains that the section applies to applications for permits for bridges and docks as a means of obtaining access to coastal islands. Regulation 30-1.D(11) defines a coastal island as: "an area of high ground above the critical area of delineation that is

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[5] At the time this case was before the ALC, the issue of whether or not a Rule 59(e) motion was cognizable to an ALC had not been decided. This Court's pronouncement in *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009), which definitively stated that Rule 59(e) motions were permitted in ALC proceedings, was not published until April 20, 2009. *Id.* at 563, 677 S.E.2d at 586. However, despite any uncertainty that might have existed prior to *Home Medical Systems*, this Court has long enforced and relied upon issue preservation rules in administrative appeals. *Id.* at 562-63, 677 S.E.2d at 586.

[6] 23A S.C. Code Ann. Regs. 30-1, *et seq*. (Supp. 2009). Throughout the order, the ALJ refers to the regulations involved in this case as the "Coastal Zone Management Act." These regulations are, of course, not the Act itself, but instead are the regulations implementing and carrying out the provisions of that Act.

separated from other high ground areas by coastal tidelands or waters." The definition of coastal island further states, in pertinent part, that:

> The purpose of this definition is to include all islands except those that are essentially mainland, i.e., those that already have publicly accessible bridges and/or causeways. The following islands shall not be deemed a coastal island subject to this section due to their large size and developed nature: . . . Fripp Island . . . .

Id. § 30-1.D(11).

The State called as a witness Sidney C. Miller, who was duly qualified as an expert in the field of tidal datum.[7] Miller undertook a study of the Lot in order to compare the Lot's elevation to the benchmark tidal data which had previously been compiled by the National Oceanic and Atmospheric Administration (NOAA). Miller, in a previous employ, oversaw NOAA's project to establish tidal boundaries for South Carolina's coast. One of the points NOAA selected to benchmark was the Hunting Island Bridge (Bridge),[8] which connects Fripp Island to Hunting Island to the north. Using the data collected by the tide gauge at the Bridge, which was collected by NOAA over the course of three years and established mean high water (MHW), mean high high water (MHHW), mean low water (MLW), mean low low water (MLLW) and various other tidal datums,[9] Miller measured the

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[7] Tidal datum can be loosely defined as measurements of the sea level, accounting for different water depths and the heights of tides over the course of a certain period of time.

[8] Hunting Island Bridge is alternately referred to as Fripp Island Bridge in the record, but they are, in fact, one in the same.

[9] The coast of South Carolina experiences semi-diurnal tides, i.e. two high tides and two low tides in a twenty-four-hour day. Of the two high tides, one is generally higher than the other. "Mean high water" is defined as the nineteen-year average height of all the high tides at a given location over the nineteen-year tidal datum cycle. "Mean high high water" is defined as the

elevations at the Lot. Miller's calculations revealed no portion of the Lot was *below* MHW or MHHW, and in fact, the lowest spot of the Lot "is about a foot above mean high water." This conclusion was later confirmed by both of Risher's experts, David Youmans and Fanning, and was undisputed by Appellants.

The ALC determined that because the Lot was contiguous to land agreed to by all parties as being part of Fripp Island, and no portion of the Lot was lower than the established MHW or MHHW marks, then it was also a part of Fripp Island. Based on Regulation 30-1.D(11)'s exclusion of Fripp Island from its definition of a "coastal island," the ALC found the requirements of Regulation 30-12.N inapplicable. The court's determination of whether or not the Lot is a part of Fripp Island is not a legal question that is determined under the rubric of a regulation; instead, it is a finding of fact properly left within the purview of the fact finding body, and only reversible if unsupported by substantial evidence in the record.

A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence. S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). "Substantial evidence is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

In our view, the ALC's determination that the Lot is a part of Fripp Island, based on the tidal datum introduced at trial, is a reasonable one which is supported by substantial evidence. *See Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 188-89, 631 S.E.2d 899, 906 (2006) (stating where conflicting evidence exists as to an issue, the Court's substantial

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nineteen-year average of all the higher of the two daily high tides at a given location.

evidence standard of review defers to the findings of the fact-finder). Because this issue is dispositive of OCRM's sole reason of denying Risher's permit,[10] it is unnecessary for the Court to address the remaining grounds on which the ALC based its final order.[11] *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing, the decision of the ALC is

AFFIRMED.

PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., concurring in a separate opinion.

[10] As the ALC noted, OCRM also denied the permit application based on the mistaken assumptions that Risher did not own the land where the proposed bridge would connect with Tarpon Boulevard. However, Risher presented contrary evidence at the hearing indicating that he did, in fact, own the land connecting to Tarpon, and such evidence was not rebutted by Appellants.

[11] Appellants also contended the ALC erred in finding: (1) the Lot was exempted from Regulation 30-12.N based on the Regulation's definition of "upland areas"; and (2) that the Lot was not a part of the surrounding Estuarine System.

CHIEF JUSTICE TOAL: I concur with the majority but write separately to address the ALJ's site visit. While I agree that a judge sitting as the finder of fact may make a site visit, I believe that in this case the ALJ improperly found new facts upon the visit and impermissibly based the order upon those facts.

I agree with Appellant that the ALJ improperly found his own facts during his site visit and impermissibly based his order upon those findings. Recently, in *Tarpley v. Hornyak*, 174 S.W.3d 736 (Tenn. Ct. App. 2004), the Tennessee Court of Appeals thoroughly discussed the various state approaches to site visits by judges. In that case, the trial judge visited the site where a bridge allegedly caused a creek to flood a nearby property. The judge viewed the flood as it was happening and determined the bridge was causing the waters to back up and therefore was a nuisance. *Id.* at 738–39. The reviewing court of appeals found the judge based his ruling on his own observations at the site, rather than on the evidence presented by the parties. *Id.* at 740.

In determining whether the judge's observations during the site visit and reliance upon those observations was error, the reviewing *Tarpley* court first considered whether a fact-finder's observations are evidence. *Id.* at 742. The court first discussed Wigmore's position that the view is evidence, but only because the view is limited to matters that can be directly perceived without making an inference. *Id.* The *Tarpley* court explained that in the case before it, the only fact that could properly be determined from the site visit was that the land was flooded; the trial judge had to infer the flooding was caused by the bridge. *Id.* After reviewing multiple cases from other jurisdictions, the court held that a view may only be used to understand evidence already in the record, not to find new facts. *Id.* at 742–43. Thus, the court found the most important question was not whether the observations from a view are evidence, but rather what use a judge makes of those observations. *Id.* at 744.

The *Tarpley* court then explained that because a view is only properly used to assist in understanding the evidence presented, a fact-finder may not

base his ruling upon the information observed during a view. *Id.* at 745. The court found two important considerations for this limitation: a judge cannot be a witness in a case before him, and facts found during a view are not preserved in the record for appellate review. *Id.* at 746–48. Thus, the *Tarpley* court aligned with the majority of jurisdictions, holding:

> [A] trial judge has the inherent discretion to take a view of the site of a property dispute, a crime, an accident, or any other location, where such a view will enable the judge to assess the credibility of witnesses, to resolve conflicting evidence, or to obtain a clearer understanding of the issues. However, the view cannot be made to obtain additional evidence or to replace the requirement that evidence be produced at trial with the judge's personal observations of the site. Thus, the proper purpose of a view is to enable the judge to better understand the evidence that has been presented in court, not as a substitute for such evidence.

Id. at 749.

I find the Tennessee court's analysis and conclusion correct, and in the absence of South Carolina cases discussing this issue, would adopt the Tennessee approach.

In my view, two vital considerations ought to bear on the outcome of this case: the great deference accorded an administrative tribunal's finding, and the necessity for a full and accurate record. The bright line rule of review for administrative tribunals is that we will uphold a tribunal's finding if it is supported by substantial evidence in the record. S.C. Code Ann. § 1-23-380 (Supp. 2009); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135–36, 276 S.E.2d 304, 307 (1981). To ensure this deferential standard remains appropriate, it is critically important that the ALJ stays firmly within his role as a judge and not bleed into other roles, such as prosecutor, expert, or witness. Allowing an ALJ to cross those boundaries creates an unpredictable environment in the courtroom. This sort of abuse and stretching of authority is precisely why some parties justifiably are displeased with administrative tribunals. Further,

allowing an ALJ to gather his own evidence and base his order upon that evidence deprives the reviewing appellate court of its lifeblood: a full and accurate record of the proceedings in the trial court. The extreme deference accorded an ALJ only makes sense if the record is pure and complete. Therefore, we cannot allow a judge to present his own evidence after a site visit because that evidence is not properly in the record and is unavailable to the reviewing court.

Applying the above reasoning to the case at hand, I would find the ALJ improperly found new evidence during the site visit, and that basing his order upon that evidence was error. I concur with the result reached by the majority, however, because even without the ALJ's improper findings the record contains substantial evidence to support the ALJ's ruling.

The Supreme Court of South Carolina

In the Matter of William
Ashley Boyd, Petitioner.

ORDER

Respondent was suspended on August 9, 2010, for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

June 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawton Limehouse, Sr., Respondent,

v.

Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants.

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

Opinion No. 4805
Heard April 13, 2010 – Filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011
Withdrawn, Substituted and Refiled June 16, 2011

AFFIRMED

A. Camden Lewis and Ariail E. King, of Columbia; and Robert H. Hood, Deborah Harrison Sheffield, James B. Hood, and John K. Weedon, of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

THOMAS, J.: This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey). Damages (actual and punitive) were found in excess of $7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of $5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.[1]

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter

[1] Tony Soprano is a fictional television character involved in organized crime.

jurisdiction.[2] The federal court electronically transmitted this order to counsel on July 20. The Charleston County Clerk of Court also received an uncertified copy and filed the order on July 21. The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27.

On August 21, 2006, Limehouse filed a request for entry of default. The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22. Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default. On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRCP.

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages. On February 6, 2008, the jury returned a verdict for actual damages in the amount of $2.39 million and awarded punitive damages in the amount of $5 million. Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court. The trial court denied the motion, as well as the accompanying motion for a new trial. This appeal follows.

ISSUES ON APPEAL

I. Did the trial court err in exercising jurisdiction over the case after remand?

II. Did the trial court err in failing to set aside the entry of default?

III. Did the trial court err in the manner in which the default damages trial was conducted?

IV. Did the trial court err in allowing an award of punitive damages?

[2] Hulsey did not answer the complaint in federal court.

LAW/ANALYSIS

I. Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v. Davis, 267 S.C. 508, 511, 229 S.E.2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U.S.C. § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal . . . the defendant . . . shall give written notice thereof to . . . the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded*." (emphasis added).

In addition, 28 U.S.C. § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual

> expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court. See, e.g., Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3rd Cir. 1995); Hunt v. Acromed Corp., 961 F.2d 1079, 1081-82 (3rd Cir. 1992); Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984); Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979).

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] . . . support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy. In re Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] . . . [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail . . . a certified copy");[3] see also Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n.1 (4th Cir. 2007) (recognizing "a remand is effective when the district court mails a certified copy . . . see [1447(c)] . . . *or* . . . if the remand is

[3] The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See *infra*. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here.

based on the lack of subject-matter jurisdiction . . . when the remand order is entered, see [Lowe]")[4] (emphasis added).

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered.[5] We believe this ends the inquiry. However, because Hulsey's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v. City of Albuquerque, 889 P.2d 204, 207 (N.M. Ct. App. 1993) aff'd 889 P.2d 185 (N.M. 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction.

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[4] We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction.

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding; presumably because its interpretation of the first clause is irreconcilable with Lowe. Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c). However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c). See Bryan, 492 F.3d at 241.

[5] The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy.

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law. S.C. Const. art. V, § 11; see, e.g., Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299, 1304 (4th Cir. 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction). On the other hand, the jurisdiction of federal courts is limited to that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto. Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005); Victory Carriers Inc. v. Law, 404 U.S. 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution.") (internal citation and quotation marks omitted); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see The Federalist No. 82, at 515-16 (Alexander Hamilton) (Wright ed., 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain . . . jurisdiction[,] . . . unless it appears to have been taken away in one of the enumerated modes"); Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order.[6]

In this regard, the distinction between the majority and minority views becomes significant. Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded." (emphasis added). Section 1447(c) states: "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court *may* thereupon proceed." (emphasis added). Naturally, if a federal court takes the majority

[6] For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it.

view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time. Therefore, the lack of a mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded. However, under the minority view, this is not the case as a remand does not require the mailing. Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions.

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view.

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same. See, e.g., Nixon v. Moore, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result); Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 228 (Tex. 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] . . . interpret[Section 1447(c)] . . . to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view). However, the same rationale compels a different result under the minority view. See Nixon, 108 S.W.3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] . . . holding that jurisdiction transfers back to the state as soon as an order of remand is entered"); Quaestor, 997 S.W.2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand"). Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction.[7]

[7] We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case. Further, it is not inconsistent with our federalist form of government to allow a state court to

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional*." Int'l Lottery, Inc. v. Kerouac, 657 N.E.2d 820, 823 (Ohio Ct. App. 1995) (emphasis added) (citing Van Ryn v. Korean Air Line, 640 F. Supp. 284 (C.D. Cal. 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)); see Albuquerque, 889 P.2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"); see also Lowe, 102 F.3d at 735 ("'Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction'") (quoting Van Ryn, 640 F. Supp. at 285) (emphasis added). In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one. Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction.

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction. For instance, in Nixon the Missouri Court of Appeals recognized:

> The state court may not be immediately notified by the federal court of the order of remand. Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action. *There is nothing in the federal*

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exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased. See Lowe, 102 F.3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[.]") (quoting In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969).

> *statutory scheme prohibiting the parties from proceeding at that point.*

Nixon, 108 S.W.3d at 817 (emphasis added).[8] Thus, although requiring the mailing to make the remand order final, the same is not an indispensible jurisdictional requirement. See Bacon v. Dir. of Revenue, State of Mo., 948 S.W.2d 266, 267 (Mo. Ct. App. 1997) ("Subject matter jurisdiction cannot be conferred by . . . consent, and the lack thereof cannot be waived."). With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional. See In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 636, 686 S.E.2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties . . . .").

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object. See Beaufort County v. Butler, 316 S.C. 465, 467, 451 S.E.2d 386, 387-88 (1994) (stating "a procedural right may be waived . . . [and a] party who fails to object to the trial of a case . . . cannot later assert the trial court erred in trying the case . . ."); Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review . . . [and] . . . [a] contemporaneous objection is required to properly preserve an error for appellate review"); In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").[9]

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[8] This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it. Similarly it undermines the notion that the statement in section 1447(c): that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action. (emphasis added).

[9] The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 831 (Ct. App. 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's

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not preserved for appeal because it was not raised before the judgment was entered. To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative. The only question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S.C. at 511, 229 S.E.2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.").

notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.[10]

II. Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the

[10] Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rational of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004). Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support. Id.

a. Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand.[11] We are not inclined to adopt such a rule.

Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP.

In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served). However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer.

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand. Neither did the trial court. Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an

[11] Hulsey avers jurisdiction has not yet revested in the state court and maintains this as an alternative position.

answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time.[12] See State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP; or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method.[13] It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b. Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

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[12] This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

[13] The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard of Rule 60(b). Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[14] The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham[15] factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. Id.

In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated . . . ." While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion. Nor did it change the standard this court applies when reviewing such a decision. What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court.[16]

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[14] Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority.

[15] Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

[16] As our colleague in the dissent points out and the trial court's ruling indicates: in practice, both the bench and bar have been aware that the explanation for the default is significant. See New Hampshire Ins. Co. v. Bey

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v. P.V., Inc., 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.[17]

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. We find the record supports the finding that Husley's explanation for default is unreasonable.[18]

Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis).

[17] We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

[18] Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulsey's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a

Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 409 (stating the "issue before this [c]ourt . . . is not whether we believe good cause existed . . . [but] whether the trial court's determination is supported by the evidence"). Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer. Accordingly, we find the trial court did not abuse its discretion.

III. Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold. He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process; (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article; and (c) the trial court erred by improperly commenting on the facts.

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional. We must disagree.

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence. Roche v. Young Bros. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311, 314 (1998);

"failure to attempt" an answer. This issue would not have arisen had the rules been followed. Thus, we suggest there is ample "guidance" for Hulsey to know a party is not entitled to 130 days to answer.

Howard v. Holiday Inn, Inc., 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978); Doe v. SBM, 327 S.C. 352, 356, 488, S.E.2d 878 881 (Ct. App. 1997); Ammons v. Hood, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986).

On appeal, Hulsey provides no controlling authority[19] for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b. Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v. Todd, 296 S.C. 432, 435, 373 S.E.2d 704, 705-06 (Ct. App. 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S.C. at 356, 488 S.E.2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

[19] Hulsey cites Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

c. Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." Sierra v. Skelton, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992).

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on . . . Hulsey's website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website.

Hulsey argues this "constitute[s] an improper comment on the facts." Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order . . . which indisputably evidences that there was no prohibition from mentioning the case on the firm website." Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter. Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case. Accordingly, we find no error.

IV. Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process. Hulsey presents four separate arguments on this issue: (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award.

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation. Hulsey further argues this due process violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint.

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S.C. 75, 504 S.E.2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial).

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 385 S.C. 428, 441-42, 685 S.E.2d 163, 170 (2009).

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b. Instruction on punitive damages

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) (indicating punitive damages may be awarded for various reasons).

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). A trial court abuses its discretion in this regard when the ruling is not supported by the evidence or is based on an error of law. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2009).

