The Supreme Court of South Carolina

In the Matter of John Michael Mitchum, Deceased.

Appellate Case No. 2012-212507

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), the Office of Disciplinary Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Michael S. Seekings, Esquire, is hereby appointed to assume responsibility for Mr. Mitchum's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mitchum maintained. Mr. Seekings shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Mitchum's clients. Mr. Seekings may make disbursements from Mr. Mitchum's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mitchum maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Mitchum, shall serve as notice to the bank or other financial institution that Michael S. Seekings, Esquire, has been duly appointed by this Court.

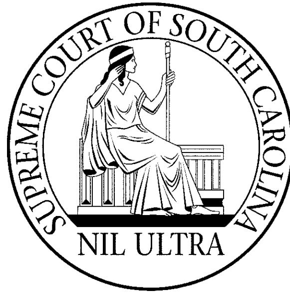
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael S. Seekings, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Mitchum's mail and the authority to direct that Mr. Mitchum's mail be delivered to Mr. Seekings' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

July 19, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
July 25, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

27146 – BAC Home Loan Servicing v. Debra Kinder 18

27147 – SC Farm Bureau v. Henry Kennedy 23

UNPUBLISHED OPINIONS

2012-MO-030 – State v. Mack Green
(Hampton County, Judge Howard P. King)

2012-MO-031 – State v. Lucius Simuel
(Beaufort County, Judge Thomas W. Cooper, Jr.)

PETITIONS – UNITED STATES SUPREME COURT

27013 – Carolina Chloride v. Richland County Pending

27081 – State v. Jerry Buck Inman Pending

27100 – Kristi McLeod v. Robert Starnes Pending

2011-OR-00625 – Michael Hamm v. State Pending

PETITIONS FOR REHEARING

27129 – State v. Jarod Wayne Tapp Pending

27131 – Nationwide v. Kelly Rhoden Pending

27139 – Dutch Fork Development v. SEL Properties Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5006-James D. Broach and Mark Loomis v. Eugene E. Carter, Advantage Real Estate, Inc., SilverDeer Management, LLC, Paradise Grande, LLC d/b/a The Horizon at 77th, and Howard Jacobson 36

5007-Janette Hamilton v. Charleston County Sheriff's Department 45

5008-Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor, v. CSX Transportation and the South Carolina Department of Transportation 51

5009-The State v. Bennie Mitchell 69

5010-South Carolina Department of Transportation v. Janell P. Revels and R. J. Poston, Jr., Landowners, and John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title or interest in or to, or lien on the lands described herein, including all unknown heirs of Reamer J. Poston, Sr. a/k/a R. J. Poston Sr., deceased, Unknown Claimants 81

5011-Ann Dreher v. South Carolina Department of Health and Environmental Control 91

UNPUBLISHED OPINIONS

2012-UP-455-State v. Lamar Jones
(Charleston, Judge Roger M. Young)

2012-UP-456-State v. Turuk Saunders
(Beaufort, Judge J. Ernest Kinard, Jr.)

2012-UP-457-State v. Clifford Johnson
(Union, Judge John C. Hayes, III)

2012-UP-458-Marion G. Blackwell, Employee/Claimant v. Haier Refrigerators, Employer, and the Hartford, Carrier
(S. C. Workers' Compensation Commission Appellate Panel)

2012-UP-459-Habersham Atlantic, LLC v. Firstar Homes, Inc.
(Richland, Judge Alison Renee Lee)

2012-UP-460-Lehua Figueroa and Nohealani Figueroa v. CBI/Columbia Place Mall, LLC, and ERMC II, LLP
(Richland, Judge Alison Renee Lee)

2012-UP-461-Kimball Robinette v. Capita Employer Resources and Key Risk
(S.C. Workers' Compensation Commission Appellate Panel)

2012-UP-462-James M. Tennant v. Board of Zoning Appeals for the City of Georgetown
(Georgetown, Judge Benjamin H. Culbertson)

2012-UP-463-Benjamin Strickland v. Sumter Utilities, Inc. and Old Republic Insurance Company
(S.C. Workers' Compensation Commission Appellate Panel)

2012-UP-464-State v. Leshaon Octavius Bell
(Marion, Judge William H. Seals, Jr.)

PETITIONS FOR REHEARING

4920-State v. Robert Taylor (2)	Pending	
4939-Cranford v. Hutchinson Const.	Pending	
4950-Flexon v. PHC	Pending	
4960-Lucey v. Meyer	Pending	
4961-Ex parte Lipscomb (Hollis v. Stone)	Pending	
4964-State v. A. Adams	Pending	
4975-Greeneagle v. SCDHEC	Pending	
4977-State v. P. Miller	Pending	
4978-Tillman v. Oakes	Denied	07/19/12
4979-Alberta Major v. City of Hartsville	Denied	07/17/12

4980-Hammer v. Hammer	Pending
4981-State v. H. McEachern	Pending
4982-Buist v. Buist	Pending
4983-State v. J. Ramsey	Pending
4984-State v. B. Golston	Pending
4985-Boyd v. Liberty Life Insurance Co. et al.	Pending
4986-Cason Companies, Inc. v. Joseph Gorrin and Sharon Gorrin	Pending
4988-Wells Fargo Bank, NA v. Michael Smith et al.	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4990-State v. C. Heller	Pending
4992-Ford v. Beaufort Cty. Assessor	Pending
4995-Keeter v. Alpine Towers International Inc.	Pending
2011-UP-558-State v. T. Williams	Pending
2012-UP-078-Tahaei v. Smith	Pending
2012-UP-134-Coen v. Crowley	Pending
2012-UP-165-South v. South	Pending
2012-UP-187-State v. J. Butler	Pending
2012-UP-197-State v. L. Williams	Pending
2012-UP-226-State v. C. Norris	Pending
2012-UP-267-State v. J. White	Pending
2012-UP-270-National Grange v. Phoenix Contract	Pending
2012-UP-274-Passaloukas v. Bensch	Pending

2012-UP-286-Rainwater v. Rainwater	Pending
2012-UP-292-Ladson v. Harvest Hope	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-316-Zetz v. Zetz	Pending
2012-UP-318-Cupstid v. Fogle	Pending
2012-UP-325-Abrams v. Nan Ya Plastics Corp., et al.	Pending
2012-UP-330-State v. D. Garrett	Pending
2012-UP-332-Tomlins v. SCDPPS	Pending
2012-UP-348-State v. J. Harrison	Pending
2012-UP-351-State v. K. Gilliard	Pending
2012-UP-353-Shehan v. Shehan	Pending
2012-UP-365-Patricia E. King, as representative of W.R. King and Ellen King, v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King (deceased) and Nelson M. King	Pending
2012-UP-371-State v. T. Smart	Pending
2012-UP-385-Suresh J. Nandwani et al. v. Queens Inn Motel et al.	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4592-Weston v. Kim's Dollar Store	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending

4685-Wachovia Bank v. Coffey, A	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4742-State v. Theodore Wills	Pending
4750-Cullen v. McNeal	Pending
4753-Ware v. Ware	Pending
4764-Walterboro Hospital v. Meacher	Pending
4766-State v. T. Bryant	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending

4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4880-Gordon v. Busbee	Pending

4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4912-State v. Elwell	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree	Pending
4924-State v. B. Senter	Pending
4927-State v. J. Johnson	Pending
4932-Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending

Case	Status
4934-State v. R. Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. B. Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Crossland v. Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4956-State v. Diamon D. Fripp	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-108-Dippel v. Horry County	Pending

2011-UP-109-Dippel v. Fowler	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending

2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending

2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Johnson v. Hall	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-P. Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-475-State v. J. Austin	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-495-State v. A. Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-516-Smith v. SCDPPPS	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending

2011-UP-522-State v. M. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-562-State v. T.Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. R. Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. D. Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-Ravenell v. Meyer	Pending
2012-UP-003-In the matter of the care and treatment of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Michelle D.C.	Pending
2012-UP-010-State v. N. Mitchell	Pending
2012-UP-014-State v. A. Norris	Pending
2012-UP-018-State v. R. Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. A. Byron	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-075-State v. J. Nash	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending

2012-UP-217-Forest Beach Owners' Assoc. v. Austin	Pending
2012-UP-218-State v. A. Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-312-State v. E. Twyman	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

BAC Home Loan Servicing, L.P., f/k/a Countrywide Home Loan Servicing, L.P., successor in interest to Defendant Mortgage Electronic Registration Systems, Inc., MIN #: 100039032108093192, Appellant,

v.

Debra Kinder, Personal Representative of the Estate of George William Brelsford, IV a/k/a George W. Brelsford, and Debra Kinder, Personal Representative of the Estate of Patricia M. Brelsford, Respondents.

Appellate Case No. 2011-191086

Appeal From Aiken County
Robert A. Smoak, Jr., Master-in-Equity

Opinion No. 27146
Heard June 6, 2012 – Filed July 25, 2012

REVERSED

Sean A. O'Connor, of Finkel Law Firm, LLC, of Charleston, for Appellant.

James L. Verenes, of Fox & Verenes, of Aiken, for Respondent.

JUSTICE HEARN: This case presents us with two issues: (1) whether an assignee of a note and mortgage has a right to surplus funds generated by the foreclosure of a prior mortgage on the property, and (2) whether that assignee is barred from recovering the surplus funds because the note and mortgage assigned to it allegedly were closed without attorney participation. We hold the assignee may recover the surplus funds even though it was not a lienholder of record at the time of the sale. We also clarify our decision in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and hold because the mortgage was filed before *Matrix*, whether it was closed without the services of an attorney would not bar the assignee from receiving the surplus funds.

FACTUAL/PROCEDURAL BACKGROUND

George Brelsford executed and delivered a promissory note and mortgage (Mortgage 1) for $30,000 to Citizens Bank of Effingham (Bank) on July 2, 2004. Mortgage 1 was secured by real property in Aiken County and recorded in the Aiken County Register of Mesne Conveyance on July 6, 2004. Brelsford executed and delivered a second promissory note to Quicken Loans, Inc. on March 21, 2007, for the sum of $149,000 and secured payment of this note with a mortgage (Mortgage 2) in favor of Mortgage Electronic Registration Systems, Inc. (Systems) as nominee for Quicken. Mortgage 2 was secured by the same real property as Mortgage 1 and was duly recorded on April 20, 2007.

Brelsford died on August 11, 2009. After determining its loan was in default, Bank foreclosed on the property. Brelsford's estate as well as Systems were named as defendants and properly served, but neither responded nor were present at the sale, and they were therefore held in default. The property was sold on July 6, 2010 to a third party for the sum of $116,000, which, after satisfying the debt to Bank, left $79,405.25 in surplus funds.

On July 30, 2010, Systems assigned its note and mortgage to BAC Home Loan Servicing, L.P., and BAC recorded this assignment on August 20, 2010. BAC then filed a claim for the surplus funds pursuant to Rule 71(c), SCRCP, and a hearing was held on October 28, 2010. In the master's original order, he found that BAC did not have standing to claim the surplusage under Rule 71(c) because it did not have "a lien on the mortgaged premises at the time of sale," specifically noting that BAC did not have a recorded interest until August 20, 2010, well after the July 6, 2010 sale date. Although arguments were also made that Mortgage 2 was closed

without attorney participation in contravention of the law, the master held he did not have sufficient evidence to make a ruling on the issue and invited the submission of additional evidence in a Rule 59(e), SCRCP, motion. Pending the submission of a Rule 59(e) motion, the master awarded the surplus funds to Brelsford's estate.

BAC made a Rule 59(e) motion arguing that the master erred in barring its recovery of the funds because, as an assignee, it was not required to record its assignment to have a valid claim. Similarly, BAC argued that as an assignee it received all the rights Systems would have had, including the right to request the surplus funds. It further contended whether Mortgage 2 was closed by an attorney was irrelevant because BAC was not a party to that closing. Finally, BAC argued that as a holder in due course of the note underlying the mortgage, it took free from the defense that the transaction was illegal.

The master disagreed and again held BAC could not claim the surplus funds, reasoning that Rule 71(c) only allowed claims by those who had a "lien" at the time of the sale and because the lien on the property was extinguished by the sale, Systems' assignment of the mortgage to BAC was "an empty shell, since the lien no longer existed." Also, although no additional evidence was presented, the master concluded that the HUD-1 closing statement, which had been the only evidence before him at the initial hearing, was proof that no attorney participated in the closing of Mortgage 2. He therefore held that even if BAC were a holder in due course, because Systems would be barred from recovery because of this illegality, so would BAC. He therefore denied BAC's motion. This appeal followed.

ISSUES PRESENTED

I. Did the master err in holding BAC could not recover surplus funds because it was not a lienholder of record at the time of the sale?

II. Did the master err in holding BAC was barred from recovering surplus funds because he found no attorney participated in the closing of Mortgage 2?

LAW/ANALYSIS

I. STATUS AS LIENHOLDER

BAC first argues the master erred in holding that it could not recover the surplus funds from the foreclosure sale because it was not a lienholder of record at the time of the sale. We agree.

Rule 71 states, in part, that "[i]n the event of a surplus fund resulting from the sale [on foreclosure], . . . [a]ny party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, . . . may have a hearing to determine [entitlement to the surplus fund]." Rule 71(c), SCRCP. In the master's original order, he found that because the assignment was not recorded until after the sale, BAC did not have a valid "lien on the mortgaged premises at the time of sale." However, the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee. *Singleton v. Singleton*, 60 S.C. 216, 235, 38 S.E. 462, 469 (1901). Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC.

Additionally, although the master noted that Systems was a party to the foreclosure action and had a lien on the subject property, he concluded that the lien was terminated by the foreclosure sale and thus the subsequent assignment to BAC "was an empty shell, since the lien no longer existed." *See* S.C. Code Ann. § 29-3-780 (2007) ("Upon . . . a sale of lands pursuant to decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien."). He also found no evidence Systems had "specifically assigned its right to pursue the surplus funds under Rule 71(c), SCRCP." However, the extinguishment of the lien has no bearing on this case because BAC is not claiming it still has a lien over the property. Instead, it merely claims an interest in the proceeds from the foreclosure sale. The master's ruling ignores the fact that Systems retained the right to claim the surplus funds pursuant to its original lien and the underlying note, and it is this right Systems assigned to BAC. Moreover, in assigning the note and mortgage, we see no reason why Systems would be required to explicitly assign the right to surplus funds for BAC to exercise it. An assignee stands in the shoes of the assignor. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). Thus, an innocent assignee receives all the rights of his assignor.

Singleton, 60 S.C. at 234-35, 38 S.E. at 469. Because Systems could have made this claim under Rule 71(c), BAC is entitled to make the same claim. To hold otherwise would ignore settled principles governing assignments.

II. ATTORNEY PARTICIPATION IN CLOSING

BAC also argues the master erred in finding Mortgage 2 was closed without attorney supervision which should bar BAC's claims. We find it unnecessary to address the factual issue of whether an attorney was present at the closing because even if one had not been present, our holding in *Matrix* would allow BAC's claims to proceed.

In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

CONCLUSION

Based on the foregoing, we reverse the master's order and award the surplus funds to BAC.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Farm Bureau Mutual Insurance Company, Respondent,

v.

Henry Kennedy, Petitioner.

Appellate Case No. 2010-177906

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27147
Heard April 3, 2012 – Filed July 25, 2012

REVERSED

Blake Alexander Hewitt and John S. Nichols, of Bluestein Nichols Thompson & Delgado, of Columbia; and Eric Holcombe Philpot, of Greenville, for Petitioner.

Karl Stephen Brehmer and L. Darby Plexico, III, of Brown & Brehmer, of Columbia, for Respondent.