Hulsey argues the trial court instructed the jury it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages. However, upon review of the verdict form we see nothing that required the jury to return punitive damages. Furthermore, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support that it instructed the jury it *had* to award punitive damages.

Initially, the trial court instructed the jury: "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willful, wanton, malicious, or in reckless

disregard for the plaintiff's rights." Although not specified, the basis for Hulsey's allegation of error is presumably premised upon the use of the word "duty" in a single statement in an otherwise lengthy and thorough instruction in which the trial court stated: "Under proper allegations, a [sic] plaintiff proves by clear and convincing evidence a willful, wanton, reckless, and malicious violation of his rights. It is not only the right, but the duty of the jury to award punitive damages." However, the trial court's very next sentence clarified the use of this term, stating: "Accordingly, *if* you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances." (emphasis added).

Upon review of the record we find the trial court properly instructed the jury on the law. See S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence). The trial court did not instruct the jury it *had* to award punitive damages, but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled. Therefore, we find no error.

c. Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules. Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family. Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth. We disagree.

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied. Further, we find no indication on the record that the trial court

suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages.

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review. See SBM, 327 S.C. at 356, 488 S.E.2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same).

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance.

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v. Donald Hawkins Const., Inc., 381 S.C. 347, 352, 673 S.E.2d 808, 811 (2009); Jamison v. Ford Motor Co., 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007). In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships." We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion.

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of $81 million. Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case. Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net

worth. The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation. Accordingly, we find no error.

d. Confirmation of punitive damages.

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages. We disagree.

Our supreme court recently indicated an appellate court's scope of review to be de novo. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).

The Fortis, court consolidated the post judgment due process analysis for punitive damages. In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. Fortis, 385 S.C. at 587-89, 686 S.E.2d at 185-86.

1. Reprehensibility

In considering reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 185, 686 S.E.2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. Id. at 185, n. 7, 686 S.E.2d at 587, n. 7.

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business. Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated. Finally, this conduct was not the result of accident or inadvertence. The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse. Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages.[20]

2. Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v. Horace Mann Ins. Co., 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9.2:1 ratio. See Fortis, 385 S.C. at 594, 686 S.E.2d at 188. Here, the punitive damage award

[20] The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered. The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable.

was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3. Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v. Citicorp Nat'l Servs. Inc., 312, S.C. 511, 518, 435 S.E.2d 864, 869 (1993) (affirming an award of $275,000 in punitive damages, in a slander case, where actual damages were found to be $25,000). Accordingly, we find no error here.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., dissents.

FEW, C.J., dissenting: I disagree with the majority's analysis of Issues I and II, and therefore dissent. Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV.

I. Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case. The plain language of 28 U.S.C. §§ 1446(d) and 1447(c) required that the motion be granted.

a. The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded." A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),[21] which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court." The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case. The word "thereupon" sets the point in time when the case is "remanded." Before a certified copy of the remand order is mailed, the state court may not proceed; afterwards, it may. The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met. This plain language is all that is necessary to resolve this appeal. A certified copy of the order of remand was never mailed to the state court clerk. Under 28 U.S.C. §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed. Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void. The trial court's failure to grant relief from the judgment was error and must be reversed.

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may proceed after remand. Their position is based primarily on two grounds. First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F.3d 731 (4th Cir. 1996). Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case.

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[21] Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

b. In re Lowe

The question before the court in Lowe was different from the question we face. Thus, the rule announced there is not applicable here. The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe: "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order." 102 F.3d at 736. The majority has incorrectly framed the issue by relying on this passage.

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded." However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs. I agree that Lowe sets the point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court lacked subject matter jurisdiction. 102 F.3d at 732-33, 736. The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified. 102 F.3d at 733. Six months later, a different federal magistrate judge granted the defendants' motion to reconsider. Id. After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court. Id. After concluding generally that remand orders

issued for lack of subject matter jurisdiction are not reviewable, 102 F.3d at 733-34, the Fourth Circuit framed the specific issue before it as follows: "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable." 102 F.3d at 734.

The court analyzed the question by focusing on 28 U.S.C. § 1447(d), and in particular the word "order."

> Subsection 1447(d) provides only that a remand "order" may not be reviewed; it does not condition reviewability on any other event. Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order."

102 F.3d at 734. The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d). In fact, Lowe does not even mention section 1446. The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event." Id. This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed." Therefore, the majority's contention that Lowe defines "remanded" is not correct.

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand. Noting that it has read sections 1447(c) and (d) independently, 102 F.3d at 734 n.3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself, the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing." 102 F.3d at 734. If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d).

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded." The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition. The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c).

c. Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one. The distinction is irrelevant in this case. Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded." 28 U.S.C. § 1446(d). This prohibition may not be avoided by labeling the mailing requirement procedural. The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes: 28 U.S.C. §§ 1446(d) and 1447(c). The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case. See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, . . . the court has no right to impose another meaning.").

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order. This court is not permitted to interpret a statute so as to render a part of it meaningless. See Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc., 102 F.3d 712, 715 (4th Cir. 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation."); Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.").

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient." I do not believe this court is free to be so loose with the requirements of federal law. If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly.

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered. The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition. See 11 U.S.C. § 362(a)(1) (2004 & Supp. 2010). In that instance, as in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time. See Ex Parte Reichlyn, 310 S.C. 495, 498-99, 427 S.E.2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay).

d. Bryan v. BellSouth Communications, Inc.

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v. BellSouth Communications, Inc., 492 F.3d 231 (4th Cir. 2007) (Bryan II).[22] As I will explain, the footnote supports the position I have taken in this dissent. To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c).[23]

[22] The first opinion was Bryan v. BellSouth Communications, Inc., 377 F.3d 424 (4th. Cir. 2004) (Bryan I).

[23] Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure. As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper

Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court. Bryan II, 492 F.3d at 234-35; Bryan I, 377 F.3d at 425. Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum. However, both parties have cited Bryan II as authoritative, as has the majority. Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law or in life, do so at their peril," I will give due regard to the footnote from Bryan II. Yeager v. Murphy, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987).

The footnote states:

> A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U.S.C.A. § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered . . . .

Bryan II, 492 F.3d at 235 n.1 (emphasis added). The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand: those made pursuant to section 1447(c) and those made for some other reason. In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed.[24]

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because Bryan presented a federal question." 377 F.3d at 427. The Fourth Circuit's decision in Bryan I demonstrates that it agreed. "On appeal, we held that the remanded claim was a federal claim . . . ." Bryan II, 492 F.3d at 234 (citing Bryan I, 377 F.3d at 432). Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c).

[24] The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth

Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court." The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal–When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U.S.C. § 1447(c)?[25]

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote. Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c). In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court." 492 F.3d at 241. This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote. Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed.

Circuit could proceed simultaneously. 492 F.3d at 235. In fact, the footnote appears at the end of this sentence in the text of the opinion: "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court." Id.

[25] It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c).

e. Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense." The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus." It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act. In most cases, however, this period is very brief; in any case it is a situation required by the plain language of federal statutes. Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute.[26]

I acknowledge that the result I propose appears at first to be harsh on the facts of this case. However, the section 1446(d) prohibition of "shall

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[26] While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk. See Peacock v. Thomas, 516 U.S. 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction . . . to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."). As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem. As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task. This is, in fact, exactly what happened in Lowe. After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court. 102 F.3d at 736. Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk.

proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.[27] However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

[27] Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.").

II. Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a. Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S.C. 1, 5 n.7, 536 S.E.2d 367, 369 n.7 (2000); Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c). See, e.g., Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) (decided after Sundown); Melton, 379 S.C. at 55, 664 S.E.2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993),

this court quoted Dean Lightsey and Professor Flanagan in listing four factors "relevant under" Rule 55(c), including "the reasons for the failure to act promptly." 312 S.C. at 50, 435 S.E.2d at 379 (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). Until Sundown, Bey Corp. was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp. gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b. The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a *requirement*, stating that the good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default." 383 S.C. at 607, 681 S.E.2d at 888. The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice." Id. Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court. First, the reason for the default is no longer merely a factor to be considered. Rather, the party seeking relief from default is required "to provide an explanation for the default." Second, the party seeking relief must give "reasons why vacation of the default would serve the

interests of justice." The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory.[28]

c. The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default: an attorney miscalculated the due date of the answer. The next question posed by Sundown was never considered by the trial court. Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable. The court found "no good reason" was presented. It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand." (emphasis omitted). At one point the trial court called this "confusion." The reasonableness of the explanation is certainly a valid factor to consider. However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice.

The facts of this case demonstrate the importance of the broader inquiry. The conduct of the lawyer in this case was not "reasonable." First, he should have filed an answer in federal court before the remand order was entered. See Rule 81(c)(2), FRCP. Second, when he learned of the remand order, he should have raced to the county courthouse to file it. A trial judge must consider the attorney's unreasonable failure to do this. However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider. First, the lawyer was apparently attempting to correctly calculate the deadline for his answer. Second, South Carolina law provides no guidance as to when the answer was actually due in state court. Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was.

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[28] The court went on to explain that the Wham factors come into play after the explanation is accepted by the court. "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider [the Wham factors]." 383 S.C. at 607-08, 681 S.E.2d at 888.

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice." Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. See generally Richardson, 383 S.C. at 618-19, 682 S.E.2d at 267. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer. This distinction is important to the interests of justice. Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear. However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *un*clear that no rule or court has ever defined it.

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result. In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S.C. 203, 125 S.E.2d 353 (1962). Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown.

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County. 240 S.C. at 204, 125 S.E.2d at 353. Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson. 240 S.C. at 205, 125 S.E.2d at 353. Before the motion to change venue could be heard, the NAACP removed the case to federal court. Id. The three Anderson residents represented by the lawyer filed a motion to remand, which was granted. Id. The same attorney then refiled the motion to change venue. Id. During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in

the State Court until the motion for change of venue had been decided." 240 S.C. at 205, 125 S.E.2d at 354.

The Lee attorney's failure to answer was unreasonable. The circuit judge "found as a matter of fact that counsel had misconceived the applicable procedural law." 240 S.C. at 206, 125 S.E.2d at 354. That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due." However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action. Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default." Id. (emphasis added).

d. Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice." I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different. The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court. It is not the task of this court to answer the question posed by Sundown. However, it is the duty of this court to see that the question gets answered. I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Randolph Frazier, Appellant.

Appeal From Lancaster County
Paul M. Burch, Circuit Court Judge

Opinion No. 4818
Heard January 11, 2011 – Filed April 13, 2011
Withdrawn, Substituted and Refiled June 10, 2011

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

LOCKEMY, J.: Randolph Frazier was convicted of first-degree burglary and sentenced to life in prison. On appeal, Frazier argues the trial court erred in (1) denying his motion to suppress, (2) allowing the victim and two neighbors to identify him in court, and (3) denying his motion for a mistrial based upon Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963). We affirm.

FACTS

On February 5, 2008, Sherika Sanders entered her apartment on Eula Street in Lancaster, South Carolina. Sanders noticed her back door was open and the blinds in the window adjacent to the door were askew. As Sanders looked around the first floor, she heard someone quickly descending the stairs from the second floor. Sanders watched to see who was descending the stairs and observed a man with gray hair and wearing a leather coat turn, look at her, and flee out the front door. Sanders fled out the back door and called for help. Patricia Cauthen, a neighbor, heard Sanders screaming, and shortly thereafter, observed a man she knew as Randolph Frazier peer in her apartment through her glass storm door and then flee. Another neighbor, Jerry Franklin Strain, also observed a black man with gray hair wearing a black jacket and black shoes run by his apartment.

Approximately a block from Sanders's apartment, Officer Susan Hunter was traveling along Chesterfield Avenue in an unmarked police car. Hunter observed a man walking from the Chesterfield Villas apartment complex, adjacent to the Eula Street apartments, and cross Chesterfield Avenue. Hunter thought the man looked similar to an individual who was the subject of an ongoing investigation. After passing the man, Hunter turned around and drove past the man a second time, but was unable to make an identification. Hunter turned onto a secondary street and proceeded around the 1200 block of Chesterfield Avenue. Before emerging onto Chesterfield Avenue again, Hunter received a radio dispatch regarding a burglary at the Eula Street apartments and indicating the suspect was a black male with gray hair wearing a brown jacket. Hunter responded to the radio dispatch indicating she located a subject matching the description walking west on Chesterfield Avenue. Officer John Poovey heard the radio dispatch and Hunter's radio call and responded to the scene in a marked patrol car. As

Poovey approached the scene, he observed Frazier walking "in a brisk manner" along Chesterfield Avenue.

Poovey and Hunter approached Frazier in their patrol cars at the same time, but from opposite directions. As Poovey approached Frazier, he observed him remove a dark object from his pocket or coat and throw it on the ground near a telephone pole. As Hunter approached Frazier, she also observed Frazier remove a dark object from his pocket, but lost sight of the object as Frazier passed behind a telephone pole. Poovey notified Hunter of his observation over the radio, exited his vehicle, and accosted Frazier. Poovey asked Frazier his name, where he was going, and where he was coming from. After establishing Frazier's identity, Poovey placed Frazier in handcuffs. Poovey also noticed Frazier was "sweating profusely." While Poovey talked with Frazier, Hunter searched the area around the telephone pole and discovered a black bag containing jewelry. As Frazier was being detained, Officer Pat Parsons arrived at the scene. Parsons took the jewelry bag to Sanders's apartment, and Sanders identified the jewelry as hers.

The police then conducted three "show-ups." An officer drove Sanders to the location where Frazier was detained, and Sanders identified Frazier as the man she observed in her apartment. Officer Kristin Grant drove Cauthen to the location where Frazier was detained. Grant stopped her vehicle at a stop sign on the opposite side of the street from Frazier, and Cauthen identified Frazier as the man who peered in her apartment after she heard Sanders scream. Finally, an officer drove Strain by Frazier. Strain recognized Frazier was wearing shoes and a jacket similar to those worn by the man he observed run past his apartment.

Frazier was indicted for first-degree burglary. At trial, Frazier moved to suppress the identifications. After a Neil v. Biggers, 409 U.S. 188 (1972), hearing, the trial court found the show-ups conducted by the police were not unduly suggestive and noted even if the show-ups were unduly suggestive they were nevertheless reliable. Ultimately, the jury found Frazier guilty of

first-degree burglary, and the trial court sentenced him to life in prison.[1] This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Frazier's motion to suppress?

2. Did the trial court err in allowing Sanders and two neighbors to make an in-court identification of Frazier?

3. Did the trial court err in denying Frazier's motion for a mistrial based upon Rule 5(a)(1)(C), SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." Id. "The trial [court's] factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. at 48-49, 625 S.E.2d at 220.

LAW/ANALYSIS

I. Motion to Suppress

Frazier argues the trial court erred in denying his motion to suppress the evidence emanating from his detention. Specifically, Frazier contends any evidence gathered was inadmissible because Hunter and Poovey lacked reasonable and articulable suspicion for the initial stop. We disagree.

The State concedes Frazier's stop was more than an investigatory detention. Thus, the pertinent analysis is not whether the police had

[1] Frazier has an extensive criminal record of property crimes dating back to 1973.

reasonable suspicion to stop Frazier and whether a subsequent on-the-scene warrantless seizure was reasonable. See State v. Rodriquez, 323 S.C. 484, 493, 476 S.E.2d 161, 166 (Ct. App. 1996) (outlining and applying seven factors for determining whether a warrantless seizure was reasonable). Rather we must determine whether the police had probable cause to arrest Frazier. "The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Id. "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id.

Based on a totality of the circumstances, we find Hunter and Poovey had probable cause to believe Frazier committed a burglary. At the time Frazier was arrested, Hunter and Poovey knew Frazier matched the general description of the subject suspected of burglarizing Sanders's apartment. Hunter observed Frazier leaving the area around the Chesterfiled Villas adjacent to, and less than a block from, where the burglary occurred. Poovey observed Frazier walking "in a brisk manner" and noticed Frazier was "sweating profusely" when he approached him. Both Hunter and Poovey observed Frazier discard a black bag shortly before they approached him. While Poovey accosted Frazier, Hunter found the black bag and determined it contained jewelry. Finally, Frazier was a person of interest in another burglary and a known individual to Hunter and Poovey. We conclude the circumstances within Hunter's and Poovey's knowledge were sufficient to lead a reasonable person to believe Frazier committed a burglary.

Finally, even if the seizure was unlawful, the black bag was discovered as a result of Hunter's and Poovey's observations not the illegal arrest. Thus, the exclusionary rule does not provide a remedy. See State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010) ("The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded."). Accordingly, the trial court properly denied Frazier's motion to suppress.

II. In-court Identifications

Frazier argues the trial court erred in allowing Sanders and two neighbors to identify him in-court because their identifications were based upon impermissibly suggestive show-ups. We disagree.

"An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). Thus, this court must determine whether the out-of-court identification process was unduly suggestive, and if so whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification occurred. Id. at 287, 540 S.E.2d at 447.

Single person show-ups are disfavored in the law and are suggestive. Id. at 287, 540 S.E.2d at 448. Because the out-of-court identification procedure used here was unduly suggestive, we must determine whether it was nevertheless so reliable that no substantial likelihood of misidentification occurred. Reliability is determined by examining the totality of the circumstances in light of the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Moore, 343 S.C. at 289, 540 S.E.2d at 448-49. Here, the police conducted show-ups for Sanders, Cauthen, and Strain. Each is discussed in turn.