JUSTICE BEATTY: South Carolina Farm Bureau Mutual Insurance Co. (Farm Bureau) brought this declaratory judgment action to determine whether

Henry Kennedy (Kennedy) was entitled to underinsured motorist (UIM) coverage for an accident. The trial court found Kennedy was entitled to UIM coverage under the terms of the policy because Kennedy was "upon" and thus "occupying" the insured vehicle at the time of the accident. The Court of Appeals reversed. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 390 S.C. 125, 700 S.E.2d 258 (Ct. App. 2010). We granted Kennedy's petition for a writ of certiorari to review the decision of the Court of Appeals. We reverse.

I. FACTS

Kennedy was sent by his employer, Irons Poultry Farms, Inc. (Irons), in his employer's truck, to Wise Barbeque, to tell Johnny Wise that Irons had some feed for him to pick up. Upon arrival, Kennedy left the keys in his employer's truck and went into the restaurant to deliver the message.

After delivering the message, Kennedy saw his brother, Teddie Robinson, and they engaged in a conversation while walking towards the Irons truck. Part of the conversation occurred at the rear of the Irons truck. Kennedy and Robinson finished their conversation and Robinson prepared to leave. At that moment, an accident occurred on a nearby highway between two pickup trucks. The impact of the collision knocked one of the pickup trucks driven by George Counts into the restaurant's parking lot. Counts's truck struck both Robinson and Kennedy as they attempted to escape the careening vehicle.

Kennedy sustained a broken right femur and multiple abrasions, as well as head, neck, and back injuries. His combined medical expenses and lost wages exceeded the liability coverage on Counts's truck. Irons had a Commercial Auto Policy with Farm Bureau that covered its truck. The policy provided UIM coverage of $50,000 per individual and $100,000 per occurrence. Kennedy sought UIM coverage under his employer's insurance policy, but Farm Bureau denied coverage.

Farm Bureau filed this declaratory judgment action seeking a determination whether Kennedy was entitled to UIM benefits under the policy. Farm Bureau (1) disputed whether Kennedy was ever pinned to his employer's vehicle; and (2) asserted Kennedy was standing by his employer's vehicle and not in actual physical contact with it when the accident occurred and, thus, did not meet the policy's definition of "occupying" the vehicle.

Kennedy was initially granted summary judgment. The Court of Appeals reversed, holding there was a genuine factual dispute regarding whether Kennedy was ever pinned against his employer's truck, which precluded summary judgment. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, Op. No. 2006-UP-423 (S.C. Ct. App. filed Dec. 19, 2006).

A bench trial was subsequently held by Judge J. Mark Hayes on the declaratory judgment action. Judge Hayes determined Kennedy was entitled to UIM benefits. As part of his findings of fact, Judge Hayes found that Kennedy had left the engine running on his employer's truck, with a dog inside, and that Kennedy had a brief conversation with Teddie Robinson at the back of the employer's truck after performing the errand for his employer. Judge Hayes further found that Kennedy "was in physical contact [with the insured vehicle] prior to the accident but had removed his hand from the *insured vehicle* in his efforts to avoid being injured when the other vehicle was about to strike him," and that "the evidence, especially the medical documentation submitted as to the injuries, clearly established the injuries were consistent as being caused by physical contact with the *insured vehicle*."

Judge Hayes stated he was reaching this result in light of this Court's mandate that "upon" and "occupying" should be construed in favor of the insured, citing *McAbee v. Nationwide Mutual Insurance Co.*, 249 S.C. 96, 152 S.E.2d 731 (1967). Judge Hayes noted the policy at issue in *McAbee*, like the policy here, did not contain any restrictions as to how or in what manner the insured was to be upon the vehicle.

In *McAbee*, this Court considered a Nationwide insurance policy that provided benefits in case of bodily injury or death "while in or upon, entering or alighting from" a motor vehicle. *Id.* at 99, 152 S.E.2d at 732. The insured was driving his employer's truck when he came upon his employer's brother, whose tractor had broken down, and stopped to help him. *Id.* at 98, 152 S.E.2d at 731-32. The insured, while preparing to leave in the truck, went to the rear of the truck to remove a chain. *Id.* at 98, 152 S.E.2d at 732. At that time the tractor began rolling toward the rear of the truck where the insured, stooped with his back turned, was engaged in removing the chain *Id.* "[T]he insured straightened up, turned, and placed his hands on the tractor with his back against the truck as if trying to stop the tractor and keep it from striking him." *Id.* at 98-99, 152 S.E.2d at 732.

However, he was crushed to death between the rear of the truck and the front of the tractor. *Id.* at 99, 152 S.E.2d at 732.

This Court stated it was conceded the insured was not in, entering, or alighting from the truck, so "[t]he sole question is whether the insured, while standing on the ground with his back against the parked truck in an effort to keep the tractor from rolling against him, was Upon the truck within the meaning of the policy." *Id.*

The Court observed that this provision had not previously been construed by this Court, and while cases in other jurisdictions are not in complete agreement, "the rule seems to be generally recognized that the words 'in or upon' as used in such policy provisions require a broad and liberal construction in favor of the insured and that by the weight of authority actual physical contact with the insured's automobile is sufficient to establish that the insured was Upon the vehicle as contemplated by such policies." *Id.*

The Court held that the insured was in actual physical contact when he had his back against the insured vehicle trying to protect himself and thus was "upon" it within the meaning of the policy provision, triggering his entitlement to UIM benefits. *Id.* at 100, 152 S.E.2d at 733.

In the current matter before us on appeal, Judge Hayes found Kennedy was entitled to UIM coverage because he (1) "was in physical contact with the insured vehicle at the exact moment of the accident, by virtue of being knocked against it or pinned to it," and (2) "that the evidence established that [Kennedy] was in physical contact [with the insured vehicle] prior to the accident but had removed his hand from the *insured vehicle* in his efforts to avoid being injured when the other vehicle was about to strike him."

The Court of Appeals reversed. The Court of Appeals concluded that Kennedy was not occupying his employer's truck at the time of the accident because "[h]e had departed the truck, gone inside the restaurant, and returned to the parking lot to talk with his half-brother near the vehicle when he was hit by the pickup truck. As a result, there was no causal connection between Kennedy's use of the [employer's] truck and his being struck by Counts'[s] pickup truck." *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 390 S.C. 125, 139, 700 S.E.2d 258, 266 (Ct. App. 2010). This Court granted Kennedy's petition for a writ of certiorari.

II. STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011) (citation omitted).

"In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* at 46-47, 717 S.E.2d at 592 (citation omitted). However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. *Id.* at 47, 717 S.E.2d at 592.

III. LAW/ANALYSIS

Initially, it is noted that the Court of Appeals ignored the trial court's findings of fact and substituted its own. Significantly, the Court of Appeals ignored the trial court's findings that Kennedy had physical contact with the insured truck until he attempted to escape the impending danger and that Kennedy also had actual physical contact as a result of being pinned between the insured vehicle and Counts's truck. These findings of fact are supported by evidence in the record. Additionally, it appears the Court of Appeals based its decision on a question not raised by the parties, that being whether or not Kennedy was using the insured vehicle at the time he was injured. It is undisputed that Kennedy was performing an errand for his employer and was preparing to return to the work site when he was struck by Counts.

The proper question before the court was whether or not Kennedy had actual physical contact with the insured truck when he was injured. This was a question of fact for the trial court, which it answered in the affirmative. The evidence in the record supports the trial court's finding. Farm Bureau attempts to convert this question of fact to one of law by arguing a finding of coverage would contravene the policy's provisions. Notwithstanding our dispositive "any evidence" standard of review, we will review the policy's provisions in light of the facts of this case because it presents a novel question for this Court: Is it

unreasonable to require that actual physical contact be maintained when facing impending danger of harm?

Part II of Farm Bureau's policy, concerning UIM coverage, provides it will pay UIM benefits to a "covered person" as follows:

> We will pay damages for **bodily injury** or **property damage** a **covered person** is legally entitled to collect from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** or **property damage** must be caused by an accident arising out of the operation or ownership of the **underinsured motor vehicle**.

A "covered person" is defined in Part II as including a "person **occupying your** [the insured's] **covered auto**." "Occupying" appears in the General Definitions portion of the policy and "means having actual physical contact with an **auto** while in, upon, entering, or alighting from it." Kennedy contended he was entitled to UIM coverage because he was "upon" the insured vehicle when he was injured and thus was "occupying" it.

On appeal, Kennedy argues that in considering whether he was "upon" his employer's truck, it should not matter when the physical contact occurs, i.e., whether he was touching the insured vehicle at the time he was crushed by another vehicle, or whether he was touching it, then ran away for his safety before being pinned back upon it, as in the current appeal. In either circumstance, the insured was in physical contact with the insured vehicle and injured.

Farm Bureau contends this interpretation would contravene the policy, which provides the physical contact must occur while the individual is "occupying" the vehicle. Farm Bureau argues Kennedy was not in physical contact with his employer's truck when Counts's truck initially hit him, and the fact that he was pushed into the vehicle as a result of the accident does not change his status.

Like the Court of Appeals, Farm Bureau erroneously assumes that this accident begins and ends at the exact moment of contact between the Counts vehicle and Kennedy. This assumption is flawed because it ignores the unfolding events surrounding the accident. The trial court found that Kennedy had physical contact with the Irons truck until he was forced to relinquish it in an attempt to escape injury, and that Kennedy suffered additional injuries when he was pinned

between the Irons truck and Counts's truck. The temporal continuum of an accident necessarily includes more than the point in time of initial impact. It also includes the events immediately surrounding the initial impact and the point in time that the last injury was inflicted. *See Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970) (observing the party was injured while still engaged in the completion of those acts reasonably to be expected from one acting under similar conditions).

In *McAbee*, although the policy did not require physical contact, there was, in fact, physical contact between McAbee and his employer's truck when McAbee was pinned between his employer's truck and a tractor.[1] This Court held that McAbee's physical contact with his employer's truck would satisfy the definition of "upon" because "upon" was not so narrowly defined as to mean only "on top of." *McAbee*, 249 S.C. at 99, 152 S.E.2d at 732. In the current appeal, the trial court specifically found that Kennedy "was in physical contact [with his employer's insured vehicle] prior to the accident but had removed his hand from the *insured vehicle* in his efforts to avoid being injured when the other vehicle was about to strike him." This factual finding has not been challenged on appeal, and we believe it establishes the requisite physical contact for UIM coverage under the circumstances present here. Moreover, the trial court also found that physical contact was established when Kennedy was pinned against the Irons truck. We agree.

As noted in *American Jurisprudence, Second Edition*, whether a person is deemed to have been "occupying" a vehicle depends on the facts of each case, although the general trend appears to be in favor of a liberal construction of the term "occupying." 7A Am. Jur. 2d *Automobile Insurance* § 455 (2007).[2]

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[1] The *McAbee* court ostensibly believed that it made no difference when the physical contact occurred because it did not address whether *McAbee* first came in physical contact with the tractor or with the insured truck.

[2] *See* Jonathan M. Purver, Annotation, *Automobile Insurance: When is a Person "Occupying" an Automobile Within Meaning of Medical Payments Provision*, 42 A.L.R.3d 501 (1972 & Supp. 2011) (discussing cases where the claimant was injured while in various situations: alighting from the vehicle, with his or her body partly in the vehicle, reaching into the vehicle, standing near the vehicle, placing an object into the trunk, leaning against the vehicle, etc.); R.P. Davis, Annotation,

In this case, Kennedy drove his employer's truck to the restaurant, where he left the keys in the truck with the engine running and a dog inside while he went inside the building. Shortly thereafter he returned to the parking lot, where he was standing with his hand on the vehicle when he saw the approaching danger and attempted to flee before immediately being struck and injured by Counts's truck. Thus, Kennedy was in physical contact with his employer's vehicle immediately prior to being struck by Counts's vehicle. The fact that Kennedy had engaged in a conversation at the rear of the truck is not important. Holding a conversation outside of an automobile is commonplace and is to be expected in the ordinary use of a vehicle.

Kennedy argues Farm Bureau's interpretation of the policy, which would deny coverage here while allowing it in a case like *McAbee*, where the individual was bracing himself against his employer's truck when he was crushed by a tractor, would be an "unreasonable" distinction that would unfairly deny him UIM benefits. We agree that requiring Kennedy to keep his hand upon the vehicle, remain in the path of Counts's oncoming vehicle, and risk being crushed is unreasonable, unconscionable, and not in accordance with the legislative purpose behind enactment of the UIM statute. *See* S.C. Code Ann. § 38-77-160 (2002) (stating automobile insurance "carriers shall . . . offer . . . underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute"); *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature." (citation omitted)); *see also O'Neill v. Smith*, 388 S.C. 246, 254-55, 695 S.E.2d 531, 535-36 (2010) (observing under South Carolina law, carriers must offer UIM coverage up to the limits of the insured's liability coverage, and the purpose of the UIM statute is to provide *to* an

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Scope of Clause of Insurance Policy Covering Injuries Sustained While "in or on" or "upon" Motor Vehicle, 39 A.L.R.2d 952, at § 4 (1955 & Later Case Service 2005) (evaluating "in or upon" and whether the injured person had physical contact with the vehicle immediately prior to the injury).

insured who is an injured claimant the same benefit level as that provided *by* the insured to those asserting claims against the insured (citation omitted)).

To interpret the physical contact requirement in a manner that would require Kennedy to succumb to the approaching danger rather than relinquish physical contact would be unreasonable and unconscionable. Kennedy's conduct was reasonably to be expected from one acting under similar circumstances when faced with a hazard encountered in the ordinary use of a vehicle. *See Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970) (holding where the plaintiff was struck within two or three feet of the automobile while running to attempt to escape an imminent impact with an oncoming vehicle, the plaintiff was still "alighting from" the automobile because the "meaning [of a policy term] must be related to the particular use of the automobile and the hazards to be encountered from such use"; the Court found "[i]t is reasonable to conclude that coverage was intended to protect a guest against the hazards from passing vehicles in the vicinity, while the guest . . . is still engaged in the completion of those acts reasonably to be expected from one . . . [acting] under similar conditions"); *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) (noting if a court finds a contract clause was unconscionable at the time it was made, the court may refuse to enforce the clause or limit its application to avoid an unconscionable result; what is unconscionable depends upon all the facts and circumstances in a particular case); *see also Blakeslee v. Farm Bureau Mut. Ins. Co.*, 201 N.W.2d 786, 791 (Mich. 1972) ("It would be unconscionable to permit an insurance company offering statutorily required coverage to collect premiums for it with one hand and allow it to take the coverage away with the other by using a self-devised [] limitation. Nothing could more clearly defeat the intention of the legislature." (*cited in* Donald M. Zupanec, Annotation, *Doctrine of Unconscionability as Applied to Insurance Contracts*, 86 A.L.R.3d 862, 872 (1978 & Supp. May 2012)); 8 Richard A. Lord, *Williston on Contracts* § 18:5, at 26-33 (4th ed. 2010) (stating the concept of unconscionability, and the standard applied by the UCC, has been extended by the courts to a variety of contexts, including provisions in insurance agreements).

Although Farm Bureau contends this dispute can be resolved by a literal interpretation of the plain language of "physical contact," we disagree, as the Supreme Court of Rhode Island recently observed the literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage

merely "illusory." *Empire Fire & Marine Ins. Cos. v. Citizens Ins. Co.*, 43 A.3d 56, 60 (R.I. 2012).