First, Sanders was able to observe Frazier face-to-face from a distance of ten feet as he descended the stairs in her apartment. Sanders explained Frazier "looked at me and I looked at him" before he fled. Nothing in Sanders's testimony indicates any distractions during her opportunity to view Frazier. Although Sanders's description of Frazier's jacket was incorrect, she demonstrated a high degree of certainty in her identification during the show-up. Finally, Sanders testified fifteen to twenty minutes elapsed between her opportunity to view Frazier and the show-up. Based on the totality of the circumstances, especially considering the short length of time between the

burglary and the show-up, Sanders's out-of-court identification was sufficiently reliable such that no substantial likelihood of misidentification occurred.

Second, Cauthen observed Frazier's face shortly after the burglary as he peered into her apartment through her glass storm door. Even though Cauthen had just begun to eat at the time she observed Frazier, her testimony does not reveal any other distraction during her opportunity to view Frazier. Cauthen did not provide a description of Frazier's physical appearance, but testified she knew Frazier and recognized his face when he peered through her glass storm door. Cauthen also exhibited a very high degree of certainty in her identification of Frazier at the show-up. Grant explained the length of time between the burglary and Cauthen's identification of Frazier was approximately fifteen minutes. Placing particular weight on Cauthen's acquaintance with Frazier, an analysis of the totality of the circumstances reveals her out-of-court identification was sufficiently reliable such that no substantial likelihood of misidentification occurred.

Finally, Frazier's argument Strain's in-court identification was tainted by an impermissibly suggestive show-up is manifestly without merit. Although the police conducted a show-up with Strain, he was unable to identify Frazier at the show-up and did not identify Frazier in court. Accordingly, we decline to consider this argument. Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

Based on the forgoing, the trial court's determination the show-ups were not unduly suggestive was error. However, the trial court's finding the identifications by Sanders and Cauthen were nevertheless admissible was proper because they were sufficiently reliable such that no substantial likelihood of misidentification occurred. Accordingly, the trial court properly denied Frazier's motion to suppress the in-court identifications.

III. Motion for a Mistrial

Frazier argues the trial court erred in denying his motion for a mistrial because the State failed to disclose Diedre Sturdivant was unable to identify

him from a photographic lineup as the person she saw the day of the burglary. We disagree.

The decision to grant or deny a motion for mistrial is within the sound discretion of the trial court. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). The trial court's decision to deny a motion for mistrial will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. A mistrial should not be granted unless absolutely necessary, and in order to receive a mistrial the defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

Generally, the State has a duty to disclose evidence that is favorable to the defendant. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Rule 5, SCRCrimP. A defendant asserting a Brady violation must demonstrate the evidence the State failed to disclose was (1) favorable to the defendant, (2) in possession of or known to the State, (3) suppressed by the State, and (4) material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the proceedings. Id.

Here, the State proffered the testimony of Sturdivant, who explained that on the day of the burglary she observed a man with gray hair and wearing a leather coat run from the Eula Street apartments shortly before she heard a women scream. According to Sturdivant, later that day the police showed her a photographic line-up, but she was unable to identify the man in the leather coat. Frazier elicited the same testimony on cross-examination. Here, there is no prejudice to be remedied by a mistrial because both the State and Frazier elicited the favorable testimony from Sturdivant. See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for a mistrial is an extreme measure which should be taken only

where an incident is so grievous that prejudicial effect can be removed in no other way."). Accordingly, the trial court properly denied Frazier's motion for a mistrial.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

HUFF, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raquel Martinez, Employee, Respondent,

v.

Spartanburg County and S.C. Association of Counties Self-Insurance Fund, Carrier, Appellants.

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4839
Submitted January 4, 2011 – Filed June 15, 2011

REVERSED

Richard B. Kale, Jr., of Greenville, for Appellants.

Chadwick Dean Pye, of Spartanburg, and Kevin B. Smith, of Charleston, for Respondent.

WILLIAMS, J.: In this workers' compensation appeal, Spartanburg County and South Carolina Association of Counties Self-Insurance Fund (Spartanburg County) contend the circuit court erred in concluding the Workers' Compensation Commissioner's (Single Commissioner) order was insufficient to enable appellate review. Further, to the extent the order was sufficient, the circuit court erred in finding Raquel Martinez (Martinez) experienced an "unusual or extraordinary" condition in the course of employment to warrant finding Martinez suffered a compensable mental injury. We agree and reverse.[1]

FACTS

Martinez, a twenty-eight year law enforcement veteran, was employed as a master deputy forensic investigator with the Spartanburg County Sheriff's Office. As a forensic investigator, Martinez' job description included reporting to crime scenes, collecting evidence, and taking photographs of crime scenes. Additionally, Martinez came into contact with deceased bodies, attended autopsies, and processed fingerprints and other forensic evidence.

On April 4, 2005, Martinez was called to perform a forensic accident investigation involving the death of a child in Greer, South Carolina.[2] At this point, Martinez only knew a child was killed, and the accident involved a former employee of the Spartanburg County Sheriff's Office. When Martinez arrived at the scene, she was informed that Anthony Johnson, a Greenville County Deputy Sheriff and a former officer with the Spartanburg County Sheriff's Office, accidentally killed his two-year-old daughter while backing his patrol car out of his driveway.

As part of Martinez' standard forensic investigation, she took measurements of the child's body and photographed the front lawn of the

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Although the accident occurred in Greer, South Carolina, the Spartanburg County Sheriff's Office conducted the forensic investigation because the Greer Police Department did not have a forensic unit.

house, the child's body, the location of the patrol car, the interior of the house, and the undercarriage of the patrol car. Martinez testified all of these tasks were part of her ordinary job.

Approximately four months after the accident investigation, Ramon Martinez, Martinez' father (Father), received a phone call from Martinez' neighbor informing him that Martinez was "going up and down in the front yard, and she[] [was] talking weird." After arriving at Martinez' house, Father was unable to locate Martinez and discovered her car windshield was "smashed to pieces," and her house was in a state of disarray. Father discovered Martinez in some nearby bushes. At this point, Martinez wanted Father to meet an imaginary "little girl" that she was going to take on a trip. Martinez was admitted to Spartanburg Regional Medical Center and was diagnosed with delirium related to Benzodiazepine withdrawal symptoms after she abruptly stopped taking Xanax. Martinez continued to receive psychiatric and psychological treatment in 2005 and 2006.

Martinez subsequently filed a Form 50 claiming she experienced a mental breakdown as a result of the April 4, 2005 investigation. During the hearing before the Single Commissioner, Martinez indicated she had worked approximately one-hundred to one-hundred and fifty death calls, investigated "a couple dozen" crime scenes involving suspicious deaths, witnessed autopsies, and viewed burnt bodies at fire scenes as a forensic investigator. However, Martinez testified she never investigated a scene when a fellow officer was involved with the death of his own child, and she never investigated a violent crime when she knew the parties. Martinez further testified, "[She and Anthony Johnson] were not best friends. [But] [w]e were friends, and we were associates, and it's a police officer." After conducting the investigation, Martinez stated she cried about the child on the same night of the accident investigation and experienced nightmares.

Captain Stephen Denton, a twenty-year law enforcement veteran, testified the April 4, 2005 accident investigation ranked emotionally as the worst investigation in his career. In addition, he stated this accident was not ordinary because of Anthony Johnson's prior affiliation with the Spartanburg County Sheriff's Office. Moreover, Captain Denton indicated he noticed a

change in Martinez' demeanor on the date of the accident. Specifically, Captain Denton stated,

> I can't imagine anybody that was present at the scene felt too good, you know, for days to follow. You don't understand that unless you've seen it, and so it's very hard for someone else to judge that, that had not seen it. However, given a reasonable amount of time to recuperate from something like that – and I don't know what reasonable is, but within a week, week and a half, I could see that, you know, obviously, she was depressed, and within [a couple] three weeks, it showed in her work, in her habits.

Nonetheless, Captain Denton stated Martinez was fulfilling her ordinary job duties when she took photographs and measurements of the scene and moved the child's body. He also stated the Spartanburg County Sheriff's Office does not have a procedure that prohibits employees from working scenes involving victims they know.

The Single Commissioner concluded the April 4, 2005 investigation was not an "unusual or extraordinary" condition of Martinez' employment. The Single Commissioner also found Martinez failed to prove the April 4, 2005 investigation was the proximate cause of her mental breakdown. The Workers' Compensation Commission Appellate Panel (Appellate Panel) adopted the Single Commissioner's findings of fact and affirmed the Single Commissioner's order in its entirety. On appeal, the circuit court reversed and remanded the decision of the Appellate Panel. The circuit court concluded the Single Commissioner's order was not sufficiently detailed to enable appellate review, and was left to speculate whether the proper analysis was applied by the Single Commissioner. The circuit court also concluded even if the Single Commissioner's findings were appropriate, the findings focused on the ordinary aspects of Martinez' job and not whether Martinez' work was unusual compared to her particular employment. The circuit court further concluded the Single Commissioner's order was deficient as a matter of law on the issue of proximate cause, and the only conclusion that could be

drawn from the evidence was that the April 4, 2005 investigation proximately caused her mental breakdown. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Commission is the ultimate fact finder in workers' compensation cases and is not bound by the Single Commissioner's findings of fact. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the commission are presumed correct and will be set aside only if unsupported by substantial evidence. Lark, 276 S.C. at 135, 276 S.E.2d at 306.

LAW/ANALYSIS

A. Sufficiency of the Order

As an initial matter, Spartanburg County contends the circuit court erred in concluding the Single Commissioner's order was not sufficiently detailed to enable appellate review. We agree.

The findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Frame v. Resort Serv. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005).

The circuit court's order stated,

> In his Order, the Single Commissioner made three Findings of Fact which were relevant to the decision. Finding of Fact 14 was "investigating the death of a

> child, even the child of a former Sheriff's deputy, was not an unusual or extraordinary condition of Claimant's employment"; [Finding of Fact] 15 was Claimant failed to prove she encountered an unusual or extraordinary condition in her employment on April 4, 2005; and [Finding of Fact] 16 was Claimant failed to prove the accident investigation of April 4, 2005 was the proximate cause of her mental breakdown. The Single Commissioner gave no basis for his factual conclusion in Finding of Fact 14, and as to Findings of Fact 15 and 16, he simply stated to each of these two Findings of Fact that "[T]his finding is based on all the evident [sic] in the record."
> . . .
>
> Here, even though the orders from the Commission give a summary of some of the testimony presented during the hearing, no basis for the Finding[s] of Fact 14, 15, and 16 is provided and, thus, this Court is left to speculate if the proper analysis was applied by the Commission and whether the factual conclusions upon which the law was applied has a substantial basis in the record. [footnote omitted] When an administrative agency acts without first making proper factual findings as required by law, the proper procedure is to remand the case and allow the agency the opportunity to make these findings. [citation omitted]

The circuit court's order only emphasizes Findings of Fact 14, 15, and 16 as relevant to the Single Commissioner's decision. However, the Single Commissioner's order provides seventeen pages of evidence, sixteen findings of fact, and conclusions of law to support its decision. Additionally, the circuit court ignored other findings of fact the Single Commissioner discussed on the issue of whether Martinez experienced an "unusual or extraordinary" condition in her particular employment. These findings of

fact provide a sufficient basis to allow appellate review. Specifically, the Single Commissioner's order provides,

> Finding of Fact 5
>
> Claimant had been to an investigation previously while working for the Greenville County Sheriff's Department in which a child's head had been run over by a dump truck. Claimant testified that the accident did not bother her. She stated that if that type of situation bothered her, she would have never chosen to be a forensic investigator.
>
> Finding of Fact 6
>
> Claimant had investigated and worked up approximately 100-150 death cases in her 3-4 years as a forensic investigator. She had also investigated approximately 24 suspicious death/homicide cases and participated in approximately 24-26 autopsies. These investigations were a usual and ordinary part of her job. Claimant also testified about an investigation of an automobile accident in which an injured teenager had died in her arms.
>
> Finding of Fact 7
>
> When Claimant went to a crime scene, she would take up to 100 photographs and move the body to investigate anything underneath the body. She also took measurements and put up barriers to prevent people from seeing the accident scene. This was a part of her usual and ordinary job.

> Finding of Fact 10
>
> CPT Steve Denton testified that the accident scene of the child's death on April 4, 2005 was a terrible sight but that Claimant was doing her ordinary job that day in investigating the death of the child. CPT Denton required the Claimant to stay and perform the accident investigation because that was her job. The fact that the death scene involved the death of a child of a former Spartanburg County Deputy Sheriff did not remove the situation from being a part of her regular job.
>
> Finding of Fact 11
>
> Spartanburg County Sheriff's Office had no rule prohibiting its employees from going to accident scenes where they knew the victim. CPT Denton testified that he had always maintained and still maintained that no matter who the victim was, the Sheriff's Department investigators were required to work the accident scene.

The foregoing findings of fact from the Single Commissioner's order were sufficient to enable appellate review, such that the underlying reasons supporting the Single Commissioner's conclusion were not left to speculation. Consequently, we find the circuit court erred in concluding the Single Commissioner's order was deficient in this regard.

B. "Unusual or Extraordinary" Condition of Employment

Spartanburg County contends the circuit court erred in concluding Martinez experienced an "unusual or extraordinary" condition in her particular employment. We agree.

Mental or nervous disorders are compensable provided the emotional stimuli or stressors are incident to or arise from "unusual or extraordinary"

conditions of employment. Doe v. S.C. Dep't of Disabilities & Special Needs, 377 S.C. 346, 349, 660 S.E.2d 260, 262 (2008). The requirement of "unusual or extraordinary" conditions in employment, for a claimant to recover for a "mental-mental" injury refers to conditions of the particular job in which the injury occurs, not to conditions of employment in general. Frame, 357 S.C at 529, 593 S.E.2d at 496. To recover for mental injuries caused solely by emotional stress, or "mental-mental" injuries, the claimant must show she was exposed to unusual and extraordinary conditions in her employment and these unusual and extraordinary conditions were the proximate cause of her mental disorder. Tennant v. Beaufort Cnty. Sch. Dist., 381 S.C. 617, 621, 674 S.E.2d 488, 490 (2009).

The Single Commissioner found Martinez did not experience an "unusual or extraordinary" condition in her employment on April 4, 2005 because Martinez took photographs and measurements of the investigation scene and moved the child's body. Additionally, the Single Commissioner noted Martinez witnessed autopsies, previously investigated twenty-four suspicious death/homicide cases, and worked approximately one-hundred to one-hundred and fifty death cases. The Single Commissioner also noted the Spartanburg County Sheriff's Office did not have a rule prohibiting its employees from investigating scenes in which they knew the victim. Martinez does not dispute her job duties during the April 4, 2005 investigation were within her ordinary employment. However, Martinez contends the April 4, 2005 investigation was an "unusual or extraordinary" condition of her employment because the child's father, Anthony Johnson, was a former co-worker at the Spartanburg County Sheriff's Office.

While we empathize with the undoubtedly difficult nature of Martinez' job, we find Martinez' argument unpersuasive. Despite the tragic nature of the accident, the Single Commissioner found that based on Martinez' testimony, Martinez and Anthony Johnson's friendship was not such a close degree as to render the investigation an unusual and extraordinary condition of employment. Specifically, the Single Commissioner stated in Finding of Fact 4:

> Claimant contended that working the death case of a child who was run over by a fellow police officer was

> unusual and extraordinary. She stated that police officers have a "special bond." However, Claimant was not a close friend of the fellow officer, Anthony Johnson, although she worked on the same shift, and they would occasionally see each other at shift changes. She did not personally know the officer's wife or child, had never visited their home, and had never socialized with Anthony Johnson or his family.

Moreover, Captain Denton testified about the Spartanburg County Sheriff Office's procedure regarding investigations of victims that are acquainted with employees. Specifically, Captain Denton stated that, while in hindsight it may not have been the best protocol, he always required detectives to investigate incidents regardless of their relationship with the victims.[3]

Based on the evidence in the record, we conclude there is substantial evidence to support the Single Commissioner's finding that Martinez did not suffer an "unusual or extraordinary" condition of her particular employment. Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (stating substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action).

Because we reverse the circuit court and conclude there is substantial evidence that Martinez did not suffer an "unusual or extraordinary" condition in her particular employment, we need not address the issue of proximate cause. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598,

[3] Martinez did not know Anthony Johnson's daughter. Therefore, the lack of a personal relationship is additional evidence that Martinez did not experience an "unusual or extraordinary condition" on April 4, 2005 because the Spartanburg County Sheriff's Office policy specifically contemplates employees investigating scenes in which they are acquainted with the victim.

613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED.

SHORT, J., concurs. FEW, C.J., concurs in a separate opinion.

FEW, C.J., concurring: I concur in the portion of the majority opinion addressing the sufficiency of the commission's order. I also agree with the majority that the circuit court erred in reversing the commission. I write separately to address what I believe is the basis of the circuit court's ruling that Investigator Martinez' employment conditions were extraordinary and unusual. The circuit court did not rule on the basis of a lack of substantial evidence supporting the commission's factual finding. Rather, the circuit court reversed the commission on a question of law, finding the commission "failed to conduct the proper analysis." I also write to explain that the circuit court erred in reversing the commission's finding of a lack of proximate cause.