Moreover, in *Chavez v. Arizona School Risk Retention Trust, Inc.*, 258 P.3d 145 (Ariz. Ct. App. 2011), the Court of Appeals of Arizona recently questioned the validity of a policy provision limiting occupying to "being in or being in physical contact with a covered Automobile, including while getting into or getting out of that covered Automobile." *Id.* at 148. It stated, "Courts 'will not interline the UM [(uninsured motorist)] and UIM statutes to permit exclusions that have not been mentioned by the legislature.'" *Id.* (alteration in original) (quoting *Taylor v. Travelers Indem. Co. of Am.*, 9 P.3d 1049, 1057 (Ariz. 2000)). The court also cited the principle that coverage must be in conformance with that contemplated by the associated statute: "Exclusions and limitations on coverage are generally invalid unless contemplated by the statute." *Id.* (quoting *Lowing v. Allstate Ins. Co.*, 859 P.2d 724, 727 (Ariz. 1993)).

In another case involving a physical contact requirement, the Appellate Court of Illinois questioned the validity of the provision in dispute, which defined "occupying" to require physical contact for UM and UIM coverage, but not for liability coverage, as the legislative intent was to provide UM and UIM coverage at a level at least equal to that in the insured's liability coverage. *DeSaga v. West Bend Mut. Ins. Co.*, 910 N.E.2d 159, 167 (Ill. App. Ct. 2009). The court found that, even if the questioned definition were allowed to stand, under "the unique facts of this particular case," the driver was in "virtual physical contact" with his vehicle where he had left the engine running and turned on his flashers before exiting the vehicle to remove nearby debris from the roadway. *Id.* at 167-68.

Although we are likewise concerned about the ultimate validity of such definitional provisions[3] and whether they alter, or conflict with, the statutory

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[3] Requiring physical contact for all methods of "occupying" a vehicle could render some terms of coverage meaningless, arguably creating illusory coverage. For example, in *Whitmire*, 254 S.C. at 191, 174 S.E.2d at 394, this Court observed that the phrase "[a]lighting from" of necessity "must [] extend to a situation where the body has reached a point when *there is no contact* with the vehicle." (Emphasis added.) The Court explained that, "[i]f the phrase 'alighting from' is limited to the physical act of descending from the automobile, it would be meaningless because a person would still be in contact with it and within the coverage afforded under the

definition of an insured,[4] that issue was not raised to the trial court nor on appeal to this Court. Therefore, we offer no formal opinion in this regard as the issue is not before us. Rather, we find Kennedy met the physical contact requirement here because it would be unreasonable and unconscionable to interpret the provision to require a party who had physical contact with a vehicle to maintain that contact under circumstances that might result in catastrophic injury. Consequently, we agree with the trial court that Kennedy was "upon" the insured vehicle and met the requirements for UIM coverage. *Cf. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (holding even though the definition of "burglary" in the insurance policies required the exterior of the premises to bear visible marks of force and violence, and only an interior door of the insured's warehouse was

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terms 'in' or 'upon'." *Id.* Farm Bureau's actual physical contact requirement arguably eliminates coverage when alighting from a vehicle.

[4] S.C. Code Ann. § 38-77-30(7) (2002) defines an insured as follows: "'Insured' means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and *any person who uses with the consent*, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above." (Emphasis added.) There is no requirement of actual physical contact with the insured vehicle at the time of injury to qualify as an insured under the statute. If "actual physical contact" is required, then the phrase "in a vehicle *or otherwise*" appears meaningless. The only statutory limitation is that a non-resident relative and others must have *the consent* of the named insured to use the vehicle. Consent to use the vehicle bestows the same level of coverage upon others as that enjoyed by the named insured. The statutory definition cannot be limited by a contractual provision. *Cf. Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973) ("It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid."); *Potomoc Ins. Co. v. Allstate Ins. Co.*, 254 S.C. 107, 173 S.E.2d 653 (1970) (holding exclusionary policy language, whether it constituted an attempt to redefine the term "insured" in contravention of insurance statutes or to afford only conditional or contingent coverage, as opposed to the full coverage required by statutory law, was invalid as it was not in accordance with the state's financial responsibility law).

damaged during a burglary, the liability-avoiding provision in the definition was, under the circumstances of the case, unconscionable and constituted no bar to recovery).

IV. CONCLUSION

Initially, we conclude that the trial court's finding of actual physical contact is supported by the evidence. Under the sequence of events that unfolded here, where the trial court found Kennedy had left the engine running on his employer's vehicle, and that he was in physical contact with the covered vehicle (with his hand on the truck) when Counts's vehicle careened towards him, forcing him to relinquish his contact in order to attempt to avoid injury, that Kennedy was "upon" and "occupying" the vehicle at the time of the accident and he is entitled to UIM coverage under the Farm Bureau policy. Moreover, a second, resultant physical contact was established when Kennedy was pinned against the insured vehicle. We further conclude that a requirement that an insured remain in physical contact with the insured vehicle in the face of imminent danger is unreasonable and unconscionable. Consequently, we reverse the decision of the Court of Appeals.

REVERSED.

Acting Justices James E. Moore and J. Ernest Kinard, Jr., concur. PLEICONES, ACTING CHIEF JUSTICE, dissenting in a separate opinion in which KITTREDGE, J., concurs.

ACTING CHIEF JUSTICE PLEICONES: I respectfully dissent. The policy defines "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it." In my opinion, there is no dispute that petitioner was not "in actual physical contact" with the truck when the accident occurred. Unlike the majority, I am unable to agree that an accident continues until the last injury is inflicted. Under this theory, in virtually every case where the victim eventually makes contact with an insured vehicle, whether he was thrown, dragged or carried across the parking lot by another vehicle, there would be coverage. Such an expansive reading renders meaningless the policy language defining "occupying" as " in, upon, entering, or alighting from" the insured vehicle. "[P]arties have the right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy or extend coverage never intended by the parties." *Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). Here, I cannot find petitioner occupied the truck without rewriting the parties' contract.

I would affirm the decision of the Court of Appeals.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James D. Broach and Mark Loomis, Respondents,

v.

Eugene E. Carter, Advantage Real Estate, Inc., SilverDeer Management, LLC, Paradise Grande, LLC d/b/a The Horizon at 77th, and Howard Jacobson, Defendants,

Of whom Howard Jacobson is Appellant.

Appellate Case No. 2011-182306

Appeal From Horry County
Steven H. John, Circuit Court Judge

Published Opinion No. 5006
Heard April 25, 2012 – Filed July 25, 2012

REVERSED

Mark D. Neill, of The Neill Law Firm, of Murrells Inlet, for Appellant.

Lawrence S. Connor, IV, of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondents.

WILLIAMS, J.: On appeal, Howard Jacobson (Jacobson) contends there is no evidence in the record to support the jury's finding he was personally liable on behalf of Paradise Grande, LLC (Paradise Grande). Additionally, Jacobson argues there is no evidence in the record to support a jury's finding that Jacobson

tortiously interfered with James Broach's (Broach) and Mark Loomis's (Loomis) contracts with Advantage Real Estate, Inc. (Advantage). Finally, Jacobson argues the record does not support the jury's award of punitive damages. We reverse.

FACTS

This case concerns two real estate agents who sued to collect unpaid real estate commissions. Broach and Loomis worked as independent contractors for Advantage to obtain sales of various properties, including condominium units, known as Horizon 77th (Horizon), to be built by Paradise Grande.

Broach and Loomis separately entered into identical contracts with Advantage. The contracts' provisions, contained in the Independent Contractor and Broker Agreements (Independent Contractor Agreements), provided the general terms and conditions of Broach's and Loomis's working relationship with Advantage. The Independent Contractor Agreements also outlined the fee agreement, which provided that Broach's and Loomis's commissions would be paid after Advantage received payment from the buyer. Both Broach and Loomis acknowledged at trial their understanding was they would be paid their share of the commissions after Advantage received payment upon closing. Broach and Loomis worked for several years obtaining presales, sales, and closings of condominium units at Horizon. Accordingly, Broach and Loomis claim they are owed sales commissions arising from the sale of condominiums at Horizon. This case turns on the various agreements between the parties, which are discussed below.

A. The First Agreement

Paradise Grande entered into an Exclusive Sales and Marketing Agreement (First Agreement) with Advantage on February 24, 2006. Jacobson, the manager of SilverDeer Management, LLC (SilverDeer), which manages Paradise Grande, signed the First Agreement on behalf of Paradise Grande. Advantage's broker-in-charge, Eugene Carter (Carter), signed the First Agreement on behalf of Advantage. The First Agreement provided, "Paradise Grande could terminate the agreement for cause if Advantage failed to have *all units* presold by August 31, 2006." (emphasis added). Further, the First Agreement stated Paradise Grande would pay Advantage a sales commission of 6% of the closing price when the final sale was closed or after repayment of the construction loan, whichever event occurred first. Advantage failed to presell all units by August 31, 2006. As a result, Paradise Grande terminated the First Agreement.

B. Construction Loan

Paradise Grande entered into a Second Exclusive Sales and Marketing Agreement (Second Agreement) with Advantage based on negotiations between Paradise Grande and Wachovia Bank (Wachovia) concerning a construction loan. Pursuant to its agreement with Wachovia, Paradise Grande was required to have at least 80% of the condominium units at Horizon presold to obtain a construction loan. Because only 75% or 76% of the condominiums were presold, Paradise Grande renegotiated its construction loan agreement with Wachovia to provide additional security. As a part of this renegotiation, Paradise Grande agreed to provide a $500,000 letter of credit. Paradise Grande also agreed to pay furniture costs in excess of two million dollars instead of including those costs into the construction loan. In addition, Wachovia required deferment of real estate commissions that would be paid to Advantage until the construction loan was paid in full. Jacobson testified Paradise Grande pursued several other options to obtain a construction loan before finally agreeing to subordinate the real estate commissions. Further, Jacobson testified that had the letter of credit and the commission subordination not been made to Wachovia, Horizon would not have been built.

C. The Second Agreement

Because Advantage failed to comply with the First Agreement by failing to presell all the condominium units, Advantage entered into the Second Agreement with Paradise Grande. Carter, acting on behalf of Advantage, testified that entering into the Second Agreement was a "no-brainer" decision. He further testified:

> The second marketing agreement . . . there was essentially no discussion about this, I mean, none. There was no deliberation. Some decisions are so clear-cut there's just no deliberation. If the project doesn't get built everybody is out of two years of work, nobody gets paid, or you—they want you to subordinate your sale—I mean, subordinate your commission, and you already have enough sales to cover it. It's a no brainer. We were all trying to get the project built . . . . [T]his is one of the things we need to do to get the construction loan, and it

> doesn't matter anyway because we've got enough sales to cover it.

Carter recognized that if Advantage refused to agree to the subordination, Wachovia would not have executed the construction loan with Paradise Grande and the Horizon project would have been cancelled. Carter did not initially tell Broach and Loomis about the subordination provision in the Second Agreement because he stated that "at the time it did not appear significant." In fact, Carter testified that when Paradise Grande entered into the Second Agreement, no one imagined Broach and Loomis would not be paid their commissions. Carter also testified, the collapse of the real estate market was not anticipated at the time. He stated at trial, "[I]t was inconceivable that that many people would walk away from their money, and—but they did . . . . Nobody in our industry, in our area had seen anything like that happen. It just wasn't in the realm of—considered to be in the realm of possibility."

However, as a result of the real estate market crash, Horizon was never built. Paradise Grande lost in excess of six million dollars, it defaulted on its construction loan, and Wachovia foreclosed on the property. As a result of the Second Agreement, all sales commissions were subordinated to the construction loan, and Advantage was never paid any commissions. Additionally, Broach and Loomis never received commissions for the Horizon condominium units they successfully sold and closed. Broach received $73,000 as a result of a sales contest created by Paradise Grande to sell the Horizon units, but he testified he is owed an additional $135,741.39 in commissions. Loomis testified he is owed $21,917.98 in unpaid commissions.

PROCEDURAL HISTORY

On November 19, 2008, Broach and Loomis filed their original complaint against Carter, Advantage, and Paradise Grande seeking payment of their commissions.[1] Carter, Advantage, and Paradise Grande all filed Answers. Broach and Loomis subsequently filed an Amended Summons and Complaint on September 14, 2009, to include Jacobson.[2] Carter, Advantage, Paradise Grande, and Jacobson all filed an Answer to the Amended Complaint.

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[1] SilverDeer and Wachovia were originally named as parties in the lawsuit but were subsequently dismissed from the lawsuit.
[2] The Amended Summons and Complaint also included other defendants, but they were subsequently dismissed from the lawsuit.

A jury trial took place on November 29, 2010. The jury found Advantage and Carter breached the Independent Contractor Agreement with Broach and Loomis. In addition, the jury found Paradise Grande was not liable for tortious interference with a contract, but found Jacobson was individually liable for tortious interference with the Independent Contractor Agreements between Broach, Loomis, and Advantage. The jury awarded Broach and Loomis a total of $50,000 in actual damages and a total of $50,000 in punitive damages. Jacobson appeals.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Jacobson argues there is no evidence in the record to support the jury's finding that Jacobson tortiously interfered with Broach's and Loomis's Independent Contractor Agreements with Advantage. We agree.

The elements of a cause of action for tortious interference with a contract include the following: (1) a valid contract exists; (2) the defendant has knowledge of the contract; (3) the defendant intentionally procures its breach; (4) the defendant acted without justification; and (5) the plaintiff suffers prejudice. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).

a. Existence of a Contract

Here, there is no dispute that Broach and Loomis both had contracts with Advantage. Even if there was a dispute, the Independent Contractor Agreement between Advantage and Broach was presented at trial without objection. Although the Independent Contractor Agreement between Advantage and Loomis was not admitted as evidence at trial, there is testimony in the record supporting the existence of a contract between Advantage and Loomis. Therefore, we find there is evidence to support the existence of contracts between Advantage and Broach and Advantage and Loomis.

b. Knowledge of the Contracts

Jacobson argues no evidence shows Jacobson had knowledge of the contracts Advantage entered into with Broach and Loomis. We disagree and find there is at least some evidence in the record to support the jury's finding Jacobson had knowledge of these Independent Contractor Agreements.

An email sent by Jacobson indicated he knew Advantage's Independent Contractor Agreements with Broach and Loomis provided for payment of commissions upon closing and the Second Agreement would interfere with Broach's and Loomis's contracts with Advantage. The email from Jacobson to Carter discussing the decision to enter into the Second Agreement states, in pertinent part:

> Note that all commissions to [Advantage] must be subordinated to Bank loan, but this should not matter because we have nearly sold enough units to make the subordination of no risk to you. I must say that this [second] agreement does not address my biggest concern— that your team stops pushing Paradise Grande . . . . I need to know that your team (I don't really worry about you) will ensure not just they are compensated but that I and my investors get some profit out of this deal.

We find a reasonable juror could infer this email evinces Jacobson's concern that Advantage's agents, including Broach and Loomis, would stop selling Horizon units because the Second Agreement interfered with their understanding that they would receive payment of commissions upon closing. If Jacobson lacked knowledge that Broach and Loomis contracted with Advantage to be paid upon closing, he would have no reason to be concerned that they would discontinue their efforts to sell the Horizon units. Accordingly, we find there is evidence to support a jury's conclusion that Jacobson had knowledge of the contractual terms between Broach, Loomis, and Advantage.

c. Intentional Procurement of the Contract Breach

Additionally, we find there is evidence in the record showing Jacobson intended to procure the breach of the contracts between Broach, Loomis, and Advantage.

At trial, Jacobson testified he never had any intention of *injuring* Broach and Loomis by entering into the Second Agreement. However, intent to injure is not an element of tortious interference. In *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007), our supreme court held:

> None of the elements required for [tortious interference with a contract] . . . include "intent to harm." Although it is true that harm may result from an intentional inference with . . . contractual relations, it is not necessary that the interfering party intend such harm. Instead, it is only necessary that they intended to interfere with . . . an existing contract . . . .

While the issue of whether Jacobson intentionally procured the breach of contract is a close call, we find that based on our supreme court's decision in *Eldeco*, there is some evidence Jacobson intentionally interfered with Broach's and Loomis's contracts with Advantage. Even if the purpose of the subordination clause was to save the Horizon project, Jacobson directly interfered with Broach's and Loomis's Independent Contractor Agreements by negotiating the subordination clause with Wachovia while knowing the subordination would necessitate the alteration of Broach's and Loomis's rights to immediate payment at closing.

d. Absence of Justification

Jacobson argues that even if he intentionally procured the breach of the Independent Contractor Agreements, he was justified in executing the Second Agreement. We agree.

Here, the evidence in the record establishes only that Jacobson was justified in entering the Second Agreement. Advantage breached the First Agreement. As a result, Jacobson remained free to enter into a subsequent contract with Advantage on different terms. *See S.C. Dep't. of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 255, 547 S.E.2d 881, 883 (Ct. App. 2001) ("Generally, parties are free to

contract for terms upon which they agree."); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."). Moreover, Jacobson testified the sole purpose for the Second Agreement was to save the Horizon project so that everyone, including Broach and Loomis, could get paid. Accordingly, there is no evidence to refute Jacobson acted in good faith when exercising his legal right to contract, and we find Jacobson was justified in entering into the Second Agreement, which subordinated Broach's and Loomis's commissions.

As we find Jacobson justified in interfering with Broach's and Loomis's contracts, we find the requisite elements to establish tortious interference with a contract are not present. *See Eldeco*, 372 S.C. at 480, 642 S.E.2d at 731 (holding a plaintiff *must show* absence of justification to establish a cause of action for tortious interference with a contract). As a result, we conclude the jury's finding that Jacobson is liable for tortious interference with a contract is unsupported by the evidence, and we reverse on this ground.[3]

B. Punitive Damages

Jacobson argues the record does not support the jury's award of punitive damages. We agree.

Based on our decision to reverse the jury's finding that Jacobson was liable for tortious interference with a contract, we must also reverse the jury's award of punitive damages. Punitive damages are predicated on the existence of actual damages, and Broach and Loomis have no other causes of action on which an actual damages award could be based. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 497, 309 S.E.2d 776, 780 (Ct. App. 1983) ("Punitive

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[3] Because we find Jacobson's conduct was justified, we decline to address the remaining elements of tortious interference with a contract and decline to address Jacobson's argument that he cannot be held personally liable for the tort. *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); *S. Contracting, Inc. v. H.C. Brown Const. Co., Inc.*, 317 S.C. 95, 98, 450 S.E.2d 602, 604 (Ct. App. 1994) (holding to establish a cause of action for tortious interference with contractual relations, the plaintiff must prove the absence of justification).

damages may be recovered only if the plaintiff proves his entitlement to actual damages.").

CONCLUSION

Accordingly, the jury's verdict is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Janette Hamilton, Appellant,

v.

Charleston County Sheriff's Department, Respondent.

Appellate Case No. 2009-132530

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5007
Heard June 5, 2012 – Filed July 25, 2012

AFFIRMED

Cameron L. Marshall, of Charleston, for Appellant.

Robin L. Jackson, of Senn Legal, LLC, of Charleston, for Respondent.

HUFF, J.: Janette Hamilton appeals the trial court's grant of the Charleston County Sheriff's Department's (the Department) directed verdict motion on Hamilton's negligent supervision claim.

On appeal, Hamilton argues the trial court erred because evidence in the record existed showing the Department was grossly negligent in its supervision of an employee of the Department who assaulted her. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Officer Antonio Aiken, former prison guard for the Department, assaulted Hamilton while she was imprisoned with the Department. Subsequently, Officer Aiken pled guilty to sexual misconduct with an inmate and was sentenced to two years' imprisonment, suspended upon two years' probation.[1] After the assault, Hamilton sued the Department for negligent training and supervision of Officer Aiken.

On June 1, 2009, a jury trial was held. Hamilton testified she was sorting laundry in the break room as usual during the late evening of June 19, 2003, when Officer Aiken came into the break room and began joking with her. Hamilton testified Officer Aiken then required her to perform oral sex on him twice.

At the close of Hamilton's case, the Department moved for a directed verdict on both claims. The trial court granted the Department's directed verdict motion on the negligent training claim, but denied the Department's motion on the negligent supervision claim. After the close of its evidence, the Department again moved for a directed verdict on the negligent supervision claim, and Hamilton also moved for a directed verdict. The trial court granted the Department's motion and denied Hamilton's motion, finding no evidence existed indicating Officer Aiken would commit such crimes and Officer Aiken was clearly acting in his own capacity when he engaged in sexual misconduct with Hamilton. Hamilton filed a motion to amend the judgment or to grant a new trial, which the trial court denied. This appeal followed.

ISSUE

Did the trial court err in granting the Department's motion for a directed verdict on the negligent supervision claim?

STANDARD OF REVIEW

In reviewing a directed verdict, the court should consider in favor of the non-moving party whether any evidence existed. *S.C. Fed. Credit Union v. Higgins*,

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[1] Officer Aiken also pled guilty to two additional indecent exposure charges; however, these charges did not involve Hamilton.

394 S.C. 189, 193-94, 714 S.E.2d 550, 552 (2011). The court should be concerned only with the existence or nonexistence of evidence. *Id.*

An employer can be liable for negligent supervision of an employee when an "employee intentionally harms another" on the employer's premises and "[the employer] (i) knows or has reason to know that he has the ability to control his [employee], and (ii) knows or should know of the necessity and opportunity for exercising such control." *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992) (quoting Restatement (Second) of Torts § 317 (1965)). "[A] governmental entity is not liable for a loss resulting from responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . . prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60 (25) (2005). "A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing." *Jackson v. S.C. Dep't of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989).

LAW/ANALYSIS

Hamilton argues the trial court erred in granting the Department's motion for a directed verdict because abundant evidence existed showing the Department was grossly negligent in its supervision of Officer Aiken. Specifically, Hamilton asserts her expert witness, Dr. George Kirkham, testified that the Department was grossly negligent by failing to employ rape prevention measures, maintain the minimum national security standards, and adopt adequate monitoring policies. Additionally, Hamilton argues the Department failed to adequately investigate Officer Aiken's background prior to employing him.

Dr. Kirkham, a criminologist, testified the Department was grossly negligent because it "was in gross violation of what would have been nationally accepted standards." He explained the Department ignored a foreseeable harm of sexual assaults against inmates by failing to minimize contact of male officers with female inmates, monitor the officers' whereabouts, and implement adequate supervision mechanisms such as cameras and locked doors.

John Gaillard, a retired lieutenant tour commander with the Department, testified the door leading to the break room also led to the service hallway. Keith Novak, a

retired chief deputy with the Department, explained they typically did not lock the door during the day because the service hallway was such a highly trafficked area.

Novak testified the break room had a camera, but explained the camera focused on the busy service hallway and entrance to the break room. Michael Tice, an administrative security lieutenant over the security services at the Department's detention center, testified the camera system met the minimum standards required by the South Carolina Department of Corrections as well as the American Correctional Association standards.

According to Major Willis Beatty, the Department did not have any established policies concerning the interactions of male guards and female inmates at the time of the incident. He also stated that the Department complied with the minimum jail standards that were established by the Department of Corrections at that time. Beatty explained the Department did not have any monitoring system for the officers, and they were able to move around the jail as they desired in order for them to do their jobs. Both Gaillard and Novak testified they trusted Officer Aiken because they had hired him and he had successfully completed the Department's training. Once the training for guards was completed they were no longer routinely supervised. Novak also explained that the Department complied with the jail standards established by the Department of Corrections.

Major Patricia Garrison testified that Officer Aiken was trained on the Department's policies on sexual harassment and appropriate interaction with the inmates. She also stated the Department immediately began investigating the incident when it learned about it in July 2003 and terminated Officer Aiken immediately after the charges were brought against him.

Dana Herron, a human resources employee for the Department, testified she recommended Officer Aiken for employment after a pre-employment investigation. However, Herron admitted she received a report from the Charleston Police Department ten days after she submitted her recommendation to the Department. There were two reports from the Charleston Police. One report concerned employment as a dispatcher during the summer of 1996 when Officer Aiken was in high school. This report stated the police would "absolutely not" rehire Officer Aiken. At the bottom of this report, the Charleston Police also have a note that Officer Aiken interviewed for a dispatcher position in 2001 and in that note stated that Officer Aiken was "not CPD material-for any position." Another report from the Charleston Police covered employment by Officer Aiken as a clerk

and also a position in the control room during the summer of 1998. This report stated that he was a nice young man and "took his job seriously." Herron testified she did not reopen her investigation on Officer Aiken after receiving these additional reports because she did not believe any "red flags" were present in the process. There was no misconduct detailed in either report. Herron explained the Department performed a psychological evaluation on Officer Aiken, which only indicated Officer Aiken had "a proclivity towards being late and absent more than three times in a single year, as well as possibly being terminated prematurely for wrongdoing." Herron testified her investigation showed that Officer Aiken was at a low-risk for performance difficulties.

CONCLUSION

Although Dr. Kirkham testified the Department violated nationally accepted standards, the Department provided uncontradicted evidence that it met minimum security standards set for South Carolina. In addition, there is no evidence the Department knew or should have known of the necessity to exercise additional supervision of Officer Aiken to prevent him from harming Hamilton. We find the only inference from the evidence is that the Department exercised at least slight care in its supervision of Officer Aiken. *See Jackson v. S.C. Dep't. of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) (stating to be guilty of gross negligence defendant's conduct must not have given slight care to what he was doing). Accordingly, the trial court properly granted the Department a directed verdict on Hamilton's negligent supervision claim.

AFFIRMED.

FEW, C.J., concurs.

SHORT, J., dissents.

SHORT, J: I respectfully dissent and would reverse the trial court's order granting the Department directed verdict on Hamilton's negligent supervision claim. While gross negligence is defined as the failure to exercise slight care, it is also "a relative term, and means the absence of care that is necessary under the circumstances." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation,* 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) (quoting *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993)). Viewing the evidence and its inferences in

the light most favorable to Hamilton, I find there was evidence the Department was grossly negligent in supervising Aiken. Hamilton presented expert testimony that the Department was in gross violation of nationally accepted standards and procedures, and the Department failed to exercise even slight care for Hamilton's safety. As to the Department's policies permitting male guards to go wherever they wanted to among female inmates, the expert testified: "[I]t just combines a maximum of opportunity and temptation in an area where we've had problems for so many years. It's shocking that something like this could still exist." Hamilton also presented evidence by the retired Department commander that the circumstances caused concern, and the Department violated its own policies. Because I believe Hamilton's negligent supervision claim should have gone to the jury, I would reverse.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor, Appellant,

v.

CSX Transportation, Inc. and the South Carolina Department of Transportation, Respondents.

Appellate Case No. 2009-126526

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

Opinion No. 5008
Heard May 7, 2012 – Filed July 25, 2012

AFFIRMED

John E. Parker, J. Paul Detrick, Grahame E. Holmes, and Matthew V. Creech, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton, Carl H. Jacobson, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith P.A., of Charleston, for Appellant.

J. Arthur Davison and James W. Purcell, Fulcher Hagler, LLP, of Augusta, Georgia, Ronald K. Wray, II and Thomas Vanderbloemen, Gallivan, White & Boyd, P.A., of Greenville, for Respondent CSX Transportation, Inc.

Andrew F. Lindemann, Davidson & Lindemann, P.A., of Columbia, Peden B. McLeod, McLeod Fraser & Cone, LLC, of Walterboro, for Respondent South Carolina Department of Transportation.

FEW, C.J.: This is an appeal from a defense verdict in a personal injury action involving a collision between a train and an automobile at a railroad crossing. Willie Stephens argues the trial court erred in excluding evidence of measures taken by CSX Transportation, Inc., after the collision, in denying his motions for partial directed verdict and JNOV, and in charging the jury. We affirm.

I. Facts

CSX maintains a railroad track in Hampton County. As the track passes through the town of Yemassee, it runs parallel to state Highway 68 and crosses Hill Road, a two-lane road that terminates at Highway 68 just a few feet from the crossing. The Hill Road crossing is a passive grade crossing, meaning it has no active traffic-control devices, such as lights or gates. Vehicle traffic is controlled by a stop sign, a stop line, and a cross-buck.[1]

In 2000, CSX started a program to improve sight distances for vehicles approaching its passive grade crossings in South Carolina by removing vegetation at the crossings. Several months before this accident, CSX's clear-cutting crew reached the Hill Road crossing. When the crew attempted to cut down a line of trees on land adjacent to the crossing, they encountered Thomas Jackson. Jackson claimed he owned the land and CSX had no right to cut down the trees. The crew did not cut down the trees. CSX's policy was that in the event of a dispute with a landowner, the crew would not remove vegetation until the dispute was resolved. CSX eventually showed Jackson that it owned a right of way over the land on which the trees were located, and its crew removed them. However, the trees were still in place on the day of the accident.

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[1] A cross-buck is a white, "X-shaped sign with the words 'Railroad Crossing' in black lettering." It "is considered the same as a 'Yield' sign." *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 644 n.1, 615 S.E.2d 440, 443 n.1 (2005).

On February 3, 2004, as Tonia Colvin drove down Hill Road towards Highway 68, a CSX train approached the crossing from her right. Tonia's boyfriend sat in the front passenger's seat, and her twelve-year old daughter Lillian sat in the back seat. When Tonia reached the crossing, she stopped at the stop sign. She pulled forward to the stop line and stopped again. Her line of sight in the direction of the train ran across the property Jackson claimed he owned. Tonia testified that she did not hear or see the train before she drove onto the track. As she did so, she heard the train's horn. She tried to get out of the way by accelerating, but the train struck her vehicle.

South Carolina law requires that a train's horn be sounded continuously from a distance of at least 1,500 feet from the road until the engine has crossed it. The train's engineer testified he "believed" he blew the horn on time, but the train's event recorder showed he did not blow the horn until the engine was 1,161 feet from the crossing. CSX took varying positions on whether it complied with the requirement, but eventually stipulated that the data from the event recorder was accurate.

Tonia, her boyfriend, and Lillian were all injured in the accident. Lillian's injuries were devastating. She sustained severe brain injuries, requiring that doctors place her in a medically induced coma and drill a hole in her skull to alleviate pressure on her brain. When Lillian awoke from the coma approximately one month later, she could not speak, walk, or feed herself. Her injuries required months of physical, occupational, and speech therapy, but even at the time of the trial over four years later, she continued to suffer severe intellectual, behavioral, and physical impairments.

II. Procedural History

Acting on behalf of Lillian, Stephens sued CSX and the state Department of Transportation for negligence. Stephens' primary claims of negligence as to CSX were that it failed to sound its train's horn far enough in advance of the crossing and that it failed to remove trees and other vegetation that obstructed Tonia's view of the track. As to DOT, Stephens claimed it failed to properly inspect the crossing and installed the stop sign and stop line at improper locations.

At trial, after both defendants had presented their evidence, Stephens moved for a partial directed verdict against CSX. Stephens asked the trial court to hold CSX

breached its duty of reasonable care and to have the jury decide proximate cause and damages. The trial court denied the motion. Stephens then presented evidence in reply, including the stipulation with CSX that the data from the train's event recorder was accurate. He rested without renewing his motion for directed verdict.