A. "Unusual or Extraordinary" Conditions of Employment

The circuit court reversed the commission's determination that Investigator Martinez' stressful employment conditions were not extraordinary and unusual based on a point of law, not based on the sufficiency of the evidence. In the introductory section of the order, before even describing the facts, the circuit court stated "the decision of this Court is that the Order from the Full Commission should be reversed because the analysis . . . is flawed by misapplying, as a matter of law, the 'unusual or extraordinary conditions of employment' test for determining compensability of mental injuries." (emphasis added). The circuit court made several other statements that it was ruling on a point of law and ultimately concluded: "The Commission's Order in the present case is void of [the analysis required by

Doe v. SCDDSN[4]] and, therefore, as a matter of law, is reversed." The circuit court never mentioned the substantial evidence standard nor even attempted to explain that the evidence was not sufficient to support the commission's decision. As Appellant stated in its brief, "the Circuit Court never addressed the Commission's findings of fact and never determined whether the findings were supported by substantial evidence." Rather, the circuit court ruled that the commission committed a legal error in its analysis of whether Investigator Martinez' conditions of employment were extraordinary and unusual.

The circuit court erred in reversing the commission on this point of law. Its ruling is based on a misapplication of the reasoning of Doe to the facts of this case. The only aspect of Investigator Martinez' employment conditions alleged to be extraordinary and unusual is the nature and character of the April 4, 2005 investigation. Otherwise, there is no suggestion that she encountered anything extraordinary or unusual in her work. Specifically, Investigator Martinez does not allege any change in her employment conditions over the long term.

Doe, on the other hand, was based on a change in the claimant's long-term employment conditions. The claimant in Doe was employed by the South Carolina Department of Disabilities and Special Needs as a licensed practical nurse. 377 S.C. at 348, 660 S.E.2d at 261. After she worked there for approximately eighteen years, the Department began to make changes in the operation of her facility, resulting in a dramatic increase in the level of noise and violence in her unit. Id.

> As a result [of the changes], the patient population in Claimant's unit changed from being a passive group to a mixed group of passive and aggressive patients. The record indicates Claimant's unit went from being "a fairly pleasant unit to work in" to being "kind of a dumping ground" where none of the other nurses wanted to work.

[4] Doe v. S.C. Dep't of Disabilities & Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008).

Id. The supreme court found that the conditions of the claimant's employment were extraordinary and unusual as a result of the changes at her facility. The supreme court discounted the fact that many of the individual incidents in the claimant's new environment were the same as before and focused on what was different about the new environment. The court stated:

> The record indicates that in the spring of 1997, with the new mix of passive and aggressive patients in Claimant's unit, behavior problems escalated because of the "domino effect" created when an aggressive patient acted out. Claimant had never before worked with a mix of passive and aggressive patients. No other unit had a mix of passive and aggressive patients. In fact, Department made changes after a DHEC survey criticized Department for housing diverse patients together.

377 S.C. at 350, 660 S.E.2d at 262.

The supreme court faulted the commission and the court of appeals for focusing on the fact that nurses had always dealt with aggressive patients and had even been injured by them before. Id. Thus, the supreme court rejected an analysis of similarities in individual incidents and focused instead on the differences caused by changes in long-term conditions. Id. ("A review of the record, however, indicates that the testimony [of similarities in individual incidents] relied upon is taken completely out of context and does not support the Court of Appeals' conclusion."). Focusing on the changes in overall, long-term employment conditions, the supreme court noted that neither of the two witnesses relied on by the court of appeals testified "that it was usual for a nurse to deal with a mix of passive and aggressive patients." 377 S.C. at 350-51, 660 S.E.2d at 262 (emphasis added). The supreme court found the overall, long-term changes in employment conditions resulting in a "mix of passive and aggressive patients" was an extraordinary and unusual condition of employment which caused the claimant's mental-mental injury and instructed the commission to award benefits. 377 S.C. at 351-52, 660 S.E.2d at 262-63.

Here, the commission applied the proper test for determining whether Investigator Martinez' conditions of employment were extraordinary and unusual. See Shealy v. Aiken Cnty., 341 S.C. 448, 459, 535 S.E.2d 438, 444 (2000) (holding the standard to be applied is whether the conditions of employment were extraordinary or unusual compared to the normal conditions of claimant's employment); see also Doe, 377 S.C. at 349-50, 660 S.E.2d at 262 (discussing Shealy). The commission described some of the investigations which "were a usual and ordinary part of [Investigator Martinez'] job." Those investigations included one "in which a child's head had been run over by a dump truck" and "an automobile accident in which an injured teenager had died in her arms." The majority described other similar investigations conducted by Investigator Martinez. Describing how she conducted investigations such as those, the commission made this factual finding:

> 7. When claimant went to a crime scene, she would take up to 100 photographs and move the body to investigate anything underneath the body. She also took measurements and put up barriers to prevent people from seeing the accident scene. This was a part of her usual and ordinary job.

The commission then focused on whether what she did on April 4, 2005, was extraordinary and unusual compared to her usual and ordinary job and made this factual finding:

> 10. [Captain] Steve Denton testified that the accident scene of the child's death on April 4, 2005 was a terrible sight but that Claimant was doing her ordinary job that day in investigating the death of the child. [Captain] Denton required the Claimant to stay and perform the accident investigation because that was her job. The fact that the death scene involved the death of a child of a former Spartanburg County Deputy Sheriff did not remove the situation from being a part of her regular job.

In Doe, the supreme court ruled that despite the similarities in individual incidents, there were changes in the overall, long-term conditions of the claimant's employment, making the conditions which caused the injury extraordinary and unusual. 377 S.C. at 349-50, 660 S.E.2d at 262. Here, Investigator Martinez does not argue that there were any long-term changes. Rather, she argues that her mental-mental injury arose out of a single investigation. When she finished this particular investigation, she continued working on the same type of cases in the same manner as before. Had she been switched to an overall pattern of investigating only particularly traumatic cases, then perhaps the reasoning of Doe would apply. Under these facts, however, it does not.

Finally, I emphasize that one particular event in a claimant's work environment can constitute extraordinary and unusual conditions such that any resulting mental-mental injury would be compensable. See, e.g., Powell v. Vulcan Materials Co., 299 S.C. 325, 326, 384 S.E.2d 725, 725 (1989) (affirming commission's award of benefits where claimant suffered "mental, emotional, and psychological injury" following a single-incident verbal altercation with a supervisor). In such a case, however, whether the individual event meets the test for extraordinary and unusual set forth by the supreme court in Shealy is a question of fact for the commission to decide. On appeal from the commission's decision, if substantial evidence supports it, an appellate court must affirm. Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785-86 (Ct. App. 2007). In this case, the circuit court never ruled as to whether substantial evidence supports the commission's decision that Investigator Martinez' conditions of employment were not extraordinary and unusual. As the majority has explained, the commission's decision is supported by substantial evidence.

B. Proximate Cause

The circuit court also reversed the commission's finding of a lack of proximate cause. The circuit court stated:

> [T]he Commission's finding [as to proximate cause] is clearly erroneous, applying the substantial

> evidence standard of review, because the only conclusion that can be drawn from the medical information is that there exists the necessary showing of proximate cause to link the accident investigation of her friend's child's death and her mental breakdown.

In making this statement, the circuit court ignored the following findings of fact made by the commission:

> 8. Claimant had other stressors in April 2005 that were not work related, including the death from AIDS of her ex-husband's cousin with whom she was very close. Claimant was treated for anxiety, insomnia, and depression from these non-work related situational stressors including medications and hospitalization.
>
> 9. Claimant did not mention the investigation involving the death of a child on April 4, 2005 until approximately four months later after being hospitalized for an emotional breakdown.
>
> 16. Claimant failed to prove that the accident investigation on April 4, 2005 was the proximate cause of her mental breakdown, said finding being based on all the evidence in the record.

The record contains ample evidence to support these findings. For example, on April 19, 2005, two weeks after Investigator Martinez' investigation into the death of her fellow officer's child, she went to her family doctor for stress. In the medical note for that visit, the doctor wrote:

> She is very upset and crying. A very close friend and relative, a cousin with whom she was very close over the years, passed away yesterday. She is very upset about it. They were very close ever since they were

> little kids. She is very upset that she did not get to the hospital in time to say goodbye before he passed away.

Investigator Martinez returned to her family doctor on eight occasions between April 25 and June 24, 2005, and did not mention stress from the April 4 investigation even once. On August 7, 2005, Investigator Martinez was admitted to Spartanburg Regional Medical Center for "behavior suggesting psychiatric problems." Her treating psychiatrist diagnosed her with Benzodiazepine withdrawal delirium, depression, and anxiety disorder. In the discharge summary on August 9, 2005, the psychiatrist stated: "The patient apparently had recent problems with uncontrollable hypertension and also had problems with anxiety, insomnia and depression related to the death of her best friend who apparently was a male cousin." Martinez was admitted to the Carolina Center for Behavioral Health for a psychiatric evaluation on August 10, 2005. One of the forms filled out for this admission contains a section entitled "Precipitating Events," in which it is noted that Martinez stated: "My cousin died mid April 2005 and I took Xanax for my nerves. I stopped taking Xanax 1-2 weeks ago and became psychotic."

These medical records contain no mention of the April 4, 2005 investigation or any other job-related stress. In light of these facts, the commission's determination that the claimant failed to prove proximate cause is supported by substantial evidence. The circuit court erred in reversing the finding.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip Danny Tims, Respondent,

v.

J.D. Kitts Construction, Employer, and SCHBSIF, Appellants.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4840
Submitted May 1, 2011 – Filed June 15, 2011

AFFIRMED

Weston Adams, III and Helen F. Hiser, both of Columbia, for Appellants.

John S. Nichols and Blake A. Hewitt, both of Columbia; and Gary W. Poliakoff and Raymond P. Mullman, Jr., both of Spartanburg, for Respondent.

GEATHERS, J.: In this workers' compensation case, J.D. Kitts Construction (Employer) and the South Carolina Home Builders Self-Insured Fund (Carrier) (collectively Appellants) seek review of the circuit court's

order affirming a decision of the South Carolina Workers' Compensation Commission (Commission). The Commission's decision required Appellants to pay medical expenses incurred by Phillip Tims (Claimant) related to heatstroke he suffered while in the care of a home health worker provided by Appellants. We affirm.

FACTS/PROCEDURAL HISTORY

Appellants began paying medical benefits and lifetime indemnity benefits to Claimant in 2006 after he fell from a twelve-foot scaffold at work and sustained a spinal cord injury resulting in quadriplegia. Claimant stayed at Greenville Memorial Hospital for approximately five weeks and at a rehabilitation facility for the next three months. He then began living in the home of his former wife, Patricia Holcombe (Mrs. Holcombe), and Appellants began providing home healthcare services as prescribed by Claimant's treating physician. After using other home healthcare providers for Claimant, Appellants insisted on using HomeWatch Caregivers of Greenville (HomeWatch).

On June 9, 2007, when the outside temperature approached a hundred degrees, a HomeWatch caregiver, Dana Earle, took Claimant on an outing to Wal-Mart at his request. While there, Earle realized she had lost her car keys and left Claimant in the back seat of her unair-conditioned car while she went to look for them. By the time Earle returned with Claimant to Mrs. Holcombe's home, Claimant was unconscious.

Claimant was taken to Greenville Memorial Hospital, where he was diagnosed as being in a coma due to heatstroke.[1] He came out of the coma approximately one week later, but then lapsed back into a coma. At the time

[1] Two days after being admitted to the hospital, a blood test indicated that Claimant had been exposed to cocaine sometime within ten days prior to the test. However, the attending physician at the hospital determined that the most likely cause of Claimant's condition on the day in question was heatstroke, "plus or minus infection."

of the hearing before the single commissioner, Claimant had come out of his coma but was still at the hospital, on a ventilator and unable to speak, and had incurred some brain damage.

Claimant sought medical benefits related to his heatstroke, and Appellants denied this claim. The single commissioner ordered Appellants to pay these benefits, and the Appellate Panel affirmed the order. The Appellate Panel found that Claimant's heatstroke was a natural consequence of his original work-related injury—his quadriplegia—because it prevented him from extricating himself from his caregiver's overheated car. The circuit court affirmed the Appellate Panel's order to pay the benefits.[2] This appeal followed.

ISSUES ON APPEAL

I. Did the Appellate Panel commit an error of law in concluding that Claimant's heatstroke was within the compensable range of foreseeable consequences of his original work-related injury?

II. Was the Appellate Panel's finding of fact that Claimant's heatstroke was a natural consequence of his original work-related injury supported by substantial evidence in the record?

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[2] The circuit court disagreed with the Appellate Panel's conclusion that section 42-15-70 of the South Carolina Code (1985) provides additional support for the claim. Although Claimant has not included this issue in his Statement of Issues on Appeal, he appears to raise it as an additional sustaining ground in a footnote. We decline to reach this issue as it is unnecessary for our disposition of this appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding that it is within the appellate court's discretion whether to address any additional sustaining grounds); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Specifically, section 1-23-380 of the South Carolina Code (Supp. 2010) provides that this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law.[3] See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct. App. 1999), modified on other grounds, 339 S.C. 68, 528 S.E.2d 667 (2000), (interpreting § 1-23-380). Section 1-23-380 allows reversal of a factual finding of the Appellate Panel only if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

[3] The pertinent language of section 1-23-380 is as follows:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The 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: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

> In workers' compensation cases, the Commission is the ultimate factfinder. This Court must affirm the findings of fact made by the [Appellate Panel] if they are supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) (citations and internal quotations marks omitted).

In reviewing workers' compensation decisions, the appellate court ascertains "whether the circuit court properly determined whether the [A]ppellate [P]anel's findings of fact are supported by substantial evidence in the record and whether the [P]anel's decision is affected by an error of law." Baxter v. Martin Bros., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006) (citations omitted).[4]

The appellate court is prohibited from overturning findings of fact by the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005). The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient

[4] The South Carolina General Assembly has since changed the review procedure for workers' compensation matters to eliminate review by the circuit court, but the change does not affect the procedure applicable to this case. See S.C. Code Ann. § 1-23-380 (Supp. 2010) (regarding judicial review of administrative decisions); id. § 42-17-60 (concerning appeals of Commission awards).

substance to afford a reasonable basis for it. Sharpe v. Case Produce Co., 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997), rev'd on other grounds, 336 S.C. 154, 519 S.E.2d 102 (1999).

LAW/ANALYSIS

I. Error of Law

Appellants assert that the Appellate Panel committed an error of law in concluding that Claimant's heatstroke was within the range of compensable consequences of his original work-related injury. Appellants argue two independent, intervening causes of Claimant's heatstroke broke the chain of legal causation:[5] (1) Claimant's "unreasonable" decision to ride in his caregiver's car without air-conditioning on an extremely hot day, and (2) the caregiver's negligent or criminal behavior in allowing Claimant to become overheated. We will address each of these arguments in turn.

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[5] To establish that an injury is a natural consequence of a work-related compensable injury, the Claimant must show that the work-related injury proximately caused the second injury. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995) (holding that as long as a causal connection is present, the compensability of the subsequent condition is beyond question).

> Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's action. Legal cause is proved by establishing foreseeability. Legal cause is ordinarily a question of fact . . . . Only when the evidence is susceptible to only one inference does it become a matter of law for the court.

Mellen v. Lane, 377 S.C. 261, 278-79, 659 S.E.2d 236, 245-46 (Ct. App. 2008) (citations and internal quotation marks omitted).

A. Claimant's Decision

Appellants contend that Claimant's decision to ride in his caretaker's unair-conditioned car on a very hot day was unreasonable, and, thus the decision constituted an independent, intervening act that was unforeseeable. We disagree.

Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation. Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954); see also 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 10.01, 10-1 (2010) (stating that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the claimant's own intentional conduct).

> Our courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable. . . . [N]ew injuries resulting indirectly from treatment for the original injury are also compensable. . . . [C]ircumstantial evidence may be used to prove causation. The causal sequence . . . may be more indirect or complex, but as long as the causal connection is in fact present the compensability of the subsequent condition is beyond question.

Mullinax, 318 S.C. at 436-37, 458 S.E.2d at 79-80 (citations and internal quotation marks omitted).

In the present case, the court must determine whether the "accident"–becoming trapped in an overheated car–was caused by Claimant's original compensable injury—his quadriplegia. Appellants cite Sanders v. Wal-Mart Stores, Inc., in support of their argument that Claimant's decision to ride in his caretaker's unair-conditioned car on a very hot day was an independent, intervening act that broke the chain of causation. 379 S.C. 554, 666 S.E.2d 297 (Ct. App. 2008). We believe Sanders is distinguishable.

In Sanders, the claimant had suffered a compensable injury to her knee while descending a ladder at work. Id. at 557, 666 S.E.2d at 299. After the knee injury resolved, the claimant fell down a stairway in her home and again injured her knee. Id. The court determined that the claimant's fall down the stairway was not caused by her prior knee condition and the fall was an intervening act. Id. at 560-61, 666 S.E.2d at 300-01. Unlike the claimant's fall in Sanders, Claimant's compensable injury, quadriplegia, caused his heatstroke because it prevented him from extricating himself from an overheated car. Further, Claimant's quadriplegic condition continued up to, during, and after the accident for which he claimed compensation (becoming trapped in an overheated car and suffering heatstroke). In contrast, the claimant's original knee injury in Sanders had resolved over a year before her fall down the stairway. Id. at 557, 666 S.E.2d at 299.