The verdict form contained special interrogatories, which first asked whether CSX or DOT breached its duty of reasonable care. The jury answered both questions "No" and did not answer any of the other questions on the form. Stephens filed a motion for JNOV, renewing his request for judgment as a matter of law on CSX's breach of duty. He also asked for a new trial on grounds that the trial court erroneously excluded evidence and erred in charging the jury. The trial court denied the motions.

III. Evidentiary Rulings

Stephens sought to admit evidence of two actions taken by CSX after the accident: (1) CSX removed the trees at the Hill Road crossing that Thomas Jackson claimed CSX had no right to remove, and (2) CSX removed vegetation planted at a different location on the railroad right of way, despite opposition by members of a local garden club. In separate rulings, the trial court sustained CSX's objections to testimony regarding these actions on the basis that the actions were subsequent remedial measures and thus inadmissible under Rule 407, SCRE. We affirm both rulings.

A. Removal of Trees at the Hill Road Crossing

One of Stephens' theories of liability as to CSX was that the trees CSX failed to remove interfered with the proper sight distance, so that a driver on Hill Road could not see an approaching train. Stephens argued that if the trees had not been there, or more particularly if CSX had cut the trees before the accident, there would have been sufficient sight distance and the crossing would have been reasonably safe. He claimed that CSX's failure to cut the trees was a breach of its duty to maintain a reasonably safe crossing. CSX argued in response that the crossing was reasonably safe even with the trees. On this point, Stephens presented testimony from Jackson about CSX's efforts to cut the trees before the accident. Without objection, Jackson testified he "rais[ed] hell" and CSX agreed not to cut them. Stephens also attempted to elicit testimony from Jackson that

CSX cut the trees shortly after the accident. The trial court excluded the testimony of the subsequent measure under Rule 407.

Rule 407 provides that "evidence of . . . subsequent [remedial] measures is not admissible to prove negligence or culpable conduct in connection with the event." The central inquiry under Rule 407, therefore, is the purpose for which the evidence is offered. If the proponent of the evidence offers it for the purpose of proving negligence or culpable conduct, Rule 407 excludes it. However, the rule also provides that it "does not require the exclusion of evidence of subsequent measures when offered for another purpose." *See also Webb*, 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose."). Permissible purposes include, as the rule provides, "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

At trial, Stephens argued his purpose for introducing evidence of the tree removal was to "impeach" CSX's position that the Hill Road crossing was reasonably safe even with the trees in place. He argued the evidence was admissible because "[i]f [the crossing] was safe, it didn't need cutting. The fact that [CSX] came back later and cut it impeaches their position . . . ." It is the trial court's responsibility to determine whether the proponent is offering the evidence for the prohibited purpose of proving negligence or culpable conduct, or is offering it for some other purpose. *Webb* requires the trial court to consider Stephens' argument as to his purpose for offering the evidence in light of his theory of the case, which was that CSX's duty of reasonable care required it to cut the trees, and therefore the crossing was not reasonably safe because CSX was negligent. 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that *under the plaintiff's theory* would have made the accident less likely to happen . . . ." (emphasis added)). The trial court correctly saw past the "impeachment" label Stephens put on the evidence and determined that his purpose for admitting the evidence was to prove that the crossing was not safe because CSX was negligent in failing to cut the trees. By offering the evidence to "impeach" CSX's position that the crossing was safe, Stephens was actually attempting to prove that CSX's negligence in failing to cut the trees was the reason the crossing was not safe. The admission of the evidence for that purpose is precisely what Rule 407 forbids. The trial judge properly excluded the evidence under Rule 407.

On appeal, Stephens presents a different argument. He now claims his purpose for offering the evidence was to show that Jackson's opposition to cutting the trees was not the reason CSX failed to cut them. He argues that CSX's decision to cut the trees after the accident shows that CSX had the right to cut them before the accident, which means Jackson's opposition could not be the reason CSX failed to act sooner. Stephens thus argues that the purpose of offering the evidence was not the prohibited purpose of proving CSX was negligent, but the permitted purpose of impeaching the testimony of a CSX witness who testified that it was Jackson's opposition to the trees being cut that prevented CSX from cutting them beforehand. His argument also goes to the "feasibility of [the] precautionary measure[]" of cutting the trees. If Stephens had presented this argument to the trial court, the court might have exercised its discretion to admit the evidence.[2] A trial court's broad discretion to decide evidence questions would have allowed it to determine whether the evidence violated Rule 407 or was legitimately offered for a purpose permitted under the rule. However, a party "may not argue one ground on the admissibility of evidence at trial and an alternate ground on appeal." *Pike v. S.C. Dep't of Transp.*, 332 S.C. 605, 615, 506 S.E.2d 516, 521 (Ct. App. 1998). Because Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal.

B. Removal of a Garden in Hampton

Stephens also attempted to introduce evidence regarding the removal of vegetation at a different crossing. Several months after the accident, CSX removed a public

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[2] Stephens insists he did present this argument, citing his lawyer's statement at trial: "The fact that [CSX] came back and cut it impeaches their position . . . ." In context, however, it is clear that the position to which this statement referred was the safety of the crossing with the trees in place:

> in [CSX's] opening statement - - by the opening statement saying this crossing was safe, it didn't need cutting, is what he said in the opening statement, it was only - - it was safe, but we wanted to make it safer. If it was safe, it didn't need cutting. The fact that they came back later and cut it impeaches their position . . . .

garden in Hampton that was planted in CSX's right of way near the other crossing. Stephens offered the testimony of two members of a local garden club who opposed the removal of the garden on the grounds that it did not obstruct sight. Stephens offered the testimony for the purpose of contradicting CSX's position that its dispute with Jackson caused the delay in removing the trees at the Hill Road crossing. The trial court excluded the testimony under Rule 407. We find Rule 407 does not exclude this testimony because removing a sight obstruction at a different crossing was not a "measure[] . . . which, if taken previously, would have made the event less likely to occur." Rule 407, SCRE. Thus, by its own terms, the rule does not apply to this evidence. *See Webb*, 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that . . . would have made the accident less likely to happen . . . .").

However, we affirm the exclusion of the testimony. First, we question whether it is relevant. *See* Rule 402, SCRE ("Evidence which is not relevant is not admissible."). The garden club members opposed the removal of the garden on an entirely different basis than the ownership-based objection Jackson asserted. Second, for this reason and because it relates to a collateral matter, even if it is relevant the evidence had almost no probative value. *See* Rule 403, SCRE (stating "evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time"). In any event, the exclusion of the evidence caused Stephens no prejudice. *See Fields v. Reg'l Med'l Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (holding appellant must show prejudice from admission of evidence to warrant reversal).

IV. Denial of Motions for Partial Directed Verdict and JNOV Against CSX

Stephens argues the trial court erred in denying his motion for partial directed verdict. We find this issue is not preserved.

When a party moves unsuccessfully for directed verdict at any point during a trial, "he must renew that motion at the close of all evidence." *Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006). "Otherwise, this court is precluded from reviewing the denial of the motion on appeal." 372 S.C. at 20, 640 S.E.2d at 496. Stephens made his motion for partial directed verdict when both defendants rested, and the trial court denied the motion. Stephens then introduced evidence in

reply. However, he did not renew his directed verdict motion after he presented that evidence. Therefore, the denial of his directed verdict motion is not preserved for our review.

After the trial, Stephens filed a motion for JNOV and a new trial, raising the same points he argued in his directed verdict motion. However, because he had not renewed his directed verdict motion after presenting evidence in reply, he could not obtain JNOV. "When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Wright*, 372 S.C. at 20, 640 S.E.2d at 496. Therefore, Stephens did not properly present his JNOV motion to the trial court, which leaves this issue unpreserved on appeal. *See* 372 S.C. at 20, 640 S.E.2d at 496-97 ("Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review."); *see also Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37, 446 S.E.2d 440, 442 (Ct. App. 1994) ("The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one."), *vacated in part on other grounds*, 320 S.C. 218, 464 S.E.2d 112 (1995) (per curiam).

Stephens makes several arguments that the rule requiring the renewal of an unsuccessful directed verdict motion does not apply in the procedural circumstances presented in this case. He first argues the rule applies only to a directed verdict motion made by a defendant, as it would be "illogical" to require a plaintiff to renew his directed verdict motion after he presents reply evidence. We disagree. The facts and procedural circumstances of this case illustrate that the rule always applies when the question of law addressed in the motion is whether the facts yield only one reasonable inference. *See* Rule 50(a), SCRCP ("When upon a trial the case presents only questions of law the judge may direct a verdict."); *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (stating "when only one reasonable inference can be deduced from the evidence, the question becomes one of law").

Stephens' argument that he was entitled to partial directed verdict is based primarily on section 58-15-910 of the South Carolina Code (1976), which requires that a train engine's horn be sounded "at the distance of at least five hundred yards from the place where the railroad crosses any public highway, street or traveled place and be kept . . . whistling until the engine . . . has crossed such highway,

street or traveled place."[3] When Stephens made the motion, he relied on evidence that the horn was sounded for a distance of less than 1,500 feet, including the data from the train's event recorder indicating that the horn began sounding 1,161 feet from the crossing. The event recorder is an electronic device that records data from various systems in the train. Stephens argued its record of when the horn was sounded should be considered conclusive and thus he was entitled to a directed verdict that CSX breached its duty of reasonable care. However, in CSX's case-in-chief, the train's engineer testified as follows:

> Q: Did you believe that you blew the horn at the whistle post?
>
> A: I believe I started at the whistle post.

The whistle post was 1,544 feet from the crossing. This testimony by the engineer appears to create a conflict in the evidence, and if so, the trial court could not have properly granted Stephens' motion at that time.

Stephens argues, however, that viewing even this testimony by the engineer in context, there is only one reasonable inference to be drawn from the evidence—that CSX failed to sound the whistle on time and thus violated section 58-15-910. We agree that, taking this statement by the engineer in the context of his entire testimony, the inference that he blew the horn on time is a weak one. In the next question to the engineer, CSX's counsel asked, "the event recorder says you were short, right?" The engineer answered, "right." Counsel also asked whether the engineer was "disputing what the event recorder said," and the engineer replied, "No, I'm not." On cross examination, Stephens' counsel asked the engineer if "we can agree that you failed to blow the horn of the locomotive for 1500 feet before the crossing as required by the company rule and South Carolina law?" The engineer replied, "According to the event recorder."

There is other testimony from the engineer, however, that supports the inference he blew the horn on time. Stephens' counsel read into the record notes a CSX official

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[3] Alternatively, a "bell of at least thirty pounds' weight" may be rung for the same distance. *Id.* Nothing in the record indicates CSX met this alternative requirement.

took from a statement the engineer gave him—"The engineer thought he started at whistle post." Stephens' next question to the engineer was "your best memory that day was that you started that blowing the horn at the whistle post?" The engineer stated, "Right." Stephens' counsel cross-examined the engineer using his deposition, in which the engineer testified "[I] believe[I] started blowing the horn at the whistle post." Explaining his deposition testimony, the engineer testified at trial, "I started at the whistle post, I thought, and I was in the process of blowing two longs, a short, and a long."

Even as to the engineer's testimony that he was not disputing what the event recorder said, there is reason to believe he did not intend to admit violating the statute. The engineer testified he did not know how to interpret the recorder's data, and he never stated whether he agreed or disagreed with what the data indicated. The engineer's statement "[a]ccording to the event recorder" could be interpreted either as a concession he did not blow the horn on time or simply as an acknowledgement of what the event recorder said, not a concession of its accuracy. When Stephens' counsel asked the engineer "you have testified previously you don't contest the event recorder," he replied "I did not." The answer can be interpreted as stating he *does* "contest" the accuracy of the recorder, or as denying he ever said that. While it is possible to draw from the engineer's testimony the inferences Stephens argues should be drawn, the testimony also supports an inference that the engineer was simply conceding the existence of the data, which he did not understand, but not agreeing to its accuracy.

The point of this discussion is not whether the trial court should have granted the motion for directed verdict, but whether the issue is preserved. During his presentation of evidence on reply, Stephens introduced a stipulation with CSX that the data from the train's event recorder was accurate.[4] If conflicting inferences could be drawn from the engineer's testimony at the point when the motion was made, the stipulation arguably removed the conflict. Stephens makes this very argument in his reply brief:

> After the Appellant's directed verdict motion, and before the close of all evidence, the Appellant offered the stipulation of CSX as to the accuracy of the event

[4] The exact language of the stipulation is not known, as Stephens did not include it in the record on appeal.

> recorder on the locomotive. The accuracy of the event recorder . . . bolstered . . . the evidence that CSX had not complied with [section] 58-15-910.

The argument proves our point on preservation. In response to Stephens' motion for partial directed verdict, CSX argued the engineer "believe[s] he did begin sounding at the whistle post . . . . That is an issue of fact." The trial court saw a conflict in the evidence and stated, "I am going to deny the directed verdict motions to CSX. . . . I think it is a jury issue." The stipulation was entered in evidence after this ruling. By not renewing his motion, Stephens never gave the trial court an opportunity to consider whether the stipulation eliminated the conflict the court saw in the evidence as to this issue. Even if we thought the trial court was mistaken as to the ruling it did make, we have no idea how the court would have ruled in light of the stipulation. This illustrates the reason for the rule—a party must renew his directed verdict motion at the close of all evidence so that the court may decide whether evidence presented after it denied the earlier motion changed the evidentiary landscape in such a way that directed verdict has now become appropriate.

For these reasons, we reject Stephens' argument that the rule requiring the renewal of an unsuccessful motion for directed verdict does not apply to the facts and procedural circumstances of this case. *See State v. Bailey*, 368 S.C. 39, 43 n.4, 626 S.E.2d 898, 900 n.4 (Ct. App. 2006) (stating in a criminal case "[i]f a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence").

Stephens' second argument is that even without the stipulation, he was entitled to a directed verdict at the time he made his motion because CSX's counsel admitted in his opening statement that the engineer did not begin sounding the horn at the whistle post. Even if Stephens is correct about the significance of what CSX's counsel said, Stephens' failure to renew his motion still leaves the issue unpreserved. Moreover, Stephens did not make this argument to the trial court. When Stephens made his motion for partial directed verdict, he never contended that counsel's remarks in opening statement constituted a binding admission that CSX breached its duty. *See Armstrong v. Collins*, 366 S.C. 204, 224-25, 621 S.E.2d 368, 378 (Ct. App. 2005) (finding because appellant did not present to the trial court the argument he raised in his appellate brief, the trial court was never

given an opportunity to rule upon that argument, and thus the argument was not preserved for appeal).

The trial court's denial of Stephens' motions for directed verdict and JNOV are not preserved.[5]

V. Jury Charge Rulings

Stephens challenges a number of rulings the trial court made in regards to the jury charge. Our review of the trial court's jury charge is controlled in the first instance by the fact that the trial court prepared special interrogatories for the jury to answer in returning its verdict, and that the jury resolved the case by finding that neither CSX nor DOT breached its duty of reasonable care. Because the jury's verdict on that basis made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling on the jury charge unless it relates to breach of CSX's and DOT's duty of reasonable care. *See Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (stating an erroneous jury instruction "is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction"); *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("[E]ven if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal."). Therefore, we address only those issues on appeal challenging portions of the charge given, or the refusal to give requested charges, that relate to CSX and DOT's alleged breach of their duty of reasonable care. Specifically, we find it unnecessary to address the issues raised by the dissent regarding the presumption against impairment and "Train Time" charges, as those alleged errors could hardly have affected the jury's deliberations over whether CSX or DOT breached its duty of reasonable care, and could not possibly have prejudiced Stephens.