Appellants also cite case law from other jurisdictions in support of their argument that Claimant's decision to ride in his caretaker's car was unreasonable.[6] However, the present case is distinguishable from the facts in the cited cases, most of which illustrate claimants' decisions to engage in certain conduct that would likely result in further injury. In those cases, the

[6] See Allen v. Indus. Comm'n of Ariz., 602 P.2d 841 (Ariz. App. Div. 1979); Amoco Chemical Corp. v. Hill, 318 A.2d 614 (Del. Super. Ct. 1974); Johnnie's Produce Co. v. Benedict & Jordan, 120 So. 2d 12 (Fla. 1960); Sullivan v. B & A Constr., Inc., 120 N.E.2d 694 (N.Y. 1954); Sinclair Prairie Oil Co. v. State Indus. Comm'n, 54 P.2d 348 (Okla. 1936); Anderson v. Westfield Grp., 259 S.W.3d 690 (Tenn. 2008); Jones v. Huey, 357 S.W.2d 47 (Tenn. 1962).

claimant was characterized as having full knowledge of the probable consequences of his actions. In the present case, Claimant's decision to ride in his caretaker's car cannot be characterized in this manner. He could not have predicted that his caretaker would leave him in the car while she went to look for a set of lost keys. Therefore, Claimant's decision was not unreasonable.

B. Caregiver's Negligence

Appellants also contend the caretaker's negligence was an independent, intervening act that was unforeseeable and thus broke the chain of causation. We disagree.

No statute or case in South Carolina specifically addresses injuries caused by the negligence of persons other than physicians who are connected with the process of treatment or convalescence.[7] However, other jurisdictions recognize that these injuries are "within the compensable range of consequences." Larson's § 10.09(3), 10-24 to -25. This includes orderlies, first aid personnel, physical therapists, and even hospital maintenance staff. Id.

Here, Claimant's physician had ordered the services of a home healthcare personal staffing company. Carrier engaged the services of Medical Services Company (MSC), a business whose job was to locate and employ home healthcare companies. In June 2007, MSC hired HomeWatch to provide services to Claimant. Shortly before June 9, HomeWatch sent Earle to provide these services. Appellants maintain Earle was nothing more than a "babysitter" and she cannot be considered to have been providing "medical treatment" such that her negligence was a foreseeable consequence of Claimant's original work-related injury. We disagree.

[7] As to the negligence of physicians, section 42-15-70 of the South Carolina Code (1985) provides that the consequences of any "malpractice by a physician or surgeon furnished by [the employer]" shall be deemed part of the original work-related injury and shall be compensated for as such.

The services provided by Earle were medically necessary for a quadriplegic who lived in a private home rather than in a fully-staffed residential treatment facility. Although the services by themselves may not have required any heightened degree of skill, they were connected with the process of treatment of a quadriplegic, and thus the negligent delivery of these services by Appellants' chosen caregiver was a foreseeable consequence of Claimant's condition. Several weeks before the day of the incident, one of Claimant's treating physicians made note of Claimant's psychological problems due to his "inability to get out of the house . . . enough," and various physicians had recommended excursions for his emotional well-being. Therefore, the June 9 excursion was within the scope of Earle's care of Claimant.

Appellants also argue that Claimant's written care plan with HomeWatch did not include transportation services, and, therefore, it could not be considered part of his treatment. However, the restrictions of the written care plan did not render Earle's provision of transportation unforeseeable. It is foreseeable that a home health client may initially indicate no need for transportation but later request his caregiver to take him on an errand.

Appellants compare this case to a Florida case in which a pedestrian who previously suffered a work-related injury requiring him to use crutches was struck by a vehicle as he was crossing the street. See D'Angelo Plastering Co. v. Isaac, 393 So. 2d 1066, 1068 (Fla. 1980) (holding that the unknown driver's negligence was an independent, intervening cause of the claimant's injuries). However, Claimant was not injured by the negligence of an independent third party. Rather, he was injured by an act of his own caregiver, who was employed by the home health company chosen by Appellants. Injuries due to the negligence of non-physicians connected with the process of treatment or convalescence are within the compensable range of consequences of the original work-related injury. Larson's § 10.09(3).

Based on the foregoing, the Appellate Panel properly concluded that neither Claimant's decision to ride in his caregiver's car nor his caregiver's negligence was an independent, intervening cause sufficient to break the chain of causation.

II. Substantial Evidence

In addition to asserting an error of law on the part of the Appellate Panel, Appellants contend that substantial evidence did not support the Appellate Panel's finding of fact on causation, i.e., whether Claimant's heatstroke was caused by his quadriplegia. Appellants maintain that the only evidence supporting the Appellate Panel's version of the events was Mrs. Holcombe's account of what Earle had told her and that Mrs. Holcombe herself doubted the truth of Earle's account. We disagree.

"In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]." Id. "It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]." Id. Further, the trier of fact has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony. See Holcombe v. Dan River Mills, 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) ("The Commission in workers' compensation cases sits as a jury does. It is elementary that a jury may believe part or all of a witness's testimony[.]").

In fact, the appellate court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty, 363 S.C. at 621, 611 S.E.2d at 301. If the Appellate Panel's factual findings are founded on evidence of sufficient substance to afford a reasonable basis for them, they must be upheld. Sharpe, 329 S.C. at 543, 495 S.E.2d at 794.

We believe there was a reasonable probability the key facts could be as related by Mrs. Holcombe's testimony concerning Earle's account of events, to which Appellants never objected.[8] Earle's version of the key events is consistent with the attending physician's assessment of Claimant's condition upon admission to the hospital. It is also consistent with Mrs. Holcombe's testimony that on the day before the incident, Claimant had asked Earle to take him to Wal-Mart. Notably, Mrs. Holcombe testified that she believed the part of Earle's account regarding losing her keys and leaving Claimant in an overheated car because it was consistent with the attending physician's diagnosis of heatstroke. Although Mrs. Holcombe wavered on this point during cross-examination, Earle's version of events had similarities to Mrs. Holcombe's deposition testimony regarding Claimant's version of the day's events. Claimant had indicated that Earle took him to Wal-Mart and left him in the car and he started feeling bad at that point. Appellants did not object to the introduction of any of this testimony.

Based on the foregoing, the evidence in the record would allow reasonable minds to reach the conclusion the Appellate Panel reached—that Claimant became trapped in his caregiver's overheated car and suffered from heatstroke because his quadriplegia prevented him from extricating himself from the car. Hence, the Appellate Panel's finding to this effect was supported by substantial evidence. See Pierre, 386 S.C. at 540, 689 S.E.2d at

[8] Although section 1-23-330(1) of the South Carolina Code (2005) provides that the South Carolina Rules of Evidence do not apply in workers' compensation proceedings, hearsay testimony is inadmissible in workers' compensation proceedings unless corroborated by facts, circumstances, or other evidence. Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000). At the hearing before the single commissioner, Appellants made no hearsay objections to Mrs. Holcombe's testimony regarding Earle's version of the events. In any event, as discussed above, Mrs. Holcombe's testimony about what Mrs. Earle told her was consistent with the medical testimony and with Claimant's statements to Mrs. Holcombe before and after the incident. Therefore, the challenged testimony is sufficiently reliable to constitute substantial evidence supporting the Appellate Panel's findings.

618 ("Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.") (citations and internal quotation marks omitted) (emphasis added).

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ERIE Insurance Co. as
Assignee and Subrogee of
Fountain Electric, Inc., Respondent,

v.

The Winter Construction
Company, Appellant.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4841
Heard December 7, 2010 – Filed June 15, 2011

REVERSED

Richard J. Morgan, of Columbia and C. Walker Ingraham, of Atlanta, for Appellant.

Mason A. Summers, Francis M. Mack and Emily R. Gifford, all of Columbia, for Respondent.

WILLIAMS, J.: The Winter Construction Company ("Winter") appeals the trial court's order granting summary judgment to ERIE Insurance Company ("Erie") and finding the administrative burden provision in a subcontract is an unenforceable penalty. We reverse.

FACTS

On March 14, 2005, Winter entered into a construction contract with Building Equity Sooner for Tomorrow Corporation ("BEST") for construction of Greenville Senior High School (the "Project"). The Project was divided into two phases. Phase 1 was comprised of a 100,000 square foot school and a 70,000 square foot addition. Phase 1 construction was intended to be completed by December 31, 2006, to accommodate students after the winter break. Phase 2, a 33,000 square foot gymnasium, was to be completed in June 2007.

On or about June 27, 2005, Winter entered into a subcontract with Fountain Electric Company, Inc. ("Fountain Electric") for all of the electrical work on the Project, with an original principal amount of $4,574,500 (the "Subcontract").[1] Winter required Fountain Electric to provide payments and performance bonds for its work from a surety acceptable to Winter. With Winter's approval, Erie provided payment and performance bonds for the full Subcontract amount.

Approximately fourteen months later, Fountain Electric defaulted on its Subcontract with Winter by failing to complete its work on the Project or pay all of its suppliers. The default occurred two months prior to the Phase 1 completion deadline. After the default, Winter sought bids from three potential replacements for Fountain Electric. Two days after the default, Winter retained the services of Metro Power, Inc. d/b/a Carolina Power ("Carolina Power") to complete the remaining electrical work. Carolina Power completed its work and the overall project was completed on time. Erie paid $2,799,654.80 to satisfy Fountain Electric's obligations under its Subcontract with Winter.

[1] After accounting for approved change orders and all other approved costs, the Subcontract's value rose to $5,487,727.

Fountain Electric's Subcontract included a damages provision that was triggered if Fountain Electric defaulted as set forth in Article 18.2 of the Subcontract. The provision set forth a formula to compensate Winter for its administrative burden of overseeing the completion of Fountain Electric's Subcontract (the "administrative burden") in the event Fountain Electric defaulted. The administrative burden provision states, in pertinent part:

> If SUBCONTRACTOR fails to cure an event of default within seventy-two (72) hours after receipt of written notice of default by WINTER to SUBCONTRACTOR, WINTER may, without prejudice to any of [its] other rights or remedies, terminate the employment of SUBCONTRACTOR and [. . .] WINTER shall be entitled to charge all reasonable costs incurred in this regard (including attorney['s] fees) plus an allowance for administrative burden equal to fifteen percent (15%) to the account of SUBCONTRACTOR.

Fountain Electric's President, Terry Fountain, Jr., agreed to every provision in the Subcontract, as evidenced by his initials on every page of the Subcontract, including directly below the administrative burden.

After Fountain Electric defaulted, a total of $3,110,150.17 worth of electrical work was ultimately completed on the Project that Winter was forced to oversee and administratively manage. After its default, Fountain Electric, as required by the terms of its bond agreement with Erie, assigned all of its rights under the Subcontract to Erie, including the right of payment for all contract balances owed to Fountain Electric. Erie, as subrogee of Fountain Electric, then made a demand upon Winter for payment of all remaining contract balances that Winter owed to Fountain Electric. On November 5, 2007, Winter made payment of $236,727.98 to Erie, representing "undisputed" amounts that it owed to Erie, as subrogee of Fountain Electric. Winter withheld an additional $466,522, claiming it was entitled to withhold these remaining funds based upon the provision in the Subcontract that is at issue. After a recalculation and retainage released from the owner of the Project, Winter made a second payment to Erie, as subrogee

of Fountain Electric. To date, Winter continues to withhold $350,000 from Erie based on the provision in the contract.

After Winter's failure to make payment, Erie initiated this action by filing a breach of contract claim against Winter. Erie's complaint asserted two causes of action. First, Erie contended the liquidated damages provision included in the Subcontract constituted an unenforceable penalty under South Carolina law. Second, Erie alleged that it is entitled to attorney's fees pursuant to section 27-1-15 of the South Carolina Code (Supp. 2010) based on Winter's alleged refusal to pay Erie "all amounts due." Winter timely filed its answer, denying any liability on Erie's claims.

Erie filed a motion for summary judgment on April 14, 2008, on the ground that the contractual clause at issue was an unenforceable penalty. Winter filed a cross-motion for summary judgment on both causes of action. A hearing on the parties' summary judgment motions was held on October 14, 2008. On May 26, 2009, the trial court issued an order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment ("Order"). In granting summary judgment in favor of Erie, the trial court ruled the contractual clause Winter had relied on in withholding payment was an unenforceable penalty. The Order further held that a question of material fact existed regarding Erie's claim to attorney's fees under section 27-1-15. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP; Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

When reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP. Pittman v. Grand Strand Entm't Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005)

(citing S.C. Elec. Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) and Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Pittman, 363 S.C. at 536, 611 S.E.2d at 925.

LAW/ANALYSIS

Winter contends the trial court erred in holding the administrative burden provision in the Subcontract is an unenforceable penalty provision. We agree.

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enter., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). It is not the function of the court to rewrite contracts for parties. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision. Id. at 172, 568 S.E.2d at 363 (finding that parties to a contract may stipulate as to amount of liquidated damages owed in event of nonperformance). Such provisions are widely used in construction contracts and have been generally enforced as an appropriate remedy for breach. See 11 S.C. Jur. Damages § 65 (2010); Restatement (Second) of Contracts § 356 (1981).

The dispositive test on whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by our supreme court in Tate v. LeMaster:

> Implicit in the meaning of 'liquidated damages' is the idea of compensation; in that of 'penalty,' the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated

> damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957); see also Kirkland Distrib. Co. of Columbia, S.C. v. U.S., 276 F.2d 138, 145 (4th Cir. 1960). Moreover, "[w]hether such a stipulation is one for liquidated damages or for a penalty is . . . primarily a matter of the intention of the parties." Tate, 231 S.C. at 441, 99 S.E.2d at 45; see also Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984), cert. granted, 284 S.C. 366, 326 S.E.2d 654, and cert. dismissed, 285 S.C. 345, 329 S.E.2d 768 (1985). Accordingly, we look to the language of the Subcontract and the reasonable intention of the parties to determine if the liquidated damages provision was the predetermined measure of compensation.

A. Language of the Subcontract

The law in this state regarding the construction and interpretation of contracts is well settled. See Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning. Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

At issue in the litigation is Article 18.2 of the Subcontract. The article states, in pertinent part:

> WINTER shall be entitled to charge all reasonable costs incurred in this regard (including attorney['s] fees) plus an allowance for administrative burden equal to fifteen percent (15%) to the account of SUBCONTRACTOR.

The language of the Subcontract is clear. In the event of a breach, Winter would be entitled to an administrative burden to oversee the timely completion of the project. The administrative burden included in the Subcontract provision was reasonably intended by the parties as the predetermined measure of compensation for nonperformance. It is undisputed that Fountain Electric's President, Terry Fountain, Jr., agreed to every provision in the Subcontract, as evidenced by his initials on every page of the Subcontract, including his initials directly below the administrative burden provision. There is no suggestion that this figure was arrived at by unfair means, or that it does not represent part of the bargained-for contract. Moreover, no evidence was presented that Mr. Fountain was an unsophisticated party or was incapable of understanding the Subcontract he signed on behalf of Fountain Electric. In fact, when the senior manager of the Project met with Mr. Fountain, he discussed the long history of Fountain Electric and noted several other projects his company was handling. The record also contains statements from Winter's Chief Financial Officer and the senior manager of the Project indicating the liquidated damages provision was meant to compensate Winter for the administrative burden if a default occurred. Accordingly, we conclude the parties agreed the stipulated sum was one for liquidated damages.

B. Predetermined Measure of Compensation

The touchstone question in determining whether the sum stipulated in the Subcontract is a liquidated damage or an unenforceable penalty is whether the amount is "reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance . . . ." Tate, 231 S.C. at 441, 99 S.E.2d at 46 (emphasis added); see also Restatement (Second) of Contracts § 356 (1981). In Foster v. Roach, our supreme court identified criteria to utilize in making this determination:

> In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to look at the whole contract, its subject-

> matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

119 S.C. 102, 107, 111 S.E. 897, 899 (1922).

The damages that Winter and Fountain Electric might reasonably anticipate were difficult to ascertain because of the very nature of the work Fountain Electric was performing. The Subcontract between Winter and Fountain Electric, signed on April 29, 2005, provided that Fountain Electric would complete all of the electrical work on two separate phases of the Project by June 2007 for an original principal amount of $4,574,500. At the time the parties entered into the contract, it was impossible to estimate administrative costs in the event of a default because the future costs were unknown. The very nature of a large and complex construction project such as this is what makes damages difficult to ascertain in the first place.

Due to the impossibility of determining the actual and consequential damages resulting from the subcontractor's failure to complete the work on time, the parties included a liquidated damages provision in the Subcontract to serve as a fair-measure formula that varies the recoverable damages based on the outstanding work remaining in the Subcontract. The fifteen percent administrative burden is not a pre-set amount, but instead operates as a "sliding scale," accounting for the outstanding and remaining work to be completed at the time a party defaults. The earlier a default occurs, the greater the administrative burden Winter incurs in completing the subcontractor's work. The fifteen percent administrative burden is a reasonable and fair liquidated damages provision. Winter presented uncontroverted evidence that the construction industry standard for subcontract agreements is to include a liquidated damages provision requiring the defaulting subcontractor to compensate the general contractor at least fifteen percent of the remaining subcontract value to cover any and all costs, expenses, and administrative burdens that result from the default. The senior project manager for Winter stated the administrative burden agreed to by the parties was fair, reasonable, and standard in the construction industry.

Winter's chief financial officer even testified outside counsel reviewed Winter's subcontract in 2004, a year before the parties agreed to the Subcontract, with the intent of making the subcontract "more friendly to [Winter's] subcontractors." Moreover, since 1996, Winter has utilized the industry standard fifteen percent liquidated damages provision in all of its subcontract agreements. Erie has presented no evidence that the fifteen percent administrative burden assessment is not the industry standard.

Fountain Electric defaulted two months prior to the completion of Phase 1 and a total of $3,110,150.17 worth of electrical work was ultimately completed on the Project after their default. Winter's senior project manager stated that although Fountain Electric had completed seventy-four percent of the electrical work of Phase 1 on paper, the Project was not as far along as originally represented. As a result of the default, Winter was forced to inspect the work completed, determine the amount of remaining work, locate and retain supplemental forces, and administratively manage the completion of the Project. These administrative duties included, but were not limited to:

1) Determining the exact amount of electrical work completed by Fountain Electric.
2) Requesting, collecting, and analyzing bids from several other electrical vendors.
3) Overseeing Carolina Power's work utilizing four senior management officials from Winter.
4) Utilizing additional employees to determine what materials Fountain Electric abandoned on the Project site, what materials were still in storage, and what work had been correctly or incorrectly completed.
5) Transitioning and overseeing Winter employees from other projects to complete the remaining electrical work.

The liquidated damages provision exists to cover these and other intangible expenses incurred in having to manage the scope of work for the balance of Fountain Electric's Subcontract.

Pursuant to the Subcontract, Winter withheld $350,000 as its administrative burden for overseeing the completion of Phase 1 and Phase 2

of the Project. The withheld amount is actually less than the originally agreed upon fifteen percent administrative burden, and the "sliding scale" approach of the provision in question acts as a fair measure of the harm done by the subcontractor's breach. See Kirkland, 276 F.2d at 145 (holding a liquidated damages provision that is designed as a fair measure of the harm done by its breach is not to be treated as a penalty and is enforceable).

Erie contends the total direct expenses Winter incurred were $84,066, that the actual amount of damages is disproportionate to the $350,000 withheld, and that the administrative burden is a penalty. Erie's argument fails for several reasons. First, due to the uncertainty as to when a default may occur, South Carolina courts have repeatedly held that only when the "sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from breach of the contract, the stipulation will be held one for penalty, and not for liquidated damages." Tate, 231 S.C. at 442, 99 S.E.2d at 46 (emphasis added). The sliding scale approach of the administrative burden provision ensures the sum stipulated is not disproportionate to any probable damage. Second, many of Winter's administrative expenses could not be retraced because Winter's executives assigned to the Project as a result of Fountain Electric's default were salaried employees.[2] Finally, because Winter's administrative burden generates a different damages figure in each situation depending on the remaining value of the subcontract and the exact time of default, we find the provision is in proportion to the actual damages that might be sustained by reason of nonperformance. Id. at 441, 99 S.E.2d at 46 (emphasis added). The intent of the damages provision is clear and its application is proper. Thus, as a matter both of contract interpretation and of public policy, the administrative burden provision of the Subcontract is a valid, enforceable measure of liquidated damages.

Because Erie failed to show that the liquidated damages provision is an unenforceable penalty, and the facts establish that the provision is

[2] Several of Winter's executives and other salaried employees were brought in to help administer the Project, but Winter did not track the additional costs, expenses, and hours of these salaried employees.

enforceable as a matter of law, the trial court erred in granting summary judgment to Erie and in denying summary judgment to Winter.

CONCLUSION

Accordingly, the trial court's order is

REVERSED.

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Charles Galen Rider, a/k/a C.G. Rider

Carolyn S. Rider, Appellant,

v.

Estate of Charles Galen Rider, Thomas M. Grady, Personal Representative, Respondent,

and

Deborah Rider McClure, Ginger C. Rider, Christian James McClure, and Austin Patrick McClure, Respondents.

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 4842
Heard May 5, 2011 – Filed June 15, 2011

AFFIRMED

Laurel Blair, of Greenville and Terry A. Finger, of Hilton Head Island, for Appellant.

Daphne A. Burns, Stephen Edward Carter and Douglas Whitsett MacNeille, all of Hilton Head Island, for Respondents.

THOMAS, J.: In this probate action, Carolyn S. Rider (Wife) appeals a probate court order that held $304,082.46 of mutual fund shares were part of the estate of her husband, Charles G. Rider (Decedent). Wife argues the probate court erred in reasoning the shares were not transferred to her as a gift prior to Decedent's death because (1) Decedent entered an agency agreement with his agent, Wachovia Bank (Wachovia), that provided "prior actions" of Decedent and Wachovia were not affected by Decedent's death; (2) Decedent issued an entitlement order regarding the shares before his death that made the transfer of the shares deemed completed upon the date the entitlement order was made; and (3) Decedent's transfer of the shares need only be effectuated by him so far as he could make it so. We affirm.

FACTS

In 1993, Decedent entered into an "Investment Agency Agreement" (the Agreement) with a predecessor bank of Wachovia. The Agreement authorized Wachovia to open an account for Decedent in which to hold cash, securities, and other property, subject to Decedent's instructions. The Agreement further gave Wachovia discretionary power to buy, sell, and exercise certain rights regarding those securities, and it specified when and how the Agreement would terminate:

> 13. This Agreement may be terminated by either party by giving thirty (30) days' notice in writing to the other party or by [Decedent's] death, provided that termination by reason of [Decedent's] death shall be effective only upon receipt of actual

> knowledge thereof by one of your responsible officials and shall not affect the validity of any prior actions. Your authority hereunder shall not terminate in the event of [Decedent's] disability.

On June 8, 2005, Decedent called his wealth manager at Wachovia, Lynn DiLella (the Wealth Manager), and told her he wanted to transfer $2,000,000 worth of securities to Wife to ensure she could maintain her standard of living between his death and the end of probate.[1] Pursuant to the call, the Wealth Manager created a list of assets to transfer and emailed the list to Wachovia's trust department. The trust department prepared a letter with an approval page to be signed by Decedent, and it mailed the list and letter to Decedent. The letter directed the trust department to transfer the securities "to a new agency account to be opened for" Wife. On June 17, 2005, Decedent executed and returned the letter to the trust department.

Between June and October 2005, four transfers were made pursuant to the letter. On June 22, a transfer of stock valued at $733,228 was settled and reflected on Wife's new account at Wachovia. On Friday, July 8, a transfer of stock valued at $39,672 was settled and reflected on Wife's account, and on the same day, Decedent died. Wachovia received actual knowledge of Decedent's death sometime late on either Friday, July 8 or Sunday, July 10.

On July 11, a transfer of mutual fund shares valued at $935,032.64 was settled and reflected on Wife's account, and on October 20, a transfer of mutual fund shares valued at $304,082.46 was settled and reflected on Wife's account.[2]

The personal representative of Decedent's estate filed this petition for declaratory judgment in probate court, naming Wife and ten others as respondents to the petition. Excluding Wife, four of the respondents named in the petition are respondents in this appeal (Respondents).

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[1] Decedent learned he had terminal cancer some time prior to the call.

[2] The aggregate value of securities transferred, $2,012,115, includes appreciation between the instruction and the transfers.

In the petition, the personal representative sought a determination of whether Decedent's execution of the letter completed the transfer of all the securities such that they are not part of Decedent's estate. Wife filed a Notice of Appearance and an Answer, alleging all of the securities transferred pursuant to Decedent's letter are not part of Decedent's estate under the Agreement and Article 8 of the South Carolina Uniform Commercial Code (Article 8). Respondents appeared and answered as well, arguing agency rules rather than Article 8 govern whether the securities are part of the estate.

At the probate hearing, Wachovia's trust officer (the Trust Officer), testified he began working for the trust department in August 2005, after Decedent's death. He stated he replaced the trust officer who handled the first three transfers, and he explained the procedure for executing transfers of the type Decedent requested: The trust department receives an instruction to make the transfer and then completes a form, which is sent to Wachovia's "back office." The back office next gives instructions to various departments depending upon the type of securities being transferred. For mutual funds, the Trust Officer testified transfers can take "from ten days to a few weeks. Maybe longer." He conceded it was unusual for settlement of the final transfer to Wife to take as long as it did.

Even though the third and fourth transfers were not settled and reflected on Wife's account until after Decedent's death, the Wealth Manager testified she believed the trust department instructed the appropriate departments to complete all of the transfers before the death occurred.

The probate court held the transfers initiated by Decedent were intended to be inter vivos gifts and Article 8 applied to those transfers. Specifically, the probate court reasoned that Wachovia was an Article 8 "securities intermediary" and Decedent held "security entitlements" in the securities as an "entitlement holder" such that his letter constituted an "entitlement order." However, the probate court held that, pursuant to the Agreement and law of agency, Wachovia's authority to execute the entitlement order terminated when Wachovia received knowledge of

Decedent's death. The court reasoned that although Decedent's entitlement order was "effective" under Article 8 when made by Decedent, the transfer was not complete until Wachovia "carried out" the entitlement order. The probate court explained that Wachovia's authority to carry out the transfers terminated before the transfer occurred because Article 8 did not supplant the law of agency. Consequently, the probate court found the first three transfers were completed before Wachovia learned of Decedent's death and, therefore, the related securities are not part of his estate. However, the probate court found the final transfer was not completed until after Wachovia learned of Decedent's death; therefore, the probate court found those securities are part of the estate.

Wife appealed to the circuit court. She argued the probate court erred in holding the final transfer was part of Decedent's estate because the entitlement order completed the transfer of the mutual funds on the day it was made. In response, Respondents argued to affirm the probate court's decision because it was supported by the evidence. Respondents did not cross-appeal the probate court's holding as to the third transfer, and they conceded to the circuit court that the only issue remaining was whether the fourth transfer was part of the estate. The circuit court affirmed, and this appeal followed.

ISSUES ON APPEAL[3]

I. Is the fourth transfer complete pursuant to the Agreement?

II. Does Article 8 displace agency law such that all of the transfers are deemed completed before Decedent's death?

III. Were the transfers completed "so far as Decedent could do so"?

[3] This appeal raised an unpreserved issue of whether North Carolina or South Carolina law applies to this case. See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (providing that an argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in the supreme court or court of appeals). However, Respondents conceded this issue during oral argument.

STANDARD OF REVIEW

The standard of review for actions in the probate court depends upon whether the underlying cause of action is at law or in equity. Univ. of S. Cal. v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005) (citation omitted). "[Q]uestions of law . . . may be decided with no particular deference to the lower court." Neely v. Thomasson, 365 S.C. 345, 350, 618 S.E.2d 884, 886 (2005) (citation omitted). However, in actions at law, "the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." Id. at 349-50, 618 S.E.2d at 886 (citation omitted). Therefore, this court reviews the interpretation of the Agreement and Article 8 without deference, but the probate court's findings as to whether the transfers were completed before the agency relationship was terminated must be upheld if supported by evidence. See Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 606-07, 663 S.E.2d 484, 487 (2008) (providing that an action involving the interpretation of a contract and statutes is an action at law); Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Ct. App. 1999) (stating that whether an agency relationship exists is a question of fact).

I. The Agreement

Wife argues the mutual funds of the fourth transfer are not part of Decedent's estate because the plain language of the Agreement states that both Wachovia and Decedent's actions prior to Wachovia's actual knowledge of Decedent's death would remain enforceable. Moreover, Wife contends Wachovia retained authority to transfer the mutual funds even after it learned of Decedent's death, and Wachovia complied with those instructions before that time. We disagree.

In interpreting a contract, a court must "ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract]. If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the

parties as found in the agreement." Cullen v. McNeal, 390 S.C. 470, 481-82, 702 S.E.2d 378, 384 (Ct. App. 2010) (alterations in original) (internal citations and quotation marks omitted).

The "prior actions" clause refers to both Decedent's and Wachovia's conduct. However, that clause did not render Decedent's instruction eternally enforceable after Wachovia learned of Decedent's death. The plain language of the Agreement shows Wachovia's authority to act for Decedent terminated upon Wachovia's "actual knowledge" of death, and the actions of either party would remain valid if those actions occurred before that time. Consequently, whether the mutual funds in question are part of Decedent's estate depends upon whether Decedent's and Wachovia's conduct was sufficient to complete the transfers before Wachovia learned of Decedent's death.

II. Article 8

Wife argues the probate court erred in holding the mutual funds of the fourth transfer are part of Decedent's estate. She maintains the agency rule that an agent lacks authority to act for a principal after the principal's death does not apply to this action because the letter was an "effective" entitlement order under Article 8. Specifically, she contends "effective" entitlement orders transfer rights to financial assets the date they are made, and even if they do not, entitlement orders remain "effective" such that they may be completed after later changes in circumstance. We disagree.

As an initial matter, Respondents have not cross-appealed the probate court's holding that the mutual funds at issue are "financial assets" falling within Part 5 of Article 8. Nor have Respondents cross-appealed the probate court's holding Wachovia was a securities intermediary and that Decedent was an entitlement holder with a securities entitlement in the instruments at issue.[4] Thus, those issues are not before this court. See Commercial Credit

[4] In simple terms, a person becomes an entitlement holder by acquiring a security entitlement, which generally occurs when a security is credited to the person's account with a securities intermediary. See S.C. Code Ann. § 36-8-102(a)(7) (2003) (providing that an "entitlement holder" is "a person

Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (providing that a holding contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding).

As an entitlement holder, Decedent could begin the process of transferring a security entitlement by issuing an "entitlement order." An entitlement order is "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement." S.C. Code Ann. § 36-8-102(a)(8) (2003). An entitlement order is "effective" if it is "made by the appropriate person"—in this case, the entitlement holder. S.C. Code Ann. § 36-8-107(a)(3), (b)(1) (2003). The "effectiveness" of an entitlement order "is determined as of the date" it is made, and it "does not become ineffective by reason of any later change of circumstances." S.C. Code Ann. § 36-8-107(e) (2003).

Like the issues addressed earlier in this section, Respondents have not cross-appealed the probate court's holding that Decedent's letter to Wachovia was an entitlement order and that Decedent was an appropriate person. Consequently, those issues are not before this court. See Commercial Credit Loans, Inc., 334 S.C. at 187, 512 S.E.2d at 129 (providing that a holding

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identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary"); S.C. Code Ann. § 36-8-102(a)(17) & official cmt.17 (2003) (providing that a "security entitlement" refers to a person's batch of rights against the securities intermediary and property interest in securities credited to his account by the securities intermediary); S.C. Code Ann. § 36-8-501(b)(1) (2003) (providing that a person acquires a security entitlement if a securities intermediary does any of the following three things: "(1) indicates by book entry that a financial asset has been credited to the person's securities account; (2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or (3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account").

contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding).

The parties' arguments present only two questions: (1) does Article 8's use of the term "effective" indicate an entitlement order completes a transfer of securities at the time the entitlement order is made, and (2) if the entitlement order does not complete the transfer in itself, does Article 8's provision that an entitlement order "remains effective" displace agency rules such that a securities intermediary has authority to complete the transfer after the entitlement holder's death? We answer both questions in the negative, and we hold the probate court properly found the mutual funds of the fourth transfer are part of Decedent's estate.

As a general rule, an "agency terminates upon the death of the principal. . . . [T]he authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will." Carver v. Morrow, 213 S.C. 199, 204, 48 S.E.2d 814, 817 (1948) (citations omitted). Accordingly, actions by the principal or the agent in contemplation of a transaction before the principal's death generally do not preserve the agency for the completion of that transaction. See C.J.S. Agency § 122 (2003) ("The fact that the agent has performed, as authorized, one or several acts of that which was contemplated as a single transaction does not operate to preserve or keep alive the power until the completion of the transaction.").

Principles of agency supplement the Uniform Commercial Code (the U.C.C.) "[u]nless displaced by the particular provisions of the" U.C.C. S.C. Code Ann. § 36-1-103 (2003). "Only where the U.C.C. is incomplete does the common law provide applicable rules," and "[d]isplacement occurs when one or more particular provisions of the U.C.C. comprehensively address a particular subject." Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc., 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) (citation omitted).

An entitlement order does not complete a transfer of financial assets at the time it is made. Like other orders made to agents, an entitlement order is

an instruction to act in the manner the principal desires. See § 36-8-102(a)(8) (providing that an entitlement order is "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement"). The transfer of a financial asset is complete when a securities intermediary credits the financial asset to a person's securities account. See S.C. Code Ann. § 36-8-104(b) (2003) ("A person acquires a financial asset, other than a security, or an interest therein, under this chapter, if the person acquires a security entitlement to the financial asset."); id. § 36-8-501(b) ("[A] person acquires a security entitlement if a securities intermediary: (1) indicates by book entry that a financial asset has been credited to the person's securities account . . . .").

Moreover, the fact an entitlement order "remains effective" despite later changes in circumstance does not displace the agency rule relevant to this action. An entitlement order's "effectiveness" does not refer to the securities intermediary's power to complete the transfer. Rather, "effectiveness" is a term used by Article 8 to frame whether a securities intermediary is liable for a transfer of financial assets made pursuant to an entitlement order.[5] See S.C. Code Ann. § 36-8-507(b) (2003) ("If a securities

[5] A comparison of Revised Article 8 with Original Article 8 is instructive on this issue. Section 107 of Revised Article 8 replaced section 308 of Original Article 8, and Revised Article 8 was specifically created to address the development of the financial assets' indirect holding system by implementing new terms such as "security entitlement," "entitlement holder," and "entitlement order." See generally S.C. Code Ann. § 36-8-101 Prefatory Note (2003) (tracing the history and development of the securities markets). Section 107 of Revised Article 8 retains most of the substance of section 308 and applies that substance to security entitlements. Compare S.C. Code Ann. § 36-8-308(4)-(5), (7), (10) (Supp. 2000) (providing that (1) an "instruction" was an order by an "appropriate person" requesting the transfer of a security be registered, and an "appropriate person" included the registered owner of the security; and (2) whether someone signing the purported instruction was an "appropriate person" was determined from the date of signing, and an instruction made by the appropriate person did not "become unauthorized . . .

intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.").