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[5] Stephens also appeals the trial court's refusal to grant him partial directed verdict that CSX breached its duty of reasonable care by not removing the trees at the crossing. For the reasons discussed above regarding preservation, and because the record is full of conflicting evidence on this issue, we affirm the trial court's decision.

A. Rejection of Stephens' Proposed Charges on a Railroad Company's Duties

Stephens argues the trial court erred in rejecting two proposed instructions concerning a railroad company's liability for injuries occurring at crossings. In the first, Stephens requested the court charge the jury:

> A railroad corporation has a duty to maintain its right-of-ways and highway railroad grade crossings in a reasonabl[y] safe condition. If a railroad corporation negligently allows vegetation to grow on its right-of-way adjacent to the crossing to such an extent that it obscures or obstructs the vision of the driver of a motor vehicle using the roadway, it is liable to anyone who is injured in a collision, if the obstructing vegetation contributed as a proximate cause to the collision.

In his second proposed instruction, Stephens requested the court charge: "When vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming on train, the railroad has a duty to exercise added care in the operation . . . of its train as the train approaches and crosses the crossing."

We find the instructions the trial court gave adequately addressed the substance of both of Stephens' proposed instructions. "It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001). As to the first proposed instruction, the trial court's general instructions fully and accurately explained the concepts of negligence and proximate cause. The court also specifically instructed the jury that "a railroad corporation has a duty to maintain a reasonably safe grade crossing." As to the second proposed instruction, the court instructed the jury that a railroad company must use "reasonable and ordinary caution to prevent accidents at [a] crossing, and this degree of care may be affected by obstructions which prevent the track from being seen as a train approaches." While this instruction does not specifically refer to "added care," it explains that obstructions affect what a railroad must do to comply with its duty of care. We do not believe the jury would have understood the charge to mean the presence of sight obstructions would allow CSX to exercise less care at the

crossing. In any event, the precise manner in which an obstruction affects the degree of care required by a railroad or a driver is a matter for the parties to argue in closing argument, not one for the trial court to address in its charge. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The trial court committed no error in refusing to give the requested instructions.

Stephens argues the trial court's alleged error in refusing these charges was compounded by the instruction it gave that a motorist whose vision is obscured "must exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." He contends this instruction led the jury to believe the law places the duty of care entirely on the motorist, when the law actually places duties on both the railroad company and the motorist. Stephens is correct that there are mutual duties, and that the duties of each must be exercised in light of all surrounding circumstances. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a lookout for danger, and the degree of vigilance required of both is in proportion to the known risk; the greater the danger, the greater the care required of both."). The trial court conveyed that point to the jury, however, stating "there is a mutual duty on traveler and railroad to exercise due care." Additionally, the trial court instructed the jury that "both the traveler and the company are charged with the same degree of care: the one to avoid being injured; and the other to avoid inflicting injury. The care of each must be commensurate with the risk and danger involved. The greater the risk, the greater the care." We find no error.

B. Charging on Signage Rules and DOT's Authority to Close Railroad Crossings

Stephens argues the trial court erred in charging the substance of three statutes pertaining to signs at railroad crossings: section 56-5-1010 (2006), which requires railroad companies to install and maintain cross-buck signs at crossings; section 58-17-1390 (1976), which requires railroad companies to install and maintain signs reading "Railroad Crossing" at crossings; and section 56-5-1020 (2006), which prohibits unauthorized signs, signals, or other devices at crossings. The court also instructed the jury on section 58-15-1625 (Supp. 2011), which authorizes DOT to close railroad crossings to public traffic when DOT finds the increased public

safety of closing the crossing outweighs the inconvenience caused to motorists who will have to take another route.

Despite Respondents' argument to the contrary, Stephens' challenges to these instructions are preserved. However, the charges contain accurate statements of law, and there was evidence to support the trial court's decision to give each of them. *See Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (stating a trial court must charge the current and correct law of South Carolina, and must charge principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues).

As to the first two charges, Stephens claimed in his complaint that, in addition to failing to remove vegetation and properly sound the train horn, CSX was negligent "in maintaining an unreasonably hazardous and unsafe crossing" and "in failing to maintain adequate warning devices at the crossing." CSX's duty to install and maintain the cross-buck and railroad crossing sign relate to those claims.

As to the third charge, Stephens' grade crossing safety expert gave an opinion that the Hill Road crossing could be made safer with the installation of active traffic-control devices, such as lights and gates. DOT's traffic management engineer, Richard Jenkins, testified railroad companies have installed gates and lights at crossings without DOT's authorization. The charge on section 56-5-1020 was applicable because it informed the jury that CSX could not legally install active traffic-control devices without DOT's authorization.

Finally, as to DOT's authority to close crossings, the charge properly relates to the liability of DOT. Further, Jenkins testified railroads have closed crossings without asking DOT for permission. From that testimony, the jury could have inferred CSX should have closed the crossing. Section 58-15-1625 places the power to close crossings in DOT's hands. Accordingly, the charge on that statute was applicable because it showed the jury CSX did not have the authority to close Hill Road at the crossing.

We find the trial court did not err in giving these charges.

C. Charging on Discretionary Act Immunity

Stephens argues the trial court erred in charging the jury on subsection 15-78-60(5) of the South Carolina Code (2005), which immunizes governmental entities from liability for injuries caused by "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."[6]

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Pike*, 343 S.C. at 230, 540 S.E.2d at 90. "[T]he governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* (citation and quotation marks omitted). In this case, DOT asserted it was entitled to an instruction on discretionary immunity for its installation of the stop sign and the stop line at the crossing. Stephens contends DOT did not present evidence entitling it to the instruction.

We agree with Stephens that DOT did not present sufficient evidence to prove its discretionary act immunity claim. However, that does not necessarily mean the trial court erred in giving the instruction. The trial court was never asked to direct

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[6] Discretionary act immunity is an affirmative defense, which the defendant bears the burden of proving. *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 28, 491 S.E.2d 571, 573 (1997). However, it is not clear whether discretionary act immunity comes into play only after a plaintiff establishes the elements of negligence, or instead relates to the question of whether a governmental entity breached its duty in the first place. *See Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000) (stating discretionary act immunity requires proof that the government entity used "accepted professional standards," "actually weighed competing considerations and made a conscious choice"). If the latter is true, then the court's instruction could have affected the jury's verdict that DOT did not breach its duty. Thus, we address this issue.

a verdict on DOT's immunity claim. At the charge conference, therefore, the court approached the issue believing immunity was for the jury to decide. The arguments on whether to instruct the jury on discretionary act immunity centered on whether there was evidence of DOT making an actual choice in where it located the stop sign or the stop line. With regard to the stop line, there was evidence that the DOT employee who installed it made a conscious choice between two potential locations.

On appeal, Stephens contends the immunity defense failed because DOT did not follow an accepted professional standard in its placement of the stop sign or the stop line. Stephens did not present this argument to the trial court. We will not reverse the trial court's jury charge based on a point Stephens never asked the court to consider. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("[A]rguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Therefore, we affirm.

VI. Conclusion

For the foregoing reasons, the trial court's decisions are **AFFIRMED.**

HUFF, J., concurs.

SHORT, J., concurs in part and dissents in part.

SHORT, J.: I concur with the majority regarding the trial court's exclusion of subsequent remedial acts. I also concur with the majority's finding that Stephens failed to preserve the issues regarding the trial court's denial of her motions for directed verdict and JNOV. However, I respectfully disagree with the majority regarding the alleged erroneous jury charges, and I would reverse and remand for a new trial.

First, I agree with the majority that DOT failed to present sufficient evidence to entitle it to a jury charge on discretionary immunity. However, I disagree with the majority's conclusion that despite DOT's failure to prove entitlement to the charge, the trial court did not err by giving the charge. Furthermore, I find Stephens was prejudiced by the error because the charge could easily have confused the jury. Here, as noted by the majority, there was testimony by three DOT employees about the conditions near the crossing.

I also note the trial judge erred in charging section 56-5-2930, which makes it unlawful for a person to drive a motor vehicle under the influence, but refusing to charge section 56-5-2950(G)(1), which provides that a person with a blood alcohol level of .05% or less is conclusively presumed to not be under the influence. *See* S.C. Code Ann. §§ 56-5-2930; -2950(G)(1) (Supp. 2011). The trial court also charged that DOT was immune from liability for the criminal actions of third persons. S.C. Code Ann. § 15-78-60 (20) (2005). Colvin admitted she consumed one or two wine coolers in the five hours preceding the accident and took prescription medications. Her blood alcohol content was measured at .018% following the accident. I conclude the trial court erred by charging the criminal driving under impairment statute and the immunity statute without charging 56-5-2950(G)(1), which permitted Colvin to rebut her alleged impairment and prejudiced her.

I next find the trial judge erred in charging CSX's proposed request to charge Number 45, which stated, "It is Always Train Time at the Crossing." In my view, this could have implied to the jury that CSX and DOT had lesser duties of care than a motorist and constituted prejudicial error.

Finally, I find these errors were not harmless beyond a reasonable doubt. *See Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("An alleged error is harmless if the appellate court determines *beyond a reasonable doubt* that the alleged error did not contribute to the verdict.") (emphasis added). Accordingly, I would reverse and remand.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bennie Mitchell, Appellant.

Appellate Case No. 2010-159286

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

Opinion No. 5009
Heard April 25, 2012 – Filed July 25, 2012

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for the State.

LOCKEMY, J.: In this criminal action, Bennie Mitchell argues the trial court erred in: (1) allowing a police officer to identify Mitchell from photographs taken by the victim's deer camera because it was in violation of Rule 403, SCRE, and

Rule 701, SCRE; (2) admitting a disk containing photographs from a deer camera because it was in violation of Rules 1001, 1002, and 1003, SCRE; and (3) failing to grant Mitchell's post-trial motion for a new trial on the first-degree burglary charge when all of the elements of the charge were not met. We affirm the trial court.

FACTS

In the early morning of October 28, 2008, Stephen Potts returned to his home in Newberry County and discovered someone had broken into his home during his absence. After reviewing a motion-activated deer camera that had been placed on top of his refrigerator, Potts saw photographs of a man in his kitchen. A police officer subsequently identified the man in the photographs as Mitchell.

In January 2009, the Newberry County Grand Jury (Grand Jury) indicted Mitchell on one count of first-degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.[1] In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. The matter was called for a jury trial on April 19, 2010.

In a pre-trial hearing, Mitchell moved to require the State to establish the authenticity and foundation of the photographs from Potts's deer camera. The trial court denied his request but indicated Mitchell could object at the appropriate time during the trial.

Additionally, Mitchell moved to exclude testimony from Lieutenant (Lt.) Roy McClurkin, of the Newberry Police Department, regarding Lt. McClurkin's identification of Mitchell as the person in the photographs from Potts's deer camera. He objected on several grounds: (1) the testimony was a lay opinion; (2) the jury could determine whether Mitchell was the person in the photographs without Lt. McClurkin's testimony; and (3) the testimony would be unduly prejudicial because of Lt. McClurkin's position as a police officer. The trial court denied his motion, finding the proposed testimony met the requirements for admissibility under Rule 701, SCRE. The trial court further found the testimony's probative value outweighed any prejudice to Mitchell, but it excluded similar testimony from other police officers as cumulative and prejudicial.

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[1] The enhancement of larceny indictment was nolle prossed on April 21, 2010.

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his refrigerator. Potts stated that upon returning home from work at approximately 1:00 a.m. on October 28, 2008, he noticed someone or something had tampered with the window next to his back door. After going inside his home and checking the deer camera, he discovered photographs of someone in his kitchen that he did not recognize. He waited to contact the police until around 10 a.m. and then told them of the photographs.

Mitchell objected to the admission of a disk containing the photographs from the deer camera, arguing it was not the "original" as required by the South Carolina Rules of Evidence and maintaining there was a genuine issue with the original's authenticity. Potts testified during the in camera hearing that he had possession of the deer camera from the time he returned home on the night of the alleged incident until he took it to his business and downloaded the data onto a laptop. He identified the photographs on the disk as the ones he downloaded directly from the camera. Potts stated the police officer viewed the photographs on his personal laptop at his home on October 28 but that laptop could not download the photographs to print them out. He then took the camera to the police station, but the police station was not able to download and print the photographs either. At that point, Potts took the deer camera back to his business where he downloaded the photographs and copied them onto a disk. The State argued that the deer camera photographs were meant to be downloaded and then printed out. It then analogized the deer camera to a regular film camera because when one takes a picture with a regular film camera, the original is on the film and then the person can get them developed to produce a copy of what came from the original. Thus, the State maintained the photographs fell under the definition of an original.

Potts admitted the pictures had a timestamp of 3:00 a.m., even though he testified he returned home from work around 1:00 or 1:30 a.m. He stated the clock was wrong on the deer camera because he had just set it up and had not properly programmed the clock feature yet.

The trial court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight. Further, the photographs were the same as the ones on the deer camera based upon the foundation offered by the State. The trial court determined the photographs were

"originals" as defined in Rule 1001, SCRE. Potts then testified before the jury regarding the photographs and stated he did not know the person pictured in them. Further, he testified that approximately one hundred dollars in quarters, some clothing, and some beer were taken from his home.

Corporal (Cpl.) Allison Moore of the Newberry Police Department testified she responded to Potts's residence on October 28, 2008. She stated Potts showed her the photographs on the deer camera, and she thought they depicted the unknown suspect well. Cpl. Moore could not determine where the person entered Potts's home and could not recover any fingerprints. When Potts came to the police station with the deer camera as requested, he met Cpl. Moore and they discovered the police station did not have the ability to download and print the photographs either. Potts informed Cpl. Moore that he could download the photographs at his place of business. She advised him to bring the photographs to the police department after he downloaded them, and he did so later that day on October 28.

Lt. McClurkin stated that Potts and Cpl. Moore came to his office with the disk on the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs taken from Potts's deer camera. Lt. McClurkin testified, over Mitchell's objection, that he viewed the photographs from the disk on his office computer and recognized Mitchell as the person in the photographs. He stated that in one of the photographs, the person he believed to be Mitchell was standing with a flashlight and a bag in his hands. Lt. McClurkin explained he knew Mitchell from living in Newberry for over twenty years.

The jury convicted Mitchell of first-degree burglary and possession of burglary tools, but it acquitted him of the petit larceny charge. Mitchell moved for a new trial based on the ground that the State failed to establish all elements of the burglary charge because the jury acquitted him of petit larceny. The trial court denied his motion, and 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). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Identification of Mitchell

Mitchell contends it was reversible error to allow Lt. McClurkin to identify Mitchell at trial from photographs taken from the deer camera because it was in violation of Rule 701, SCRE, and Rule 403, SCRE. Specifically, Mitchell argues Lt. McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the photographs from the disk was simply his opinion of what was on the video. Further, Mitchell states the jury could observe the photographs themselves and draw their own conclusion as to identity. We disagree.

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." *Id.* at 439, 721 S.E.2d at 467.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "'Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'" *Fripp*, 396 S.C. at 439, 721 S.E.2d at 467 (quoting Rule 704, SCRE).

Mitchell also argues the police officer's testimony violated Rule 403, SCRE, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

Mitchell cites *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009), in support of his argument that the police officer's identification was in violation of Rule 701, SCRE. However, in *Fripp* this court determined that two witnesses could testify to the identity of a person depicted on surveillance videotape. 396 S.C. at 438-40, 721 S.E.2d at 467-68. The defendant was charged with second-degree burglary after he was identified as the suspect in a burglary at a general store. *Id.* at 436-37, 721 S.E.2d at 466. The burglary took place around 4:00 a.m. with no one else present in the general store. *Id.* at 437, 721 S.E.2d at 466. An alarm triggered the police response, and the suspect's image was caught on the store's surveillance videotape. *Id.* In explaining how she was able to identify the suspect on the videotape as being the defendant, one witness, the store manager, indicated she knew the defendant "very well" and "saw him all the time." *Id.* at 437-38, 721 S.E.2d at 466. The second witness, a store employee, testified she was able to identify the defendant because she was acquainted with him through his family. *Id.* at 438, 721 S.E.2d at 466. This court found their testimony was "rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing." *Id.* at 439, 721 S.E.2d at 467. Additionally, this court concluded the two witnesses' opinions were helpful in determining a key fact in issue—"whether [the defendant] was the person depicted on the videotape." *Id.*

This court then proceeded to analyze federal authority construing the element of helpfulness in determining a key fact in issue.[2] *Id.* at 439-40, 721 S.E.2d at 467-68. In *United States v. Allen*, 787 F.2d 933 (4th Cir. 1986), *vacated on other*

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[2] Rule 701 of the Federal Rules of Evidence states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

grounds, 479 U.S. 1077 (1987), the court permitted identification testimony by witnesses based on surveillance photographs. That court stated:

> We believe . . . testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting.
>
> This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear.

Id. at 936.

"In *United States v. Robinson*, 804 F.2d 280 (4th Cir.1986), the court concluded the defendant's brother's identification testimony, based on surveillance photographs, was admissible under Federal Rule 701 as it would aid the jury in determining a key fact in issue." *Fripp*, 396 S.C. at 440, 721 S.E.2d at 468.

> Sylvester Robinson was an individual who could testify under this rule as a lay witness. His testimony was based upon his perceptions from viewing the photographs and from his perceptions of and close association with his brother over the years. Although the defendant's appearance may not have physically changed from the time of the bank surveillance photograph until the time of trial, the individual in the photograph was wearing a hat and dark glasses, and the testimony of Sylvester Robinson could be helpful to the jury on the issue of fact of whether the appellant was the person shown in the bank surveillance photographs. A lay witness may give

> an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. Sylvester Robinson certainly qualified as a person more likely to correctly identify the individual shown in the photograph.

Id. at 440-41, 721 S.E.2d at 468 (quoting *Robinson*, 804 F.2d at 282).

After analyzing federal law, this court stated "the surveillance video was not crystal clear and the perpetrator sought, in some measure, to obscure his identity by wearing the hood of his jacket up." *Id.* at 441, 721 S.E.2d at 468. "While the jury, having observed Fripp for a relatively brief period of time in the courtroom setting, may have believed Fripp was the person on the videotape, Brown's and Young's testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity." *Id.* We then found that "the identification of a familiar person does not require any specialized knowledge, skill, experience, or training as contemplated by subpart (3) of Rule 701." *Id.* "Consequently, [this court] affirm[ed] the trial court's admission of Brown's and Young's identification testimonies." *Id.*

Here, we find these facts are analogous to *Fripp*, and the trial court did not err in introducing Lt. McClurkin's testimony pursuant to Rule 701, SCRE. Lt. McClurkin's perception of the person in the photographs was based on his first-hand knowledge of Mitchell. While Lt. McClurkin was not present during the alleged crime, he knew Mitchell through his twenty years of living in the Newberry area. This was the only fact presented at trial that allowed Lt. McClurkin to identify Mitchell, whereas in *Fripp*, the witnesses seemed to be able to describe their knowledge of the defendant from the community in more detail. However, that fact did give a basis for concluding that Lt. McClurkin was more likely to correctly identify the defendant from the photograph than the jury. Furthermore, the identity of the person in the photographs was a fact in issue, and Lt. McClurkin's identification of who he thought was in the photographs was surely helpful to the jury.

As we noted, we do not find Lt. McClurkin's testimony's probative value was outweighed by the prejudicial value under Rule 403, SCRE, based on Mitchell's

contention that it was a lay opinion not based on personal observation. We also find the probative value of his testimony was not outweighed by the prejudicial effect based upon Mitchell's argument that Lt. McClurkin was a police officer offering his opinion as to Mitchell's identity. Lt. McClurkin was available for cross-examination by Mitchell, and his basis for identification was stated as simply having been in the Newberry community for twenty years. The trial court's jury instructions further undermined any prejudicial effect Lt. McClurkin's testimony may have had.[3] For the foregoing reasons, we affirm the trial court.

II. Authentication of the disk with downloaded photographs

Mitchell contends the trial court erred in allowing the disk with the downloaded deer camera photographs to be admitted when the photographs were not properly authenticated. Specifically, Mitchell maintains that because the police did not take the camera into custody but left it with Potts to download the photographs onto his business computer, the evidence was admitted in violation of Rules 1001, 1002, and 1003, SCRE.[4] We disagree.

The pertinent section of Rule 1001, SCRE, states:

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[3] The jury instructions included the following statements, "[A]s I told you, you must consider and determine the credibility of the witnesses and of the exhibits. And I told you some things you could use in engaging credibility . . . [Y]ou may believe everything a witness says, you may believe nothing a witness says. You may believe parts of a witnesses [sic] testimony and disregard other parts. You may believe one witness over several or several over one. But remember that your job is to determine the true facts of the case and whether the state has met its burden of proof and you do that by weighing all the evidence, regardless of who called the witness."

[4] At trial, Mitchell objected to the chain of custody of the disk as well. However, he appears to have abandoned that argument on appeal. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

> An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

Rule 1001(3), SCRE. Further, Rule 1001 defines a duplicate as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Rule 1001(4), SCRE.

Rule 1002, SCRE, in addressing the requirements of an original, states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." In addressing the admissibility of duplicates, Rule 1003, SCRE, states that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

"The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is also addressed to the discretion of the trial court." *State v. Halcomb*, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct. App. 2009).

We find the photographs from the disk were originals pursuant to Rule 1001, SCRE. Rule 1001(3), SCRE ("If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."). A digital camera was used, and the photographs from the disk were testified to as being the same photographs that were on the deer camera on October 28, 2008. Mitchell had the opportunity to cross-examine Potts and the police officers as to the handling of the photographs and disk on which the photographs were downloaded. We conclude the trial court properly admitted the photographs from the disk as originals, and thus, Rule 1003 is not relevant to our analysis. For the forgoing reasons, we affirm the trial court.

III. Motion for New Trial

Mitchell argues the trial court erred in denying his post-trial motion for a new trial on his first-degree burglary charge. Specifically, Mitchell contends all of the elements of first-degree burglary were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. We disagree.

"'The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion.'" *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)). "If there is no evidence to support a conviction, [this court] should uphold an order granting a new trial." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (citing *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, if competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id.* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)).

We believe Mitchell's argument is referencing the "inconsistent verdict theory." However, our supreme court has abolished the rule against inconsistent verdicts in this state. *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). Moreover, we find the verdicts are not necessarily inconsistent. Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling* . . . ." S.C. Code Ann. § 16-11-311(A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime. Thus, the trial court did not err in denying Mitchell's post-trial motion for a new trial. For the forgoing reasons, we affirm the trial court.

CONCLUSION

Accordingly, we find the trial court did not abuse its discretion regarding the issues on appeal. Thus, we affirm the trial court.

AFFIRMED.

WILLIAMS AND THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Transportation, Respondent,

v.

Janell P. Revels and R.J. Poston, Jr., Landowners, and John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title or interest in or to, or lien on the lands described herein, including all unknown heirs of Reamer J. Poston, Sr. a/k/a/ R.J. Poston Sr., deceased, Unknown Claimants,

Of whom Janell P. Revels and R. J. Poston are, Appellants.

Appellate Case No. 2010-158646

Appeal From Marion County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5010
Heard March 14, 2012 – Filed July 25, 2012

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, P.C., of Surfside Beach, for Appellants.

Beacham O. Brooker, Jr., of the South Carolina Department of Transportation, of Columbia, for Respondent.

LOCKEMY, J.: In this appeal from a condemnation action, Janell P. Revels and R.J. Poston, Jr. (the Appellants) argue the circuit court erred in finding they were entitled to attorney's fees based on an hourly rate rather than a contingency fee agreement. We affirm.

FACTS/PROCEDURAL BACKGROUND

On August 6, 2007, the South Carolina Department of Transportation (SCDOT) served the Appellants with a notice of condemnation.[1] SCDOT subsequently offered the Appellants $40,300 for their property. In June 2009, the case proceeded to a jury trial where the Appellants prevailed and were awarded $125,000.

On June 23, 2009, the Appellants filed an application for attorney's fees and costs pursuant to section 28-2-510(B)(1) of the South Carolina Code (2007). The Appellants sought $28,233.33 in attorney's fees and $6,643.91 in costs pursuant to a contingency fee agreement with their attorney. The agreement provided that the Appellants' attorney agreed to represent them on a contingency fee basis of one-third of the gross amount collected over SCDOT's offer of $40,300. During a hearing before the circuit court, the Appellants argued the court should determine whether the requested contingent attorney's fees were reasonable based on the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). SCDOT argued the contingency fee agreement should not be considered, but rather fees should be calculated based upon the lodestar analysis set forth in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

In a March 1, 2010 order, the circuit court determined attorney's fees should be based on an hourly rate rather than on the contingency fee agreement between the Appellants and their attorney. Citing the six *Jackson* factors, the circuit court determined Appellants' attorney was entitled to compensation at the rate of $300 per hour for a total of $16,290.[2] The circuit court subsequently denied the Appellants' motion for reconsideration. In its order denying the Appellants'

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[1] According to the Appellants' brief, the condemnation notice provided that SCDOT was acquiring .314 acres of the Appellants' property for the construction of the U.S. Highway 378 relocation.

[2] The circuit court also awarded the Appellants $6,643.91 in costs. The costs awarded are not at issue in this appeal.

motion, the court found the *Jackson* factors were not applicable. The court also found the Appellants' request for a determination that its contingency fee agreement was reasonable was not applicable in light of *Layman*. This appeal followed.

STANDARD OF REVIEW

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. School Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.*

LAW/ANALYSIS

Layman v. State

The Appellants argue the circuit court erred in relying on *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). We disagree.[3]

"Under the 'American Rule,' the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees." *Layman*, 376 S.C. at 451, 658 S.E.2d at 329. South Carolina and other jurisdictions "recognize numerous exceptions to this rule, including the award of attorneys' fees pursuant to a statute." *Id.* at 451-52, 658 S.E.2d at 329. "A statutory award of attorneys' fees is typically authorized under what is known as a fee-shifting statute, which permits a prevailing party to recover attorneys' fees from the losing party." *Id.* at 452, 658 S.E.2d at 329.

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[3] The Appellants also argue they are entitled to attorney's fees based upon their contingency fee agreement in order to satisfy the "just compensation" to which they are entitled under the South Carolina Constitution. Because the Appellants failed to raise this argument to the circuit court, it is not preserved for our review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (holding issues must be raised to and ruled upon by the circuit court to be preserved for appellate review).

In *Layman*, participants in the Teachers and Employee Retention Incentive (TERI) brought a class action suit against the State and the South Carolina Retirement System alleging breach of contract as a result of the State collecting retirement contributions from their paychecks. 376 S.C. at 441, 658 S.E.2d at 323-24. The plaintiffs argued the court's instructions to consider the "benefit to all old TERI participants" in awarding attorney's fees made the determination of a reasonable award analogous to cases in which attorney's fees were awarded from a common fund. *Layman*, 376 S.C. at 453, 658 S.E.2d at 330. The plaintiffs argued that even though the applicable state action statute, section 15-77-300 of the South Carolina Code (Supp. 2011), shifts the source of attorney's fees to the State, the court should find that the circuit judge properly awarded attorney's fees based on the percentage-of-the-recovery approach typically utilized when the source of attorney's fees is spread among the beneficiaries of a common fund. *Id.*

Our supreme court disagreed with the plaintiffs, holding "that because the state action statute shifts the source of the prevailing party's attorneys' fees to the losing party, an award of fees based on a percentage of the prevailing party's recovery is improper." *Id.* at 455, 658 S.E.2d at 331. The court noted:

> [U]tilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees. Although both sources are exceptions to the general rule that each party is responsible for the party's own attorneys' fees, the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party. This Court certainly acknowledges that a percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants. However, where, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a fee-spreading theory.

Id. at 453-454, 658 S.E.2d at 330. The court found a lodestar analysis was the proper method for determining an award of reasonable attorneys' fees under the state action statute. *Id.* at 457, 658 S.E.2d at 332. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Id.*

Here, the Appellants argue *Layman* is not applicable because the state action statute at issue in *Layman*, section 15-77-300, is not at issue in the present case. They contend the Eminent Domain Procedure Act[4] (the Act) provides the proper procedure for determining reasonable litigation expenses. SCDOT argues the analysis in *Layman* is not limited to section 15-77-300, but also applies to the Act.

The Act provides the procedural guidelines for determining just compensation with regards to the exercise of the power of eminent domain. Pursuant to the Act, a landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his "reasonable litigation expenses." S.C. Code Ann. § 28-2-510(B)(1) (2007). "Litigation expenses" are defined in the Act as

> the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises.

S.C. Code Ann. § 28-2-30(14) (2007). In any application for attorney's fees under the Act, the landowner

> shall show that [he] has prevailed, state the amount sought, and include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.

[4] S.C. Code Ann. §§ 28-2-10 to -510 (2007).

S.C. Code Ann. § 28-2-510(B)(1) (2007). The court can, in its discretion, reduce or deny the amount to be awarded if it determines the landowner "engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust." *Id.*

We find *Layman* is controlling in this case. Here, section 28-2-510, like section 15-77-300, shifts the source of the prevailing party's attorney's fees to the losing party, the State. According to *Layman*, it is improper to award a percentage-of-the-recovery as fees under a statute that shifts the source of attorney's fees to the losing party. Furthermore, as the court explained in *Layman*, it is improper to award a percentage-of-the-recovery under a statute that explicitly requires an attorney to state his hours. The *Layman* court found:

> [A]n award based on a percentage of the TERI plaintiffs' recovery is inconsistent with the express terms of the statutory scheme. Although the state action statute neither requires that attorneys' fees be awarded based on an hourly rate, nor places a numerical cap on attorneys' fees, we find it significant that the statute provides that attorneys' fees assessed to the state agency may only be paid 'upon presentation of an itemized accounting of the attorney's fees.' S.C. Code Ann. § 15-77-330 (2005). In our opinion, the requirement of an 'itemized accounting' squarely contradicts the utilization of the percentage-of-the-recovery method in awarding attorneys' fees under the statute.

376 S.C. at 454, 658 S.E.2d at 330-31. Like section 15-77-300, section 28-2-510(B)(1) requires the presentation of an itemized statement from an attorney detailing his fee, hours, and expenses. As the *Layman* court found, this requirement "squarely contradicts" the percentage-of-the-recovery approach.

We also note the United States District Court for the District of South Carolina recently discussed *Layman* in *Sauders v. South Carolina Public Service Authority*, 2011 WL 1236163 (D.S.C. 2011). In *Sauders*, the District Court found the plaintiffs' contingency fee agreement was merely one of many factors to be taken into consideration in determining the reasonable amount of attorneys' fees due to the plaintiffs arising out of their inverse condemnation claims pursuant to section

28-11-30 of the South Carolina Code (Supp. 2011).[5] Citing *Layman*, the *Sauders* court gave "enhanced consideration" to the actual amount of work performed, the customary legal fees for similar services, and the benefit obtained for all plaintiffs. *Sauders*, 2011 WL 1236163 at 7. The District Court noted that "[e]mphasizing these criteria remains consistent with awarding fees pursuant to a fee-shifting statute." *Id.*

Accordingly, we find the circuit court did not err in relying on *Layman*.