Once one understands the import of finding an entitlement order "effective," it becomes clear that Revised Article 8 does not comprehensively address the agency rules relevant to this appeal. The fact that an entitlement order is effective does not establish that the transfer is in fact complete or deemed complete, nor does it establish that the securities intermediary retains the authority to complete the entitlement order. Therefore, whether the mutual funds of the fourth transfer are part of Decedent's estate depends upon whether Wife's accounts were credited before Wachovia learned of Decedent's death.

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by virtue of any subsequent change of circumstances"), with S.C. Code Ann. §§ 36-8-102(a)(8) & 107(a)(3), (8), (b)(1), (e) (2003) (providing that (1) an entitlement order directs transfer of a financial asset; (2) an entitlement order is "effective" if it is made by the entitlement holder; and (3) the "effectiveness" of an entitlement order "is determined as of the date" it is made, and it "does not become ineffective by reason of any later change of circumstances"). However, section 107's use of "effective" replaced section 308's use of "authorized." The Amended Official Comments of section 308 explained that its use of "authorized" did not refer to agency authority but rather determined whether an issuer who registered the transfer of a security could be held liable for a transfer under section 311 of Original Article 8. See S.C. Code Ann. § 36-8-308 amended official cmt.6 (Supp. 2000) (providing that although an "instruction speak[s] as of the date of signing" and "do[es] not become 'unauthorized' (section 311) because [the appropriate person] dies," the "[a]uthority to deliver a certificated security and thus to complete the transfer is not covered by" section 308). This is a similar function to the Revised Article 8's use of the term "effective."

Here, the probate court erred in finding the mutual funds of the third transfer were not part of Decedent's estate.[6] However, that issue is not properly before this court. Respondents never cross-appealed to the circuit court that those mutual funds were part of the estate, and in fact, Respondents conceded the issue during the circuit court hearing. Therefore, the probate court's holding that the mutual funds from the third transfer were not part of the estate is the law of the case. See Commercial Credit Loans, Inc, 334 S.C. at 187, 512 S.E.2d at 129 (providing that a holding contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding).

As to the mutual funds of the fourth transfer, the probate court properly found their transfer was not completed before Wachovia learned of Decedent's death. The Wealth Manager testified she believed the trust department instructed the appropriate persons to transfer the mutual funds before Decedent died. However, the record did not include evidence of when the trust department in fact issued instructions to transfer the mutual funds, and more importantly, nor did the record include evidence Wife's account was credited with the mutual funds before Wachovia learned of Decedent's death. The only evidence the trust department actually made the instructions and credited the account was when settlement of the transfer was reflected on the account, and that date occurred three months after Wachovia gained actual knowledge of the death. Accordingly, even if the time of credit and settlement were different, we have no way of knowing when the credit

[6] The Wealth Manager testified the third transfer was not settled until after Wachovia learned Decedent passed away. And although the Wealth Manager testified she believed the trust department executed the transfer instruction before that time, the Trust Officer testified the trust department's role in executing those instructions merely constituted sending instructions to Wachovia's back office. No party introduced testimony indicating the trust department, the back office, or some other entity in fact credited those mutual funds to Wife's account before Wachovia learned of Decedent's death. Accordingly, the probate court's finding "Wachovia took the actions necessary to effectuate" the third transfer before it knew of Decedent's death was not supported by evidence.

occurred. Therefore, the probate court's holding that the mutual funds of the fourth transfer are part of the estate is supported by the evidence and not affected by an error of law.

III. Completed "So Far as Decedent Could Do So"

Even if Article 8 did not deem the fourth transfer complete, Wife argues the transfer was sufficiently complete under the law of gifts. Specifically, she maintains an inter vivos gift requires intent and delivery only "so far as the donor can make it so," and once she provided Wachovia with the instruction letter, she could do no more to ensure the transfer occurred.

Wife makes a different argument on appeal to this court than she did on appeal to the circuit court. On appeal to the circuit court, she argued the transfers constituted completed inter vivos gifts because Wachovia lacked notice of Decedent's death when the transfers were made. Consequently, her argument is not preserved for review. See Kiawah Prop. Owners Grp., 359 S.C. at 113, 597 S.E.2d at 149 (providing that an argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in the Supreme Court or Court of Appeals); cf. Taylor v. Medenica, 324 S.C. 200, 216, 479 S.E.2d 35, 43 (1996) (holding that an issue was not preserved because the appealing party argued a different ground at trial than the party argued on appeal).

CONCLUSION

For the aforementioned reasons, the ruling of the probate court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Lee Spears, Appellant.

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4843
Heard March 10, 2011 – Filed June 15, 2011

AFFIRMED

Assistant Appellate Defender M. Celia Robinson and Appellate Defender Breen R. Stevens, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General A. West Lee, of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville, for Respondent.

GEATHERS, J.: Phillip Lee Spears appeals his convictions for armed robbery, kidnapping, and possession of a firearm during the commission of a violent crime. Spears argues the trial court erred in: (1) denying his motion to sever his case from his codefendant's case prior to trial; (2) denying his motion to suppress trial testimony and evidence of a gun found in the room where Spears was taken into custody; (3) denying his motion to suppress the in-court identifications of both defendants on the ground that the out-of-court identification process was unduly suggestive; (4) denying his motion to suppress evidence that Spears submits was obtained without a valid search warrant and without valid consent; and (5) denying his motion for a mistrial, which was based on multiple grounds. We affirm.

FACTS / PROCEDURAL HISTORY

On November 6, 2006, two men entered Bell's Bait and Tackle Shop in Elloree, South Carolina (also known as, and hereinafter, the Wagon Wheel). The men held the store owner and several of his employees[1] on the floor at gunpoint while they proceeded to rob the store. The robbers absconded with over $200 in cash, approximately $580 in rolled coins, and several packs of Newport cigarettes.

James Bourgeois (the owner of the Wagon Wheel) called 911, and the police arrived within ten minutes. Natasha Rivers, a store employee, was able to provide the police with a detailed description of both suspects. As a result of her description, police developed Phillip Spears as a suspect. Later that same day, approximately four hours after the robbery, police showed Rivers a photo line-up and she immediately identified Spears. Rivers testified she was one hundred percent certain that Spears was the same gunman who first entered the Wagon Wheel that morning. Around six-thirty or seven o'clock on the evening of the robbery, Rivers was shown a second photo line-up. Rivers said she saw the second line-up on a computer screen at the sheriff's office. Rivers immediately pointed to Spears's codefendant,

[1] The victims were Natasha Rivers, James Bourgeois, Cleveland Williams, and Iskier Prezzie. Rivers's two minor children were also in the store on the morning of the robbery.

Titus Bantan, although she noted Bantan's hair was different in the photo line-up than it had been when she saw him that morning.

The police investigation led them to the home of Spears's ex-girlfriend, Tanesha Adams. Through Adams, police learned that prior to the robbery Spears had called Adams at 5:00 a.m. and again at 7:00 a.m. to ask her whether she knew if the Wagon Wheel had video cameras. Adams testified she told Spears she did not know. While the police were still present, Spears called Adams again. Adams testified Spears admitted to her over the telephone that he robbed the Wagon Wheel that morning.

During the same police visit, Adams's brother told police about a mobile home in Orangeburg, South Carolina, where he said Spears sometimes stayed. Adams's brother volunteered to show police the mobile home. Police arrived at 140 Charlotte Circle in Orangeburg armed with an arrest warrant for Spears. The police entered with their guns drawn and ordered an unknown suspect to back down the hallway with his hands up. After the suspect was detained, the police identified him as Bantan, not Spears. Officer Williams stated, "Initially [Bantan] was handcuffed. Once we believed that he was going to sign the permission to search, of course he was unhandcuffed . . . ." Although Bantan initially consented to a search of the mobile home, Bantan later withdrew his consent after the police located items consistent with the robbery.

The officers then left and obtained a search warrant, which they executed at 9:00 p.m. on the evening of the robbery. They recovered Timberland boots and army fatigue style pants that matched the description of the clothing worn by one of the robbers, several packs of Newport cigarettes, $260 in twenty dollar bills, and a "Coinstar" receipt showing $300 in coins that had been exchanged for cash at a nearby Bi-Lo a few hours after the robbery. Even though the trial court noted Bantan's initial consent was invalid, the trial court ruled all the evidence obtained through the search was admissible via the doctrine of inevitable discovery.

Bantan and Spears were tried together for the Wagon Wheel robbery. A jury convicted both defendants on all counts. The trial court sentenced Spears to thirty years' imprisonment for kidnapping, thirty years'

imprisonment for armed robbery, and five years' imprisonment for possession of a firearm during the commission of a violent crime, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

I. Motion to Sever

Spears filed a motion in limine to sever his case from that of his codefendant, Titus Bantan, and the trial court denied Spears's motion. Specifically, the trial court noted that mutually antagonistic defenses do not mandate separate trials. On appeal, Spears argues severance was required because he was forced to defend himself against the prosecution and against Bantan, and this denied him the specific right to a fair trial.

"A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. at 613, 629 S.E.2d at 395.

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." Simmons, 352 S.C. at 350, 573 S.E.2d at 860. "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." Id.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) (emphasis added). An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand. Bruton v. United States, 391 U.S. 123, 135-37 (1968).

"A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009). "The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime." Id. "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct. App. 2001) (citations and quotation marks omitted).

We affirm the trial court's denial of a severance because there was no abuse of discretion; the ruling was supported by the evidence and not affected by an error of law. Rice, 368 S.C. at 613, 629 S.E.2d at 395. The evidence against Spears and Bantan was interconnected. Both defendants were charged with an armed robbery that occurred at the Wagon Wheel on the morning of November 6, 2006. Both defendants were charged with kidnapping the same victims during the robbery. Both defendants were charged with possession of a firearm during the commission of these crimes. Finally, Spears's ex-girlfriend, Tanesha Adams, and Adams's brother led police to Bantan's mobile home, which contained evidence corresponding to the items victims testified were stolen from the Wagon Wheel.

Furthermore, no specific trial right was prejudiced by the joinder of these codefendants' trials. See Bruton, 391 U.S. at 135-37 (finding a specific trial right was prejudiced and that prejudice could not be remedied with a curative instruction when one codefendant expressly implicated the other codefendant in his oral confession but refused to take the witness stand).

Although the State presented evidence that Spears confessed to committing the crime to Adams over the telephone, there was no evidence Spears implicated Bantan during the call. In addition, Bantan did not implicate Spears at any point during the police investigation. Therefore, we hold the trial court did not abuse its discretion in denying Spears's motion for a severance.

Spears also argues severance was warranted because he suffered prejudice during Bantan's closing argument, which emphasized the plethora of evidence against Spears in contrast to the scant evidence against Bantan. We disagree. South Carolina law provides that mutually antagonistic defenses, or the possibility that codefendants may accuse each other of the crime, does not necessarily warrant a severance. See State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999); Halcomb, 382 S.C. at 440, 676 S.E.2d at 153. In addition, the trial court gave a cautionary instruction to the jury during its opening remarks that it should consider the evidence against each defendant separately. See Stuckey, 347 S.C. at 497, 556 S.E.2d at 409 (noting a proper cautionary instruction may help to protect the individual rights of each defendant and ensure that no prejudice results from a joint trial).

Finally, Spears argues severance was required in order to protect his specific trial right to argue last during closing arguments if he presented no evidence or witnesses. We decline to address this argument as it was not argued below, and therefore it is not properly preserved for this court's review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

II. Motion to Suppress Evidence of Gun

Spears was arrested three days after the Wagon Wheel robbery at a residence in North Carolina. A gun was found under the mattress in the bedroom where Spears was staying. Spears filed a motion in limine to suppress evidence of the gun, arguing there was no evidence he ever possessed the gun, such as fingerprints or testimony that the gun belonged to

him. Spears further contended Bourgeois's statement to police described a silver automatic gun with black trim, whereas the gun found near Spears at the time of his arrest was a black gun with silver trim. The trial court denied the motion to suppress, noting any discrepancies between the victims' description of the gun they saw during the robbery and the gun found near Spears at the time of his arrest would go to the weight of the evidence rather than to its admissibility. However, the trial court noted that the State would need to lay a proper foundation for the admission of the gun during the course of the trial.

On appeal, Spears argues the trial court erred in its in limine ruling that the gun was admissible despite acknowledging the State would need to establish a proper foundation during trial. Spears submits the gun was irrelevant because the State was unable to establish he owned it and was also unable to establish any connection between the gun and the crimes for which he was indicted. Finally, Spears contends the prejudicial effect of admitting the gun substantially outweighed the probative value.

During trial, Rivers testified she saw Spears with a black gun trimmed with silver on the top. Bourgeois testified he saw Spears with a dark colored gun with chrome parts on it.[2] The State displayed the gun found near Spears to Bourgeois, and he stated it looked similar to the gun he saw on the day of the robbery. Finally, Cleveland Williams (another store employee) testified during trial that the gun found near Spears at the time of his arrest in North Carolina looked "almost exact[ly]" the same as the gun he saw on the day of the robbery.

Spears did not object to any of the victims' trial testimony regarding the appearance of the gun or its similarity to the gun found near Spears at the time of his arrest. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in

[2] Spears's trial counsel cross-examined Bourgeois extensively regarding the discrepancy between his description of the gun in his written statement to police (silver with black trim) and his description of the gun at trial (dark colored with chrome parts).

limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.") (citations and quotation marks omitted). In addition, the motion in limine did not occur immediately prior to the victims' testimony regarding the gun. See id. ("However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection."). Therefore, Spears's argument regarding the admissibility of the testimony concerning the gun is not preserved for our review.

Spears did object, however, when the State moved the actual gun into evidence. Therefore, we proceed to evaluate that ruling on the merits. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Moore, 377 S.C. 299, 305-06, 659 S.E.2d 256, 259 (Ct. App. 2008) (citations and quotation marks omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 306, 659 S.E.2d at 259 (citations and quotation marks omitted).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, SCRE. However, relevant evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one." S.C. Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008).

We believe the trial court did not err in admitting evidence of the gun. The State laid a proper foundation for admission of the gun. Specifically, several victims testified the gun found near Spears was very similar to the gun they saw him with on the day of the robbery. Because this evidence was relevant and highly probative, we believe the trial court properly admitted it.

III. Motion to Suppress In-Court Identifications

Spears suggests the trial court erred in denying his motion to suppress both the out-of-court and the in-court identifications of Spears and Bantan when the out-of-court identification procedures were unduly suggestive.

"The United States Supreme Court has developed a two-prong[ed] inquiry to determine the admissibility of an out-of-court identification." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000) (citing Neil v. Biggers, 409 U.S. 188, 198-99 (1972)). First, a court must ascertain whether the identification process was unduly suggestive. Moore, 343 S.C. at 287, 540 S.E.2d at 447. Next, the court must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). The following factors are to be considered in evaluating the totality of the circumstances when determining the likelihood of misidentification:

> (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. at 127, 644 S.E.2d at 696-97.

Spears failed to contemporaneously object when Rivers or Bourgeois made in-court identifications of the defendants during their direct testimony, despite the fact that both witnesses identified Spears and Bantan as the gunmen who robbed the Wagon Wheel on several occasions during the course of their testimony. Consequently, any issue with respect to the

witnesses' in-court identifications is not properly before this court. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.") (citations and quotation marks omitted). In addition, Spears's motion in limine to suppress this evidence did not occur immediately prior to the victims' in-court-identifications of Spears and Bantan. See id. ("However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.").

Spears did contemporaneously object to the introduction of the photo line-ups for both Bantan and Spears. However, we do not believe the photo line-ups were unduly suggestive. In addition, the identification process was so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447. Shortly after the robbery, Rivers was able to provide a detailed description of both of the suspects to police. Rivers testified she "directly" pointed to the photo of Spears when she saw the photo line-up, and she was "a hundred percent sure" Spears was the man who entered the Wagon Wheel first that morning. In addition, Rivers saw the first photo line-up only four hours after the robbery. Finally, Rivers testified she recognized Spears during the course of the robbery as someone she knew "from the neighborhood." Rivers saw the photo line-up of Bantan the evening of the robbery, and she "directly" pointed to Bantan as well. Viewing the totality of the circumstances, no substantial likelihood of misidentification existed. See Turner, 373 S.C. at 127, 644 S.E.2d at 696-97.

IV. Motion to Suppress Evidence Obtained in Search

In a motion in limine to exclude all evidence obtained via the search, the trial court ruled Bantan's initial consent to search was invalid based on the fact that his will was overcome. However, after redacting the sentence in the search warrant affidavit referencing Bantan's consent, the trial court found that the affidavit attached to the search warrant still gave rise to probable cause. Therefore, the trial court ruled that all the evidence obtained through

the search was admissible via the doctrine of inevitable discovery. On appeal, Spears argues that because Bantan's initial consent was invalid, the subsequent search warrant was also invalid because it was obtained on the basis of illegally discovered evidence. In the absence of this illegally discovered evidence, Spears contends the search warrant affidavit failed to establish probable cause to search the mobile home. Spears further argues the search warrant for evidence seized from 140 Charlotte Circle in Orangeburg, SC, was invalid as it was issued to a Calhoun County officer who was without jurisdiction to execute the warrant.

"The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." State v. Baccus, 367 S.C. 41, 48-49, 625 S.E.2d 216, 220 (2006). The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; see also S.C. Const. art. I § 10. The United States Supreme Court adopted the federal exclusionary rule to prevent the admission of evidence at trial that was unlawfully seized in violation of the Fourth Amendment and subsequently expanded that rule to apply to the individual states via the Due Process clause. Weeks v. United States, 232 U.S. 383, 398 (1914), overruled by Mapp v. Ohio, 367 U.S. 643, 655 (1961). However, the United States Supreme Court has narrowly interpreted the scope of the exclusionary rule in recent years. See Hudson v. Michigan, 547 U.S. 586, 591-94 (2006) (holding violation of the "knock and announce" rule did not warrant the exclusion of all evidence obtained in a search, and noting that the exclusionary rule generates "substantial societal costs") (citations and quotation marks omitted).

The inevitable discovery doctrine, one exception to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 444 (1984). As explained by the Nix Court, "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the

trial proceedings." Id. at 447. Therefore, in Nix, the Court allowed the introduction of physical evidence of the victim's body despite the fact that the defendant's statements regarding the location of the body had been obtained in violation of his right to counsel. Id. at 437, 449-50. The Court noted that search parties were approaching the location of the body, and there was testimony that it would only have taken an additional three to five hours to discover the victim's body if the search had continued. Id. at 449.

"A search warrant may issue only upon a finding of probable cause." State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the appellate court is simply to determine whether the magistrate had a substantial basis for concluding that probable cause existed. Id. at 144, 519 S.E.2d at 349 (citing Illinois v. Gates, 462 U.S. 213, 238-39 (1983)). "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004) (citing Gates, 462 U.S. at 238). "The appellate court should give great deference to a magistrate's determination of probable cause." Dunbar, 361 S.C. at 253, 603 S.E.2d at 622.

In the instant case, the trial court found that all the evidence recovered from 140 Charlotte Circle was admissible under the inevitable discovery exception. We agree. Relying on State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (2007), the trial court first redacted any reference to Bantan's initial consent due to the fact that his will was overcome by the officers' show of force and then found the remaining search warrant still gave rise to probable cause to search the residence. See Davis, 371 S.C. at 415-17, 639 S.E.2d at 459-60 (noting that a court may redact alleged misstatements in an affidavit and consider the remaining content of the affidavit to determine whether it is sufficient to establish probable cause). The remaining portion of the search warrant, as read into the record by the trial court, was as follows:

> An armed robbery occurred at Bell's Bait and Tackle Shop in Elloree, South Carolina, and a suspect, Phillip Spears, was positively identified by a store clerk from a six photo line-up compiled by SLED.

> Information was received by officers from the Calhoun County Sheriff's Office that suspect sometimes stayed at 140 Charlotte Circle in the City of Orangeburg, so officers responded to that location. Upon arriving at 140 Charlotte Circle, a second suspect, Titus Bantan, was located and had also been positively identified from a six photo line-up compiled by SLED as one of the armed robbery suspects.

As previously discussed, we believe the out-of-court photo identifications of Spears and Bantan were valid and not the product of unduly suggestive procedures. In addition, we disagree with Spears's contention that the affidavit mentions any of the evidence initially located by police during the period of Bantan's initial consent. Viewing the totality of the circumstances, the magistrate had a substantial basis for determining evidence relevant to the Wagon Wheel robbery would be found at 140 Charlotte Circle. See Bellamy, 336 S.C. at 144, 519 S.E.2d at 349. We hold the trial court properly found that the magistrate had a substantial basis for concluding that probable cause existed. Accordingly, the evidence recovered from 140 Charlotte Circle was admissible under the inevitable discovery doctrine as the evidence would have been found subject to the valid search warrant, regardless of whether Bantan was coerced to give consent during the initial search. See Nix, 467 U.S. at 443-44, 447.

We need not address Spears's remaining argument with respect to whether the search warrant was improperly issued to an officer without jurisdiction to execute the warrant because the entire argument on appeal consists of a single sentence. See State v. Cutro, 332 S.C. 100, 108 n.1, 504 S.E.2d 324, 328 n.1 (1998) (noting a one sentence argument is too conclusory to present any issue on appeal).

V. Motion for a Mistrial

Spears argues the trial court erred in denying his motion for a mistrial after Officer Christopher Golden improperly introduced testimony concerning .40-caliber bullets, drugs, and a shotgun recovered during the

search of 140 Charlotte Circle. Spears further argues the trial court erred in denying his second motion for a mistrial on the ground that the jury was improperly influenced by extraneous information regarding another robbery that Spears and Bantan allegedly committed.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct. App. 2007) (citation and quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citation and quotation marks omitted).

"The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009) (citation and quotation marks omitted). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless . . . it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

We affirm the trial court's denial of both of Spears's mistrial motions. During pre-trial motions, the trial court ruled that the State was not to refer to drugs, a shotgun, or .40-caliber bullets, all of which were found in Bantan's mobile home at the time of the search. During trial, Officer Golden was listing the items recovered from 140 Charlotte Circle and he mentioned recovering "some bullets, .40-caliber, a shotgun. Plus, there [were] some drugs found." Bantan's counsel immediately objected and moved for a mistrial after Officer Golden improperly testified about these items. Spears's counsel joined in the motion for a mistrial. The State conceded Officer Golden's testimony regarding a shotgun and drugs was inadmissible. The trial court agreed the items should not have been mentioned, but denied Bantan's motion for a mistrial. The trial court offered to give a curative

instruction for the jury to disregard "the testimony that was given by [Officer Golden] for ten seconds before we took our break." Both Bantan and Spears declined any curative instruction by the trial court, arguing the instruction would only bring more attention to the prejudicial testimony and that a mistrial was the only remedy.

We affirm the trial court's denial of Spears's first mistrial motion as the testimony was harmless in light of the overwhelming evidence of guilt presented at trial. See Reeves, 301 S.C. at 194, 391 S.E.2d at 243 ("Error is harmless when it could not reasonably have affected the result of the trial."). Specifically, Rivers and Bourgeois testified at trial that they were both one hundred percent certain that Spears was the first gunman who entered the Wagon Wheel. In addition, the State presented evidence that Spears confessed to committing the robbery over the phone to Adams.

Spears argues the trial court erred in denying his second mistrial motion based on extraneous information published to the jury concerning an unrelated bank robbery. However, Spears's appellate brief fails to cite any legal authority in support of this argument. Therefore, this argument has been abandoned on appeal. State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (recognizing an argument is deemed abandoned on appeal when it is merely conclusory and made without supporting authority).

Finally, during oral argument, Spears's appellate counsel suggested the trial court erred in denying his mistrial motions because the trial court did not evaluate all of the mistrial factors on the record before ruling on the motion. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) (listing several factors to be considered by the trial court in evaluating the merits of a mistrial motion). We decline to address this argument as it was raised for the first time during oral argument and was not addressed in Spears's appellate brief. Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (holding an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief).

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is **AFFIRMED.**

WILLIAMS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ITC Commercial Funding, LLC,

a Delaware Limited Liability Company, Respondent,

v.

Alice Crerar, Appellant.

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

Opinion No. 4844
Heard February 8, 2011 – Filed June 15, 2011

AFFIRMED

Milton M. Avrett, III, of Augusta, for Appellant.

Clay Stebbins, III, and James S. Murray, both of Augusta, for Respondent.

LOCKEMY, J.: Alice Crerar appeals the trial court's denial of her motion to set aside a default judgment in favor of ITC Commercial Funding, LLC (ITC). We affirm.

FACTS

In 2001, BCC Management Group, LLC (BCC), a company owned by John Crerar and his son, Duncan Crerar, purchased an ice skating rink in Augusta, Georgia. In 2006, John Crerar became seriously ill, and Duncan Crerar took over management of the ice rink. On August 25, 2006, counsel for ITC visited John Crerar's hospital room and presented a promissory note (the note) for his signature. The $1,990,000 note was to secure funds to refinance BCC's Bank of America loan on the skating rink.[1] After John Crerar signed the note, his wife (the Appellant), who was present in his hospital room, executed a guaranty of the note in favor of ITC.

John Crerar died in October 2006, and his interest in BCC was transferred to a revocable trust of which the Appellant was the trustee. In August 2007, Duncan Crerar negotiated a one-year extension of the note and the Appellant consented to the extension. In November 2007, BCC became delinquent on the note, and a notice of default was mailed to Duncan Crerar. On May 23, 2008, ITC sent the Appellant and her attorney, John West, a second notice of default and demanded immediate payment of the full amount owed on the loan.

On June 20, 2008, ITC filed a complaint seeking judgment against the Appellant on her guaranty of the note. A summons was mailed to the Appellant's home. On June 30, 2008, after negotiations between West and ITC's counsel, Alice Crerar paid ITC $147,664.28. After the loan matured on August 31, 2008, ITC and its counsel entered into negotiations with West, which resulted in a September 24, 2008 letter agreement. This agreement provided the Appellant would pay ITC $87,388.13, which included amounts owed for taxes, legal fees, and interest payments, by September 30, 2008.

[1] The note was modified in August 2007, and the loan amount was increased to $2,064,625.

The agreement further provided that ITC would delay the payment date on the note until December 31, 2008, provided the Appellant acknowledge service of the action against her. West mailed a copy of the letter agreement to the Appellant and stated, "I will not be able to represent you in the South Carolina lawsuit since I am not admitted to practice before the courts of that State." According to the Appellant, she does not remember receiving the letter. The Appellant paid ITC $87,388.13 pursuant to the parties' agreement; however, she failed to acknowledge service. On October 13, 2008, the Aiken County Sherriff's Department served the Appellant with ITC's complaint at her home. The Appellant filed no responsive pleading.

When the note was not paid in full on December 31, 2008, ITC notified the Appellant through West that it intended to proceed with its case against her, and made an additional loan extension proposal as an alternative. West sent a certified copy of the letter to the Appellant, and she acknowledged receipt. West informed the Appellant in the letter for the second time that he could not represent her in South Carolina. After no further funds were received, ITC filed a request for entry of default and motion for default judgment against the Appellant on March 12, 2009. The Appellant was served by mail at her home, and she did not respond. On April 7, 2009, the trial court granted ITC's motion for default judgment against the Appellant in the amount of $2,172,955.38.

In May 2009, the Appellant filed a motion for relief from judgment, citing Rules 54, 55, and 60, SCRCP. ITC consented to a reduction in certain attorney's fees and charges included in the default judgment, which resolved the Appellant's complaints based on Rules 54 and 55, SCRCP. At the hearing, the Appellant's counsel admitted the Appellant was negligent in failing to answer the suit. However, the Appellant's counsel argued the default judgment should be set aside because of the negligence of West and ITC. The trial court denied the Appellant's motion, finding she was "not entitled to relief from the judgment on account of negligence of her own counsel, that there was no misconduct by [ITC] or its counsel, and that under the standard of Rule 60(b), [the Appellant] was not entitled to relief." This appeal followed.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial [court]." Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Id. An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. Id.

LAW/ANALYSIS

I. West's September 24, 2008 Letter

The Appellant argues the trial court erred in finding West's September 24, 2008 letter sufficiently advised her that West could not represent her in the present action. We disagree.

In its order and modification of default judgment, the trial court determined West clearly notified the Appellant that he could not represent her because he was not licensed to practice law in South Carolina. The trial court found that although the Appellant maintained she did not remember receiving West's letter, the evidence established the letter was properly addressed and sent by U.S. Mail to the Appellant and she failed to show it was not received.

The Appellant argues West represented her in default negotiations for one year, and she had the right to assume he would continue to represent her. The Appellant contends that considering her age and inexperience in legal matters, West's letter should have contained an explanation of the risks regarding his limited representation. She also maintains West should have discussed his representation with her personally and in the presence of a family member or family attorney, and obtained a response from her to ensure she understood his inability to represent her. The Appellant contends the trial court erred in failing to consider Rule 1.2 of the Rules of Professional Conduct (RPC), Rule 407, SCACR.

Pursuant to Rule 1.2(c), RPC, "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g), RPC. Comment 6 to Rule 1.0, RPC, provides:

> A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

Comment 7 to Rule 1.0, RPC, states:

> Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

ITC takes no position regarding the RPC, and maintains it is a matter between the Appellant and West. ITC argues West's September 24, 2008 letter regarding his representation of the Appellant does not amount to a willful abandonment of the Appellant. ITC maintains that even assuming

West did willfully abandon the Appellant, she is not excused from failing to take action in response to West's letters or ITC's complaint and default judgment motion.

We find the trial court did not abuse its discretion in finding West's letter to the Appellant sufficiently advised her that West could not represent her. While the Appellant maintains she is entitled to relief from judgment because she did not give West her informed consent pursuant to Rule 1.2(c), RPC, we note our supreme court determined "the failure to comply with the RPC should not . . . be considered as evidence of negligence per se." Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 437 n.6, 472 S.E.2d 612, 614 n.6 (1996); see also Preamble to RPC, Rule 407, SCACR (stating a "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached"). In Smith, the supreme court concurred with the majority of jurisdictions and held that

> in appropriate cases, the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action. However, we adopt the view taken by the Supreme Court of Georgia in Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 453 S.E.2d 719, 721-22 (1995), as follows:
>
> [t]his is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm.

Id. at 437, 472 S.E.2d at 614. The Smith court noted an attorney's failure to comply with the RPC was "merely a circumstance that, along with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client." Id. at 437 n.6, 472 S.E.2d at 614 n.6.

Here, the record contains evidence West acted with reasonable care in informing the Appellant he could not represent her. In two letters to the Appellant, West clearly explained he was not authorized to practice law in South Carolina, and the Appellant needed to find new counsel. Because the trial court was not required to consider the RPC in determining whether West acted with reasonable care, we find the trial court did not abuse its discretion in determining West's letter sufficiently limited his representation of the Appellant.

II. Imputation of Negligence

The Appellant argues the trial court erred in finding West's negligence was imputed to the Appellant. In its order, the trial court cited Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163-64, 375 S.E.2d 321, 323 (Ct. App. 1988), wherein this court held the negligence of an attorney is ordinarily imputed to the client. The trial court further stated, "[t]he court finds no reason that any negligence of [the Appellant's] counsel in this matter should not be imputed to [the Appellant]." Although the trial court cited cases regarding the imputation of negligence, it failed to make any specific findings of negligence by West and impute those findings to the Appellant. Accordingly, because the trial court did not impute any negligence to the Appellant, we do not consider the Appellant's argument that the trial court erred in imputing negligence to her.

III. Relief under Rule 60(b)(1), SCRCP

The Appellant argues the trial court's errors of law resulted in its finding she failed to prove mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1), SCRCP. We disagree.

In Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009), our supreme court held "[t]he standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." The supreme court further noted relief from default judgment under Rule 60(b), SCRCP, "requires a more particularized showing of mistake, inadvertence, excusable

neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party.'" Id. (quoting Rule 60(b), SCRCP).

Here, the trial court noted in its order that the Appellant's counsel conceded at the hearing that the Appellant was negligent, and the trial court found her negligence was not excusable within the meaning of Rule 60(b), SCRCP. The trial court held that although the Appellant may have had good cause to set aside the entry of default under Rule 55, SCRCP, she did not meet the standards established by Rule 60(b), SCRCP, to set aside the judgment.

The Appellant argues she demonstrated a particularized showing of mistake, inadvertence, and excusable neglect to the trial court, and thus, she was entitled to relief from judgment under Rule 60(b)(1), SCRCP. The Appellant maintains her failure to file an answer after being served was excusable under the following circumstances: (1) her age and mental state prevented her from understanding the situation, (2) she thought the loan was current, (3) she was not aware of the lawsuit, (4) she believed she was still represented by West, and (5) she had no experience working with attorneys.

We find the trial court did not abuse its discretion in finding the Appellant's negligence in failing to answer ITC's complaint was not excusable under Rule 60(b), SCRCP. We also find the Appellant failed to identify any errors of law made by the trial court. The record reflects the Appellant was properly served with ITC's summons and complaint at her home by the sheriff's department. Moreover, West notified the Appellant in a certified letter, to which she acknowledged receipt, that ITC intended to proceed with its suit against her and that he could not represent her. The Appellant also failed to show through medical testimony that she had a diminished capacity or that ITC and its counsel engaged in any misleading conduct. ITC properly served the Appellant with its complaint and subsequently with its motion for default judgment and amended motion for default judgment.

IV. Meritorious Defenses

The Appellant argues she has meritorious defenses to justify relief from the default judgment. We need not address this issue.

"[A] meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments." McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008).

> [O]ur courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense. . . . [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Id. at 574-75, 671 S.E.2d at 93-94 (internal quotation marks and citations omitted). The party seeking to set aside the judgment "has the burden of presenting evidence proving the facts essential to entitle him to relief." Id. at 575, 671 S.E.2d at 94.

The Appellant contends she has the following meritorious defenses to justify relief under Rule 60(b), SCRCP: (1) she was in a state of shock and extreme grief at the time she signed the guaranty, (2) she did not understand what she was signing, (3) she was given no consideration for signing the guaranty, and (4) the note may not be in default. Having concluded the trial court did not abuse its discretion in finding the Appellant was not entitled to relief on any of the grounds specified in Rule 60(b), SCRCP, we need not address whether the Appellant has a meritorious defense. See id. at 574-75, 671 S.E.2d at 93-94; see also Futch v. McAllister Towing of Georgetown,

Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

The trial court's denial of the Appellant's motion to set aside default judgment is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.