Jackson v. Speed

The Appellants argue the circuit court erred in failing to determine whether the requested attorney's fees were reasonable pursuant to *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). We disagree.

In *Jackson*, our supreme court held that "[w]hen determining the reasonableness of attorney's fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate." 326 S.C. at 308, 486 S.E.2d at 759. The court held the following six factors should be considered when determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Id.* at 308, 486 S.E.2d at 760.

Here, the circuit court, in its order, stated

> I have taken into consideration the following items in reaching a decision in this matter:
>
> a) Major extent and difficulty of the case;
> b) Time necessarily devoted to the case;
> c) Professional standing of counsel;
> d) Contingency of compensation; and
> e) Beneficial results obtained.

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[5] Section 28-11-30 deals with reimbursement for property owners for certain expenses under the relocation assistance chapter. S.C. Code Ann. § 28-11-30 (Supp. 2011).

> Based on the factors set forth above, I do find that [the Appellants are] entitled to an award of attorney's fees but that the attorney's fees should be based on an hourly rate rather than on a contingency fee agreement between [the Appellants'] attorney and his client[s].

In their motion for reconsideration, the Appellants argued the circuit court's ruling did not address any of the *Jackson* factors the court must consider in awarding attorney's fees. Subsequently, in its order denying the Appellants' motion for reconsideration, the circuit court found the *Jackson* factors were not applicable. The court further stated that the Appellants' "request for attorney's fees and whether or not a contingent attorney fee under S.C. Code Ann. § 28-2-510(B) are reasonable are not applicable in light of the *Layman* decision."

On appeal, the Appellants contend that although the circuit court cited the six *Jackson* factors in its order, it relied on the factors "only in determining the lodestar multiplier" and did not rule whether the Appellants' agreed upon contingency fee was reasonable under the Act. Relying on *Vick v. South Carolina Department of Transportation*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001), the Appellants argue the circuit court should have first determined whether the requested attorney's fees were reasonable in accordance with the *Jackson* factors.

In *Vick*, a property owner brought an inverse condemnation action against SCDOT, alleging damage to a private road. 347 S.C. at 475, 556 S.E.2d at 696. After a finding by the master-in-equity that the road was privately owned and had not been dedicated to the public, the circuit court entered judgment on the jury verdict and awarded Vick, the property owner, attorney's fees pursuant to section 28-2-510(A). *Id.* at 476, 556 S.E.2d at 696. After the trial, Vick's attorney submitted an affidavit stating that he had worked for Vick in the past at an hourly rate of $130, but in this case the fee agreement called for a one-third contingency fee. *Id.* at 483, n.6, 556 S.E.2d at 700, n.6. Vick's attorney stated that he spent 137.2 hours on this matter, plus 59.1 hours by an associate, and 7.7 hours of paralegal time. *Id.* The circuit court awarded Vick $41,425.00 in attorney's fees. *Id.* SCDOT appealed and this court found that "[t]o the extent SCDOT asserts the attorney fees are excessive because they exceed the amount that would be due on an hourly basis, this issue also was not preserved . . . . In any event, the award was not error." *Id.* at 483, 556 S.E.2d at 700. Based upon the *Jackson* factors, this court found that the "circuit judge's order in this case shows that he considered these factors in determining a figure he believed constituted reasonable compensation." *Id.* at 484, 556 S.E.2d at 701.

Here, the circuit court was not required to first make a determination regarding the reasonableness of the contingency fee agreement. The South Carolina District Court recently analyzed *Vick* in *Sauders*. The *Sauders* court held that although this court's language in *Vick* concerning the amount of reasonable attorney's fees was dicta because the issue was not preserved for appeal, the discussion in *Vick* was relevant to determining the method of attorney's fees. 2011 WL 1236163 at 5. The District Court found *Vick* "demonstrates that after analyzing the six factors a court should consider in determining a reasonable attorney's fee, a court could conclude that a reasonable attorney's fee under the circumstances of the particular case is an amount close to or equal to the contingency fee contract." *Id.* However, the District Court noted "*Vick* does not hold that the contingency fee contract controls the determination of what is a reasonable attorney's fee in an inverse condemnation action." *Id.* The District Court noted that "South Carolina law specifically rejects the notion that a contingency fee contract controls a court's determination of reasonable attorneys' fees due to a plaintiff pursuant to a statute mandating the award of attorney's fees." *Id.*

Accordingly, in light of *Layman* and *Sauders*, we find the circuit court was not required to first determine the reasonableness of the Appellants' contingency fee agreement.

Consideration of Fee Agreement

Relying on *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009), the Appellants argue a contingency fee agreement between a landowner and his attorney must be considered by the court when determining reasonable attorney's fees. The Appellants contend it is contradictory for SCDOT to argue the circuit court should not consider the Appellants' contingency fee agreement when, in *Kiriakides*, the condemnor argued the contingency fee agreement between the condemnee and his attorney controlled. Because the Appellants failed to raise this argument to the circuit court, it is not preserved for our review. *See Pye*, 369 S.C. at 564, 633 S.E.2d at 510 (holding issues must be raised to and ruled upon by the circuit court to be preserved for appellate review).

CONCLUSION

Based on the foregoing, we affirm the circuit court.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ann Dreher, Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2010-181586

Appeal From Richland County
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 5011
Heard May 23, 2012 – Filed July 25, 2012

REVERSED

Christopher McG. Holmes, of the Law Offices of Christopher McG. Holmes, of Mt. Pleasant; and Leslie S. Riley, of McNair Law Firm, PA, of Charleston, for Appellant.

Carlisle Roberts, Jr. and Davis A. Whitfield-Cargile, both of South Carolina Department of Health and Environmental Control, of Columbia, for Respondent.

WILLIAMS, J.: Ann Dreher (Dreher) appeals the final order of the Administrative Law Court (ALC) affirming the denial of her application to construct a bridge to property she owns on Folly Island, South Carolina, based on the ALC's finding that her property is a coastal island subject to regulatory restrictions. In addition, Dreher asserts a permit should have been issued because

she demonstrated *de minimus* environmental impact from the proposed bridge construction. We reverse.

FACTS/PROCEDURAL HISTORY

Dreher is the record owner of two parcels of property located on Folly Island.[1] The first parcel of land, designated as 806 East Cooper Avenue, consists of .2409 acres. The second parcel, identified as "Tract D," contains .8434 acres of upland high ground (the buildable portion) and the remainder, which surrounds the buildable portion, is comprised of coastal tidelands and waters. Tract D commences at the southeast corner of lot 809 East Cooper Avenue and extends to the edges of the marsh of Folly River and then approximately 290 feet to the west and back to the eastern line of 805 East Cooper Avenue and then back to the starting point at lot 809. It is undisputed that 806 East Cooper Avenue and Tract D were previously a contiguous tract of high ground property. Prior to Dreher's purchase of the parcels, two man-made canals were constructed resulting in Tract D being completely surrounded by coastal tidelands and waters.

On April 2, 2009, Dreher submitted an application to the South Carolina Department of Heath and Environmental Control (DHEC), requesting a permit to construct a 9 feet x 51 feet vehicular bridge originating at 806 East Cooper Avenue and across the tidal canal to Tract D. DHEC denied Dreher's application because Regulation 30-12(N)(2)(c) (the Small Islands Regulation) prohibits DHEC from issuing a permit for the construction of a bridge to a coastal island that is less than two acres in size. 23A S.C. Code Ann. Regs. 30-12(N)(2)(c) (Supp. 2011) ("The Department will not consider applications for bridge access to islands less than two acres in size."). The Board of Health and Environmental Control (Board) declined to conduct a final review conference on the matter, and Dreher filed a written request for a contested hearing with the ALC. Following a hearing on July 13, 2010, the ALC issued a Final Order and Decision (the Order) on October 19, 2010, and both parties timely filed motions to reconsider. The ALC did not issue a ruling

[1] The title abstract for Dreher's property demonstrates that her title derives from an original grant on November 8, 1918, to Folly Island Company of a tract described as "the 'Folly Islands' or more commonly known collectively as 'Folly Island,' being bounded on the East by the Atlantic Ocean, on the South by the channel of Stono Inlet, on the West by the channel of Folly River and Folly Creek and on the North by the channel of 'Lighthouse Inlet.'"

on either party's motions and, by rule, they were deemed denied after thirty days. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes this court's standard of review for cases decided by the ALC. This court will only reverse the ALC's decision if it 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.

S.C. Code Ann. § 1-23-610(B) (Supp. 2011). Furthermore, "[t]he court may not substitute its judgment for the judgment of the administrative law [court] as to the weight of the evidence on questions of fact." *Id.*

LAW/ANALYSIS

I. Folly Island

Dreher contends the ALC erred in concluding Tract D is subject to the Small Islands Regulation because Folly Island is expressly excluded by the General Assembly's definition of coastal island. We agree.

As an initial matter, we note the ALC's finding of fact that Tract D is a part of Folly Island is the law of the case. DHEC initially filed a motion to reconsider this particular finding by the ALC, stating "[t]he [c]ourt's finding that 'notwithstanding the man-made excavation, Petitioner's property, geologically, geographically, and

by legal description, is on and within the boundaries of Folly Island' is inconsistent with the evidence presented and misleading in light of the court's correct legal conclusions." Despite DHEC's attempt to correct this alleged inconsistency in the Order, the ALC did not rule on the motion and DHEC failed to challenge the ALC's finding on appeal; therefore, the finding that Tract D is a part of Folly Island is the law of the case. *See, e.g., Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue).

Even if the ALC's finding that Tract D is a part of Folly Island is not the law of the case, we find there is substantial evidence in the record to support the ALC's finding of fact that Dreher's property "geologically, geographically, and by legal description, is on and within the boundaries of Folly Island." At the hearing, Dreher presented expert testimony establishing that Tract D is geologically and geographically part of Folly Island. Dr. Eric Poplin ("Dr. Poplin") and Dr. Allen Kem Fronabarger ("Dr. Fronabarger") both testified Tract D was part of a "dune ridge" that formed on the back side of Folly Island as a result of aeolian deposition of sand. In addition, this "dune ridge" is graphically depicted as early as 1825 on a survey prepared by the Department of the Army and on subsequent aerial photographs as late as 1949. Furthermore, Dr. Poplin testified he conducted shovel tests of the soils on 806 East Cooper and Tract D that demonstrated there are no differences in their composition and that they appear to be from the same land form.

Dreher also presented substantial evidence to support the ALC's finding that Tract D is on and within the legal boundaries of Folly Island. The title abstract for Tract D states that Dreher's title derives from a grant made on November 8, 1918, to Folly Island Company of a tract described as "the 'Folly Islands' or more commonly known collectively as 'Folly Island,' being bounded on the East by the Atlantic Ocean, on the South by the channel of Stono Inlet, on the west by the channel of Folly River and Folly Creek and on the North by the channel of Lighthouse Inlet." Attached to the deed is a plat recorded on December 9, 1895, showing the property described in the grant. Accordingly, Tract D is included both in the metes and bounds of the 1918 deed and within the surveyed boundaries of

the 1895 plat. Based on Dreher's deed and subsequent chain of title, Tract D is, by legal description, on and a part of Folly Island. [2]

Therefore, the ALC's finding of fact that Tract D is "geologically, geographically, and by legal description, on and within the boundaries of Folly Island" is a reasonable conclusion supported by substantial evidence based on the expert testimony and title evidence presented at the hearing. *See Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) ("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."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 188-89, 631 S.E.2d 899, 906 (2006) (stating when conflicting evidence exists as to an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder).

II. Plain Language of the Regulation

Next, Dreher contends the ALC erred in determining Tract D was a coastal island because the court relied exclusively on the first sentence of the regulatory definition of coastal island to the exclusion of the subsequent language of the regulation. We agree.

Regulation 30-1(D)(11) defines coastal island as "an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters." 23A S.C. Code Ann. Regs. 30-1(D)(11) (Supp. 2011). Here, there is no dispute that Tract D is a coastal island as defined in the regulations because Dreher concedes Tract D is a high ground area above the critical line delineation separated from the upland immediately adjacent to 806 East Cooper Avenue by navigable, saline waters. However, the regulation further provides, in pertinent part, that:

> The purpose of this definition is to include all islands except those that are essentially mainland, i.e., those that

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[2] The property description found in the eight subsequent deeds, including the grant to Dreher in 1994, is identical to the original grant to the Folly Island Company in 1918.

> 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: . . . Folly Island . . . .

Id.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). A statute should be read as a whole. *Id.* Further, "[s]tatutes which are part of the same legislative scheme should be read together." *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Mid-State Auto*, 324 S.C. at 69, 476 S.E.2d at 692. "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005).

Although Tract D satisfies the definition of a coastal island in the first sentence of Regulation 30-1(D)(11) as it is "an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters," the regulation further provides for certain exclusions, stating the coastal island definition does not apply to Folly Island. *See* § 30-1(D)(11). Based upon the ALC's finding that Tract D is a part of Folly Island, we find the regulation, when read in its entirety, supports a finding that Tract D is exempt from the definition of coastal island and thereby exempt from the Small Islands Regulation. Therefore, the ALC erred in concluding Tract D was not exempt from the definition of coastal island under Regulation 30-1(D)(11).

III. *De Minimus* Impact

Dreher contends if the Small Island Regulations do not apply to Tract D, she is in compliance with 23A S.C. Code Ann. Regs. 30-12(F) (Supp. 2011) (the Transportation Regulation), and the bridge permit should be granted. We agree.

Although DHEC initially filed a motion to reconsider the ALC's finding that "the proposed bridge was the least environmentally damaging alternative for access to

Tract D and, in fact, would have de minimus environmental impact," DHEC failed to challenge the ALC's finding on appeal. Accordingly, the ALC's finding is the law of the case. *See Commercial Credit Loans*, 334 S.C. at 187, 512 S.E.2d at 129 (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue).

Notwithstanding the law of the case, there is substantial evidence to support the ALC's finding that the proposed bridge complied with the Transportation Regulation. The Transportation Regulation provides, in pertinent part, "the location and design of public and private transportation projects must avoid the critical areas to the maximum extent feasible. Where coastal waters and tidelands cannot be avoided, bridging rather than filling of these areas will be required to the maximum extent feasible." *See* § 30-12(F)(2)(b). Because Dreher cannot avoid the waters and tidelands, her permit application proposes minimal construction of a bridge to span the critical area to reach Tract D. Dreher's application also states that the cumulative impacts to the environment and surrounding areas would be minimal and that the proposed bridge represents "the least damaging and most practicable alternative for accomplishing the project." Accordingly, we find there is substantial evidence to support the ALC's finding that Dreher's permit application complied with the criteria of the Transportation Regulation. *See Se. Res. Recovery, Inc. v. Dep't of Health & Envtl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) ("Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.").

CONCLUSION

It is the law of the case that Dreher's property is geologically, geographically, and by legal description on, and a part of, Folly Island. Folly Island is specifically exempted from the Small Islands Regulation, and as a result, it was error for the ALC to affirm DHEC's denial of Dreher's permit to build a bridge to Tract D. We further conclude the finding that Dreher's permit application to access Tract D complies with the Transportation Regulation is the law of the case. Accordingly, the order of the ALC is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.